

THE ICSID REVIEW AND ENFORCEMENT MECHANISMS AND THE BACKLASH AGAINST THE INVESTOR-STATE ARBITRATION

SUPERVISOR: PROF. TIBOR VARADY

SJD CANDIDATE: YUE MA

February 2016

Abstract

The ICSID arbitration is created for the resolution of investment disputes between private investors and states through investor-state arbitration. While most non-ICSID arbitral awards are subject to national court review in the setting aside proceedings and the enforcement proceedings, the ICSID Convention provides a self-contained review mechanism and requires member states to enforce an ICSID award as if it were a final court judgment of its own court. Thus, the review and enforcement mechanisms represent the most distinctive feature of the ICSID arbitration. However, recently a wave of backlash against the investor-state arbitration is rising, which brings up more and more challenges to the ICSID arbitration, *inter alia* its review and enforcement mechanisms. The central task of this thesis is to investigate the specific challenges faced by the ICSID review and enforcement mechanisms and discuss some possible suggestions to achieve a more balanced and effective post-award stage of the ICSID arbitration.

The first part of this thesis focuses on the review mechanism, especially the annulment proceeding of the ICSID arbitration. The ICSID practice in the past decades shows that a consistent review standard of the annulment proceedings is lacked due to the ambiguities in the ICSID Convention and the shillyshally positions of the annulment committees. Recently the issue of annulment standard is under the spotlight again since some *ad hoc* committees adopted an expanded standard of review, which might be influenced by some respondent states' desire of a wider post-award review or even an appellate mechanism within the ICSID framework. The tendency of an extensive annulment proceeding need to be ceased since it conflicts with ICSID's basic policy that the post-award review should be extraordinary rather than routine. The ICSID

review proceedings should be single-layered and restricted with high threshold as designed by the ICSID Convention.

The second part discusses the ICSID enforcement mechanism. There are basically three steps when an ICSID award is brought to a national court for enforcement, namely recognizing the award as *res judicata* (the recognition proceeding), declaring the award as enforceable (the enforcement proceeding) and collecting the awarded damages (the execution proceeding). Given states' increasing hostility against the ICSID arbitration, it can be expected that some respondent states that bear a number of ICSID cases and huge amount of damages may hinder the enforcement of unfavorable ICSID awards through national court adjudication or invoking sovereign immunity to repel the forcible execution of their sovereign assets. Facing these challenges, some measures should be taken to enhance the effectiveness of ICSID awards during the enforcement phase.

Through this thesis, the author attempts to uncover the weak points of the ICSID review and enforcement mechanisms and provide some possible clue to the refinement of the ICSID system in order to help it stay appealing to both investors and states while keeping its peculiar advantages.

Key words: ICSID; review mechanism; annulment; enforcement

Table of Contents

Preface

Chapter 1. Background: The ICSID Arbitration's Review and Enforcement Mechanisms and the Recent States' Countermeasures

- 1.1. Introduction of the ICSID Arbitration
- 1.2. The ICSID Review Mechanism
 - 1.2.1. Interpretation of ICSID awards
 - 1.2.2. Revision of ICSID awards
 - 1.2.3. Annulment of ICSID awards
- 1.3. The ICSID Enforcement Mechanism
 - 1.3.1. The obligation to comply with ICSID awards
 - 1.3.2. Recognition of ICSID awards
 - 1.3.3. Enforcement of ICSID awards
 - 1.3.4. Execution of ICSID awards and sovereign immunity
- 1.4. Backlash against the Investment Arbitration and States' Influence on the ICSID Review and Enforcement Mechanisms
 - 1.4.1. Investment arbitration in Latin America
 - 1.4.2. States' critiques and countermeasures concerning the ICSID review and enforcement mechanisms

Part I. Challenges Faced by the ICSID Annulment Mechanism and Suggestions Prompted by the Challenges

Chapter 2. The Strict but Ambiguous Annulment Standard Set by the ICSID Convention

- 2.1. Drafting History of the ICSID Annulment Proceedings
- 2.2. Review Authority of the ICSID Annulment Proceedings
- 2.3. Limited Annulment Grounds in the ICSID Convention and the Textual Ambiguity
 - 2.3.1. Improper constitution of the tribunal
 - 2.3.2. Corruption
 - 2.3.3. Manifest excess of power
 - 2.3.4. Serious departure from a fundamental rule of procedure
 - 2.3.5. Failure to state reasons

Chapter 3. The Unsettled Annulment Standard in Practice and the Tendency of an Expansive Annulment Standard

- 3.1. The First Generation of the ICSID Annulment Jurisprudence
- 3.2. The Second Generation of the ICSID Annulment Jurisprudence
- 3.3. The Third Generation of the ICSID Annulment Jurisprudence
 - 3.3.1. *Wena Hotel v. Egypt*
 - 3.3.2. *Vivendi v. Argentina I*

3.4. The Fourth Generation of the ICSID Annulment Jurisprudence – Back to the Expanded Standard of Review

3.4.1. *Sempra v. Argentina*

3.4.2. *Enron v. Argentina*

Chapter 4. Suggested Reforms for the ICSID Annulment Mechanism

4.1. What Should Be the Proper Review Standard of the ICSID Annulment Proceedings?

4.1.1. The high ratio of annulled ICSID awards requires more restricted, rather than extensive review standard

4.1.2. ICSID annulment proceedings should return back to the restricted standard of review, but the ‘educational function’ should be eliminated

4.2. Should An Appellate Mechanism Be Introduced into the ICSID System?

4.2.1. The calling for an appellate mechanism

4.2.2. Is the appellate mechanism a better cure?

4.3. Other Procedural Tactics to Enhance Efficiency of the Annulment Proceedings

4.3.1. Preliminary objection

4.3.2. Cost allocation rules

4.3.3. Speeding up the annulment registration process

4.3.4. Circulating draft awards for parties’ comments

Part II. Challenges Faced by the ICSID Enforcement Mechanism and Suggestions Prompted by the Challenges

Chapter 5. Are ICSID Awards Free from Court Review in the Enforcement Proceedings?

5.1. Interpretation of the Provisions regarding the Enforcement Proceedings under the ICSID Convention

5.1.1. Debates regarding the reviewability of ICSID awards under Article 54

5.1.2. The Vienna Convention interpretation rules

5.1.3. Meaning of ‘enforce’ in Article 54

5.1.4. Assimilating ICSID awards to final court judgment in the enforcement proceedings

5.1.5. Relationship between Article 53 and 54

5.1.6. Standard of review in the enforcement proceedings

5.2. States’ Practices regarding the Enforcement of ICSID Awards

5.2.1. Enforcing ICSID awards in the forum states

5.2.2. Enforcing ICSID awards in the host states

Chapter 6. Execution of ICSID Awards and Sovereign Immunity

6.1. Hurdles before the Execution of ICSID Awards

6.1.1. Sovereign immunity against execution

6.1.2. Drafting of the ICSID execution mechanism and the changing circumstances after the enactment of the ICSID Convention

6.1.3. Barriers to the execution of ICSID awards

6.2. States' Practices regarding the Execution of ICSID Awards

6.2.1. Execution of ICSID awards in the forum states

6.2.2. Execution of ICSID awards in the reluctant host states

Chapter 7. Possible Ways to Enhance the Effectiveness of ICSID Awards through Enforcement and Execution Mechanisms

7.1. Possible Changes within the ICSID Framework

7.1.1. ICSID should take self-scrutiny regarding the quality of its awards

7.1.2. Possible amendments of the ICSID Convention and the Regulations and Rules

7.1.3. Securing compliance through annulment committees' decisions on a conditional stay of enforcement

7.2. Investors' strategies to secure the enforcement of ICSID awards

7.2.1. Avoiding non-pecuniary damages

7.2.2. Waiver of immunity from execution

7.2.3. Choosing the proper place of execution

7.2.4. Assignment

7.3. Improvements from State's Perspective

7.3.1. Suggestions regarding the laws and court practice in the forum states

7.3.2. Suggestions regarding the laws and court practice in the host states

7.4. *Ex post* Recourse for the Failure of Enforcement and Execution

7.4.1. Diplomatic protection

7.4.2. ICJ proceedings

7.4.3. Influence of international financial institutions

7.4.4. Post-award settlement

Conclusion

Preface

Not many memories regarding the year of 1966 were left to us today, except for the first episode of ‘Star Trek’ debuting on TV or the landmark US case *Miranda v. Arizona*.¹ However, in the realm of international investment, a profound change started from this year. In 1966, the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the ICSID Convention) entered into force, which means the establishment of the International Centre for Settlement of Investment Disputes (ICSID or the Centre) as a branch of the World Bank. ICSID provides an international forum for private investors to directly sue the host states in their own names through arbitration. Although the investor-state arbitration had existed before ICSID, it was not the major way of solving investment disputes. After years of fast development, nowadays the ICSID arbitration has gained its outstanding importance and popularity in the field of investment dispute resolution.

Compared with other forms of international arbitration, the ICSID arbitration has several distinctive features, mainly represented by its review and enforcement mechanisms. After an ICSID award is rendered, the ICSID Convention tends to prevent it from external intervention in order to pursue finality and efficiency. Thus these peculiar proceedings in the post-award stage basically stand for the uniqueness of the ICSID arbitration.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966). In this case, the United States Supreme Court the Court held that both inculpatory and exculpatory statements made in response to interrogation by a defendant in police custody will be admissible at trial only if the prosecution can show that the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination before police questioning, and that the defendant not only understood these rights, but voluntarily waived them.

However, backlash against investor-state arbitration has shown recently, which mainly comes from some host states that face a number of ICSID cases and huge amount of damages. By and large, some respondent states wish for wider space of post-award review and hope to hinder the enforcement of the ICSID awards against them. In this situation, the ICSID review and enforcement mechanisms bear the brunt. Given that the state parties' contention lay the legitimacy foundation of the ICSID arbitration and their discontent may influence the future development or even existence of ICSID, their criticisms and countermeasures need to be treated seriously.

Therefore, the central task of this thesis is to investigate the challenges faced by the ICSID review and enforcement mechanisms due to the wave of backlash and discuss some possible suggestions prompted by these challenges. The analysis generally focuses on the legal sources, including international treaties and different national laws, as well as relevant cases in ICSID and in selected counties. Since states' anti-ICSID actions are relatively new and keep growing, a comprehensive and systematic analysis of the ICSID review and enforcement mechanisms under the influence of the backlash is still needed. The purpose of this research is to provide some clue to the refinement of the ICSID arbitration in order to help it strike balance between investors and states while keeping its distinctive advantages in the changing landscape of the global market, so that the ICSID arbitration could develop sustainably in the future.

Chapter 1

Background: The ICSID Arbitration's Review and Enforcement Mechanisms and the Recent States' Countermeasures

1.1. Introduction of the ICSID Arbitration

The International Centre for Settlement of Investment Disputes (ICSID or the Centre) is an investment arbitration institution created in 1966 by the World Bank. The establishment of ICSID was based on the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the ICSID Convention), which provides procedures of conciliation and arbitration to settle investment disputes between states and foreign investors. The past decades have witnessed tremendous development of ICSID. Nowadays, the ICSID arbitration has already been the most important device of the investor-state dispute settlement (ISDS) relating to cross-border investment.

The idea of creating the ICSID arbitration generated along with the increasing investment disputes. During the late 19th century, the state independence movement occurred and many former colonies gained their sovereignty. Most of the newly independent countries had less developed economy and thus were badly in need of foreign investment to fill the shortage of their own public funds and promote the economic growth. Thus, the cross-border capital flowing from developed countries to developing countries rose quickly. However, at the same time some states obsessively concentrated on the recently gained sovereignty and were unsatisfied with certain foreign investors' behavior that imposed risks on their sovereignty. As a result, private

investment was also conceived as a neo-colonial tool in some places. The emphasis on sovereignty and the immaturity of domestic legal system tend to result in some wrongful government actions in these states, such as expropriation or nationalization of foreign investments, which threatened foreign investors' interests. These political risks could restrain the inflow of foreign private capital, which in turn hinder the economic growth of the capital-receiving developing countries. To find a solution to this dilemma, Aron Broches, the General Counsel of the World Bank then, proposed in 1961 an idea of establishing an investment dispute resolution mechanism within the World Bank framework. This proposal turned into the ICSID Convention and was approved in 1966, based on which the Centre was established. Thus, Aron Broches is also called the founding father of ICSID.

The ICSID arbitration is an innovative and unique dispute settlement device in the realm of international arbitration. The most distinctive character of the ICSID arbitration is the 'semi-public' nature thanks to the involvement of both private and public parties in the arbitration process. As is well-known, international commercial arbitration usually deals with disputes between private parties.² Before the creation of the ICSID arbitration, most investment disputes between investors and host states were not solved through the path of international arbitration, but relied on the so-called 'diplomatic protection'. In the context of international investment, diplomatic protection means that, when dispute arises out of a foreign investment, the home country of an investor may take diplomatic actions against the host state on behalf of its nationals. This method of dispute settlement is between sovereign states and thus inevitably politicalized, unpredictable and economically inefficient. To replace diplomatic protection and provide a

² It is noteworthy that ICC, SCC and a number of other arbitral institutions also handled a fair number of investor-State disputes. But as a matter of fact, investment arbitration was not the mainstream of solving investor-State investment disputes before the creation of ICSID.

neutral forum for investment dispute settlement, the ICSID arbitration mechanism comes to play. Under the ICSID system, investors need not to rely on their home states but can directly bring arbitration claims against the states hosting their investment. The parties of each ICSID arbitration case is an investor and a host state, thus the home state of the investor does not participate in the arbitration process. Hence, the ICSID arbitration involves both private and public parties and avoids the complicated political issues in the process of diplomatic protection.

The ICSID arbitration can be an attractive choice for both private investors and sovereign states. Once getting access to ICSID, investors can bring claims in a delocalized international institution in their own name and accordingly avoid nationalist decisions rendered by non-neutral local courts of the host states. As a result, investors are more willing to choose those states ratifying the ICSID Convention as the investment destination, and these countries can induce more private funds, which would not be available under the threat of political risks. From this perspective, ICSID arbitration is a remarkable improvement in the regime of international investment by providing an efficient dispute resolution device that benefit all players in the global market. In fact, the past decades have witnessed considerable acceleration of the ICSID arbitration. The number of states ratifying the ICSID Convention has reached 150 up to 2015,³ and the ICSID arbitration was involved as an option of resolving investment disputes in more and more bilateral investment treaties (BITs) and multilateral investment treaties (MITs).

Due to the distinctive ‘semi-public’ feature, the ICSID arbitration is equipped with some peculiar mechanisms. The most noticeable innovations are the review and the enforcement mechanisms, which distinguish the ICSID arbitration from other forms of international arbitration, such as the

³ See the ICSID website, <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx>, accessed on September 2, 2015

UNCITRAL arbitration⁴ or the institutional arbitrations carried on by ICC,⁵ SCC,⁶ CIETAC,⁷ etc. One primary goal of all forms of international arbitration is to provide a neutral forum for dispute resolution, which, theoretically and optimally, should be excluded from national judicial bureaucracies. However, non-ICSID arbitrations fail to fully divorce from external control, especially on the post-award stage. In the context of non-ICSID arbitration, once an arbitral award is rendered, it might be subject to court review in the seat country where the arbitration was taking place, which is called a setting-aside proceeding. The court of the seat can review the award according to the relevant local law and set aside the award if certain nullification ground provided therein is met. If the losing party of the arbitration refuses to honor the award, the prevailing party can choose to enforce the award in a national court. In most cases, the enforcement proceeding is governed by the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention).⁸ According to the New York Convention Article V, courts can refuse enforcement of an award if one or more of the enumerated grounds in this provision are met.⁹ Thus, for most awards that are not rendered by ICSID, the finality of

⁴ The United Nations Commission on International Trade Law issued an UNCITRAL Arbitration Rules in 1976. The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationships and are widely used in ad hoc arbitrations as well as administered arbitrations. See the UNCITRAL website, UNCITRAL Arbitration Rules page, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html, accessed on September 3, 2015.

⁵ The ICC International Court of Arbitration is based in Paris, which is a leading body for resolution of international disputes by arbitration. See the ICC website, <http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/>.

⁶ SCC (Stockholm Chamber of Commerce) is based in Stockholm, which is also a leading forum of dispute resolution. See the SCC website, <http://www.sccinstitute.com/about-the-scc/>.

⁷ CIETAC (China International Economic and Trade Arbitration Commission) is based in China, which is one of the major arbitration institutions. See the CIETAC website, <http://www.cietac.org/index.cms>.

⁸ See the New York Convention website, <http://www.newyorkconvention.org/>.

⁹ Article V of the New York Convention provides the situations when a national court can refuse to enforce a foreign arbitral awards. The grounds are provided as follows:

“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

the awards are facing challenges from national courts in the review and enforcement proceedings. However, the ICSID Convention changes this situation by providing a self-contained review mechanism and an expedite enforcement mechanism. The ICSID review proceedings are conducted by internal review agencies within the ICSID framework and only deal with the egregious procedural violations; the ICSID enforcement proceedings are generally free from national judicial intervention and make ICSID awards almost automatically enforceable. The review and enforcement mechanisms of the ICSID arbitration are essentially designed for the purpose of preserving the finality of ICSID awards and enhance the efficiency of the entire arbitration process. These two particular devices define the most distinguished feature of the ICSID arbitration, thus when ICSID faces challenges and needs to be reconsidered, the review and enforcement mechanisms should be paid more attention. This thesis is devoted to analyze the ICSID review and enforcement mechanisms on the background of the increasing anti-ICSID wave. The research aims to promote future sustainability of the ICSID arbitration system. Before going to detailed analysis of the specific problems of the ICSID review and enforcement mechanisms, they will be briefly introduced in the following section.

1.2. The ICSID Review Mechanism

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

According to Murphy's Law, anything that can go wrong will go wrong,¹⁰ which also applies to the arbitration process. In the ICSID arbitration, arbitral tribunals may commit errors in some matters of fact or law, or violate procedural requirements during the arbitration process. Hence, a review device is in need to ensure the arbitrators' authority not exceeding parties' delegation. However, since finality of arbitral awards is essential to the ICSID arbitration, the ICSID review mechanism does not correct substantive errors in the original award, but only deals with the extreme procedural violations in very exceptional cases. After an ICSID award is rendered, either party can apply for interpretation, revision or annulment of the award according to Article 50 to 52 of the ICSID Convention. All of the three proceedings will be carried on by internal review agencies within the ICSID framework.

1.2.1. Interpretation of ICSID awards

Article 50 of the ICSID Convention establishes interpretation proceeding for ICSID awards, which provides that:

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request shall, if possible, be submitted to the Tribunal, which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Briefly, either party can submit a request for interpretation of an ICSID award. The request must relate to the meaning or scope of an award based on the existence of a dispute. The request should be concrete and with practical relevance, thus general complaint about lack of clarity or abstract theoretical concern will not be dealt with by ICSID. The award to be interpreted does

¹⁰ See Murphy's Law, Wikipedia, https://en.wikipedia.org/wiki/Murphy%27s_law, accessed on September 5, 15

not refer to any preliminary decision, provisional measure or an annulment committee's decision. The original tribunal or a newly constituted tribunal will exercise the interpretation proceeding. It is noticeable that the request for interpretation is not subject to time limit, which means that interpretation can be requested, even more than once, at any time after the award has been rendered. During the interpretation proceeding, parties can apply for stay of enforcement and the tribunal has discretion to decide this issue.

In practice, the interpretation proceeding is rarely requested. From 1966 to 2015, there are 7 interpretation proceedings conducted by ICSID.¹¹ The rare application of interpretation shows that most ICSID awards are well drafted; it also reflects that interpretation proceeding is not the prominent part in the ICSID post-award review system.

1.2.2. Revision of ICSID awards

Besides interpretation, another review device is the revision proceeding. In the context of ICSID arbitration, revision of an award means altering the original award due to newly discovered facts that were unknown when the award was rendered. The provision of revision can be found in Article 51 of the ICSID Convention, which reads as follows:

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

¹¹ See the ICSID website, interpretation proceedings, <https://icsid.worldbank.org/apps/icsidweb/cases/Pages/AdvancedSearch.aspx?typ=CD15>, accessed on September 21, 2015

(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

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

According to this provision, revision is only available in respect of final awards, rather than preliminary decisions, provisional measures or annulment decisions. The new issue of fact (not new issue of law) must be decisive, which means that it would have led to a different result had it been known to the tribunal. The initiating party also needs to show that the failure to discover the new fact when the award was rendered was not due to negligence. Furthermore, unlike the interpretation proceeding, which can be applied for at any time after the awards has been dispatched, there is a time limit for revision requests. A party must submit the request within 90 days after the discovery of the new fact, and no later than three years from the date on which the award was rendered. While the stay of enforcement is subject to tribunal's discretion in an interpretation proceeding, it is automatically and immediately granted upon parties' request in a revision proceeding.¹²

It is noteworthy that the remedy of revision due to newly discovered facts is rarely available for arbitral awards in most national legal systems.¹³ Thus, incorporating an internal revision instrument is one of the distinctive features of the ICSID arbitration. For most international arbitral awards not rendered by ICSID, parties can challenge the awards by initiating a setting aside proceeding or opposing recognition and enforcement of the award in the enforcement

¹² It is arguable whether stay of enforcement is still possible or reasonable when a new fact is discovered after the award had already been enforced and executed. Since the annulment proceeding is the main topic of this thesis, the above question will not be discussed here but in another article.

¹³ Tibor Varady, *Control of Arbitral Awards and the Relevance of Newly Discovered Facts*, Liber Amicorum Kresimir Sajko, Zagreb 2012, 435-451

proceeding. If a new fact was discovered after the award was rendered but before it was challenged, the issue of the newly discovered facts could be considered by court in a setting aside proceeding or an enforcement proceeding if it relates to one of the grounds of challenge, or the arbitrator's improper/incomplete fact-finding process violated procedural guarantees or the public policy.¹⁴ However, what if the new fact was discovered after the completion of the setting aside proceeding and there are no enforcement proceeding pending? As a matter of fact, not many jurisdictions provide a third recourse such as revision to deal with the latter situation. One of the few exceptions is Switzerland, which recently recognized revision as a possible remedy for arbitral awards through case law.¹⁵ The hesitation of most national legal systems to extend the remedy of revision to arbitral awards may be out of the fear of opening the door for appeals and impairing finality of arbitral awards. Nevertheless, although revision is available under the ICSID system, this instrument has rarely been triggered. From 1966 to 2015, there are only eight decisions regarding the revision of ICSID awards.¹⁶ For the rare usage, the ICSID revision mechanism has not raised much criticism from investors and states.

1.2.3. Annulment of ICSID awards

In the ICSID review system, neither the interpretation nor the revision proceedings can be compared to the importance of the annulment proceeding, through which parties can nullify ICSID awards when certain grounds are met. As elaborated above, the ICSID arbitration highlights finality of its arbitral awards. However, it is also conceivable that finality must be

¹⁴ Id., at 437

¹⁵ Id., at 443. In 1992, the Switzerland Federal Tribunal recognized revision as a matter of principle in a case decision, but did not grant the request of revision; in a 2006 case, the Federal Tribunal actually granted a request for revision.

¹⁶ See the ICSID website, revision proceedings, <https://icsid.worldbank.org/apps/icsidweb/cases/Pages/AdvancedSearch.aspx?typ=CD16>, accessed on September 21, 2015

limited by certain exceptions. If no exception were imposed, absolute finality of arbitral awards would scare away the potential users who are worried to be bound by unfair outcomes. In the system of ICSID arbitration, the annulment proceeding acts as the exception of finality and aims to enhance fairness and integrity of the arbitration process.

The ICSID Convention Article 52 provides the annulment proceeding. According to Article 52(2), after an award being rendered, the dissatisfied party may submit an application for annulment within 120 days. One exception of this time limitation is the situation of corruption, where such application shall be made within 120 days after discovering the fact of corruption.¹⁷ In any event, application must be filed within three years after the date on which the award was rendered.¹⁸ Unlike the setting aside proceeding conducted by national courts, Article 52(3) provides that an *ad hoc* committee constituted of three ICSID arbitrators is the review agency of the annulment proceeding. Michael Reisman states that the internal review agency is the most noticeable innovation of the ICSID annulment mechanism.¹⁹ None of the committee members shall have been a member of the tribunal which rendered the award; shall be of the same nationality as any such members; shall be a national of the state party to the dispute or of the state whose national is a party to the dispute; shall have been designed to the Panel of Arbitrators by either of those states; or shall have acted as a conciliator in the same dispute.²⁰ The committee is authorized to review the award and may annul the award in whole or in part, based on the five grounds listed in Article 52(1).²¹ The enumerated annulment grounds under Article 52(1) include:

(a) that the tribunal was not properly constituted;

¹⁷ ICSID Convention, Article 52(2).

¹⁸ *Id.*

¹⁹ Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, DUKE L.J. (1987), p.739.

²⁰ ICSID Convention Article 52(3)

²¹ ICSID Convention Article 52(3)

- (b) that the tribunal has manifestly exceeded its power;
- (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;
- (e) that the award has failed to state the reasons on which it is based.

The above listed grounds are strictly limited and only relating to procedural matters, for the purpose to preserve the procedural integrity of the ICSID arbitration process. As expounded by the *Soufraki ad hoc* committee, these five grounds are drafted so as to ensure the integrity of arbitral tribunal (Article 52(a) and (c)), arbitration procedure (Article 52(1)(b) and (d)), as well as arbitral awards (Article 52(1)(e)) accordingly.²² It is noteworthy that the drafters of the ICSID Convention cast out two merit-concerning nullification grounds—violation of public policy and non-arbitrability. These two grounds of challenge against arbitral awards are incorporated in the New York Convention, the UNCITRAL Model Law and in many domestic arbitration laws. The ICSID annulment mechanism excludes the review on merits of the original awards in order to preserve finality and efficiency of the arbitration process.

Article 52(5) provides a special procedure of stay enforcement pending the review proceedings. During the annulment proceeding, an *ad hoc* committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requires a stay, enforcement of the award shall be stayed provisionally until the committee rules on such request. If an ICSID award is annulled, the same dispute can be resubmitted to ICSID

²² *Hussein Nuaman Soufraki v. The United Arab Emirates*, Decision of the Ad hoc Committee on the Application for Annulment of Mr. Soufraki, ICSID Case No ARB027 (2007). para 23

according to Article 52(6). A new tribunal shall be constituted in accordance with related provisions in the Convention to decide this dispute.²³

The ICSID annulment proceeding is one of the most significant and innovative mechanisms of the ICSID arbitration. However, the relevant Convention provisions are lack of sufficient clarity and thus in practice the review standards adopted by different annulment committees change time to time. The textual ambiguity and inconsistency of the annulment standard casts the effectiveness and legitimacy of the ICSID annulment proceedings into doubt and has triggered continuous debates from commentators. Given the importance of the annulment mechanism in the ICSID framework, the challenges faced by the annulment proceedings need to be closely investigated. Chapter 2 and 3 will analyze the problems regarding the Convention provisions about the ICSID annulment mechanism and the annulment standards adopted in practice, and Chapter 4 will discuss some possible suggestions to deal with the challenges against the ICSID annulment mechanism.

1.3. The ICSID Enforcement Mechanism

Winning an arbitration case and obtaining a favorable award does not necessarily mean getting paid. Most ICSID awards are voluntarily complied with, but sometimes certain losing parties refuse to honor their obligation rendered by ICSID. When non-compliance happens the common practice is to seek enforcement of the award in the court of a state where the losing party is believed to have assets. For non-ICSID awards, the court can deny the enforcement if it finds violations under Article V of the New York Convention. Nevertheless, when an ICSID award is

²³ ICSID Convention Article 52(6)

brought to a national court for enforcement, the ICSID Convention requires the court not to review on the award but enforce it straightaway.

The court where an ICSID award is sought to be enforced can be any contracting state of the ICSID Convention, which can be the host state, the home state or a third state that ratifying the ICSID Convention but not directly connected with the specific arbitration case. Since the host state participate the arbitration case as a party, while the home state or a third state are not parties of the case but only the forums of the enforcement proceedings, then it will make the following discussion more clear to distinguish these two situations—the first situation is the enforcement of an ICSID award in the host state; the second situation is the enforcement of an ICSID award in the home state or a third state, which can be collectively referred to as the ‘forum state’.

The expedient enforcement mechanism provided by the ICSID Convention distinguishes the ICSID arbitration from other forms of international arbitration on the post-award stage. The related provisions can be found in Article 53 to 55 of the ICSID Convention, which respectively stipulate the parties’ obligation to comply with ICSID awards, three steps to achieve the award-granted relief (namely recognition, enforcement and execution), and the matter regarding states’ sovereign immunity. These three articles read as follows:

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

1.3.1. The obligation to comply with ICSID awards

Article 53 stipulates party's obligation to comply with ICSID awards and provides the exclusion of external review owing to the binding force and finality of the ICSID awards. The binding nature of ICSID awards stems from the agreement between parties, which includes the promise to be bound by the result of the arbitration. Additionally, as for the state party to the arbitration, the obligation to abide by the award also arises directly from the ICSID Convention, to which the state is a signatory member. The award's binding force also has its legal basis on the doctrines of *res judicata* and *pacta sunt servanda*. Finality of an arbitral award requires that the award settles dispute definitively without appeal.²⁴ Thus the ICSID Convention only allows internal review authorities to conduct the interpretation, revision and annulment proceedings within the ICSID framework and explicitly casts out the possibility of appeal. In this situation, once an ICSID award is rendered and all possible internal remedies are exhausted, parties are

²⁴ Art. 37 of the 1907 Hague Convention for the Pacific Settlement of International Disputes.

immediately imposed with the obligation to comply with the awards without further opportunities to seek external remedies. Non-compliance with the award constitutes a breach of legal obligation under the ICSID Convention and hence forcible enforcement proceedings in national court or other forms of recourse may ensue.

1.3.2. Recognition of ICSID awards

Article 54 provides the proceedings of recognition, enforcement and execution of ICSID awards, which come to play when the losing party refuses to comply with an award and the prevailing party brings the award to a national court in any ICSID contracting state. The court shall automatically recognize the ICSID award without any review and enforce the pecuniary obligation as if it were a final judgment of the state. The ICSID Convention does not govern the execution of ICSID awards but leaves it to national laws.

Recognition of an ICSID award is a proceeding to confirm the award as authentic and *res judicata*, which means that the same issue should not be brought up again before a court or another arbitral tribunal.²⁵ Some scholars describe the recognition proceeding as a ‘shield’ because its main function is to defend the attempts to initiate new legal proceeding based on the same issue.²⁶ Recognizing an ICSID award (including the pecuniary and non-pecuniary damages in the awards) is obligatory for each contracting state of the ICSID Convention once the award is confirmed as authentic. From this perspective, the ICSID Convention establishes an ‘automatic recognition’ mechanism.

1.3.3. Enforcement of ICSID awards

²⁵ Herbert Kronke, Patricia Nacimiento, Dirk Otto, Nicola Christine Port, Recognition and Enforcement of Foreign Arbitral Awards-A Global Commentary on the New York Convention, Wolters Kluwer, 2010, page 7.

²⁶ Id. at 7-8

The ICSID Convention does not specify the clear meaning of ‘enforcement’. I agree with the opinion that in the context of ICSID arbitration, it means court’s declaration of the enforceability of ICSID awards in the territory of the state where enforcement is sought.²⁷ It is noticeable that ICSID member states only have obligations to enforce the pecuniary damages awarded by ICSID tribunals. However, this provision does not restrict ICSID tribunal’s authority to order non-pecuniary damages, such as specific performance or withdrawal of governmental measures that has been found illegal; it only means that the prevailing party cannot seek expedite enforcement of the reliefs in forms of non-pecuniary damages. To enforce non-pecuniary damages issued by ICSID tribunals, parties can go through an enforcement proceeding under the New York Convention.

Article 54(1) provides that the pecuniary obligation imposed by an ICSID award should be enforced as a final judgment of a court in the state where enforcement is sought. The drafters designed this mechanism in order to leave ordinary judicial review off the list during the proceedings of enforcing ICSID awards. In most situations, a final domestic court judgment does not face further judicial review, whereas a regular foreign arbitral award sought for enforcement is subject to court scrutiny under the New York Convention Article V. For non-ICSID awards, the court has authority to deny enforcement pursuant to the New York Convention if certain procedural violations, unarbitrability or breach of public policy of the state occur. However, according to the ICSID Convention, any member state’s court should enforce an ICSID award if such a final court judgment could be enforced under its domestic law. This makes ICSID awards very powerful and more readily to enforce comparing with other arbitral awards. Some scholars

²⁷ Detailed analysis of the meaning of ‘enforcement’ is presented in Chapter 5

accordingly claim that the ICSID enforcement is ‘automatic’,²⁸ which is however not an unequivocal conclusion. In some states, a final court judgment may be subject to court review in very exceptional cases, thereby if an equal final court judgment should not be enforced under local law, the ICSID award may not be enforced in that state. Thus a question raised is whether an ICSID award is reviewable in an enforcement proceeding, or whether ICSID enforcement is automatic or not? If the answer is yes, does it conflict with Article 53, which provides that ICSID awards should not be subject to any appeal or any other remedy except for the internal review mechanism? This is becoming a more and more explosive issue and will be closely discussed in the fifth chapter below.

1.3.4. Execution of ICISD awards and sovereign immunity

Article 54(3) regards the execution of ICSID awards. Execution refers to the actual realization of the damages granted in ICSID awards. If the obligor refuses to pay damages awarded by an ICSID tribunal after the award has been confirmed enforceable by a national court, the prevailing party may ask for court assistance to enforcedly collect the assets owed by the other party in that country. Unlike the recognition and enforcement proceedings, for which the ICSID Convention intends to exclude interventions of national court, the execution of an ICSID award is governed by nothing but the domestic law in the forum of execution. Thus, if a final domestic court judgment should not be executed in the forum state according to its national law, an ICSID award as such should neither be executed.

²⁸ The statement regarding ‘automatic recognition of ICSID award’ can be found in several scholarly article, e.g. CHRISTOPH SCHREUER, *THE ICSID CONVENTION-A COMMENTARY* (2nd ed. 2009).at 1128 “recognition of awards”; also see LUCY REED, JAN PAULSSON & NIGEL BLACKABY, *GUIDE TO ICSID ARBITRATION* (2010). Kluwer Law, 2008, p. 105.

Since the majority of ICSID cases are brought by investors against host states, thus enforcement or execution of ICSID awards are usually against host states. One of the main obstacles for collecting the host states' assets is 'sovereign immunity'. Article 55 of the ICSID Convention affirms that the domestic law relating to sovereign immunity governs the execution of ICSID awards in the forum state. Hence, the respondent state may plea sovereign immunity in the forum of execution and the court may refuse to execute the award according to the forum's domestic law. Nowadays, the restrictive notion of sovereign immunity dominates most states' legislation, according to which the respondent state cannot invoke sovereign immunity to protect the sovereign assets used for commercial purpose, and thus these assets can be executed by the forum court. However, specific national laws concerning sovereign immunity differ from one another and different countries take different positions to treat the execution of ICSID awards, which brings more uncertainty to the execution of ICSID awards. Thus, while the ICSID review mechanism and the recognition and enforcement of ICSID awards are almost isolated from external intervention, the shield vanishes during the execution proceedings—that is to say, an ICSID award may be refused to be executed if sovereign immunity is successfully invoked by the host state. Therefore, some authors call the execution of ICSID awards the 'Achilles' heel' of the ICSID system.²⁹

In summary, the ICSID review and enforcement mechanisms are designed to preserve finality and effectiveness of ICSID awards during the post-award stage, which represent the most distinctive feature of the ICSID arbitration. After an ICSID award is rendered, it is only subject to interpretation, revision and the highly restricted annulment proceedings carried on by internal review agencies. If the respondent party refuses to comply with the award, the prevailing party

²⁹ Michael Waibel, *Sovereign Defaults before International Court and Tribunals*, Cambridge University Press, 2011, p.321

can bring the award to a national court of any ICSID member state for enforcement. The court should recognize the award as final and binding, and then enforce the pecuniary obligations therein within the state's territory as if it were a final court judgment in that state. Despite the ease of enforcement, the ICSID Convention does not provide mandatory execution of the award. The forum court may deny execution based on the respondent state's plea of sovereign immunity, which is governed by the forum state's domestic law rather than the ICSID Convention.³⁰

Despite of the careful design of the ICSID system, there still exist some shortcomings that could impair the effectiveness of the review and enforcement instruments. The Convention provisions concerning the annulment proceedings are ambiguous to some extent, so that there still has not been a consistent standard of review that is deemed as properly balanced. In the enforcement proceedings, the equal relationship between ICSID awards and final court judgments of the forum states raises an arguable question whether an ICSID award can be reviewed by a national court if an equivalent final judgment is reviewable. Moreover, when it comes to the execution stage, the respondent states may invoke sovereign immunity to hinder collection of damages against them, and the difference between domestic laws regarding the execution proceedings brings more uncertainty to the realization of ICSID awards. All of these questions are critical to the function of the ICSID review and enforcement mechanisms and affect the operation of the entire ICSID system, which thus deserve close analysis in this thesis.

Recently, an emerging tendency of backlash against the investment arbitration, which is mainly fueled by sovereign states, has caught more and more attentions. Different from the generally supportive attitude towards ICSID before, in recent years some sovereign states have become

³⁰ See ICSID Convention, Article 55, which states: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting States relating to immunity of that State or of any foreign State from execution."

dissatisfied with the ICSID arbitration and begun to take opponent actions, including denouncing the ICSID Convention, criticizing the legitimacy of the ICSID arbitration, requiring broader post-award remedy, hindering enforcement and execution of ICSID awards, etc. Due to the backlash against ISDS, ICSID and its review and enforcement mechanisms are under more challenges. Given that host states are the most important stakeholders of the ICSID arbitration, their reactions towards arbitration process and the post-award issues urge reconsiderations of these mechanisms. States' critiques and actions regarding the ICSID review and enforcement mechanisms will be paid close attention in the following section.

1.4. Backlash against the Investment Arbitration and States' Influence on the ICSID Review and Enforcement Mechanisms

The past decades have witnessed a rapid development of the investment arbitration. However, recently this dispute resolution mechanism is under growing criticisms and severe public scrutiny. The most radical challenges are from some sovereign states, especially the developing countries in Latin America. From 2005, a series of denunciation from the ICSID Convention, starting from Bolivia and then Ecuador and Venezuela, hit the news in the circle of international investment and attracts close attentions and heated controversies. Besides the actions of withdrawal from ICSID, rhetorical attacks and various countermeasures inside and outside the ICSID framework were also engaged by some countries, tackling both the review and enforcement mechanisms of the ICSID arbitration.

The wave of sovereign resistance is not limited to developing countries but also involves some major developed countries, such as the US and Australia, which used to be firm supporters of the direct investor's claim against states. The US is a big whale in the global market and in the past

years always acted as the capital-exporting country. However, along with the changing landscape in the international investment regime, these years the US has absorbed more and more foreign capitals and gained a dual-role as both a home state and a host state of international investment. Owing to this shift, the US government also faces the risk of being sued in international forum by foreign investors and thus it assumes a more cautious position towards the ISDS. In 2004 and 2012, the US government revised the Model BIT³¹ twice and restrained the investment arbitration jurisdiction to some extent.³² The Australian government made a more radical policy change in 2011 through that year's Trade Policy Statement, where it proclaims that Australia will no longer include ISDS provisions in future trade agreements.³³ However, since the change of government in 2013, the Abbott Government reverted to the position that considering the inclusion of ISDS on a case-by-case basis.³⁴ In fact, ISDS has been incorporated in the FTA between Australia and Korea (KAFTA, signed on April 8, 2014).³⁵ The US and Australia's opposition to ISDS are apparently much less radical than those of the Latin American countries and have little impact on the ICSID post-award issues.

Generally, those developing countries in Latin America mainly fuel the anti-ISDS wave and many commentators have observed a backlash against the ICSID arbitration. As the most featured devices of the ICSID arbitration, the review and enforcement mechanisms are also

³¹ Since 1980s, the US government initiated the Model BIT program, which aims to provide a basic model for the negotiations of BIT with another country.

³² See Lise Johnson, *The 2012 US Model BIT and What the Changes (or lack thereof) Suggest about Future Investment Treaties*, Political Risk Insurance Newsletter, Volume VIII, Issue 2, November 2012, available at http://www.vcc.columbia.edu/files/vale/content/Political_Risk_Insurance_Newsletter_-_The_2012_US_Model_BIT_-_Nov_2012.pdf, accessed on February 14, 2014.

³³ See Leon Chung and Jamie Stollery, *Australia Goes against the Trend with Investor-State Dispute Settlement*, <http://www.lexology.com/library/detail.aspx?g=1b4fc432-f5d3-4a57-9d0c-f8edc6a2d992>, accessed on 6/2/2013.

³⁴ Luke Nottage, *The "Anti-ISDS Bill" before the Australian Senate*, Kluwer Arbitration Blog, August 28, 2014, <http://kluwerarbitrationblog.com/blog/2014/08/28/women-in-arbitration-in-brazil/>, accessed on September 29, 2015.

³⁵ Leon E. Trakman and Kunal Sharma, *Indonesia's Termination of the Netherlands-Indonesia BIT: Broader Implications in the Asia-Pacific?*, Kluwer Arbitration Blog, August 21, 2014, <http://kluwerarbitrationblog.com/blog/2014/08/21/indonesias-termination-of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/>, accessed on September 29, 2015.

under challenges due to states' countermeasures and criticisms. Since states' consent forms the legitimacy basis of the ICSID arbitration and could determine the future existence of this mechanism by choosing to stay or to leave, their reactions deserve careful investigation. If states' recalcitrance is neglected, the trend of resistance might continuously grow and ultimately lead to the collapse of the ICSID system. This section will mainly focus on the Latin American countries' resistance to the ICSID arbitration during the recent backlash and analyze its influence on the ICSID review and enforcement mechanisms.

1.4.1. Investment arbitration in Latin America

A historical overview of the Latin American countries' attitude towards the investment arbitration may provide some clue to the explanation of their recent anti-ICSID position. From a historical perspective, the history of investment arbitration in Latin America is quite like the flight track of a boomerang. In the late 19th century, Calvo Doctrine was created and proliferated in Latin America. As a result, international investment arbitration, especially the ICSID arbitration, was generally rejected by Latin American countries. From mid 1990s, the hostility towards ISDS faded out and ICSID was incorporated into most BITs signed by Latin American countries. However, the recent resistance against investment arbitration begins to rebound, which is described by some scholar as the "revival of Calvo Doctrine"³⁶.

Calvo Doctrine was established by Carlos Calvo, an Argentinean jurist, and rapidly proliferated across this region and also in some other developing countries.³⁷ At that time, European countries adopted the doctrine of diplomatic protection to justify their interventions in Latin

³⁶ Wenhua Shan, *From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW.J.INT'L L. & BUS. P.631

³⁷ A typical example is China. The so-called "first generation of China's BIT", which were concluded in 1990s, took a very conservative attitude to ICSID arbitration by strictly restraining the scope of ICSID jurisdiction.

America as the means to collect debts owed to their citizens. Their alleged justification was that an injury to a citizen constituted an affront to the state. As a response to the intervention, Carlos Calvo proposed his opinion that host states shall not grant any rights or benefits to foreign investors that exceed those accorded to their own nationals, and foreigners shall not be entitled to any remedies other than those available to nationals of a host state, which set the basis of Calvo Doctrine.³⁸ Essentially, the doctrine requires that all disputes involving private individuals conducting business in a foreign country should be resolved by local remedies rather than by international legal remedies.³⁹ Upon its creation, Calvo Doctrine was enthusiastically advocated by Latin American countries as well as some developing countries in Asia and Africa. In several Latin American countries, such as Argentina, Ecuador and Venezuela, the doctrine was implemented into their constitutions and domestic legislations in the form of “Calvo Clause”. Complying with Calvo Doctrine, at the 1964 World Bank annual meeting held in Tokyo, the Chilean delegate on behalf of all Latin American countries declared their rejection to the ICSID Arbitration, which was the famous “No of Tokyo”.

Nevertheless, along with the debt crisis in Latin America, Calvo Doctrine was abandoned and replaced by the neo-liberalism in the mid-20th century. During 1960s and 1980s, many Latin American countries, notably Argentina, Brazil and Mexico, were in heavy debt burden. The debts rose sharply from USD 75 billion in 1975 to USD 315 in 1983,⁴⁰ and these countries were unable to pay back the huge debts.⁴¹ In order to restructure debts to avoid financial panic, foreign banks provided new loans, which were nevertheless attached with a condition of accepting the

³⁸ Wenhua Shan, *supra* note 36 at 633.

³⁹ Charity L. Goodman, *Comment Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. Pa. J. Int’l Econ. L. 449. P.469-470.

⁴⁰ Institute of Latin American Studies, *The Debt Crisis in Latin America*, page. 69.

⁴¹ Schaeffer, Robert. *Understanding Globalization*, page. 90

intervention of International Monetary Fund (IMF) and signing treaties and conventions with provisions of foreign investor protection. Under this situation, many Latin American countries gave up their policies guided by Calvo Doctrine and accepted the ICSID jurisdiction in order to get new loans. Furthermore, the Washington Consensus, an economic reform package designed for Latin American countries in 1987, began to build a new investment regime directed by the neo-liberalism to replace the Calvo regime. Along with the global wave of economic liberalization, many countries in Latin America became members of the ICSID Convention and signed hundreds of BITs containing the ICSID arbitration as a dispute settlement option.⁴²

However, lately the boomerang suddenly flies back. Some Latin American countries recently revealed obvious hostility against the investment arbitration again through rhetorical criticisms and various countermeasures. To a large extent, this sudden shift happened along with the soaring ICSID caseload against Latin American countries and the mounting damages waiting for them to pay. According to the UNCTAD data of the total number of investment treaty arbitration till 2015, Latin American countries occupy four seats among the top 10 respondent states.⁴³ Argentina sits the first place with 56 cases, followed by Venezuela (2nd with 36 cases), Ecuador (6th with 21 cases) and Mexico (6th with 21 cases).⁴⁴ The big number of ICSID cases against Latin American countries was by and large owing to the regional economic situations and the governments' nationalization and expropriation of foreign investment. Take Argentina for example, in 2001, financial crisis swept the country and caused economy collapse and huge loss of many foreign and domestic companies. To deal with this crisis, the Argentine government

⁴² According to UNTAD statistics, Latin American States did not engage in BITs until the late 1980s, while by the end of 1990s, Latin American States had entered into 300 BITs. See Wenhua Shan, *supra* note 36 at 632.

⁴³ *Id.* at 632.

⁴⁴ Mexico is not a signatory member of ICSID Convention, thus cases against Mexico before ICSID are under the Additional Facility proceedings.

adopted several emergency actions, including a currency control manner called ‘pesification’, through which the government prohibited constant outflow of capital from banks by forbidding withdrawal of more than US\$250 per week and limiting transfer of funds abroad.⁴⁵ As a result, foreign investors suffered severe loss. To seek remedies, many investors brought claims against the Argentine government before ICISD based on investment contracts or BITs between their home states and Argentina. As a result, Argentina need to face over fifty ICSID cases and the damage awarded against it has amounted to tens of billions dollars.⁴⁶

1.4.2. States’ critiques and countermeasures concerning the ICSID review and enforcement mechanisms

The heavy burden of defending themselves before ICSID tribunals and the huge amount of damages drag these developing counties into more severe economic hardship and political crisis. As a response, a series of actions and criticisms against the ICSID arbitration were employed by some Latin American countries. The most drastic actions are some states’ denunciation from the ICSID Convention. On 2007, 2009 and 2012, Bolivia, Ecuador and Venezuela withdrew from the ICSID Convention accordingly. Condemnations against the ICSID system were expressed by officials of these countries along with the denunciation to back their actions.⁴⁷ For example, before withdrawing from ICSID, the Bolivian President Morales complained that “The

⁴⁵ Silvia Karina Fiezzoni, *Study on the Challenges and Countermeasures of Latin America against ICSID*, 2011. P.2

⁴⁶ Oscar Lopez, *Smart Move: Argentina to Leave the ICSID*, Cornell International Law Journal Online, <http://cornellilj.org/smart-move-argentina-to-leave-the-icsid/>, accessed on December 21, 15

⁴⁷ For example, before Bolivia withdrawing from ICSID, President Morales complained that: “The government of Latin America, and I think the world, never win the cases. The multinationals always win”, thus “[We] emphatically reject the legal, media and diplomatic pressure of some multinationals that...resist the sovereign rulings of countries, making threats and initiating suits in international arbitration.” See Diana Marie Wick, *The Counter-productivity of ICSID Denunciation and Proposals for Change*, 11 J.Int’l Bus.&L.239, page 8. When Bolivia denounced ICSID Convention, the Bolivian Ministry of Foreign Affairs released articles on its website elaborating reasons of the government’s withdrawal, which include bias of ICSID arbitrators towards investors, lack of appellate proceedings and deficient transparency in arbitration hearings. See Investment Treaty News (ITN), May 9, 2007, http://www.iisd.org/pdf/2007/itn_may9_2007.pdf, accessed on 10/2/2013.

government of Latin America, and I think the world, never win the cases. The multinationals always win”, and thus “[We] emphatically reject the legal, media and diplomatic pressure of some multinationals that...resist the sovereign rulings of countries, making threats and initiating suits in international arbitration.”⁴⁸

This speech represents not only Bolivia, but also some other Latin American countries’ discontent with the investment arbitration regime. When Bolivia denounced the ICSID Convention, the Bolivian Ministry of Foreign Affairs released several articles on its website elaborating reasons of the government’s withdrawal, including (1) institutional bias that disfavors state parties, (2) inconsistency of tribunals and *ad hoc* committees’ decisions, (3) insufficiency of the review mechanism, (4) lack of appellate proceedings, etc.,⁴⁹ which are also frequently raised by other dissatisfied states as well as many scholars.⁵⁰ The alleged institutional bias has been defeated by statistics of ICSID cases’ outcomes and scholars’ empirical research, which show no trace that investors were always better treated by ICSID tribunals.⁵¹ The remaining critiques all concern the ICSID review mechanism.

However, while expressing dissatisfaction with the review mechanism, these states on the other hand assume a very active role in utilizing the annulment proceeding. It seems a common tactic of losing parties to initiate annulment proceedings and raise as many as annulment grounds even

⁴⁸ Diana Marie Wick, *The Counter-productivity of ICSID Denunciation and Proposals for Change*, 11 J.Int’l Bus.&L.239, page 8.

⁴⁹ Id. Also see Investment Treaty News (ITN), May 9, 2007, http://www.iisd.org/pdf/2007/itn_may9_2007.pdf, accessed on 10/2/2013.

⁵⁰ E.g. Diana Marie Wick, *The Counter-productivity of ICSID Denunciation and Proposals for Change*, 11 J.Int’l Bus.&L.239, page 26; TNI, *Profiting from Injustice*, available at <https://www.tni.org/en/briefing/profitting-injustice>, accessed on October 8, 2015; Louis T. Wells, *Backlash to Investment Arbitration: Three Causes*, The Backlash against Investment Arbitration, Kluwer Law International, 2010, pp. 341-352; Ante Wessels, *Investor-to-State Dispute Settlement Is A Rigged System*, FFII Blog, May 28, 2014, <https://blog.ffii.org/investor-to-state-dispute-settlement-is-a-rigged-system/>, accessed on October 8, 2015. However, there are also many other scholars disagree with these critiques regarding the ICSID arbitration.

⁵¹ See Susan Frank, *Development and Outcomes of Investment Treaty Arbitration*, 50 Harv. Int’l, Rev, 435 (2009)

when some are not with solid basis. These actions or critiques essentially reflect the state parties' desire to have more chance to change the disfavoring result through the post-award remedy. However, their request of a broader review mechanism conflicts with the Convention drafters' intention that the annulment of ICSID awards should be an extraordinary remedy.

States also take actions to hinder the enforcement of ICSID awards. Since most ICSID cases involve large-scale multinational corporations and big investment projects, the cases often end up with huge amount of damages. In *Occidental Petroleum Corp. v. Ecuador*,⁵² for instance, the tribunal awarded damages as high as US\$1.77 billion.⁵³ Currently, in most BITs only the investors are entitled to the right of initiating investment arbitrations against the host states, thus it is usually the state parties who bear the obligation to pay the damages. However, many respondent states are at developing status, and some of them are even facing domestic economic crisis. Hence, it can be a huge burden for these states to fulfill the awarded obligations. In this situation, some states refuse to comply with ICSID awards and employ some measures to hinder the enforcement or execution of the awards. As expounded above, the Convention requests member states to immediately enforce ICSID awards as enforcing domestic final court judgments, so that ICSID awards could generally avoid external judicial review in national courts. Nevertheless, Argentina asserted that additional conditions should be attached to the enforcement of ICSID awards in its territory and its government expressed the intention to invalidate ICSID awards in national courts relying on its own Constitution. When an ICSID awards are brought to other countries for enforcement, they might also be subject to court scrutiny if that country's national law allows further judicial review on final court judgments in

⁵² See *Occidental Petroleum Corporation v The Republic of Ecuador*, Award, ICSID Case No. ARB/06/11 (Oct. 5, 2012)

⁵³ *Id.*

exceptional situations. Moreover, respondent states may also take advantage of the ICSID's 'Achilles Heel' and invoke sovereign immunity to impede the execution of ICSID awards. All of these measures may become obstacles before the enforcement of ICSID awards.

Summary

The above analysis shows that states' critiques and countermeasures against the ICSID arbitration put the review and enforcement mechanisms of ICSID under challenges. As for the review mechanism, states criticize the inconsistency of *ad hoc* committees' decisions and desire a broader review on ICSID awards in order to help them change the result with higher possibility. In terms of the enforcement mechanism, states may prevent enforcement of ICSID awards through national court review or block execution of ICSID awards by invoking sovereign immunity. In addition to the external challenges from state parties, the above sections also indicate that the ICSID review and enforcement mechanisms have some inherent shortcomings, namely that (1) the ICSID Convention provisions regarding the annulment proceedings are ambiguous to some extent, so that a consistent and clear annulment standard is lacked in practice; (2) the Convention provisions fail to provide a clear answer to the question whether ICSID awards can be reviewed or not in state courts at the enforcement stage; and (3) the execution of ICSID award is the weak point in the ICSID post-award phase due to states' rights to invoke sovereign immunity. The intrinsic problems could form potential risks affecting the efficiency and effectiveness of the ICSID review and enforcement mechanisms, and the recent states' backlash that goes against the ICSID's initial design may further deepen the risks. As the most distinctive devices of the ICSID arbitration, the review and enforcement mechanisms must deal with the challenges from both inside and outside, and take necessary refinement so that the

ICSID arbitration could keep its special features and simultaneously stay appealing to its users. This is the main task of this thesis.

The following chapters will be divided into two parts. Part I focuses on the review mechanism: Chapter 2 examines the ICSID Convention provisions concerning the annulment mechanism and analyzes the ambiguities regarding the annulment standard; Chapter 3 regards the changing annulment standards adopted by *ad hoc* committees in practice and investigates the recent changes in annulment standard due to some states' desire of a boarder review mechanism; Chapter 4 suggests some possible refinements for the ICSID review mechanism under current situation. Part II concerns the enforcement mechanism: Chapter 5 discusses the question whether ICSID awards are subject to court review in the enforcement proceedings; Chapter 6 talks about the execution of ICSID awards that is affected by sovereign immunity; Chapter 7 is suggesting some possible ways to enhance the effectiveness of ICSID awards during the enforcement phase. Through these discussions, the author intends to comprehensively examine the deficiency of the ICSID review and enforcement mechanisms and suggest possible solutions regarding these problems. The purpose is to find a path to refine the post-award stage of the ICSID arbitration and improve the effectiveness of the entire ICSID system.

Part I

Challenges Faced by the ICSID Annulment Mechanism and Suggestions Prompted by the Challenges

Introduction

Annulment is the most important proceeding of the ICSID control mechanism. Theoretically, where there is delegation of power, there shall be certain techniques of control. A control mechanism can ensure the exercise of power being limited within the pre-set boundaries and the entire system running on the right track as designed.⁵⁴ The essential feature of arbitration is that “parties submitted their disputes to judges of their own choice”, which purports that the powers retained by arbitrators are delegated by parties.⁵⁵ Thereby, a certain control mechanism in the arbitration proceedings is necessary to redress possible violations of parties’ intentions and to ensure the arbitration process conforming to parties’ expectations and the basic principles of due process. The ICSID Convention establishes a review mechanism consisting of interpretation, revision and annulment proceedings for the purpose to control the integrity of the arbitration system.⁵⁶ Compared to interpretation and revision, annulment is endowed with the major function of reviewing ICSID awards and represents the most distinguished feature of ICSID.

Article 52 of the ICSID Convention establishes a self-contained annulment mechanism. After an ICSID award is rendered, either party can apply for annulment, which is decided by an *ad hoc*

⁵⁴ MICHAEL REISMAN, SYSTEM OF CONTROL IN INTERNATIONAL ADJUDICATION & ARBITRATION, p.1 (1992).

⁵⁵ Jan Paulsson, *ICSID’s Achievements and Prospects*, ICSID REV-FILJ 387 (1991).

⁵⁶ The introduction of the interpretation, revision and annulment proceedings can be found in Chapter 1 of this thesis. Briefly speaking, either party of may request interpretation of the award as to the meaning or scope of the award, or request revision of the award on the ground of newly discovered facts (see Article 50, 51 of the ICSID Convention). Annulment will be described in the following paragraph.

committee composed of three ICSID arbitrators. Unlike other international arbitration instruments that are subject to national judicial intervention, ICSID awards are merely subject to the internal review exercised by *ad hoc* committees, and cannot be set aside by any national court.⁵⁷ As stated in Article 53, “the award shall be binding on the parties and shall not be subject to any appeal or to other remedy except those provided for in this Convention.” Therefore, the ICSID review mechanism is distinctive in the sense that it uniquely excludes external control from national courts. This internal review mechanism reflects the endeavor to preserve finality of arbitral awards in the ICSID arbitration.

Article 52(1) sets forth five limited grounds of the annulment of ICSID awards. Either party of an ICSID case can request an *ad hoc* committee to nullify the award rendered by the original tribunal. The grounds include: (1) the Tribunal was not properly constituted; (2) the Tribunal has manifestly exceeded its powers; (3) there was corruption on the part of a member of the Tribunal; (4) there has been a serious departure from a fundamental rule of procedure; (5) the award has failed to state the reasons on which it is based.⁵⁸ It shows that the Convention only allows an award to be annulled when egregious procedural defects exist. The grounds of annulment do not involve any substantive flaw, such as “violation of public policy” or “unarbitrability” that are incorporated in the New York Convention as two grounds of challenging arbitral awards.⁵⁹ The

⁵⁷ For non-ICSID arbitrations, generally the discontent party can ask the national court in the arbitration seat to set aside the award.

⁵⁸ ICSID Convention Article 52(1)

⁵⁹ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) is an important instrument in international arbitration. It imposes on the contracting states a general obligation to recognize foreign arbitral awards as binding and enforce them in their territories. According to Article V of the New York Convention, an arbitral award can be refused enforcement if one or more of the enumerated grounds are met, among which two grounds are relating to substantive matters, i.e. “violation of public policy” and “unarbitrability” (Article V (2)). The relative text reads as follows:

“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country;
or

exclusion of substantive review of ICSID award is in accordance with Article 53 of the Convention, which explicitly casts out the possibility of any form of appeal and thus gives no room for substantive review on ICSID awards. Furthermore, the qualifiers in the text, namely “manifestly”, “serious” and “fundamental”, entail a very high standard of ICSID annulment. Therefore, the Convention provisions indicate that annulment is an extraordinary remedy that only addresses exceptional irregularities of the arbitration in terms of procedural matters. This basic policy of ICSID annulment was expressed in the *travaux préparatoires* of the Convention, which states that the drafters’ intention is to “narrowly design the grounds for annulment so that this procedure remains exceptional” and to “assure the finality of ICSID awards”.⁶⁰

However, the exceptionality of ICSID annulment is facing challenges, especially attributed to the current backlash against investment arbitration. As discussed in Chapter 2, there has been a tendency of abusive use of the annulment proceedings by parties. On the one hand, the number of annulment request remains on a high level during the past years. Until February 2015, 262 arbitration cases have been concluded under the ICSID Convention, out of which 74 cases were applied for annulment, taking more than one-fourth of the entire concluded cases.⁶¹ On the other hand, abusive use of the nullification mechanism is revealed by the “shrapnel tactic” employed by some parties when preparing the annulment requests. As observed by Christoph Schreuer, many parties alleged violations in the original award on multiple grounds for annulment, even though some allegations obviously lack solid basis. The three most popular grounds, namely excess of powers, serious departure from a fundamental rule of procedure, and failure to state

(b) *The recognition and enforcement of the award would be contrary to the public policy of that country.*”

See the New York Convention, available at <http://www.newyorkconvention.org/texts>, accessed on 2/9/2015.

⁶⁰ REPORT OF THE SECRETARY-GENERAL TO THE ADMINISTRATIVE COUNCIL, ICSID Doc No AC/86/4, 3 (1986).

⁶¹ Data are found from the ICSID website, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>, accessed on 2/8/15.

reasons are invoked in almost every annulment case. It is akin to using a bombardment in order to hit as many targets as possible, so it is called a “shrapnel tactic”.⁶² Although as a matter of fact, the annulment grounds under Article 52(1) are not isolated from each other but overlapping to some extent, it can hardly be denied that this tactic may aim to increase the victory possibility or even to prolong the proceeding by burying the arbitrators with piles of materials. This kind of tactic has resulted in an inflation of the annulment proceedings, which diverges from the Convention drafters’ intention of establishing an extraordinary review mechanism.

State parties take the major role in starting up and fueling the abuse of ICSID annulment. Statistic shows that the majority of annulment proceedings were initiated by state parties. According to the *Background Paper on Annulment for the Administration Council of ICSID* issued in 2012, 30 out of 53 annulment proceedings were requested by states, occupying 57%; 19 by investors, approx. 36%; and both parties filed the request in 4 cases. Noticeably, Argentina represents 20% by initiating 11 cases and makes itself the most frequent user of the ICSID annulment proceeding.⁶³ This situation is explainable considering the following reasons. Firstly, state parties are usually the respondents of ICSID cases, and thus naturally lose more cases than investors in accordance with the theory of statistics. Facing the huge amount of damages or even restrictions on national government’s ability to regulate domestic affairs that benefit public health or environment for instance, the losing states may try their best to nullify the award as possible as they can. Moreover, ICSID excludes national courts’ jurisdiction in reviewing ICSID awards and only provides an internal review mechanism, so that the losing parties can only grasp at the straw—the annulment proceedings—when they are dissatisfied with the awards. Along

⁶² See Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel, (2011).at 6 (Christoph Schreuer, speaking)

⁶³ See BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATION COUNCIL OF ICSID, (2012), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment_English.pdf.

with the revival of “Calvo Doctrine”, which primarily aims to preserve the host states’ national jurisdiction in solving investment disputes, states become more and more discontent with the self-contained ICSID review mechanism and thus take measures to resist the narrow scope and exclusive feature of the annulment proceedings.

Essentially, the abusive use of the annulment mechanism reflects that some losing parties, *inter alia* some sovereign states, desire for an expansive review mechanism providing them more opportunities and bigger chance to turn the table. However, this desire conflicts with the extraordinary feature of the ICSID annulment proceedings. Such confliction forms the major challenge faced by the ICSID review mechanism. In theory, the confliction and the challenge to the review mechanism stem from the tension between two contradictory values: one is the finality of ICSID awards, which requires the exceptionality of the annulment results; the other is parties’ pursuance of fairness and the demand of an expansive review mechanism. Therefore, during the rising wave of discontents towards the investment arbitration system, it has become an urgent task to find a balance point between finality and fairness for the ICSID annulment proceedings in order to deal with the users’ discontents and at the same time keep the ICSID arbitration appealing to both investors and states. How to find the proper balance for the ICSID annulment mechanism is the central question of Part II of this thesis.

In Part II, there will be three chapters analyzing the problems of the annulment mechanism in the text of the ICSID Convention (Chapter 2); the practice of the annulment proceedings in the past decades and the practical problems emerging recently (Chapter 3); and finally the proposed reforms for the annulment mechanism that may help to reach a proper balance for the review proceedings (Chapter 4). Specifically, Chapter 2 will analyze the ICSID Convention provisions regarding the annulment mechanism, based on which it is discovered that the ICSID Convention

establishes a very high but ambiguous standard for annulment. Chapter 3 will investigate the past years' practice of the annulment committees, and finds out that during the history of ICSID the committees still fail to set up an appropriate and consistent standard, but swung between the narrow and the broad ends. In Chapter 4, some possible suggestions regarding the ICSID review mechanism will be discussed, which might help the ICSID arbitration find the right balance in the post-award stage.

Chapter 2

The Strict but Ambiguous Annulment Standard Set by the ICSID Convention

The annulment proceeding is the most important device of the ICSID review mechanism. After an ICSID award is rendered, either party can apply for annulment if the award is deemed procedurally flawed, but the ICSID *ad hoc* committees can only grant annulment based on extremely limited grounds as enumerated in Article 52(1) of the ICSID Convention. From this perspective, ICSID annulment is a self-contained and extraordinary remedy mechanism as designed. However, along with the recently emerging backlash against the investment arbitration, some losing parties of ICSID cases, represented by several host states such as Argentina, take various measures to seek an expansive review mechanism in order to increase the possibility of nullification of the awards. In the context of the ICSID annulment proceedings, expansive review requires a lower threshold of nullifying ICSID awards. Thus, such desire of certain parties may form a severe challenge to the exceptionality of the ICSID annulment mechanism as well as the finality of ICSID awards. In this situation, ICSID has to take into consideration of parties' demand and rethink the arbitration proceedings when necessary, so that ICSID could avoid losing appeals to users. As for the annulment mechanism, ICSID need to find an appropriate standard of review in current situation in order to balance parties' conflicting demands and stay attractive to both investors and states. To achieve this goal, the first step is to examine the current standard of review adopted in the annulment jurisprudence and to find out whether there are problems that need to be solved; the next step is to raise practical proposals per the problems discovered. To examine the existing problems of the annulment standard of review is a two-fold

task. Firstly, the related Convention text should be examined in order to find out the annulment standard in book and to investigate potential problems due to the provisions of the Convention. Secondly, the review standard of annulment taken by *ad hoc* committees in practice need to be studied, based on which the problems of the annulment proceedings in practice can be observed. This chapter focuses on the first-fold task, i.e. looking at the Convention text relating to the annulment proceedings and analyzing whether there are potential problems regarding the review standard that derive from the text. The second-fold task of examining the annulment standard adopted in practice will be left to the next chapter. Through the discussions in this chapter concerning the drafting history, review authority and the limited grounds of the annulment proceedings, it shows that the ICSID Convention generally sets a very high threshold for annulment to preserve the finality of ICSID awards, nevertheless the standard lacks sufficient clarity due to the ambiguities in the text, which forms a substantial challenge to a clear and consistent annulment standard in practice.

2.1. Drafting History of the ICSID Annulment Proceedings

The power of arbitrators all comes from parties' authorization. In the framework of ICSID arbitration, arbitrators' mandate is limited to the ICSID Convention, which is consented by contracting states. Therefore, the Convention provisions relating to the annulment proceedings must be consulted at the outset when exploring the review standard of annulment. The drafting history of the Convention and the text of Article 52, which stipulates an internal review agency and strictly limited grounds for the nullification of ICSID awards, infer that the threshold of annulment should be very high. However, the Convention itself fails to provide a specific review standard due to the ambiguities in the provisions, and thus leads to a wide discretion space for *ad*

hoc committees as well as the confusion regarding the appropriate standard of review in practice. The following subsections will demonstrate the high annulment standard set by the ICSID Convention through the examination of the drafting history, review authority and annulment grounds, and point out the unsettled problems regarding the annulment standard stemming from the ambiguity of the Convention text. Before analyzing the text of the ICSID Convention, examining the drafting history of the annulment proceeding will be helpful to discover the basic policy behind this mechanism and for a better understanding regarding what the standard of annulment is intended for by the Convention drafters.

Aron Broches, the former General Counsel of the World Bank, proposed to create a dispute resolution mechanism to solve investment disputes between investors and states in 1961.⁶⁴ Then in the next year he prepared a proposed ICSID Convention, but no review or appeal mechanism was included in this draft. In 1963, the first primary draft of ICSID Convention involved an annulment proceeding but only listed three annulment grounds, i.e. tribunal's excess of power, corruption and departure from fundamental rules of procedure.⁶⁵ The draft ICSID Convention was issued in Sep.11 of 1964, in which two more annulment grounds were added, namely improper composition of the tribunal and the reasons requirement.⁶⁶ Notably this version of the draft Convention provided that the reasons requirement could be waived by parties' agreement, which was nevertheless denied by vote thereafter.⁶⁷ In December of the same year, the draft Convention was revised according to the opinion that the reasons requirement should be mandatory, and in the next year the ICSID Convention was approved by the World Bank. Article

⁶⁴ Tai-Heng Cheng, *The Role of Justice in Annuling Investor-State Arbitration Awards*, 31 BERKELEY J. INT'L L. 236, 276.

⁶⁵ *Id.* at 277.

⁶⁶ *Id.*

⁶⁷ *Id.*

52 in the final version of the ICSID Convention deals with the annulment proceedings, enumerating five annulment grounds as follows:

- (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,*
- (e) the award has failed to state the reasons on which it is based.*⁶⁸

As for the review authority of the ICSID proceeding, it should be an *ad hoc* committee consisting of three ICSID arbitrators. The committee can decide to nullify an award in whole or in part if one or more annulment grounds are met. If an award is annulled, parties can resubmit the dispute to a new ICSID tribunal.⁶⁹

During the drafting process of the Convention, the issue of finality of ICSID awards was constantly raised up to discuss whether it is the fundamental value of the ICSID arbitration and to what extent finality should be limited in order to preserve fairness and justice. When an arbitral award is final and binding after being rendered, the efficiency of the arbitration process can be assured, and efficiency might be the most attractive feature of arbitrations comparing to judicial proceedings. Nevertheless, absolute finality means the lack of remedies against severe miscarriage of justice and would ultimately diminish the legitimacy of the entire arbitration system. Thus, the principle of finality should not be absolute but restricted by certain exceptions in virtue of the requirement of justice. Accordingly, the annulment proceeding was introduced into the ICSID framework as the exception to finality. However, how to balance between finality and justice is a tricky question. The *travaux préparatoires* of the Convention state that the

⁶⁸ ICSID Convention Article 52(1)

⁶⁹ ICSID Convention Article 52(2)-(6)

drafters should “narrowly design the grounds for annulment so that this procedure remains exceptional” and “assure the finality of ICSID awards”.⁷⁰ Based on this statement, it can be seen that finality by and large overweighs fairness in the context of ICSID arbitration. Therefore, according to the drafting history, annulment of ICSID awards should have a high threshold for the purpose of preserving finality.

Furthermore, by casting out two merit-concerning grounds—violation of public policy and non-arbitrability, which are commonly incorporated in non-ICSID arbitration instruments through the New York Convention and the UNCITRAL Model Law, the drafters of the ICSID Convention revealed the desire of a more limited review mechanism. All of the annulment grounds under Article 52 of the Convention are relating to egregious procedural flaws. Thus, the drafting history of the ICSID Convention shows that the ICSID annulment standard should be even higher than other nullification proceedings of non-ICSID arbitrations.

2.2. Review Authority of the ICSID Annulment Proceedings

The most distinguished feature of the ICSID annulment mechanism is not the grounds leading to annulment but the *ad hoc* committees, the entities that carry out the annulment proceedings.⁷¹ As stated above, the limited annulment grounds are designed to limit the nullification of ICSID awards only in the most exceptional cases. More importantly, establishing an internal review authority can enhance the exceptionality of annulment due to the exclusion of external interference from national courts.

⁷⁰ Tai-Heng Cheng, *supra* note 64.

⁷¹ See Michael Reisman, *supra* note 19 at 754. He writes: “Article 52 of [ICSID Convention] thus authorizes either party to request the Secretary General of the Arbitration Centre to annul an award rendered by an ICSID tribunal for a limited number of specified reasons comprised of the familiar terms of art of arbitral nullity [...] The innovation in ICSID is the control entity to which claims for nullification are to be submitted.”

For the purpose of preserving finality of arbitral awards, the theoretical optimal model of an arbitration review mechanism should be equipped with an internal and single-layered review agency. In the context of international arbitration, supra-national neutrality is the most featured advantage comparing to domestic litigations, thus the exclusion or minimization of the interference from national adjudication is one of the primacy considerations in designing the review mechanism of international arbitration. In addition, since the lack of a central supreme authority on the international level, the control of international arbitration should be operated through institutional devices.⁷² Nevertheless, in practice it is hard to thoroughly implement the exclusion of national judicial control and replace it with an internal control mechanism within the institution due to the influence of states' sovereign powers in the realm of international arbitration. The current reality is that national court may have the authority to review non-ICSID arbitral awards in certain contexts. The most evident reason lies in the reality that not every arbitration award is automatically honored by the losing party; when noncompliance occurred, the final actual realization of the awarded damage, i.e. the execution, depends on the assistance of local courts. Along with other practical reasons due to the tension between sovereign judicial powers and international arbitration authorities, currently for non-ICSID arbitrations, national court intervention is indispensably involved. Generally, in the post-award stage of non-ICSID arbitrations, national judicial review is available in the following two circumstances: 1) in a setting aside proceeding, the court in the place of arbitration has jurisdiction to review the award; 2) in a recognition and enforcement proceeding, the court of the country where recognition and enforcement are sought has jurisdiction to review the award. Despite the limited scope of review stipulated in most local arbitration laws and international agreements, such as Article V of the

⁷² *Id.* at 746.

New York Convention, the involvement of national court will definitely raise the risk of an arbitral award being annulled and thus impair the finality of international arbitration.

Unlike the mechanism involving national court intervention, ICSID arbitration is famous for its internalized and delocalized review system, which by and large excludes national court judicial review and is more in line with the fundamental feature of international arbitration. Once a party applies to annul an award, an *ad hoc* committee composed by ICSID arbitrators, rather than a court in certain state, assumes the authority to review the award. Accordingly, review of ICSID arbitration awards, theoretically speaking, should be more limited and extraordinary than that of non-ICSID awards, which are subject to external review and exposed to higher risk of being nullified.

2.3. Limited Annulment Grounds and the Textual Ambiguity in the ICSID Convention

ICSID annulment grounds are designed based on the basic policy that nullity of awards should be rarely granted and should be used only to deal with the severe miscarriage of justice. All of ICSID annulment grounds are regarding procedural matters and completely precluding from review on merits by casting out the grounds of violation of public policy and non-arbitrability.

As expounded above, the annulment proceeding is an exception to the principle of finality and reveals the requirement of justice. Theoretically, the concept of justice can be divided into three categories, namely distributive justice, procedural justice and retributive justice.⁷³ As described by Tai-Heng Cheng, distributive justice refers to fair allocation of values and other resources

⁷³ Michael Reisman, *supra* note 19. Also see Serge-Christophe Kolm, *Modern Theories of Justice* (2002); Robert C. Solomon & Mark C. Murphy, *What is Justice?* (1990).

among individual members and groups in a community. In the context of investment law, distributive justice relates to the investment treaties or project contracts, but not the dispute resolution systems such as the ICSID arbitration.⁷⁴ Procedural justice refers to the basic norms of fairness in adjudication.⁷⁵ Retributive justice refers to the appropriate correction of behavior that deviates from community standards of acceptable conduct.⁷⁶ The latter two concern the review mechanism of international commercial arbitrations and the investment arbitrations conducted by non-ICSID instruments. However, the grounds under Article 52 infer that the ICSID annulment proceedings merely pursue the procedural justice but not the retributive justice. That is to say, annulment should be granted only for egregious procedural violations but not for the purpose to correct substantive errors. Procedural justice has great significance in leading to a fair outcome. As explained by one scholar, “empirical research reveals that decision-making and dispute resolution procedures are more likely to be effective if they are perceived as procedurally fair. If parties perceive a dispute resolution or decision-making process as procedurally fair, they are more likely to perceive the outcome as substantively fair”⁷⁷

To pursue procedural justice, the five grounds of ICSID annulment are designed to preserve the integrity of the ICSID procedure. Specifically, the grounds of improper constitution of the tribunal and corruption concern the integrity of the tribunal; manifest excess of power and serious departure from a fundamental rule of procedure concern the integrity of the arbitration proceeding; failure to state reasons concerns the integrity of the arbitral award.⁷⁸ This section

⁷⁴ Tai-Heng Cheng, *supra* note 64.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Andrea Kupfer Schneider, *Error Correction and Dispute System Design in Investor-State Arbitration*, 5 Y.B. On Arb. & Mediation 194, 211.

⁷⁸ HUSSEIN NUAMAN SOUFRABI V. THE UNITED ARAB EMIRATES, DECISION OF THE AD HOC COMMITTEE ON THE APPLICATION FOR ANNULMENT OF MR. SOUFRABI, *supra* note 22.

will examine the five annulment grounds based on the related Convention text. Through the analysis, it will be found that the ICSID Convention requires very high review standard for all of these annulment grounds, but the ambiguity of the text brings up uncertainty as to the specific annulment standard adopted in practice.

2.3.1. Improper constitution of the tribunal

The first ground for annulment set forth in Article 52(1) is that “the tribunal was not properly constituted”. Chapter IV, Section 2 of the Convention, i.e. Articles 37 to 40, deal with the constitution of an ICSID tribunal. These articles provide the basic principles of constituting a tribunal appointed by parties (Article 37), the method of appointing arbitrators (Article 38), the nationality requirement of arbitrators (Article 39), and the appointment of arbitrators who are not designated to the Panel of Arbitrators (Article 40). The scenario of improper composition of a tribunal may include absence or invalidity of parties’ agreement,⁷⁹ or the arbitrator does not meet the requirement on competence or moral requirement.

As a matter of fact, the ground of improper constitution of the tribunal has been seldom invoked in annulment proceedings.⁸⁰ The rare invocation of the ground of improper composition of tribunal is by and large owing to the cautious execution of the ICSID Secretary when dealing with this matter. Additionally, failure to exhaust remedies in the primary proceeding would hinder parties from raising this ground, which also leads to the result of the rare invocation.

2.3.2. Corruption

⁷⁹ Albena P. Petrova, *The ICSID Grounds for Annulment in a Comparative Perspective: analysis and Recommendations for the Future*, 10 VJ 287, 301 (2006).

⁸⁰ See BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATION COUNCIL OF ICSID, *supra* note 63 at 41.

Another annulment ground concerning the integrity of the tribunal is Article 52(1)(c) “that there was corruption on the part of a member of the tribunal”. The fact of ‘corruption’ would be established if there is improper conduct by an arbitrator induced by personal gain.⁸¹ Mere biased behavior without improper ‘compensation’ does not count ‘corruption’, but may amount to a serious departure from a fundamental rule of procedure.⁸² Article 52(2) contains a special provision regarding time limits of requesting annulment based on the ground of corruption, which states that such application should be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

To date, there has been no annulment application based on the ground of corruption. This situation, to a large extent, is attributed to the high moral character of the arbitrator, which is set as a prerequisite when designating a person to the Panel of Arbitrators.⁸³ Besides, Arbitration Rules 6 requires each arbitrator to sign a declaration before or at the first session of the tribunal, which contains the following statement “I shall ... not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention”.

‘Corruption’ is one of the grounds for annulment listed in Article 35 of the ILC Model Rules, which was modeled by Article 52 of ICSID Convention. However, it is not incorporated as an independent ground in the UNCITRAL Model Law and the New York Convention. In a setting aside proceeding governed by the Model Law or a recognition and enforcement proceeding governed by the New York Convention, parties who claim there is corruption of the tribunal member and seek for set aside or refusal of enforcement of an award may invoke the ground of

⁸¹ CHRISTOPH SCHREUER, *supra* note 28. at 967

⁸² *Id.* at 965.

⁸³ See Article 14 (1) of ICISD Convention, which states that: “Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”

‘violation of public policy’ as Article 34(2)(b)(ii) of the UNCITRAL Model Law and Article V (2)(b) of the New York Convention, which is however not a ground of annulment in ICSID Convention.⁸⁴

2.3.3. Manifest excess of power

For the purpose of preserving integrity of the arbitration process, Article 52(1)(b) provides that an award can be annulled if the tribunal manifestly exceeded its powers. It is one of the most frequently invoked annulment grounds and has been raised by annulment applicants in almost every case.⁸⁵

Article 52(1)(b) uses a qualifier ‘manifest’ to raise the standard of this ground to a relatively high level. According to the provision, only if the excess of power is ‘manifest’, can an annulment decision be rendered based on this ground. The reason why the tribunal’s excess of power must be manifest to lead to an annulment lies in the doctrine of competence-competence, i.e. tribunals can make their own decisions on whether they have jurisdictions over the issues at hand.⁸⁶ Literally, ‘manifest’ can be defined as “easily understood or recognized by the mind”.⁸⁷ It is believed by scholars that the use of “manifest” in this ground refers to a standard concerning the ease with which the excess of power can be observed, rather than the seriousness of this incident.⁸⁸

⁸⁴ Albena P. Petrova, *supra* note 79 at 309.

⁸⁵ BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATION COUNCIL OF ICSID, *supra* note 63 at 41.

⁸⁶ *Id.* at 44.

⁸⁷ CHRISTOPH SCHREUER, *supra* note 28 at 932–33.

⁸⁸ *Id.* Also see BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATION COUNCIL OF ICSID, *supra* note 63 at 43–44. Also see Albena P. Petrova, *supra* note 79.

However, the text *per se* does not provide specific criteria as for whether an excess of power is manifest or not. In the past years, *ad hoc* committees have developed two different methodologies for the “manifest” standard. One is a two-step test: the first step is to determine whether there was excess of power; if so, the next step is to examine whether the excess is ‘manifest’. The other is a *prima facie* test, which means that the committee only does a summary examination as to whether the alleged excess of power can be considered ‘manifest’.⁸⁹

This ground concerns the power of ICSID tribunals. As provided by Article 41-47 of the Convention, entitled as “Powers and Function of the Tribunal”, an ICSID tribunal’s power generally include the followings:

- (1) *to decide its own competence;*
- (2) *to decide whether the objection of its jurisdiction should join to the merits or to be dealt with as a preliminary question;*
- (3) *to decide the dispute in accordance with the law agreed by the parties to the governing law under Article 42 of the ICSID Convention;*
- (4) *to decide a dispute ex aequo et bono if the parties so agree;*
- (5) *to call upon the parties to produce evidence and visit the scene connected with dispute;*
- (6) *to conduct the arbitration in accordance with the Arbitration Rules in force at the time of the parties’ consent, except as the parties otherwise agree;*
- (7) *to decide any questions of procedure not covered by the ICSID Convention or Arbitration Rules, or the rules agreed by the parties;*
- (8) *unless parties otherwise agree to determine any incidental or additional claims or counterclaims arising directly out of the subject matter of the dispute, so long as they are within the scope of the parties’ consent and within ICSID’s jurisdiction, if requested by a party and*

⁸⁹ *Id.*

(9) *unless parties otherwise agree to recommend any provisional measures requested by a party to preserve its rights.*⁹⁰

According to Article 52(4) that “the provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee”, thus all of the above listed tribunal’s powers, except the last two that are provided in Article 46 and 47, are also enjoyed by *ad hoc* committees. Among all of the committees’ powers, the most controversial two are the jurisdictional matters and the issues regarding the applicable laws. These two questions will be explained below.

- Jurisdictional issues

None of the grounds in Article 52 expressly mentions ‘jurisdiction’, yet the jurisdictional issue is still relevant in the annulment proceeding under the ground of ‘manifest excess of power’. Making a decision on merits without proper jurisdiction is the most obvious excess of power, thus the drafters of the Convention considered that a specific reference to jurisdiction or to the parties’ agreement was superfluous.⁹¹

In the annulment proceedings, the most commonly raised jurisdictional issues are the tribunal’s lack of jurisdiction and failure to exercise jurisdiction. In order to establish a good jurisdiction, the requirement set forth by Article 25 of the Convention and, if any, other requirements under parties’ agreement must be satisfied. According to Article 25, a tribunal could enjoy jurisdiction over certain disputes only if the following standards are met:

- (1) the dispute at issue is a legal dispute;
- (2) it arises directly out of an investment;

⁹⁰ DOAK BISHOP & SILVIA MARCHILI, ANNULMENT UNDER THE ICSID CONVENTION 62 (2012).

⁹¹ CHRISTOPH SCHREUER, *supra* note 28 at 944.

- (3) it is between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State;
- (4) the parties to the dispute consent in writing to submit to the Centre.⁹²

If any of the above listed requirements or any party-agreed requirement have not been met, the tribunal must decline jurisdiction; otherwise, there might be a good standing for any party to allege that the tribunal has exceeded its power.⁹³ This is the typical scenario of “lack of jurisdiction”.

Another situation that can lead to annulment is the tribunal’s failure to exercise jurisdiction. Literally, ‘excess of power’ should be understood as that the tribunal exercised more power rather than less. Based on this interpretation, it is somehow paradoxical to constitute the tribunal’s failure to exercise jurisdiction, which seems to be exercising less power, as a scenario of an excess of power. Nevertheless, “failure to exercise jurisdiction” is essentially an excess of power in the sense that a tribunal does not have the power to refuse to decide a dispute that meets all jurisdictional requirements.⁹⁴ A tribunal’s power is conferred by parties, and basically parties would not give tribunal the power to not decide the issues over which it has jurisdiction. From this perspective, failure to exercise jurisdiction can be involved in this ground as a deviation from parties’ agreement rather than relating to the quantitative concept of jurisdiction. In practice, some *ad hoc* committees confirmed this position. For example, the *Vivendi I* committee stated 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 possesses under those instruments.”⁹⁵

⁹² ICSID Convention Article 25 (1)

⁹³ Related cases include *Vivendi I*, *Mitchell*, *CMS*, *Azurix*, *Lucchetti*, *MCI*.

⁹⁴ Related cases include *Vivendi I*, *Soufraki*, *Lucchetti*, *Fraport*, *MHS*, *Helnan*.

⁹⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision on Annulment, ICSID Case No ARB973 (2002).

Similar opinions were also expressed in other annulment cases, such as *Soufraki*⁹⁶ and *Lucchetti*.⁹⁷

- Applicable law issues

If a tribunal exceeded its power in terms of applicable law issues, the award it rendered may be annulled. Article 42(1) of the ICSID Convention sets forth two methods to decide the applicable law. Firstly, the tribunal shall decide the dispute in accordance with such rules of law as may be agreed by the parties; in absence of such agreement, the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.⁹⁸ Since parties choose ICSID arbitration and consented to the ICSID Convention, it can be conceived that parties have agreed with the residual rule of Article 42 (1), i.e. applying host state's law and applicable rules of international law, when they did not explicitly agree on the choice of law. If the tribunal did not comply with Article 42(1) and failed to apply the law chosen by parties, including the host state's law and applicable international law determined according to the residual rule, this situation could amount to an 'excess of power'.⁹⁹ A noticeable question is regarding the difference between failure to apply the proper law and erroneous application of the proper law—the former is a well-recognized

⁹⁶ *Hussein Nuaman Soufraki v. United Arab Emirates*, Decision on Annulment, June 5, 2007, para. 43

⁹⁷ *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, para 99.

⁹⁸ ICSID Convention, Article 42 (1)

⁹⁹ For example, in *MINE*, the ad hoc committee stated the link between applicable law and manifest excess of power. The committee firstly cited Article 42(1) and then said that: "[T]he 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." See *MINE v. Guinea*, Decision on Annulment, 22 December 1989, para. 5.03.

scenario of excess of power that may constitute a ground of annulment, while the latter should not be deemed as an excess of power in the context of Article 52 and thus should not lead to annulment. However, due to the lack of explanations in further detail in Article 52(1)(b), how to differentiate these two situations in some specific cases becomes a tricky question.

Non-application v. erroneous application of the proper law:

A well-recognized notion is that non-application of the proper law is a typical basis of ‘excess of power’, while erroneous application does not form a ground of annulment. On the stage of drafting, there were a lot of debate regarding the problem of excess of power and the application of law. Mr. Broches, who played a prominent role in establishing ICSID and formulated the ICSID Convention, initially denied the idea that mistakes in terms of the application of law forms a ground of annulment, but later conceded that non-application of the proper law could constitute excess of power. Some delegates of ICSID member states proposed that erroneous application of the proper law should also be counted as ‘excess of power’ and form a reason for annulment, which was nevertheless defeated in a later voting.¹⁰⁰ Hence, the drafting history infers that erroneous application does not lead to annulment.

It has been expounded before that the basic policy of establishing the annulment mechanism is to pursue the procedural integrity of ICSID arbitration proceedings rather than correct errors committed by the original tribunals. Once an *ad hoc* committee engages in examination regarding whether there is an erroneous application of the proper law in the award, the committee has slipped into substantive review and turned the annulment proceeding into an

¹⁰⁰ Id.

appellate proceeding, which is expressly forbidden by Article 53.¹⁰¹ This perception is repeatedly pointed out by several *ad hoc* committees, such as the *Amco I v. Indonesia*¹⁰² committee, which states that,

*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 interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not.*¹⁰³

Therefore, an *ad hoc* committee should determine whether the tribunal did in fact apply the law that it was bound to apply and refrained from investigating whether there is any error in the application. Only non-application of the proper law constitutes a ground for annulment, whereas erroneous application is a ground for appeal. If the tribunal indeed applied the proper law but misconstrued that law, this situation cannot lead to annulment of the award. However, real cases are far more complex than the theory above and there is nothing specific in the Convention drawing the line between procedural review and substantive review. Thus, despite the theoretical distinction between non-application and erroneous application can be stated clearly, in practice *ad hoc* committees are easily tempted to cross the line and begin to look into the errors in the original award.¹⁰⁴ A scenario making the situation worse is partial non-application of the proper law.

¹⁰¹ Article 53 provides that: “[T]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”

¹⁰² *Amco v. Indonesia*, 1 ICSID Reports 515/6, 1 ICSID Rep. 5156 (1986).

¹⁰³ *Id.*

¹⁰⁴ For example, the *ad hoc* committees of *Sempra v. Argentina* and *Enron v. Argentina* found manifest excess of power in the original award based on error in law to some extent. These two cases will be closely analyzed in Chapter 3.

It is a debatable question whether partial non-application of the proper law amounts to excess of power and constitutes a ground of annulment. Tribunals might neglect some single provision when applying the law. Under this situation, if partial non-application constitutes excess of power and leads to the same result of completely non-application, the award will face the risk of being annulled merely due to the tribunal's minor omission. This result goes against the purpose of ICSID annulment mechanism, which is designed only as recourse to egregious rather than minor violation of fundamental rules. In another perspective, accidental omission of minor parts of the applicable law is a common error happening in many arbitration proceedings. Hence, partial non-application should be deemed as a mistake in applying the proper law, which does not constitute an annulment of excess of power. However, *ad hoc* committees' practice regarding this problem diverges. For example, the recent case *Sempra v. Argentina*¹⁰⁵ concerns partial non-application of the proper law, however, the *Sempra ad hoc* committee nullified the original award based on the partial non-application. This case will be analyzed in detail in the next section and it will be discussed whether the *Sempra* committee's position regarding non-application of proper law is appropriate.

In a short summary, a tribunal's "excess of power" must be "manifest" so that it can result in annulment. The situations that can meet up to this high standard mainly refer to the tribunal's lack of jurisdiction, failure to exercise jurisdiction and non-application of the proper law. However, the text of Article 52(1)(b) does not provide a clear standard to be applied by *ad hoc* committees in practice. The most noticeable questions include the specific methodology used for deciding whether a violation is "manifest" and whether partial non-application of the proper law forms a ground of annulment.

¹⁰⁵ *Sempra Energy International v. Argentine Republic*, ICSID Case No ARB0216 (2010).

2.3.4. Serious departure from a fundamental rule of procedure

Article 52(1)(d) provides that an ICSID award could be annulled if “there has been a serious departure from a fundamental rule of procedure”. This ground is meant to protect the integrity of the arbitration procedure. Only if all the following three requirements are met, an ICSID award could be annulled. Firstly, there must be facts of procedural impropriety departing from certain rules of procedure. Secondly, the departure must be ‘serious’, rather than merely a minor, non-substantial violation. Thirdly, the procedural rule being violated must be ‘fundamental’. Thus, Article 52(1)(d) sets a high threshold for this ground.

Specifically, the first requirement demands that the moving party has to provide evidence of the existence of a ‘departure’. The ‘departure’ relates to the manner in which the tribunal proceeded, rather than the decision of the tribunal.¹⁰⁶ The second requirement concerns the gravity of the departure, i.e. the departure must be serious rather than trivial. However, the standard for determining the seriousness of procedural impropriety diverges from different *ad hoc* committees. One position is that ‘serious departure’ means that a party was actually deprived of the benefits of protection that the rule aimed at providing, as stated by the *MINE v. Guinea* committee.¹⁰⁷ Another position held by the *Wena v. Egypt* committee for instance is that the serious departure must have a material effect on the outcome of the dispute.¹⁰⁸ A third position combines both of these two standards, which is adopted by, for example, the *CDC v. Seychelles*

¹⁰⁶ DOAK BISHOP AND SILVIA MARCHILI, *supra* note 90 at 133. Also see *Videndi I* para 83.

¹⁰⁷ Maritime International Nominees Establishment (MINE) v. Government of Guinea, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award, ICSID Case No ARB844 (1988). The *MINE* committee stated that: “not every departure from a rule of procedure justifies annulment; it requires, that the departure be a serious one... 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”.

¹⁰⁸ *Wena Hotels LTD. V. Arab Republic of Egypt*, Decision on the Application by the Arab Republic of Egypt for annulment of the Arbitral Award, ICSID Case No ARB984 (2000). The *Wena ad hoc* committee stated that: “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.”

committee. In the annulment decision, the CDC committee described this standard as “A departure is serious where it is substantial and [is] such to deprive the party of the benefit or protection, which the rule was intended to provide. In other words, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had the rule been observed.”¹⁰⁹

The uncertainty also exists as to the third requirement—the fundamentality of the procedural rule that is alleged to be violated. In the context of Article 52(1) (d), the fundamental rules of procedure do not necessarily include all of the ICSID Arbitration Rules;¹¹⁰ meanwhile, they do not merely refer to the ICSID Arbitration Rules, but also the general rules of procedure, which are conceived as the principles of natural justice. As explained by the *Wena ad hoc* committee, “Article 52(1) (d) refers to a set of minimal standards of procedure to be respected under international law”.¹¹¹ Those procedural rules widely recognized as fundamental include impartiality and equality of treatment, right to be heard, deliberation, etc. Nevertheless, a specific standard to distinguish fundamental and non-fundamental procedural rules cannot be read merely from the Convention text. Furthermore, it is noteworthy that the distinction between ‘serious’ and ‘fundamental’ is rather volatile. As a result, annulment committees’ practices vary from narrower to wider scope in terms of this ground. In a recent case, *Enron v. Argentina*,¹¹² the *ad hoc* committee recognized parties’ agreement as a fundamental rule of procedure, which in fact expanded the scope of this annulment ground.

¹⁰⁹ CDC Group PLC v. The Republic of Seychelles, Decision of the Ad hoc Committee on the Application for Annulment of the Republic of Seychelles, (2005). Also see *Azurix Corp. v. The Argentina Republic*, Decision on the Application for Annulment of the Argentina Republic, ICSID Case No ARB0112 (2009).

¹¹⁰ DOAK BISHOP AND SILVIA MARCHILI, *supra* note 90 at 134.

¹¹¹ WENA HOTELS LTD. V. ARAB REPUBLIC OF EGYPT, DECISION ON THE APPLICATION BY THE ARB REPUBLIC OF EGYPT FOR ANNULMENT OF THE ARBITRAL AWARD, *supra* note 108, para 56-7.

¹¹² *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, (2010).

Therefore, analysis of the text of Article 52(1) (d) shows that the threshold of the ground “serious departure of a fundamental rule of procedure” is raised to a high level by several strict requirements, but the standard of ‘serious’ and ‘fundamental’ is so vague in the text that *ad hoc* committees may have a quite wide space of discretion and thus an inconsistency regarding this ground may be resulted. However, a question arising is whether the qualifiers, such as ‘serious’ and ‘fundamental’, can be replaced with some clearer expression that could lead to an unequivocal standard? For example, suppose that the Convention set a clear standard to replace the wording of ‘fundamental rule of procedure’, there would be two situations: (1) if departure from any rule of procedure would trigger annulment, then the situation would be clear – but the standard is too low, and we would have too many annulments; (2) if departure from some specific rules of procedure would trigger annulment, then we have a better and more pro-arbitration approach, but is it possible to distinguish the rules of procedure that would trigger annulment from the rules that would not? Probably neither possible nor practical. In this case, the general qualifiers such as ‘serious’ and ‘fundamental’ seem like the only choice remaining. The standard regarding ‘serious’ and ‘fundamental’ could probably be made more clear (though it is not a simple matter), but could never be unequivocal. A possible way to develop a clearer standard could be the *ad hoc* committees’ practice—despite that the committees now have diverging positions regarding the Article 52(1) (d) ground, along with more and more awards published, practice would offer some guidelines with more clarity.

2.3.5. Failure to state reasons

Article 52(1)(e) regards the integrity of ICSID awards, providing that an ICSID award could be annulled if there is a failure to state the reason on which it is based. Unlike the grounds of manifest excess of power and serious departure from fundamental procedural rules, both of

which concern the perspective of the procedure leading to an ICSID award, Article 52(1)(e) focuses on the award *per se*, i.e. the manner in which the tribunal's decision is elaborated and justified.¹¹³

Failure to state reasons as a ground for annulment is not an innovation of ICSID arbitration. The primary draft of ICSID Convention duplicates the relevant provision in the ILC Model Rules, which includes the failure to state the reasons for the award as a ground of annulment.¹¹⁴ The subsequent draft attached an exception to the ground of failure to state reasons, i.e. parties can agree to exempt the reason requirement, which was nevertheless abandoned later.¹¹⁵ Thus, it finally becomes a mandatory requirement for ICSID tribunals to provide reasons for every award, and failing this requirement may lead to nullification of an award.

The difference between investment arbitration and commercial arbitration can well explain why providing reasons for an arbitral award is a mandatory requirement for ICSID tribunals rather than other commercial arbitration tribunals. In the realm of commercial arbitration, neither the UNCITRAL Model Law nor the New York Convention incorporates failure to state reasons as a ground for setting aside or refusing recognition and enforcement of an arbitral award. Generally, parties of commercial arbitrations are sophisticated merchants and the arbitral awards are usually unpublished. Thus, a commercial arbitral award without reasoning has nothing wrong if it is accepted by both parties. However, in investment arbitration, sovereign states are involved and most ICSID awards are open to the public. Citizens of the respondent state of ICSID arbitration as taxpayers ultimately bear the obligation to pay the huge amount of damages rendered by the ICSID tribunal. Hence, ICSID awards have significant political impacts on those countries and

¹¹³ DOAK BISHOP AND SILVIA MARCHILI, *supra* note 90 at 151.

¹¹⁴ Yearbook of the International Law Commission, 1958, Vol. II, 86.

¹¹⁵ See *History of the ICSID Convention*, Vol.I, 232.

their nationals. From this perspective, ICSID awards should be well reasoned in order to be understood by the public.¹¹⁶

Since the first annulment case, *Klöckner I v. Cameroon*, many vexed controversies surrounding the ground of failure to state reasons have been raised. The major debates basically center the following four aspects: (1) what standard should be applied to the reasoning of the award; (2) whether contradictory reasoning constitutes a failure to state reasons; (3) whether ‘failure to deal with every question’ provided in Article 48(3) can lead to annulment based on Article 52(1)(e). For all of these questions, the Convention provisions do not provide clear answers. The textual ambiguity regarding the above questions will be analyzed respectively below.

- Standard of the reasons requirement

The provisions in the ICSID Convention do not provide a specific test for the reasoning of an award. The obligation of tribunals to provide reasons of its decision rests on Article 48(3) of the Convention, which states that “the award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based”. However, how detailed the reasoning in an award should be is not clear. The text of Article 48(3) and Article 52(1)(e), as well as the drafting history of the Convention, do not shed much light in this regard. In practice, *ad hoc* committees adopted different standard regarding the reasons requirement.

The first annulment case, *Klöckner v. Cameroon I*, set forth a standard of “sufficient reasons” or “adequate reason”.¹¹⁷ According to the committee’s decision, there would be a ‘failure to state reasons’ in the absence of a statement of reasons that are ‘sufficiently relevant’, that is

¹¹⁶ Michael Reisman, *Reflection on the Control Mechanism of the ICSID System*, in *THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS* (2008). P. 224.

¹¹⁷ See *Klöckner v. Republic of Cameroon*, Decision on the Application for Annulment Submitted by Klöckner Against the Arbitral Award, ICSID Case No ARB812 (1983).

reasonably sustainable and capable of providing a basis for the decision.¹¹⁸ The next annulment case, *AMCO v. Indonesia I*, followed the same line of analysis as in *Klöckner I*. However, the “sufficient reasoning” standard brought up prevalent criticisms from commentators, censuring that the standard is a too high and tempts the *ad hoc* committees into substantive review over the award.¹¹⁹ Michael Reisman criticized the methodology of *Klöckner I* as a hair-trigger approach, which wrongfully included an assessment of the gravity of the defect in the reasons.¹²⁰ Thereafter, the subsequent cases began to abandon the ‘sufficient reasoning’ standard.

After the early experiment regarding the reasons requirement, the *MINE v. Guinea ad hoc* committee lowered the threshold and employed a standard of ‘understandable reasons’. Pursuant to this standard, the requirement to state reasons is satisfied as long as the readers of the award can follow “how the tribunal proceeded from Point A to Point B, and eventually to its conclusion, even if it made an error of fact or law”.¹²¹ Accordingly, *ad hoc* committees should not examine the sufficiency or adequacy of the tribunal’s reasoning, but only look at whether the line of reasoning in the award is traceable.¹²² The “understandable reasons” receives more endorsement, but not without doubts.¹²³ One significant concern is about the question of “understood by whom”—by parties only or by others, including regular people? The standard of the reasons requirement may be higher or lower when different readers of the award are taken into consideration. While an award with some missing or less detailed reasons could still be understood by parties who are familiar with the case and equipped with expertise, for other

¹¹⁸ *Id.*

¹¹⁹ Mark Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, ICSID review. 2(1) Spring 1987, 85-109.

¹²⁰ Michael Reisman, *supra* note 116 at 225.

¹²¹ See MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT (MINE) V. GOVERNMENT OF GUINEA, DECISION ON THE APPLICATION BY GUINEA FOR PARTIAL ANNULMENT OF THE ARBITRAL AWARD, *supra* note 107.

¹²² DOAK BISHOP AND SILVIA MARCHILI, *supra* note 90 at 156.

¹²³ *Id.*

readers it may not be understandable. As mentioned above, the reasons requirement for ICSID awards stems from the involvement of sovereign states and their nationals in the ICSID arbitration. Thus, whether an ICSID award should be so well reasoned in order to be understood by regular people? When applying the ‘understandable reasons’ standard, this is a question yet to be answered.

- Contradictory reasons

The second issue is whether contradictory reasoning amounts to failure to state reasons. Aron Broches stated that contradictory reasons “cancel each other out and are equivalent to the absence of reasons”.¹²⁴ The opinion of *Klöckner I ad hoc* committee is in line with Broches’ statement, and so as the committee of *MINE* committee.¹²⁵ The *Vivendi I ad hoc* committee consented to this position, but opined that more cautiousness should be exercised to distinguish “genuine contradiction”. The *Vivendi I* committee stated as follows,

*It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually expressed in a tribunal’s reasons could more truly be said to be but a reflection of such conflicting considerations.*¹²⁶

However, some commentators worry that analyzing contradictory reasons, especially examining whether a contradiction is “genuine”, can be a temptation for *ad hoc* committees to cross the line and slip into the substantive review.¹²⁷

¹²⁴ Aron Broches, *Observations on the Finality of ICSID Awards*, ICSID REVIEW (1991) 6 (2) 321–366.

¹²⁵ *Klöckner I ad hoc* committee stated that: “two genuinely contradictory reasons ”

¹²⁶ COMPAÑÍA DE AGUAS DEL ACONQUIJA S.A. AND VIVENDI UNIVERSAL S.A. V. ARGENTINE REPUBLIC, DECISION ON ANNULMENT, *supra* note 100.

¹²⁷ DOAK BISHOP AND SILVIA MARCHILI, *supra* note 90 at 159.

- Failure to deal with every question

The third question is whether failure to deal with every question is involved in the ground of failure to state reasons and could lead to annulment. As stated above, Article 48(3) imposes two obligations on arbitral tribunals, the first obligation requires an award to deal with every question submitted to the tribunal,¹²⁸ and the second obligation requires the award to state the reasons upon which it is based. Literally, Article 52(1)(e) only provides remedy regarding the latter obligation in Article 48(3), but does not mention the former one.

Opinions regarding whether failure to deal with every question can lead to annulment diverge in different *ad hoc* committees. In *MINE* and *Wena Hotels*, the committee members considered that Article 49(2) is generally the remedy for ‘failure to deal with every question’, which provides that a party may require the tribunal to decide any question which it had omitted to decide in the award. However, it is noticeable that Article 49(2) is only available for the cases of inadvertent omissions of a technical character. Thus *MINE* and *Wena Hotels* committees contended that Article 52(1)(e) is only useful in cases of failure to address the major facts and arguments that go into the core of the tribunal’s decision.¹²⁹ Another opinion is that Article 52(1)(e) encompasses

¹²⁸ Under Article 48, it is arguable what constitutes a ‘question’. It is conceivable that ‘every question’ in this provision should refer to every claim submitted by parties. Does it also refer to every argument raised by parties? Many scholars opine that ICSID tribunals are not obligated to deal with every argument raised by parties. Justice Tysoe states that: “The tribunal must answer the question that have been submitted to it and give its reasons for its answers. In other words, the tribunal must deal fully the dispute between the parties and give reasons for its decision. It is not reasonable to require the tribunal to answer each and every argument which is made in connection with the questions which the tribunal must decide.” See Guillermo Aguilar Alvarez, W. Micheal Reisman, *How Well Are Investment Awards Reasoned?*, The Reasons Requirement in Investment Arbitration, Martinus Nijhoff Publishers, 2008, p.13. Christoph Schreuer also says that Article 49(2) as the remedy of Article 48 is useful when the tribunal overlooked one of several claims submitted by parties, but not useful in cases of failure to address major facts or arguments. See Christoph Schreuer, *The ICSID Convention-A Commentary*, 2nd Edit, Cambridge, 2009, p.1014.

¹²⁹ CHRISTOPH SCHREUER, *supra* note 28 at 1014. Also see See MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT (MINE) v. GOVERNMENT OF GUINEA, DECISION ON THE APPLICATION BY GUINEA FOR PARTIAL ANNULMENT OF THE ARBITRAL AWARD, *supra* note 107. para 5.13

the scenario of failure to deal with every question. For instance, the *Klöckner I ad hoc* committee stated that:

Prima facie, therefore, one does not see how a failure to deal with "every question submitted to the Tribunal" can have a sanction other than annulment for a failure to state reasons-- unless, of course, the failure to deal with "every question submitted to the Tribunal" is considered to be a "serious departure from a fundamental rule of procedure" under Article 52(1)(d).¹³⁰

Thus, regarding the question whether failure to deal with every question should be a ground of annulment, or whether merely the omission of major questions could lead to annulment, no clear answer is provided by the Convention text.

As a summary, Article 52(1)(e) that provides the ground of “failure to state reasons” lacks sufficient clarity regarding several significant questions. Firstly, it is not clear about what standard should be used to determine whether a tribunal failed the obligation to provide reasons for the award. The “sufficient reasons” test has been criticized as imposing the danger of slipping into appellate review, and the “understandable reasons” test is not specific enough despite of the wider acceptance in academia. Secondly, it is controversial whether “conflicting reasons” is a scenario of “failure to state reasons” under Article 52(1)(e). One concern is that analyzing conflicting reasons may turn the annulment review into examination on merits. Thirdly, consensus is lacked in terms of whether “failure to deal with every question” can result in annulment. These unsettled questions result in the divergence of different *ad hoc* committees’ positions regarding the ground of failure to state reasons. Noticeably, preventing substantive review is paid close attention and raises debates in the above questions. As pointed out by Christoph Schreuer, “of all the grounds for annulment, an evaluation of the tribunal’s reasoning

¹³⁰ KLÖCKNER V. REPUBLIC OF CAMEROON, DECISION ON THE APPLICATION FOR ANNULMENT SUBMITTED BY KLÖCKNER AGAINST THE ARBITRAL AWARD, *supra* note 117. para 115.

carries the biggest danger of blending into an examination of the award's substantive correctness and hence to cross the boarder between annulment and appeal".¹³¹ Therefore, in searching for the proper standard and scope of the "failure to state reasons" ground, avoiding review on merits is an especially sensitive issue and deserves more careful consideration.

Summary

The above analysis about the Convention provisions regarding the annulment mechanism mainly reveals two observations. Firstly, the wording of Article 52(1) and the drafting history of the Convention infer that the annulment proceedings should be limited by strict criteria. Article 52 of the Convention does not include violation of public policy and non-arbitrability as the grounds of annulment, so that the *ad hoc* committee's authority only covers some limited procedural matters and is excluded from any review over the merits of awards. Additionally, the qualifiers such as "manifest" and "fundamental" raise the threshold of the grounds to a very high level. The presumably high standard of annulment conforms to the basic policy of the annulment mechanism, i.e. nullification of awards should be rarely granted and only used for the egregiously irregular cases.

Secondly, the text of Article 52 is not clear enough to indicate a specific annulment standard that can be practically applied by *ad hoc* committees. Regarding the three most frequently raised grounds, namely manifest excess of power, departing from the fundamental rule of procedure and failure to state reasons, the major controversial questions include the followings:

¹³¹ Christoph Schreuer, *ICSID Annulment Revisited*, LEGAL ISSUES OF ECONOMIC INTEGRATION 30(2) 103–122, 120 (2003).

- 1) Under the ground of manifest excess of power, there is a fine line between non-application of the proper law and erroneous application. The former is a typical scenario of manifest excess of power that may lead to annulment, whereas the latter is not an annulment ground and accompanies with substantive review. However, distinguishing these two situations and refraining from review on merits when examining the applicable law issue is a tricky question for *ad hoc* committees, and it becomes even trickier when it comes to the problem of partial non-application of the proper law.
- 2) As for the ground of departure from a fundamental rule of procedure, how to determine the degree of “seriousness” and identify the “fundamental” rule of procedure are the major focal points, regarding which there are different interpretations and positions.
- 3) The ground of failure to state reasons is surrounded by many debates. The first issue lies on how well an award should be reasoned in order to satisfy the requirement in Article 52(1)(e). It has not been settled in practice that what standard should be applied to access the reasons in an award. Secondly, whether the contradictory reasons in an award can lead to annulment bears some doubts. In addition, there is no consensus on the matter of whether failure to deal with every question is a ground of annulment.

As expounded above, although the general wording of the annulment grounds brings up unclarity, it actually cannot be replaced with some specific but rigid standard. A clearer annulment standard could be induced from the cases in practice. However, up to now *ad hoc* committees have not reached a consistent annulment standard but adopted diverging positions for the past decades, and recently an extensive tendency regarding the annulment proceedings has emerged. The next chapter will analyze the changing annulment standard in practice, especially the recent cases where standard seems to be extended. Along with all the shifts of the annulment

proceedings in practice, one thing never changes—the ICSID Convention requires the annulment mechanism to be an extraordinary remedy that should be limited with restricted criteria. Even if the ICSID annulment mechanism need to be reformed in order to adapt to the new landscape of the international investment, this basic line should never be crossed. In Chapter 5, how to reach a new balance of the ICSID annulment proceedings will be discussed.

Chapter 3

The Unsettled Annulment Standard in Practice and the Tendency of an Expansive Annulment Standard

It can be inferred from the wording of Article 52 that annulling an ICSID award is constrained with very strict standards. However, the ambiguities embodied in the Convention text bring up a number of questions regarding what specific review standard should be adopted in the annulment proceeding. During the three decades of annulment jurisprudence starting from the first case in 1984, *ad hoc* committees keep struggling between the narrow and the broad review standard. Recently, there has been an emerging tendency of an expanded review standard, which may represent some annulment committees' response to state parties' desire of a wider post-award review. However, according to the above analysis, expansive annulment standard deviates from the exceptionality nature of the ICSID annulment mechanism. Therefore, the review standard of ICSID annulment is still lost in the jungle and thus needs to be reconsidered to find the right balance.

Christoph Schreuer pointed out in an article that the history of annulment from 1984 to 2002 can be divided into three generations according to different standard of review.¹³² The major criterion of categorizing each generation is “to what extent ICSID *ad hoc* committees have respected and implemented the principle that ICSID annulment procedure is an extraordinary remedy for unusual and important cases”.¹³³ As per this criterion, the first generation consists of *Klöckner*

¹³² Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in ANNULMENT OF ICSID AWARDS 17–42 (2004).

¹³³ Irmgard Marboe, *ICSID Annulment Decisions: Three Generations Revisited*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY—ESSAYS IN HONOR OF CHRISTOPH SCHREUER, 201 (2009).

*I*¹³⁴ and *AMCO I*,¹³⁵ the second generation includes *Klöckner II*, *AMCO II* and *MINE*,¹³⁶ and the third generation is represented by *Wena*¹³⁷ and *Vivendi*.¹³⁸ He asserts that the first two generations of the annulment proceedings failed to adopt the appropriate review standard, and the third generation cases found the right balance by adopting a cautious position, which shows that *ad hoc* committees only intervene in serious and important cases.¹³⁹ The “three generation” theory received wide support in the realm of investment arbitration and “the third generation approach” that was deemed as the right balance began to be inherited by subsequent cases. It seemed that the ICSID annulment proceedings had found the proper standard of review in practice.

However, recent annulment jurisprudence shows some change in terms of the standard of review, which diverges from the third generation approach. Since 2010, the issuance of several annulment decisions such as *Sempra*¹⁴⁰ and *Enron*¹⁴¹ raised controversy as to whether the *ad hoc* committees turn to an extensive review in determining the nullification of ICSID awards. In light of the alteration of the annulment standard, some commentators predict that a fourth generation of ICSID annulment proceedings may come to play.¹⁴²

¹³⁴ *KLÖCKNER V. REPUBLIC OF CAMEROON, DECISION ON THE APPLICATION FOR ANNULMENT SUBMITTED BY KLÖCKNER AGAINST THE ARBITRAL AWARD*, *supra* note 117.

¹³⁵ *AMOC I DECISION ON ANNULMENT*, *supra* note 102.

¹³⁶ *MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT (MINE) V. GOVERNMENT OF GUINEA, DECISION ON THE APPLICATION BY GUINEA FOR PARTIAL ANNULMENT OF THE ARBITRAL AWARD*, *supra* note 107.

¹³⁷ *WENA HOTELS LTD. V. ARAB REPUBLIC OF EGYPT, DECISION ON THE APPLICATION BY THE ARB REPUBLIC OF EGYPT FOR ANNULMENT OF THE ARBITRAL AWARD*, *supra* note 108.

¹³⁸ *COMPAÑÍA DE AGUAS DEL ACONQUIJA S.A. AND VIVENDI UNIVERSAL S.A. V. ARGENTINE REPUBLIC, DECISION ON ANNULMENT*, *supra* note 100.

¹³⁹ Christoph Schreuer, *supra* note 132 at 17–18.

¹⁴⁰ *SEMPRA ENERGY INTERNATIONAL V. ARGENTINE REPUBLIC*, *supra* note 105.

¹⁴¹ *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No ARB013 (2010).

¹⁴² See Promod Nair, Claudia Ludwig, *ICSID Annulment Awards: The Fourth Generation?*, Lexology, <http://www.lexology.com/library/detail.aspx?g=7218cb56-7a64-426f-8cc0-8475303444e6>, accessed on April 1, 2015. Also see Irmgard Marboe, *supra* note 133.

The continuous change of the annulment standard generally raises the following questions. Firstly, whether the third generation standard of review represents the proper balance of the annulment proceedings. Secondly, what might be the reasons behind the change from the third generation approach to an extensive review? Is the change affected by state parties' desire for a broader review mechanism in the post-award stage? Thirdly, whether the fourth generation annulment standard deviates from the proper balance required by the ICSID Convention? Finally, considering the backlash against investment arbitration and the rhetoric for more review in ICSID arbitration, what should be the proper standard of review? This section tries to find explanations to the first three questions by analyzing the annulment standard taken by the three generations of jurisprudence and the recently emerging trend of the extensive annulment review. The last question regarding the proper standard of review will be discussed in the next chapter.

3.1. The First Generation of the ICSID Annulment Jurisprudence

Klöckner I and *Amco I* are the first two cases in the history of the ICSID annulment proceedings. The decisions of these two *ad hoc* committees were criticized for their extensive review standard represented by a “hair-trigger” approach and the re-examination of merits in the original awards.¹⁴³

In *Klöckner I* and *Amco I*, the state parties applied for annulment based on three grounds under Article 52, i.e. manifest excess of powers, serious departure from a fundamental rule of procedure and failure to state reasons.¹⁴⁴ Both of the awards were annulled. The *Klöckner I* committee concluded that the tribunal failed to apply the proper law and failed to deal with every

¹⁴³ Christoph Schreuer, *supra* note 132 at 18.

¹⁴⁴ See *KLÖCKNER V. REPUBLIC OF CAMEROON, DECISION ON THE APPLICATION FOR ANNULMENT SUBMITTED BY KLÖCKNER AGAINST THE ARBITRAL AWARD*, *supra* note 117. Also see *Amco v. Indonesia, Decision on Annulment*, *supra* note 108.

question, which lead to the nullification of the award.¹⁴⁵ In *Amco I*, the award was annulled for failure to apply the proper law and contradictory reasons.¹⁴⁶ Once issued, the annulment decisions of *Klöckner I* and *Amco I* suffered severe criticism. One major aspect of the criticism focuses on the degree of *ad hoc* committees' discretion for annulment when discrepancy in the original award was found. Another focal point concerns the *ad hoc* committees' re-examination of the merit issue in the original award. Moreover, whether *Klöckner I* committee could nullify the award based on "failure to deal with every question" is under debates.

The issue of *ad hoc* committee's discretion is closely analyzed in Michael Reisman's article, *Breakdown of the Control Mechanism in ICISD Arbitration*.¹⁴⁷ In this article, Reisman comments that the *Klöckner I* committee adopted a "hair-trigger" standard or an automatic technical discrepancy standard, which means that "the committee posited an automatic requirement of nullification if a defect were established".¹⁴⁸ According to his view, the committee "have no prudential competence".¹⁴⁹ In *Klöckner I* committee's decision, the Article 52(3) provision "the Committee shall have the authority to annul the award [...]" infers that the existence of a ground for annulment will automatically lead to nullification of the award.¹⁵⁰ To refute the *Klöckner I* committee's interpretation, Reisman asserts that Article 52(3) endows *ad hoc* committees with certain degree of discretion to decide whether an award should be annulled when one or more of the Article 52(1) grounds have been demonstrated.¹⁵¹

¹⁴⁵ *Id.*

¹⁴⁶ See *AMCO v. Indonesia*, Decision on Annulment, *supra* note 108.

¹⁴⁷ Michael Reisman, *supra* note 19.

¹⁴⁸ *Id.* at 739.

¹⁴⁹ *Id.* at 762

¹⁵⁰ *KLÖCKNER V. REPUBLIC OF CAMEROON, DECISION ON THE APPLICATION FOR ANNULMENT SUBMITTED BY KLÖCKNER AGAINST THE ARBITRAL AWARD*, *supra* note 117, para 179.

¹⁵¹ *Id.*

Additionally, *Klöckner I* committee was criticized for reviewing merits in the original award and thus crossing the line between annulment and appeal. In deciding whether the *Klöckner I* applied Cameroon law as the law of the contracting state party, the *ad hoc* committee carried out a very detailed examination. By analyzing the *Klöckner I* annulment decision, Reisman found out that:

*In addition to finding that there were defects in the award warranting nullification, the Committee made certain key decisions on some legal issues of the merits, some of which it even suggested might be used by a subsequent tribunal.*¹⁵²

This substantive review overstepped *ad hoc* committees' authority conferred by the ICSID Convention, which only allows nullification of awards based on procedural matters and expressly preclude appeal after an award being rendered.¹⁵³ Furthermore, in deciding whether the tribunal satisfy the reasons requirement provided by Article 52(1)(e), the *Klöckner I* committees set forth a "sufficient reason" standard, which was explained by the committee as follows:

*A middle and reasonable path is to be satisfied with reasons that are 'sufficiently relevant' that is, reasonably capable of justifying the result reached by the Tribunal. In other words, there would be a 'failure to state reasons' in the absence of a statement of reasons that are 'sufficiently relevant', that is reasonably sustainable and capable of providing a basis for the decision.*¹⁵⁴

The test of 'sufficient reasons' was also adopted by the subsequent case *Amco I*. However, in deciding whether the reasons provided in the original award is sufficient or adequate, the *ad hoc* committee is easily tempted to engage a substantive review on the award. Thus, whether the "sufficient reason" test is appropriate is controversial.

Another issue is whether *Klöckner I* committee went beyond authority by annulling the award based on tribunal's failure to deal with every question. As discussed in the above section, it is

¹⁵² Michael Reisman, *supra* note 19, at 765

¹⁵³ See Article 52 and 53 of the ICSID Convention.

¹⁵⁴ *KLÖCKNER V. REPUBLIC OF CAMEROON, DECISION ON THE APPLICATION FOR ANNULMENT SUBMITTED BY KLÖCKNER AGAINST THE ARBITRAL AWARD*, *supra* note 117, para 118-20.

debatable whether the Article 52(1)(e) ground of “failure to state reasons” covers the Article 48(3) obligation of “dealing with every question”. The committee of *Klöckner I* supported the idea that the obligation under Article 48(3) is enforced by Article 52(1)(e) and thus annulled the award due to the tribunal’s failure to deal with every question.¹⁵⁵ However, Reisman disagreed with the committee’s opinion. According to him, involving “failure to deal with every question” into the scope of Article 52(1)(e) is an expansion of this annulment ground.¹⁵⁶

Based on the above analysis, the first generation annulment cases are widely deemed as representing an improper standard of review, which expands the annulment remedy. Firstly, the “hair-trigger” standard adopted by the two committees leads to a situation where “even a minor, technical defect will entail nullification of the entire award”,¹⁵⁷ which makes the annulment of ICSID awards become too easy and thus encourages losers to apply for annulment based on some minor defects of the awards. Secondly, the *Klöckner I* committee carried out substantive review and thus stepped over the *ad hoc* committees’ authority.

The first generation’s expansive review of annulment is mainly attributed to the *Klöckner I* and *AMCO I* committees’ ideology that justice should not be sacrificed for the pursuance of finality. Two decades after the issuance of the *Klöckner I* annulment decision, the chairman of the *Klöckner I* committee, Pierre Lalive, responded to the criticism towards their annulment decision in a conference and mentioned that he is “not going to attempt to promote the absolute or even greater finality of arbitral awards”.¹⁵⁸ However, many scholars oppose to this position and highlight the significance of finality in the ICSID annulment proceedings. Therefore, the debate

¹⁵⁵ *Id.* para 115.

¹⁵⁶ Michael Reisman, *supra* note 19, at 763.

¹⁵⁷ *Id.* at 786.

¹⁵⁸ *Id.* Also see Pierre Lalive, *Concluding Remarks*, in ANNULMENT OF ICSID AWARDS, 299 (2004).

over the annulment standard is essentially a battle between finality and justice. After *Klöckner I* and *AMCO I*, the second generation of annulment cases changed the line of decision and showed an obvious preference to the value of finality.

3.2. The Second Generation of the ICSID Annulment Jurisprudence

After the nullification of the *Klöckner I* and *AMCO I* awards, these two cases were resubmitted to ICSID according to Article 52(6) of the ICSID Convention¹⁵⁹ and then applied for annulment again. Both of the applications for annulment were rejected by the new *ad hoc* committees. Since the changed standard of review, *Klöckner II*, *Amco II* and *MINE*¹⁶⁰ consist the second generation of the ICSID annulment proceedings. Unfortunately, the decisions of *Klöckner II*, *Amco II* are not published. Thus, the characteristics of the second-generation annulment standard can only be investigated from the annulment decision of *MINE*, of which Aron Broches, the founding father of ICSID, is one of the *ad hoc* committee member.

In the case of *MINE*, Guinea applied for annulment and alleged that the award should be nullified due to the tribunal's failure to apply the proper law, which amounts to excess of power, violation of party's right to be heard as a serious departure from fundamental rule of procedure, and failure to state reasons.¹⁶¹ The *ad hoc* committee did not address the question regarding the right to be heard, and denied that there was excess of power, and annulled the award in part by accepting the applicant's argument of failure to state reasons.¹⁶²

¹⁵⁹ Article 52(6) of the ICSID Convention provides that: "If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of the Convention."

¹⁶⁰ MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT (MINE) V. GOVERNMENT OF GUINEA, DECISION ON THE APPLICATION BY GUINEA FOR PARTIAL ANNULMENT OF THE ARBITRAL AWARD, *supra* note 107.

¹⁶¹ *Id.*

¹⁶² *Id.*

In regard to the alleged failure to apply the proper law, the committee held that there is no basis to support that the tribunal failed to apply any law.¹⁶³ The committee admitted that the Tribunal erred in citing Article 1134 of the French Civil Code, but it declined to annul on this ground for the reason that the error is inconsequential and thus does not warrant annulment.¹⁶⁴

Guinea also alleged that the award should be annulled based on Article 52(1)(e) ground that “the award has failed to state reasons”, specifically for absence of reasons, contradictory reasons, and failure to deal with every question.¹⁶⁵ The committee declined to annul the award for the alleged “absence of reason”. Different from the “adequate reasons” test employed in *Klöckner I* and *Amco I*, the *MINE* committee adopted an “understandable standard” as the test of the reasons requirement. The *MINE* annulment decision states that:

*In the Committee’s view, the requirement to state reasons is satisfied as long as the award enables one to follow point A to point B, and eventually to its conclusion, even if it made an error of fact or of law.*¹⁶⁶

It can be seen that the above standard is apparently looser than the “adequate reasons” requirement. It implies that certain reasons can be implicit if the tribunal’s reasoning is understandable. Pursuant to this standard, the *MINE* committee reconstructed some of the missing reasons in their own decision and rejected to annul based on “absence of reasons”.¹⁶⁷ The allegation of contradictory reasons regarding the calculation of the amount of profit was supported by the committee. It also agreed with Guinea’s argument that the tribunal failed to deal with every question. As a result, the damage portion of the award was nullified.¹⁶⁸

¹⁶³ *Id.* at 40

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* pp. 44-6.56

¹⁶⁶ *Id.* pp. 87-8

¹⁶⁷ *Id.* pp. 107-8

¹⁶⁸ *Id.*

Compared with the first-generation cases, the *MINE* committee adopts a much more limited and cautious approach, under which an obvious preference to the finality of ICSID awards is revealed. Finality is strongly advocated by Aron Broches, the chief negotiator of the ICSID Convention, whose position sets the underlying tone of the *MINE* annulment decision since he is the key decisionmaker in the committee. Hence, *MINE* adopted a minimalist approach strongly favoring finality, which is manifestly different from the activist approach of *Klöckner I* and *Amco I*.¹⁶⁹ As described by Broches, “the gulf between *Klöckner I* and *MINE* is wide”.¹⁷⁰ However, *MINE*’s approach is not unquestionable. The committees’ position regarding manifest excess of power and violation of a fundamental rule of procedure seems excessively overweighing finality and thus risks the balance of the annulment proceeding. Therefore, Schreuer treats the second-generation jurisprudence as an overcorrection, which does not represent the proper annulment standard, and his opinion receives many support.

3.3. The Third Generation of the ICSID Annulment Jurisprudence

Two annulment decisions rendered in 2002, *Wena Hotel v. Egypt*¹⁷¹ and *Vivendi v. Argentina I*,¹⁷² caught intensive attentions and evoked a widely-shared positive prospect that a new generation of ICSID annulment jurisdiction has begun, where the *ad hoc* committees have found a proper balance of the standard of review.

3.3.1. *Wena Hotel v. Egypt*

¹⁶⁹ Tai-Heng Cheng, *supra* note 64 at 258.

¹⁷⁰ Aron Broches, *supra* note 124.

¹⁷¹ WENA HOTELS LTD. V. ARAB REPUBLIC OF EGYPT, DECISION ON THE APPLICATION BY THE ARB REPUBLIC OF EGYPT FOR ANNULMENT OF THE ARBITRAL AWARD, *supra* note 108.

¹⁷² COMPAÑÍA DE AGUAS DEL ACONQUIJA S.A. AND VIVENDI UNIVERSAL S.A. V. ARGENTINE REPUBLIC, DECISION ON ANNULMENT, *supra* note 100.

The dispute in *Wena Hotel v. Egypt* arose between a British investor and EHC, an Egyptian public sector company, regarding the respective obligations under an agreement between them for the lease, development and management of two hotels in Luxor and Cairo. The ICSID tribunal found Egypt liable and awarded damages with interests for Wena Hotel. Egypt then applied to annul the award. The request was based on three grounds: manifest excess of power, serious departure of a fundamental rule of procedure and failure to state reasons.

Under the ground of excess of power, Egypt argued that the tribunal failed to apply the proper law and lacked jurisdiction over certain claims. As contended by Egypt, the applicable law should be Egyptian law, rather than the BIT between Egypt and England, which was applied by the tribunal. The *ad hoc* committee asserted that there was no agreement regarding the choice of law, thus the applicable law should be determined according to Article 42(1) of the Convention, which provides that the law of the contracting state party of the dispute, namely Egyptian law here, and such rules of international law as may be applicable in the absence of parties' agreement. The *Wena ad hoc* committee confirmed that the BIT between Egypt and England, as well as the ICSID Convention, are part of Egyptian law and there is no inconsistency detected, so the tribunal's application of law complies with the provision of Article 42(1).¹⁷³ Therefore, the committee refused the allegation that the tribunal exceeded its power by failing to apply the proper law.¹⁷⁴ Besides the issue of applicable law, Egypt also argued that Wena Hotel brought claims for the losses of its affiliates, over which the tribunal did not have jurisdiction. The

¹⁷³ WENA HOTELS LTD. V. ARAB REPUBLIC OF EGYPT, DECISION ON THE APPLICATION BY THE ARB REPUBLIC OF EGYPT FOR ANNULMENT OF THE ARBITRAL AWARD, *supra* note 108.

¹⁷⁴ *Id.*

committee stated, “ICSID practice has been quite flexible on claims that include the interests of subsidiaries and affiliates” and rejected Egypt’s argument.¹⁷⁵

The second annulment ground invoked by Egypt was ‘serious departure from a fundamental rule of procedure’. The *ad hoc* committee rejected all of Egypt’s arguments and refused to annul for this ground. Firstly, Egypt claimed that the tribunal breached the procedural rule regarding the burden of proof. The committee disagreed to treat this as an annulment ground because Egypt did not identify a fundamental rule of procedure in its application.¹⁷⁶ Secondly, Egypt argued that its right to be heard was violated because it did not have an opportunity to address the issue of interest before the tribunal. The committee decided that Egypt had full and fair opportunity to respond to Wena Hotel’s claim and pointed out that parties should be aware of the possibility of tribunal’s granting of compound interests.¹⁷⁷ A third problem raised by Egypt is that the tribunal failed to call for further evidence regarding the issue of corruption. The committee explained that an ICSID tribunal has the power to require parties to provide further evidence, which is discretionary rather than mandatory, and thus decided that the tribunal did not violate a fundamental procedural rule in terms of calling for further evidence.¹⁷⁸ Based on the above analysis, the *ad hoc* committee refused to annul the award for the ground of serious departure of fundamental rule of procedure.¹⁷⁹

Egypt’s annulment application contains another argument that the award fails to state reasons and fails to deal with every question. For the first aspect, Egypt was dissatisfied with the lack of reasons in respect of the amount of damages and the calculation of interest. The committee

¹⁷⁵ *Id.* at 943.

¹⁷⁶ *Id.* at 944.

¹⁷⁷ *Id.* at 945

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

admitted that some reasons were not expressed but implicit, however the reasoning of the award was sufficient.¹⁸⁰ This position is in line with *MINE*. As for the issue of failure to deal with every question, the committee rejected Egypt's argument because its allegations referring to the questions irrelevant to this case.¹⁸¹ Therefore, Egypt's application for annulment was dismissed by the *ad hoc* committee and the award was left intact.

3.3.2. *Vivendi v. Argentina I*

The case *Vivendi v. Argentina I*, one of the primary questions is regarding ICSID tribunal's jurisdiction over treaty claims and contract claims. In this case, a French investor (CGE, then called Vivendi) entered into a concession contract with an Argentinean province of Tucumán, which includes an exclusive jurisdiction clause in favor of the Tucumán administrative tribunals. Thereafter, disputes arose and CGE initiated ICSID arbitration against Argentine government based on the BIT between Argentina and France. Argentina challenged the tribunal's jurisdiction by arguing that the tribunal had jurisdiction only over the claims relating to Argentine government's obligation under the BIT (treaty claim), but not over the claims concerning the action of the Tucumán province (contract claim).¹⁸² The Tribunal decided that the contract clause providing for exclusive jurisdiction of Tucumán tribunals does not constitute a waiver of party's right to bring claims under the BIT.¹⁸³ According to the tribunal's analysis, although the contract claim is regarding the actions of Tucumán province, it was brought against the central

¹⁸⁰ *Id.* at 946.

¹⁸¹ *Id.* pp. 950-951. The applicant argued that the relationship between Wena and Mr. Kandil rendered the lease agreement null and void, which is irrespective of the purpose of the alleged consultancy agreement between Wena and Mr. Kandil. In the applicant's view, the tribunal failed to deal with this argument. Regarding this question, the tribunal took the view that it is not relevant to determine the issue in this case. Thus, the committee stated that the applicant's allegation is directed not to any failure to state reasons, but to the merits of the reasons given by the tribunal, which cannot be heard by the committee in respect of the annulment grounds.

¹⁸² *COMPANÍA DE AGUAS DEL ACONQUIJA S.A. AND VIVENDI UNIVERSAL S.A. V. ARGENTINE REPUBLIC, DECISION ON ANNULMENT, supra* note 100.

¹⁸³ *Id.*

government of Argentina under the BIT rather than under the concession contract, and the government is responsible for Tucumán's action as alleged by the claimant.¹⁸⁴ Therefore, the tribunal confirmed its jurisdiction over both the treaty claim and the contract claim.¹⁸⁵ Vivendi then moved for an annulment proceeding. The annulment request was based on three grounds: manifest excess of power, serious departure of a fundamental rule of procedure and failure to state reasons.¹⁸⁶

Firstly, Vivendi claimed that the tribunal failed to determine the merits of the treaty claims, which amounts to an excess of power. Vivendi argued that, while the tribunal confirmed its jurisdiction as to the claims of Tucumán province's actions under the BIT, it did not decide the merits of the claims, so that the tribunal essentially failed to exercise jurisdiction over the treaty claims. The *ad hoc* committee upheld this argument and decided to annul the part of the award regarding the Tucumán claims.¹⁸⁷

The second allegation is that the tribunal departed from a fundamental rule of procedure by depriving party's right to be heard. The *ad hoc* committee dismissed this claim because it found from the record that the parties had a full and fair opportunity to be heard at every stage of the proceeding.¹⁸⁸

Finally, Vivendi argued that the tribunal failed to state reasons based on which the award was made. However, the *ad hoc* committee did not address this issue because the decision of annulment had been made based on the ground of excess of power.¹⁸⁹ As a conclusion, the *ad*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

hoc committee held that the award should be annulled in part due to non-exercise of jurisdiction over the Tucumán claim, which amounts to a manifest excess of power.

In summary, the *Wena* and *Vivendi I ad hoc* committees established several principles of the annulment review standard, which were appraised by commentators and considered as the beginning of a new generation of annulment jurisprudence. The third-generation annulment standard represented by *Wena* and *Vivendi* decisions can be summarized as the following two aspects.

Firstly, *ad hoc* committees possess certain degree of discretion regarding whether to annul an award when some annulable defect exists. Just as explained by the *Vivendi I* committees, even if there is an annulable error, the committee has a measure of discretion under Article 52(3) in ordering annulment or in refusing to do so.¹⁹⁰ This position negates the hair-trigger approach employed by the first-generation cases, i.e. an award should be nullified once an annulable defect is found, and reflects a more cautious annulment standard.

Secondly, *Wena* and *Vivendi I* decisions confirmed that the mandate of *ad hoc* committees conferred by Article 52 of the ICSID Convention is very narrow and limited. These two decisions reveal a position that the annulment mechanism should only deal with the egregious procedural injustice, and thus committees should cautiously stay within their authority and never turn the annulment proceeding into an appellate proceeding by engaging in substantive review on the original award. Regarding the three most frequently invoked annulment grounds, i.e. manifest excess of power, serious departure from a fundamental rule of procedure and failure to state reasons, all of which were raised in both cases, the *Wena* and *Vivendi I* committees

¹⁹⁰ *Id.* Para 252

interpreted the Convention provisions narrowly and reflects the pursuance of finality of ICSID awards. The committees' position regarding each ground will be expounded as follows.

In regard to the ground of excess of power, the *Wena* and *Vivendi I* decisions demonstrate the committees' firm position that they do not correct the tribunals' error in law and fact. In the case of *Wena*, in response to Egypt's allegation of the tribunal's failure to apply the proper law regarding the calculation of interests, the committee made the following statement to refuse taking merits review on the original award:

*The option the Tribunal took was in the view of this Committee within the Tribunal's power. [...] Whether among the many alternatives available under such practice the Tribunal chose the most appropriate in the circumstances of the case is not for this Committee to say as such matter belongs to the merits of the decision. Moreover, this is a discretionary decision of the Tribunal. Even if it were established that the Tribunal did not rely on the appropriate criteria, this in itself would not amount to a manifest excess of power leading to annulment.*¹⁹¹

Regarding the ground of serious departure from a fundamental rule of procedure, the two committees took a quite strict standard of review, under which the criteria to meet the requirement of 'serious' and 'fundamental' are quite high. Therefore, although this ground was invoked in both cases concerning the right to be heard, allocation of burden of proof and so on, the committees dismissed all of the arguments.

Failure to state reasons is a very subjective ground and could easily generate temptation for *ad hoc* committees to cross the line between annulment and appeal. Regarding this ground, the third-generation *ad hoc* committees set forth some basic principles: (1) the object of the reason requirement is to ensure that the tribunal's decision can be understood; (2) the reasons do not have to be expressed but can be implied, provided that they could be reasonably inferred from

¹⁹¹ WENA HOTELS LTD. V. ARAB REPUBLIC OF EGYPT, DECISION ON THE APPLICATION BY THE ARB REPUBLIC OF EGYPT FOR ANNULMENT OF THE ARBITRAL AWARD, *supra* note 108. at 943.

the terms used in the decisions; (3) if some reasons are missing, the *ad hoc* committee can reconstruct the reasons on the basis of the knowledge it has received upon the disputes.¹⁹²

The above observation shows that the third-generation annulment standard is carefully confined within the authority conferred by the ICSID Convention and highly favors the value of finality. Since the issuance of *Wena* and *Vivendi I* annulment decisions, their basic line of reasoning was generally endorsed in subsequent cases for several years, including *CDC Group v. Seychelles*¹⁹³, *Repsol v. Ecuador*¹⁹⁴, *MTD Equity v. Chile*¹⁹⁵, *Soufraki v. United Arab Emirates*¹⁹⁶, *Lucchetti v. Peru*¹⁹⁷ and *CMS v. Argentina*¹⁹⁸. However, in the wake of two annulment decisions rendered lately, namely *Sempra v. Argentina*¹⁹⁹ and *Enron v. Argentina*²⁰⁰, some changes in terms of the standard of review have been observed and it is argued whether a fourth generation of ICSID annulment begins to emerge and what are the reasons and impacts of the new cases. These questions will be discussed in the following part.

3.4. The Fourth Generation of the ICSID Annulment Jurisprudence – Back to the Expanded Standard of Review

Supposing that the third-generation jurisprudence represents the right balance of the annulment proceedings, all of the subsequent cases should have followed this approach. However, two

¹⁹² *Id.* at 947.

¹⁹³ *CDC GROUP PLC v. THE REPUBLIC OF SEYCHELLES*, DECISION OF THE AD HOC COMMITTEE ON THE APPLICATION FOR ANNULMENT OF THE REPUBLIC OF SEYCHELLES, *supra* note 109.

¹⁹⁴ *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10)

¹⁹⁵ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, (ICSID Case No. ARB/01/7)

¹⁹⁶ *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7)

¹⁹⁷ *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4)

¹⁹⁸ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8)

¹⁹⁹ *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16)

²⁰⁰ *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3)

annulment decisions issued in 2010, *Sempra v. Argentina* and *Enron v. Argentina*, appear to have adopted an expansive interpretation of the annulment grounds and raise a trepidation of the emergence of a ‘fourth generation’ of annulment jurisprudence. Some scholars worry that the fourth generation will make the annulment proceeding no longer an extraordinary remedy but tends to be a routine.²⁰¹ While some other authors endorse the value of *Sempra* and *Enron* in the sense that the *ad hoc* committees for these two cases effectively balanced finality and justice for the consideration of the state parties’ interest.²⁰² From this perspective, the fourth-generation annulment cases might represent a shift in terms of the standard of review that adapts to the host states’ dissatisfaction regarding the ICSID mechanism and indicate the *ad hoc* committees’ endeavor of striking a new balance of the annulment proceeding due to the changing investment landscape. In this section, the *Sempra* and *Enron* annulment decisions will be expounded to reveal the new changes of the annulment standard.

3.4.1. *Sempra v. Argentina*

The annulment decision of *Sempra v. Argentina* was rendered in 2010 and has triggered considerable concerns. The dispute is between Argentine government and an US energy company Sempra that invests in Argentina. In 2002, Sempra filed ICSID arbitration based on the US-Argentina BIT, alleging that the Argentine government’s actions dealing with the 2001 domestic economic crisis impaired Sempra’s entitlements as the licensee and breached the obligation regarding investors’ protections under the BIT.²⁰³ Argentina pleaded the necessity defense by invoking Article XI of the BIT, i.e. the non-precluded measures (NPM) clause, as

²⁰¹ Promod Nair & Claudia Ludwig, ICSID ANNULMENT AWARDS: THE FOURTH GENERATION? LEXOLOGY (2015), <http://www.lexology.com/library/detail.aspx?g=7218cb56-7a64-426f-8cc0-8475303444e6>.

Also see Irmgard Marboe, *supra* note 133.

²⁰² Michael Wilson, *The Enron v. Argentina Annulment Decision: Moving a Bishop Vertically in The Precarious ICSID System*, 43 U. MIAMI INTER-AM. L. REV. 347.

²⁰³ SEMPRA ENERGY INTERNATIONAL V. ARGENTINE REPUBLIC, *supra* note 105, pp.6-12

well as customary international law. The tribunal rejected Argentina's necessity defense and awarded damages for Sempra.

After the award being rendered, Argentina applied for annulment based on four grounds, namely improper constitution of the tribunal, manifest excess of power, serious departure from a fundamental rule of procedure and failure to state reasons.²⁰⁴ The *Sempra ad hoc* committee found that the tribunal manifestly exceeded its power in respect of failing to apply Article XI of the BIT when deciding Argentina's necessity defense and thus the award should be entirely nullified. However, the *Sempra* committee's analysis of the manifest excess of power ground receives a lot of criticism for its expansive review standard. The necessity defense and the committee's approach regarding manifest excess of power will be discussed in the following.

In the original award, *Sempra* tribunal considered two possible sources of law concerning the necessity defense raised by Argentina, namely Article XI of the BIT and customary international law. In the BIT, Article XI is the so-called NPM clause, which standards for 'non-precluded measures' and refers to the standard provision in BITs that exempts State action during extraordinary circumstances from the protections of the BIT.²⁰⁵ This article provides that:

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

²⁰⁴ *Id.* at 8

²⁰⁵ See Steven Smith & Kevin Rubino, *Investors Beware: Enron and Sempra Annulment Decisions Bolster the State of Necessity Defense While Sowing New Uncertainty regarding the Finality of ICSID Arbitral Awards*, O'Melveny & Myers LLP News Alert (Aug. 9, 2010), available at <http://www.omm.com/investors-beware--enron-sempra-annulment-decisions-bolster-state-necessity-defense-while-sowing-new-uncertainty-regarding-finality-of-icsid-arbitral-awards-08-09-2010/>.

The necessity principle under customary international law is stated in Article 25 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, codified by the International Law Commission in 2001(hereafter referred to as the “ILC Articles”). Article 25 reads as that:

1. *Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
 - a) *Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*
 - b) *Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
2. *In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*
 - a) *The international obligation in question excludes the possibility of invoking necessity; or*
 - b) *The State has contributed to the situation of necessity.*

The *Sempra* tribunal compared these two sources of law and asserted that Article XI of the BIT does not set out conditions different from customary international law.²⁰⁶ Based on this finding, the tribunal firstly examined Article 25 of the ILC Articles and concluded that Argentina’s economic crisis did not meet the customary law requirements for the necessity defense, and thus stated that there was no need to undertake a further judicial review under Article XI of the BIT due to its similarity to customary law.²⁰⁷

²⁰⁶ *SEMPRA ENERGY INTERNATIONAL V. ARGENTINE REPUBLIC*, *supra* note 105. para 388.

²⁰⁷ *Id*, para 388.

In the annulment proceeding, Argentina argued that the tribunal committed a serious error in law by equating The BIT's NPM clause and the customary law necessity principle.²⁰⁸ Although Argentina admitted that ICSID practices repeatedly confirm that erroneous application of law does not lead to annulment based on the ground of manifest excess of power, it argued that the alleged error committed by the tribunal is so serious that it amounts to failure to apply the proper law and thus constitutes an annulable ground.²⁰⁹

The *Sempra ad hoc* committee compared Article XI of the BIT with Article 25 of the ILC Articles and opined that there are material differences between the texts, thus the committee accepted Argentina's argument that the tribunal committed a manifest error in law by equating these two provisions.²¹⁰ In previous annulment cases, there has been a well-established rule that merely the failure to apply the proper law amounts to a manifest excess of power that leads to annulment, whereas erroneous application is not an annulable ground. However, in response to Argentina's contention that "a serious error of law may, in certain circumstances, constitute a manifest excess of power",²¹¹ the *Sempra* committee accepted the possibility of this situation, despite in a negative expression. The committee stated that it "would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature to amount to a manifest excess of powers".²¹²

Nevertheless, the committee stopped here before going to engage in further analysis for the key question regarding whether the *Sempra* tribunal's error in law is of such egregious nature that amounts to a manifest excess of power. Instead, they turned to discuss another question—

²⁰⁸ *Id.* at 81-85

²⁰⁹ *Id.* at 19

²¹⁰ *Id.* at 21, 42

²¹¹ *Id.* at 29

²¹² *Id.* pp. 29-30

whether the tribunal failed to apply the proper law, *inter alia* Article XI of the BIT.²¹³ The committee cited a sentence in the original award to demonstrate that the tribunal indeed failed to apply Article XI of the BIT, which states that:

*Since the Tribunal has found above that the crisis invoked does not met the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conductive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard.*²¹⁴

Based on the above statement, the committee decided that the tribunal failed to apply the proper law and thus committed manifest excess of power, which should result in the nullification of the award. Owing to this scrappy line of analysis, the committee circumvented the intractable task of deciding the specific line between an error of law that justifies annulment and one that does not.²¹⁵ However, its decision seems to be rested on a tenuous distinction between erroneous application and non-application of the law.²¹⁶

The *Sempra* committee's decision is questionable in several aspects and shows an indication of extensive annulment review, which is different from the cautious approach established by the third-generation ICSID annulment jurisprudence. Firstly, although the *Sempra* committee intentionally avoided further analysis of Argentina's argument that a serious error in law can amount to manifest excess of power in certain circumstances and then lead to annulment, its cursory endorsement of this position raises doubts. From the drafting history of the ICSID Convention to several decades of annulment practices, the assertion that error in law should not be an annulable ground has been repeatedly emphasized. However, after *Sempra*, this principle

²¹³ *Id.* at 30

²¹⁴ *Id.* at 44

²¹⁵ *Id.*

²¹⁶ Michael Wilson, *supra* note 202 at 373.

may be dragged into gray areas. If the *Sempra* committee's approach of masquerading an error in law as a non-application of law is adopted by subsequent cases, the scope of the manifest excess of power ground will be substantially expanded. Furthermore, even if an error in law could amount to manifest excess of power when it is serious enough, the fine line between annulable error and non-annulable error will be very difficult to draw and different standards will lead to inconsistent annulment decisions.

Secondly, the *Sempra* committee changed the third-generation review standard regarding the failure to apply the proper law and essentially expanded the scope of this ground by applying a substantive review standard. The *Sempra* committee's finding of the tribunal's failure of applying Article XI of the BIT goes opposite to the previous annulment decision of *CMS v. Argentina*, which followed the third-generation annulment approach.²¹⁷ These two cases are quite analogous. They arose from the almost identical disputes that stem from Argentina's economic crisis, and in both cases Argentina invoked the necessity defense under the US-Argentina BIT as well as customary international law. The *CMS* tribunal adopted the similar approach as in the *Sempra* case to determine the applicable law issue, i.e. equalizing Article 25 of the ILC Articles and Article XI of the BIT and firstly examining whether the requirements for the customary necessity defense had been met. During the annulment proceeding, the *CMS ad hoc* committee admitted the existence of error in law in the original award due to the tribunal's equalization of the BIT preclusion provision and the customary necessity defense. However, the *CMS* committee refused to nullify the award based on this error and confirmed that the tribunal had indeed applied Article XI of the BIT. The *CMS* committee stated that:

²¹⁷ *CMS Gas Transmission Company v. Argentina Republic*, ICSID Case No. ARB/01/8

*136. The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. In the circumstances, the Committee cannot simply substitute its own view of the law its own appreciation of the facts for those of the Tribunal. Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers.*²¹⁸

Following the above analysis, the *CMS* committee decided that the tribunal committed no manifest of power since they had applied Article XI of the BIT, despite defectively. It reveals the *CMS* committee's cautious attitude regarding the annulment standard and the high threshold of the ground of manifest excess of power.

Nevertheless, the *Sempra* committees did not follow the *CMS* committee's approach and reached a contradictory conclusion concerning whether the *Sempra* tribunal applied Article XI of the BIT. The *Sempra* committee's analysis shows that they essentially adopted an implicit distinction between the formal application and the substantive application of the proper law. Both the *CMS* and *Sempra* tribunals recognized Article XI of the BIT as the proper law but did not carry on further judicial review on this provision because of its similarity with the customary law necessity principle. In the eyes of the *CMS* committee, the *CMS* tribunal had formally applied Article XI of the BIT, and the lack of further judicial analysis was attributed to the assumed similarity and did not amount to "failure to apply the law". On the contrary, the *Sempra* committee was not satisfied with merely formal application of the BIT provision; for them, the *Sempra* tribunal's failure of substantively or effectively applying Article XI of the BIT amounts to manifest excess of power for failure to apply the proper law.

²¹⁸ *CMS Gas Transmission Company v. Argentine Republic*. Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, ICSID Case No ARB018 (2007). para 136.

The *Sempra* committee in fact employed a substantive standard to decide the application of law issue. Following this approach, once an annulment committee decides that the tribunal's application of law is merely formal rather than substantive, the original award may be nullified under the ground of manifest excess of power. The substantive standard makes an ICSID award face more risk of being annulled and thus lowered the threshold of the ground of manifest excess of power for failure to apply the proper law. However, pursuant to the ICSID Convention, substantive review should not be a proper review standard for the annulment proceeding. Article 53 of the Convention explicitly provides that "the award shall [...] not be subject to any appeal", which infers that an ICSID award should not be reviewed substantively but only procedurally. Thus, the *Sempra* committee's decision based on the investigation on substantive application of the proper law blurs the line between annulment and appeal. Moreover, although the *Sempra* committee did not rendered the decision of nullification expressly based on the tribunal's error of equating the BIT's NPM clause and the customary necessity principle, the line of analysis in the *Sempra* annulment decision leaves an impression that the committee seems to find backstairs to annul the award for the error in law. If the *Sempra* committee's approach is adopted by subsequent cases, annulment will have a more expansive scope and no longer be an extraordinary remedy.

Nevertheless, some other scholars argue for the value of substantive review standard from the perspective of justice, especially in the wake of the rising wave of host states' dissatisfaction towards the investment arbitration system. Firstly, it is argued that merely formal application of the proper law is not real application, and thus should be cured by post-award remedy. Andreas von Staden asserts that "... [the applicable law] has to be understood not merely in purely formal terms in the sense of not even referring to the applicable legal provisions, but must be

given a substantive meaning.”²¹⁹ From this view, what the *CMS* and *Sempra* tribunals actually did is merely paying lip service to the NPM clause in the BIT without expounding the provision in the context of the specific dispute, which does not count ‘application of law’ in the sense of adjudication.²²⁰ Hence, the supporters for the value of justice may argue that the *Sempra* committee adopted substantive review for a good reason to ensure the effective application of the proper law in the proceeding of arbitration.

Furthermore, there are also scholarly opinions supporting the value of substantive review in terms of keeping balance between investors and host states during the proceeding of investment arbitration.²²¹ Michael Wilson says, through the *Sempra* annulment decision, investors should be aware of that “ICSID does not provide them a golden life raft to let these big companies watch ordinary citizens drown during economy crashes”.²²² If investors survive economic crisis by relying on an erroneous arbitral award, the host state’s nationals and other global market players will have an impression that the ICSID arbitration produces injustice. On the other hand, the *Sempra* annulment decision that favors Argentina may give the country more chance to recover its domestic economy after the financial crisis and help the government to pay back foreign debts and return to the international financial market. As Wilson says, “recent tribunal awards have continued to aggrandize monetarily, making it less likely that Argentina will satisfy its debt claims”.²²³ The annulment decisions favoring Argentina will give it a breathing break to make a step forward from its current economy status, which will enhance its capability to fulfill other investment arbitral awards against it. Moreover, if *Sempra* followed the *CMS* position and left a

²¹⁹ Andreas von Staden, *Reestablishing Doctrinal Clarity and Correctness: Treaty Exceptions, Necessity, and the CMS, Sempra, and Enron Annulment Decisions*, October 9, 2010, *Czech Yearbook Int'l L.*, vol. 2, p.13

²²⁰ Michael Wilson, *supra* note 202 at 374.

²²¹ *Id.* at 375.

²²² *Id.*

²²³ *Id.*

flawed award intact, there will be a great difficulty for Argentine government to explain to its citizens the rationale of paying a huge amount of money collected from the taxpayers to fulfill this erroneous arbitral award.

Thus, viewed from the perspective of the balance between investors and states, the assertion that the *Sempra* annulment decision goes the wrong way seems too arbitrary. What the *Sempra* case inspires us is that it is time to reconsider the proper review standard for the annulment proceeding in the background of the increasing discontent against the investment arbitration. Specifically, we can ask whether the third-generation position should be preserved or a new review standard needs to be considered?

3.4.2. *Enron v. Argentina*

After *Sempra*, another similar case, *Enron v. Argentina*,²²⁴ was brought to ICSID and then also went into the annulment proceeding. The dispute between Enron, an American company, and Argentina mainly arose from the Argentine government's emergency measures that dealt with its domestic economic crisis in 2001. As alleged by Enron, the Argentine government's measures breached its guarantees under the US-Argentina BIT. Argentina invoked the necessity defense under the US-Argentina BIT (Article XI, the NPM clause), as well as the customary international law (ILC Article 25). The *Enron* tribunal adopted almost the same approach as the *Sempra* tribunal regarding the necessity defense and rendered an award against Argentina, and then Argentina applied for annulment.

²²⁴ *Enron v. Argentina*, ICSID Case No. ARB/01/3 (2007)

In the annulment request, Argentina used the same argument as before and alleged that the *Enron* tribunal committed manifest excess of power by erring in equating the BIT's NPM clause to the customary law necessity principle in the ILC Article 25. In deciding this issue, the *Enron* committee took an approach different from the *Sempra* committee's analysis, which is nevertheless even more intruding than the *Sempra* case. In *Sempra*, the *ad hoc* committee decided that, due to the incorrect finding of the equal relationship between the BIT's NPM clause and the ILC Article 25, the tribunal defeated Argentina's necessity defense by merely examining the requirements under the ILC Article 25, and in fact failed to apply the BIT's NPM clause, which amounts to manifest excess of power for failing to apply the proper law. Unlike *Sempra*, The *Enron* committee did not discuss whether the BIT's NPM clause was applied or not, instead it asserted that the tribunal failed to apply the ILC Article 25 for the lack of sufficient legal analysis. In the original award of *Enron*, one critical issue is whether the Argentine government's measure meets the "only way" requirement provided by the ILC Article 25(1) (a), i.e. the measure must be "the only way for the State to safeguard an essential interest against a grave and imminent peril".²²⁵ According to the *Enron ad hoc* committee, "the tribunal does not address a number of issues that are essential to the question of whether the 'only way' requirement was met",²²⁶ including the meaning of the expression 'the only way'; whether the relative effectiveness of alternative measures is being taken into account; who makes the decision whether there is a relevant alternative, and in accordance with what test.²²⁷ The committee found that the tribunal merely relied on an expert opinion based on economic analysis and immediately

²²⁵ The ILC Article 25(1) provides that "Necessity may not be invoked by an State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; [...]"

The ILC Draft Articles is available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

²²⁶ *Enron v. Argentina*, Decision on the Application for Annulment of the Argentine Republic, para 368

²²⁷ *Enron v. Argentina*, Decision on the Application for Annulment of the Argentine Republic, para 369-72

decided that the Argentine government's measure was not "the only way", but did not engage in any further legal analysis regarding the above issues under Article 25(1) (a).²²⁸ Accordingly, the committee decided that "the tribunal did not in fact apply Article 25(1) (a) of the ILC Articles"²²⁹ and thus committed manifest excess of power.

The *Enron* committee's above analysis blurs the line between non-application and erroneous application of the proper law, and thus looks like an appellate review more than an annulment review. The ICSID Convention does not authorize an annulment panel any power to exercise any review on merits, to express its better legal wisdom, or to replace the original award with its own decision—otherwise, the ICSID review mechanism would turn into an appellate proceeding. In terms of the ground of manifest excess of power, years of annulment practice has confirmed that erroneous application of the proper law does not lead to annulment, because this scenario is accompanied with substantive review on the tribunal's application of law. In the case of *Enron*, the *ad hoc* committee disregarded the tribunal's finding on the legal issue of whether Argentina's measure met "the only way" requirement under the ILC Article 25(1) (a), and expressed its own legal opinion of what legal elements should be examined by the tribunal in order to decide this issue. What the *Enron* committee did was to judge whether the tribunal's application of the ILC Article 25(1) (a) is correct or not, rather than the provision was applied or not. Thus, by overturning the tribunal's decision based on erroneous application of the proper law, the *Enron* committee overstepped its mandate under Article 52 of the ICSID Convention by expanding the scope of annulment review.

²²⁸ *Id.* para 376

²²⁹ *Id.* para 377

In addition, the *Enron* committee also applied an expanded review regarding the ground of ‘serious departure from a fundamental rule of procedure’. Argentina contended that the original award should be nullified because of the tribunal’s serious departure from fundamental rules of procedure.²³⁰ One aspect of the alleged departure is that the tribunal admitted an expert report submitted by the claimant with delay against a party-agreed timetable.²³¹ According to Argentina, the tribunal accordingly violated party’s right of defense and equality of treatment.²³²

The *Enron ad hoc* committee applied a two-step approach to examine whether the tribunal’s admission of the expert report constituted a serious departure of a fundamental rule of procedure. Firstly, the committee focused on the “fundamental” test. Rather than discussing whether the party’s right of defense and equality of treatment as raised by Argentina are fundamental rules of procedure, the committee applied a different line of reasoning and identified that “the principle of party autonomy is a fundamental rule of procedure”.²³³ From this perspective, the committee decided that the tribunal failed to decide in accordance with the party-agreed timetable and hence violated a fundamental rule of procedure. The second step is to determine whether such violation is ‘serious’. The committee decided that it is not a serious departure and rejected this ground of annulment.²³⁴

Although the *Enron* committee declined to nullify the award for this procedural violation, some scholars deem the methodology of treating the principle of party-autonomy as a fundamental rule

²³⁰ *Id.* at 59.

²³¹ *Id.* at 60

²³² *Id.* at 71

²³³ *Id.* at 75

²³⁴ *Id.* at 76

of principle as problematic.²³⁵ Christoph Schreuer commented that this position might lead to an absurd conclusion that all of the procedural rules agreed by parties, including every provision in the ICSID Convention and the ICSID Arbitration Rules, are ‘fundamental’.²³⁶ If the *Enron* committee’s line of reasoning is followed by subsequent cases, the scope of the ‘serious departure from a fundamental rule of procedure’ ground will be tremendously expanded and possibly turn the annulment proceeding from an extraordinary remedy to a routine.

Based on the analysis of the *Sempra* and *Enron* annulment decisions, an activism in annulment proceeding can be observed. Both of the two *ad hoc* committees adopted an expansive review standard, which lowered the threshold of the ground of manifest excess of power and serious departure from a fundamental rule of procedure. These two cases shift away from the cautious approach standardizing the third-generation annulment jurisprudence and seem to turn back to the activist approach of the first-generation annulment cases (*Klöckner I* and *AMCO I*). Thus, it has been claimed by some scholars that a fourth generation of the annulment proceedings may have emerged.²³⁷

Summary

Since 1984 when the first ICSID annulment case was brought up, the annulment standard changed continuously for the past three decades. The deficient clarity of the ICSID Convention text relating to the review mechanism results in the *ad hoc* committee’s shillyshally positions between narrower and wider scope and standard of the annulment review. In this process,

²³⁵ For example, Christoph Schreuer expressed this idea in the 105th Annual Meeting of the American Society of International Law. See Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel, *supra* note 62. Also see Promod Nair and Claudia Ludwig, *supra* note 201..

²³⁶ Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel, *supra* note 62 at 199.

²³⁷ Promod Nair and Claudia Ludwig, *supra* note 201. Also see Irmgard Marboe, *supra* note 133.

conflicting annulment decisions were issued due to different annulment standard adopted by the *ad hoc* committees, which put the consistency and legal predictability of the annulment proceeding under critiques. The recent annulment decisions of *Sempra and Enron* show that the annulment standard is still changing and even reveal a tendency of going back to the formally abandoned expanded standard of review. This change raises several significant questions and deserves close attention for the refinement of the ICSID arbitration mechanism.

Firstly, it needs to be answered whether the fourth-generation annulment cases are in the right or wrong direction. It has been discussed above that the *Sempra* and *Enron ad hoc* committees overstepped their mandate by adopting substantive review and expanded the scope of annulment review, which conflict with the basic principle that the annulment proceedings do not correct wrong awards, but only cure these egregious violations in procedural matters. Although some scholars support the fourth-generation approach in terms of pursuing substantive justice, benefiting host states and balancing the interests between states and investors, the *Sempra* and *Enron* annulment cases went probably too far. If the fourth-generation continues, the annulment proceeding may become a routine rather than an extraordinary remedy, which will jeopardize the finality of ICSID awards, impair efficiency of the ICSID arbitration process and thus conflict with the basic policy of the ICSID Convention. Therefore, the fourth-generation annulment jurisprudence does not represent the right balance of the annulment proceedings and the expansive tendency of annulment review should be ceased.

Then a second question comes up: if the fourth-generation approach is wrong, should the annulment review turn back to the third-generation approach, for this is claimed by many scholars as the appropriate standard? Or should there be some new refinement? The landscape of the global investment regime has been changing in the late past and the demand of host states

becomes more and more important. Thus the ICSID arbitration mechanism better not stay rigid but follow up the significant changes in order to stay appealing to its users. Nowadays, the anti-ICSID wave should not be ignored any more, and thus it is time to rethink the annulment proceeding as the most distinctive device of the ICSID arbitration. One direction is to pursue a more balanced annulment mechanism, which not only highlights finality and efficiency, but also concerns the value of justice and fairness. Some suggestions that may help reach a more balanced annulment proceeding will be the main theme of the next chapter.

Chapter 4

Suggested Reforms for the ICSID Annulment Mechanism

Due to the ambiguity of the ICSID Convention provisions regarding the annulment mechanism, the Convention text fails to provide a clear annulment standard. In the three decades of annulment practice, the *ad hoc* committees also fail to reach a consistent and appropriate standard of review. Two recent annulment cases, *Sempra* and *Enron*, reveal a tendency of expansive interpretation of the annulment grounds and may start a fourth generation of the annulment jurisprudence. This shift may be attributed to the increasing influence of the capital-importing countries and the anti-ICSID actions, such as the series of denunciation from the ICSID Convention. It is conceivable that an extensive annulment review is welcomed by the respondent state parties, who can use it to nullify the unfavorable awards with higher possibility. Although it is hard to assure whether the host states' attitude play some role in the shifting of the annulment standard, at least their reactions and proposals in respect to the annulment mechanism should not be neglected. The major plea of state parties, as well as some investors, is pursuing justice and fairness in the annulment proceedings, through extensive review standard or even an appellate mechanism. In the following, the questions regarding what should be the proper annulment standard and scope will be under discussion. The first and second sections will suggest that the ICSID annulment proceeding should stick to the restricted, rather than extensive standard of review, and an appellate mechanism does not fit for the ICSID system. Furthermore, as the most distinctive feature, efficiency of the annulment proceeding should always be

emphasized. The third section will propose some procedural tactics to help refine the annulment mechanism with better efficiency.

4.1. What Should Be the Proper Review Standard of the ICSID Annulment Proceedings?

During the rising wave of the discontents against ICSID arbitration, one noticeable point is host states' dissatisfaction with the highly restricted review device for ICSID awards. They desire a broader award review mechanism and stress the value of justice, for the purpose to turn the table after an unfavorable award was issued. Along with the increasing importance of the capital-receiving countries in the global investment realm, the host states' anti-ICSID positions may result in several more member states' withdrawal from the ICSID Convention, which will substantially affect the future development of the ICSID arbitration. In that case, should the ICSID annulment committees change to a more extensive review standard as a response to the host states' challenges? In Chapter 3, it has been expounded that the fourth-generation annulment cases were not on the right track for their extensive review standard conflicts with the basic policy of the annulment mechanism provided in the ICSID Convention. The following analysis in this section will demonstrate that an extensive annulment review standard should not be adopted. As a conclusion, the annulment committees should return back to the cautious and restrictive approach as established by the third-generation jurisprudence, but with certain refinement.

4.1.1. The high ratio of annulled ICSID awards requires more restricted, rather than extensive review standard

For non-ICSID arbitrations, the post-award review is generally carried out by national courts in the setting-aside proceedings. The grounds for setting aside foreign arbitral awards are generally strictly limited, but still broader than the ICSID annulment proceedings. For example, the UNCITRAL Model Law²³⁸ sets forth several grounds for setting aside an arbitral award in Article 34(2), which includes both procedural matters and substantive matters, namely the issues of arbitrability and public policy.²³⁹ Furthermore, in setting-aside proceedings, courts are not confined to determine the issues that were raised by parties, but also have power to consider those matters observed by themselves.

Compared to the setting-aside proceedings, the mandate of ICSID annulment committees is constrained much more strictly: the committee can only review procedural matters raised by parties, and merits of the award are completely off the table. Thus, presumably it should be more difficult to nullify an ICSID award than to set aside a non-ICSID award. However, the reality

²³⁸ The UNCITRAL Model Law on International Commercial Arbitration (1985) is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. Until mid-2015, over 60 countries have adopted and incorporated the UNCITRAL Model Law into their domestic laws.

²³⁹ The UNCITRAL Model Law on International Commercial Arbitration (1985) Article 34(2) provides that:

(2) *An arbitral award may be set aside by the court specified in article 6 only if:*

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;
or

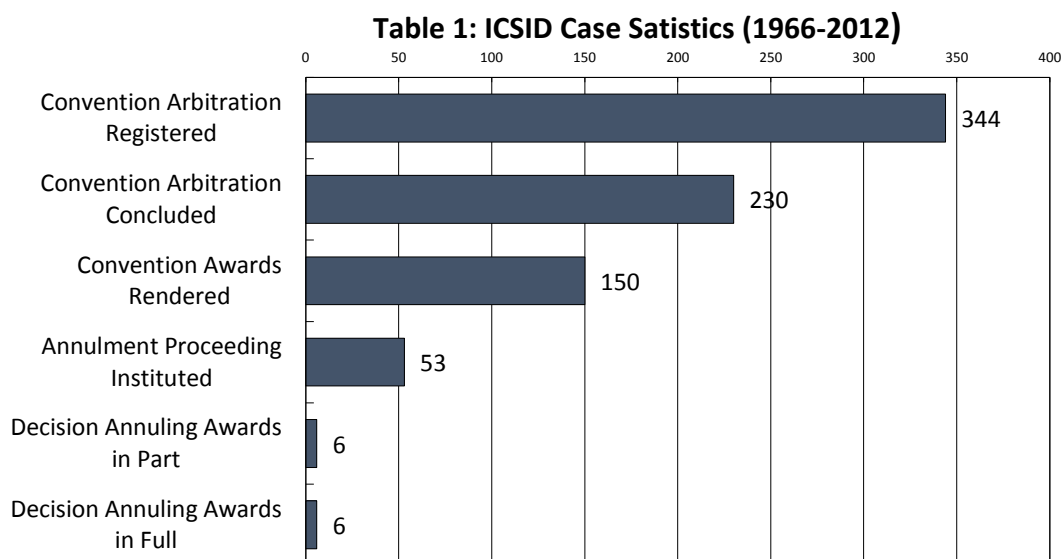
(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

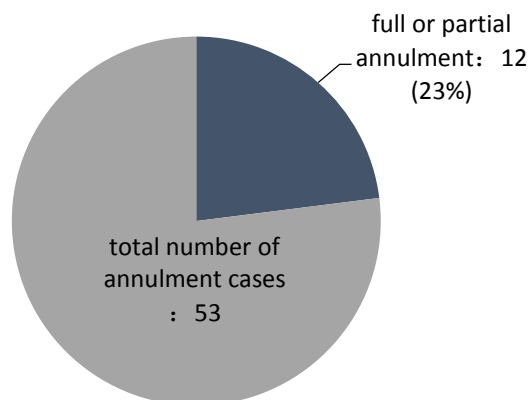
finds the opposite — the ratio of successful ICSID annulment applications is observed higher than the successful setting-aside requests. The following statics indicate that the ICSID annulment has not reached the level of ‘extraordinary remedy’ as designed by the ICSID Convention. In this case, there is no reason to expand the annulment review scope or loosen the annulment standard.

From 1966 when the ICSID Convention was enacted till June 2012, 53 ICSID annulment proceedings were initiated, out of which 12 awards were annulled (6 in whole and 6 in part), which means that the rate of successful annulments out of all annulment requests is about 23%, and 8% out of all issued awards (150 awards in total) were annulled.²⁴⁰



²⁴⁰ Data are taken from the *Background Paper on Annulment for the Administration Council of ICSID*, August 10, 2012. After an arbitration case is registered and before the award is rendered, the arbitration process might be discontinued because of parties’ agreed settlement (Article 49 of the ICSID Arbitration Rules), request of a party (Article 50 of the ICSID Arbitration Rules), failure of parties to act (Article 51 of the ICSID Arbitration Rules), or lack of payment of required advances (Administrative and Financial Regulation 14(3)(d)). If parties reach a settlement, an order taking note the discontinuance will be issued, or parties can ask the tribunal issue an award embodying the settlement agreement. Due to the possibility of discontinuances of the proceeding, there are the difference in the numbers of registered arbitration, concluded arbitration and rendered arbitral awards.

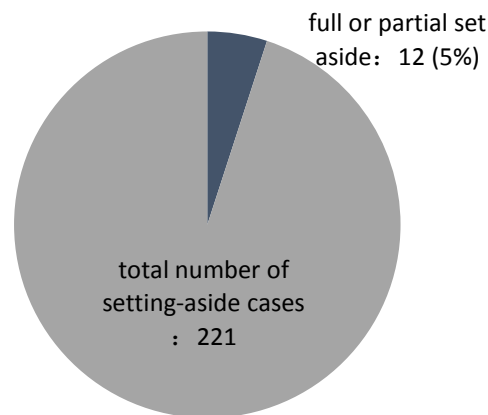
Table 2: ICSID Annulment by Outcome (1984-2012)



However, despite the theoretical assumption that the rate of successful ICSID annulment should be lower than the ratio of setting aside non-ICSID arbitral awards, statistics reveal that the situation in practice is on the contrary. Since the setting aside proceedings are localized and carried on by different national courts, it is impossible for this thesis to assess all statistics in each country regarding the result of setting aside. In this section, Switzerland as a very popular and important seat of international arbitration will be taken as a typical example. Under the Swiss arbitration law, challenges to international arbitral awards should be brought before the Supreme Court pertaining to Chapter 12 of the Swiss Private International Law Act (the PILA). Article 190(2) of the PILA provides five grounds for setting aside international arbitral awards, namely irregular constitution of the arbitral tribunal, wrong ruling on jurisdiction, award granting relief beyond what was sought (*ultra petita*) or granting relief different than what was sought (*extra petita*) or failing to adjudicate certain claims, violation of a party's fundamental rights of procedural fairness or a party's right to equal treatment, and violation of public policy. Statistics

show that the rate of successful setting aside is very low in the Swiss Supreme Court. According to a survey, from 1989 (when PILA was enacted) to 2005, 221 decisions were rendered by the Swiss Federal Court regarding the challenging against international arbitral awards, out of which only in 12 cases the court decided to set aside in full or in part the arbitral award in issue.²⁴¹ Thus the ratio of setting aside in the Swiss court is approx. 5%.

Table 3: Setting aside proceeding in Switzerland by outcome (1989-2005)



The statistics manifest that, compared to non-ICSID arbitration awards, which are subject to external intervention of national judicial power under wider grounds of nullity, ICSID awards nevertheless seem to be more readily challengeable. This illogical phenomenon shows that the ICSID annulment proceedings deviate from the ‘extraordinary remedy’ to some extent. In order to conform to the Convention drafters’ intention that the ICSID awards can only be annulled in

²⁴¹ Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis*, <http://www.homburger.ch/fileadmin/publications/IPRG190.pdf>, p. 452, accessed on June 11, 2013. The authors says “the aim of an empirical analysis cannot be scientific exactness. What the author hopes for is to be able to provide the readers with some guidelines as to what the Court's practice is and what may be expected from the Federal Court in the future by extrapolation.”.

extremely exceptional situations, the annulment proceedings should keep to the restricted standard, and expand no more.

Moreover, as pointed by Tai-Heng Cheng, there is no need to expand the annulment review standard. In his article, Cheng states that:

*“[I]f it turns out that ICSID awards make errors of law more than they correctly apply the law, then the argument for preserving the efficacy of the system of ICSID arbitration through finality also breaks down. [...] then it may become necessary to consider creating alternative mechanisms for broader review in ICSID arbitration, in order to promote greater procedural and retributive justice even at the cost of delaying justice”.*²⁴²

The decades of ICSID practice shows that, despite error in law occurs in some cases, by and large ICSID awards are carefully rendered by the most prominent and reputable arbitrators and generally are just. Many cases that raise concerns are regarding the necessity defense, which is a very complex issue *per se* and the related substantive laws are not mature enough. Thus these debatable annulment decisions that center the issue of necessity defense do not count a sufficient demand for a broader annulment review. What should be urgently improved are the substantive laws that regulate the necessity defense, i.e. the related international convention and the BITs between countries, which will help the ICSID annulment proceedings enhance consistency and legitimacy. As a conclusion of the above analysis, there is no adequate rationale for turning into a broader annulment review.

4.1.2. ICSID annulment proceedings should return back to the restricted standard of review, but the ‘educational function’ should be eliminated

²⁴² Tai-Heng Cheng, *supra* note 64 at 287.

It has been demonstrated that expanding the review standard is not the right track for future improvement of the annulment proceedings. When the third generation of annulment replaced the former jurisprudence, the cautious and restrained approach was appraised by many scholars and practitioners, and was deemed as a proper standard of review that complies with the purpose of the ICSID Convention. Generally, the tendency of expansively interpreting annulment grounds should be reversed, and the review standard should return back to the highly limited level. Otherwise, the fourth generation cases may lead the annulment proceeding into a routine remedy.

Nevertheless, returning to the third generation approach is not the perfect solution. For the sake of the dissatisfaction with the ICSID review mechanism, especially the host states' challenge in terms of the fairness of the annulment proceedings, the balance between finality and justice should be paid more attention. One significant issue concerning justice and legitimacy of ICSID annulment decisions is regarding the erroneous arbitral awards. It has been repeatedly stressed that substantive error in the original award does not amount to an annulable ground. However, if an *ad hoc* committee expressly criticized the tribunal's error but at the end the award is left intact, this probably leaves an impression of injustice of the ICSID arbitration and gives the losing party an excuse to refuse complying with the award. Thus, how to treat the erroneous awards in the annulment proceedings deserves close analysis.

Understood from the positive side, even though the *ad hoc* committees should not nullify awards based on any substantive errors, their comments of these defects may provide guidance regarding the same issue for subsequent cases, which could act as certain 'educational function' or

‘pedagogical function’.²⁴³ However, a question comes up — whether this educational function oversteps the *ad hoc* committee’s authority? Both practical and academic analysis demonstrate that *ad hoc* committee’s critiques regarding the non-annullable error is not within their mandate under the ICSID Convention and generates adverse effect to the annulment proceedings and the ICSID arbitration.

Ad hoc committees’ criticizing of the non-annullable errors is a continuing phenomenon during the history of the ICSID annulment proceedings, from *Klöckner I*, a first-generation case, to *CMS*, a third-generation case, till *Vivendi v. Argentina II*,²⁴⁴ a recent fourth generation case.²⁴⁵ As has been illustrated in Chapter 3, the *CMS* annulment committee spent several paragraphs to criticize the original award’s serious error in identifying the equal relationship between the BIT’s NPM clause and the customary law necessity principle, nevertheless at the end the committee refused to annul the award based on this error. In the annulment decision of *Vivendi v. Argentina II*, the *ad hoc* committee severely criticized a tribunal member Kaufmann-Kohler for failing her obligation of disclosing her connection with the Swiss Bank, based on which Argentina argued that there was a serious departure from a fundamental rule of procedure and should lead to annulment. However, the *ad hoc* committee decided at the end that, although it identified serious errors in the award, it refused to grant annulment based on this ground because Kaufmann-Kohler did not have actual knowledge of the connection between UBS and Vivendi before rendering the award and thus her independence was not affected.²⁴⁶

²⁴³ See Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel, *supra* note 62.

²⁴⁴ After the annulment of the award of *Vivendi v. Argentina I*, the case was resubmitted in 2003 and the second annulment decision was issued on August 10, 2010.

²⁴⁵ Promod Nair and Claudia Ludwig, *supra* note 201.

²⁴⁶ *Id.*

It is quite conceivable that the losing party of the cases like *CMS* and *Vivendi II* will feel unfair to obey an award that has been declared by ICSID itself deeply flawed. It will bring much uncertainty in respect of the enforcement and execution of the award since it deters the respondent governments to comply with the award or provide excuse for them to default. The conundrum faced by the respondent states is pictorially described by Stanimir Alexandrov as that:

Wouldn't you be in a difficult position explaining to your constituents that your government has to write a check for \$100 million for an award that an annulment committee considers deeply flawed and essentially wrong? How do you explain to your constituents the legal obligation to comply with your obligation under the ICSID Convention and the investment treaty question when your opposition in your parliament is waving this annulment decision against you and is telling you, "See, you have to pay \$100 million for an award that is deeply, deeply flawed"?²⁴⁷

If sovereign states, who are the major users of the annulment mechanism and whose commitments give ICSID its legitimate ground, are unsatisfied with the embarrassed situation as depicted by Stanimir Alexandrov, they may challenge ICSID and its review mechanism by criticizing, non-cooperating or even withdrawing the system just as several countries, like Ecuador, Bolivia and Venezuela, have done. As a result, the legitimacy and reputation of ICSID arbitration will be impaired.

Furthermore, the type of annulment decisions like *CMS* and *Vivendi II* may create improper incentives for the councils of the losing party to apply for annulment, no matter whether there are exceptional defects or not. It is imaginable that if the lawyers of a losing party applied for annulment based on non-annullable defects of the award and the *ad hoc* committee criticizes the award's defects but refuse to annul, then the lawyers can show the committee's decision to their client and explain that "in spite of unsuccessful annulment, we got it clear that the tribunal was

²⁴⁷ Transcript of Am. Soc'y Int'l L. 105th Annual Meeting Panel, *supra* note 62.(Stanimir Alexandrov's speaking)

wrong”, which may release the lawyers from the embarrassed situation of losing the case.²⁴⁸ If this approach can be taken advantage of by the losing party’s council and thus fuel future requests for annulment, it may bring up inflation of the annulment proceedings, which challenges the exceptionality of the review mechanism.

Except for the adverse effects as discussed above, i.e. impairing legitimacy of the arbitral award, adding uncertainty to the enforcement and execution stage, and fueling more future annulment requests by creating improper incentives for legal councils, scholars also provided a theoretical basis for not commenting non-annullable errors in annulment decisions. Stanimir Alexandrov gives two reasons: firstly, *ad hoc* committee has certain degree of discretion, i.e. even if there is a ground for annulment, *ad hoc* committee does not have an obligation to annul; secondly, not annulling an award does not mean that the *ad hoc* committee agreed with or affirmed the award, rather it merely means that the committee confined itself within the narrow mandate granted by the Convention and did not find the defects sufficient enough to lead to annulment. Therefore, *ad hoc* committee does not need to expressly state in its decision that there are some non-annullable defects in order to declare its disagreement with those related parts of the awards, because even without those statements or criticisms, it cannot be inferred that the refusal of annulment is an affirmation of the whole award.²⁴⁹ Thus Stanimir Alexandrov advised that *ad hoc* committees should not criticize the defects of the award without annulling it based on those defects; rather they can add a statement in their decision explaining that their role is limited, in that non-

²⁴⁸ See *Id.* (Christoph Schreuer’s speaking). He said: “if there is a high likelihood of strong criticism, this may be seen as a consolation prize to the losing party, and their lawyers will be able to go back to their clients and say, “well, we did not quite achieve the annulment, but we now have it black and white. As we always said, the tribunal was wrong, and the award is deeply flawed.” And that, of course is a very nice way of getting out of a somewhat embarrassing situation for the lawyer and will fuel future requests for annulment.”

²⁴⁹ *Id.* (Stanimir Alexandrov’s speaking)

annulment does not mean endorsement or affirmation and thus to avoid misunderstanding of the readers of the decision.²⁵⁰

Accordingly, the educational function is not contained in the mandate of *ad hoc* committees as conferred by the Convention. If the *ad hoc* committee comments the defects of the awards that do not amount to annulable grounds, it can be an overstepping of its authority and at the same time may create adverse impacts. As a conclusion, the ICSID annulment committees should keep a high threshold of the nullification of ICSID awards and stop the newly emerging tendency of expansive interpretation of the highly limited annulment grounds. Furthermore, *ad hoc* committees have no need to exercise the ‘educational function’ by criticizing the non-annulable defects in the original awards, which may jeopardize the legitimacy and reputation of the ICSID arbitration.

4.2. Should An Appellate Mechanism Be Introduced into the ICSID System?

A very popular but controversial proposal is to supplement or even replace the ICSID annulment proceeding with an appellate proceeding. As has been explained before, the appeals procedure is a typical form of judicial review, which is established for the pursuance to correct substantive errors, but with highly expense in time and financial cost. Unlike appeal, the ICSID annulment mechanism especially values the finality of arbitral awards and the efficiency of the arbitration process. Hence, replacing the annulment proceeding with an appellate proceeding is theoretically conflicting with the fundamental pursuance of the ICSID arbitration. However, along with the challenges towards the ICSID review proceedings, especially the critiques to the insufficient error correcting function of ICSID annulment mechanism, the issue of introducing an appellate

²⁵⁰ *Id.*

mechanism has been frequently raised and heatedly debated by states, scholars, other arbitration institutions and even ICSID itself. In the following, it will discuss whether the ICSID arbitration should incorporate the appeals procedure.

4.2.1. The calling for an appellate mechanism

Sovereign states, both developing and developed, have been calling for an appellate mechanism to be introduced in investment dispute resolution, as being discussed in Chapter 1 of this thesis. With the shifting of the international investment landscape, many countries have assumed a dual-role as both capital importer and exporter. Unlike decades ago when developed countries merely acted as the home of investors, now the US and Australia for instance have also become important capital destinations and been sued in more and more investment arbitration cases. To avoid the results of disfavored arbitral awards, both developing and developed countries desire a broader review mechanism providing them a second bite to turn the table. However, ICSID arbitration is only equipped with the annulment proceeding as the post-award remedy, which is a highly limited review mechanism merely for extremely irregular cases. To chase for more inclination to justice through a broader review, some states and scholars propose to introduce appellate mechanism into the investment dispute resolution.

In Latin America, along with three members' denunciation of the ICSID Convention (Venezuela, Ecuador and Bolivia), the Union of South American Nations (UNASUR) discussed to establish a regional arbitration center in Latin America to take the place of the ICSID arbitration. In terms of review mechanism, the most distinguishing feature of UNASUR comparing with ICSID is the involvement of appeals proceeding.

As early as 2002, the US set forth an agenda to introduce appeals in investment dispute resolution in the US Trade Promotion Authority under Section 21-2 of the US Trade Act, where it states that “when negotiating future investment treaties, the US will consider an appellate body for each treaty”. This position was reinforced thereafter in the US Model BIT (2004) and the Central American Free Trade Agreement (CAFTA). Annex D of 2004 US Model BIT provides that “[w]ithin three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered”.²⁵¹ A similar provision is embedded in Annex 10-F of CAFTA Chapter 10, but the period was shortened to three months.²⁵² However, it is worth noting that no appellate mechanism has been established according to the provision in the model BIT and CAFTA agreement; moreover, the recent version of 2012 US Model BIT has deleted the provision regarding introducing an appellate mechanism.

Besides states’ demands of an appellate proceeding, this issue has also been widely debated by academia and practitioners. In some articles, the proposal of bringing appeals proceeding into ICSID is raised. In *International Arbitral Appeals: What Are We So Afraid of?*, the author Erin E. Gleason asserts that “[t]he establishment of a mechanism for appellate review of investor-state arbitral awards is inevitable”.²⁵³ In *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, the authors William Knull and Npah Rubins state that:

[...] as recent evidence suggests , such an exchange of finality and speed for accuracy is one that some parties to international arbitration may feel is necessary if arbitration is to be an acceptable method for dispute resolution.[...] when the

²⁵¹ See 2004 US Model BIT, available at <http://www.state.gov/documents/organization/117601.pdf>, accessed on January 4, 14.

²⁵² CAFTA Agreement Chapter 10 Annex 10-F, Available at http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf, accessed on January 4, 14.

²⁵³ Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid of?*, 7 PEPDRLJ 269, at p.285.

*assumption of the value of finality is considered in light of the high stakes and factual and legal complexity of many modern transnational transactions and increasingly suggestive empirical evidence, it is apparent that there is potentially a significant market for optional appellate procedures in international arbitration.*²⁵⁴

From the perspective of preventing inconsistent awards, Christina Knahr supports the idea of introducing an appellate body into the ICSID framework. In her article *Annulment and Its Role in the Context of Conflicting Awards*, Knahr argues that, due to the lack of precedent rule in ICSID arbitration, rendering an award contradicting with previous awards does not constitute a ground of annulment. Furthermore, *ad hoc* committee is prevented from substantially reviewing the award. Thus it is out of the committee's mandate to examine whether the award at hand is inconsistent with previous cases in respect of factual or legal analysis. From this perspective, the annulment mechanism is not an effective tool to mitigate the problem of conflicting arbitration outcomes; while an appeal body entailed with the competent to fully review the award might be a proper option.²⁵⁵

Upholding the same opinion, Louis T. Wells wrote in his article *Backlash to Investment Arbitration: Three causes* that:

*One step to ameliorate the backlash is to develop richer legislation that would reduce the inconsistency of decisions. In the absence of more detailed provisions on foreign direct investment from multilateral negotiations, one must rely on the development of precedents to create a common law to govern dispute. But creating precedents demands a supreme appellate "court".*²⁵⁶

²⁵⁴ William H. Knull, III and Npah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 Am. Rev. Int'l Arb. 531, 564.

²⁵⁵ Christina Knahr, *Annulment and Its Role in the Context of Conflicting Awards*, The Backlash against Investment Arbitration, Michael Waibel, Asha Kaushal, ed. Wolter Kluwer, 2010, p. 151-163.

²⁵⁶ See Louis T. Wells, *Backlash to Investment Arbitration: Three causes*, The Backlash against Investment Arbitration, Michael Waibel, Asha Kaushal, ed. Wolter Kluwer, 2010, p. 349

Similar viewpoint is also expressed in some other articles.²⁵⁷ It can be seen that introducing an appellate proceeding in the framework of the ICSID arbitration is not a rarely supported idea in the academic circle. The main arguments favoring this proposal include enhancing fairness of ICSID awards by correcting substantive errors in the original awards and promote consistency of ICSID decisions through a permanent appellate body. These arguments are not lack of practical significance, but conflict with the essential feature of international arbitration, i.e. finality and efficiency. However, a recent change in the realm of international arbitration is quite noteworthy, which represents an important step of the real involvement of the appeals procedure into the international arbitration regime.

In November 2013, the American Arbitration Association (AAA) released a new set of Optional Appellate Arbitration Rules.²⁵⁸ The appellate proceeding is not carried out by national courts but within the arbitration process. As introduced by AAA, “the appellate arbitral panel applies a standard of review more expansive than that allowed by existing federal and state statutes to vacate an award. In this regard, the optional rules were developed for the types of large, complex cases where the parties think the ability to appeal is particularly important”.²⁵⁹ It still too soon to assess the real effects of this innovative appellate arbitration proceeding. At least, AAA’s creation of the appellate arbitration process may also be used as a supporting argument for the involvement of an appellate process within the ICSID arbitration.

4.2.2. Is the appellate mechanism a better cure?

²⁵⁷ See e.g. Andrea Kupfer Schneider, *Error Correction and Dispute System Design in Investor-State Arbitration*, S Y.B. On Arb. & Mediation 194. See also Louis T. Wells, *Backlash to Investment Arbitration: Three causes*, The Backlash against Investment Arbitration, Michael Waibel, Asha Kaushal, ed. Wolter Kluwer, 2010, p. 349

²⁵⁸ The AAA Optional Appellate Arbitration Rules is available at <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2016218>.

²⁵⁹ See the AAA website page regarding the Optional Appellate Arbitration Rules, <http://go.adr.org/AppellateRules>, accessed on August 19, 2015.

a. Arguments in favor of the appellate mechanism

The first argument in support of the appeals proposal is regarding error correction. The most substantive difference between appeal and annulment is in terms of the scope of review. Annulment committee members should not touch the merits of the case but only confine themselves to procedural matters; while appellate authority could review the question of law and/or question of facts. The theory of control mechanism explains that the fundamental purpose of judicial appeal is to pursue correctness, which is nonetheless the primary goal of annulment. Some scholar asserts that the annulment review of ICSID is insufficient due to the shortage in error correcting,²⁶⁰ manifested especially by the *CMS* case, where there had been a confirmed error in law but the award was left intact. Therefore, it is argued that ICSID annulment is insufficient in the function of error correcting, which has to be cured through an appellate proceeding.

Another alleged advantage of the appellate mechanism lies in that it may provide higher consistency and coherence. ICSID tribunals are criticized for inconsistency in dealing with similar issues—examples include the conflicting decisions concerning ‘umbrella clause’ in *SGS v. Pakistan*²⁶¹ and *SGS v. Philippine*²⁶², ‘MFN treatment’ in *Plama v. Bulgaria*²⁶³ and *Maffezini v. Spain*²⁶⁴, and ‘necessity defense’ in *Continental v. Argentina*²⁶⁵ and *LG&E v. Argentina*²⁶⁶.

²⁶⁰ See e.g. Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid of?*, 7 PEPDLJ 269, at p.282. The author discusses the ‘effect of insufficient review of investor-state arbitration’. Also see Andrea Kupfer Schneider, *Error Correction and Dispute System Design in Investor-State Arbitration*, S Y.B. On Arb. & Mediation 194.

²⁶¹ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13)

²⁶² *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6)

²⁶³ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24)

²⁶⁴ *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7)

²⁶⁵ *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9)

²⁶⁶ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1)

Annulment committees are also challenged for rendering conflicting decisions, such as the *CMS* case and *Sempra* case in the issue of application of law. Supporters of the appeals process contend that, unlike annulment, appeal mechanism improves coherent interpretation and lead to consistent decisions, which has been well proved by the success of WTO Appellate Body.²⁶⁷

b. Arguments disfavoring the appellate mechanism

However, the above allegations in support of the appellate mechanism are neither prudent nor plausible in the context of ICSID arbitration. As for the argument of error correcting function, it is undeniable that an appellate authority has advantages in promoting correctness by virtue of broader reviewing mandate, but the costs in time and money will increase as well, and the finality of ICSID awards will be severely diminished. Although there are more and more calling for justice of the ICSID arbitration and some scholars have been questioning the significance of finality as to ICSID arbitration,²⁶⁸ it is hard to predict that through an appellate mechanism, more satisfactory results can be guaranteed, or parties are willing to pay the increased costs and give up the benefits of finality.

Secondly, appeal may not be the better cure for inconsistency problem of ICSID jurisprudence. The WTO Appellate Body indeed has an impressive performance in achieving coherence and consistency, which is however attributed to some pre-conditions that cannot be introduced in ICSID. The crux is that consistent interpretation of applicable legal norms is impossible in

²⁶⁷ See Melida Hodgaon, *Elements of An Architecture for A CAFTA Appellate Mechanism*, American Bar Association Section of International Law, Fall Meeting 2009, at p.1.

²⁶⁸ See e.g. Some argues that it is “not entirely solid assumption that finality is invariably a virtue in the eyes of all who consider resolving international dispute through arbitration”, See William H. Knull, III and Npah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 Am. Rev. Int’l Arb. 531, 559. And some argues that “the necessity for incentives in the ICSID Convention to encourage [...] finality of awards may become increasingly less important to promote”, see Tai-Heng Cheng, *The Role of Justice in Annulling Investor-State Arbitration Awards*, 31 Bereley J. Int’l L. 236, 290.

ICSID even through an appellate mechanism. The WTO Appellate Body only deals with cases arising under the WTO agreement; whereas in ICSID arbitration, the subjects of interpretation are hundreds of BITs and investment contracts drafted in various terms, at different times and between different parties.²⁶⁹ This fundamental difference between the ICSID and the WTO dispute settlement mechanisms determines that coherence of ICSID jurisprudence cannot be realized merely by introducing an appellate proceeding. Moreover, by legal theory, a certain level of inconsistency is inevitable in any system of administration of justice,²⁷⁰ thus some extent of inconsistency is tolerant for an arbitration system. ICSID practice shows that although inconsistent jurisprudence exists, it is not severe to the extent that the review system should be abandoned and rebuilt. Thus, the inconsistency problem of ICSID cannot and need not be solved by employing an appeal mechanism. Therefore, the above analysis shows that the proposal of introducing appellate mechanism in ICSID arbitration is lack of sufficient rational.

c. Options of introducing appeals into the ICSID arbitration

Even if the proposal of an appellate mechanism could be well supported in theory, there is actually no path to realize it in practice. One option to realize the proposal is to incorporate appeals proceeding into the ICSID Convention. However, several provisions in the Convention are acting as obstacles, such as Article 53(1) which provides that “the award shall be binding on parties and shall not be subject to any appeal [...]”. There are only two ways to avoid the obstacle: one is to amend Article 53(1), and the other is to circumvent this article. However, the

²⁶⁹ Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, Appeals Mechanism in International Investment Disputes, at p.236. Also see Donald MaRae, *The WTO Appellate Body: A Model for An ICSID Appellate Facility?*, J Int. Disp. Settlement (2010), 1(2): 371-387.

²⁷⁰ *Id.* at 237.

latter one is not allowed under the Convention, and the former one is basically impossible because amending the Convention requiring consensus of all of the member states.

As suggested by scholars, another option is to create an appellate mechanism in BIT.²⁷¹ This was exactly what the 2004 US Model BIT tried to do, however, this proposal has never been realized and finally was abandoned in the new Model BIT of 2012. Furthermore, if different treaties establish appeals procedure separately, it can be conceived that more inconsistent cases will be issued and the situation of incoherence will not be cured but be more severe.

In fact, ICSID also considered the possibility of establishing an optional appellate mechanism within its framework. In 2004, the ICSID Secretariat discussed the possibility of establishing an ICSID appeals facility, and concluded that this proposal is still premature.²⁷² The ICSID Secretariat generally has two main reasons behind its refusal of the establishment of the appeals facility. Firstly, it says that “significant inconsistencies have not to date been a general feature of the jurisprudence of ICSID.”²⁷³ Secondly, the ICSID Secretariat worries the appeals mechanism jeopardize the finality of ICSID awards and open opportunities for delays in their enforcement.²⁷⁴ These reasons are still valid today. Therefore, in current situation, it is still immature to involve the appeals procedure into the ICSID framework.

In summary, an appellate proceeding would impair the finality of the ICSID awards, decrease efficiency of the arbitration process, and is not urgently needed since in the current ICSID system inconsistency is not a severe problem. More importantly, there is no feasible way to

²⁷¹ Tai-Heng Cheng, *supra* note 64 at 289.

²⁷² See the *Discussion Paper on Possible Improvements of the Legal Framework for ICSID Arbitration*, p.14-18, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14, accessed on January 4, 14.

²⁷³ *Id.*, at 15

²⁷⁴ *Id.*

incorporate the appeals proceeding into the ICSID framework without changing the ICSID Convention. Therefore, although much heat it generates, the proposal of creating an appellate mechanism in ICSID arbitration does not have sufficient support in theory nor have a practical method to realize it in reality.

4.3. Other Procedural Tactics to Enhance Efficiency of the Annulment Proceedings

4.3.1. Preliminary objection

Preliminary objection provided by Rule 41(5) of the ICSID Arbitration Rules can be used to decrease the annulment caseload by filtering frivolous requests.²⁷⁵ According to this rule, “a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merits”. This procedure also applies to the annulment proceeding. According to Article 52(4) of the Convention, “[t]he provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee”, and Rule 53 of the Arbitration Rules also provides that “[t]he provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee”. Therefore, if one party applied for annulment without solid basis for the purpose to delay the arbitration process, the other party may file a preliminary objection to the *ad hoc* committee claiming that the annulment request is lack of

²⁷⁵ See Bernardo M. Cremades Román, B. Cremades y Asociados, *The Use of Preliminary Objection in Annulment Proceedings*, <file:///localhost/Users/apple/Desktop/Chapter%203/%E8%B5%84%E6%96%99/The%20Use%20of%20Preliminary%20Objections%20in%20ICSID%20Annulment%20Proceedings%20%20%20Kluwer%20Arbitration%20Blog.html>, accessed on January 9, 14

legal merits. The *ad hoc* committee should at its first session or promptly thereafter notify the parties of its decision on the objection according to Rule 41(5). This procedure may break off the frivolous annulment request on the preliminary stage in order to save time and cost as well as reduce the increasing workload of *ad hoc* committees.

4.3.2. Cost allocation rules

The current practice regarding the cost of annulment is equal sharing between parties. *Ad hoc* committees allocate costs using this rule except in two cases, *CDC v Seychelles*,²⁷⁶ and *Repsol v Petroecuador*.²⁷⁷ In the former case, the committee ordered Seychelles to bare all cost because the annulment application was found ‘fundamentally lacking in merit’ and ‘to any reasonable and impartial observer, most unlikely to succeed’.²⁷⁸ In the latter case, Petroecuador was order to bear all its own costs plus half of the fees and expenses of Repsol in the annulment proceeding.²⁷⁹ As to discourage parties from submitting annulment request without solid basis, ICSID annulment committees should adopt the ‘English Rule’ in terms of cost allocation. Under the English Rule, the losing party should bare all costs for both parties. However, this should not be a rigid rule, and some exceptions should apply when the value of fairness requires. For example, in some particular situations, the committee could allow equal split of the cost between parties by majority vote.²⁸⁰

4.3.3. Speeding up the annulment registration process

²⁷⁶ *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), 2004

²⁷⁷ *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), 2004

²⁷⁸ *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision of the ad hoc Committee on the Application for Annulment of the Republic of the Seychelles issued on June 29, 2005, para 89.

²⁷⁹ *Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/10), Decision on the Application for Annulment issued on January 8, 2007, para 86-88.

²⁸⁰ Irmgard Marboe, *supra* note 133.

During the annulment procedure, each step will affect the efficiency of the whole process. It has been discovered that in some cases the registration of annulment application took a very long time, which may cause delay to the annulment proceeding. To enhance efficiency of the arbitration process, the ICSID Secretary-General should avoid taking too long in registering annulment requests.

The ICSID Convention and the ICSID Arbitration Rules require that an annulment application accompanied with the lodging fee shall be submitted to the Secretary-General with 120 days after the award was rendered.²⁸¹ Upon receiving the application and the lodging fee, the Secretary-General shall forthwith register the application if it was made within the 120 days limitation and the lodging fee was paid.²⁸² Thereafter, an *ad hoc* committee will be constituted and the annulment proceeding begins to start. During this process, neither the ICSID Convention nor the Arbitration Rules provide for any time limitation for the registration of annulment application.

For most published annulment cases, the registration usually took one to two weeks.²⁸³ However, there are also some exceptional situations where the annulment was registered after nearly one month or more than one month since the application was submitted. For example, in *Azurix v. Argentina*,²⁸⁴ the registration took 29 days;²⁸⁵ and in *Viera v. Chile*,²⁸⁶ it was as long as 41

²⁸¹ Article 52(2) of the ICSID Convention provides that: “The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.” Rule 50(1) of the ICSID Arbitration Rules provides that: “An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General [...]”

²⁸² See ICSID Arbitration Rules, Rule 50(2)(a) and (b), as well as 50 (3)(b).

²⁸³ See the annulment cases on the ICSID website,

<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>, accessed on August 21, 2015

²⁸⁴ *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12)

days.²⁸⁷ Why did the registration in these two cases take so long? Is there any reason can justify this delay? If no conceivable explanation can be found, then the ICSID Secretary-General should be advised to speed up the registration process.

As pointed out above, whether to register an annulment application only concerns the 120 days' limitation and whether the fee payment requirements have been met, which are quite straightforward. Article 49(1) of the Convention clearly defines the date when an ICSID award was rendered.²⁸⁸ Thus, to determine the date when the 120 days' limitation ends should be with no ambiguity. As for the fee payment, if the applicant failed to pay promptly, it is hard to imagine that the Secretary-General could grant a long grace period. In practice, the fee for lodging an annulment application is only US\$10,000.²⁸⁹ There seems no reason for the Secretary-General to wait for such a small amount of money for one month. Rule 50(1) requires the annulment application being accompanied with the fee payment. Failing to pay promptly may indicate the applicant's bad faith in delaying the procedure and should result in denial of its request. Accordingly, since the lack of no reasonable explanation of the delay in registration, the administrative efficiency of the ICSID per se might bear the blame. In this case, it deserves to draw the Secretary-General's attention to the time issue in terms of registering annulment requests and suggest prompt registration in order to speed up the annulment process.

²⁸⁵ See *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Application for Annulment (September 1, 2009). The annulment application was submitted on November 13, 2006 and was registered on December 11, 2006.

²⁸⁶ *Sociedad Anónima Eduardo Vieira v. Republic of Chile* (ICSID Case No. ARB/04/7)

²⁸⁷ See *Sociedad Anónima Eduardo Vieira v. Republic of Chile* (ICSID Case No. ARB/04/7), Decisión de Anulación (December 10, 2010). The application was submitted on December 15, 2007 and was registered on January 24, 2008.

²⁸⁸ Article 49(1) of the ICSID Convention provides that: "The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched."

²⁸⁹ BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATION COUNCIL OF ICSID, *supra* note 63; Michael Wilson, *supra* note 202 at 12.

4.3.4. Circulating draft awards for parties' comments?

Tai-Heng Cheng suggests that tribunals can circulate draft awards to parties for giving them an opportunity to comment on perceived errors and the tribunal can correct the errors, if any, before dispatching the award to parties.²⁹⁰ He argues that this could protect awards from being annulled by ensuring that tribunals respect procedural justice.²⁹¹ However, this proposal's practical value is somehow in doubt. Allowing parties to comment on the draft award will create more debates and disagreements at the very last stage and prolong the proceeding. Since it is practically impossible to limit parties' comments, there would be another procedure stage — post-award briefs — in addition to the post-hearing briefs. Furthermore, even if parties' comments are adopted, it cannot clear up all controversies that could lead to the annulment proceeding nor eliminate parties' incentives to apply for annulment. Thus, this proposal may not ensure an award with better fairness, but will prolong the arbitration process and impair efficiency.

Summary

The drafters of the ICSID Convention created a highly limited review mechanism, represented by the annulment proceeding, to preserve finality of ICSID awards. As designed, annulment of ICSID awards should only be granted in extraordinary cases when fundamental procedural rules are breached. However, the recent practice of ICSID annulment has shown a tendency of 'inflation' in terms of the review standard. To cease the tendency of expansive annulment review, *ad hoc* committees should not lower the threshold of annulment, but to return back to the restrictive and cautious approach. Moreover, there is not enough justification and necessity to introduce an appellate proceeding into the ICSID system. At the same time, some procedural

²⁹⁰ Tai-Heng Cheng, *supra* note 63 at 236.

²⁹¹ *Id.* at 288.

measures, including utilizing the preliminary objections proceeding, adopting the ‘English Rule’ to determine the cost allocation and speeding up the registration process, could be useful to achieve better efficiency of the annulment proceedings.

Part II

Challenges Faced by the ICSID Enforcement Mechanism and Suggestions Prompted by the Challenges

Introduction

Winning ICSID arbitration may not be an end of the dispute. If the respondent party refuses to voluntarily honor the ICSID award, the prevailing party could bring the award to a member state's court for enforcement. As explained in Chapter 1, the ICSID Convention provides three steps for the realization of awarded relief in national courts, namely the recognition proceeding (confirming *res judicata* effect of the award), the enforcement proceeding (declaring the enforceability of the award) and the execution proceeding (forcibly collecting the awarded damages), which constitute the ICSID enforcement mechanism.

The ICSID arbitration is featured for its efficient enforcement mechanism. Non-ICSID awards may probably be subject to national court review per Article V of the New York Convention in the enforcement proceedings.²⁹² However, the ICSID Convention does not incorporate any review ground in the New York Convention, but provides that “each contracting state shall enforce the pecuniary obligations imposed by that award within its territories as if it were a final court judgment in that state.”²⁹³ Thus the ICSID enforcement mechanism is deemed by many people as delocalized or ‘automatic’, in the sense that local court review on ICSID awards is

²⁹² The New York Convention Article V enumerates several grounds, based on which a national court can deny enforcement of a foreign arbitral award.

²⁹³ See Article 54 of the ICSID Convention.

excluded in the enforcement proceeding.²⁹⁴ However, this assertion is doubtful viewing from both the ICSID Convention and the practice of the enforcement of ICSID awards. Especially due to the backlash against the investment arbitration, some states may hinder the enforcement of the ICSID awards against them through national court adjudication, which urges the answering to the question whether ICSID awards are free from court review in the enforcement proceedings. This is the main theme of Chapter 5.

ICSID awards also face challenges during the execution stage. Execution of ICSID awards is not shielded by the self-contained feature of the ICSID arbitration, but entirely governed by the domestic law in the state where execution is sought. Therefore, the respondent host state can plea sovereign immunity in order to prevent its assets from being executed according to the investor's request. Hence, the execution proceeding is called the Achilles' heel of the ICSID arbitration. Chapter 6 will analyze the hurdles before the execution of ICSID awards under the ICSID Convention as well as in practice.

It is noteworthy that the enforcement and execution of ICSID awards may occur in any member state of the ICSID Convention, including the host state, home state and a third state. However, the host state is directly involved in the ICSID arbitration as a party, while the home state and third state can only be a forum of the enforcement and execution proceedings. Therefore, the analysis below will distinguish the host state and the forum state (can be the home state or a third state), which have different status in the enforcement and execution proceedings.

²⁹⁴ There are many scholarly articles describing ICSID enforcement mechanism as delocalized, for example, see Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, Session on Specific Aspects of State-Party Arbitration, 24th Joint Colloquium International Arbitration, Paris, Nov.16, 2007, available at http://www.arbitration-icca.org/media/0/12144885278400/enforcement_of_icsid_awards.pdf, accessed on March 14, 2014; see also Lucy Reed, Jan Paulsson, *Guide to ICSID Arbitration*, Kluwer Law International, 2011; see also CS commentary p.1103.

Chapter 5

Are ICSID Awards Free from Court Review in the Enforcement Proceedings?

Upon the establishment of ICSID, there has been a popular assumption that the ICSID Convention creates an automatic enforcement mechanism, which requires a national court immediately enforce an ICSID award with no further judicial review. However, considering the backlash against the investment arbitration, it is not a wild guess that the respondent parties of ICSID arbitrations may take actions to hinder the enforcement of the disfavoring awards. As a matter of fact, some Latin American countries such as Argentina, Bolivia and Ecuador have revealed their intention of blocking the enforcement of the unfavorable ICSID awards. In this situation, it will be worthwhile to find out whether the enforcement of ICSID awards can be denied by national courts. This is the central question of this chapter.

The question regarding the reviewability of ICSID awards in the enforcement proceedings will be analyzed from two perspectives: one is the provisions in the ICSID Convention relating to the enforcement proceedings, the other is different states' practice concerning the enforcement of ICSID awards. Section 1 in this chapter will focus on the interpretation of the ICSID Convention to determine what the implication of 'enforcement proceeding' is in the context of Article 54 and whether the Convention excludes judicial review on ICSID awards in the enforcement proceedings as claimed by some scholars. Section 2 will examine the legal environment and practice regarding the enforcement of ICSID awards in several significant jurisdictions.

Analysis of the textual meaning of the ICSID Convention and states' practice regarding the enforcement of ICSID awards shows that: (1) the Convention leaves a loophole that allows for exceptional judicial review on an ICSID award in the forum states, but requires the host state to comply with the award with no court intervention; (2) generally the forum states' courts may refrain from scrutinizing ICSID awards in the enforcement proceedings, while some host states may utilize the ambiguous relationship between Article 53 and Article 54 to hinder the enforcement through its national courts.

5.1. Interpretation of the Provisions regarding the Enforcement Proceedings under the ICSID Convention

In this section, the textual meaning of the provisions in Article 54 in the ICSID Convention and other related provisions with regard to the enforcement of ICSID awards will be analyzed, based on which it can be seen that under the ICSID Convention court review in the enforcement proceedings might be possible in some circumstances.

The understanding of a specific mechanism created by a legal document is first and foremost based on the interpretation of the text. In the ICSID Convention, Article 54 expressly provides the enforcement proceeding for ICSID awards. The kernel of Article 54 is that each contracting state of the Convention shall enforce the pecuniary obligations imposed by an ICSID award within its territory as if it were a final court judgment in that state.²⁹⁵ With regard to this provision, there are basically two different opinions—some assert that the enforcement of an ICSID award shall be automatic and excluding from any judicial review; whereas others disagree with this view and they contend that nowhere in the ICSID Convention is mentioned “automatic

²⁹⁵ See the ICSID Convention Article 54(1)

enforcement”, thus court review in the enforcement proceeding is possible under the Convention. The divergence of the above viewpoints are by and large owing to the different interpretations of Article 54 and other related provisions, especially in terms of the meaning of ‘enforce’ and the assimilation of ICSID awards to final judgments of the forum states. In the following, the first subsection focuses on the debates regarding the reviewability of ICSID awards in the enforcement proceedings, the second subsection introduces the interpretation method set forth in the Vienna Convention on the Law of Treaties (1969), the third subsection discusses the implication of ‘enforce’ pursuant to the interpretation rules in the Vienna Convention (1969), the fourth subsection analyzes the assimilation of ICSID awards and final court judgments, and the final subsection elaborates the relationship between Article 53 and 54.

5.1.1. Debates regarding the reviewability of ICSID awards under Article 54

Articles 53 to 55 of the ICSID Convention are entitled ‘recognition and enforcement of the award’. Specifically, Article 53 stipulates the binding force of ICSID awards, because of which parties have the obligation to comply with their award; Article 54 deals with the recognition and enforcement proceedings as well as the governing law of execution; Article 55 concerns the sovereign immunity from execution. Among these three provisions, Article 54 is of central importance to the question of ICSID awards’ reviewability in the enforcement proceedings. The text of Article 54 reads as follows:

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 54 basically deals with three subject matters, namely recognition, enforcement and execution. The above three paragraphs respectively tackle the obligation of each contracting state to recognize an ICSID award and enforce the pecuniary obligation therein, the procedural requirements for recognition and enforcement proceedings, and the execution proceeding as well as its governing law. Regarding the issue of the reviewability of an ICSID award, there is little ambiguity in terms of the recognition and the execution stage, however, for the enforcement stage it is not that clear-cut.

The first paragraph of Article 54 clearly states that, “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding [...]”. According to this provision, once an ICSID award is presented before a national court seeking recognition, the only mandate of the court is to recognize the *res judicata* effect of the award once a party submitted a certified copy of the award.²⁹⁶ There is no leeway for any judicial review during the stage of recognition, thus it can be asserted with no doubt that the recognition of ICSID award is ‘automatic’.²⁹⁷ As for execution, Article 54(3) explicitly allows court review based on national laws by stating that: “Execution of the award shall be governed by the laws concerning the execution of judgment in force in the state in whose territory such execution is sought.” Therefore, according to Article 54,

²⁹⁶ See Article 54 (2) regarding the procedural requirement of recognition and enforcement of an ICSID award.

²⁹⁷ The statement regarding ‘automatic recognition of ICSID award’ can be found in several scholarly article, e.g. Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2009, p. 1128 “recognition of awards”; also see Lucy Reed, *Guide to ICSID Arbitration*, Kluwer Law, 2008, p. 105.

it is clear enough that a national court has no authority to carry on any judicial review on an ICSID award in the recognition proceeding, and it is also without doubt that a court has judiciary discretion by virtue of local law in deciding whether an ICSID award can be executed in the forum state.

Nevertheless, regarding the reviewability of an ICSID award in the enforcement proceeding, scholarly opinions diverge. A popular notion held by many scholars is that the enforceability of an ICSID award within a contracting state is subject to no judicial resistance.²⁹⁸ Some authors even introduce a term ‘automatic recognition and enforcement of ICSID’ to emphasize that national courts shall not impose any review on ICSID awards but only to immediately recognize and enforce it.²⁹⁹ This point of view basically relies upon an assumption that ICSID arbitration is designed as a delocalized and self-contained mechanism, thus external review by national court is precluded from this system. Supporting evidence of this point can be found in Article 53, which provides that “the award shall [...] not be subject to any appeal or any other remedy except those provided for in this Convention.” and can be interpreted as that an ICSID award is only subject to internal review set forth in Article 50 to 52, i.e. interpretation, revision and annulment, but no further court review. However, it is noteworthy that the assertion of the non-reviewability of ICSID award is inferred generally based on purposeful and contextual evidence.

In contrast, there is an opposite opinion denying the automatic feature of the enforcement of ICSID awards. This opinion contends that the possibility of court review over ICSID awards during the enforcement proceedings cannot be excluded. The pillar in support of this contention

²⁹⁸ See CHRISTOPH SCHREUER, *supra* note 28. p1139, ‘finality and non-reviewability’; Lucy Reed, Guide to ICSID Arbitration, p.105; Edward Baldwin, Mark Kantor and Michael Nolan, Limits to Enforcement of ICSID Awards, (2006) Journal of International Arbitration 23(1), p.3.

²⁹⁹ LUCY REED, JAN PAULSSON, AND NIGEL BLACKABY, *supra* note 28. at 105

is the relevant part in Article 54 that assimilates ICSID awards to domestic final judgments for the purpose of enforcement. In an article *The ‘Automatic’ Enforcement of ICSID Awards: the Elephant in the Room*, the author James Barratt and Margarita Michael point out that Article 54 leaves a loophole for national court review on ICSID awards in those states where a final court judgment can be denied enforcement according to local law.³⁰⁰ In fact, Christoph Schreuer, who supports the non-reviewability of ICSID award, also admits that equating ICSID awards with final court judgments “implies that enforcement may be resisted in countries where national rules provides for an exceptional refusal to enforce a final judgment”,³⁰¹ however, he refuses to consider this corollary as a denial to the assumed non-reviewability of ICSID awards and stresses that “it has not yet been relied upon in practice in order to defy recognition and enforcement [...]”.³⁰² Barratt and Michael challenge Schreuer’s optimistic view by saying that the possibility of court review in enforcing ICSID awards is like the elephant in the room, which means that the loophole is a factual matter—even though being intentionally ignored, it is still there.³⁰³

The above controversy arises mainly out of the different interpretations of Article 54, *inter alia* the part providing that “[e]ach Contracting State shall [...] enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State”. When analyzing the implication of this sentence, two questions should be specially considered: one is the meaning of ‘enforce’, and the other is how to understand the provision equating ICSID awards to final court judgments. In the following, these two issues will be explored according to the interpretation rules provided in the Vienna Convention on the Law of Treaties (1969).

³⁰⁰ James W Barratt & Margarita N Michael, *The “Automatic” Enforcement of ICSID Awards: The Elephant in the Room?*, THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW 2014, <http://globalarbitrationreview.com/reviews/58/the-european-middle-eastern-african-arbitration-review-2014/>.

³⁰¹ CHRISTOPH SCHREUER, *supra* note 28. pp.1142-1143

³⁰² *Id.* at 1143.

³⁰³ James W Barratt and Margarita N Michael, *supra* note 300.

5.1.2. The Vienna Convention on the Law of Treaties (1969) interpretation rules

Before going to the substantive analysis, the methodologies guiding the interpretation of the ICSID Convention need to be clarified. The Vienna Convention on the Law of Treaties (1969) is a multilateral treaty regarding the international law of treaties between States, drafted by the International Law Commission. Up to 2015, there have been 114 member states of the convention.³⁰⁴ Articles 31 to 33 of the Vienna Convention (1969) set forth the interpretation rules for treaties (the Vienna rules), which basically reflect the principles in international customary law regarding this matter.³⁰⁵

The general rule of interpretation provided by Article 31(1) of the Vienna Convention (1969) is that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The elements mentioned in the general rule, i.e. ordinary meaning, context and purpose, shall be used in a single operation rather than a hierarchical relation.³⁰⁶ However, there is hierarchy between Article 31, the general rule, and Article 32, the supplementary means of interpretation. As provided in Article 32, when the interpretation according to Article 31 results in ambiguity or leads to absurd or unreasonable result, recourse including the preparatory work of the treaty and the circumstances of its conclusion may be used as supplementary means of interpretation. Article 33 tackles the situation when a treaty has been authenticated in two or more languages.

³⁰⁴ See United States Treaty Collection, Chapter XXIII Law of Treaties, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en, accessed on October 19, 2015.

³⁰⁵ Andrea Saldarriaga, *Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement*, ICSID REVIEW, VOL. 28, NO. 1 (2013) 197. p.198.

³⁰⁶ *Id.* at 202. Also see Leo Gross, “*Treaty Interpretation: The Proper Role of an International Tribunal*,” 63 A28M SOCY INTL L PROC (1969). p.19.

As an international treaty between states, the ICSID Convention should be interpreted pursuant to the Vienna Convention interpretation rules. In interpreting Article 54 of the ICSID Convention, the ordinary meaning of the text along with the context and purpose of the ICSID Convention will be primarily examined, and supplemented by the consideration of drafting history and other related resources. In addition, the Article 33 rule regarding the language issue will come to play since the ICSID Convention is authenticated in English, French and Spanish.

5.1.3. The meaning of ‘enforce’ in Article 54

According to the interpretation rules in the Vienna Convention, the ordinary meaning of the words and phrases determining the implication of the provision at issue should be examined at first. In the text of Article 54, while ‘pecuniary obligation’ and ‘final judgment’ are of less ambiguity, the word ‘enforce’ is hard to define. As a matter of fact, the three terms—‘recognition’, ‘enforcement’ and ‘execution’—are frequently mentioned in the context of post-award remedy of arbitral awards, but nevertheless lack precise and uniform definitions. They are used in different meanings under various situations and sometimes are even used interchangeably. Among the three terms, it is relatively easy to distinguish ‘recognition’ and ‘execution’: during the national court proceedings regarding post-award issues, recognition is the first step, the primary purpose of which is to confirm the award as *res judicata* and make the award a valid title for execution in that state; execution is the last step to realize the awarded damages, which refers to the court actions assisting parties to collect certain assets owned by the obligor. However, enforcement has an obscure position comparing to the above two concepts. Neither in court practices nor in scholarly articles a stable notion regarding the implication of ‘enforcement’ is found. Generally there are three different opinions regarding the meaning of enforcement, which lead to different relationships between recognition, enforcement and execution.

- *Opinion 1: enforcement in a broad sense*

The first opinion is that enforcement can be used in a broader meaning, which covers both the recognition and execution phases. This usage is adopted in some contexts where a strictly academic description is not required. As stated by Tatyana Mikhailova and Felton Johnston,

“Enforcement” is often casually used to describe the process of obtaining legal recognition (or confirmation) of the award by turning it into money judgment, and then securing payment by way of seizing assets of the sovereign debtor either at the seat of arbitration or in other jurisdictions (the latter is referred to as execution).³⁰⁷

As for the ICSID arbitration, it is not rare that scholars use ‘enforcement’ in a broader sense to concisely refer to the whole process provided by Articles 53 to 55—otherwise, it is hard to find another short expression standing for the complex process. For example, in the introduction part of Doak Bishop’s book *Enforcement of Arbitral Awards against Sovereigns*,³⁰⁸ he explains that enforcement of an arbitral award takes place in two stages: in the first stage is the award is accepted by the court for enforcement; in the second stage, the court deals with the execution on certain specific assets.³⁰⁹ In this context, the first ‘enforcement’ Bishop uses refers to the broader meaning. Aron Broches, the founding father of ICSID, also uses this broader meaning of ‘enforcement’ in one of his articles, although he embraces another understanding about this term in a different statement.³¹⁰

However, to be precise and avoid confusion, enforcement should not be understood in such a broad way under the ICSID Convention. Article 54(1) clearly distinguishes recognition and

³⁰⁷ Tatyana A. Mikhailova & Felton (Mac) Johnston, ENFORCING ARBITRAL AWARDS AGAINST SOVEREIGNS: PROCESS AND PITFALLS, <http://www.robertwraypllc.com/enforcing-arbitral-awards-against-sovereigns-process-and-pitfalls/> (last visited Jun 5, 2014).

³⁰⁸ DOAK BISHOP, ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS (2009).

³⁰⁹ *Id.* p.10. Also see Tatyana A. Mikhailova and Felton (Mac) Johnston, *supra* note 307.

³¹⁰ Aron Broches, *Awards rendered pursuant to the ICSID Convention: binding force, finality, recognition, enforcement, execution*, ICSID REVIEW. 2(2) FALL 1987.pp. 318-320.

enforcement by providing that any obligation rendered in an ICSID award shall be recognized, whereas only pecuniary obligation can be enforced. Therefore, the Convention text requires the term ‘enforcement’ to be interpreted as an independent phase distinguishing from the recognition process rather than covering it. Unfortunately, Article 54 or other provisions in the Convention fail to clearly indicate the relationship between enforcement and execution, which thus results in two contradictory views—one opinion is that enforcement and execution can be used interchangeable; another is that enforcement and execution are two different proceedings. These two positions will be elaborated below.

- ***Opinion 2: enforcement and execution are interchangeable terms***

The opinion that ‘enforcement’ should be understood in the same way as ‘execution’ in the context of ICSID arbitration is noticeably proposed by Christoph Schreuer in his book *ICSID Convention: A Commentary*.³¹¹ This viewpoint is generally based on linguistic analysis. The ICSID Convention has three authentic versions in English, French and Spanish. In the English version, Article 54 uses ‘enforce’ and ‘enforcement’ three times (in Article 54(1) and (2)), and uses ‘execution’ twice (in Article 54(3)). However, in the French and Spanish versions the same word is used five times throughout Article 54—in French, it is ‘l'exécution’;³¹² in Spanish, it is ‘ejecutar’, ‘ejecuten’ (Article 54(1)), ‘ejecución’ (Article 54(2)) and ‘ejecutará’, ‘ejecución’ (Article 54(3)).³¹³ It infers that in the French and the Spanish versions, there is no such difference between ‘enforcement’ and ‘execution’ as in the English version.

³¹¹ CHRISTOPH SCHREUER, *supra* note 28. at 1136.

³¹² French version of the ICSID Convention, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc-fra/main-fra.htm>, accessed on June 3, 2014

³¹³ Spanish version of the ICSID Convention, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc-spa/main-spa.htm>, accessed on June 3, 2014

In the case of a treaty being authenticated in two or more languages, Article 33 of the Vienna Convention (1969) sets forth the interpretation rules. According to this provision, the text is equally authoritative in each language,³¹⁴ and the terms of the treaty are presumed to have the same meaning in each authentic text.³¹⁵ Further, it states in the fourth subparagraph that “Except where a particular text prevails in accordance with paragraph 1, when a comparison disclose a difference of meaning which the application of article 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.” Relying on the above Vienna rules, Schreuer asserts that “In the case of Art.54 of the ICSID Convention, the interpretation that best reconciles the three texts would appear to be that the words ‘enforcement’ and ‘execution’ are identical in meaning.”³¹⁶

Since the French and Spanish versions reveal no difference between ‘enforcement’ and ‘execution’, equating the meaning of these two terms in the English version could achieve a reconciliation of the divergence in different languages. According to this view, the relative part of Article 54(1) in the English version can be replaced with wording that the pecuniary obligation shall be executed as if it were a final judgment. Thus Article 54 should be considered as tackling only two procedures—recognition and execution. As is illustrated above, there is no doubt that court review is never allowed in the proceeding of recognizing an ICSID award, and in the execution stage, the court can decide whether or not to issue an order of attachment depending on related local laws. Thus, if the difference between enforcement and execution is

³¹⁴ Vienna Convention Article 33(1): “When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.”

³¹⁵ Vienna Convention Article 33(3): “The terms of the treaty are presumed to have the same meaning in each authentic text.”

³¹⁶ CHRISTOPH SCHREUER, *supra* note 28. at 1135

eliminated, the puzzle regarding the reviewability of ICSID awards during the enforcement proceeding would be circumvented.

However, it is questionable whether the method of equating ‘enforcement’ and ‘execution’ could best reconcile the difference as required by Article 33(4) of the Vienna Convention (1969). I argue that this interpretation creates more problems than it solves. The drawbacks of equating ‘enforcement’ to ‘execution’ include at least the following five aspects. Firstly, it does not comport with the general interpretation rules provided by Article 31 of the Vienna Convention. The general rule of interpretation requires the ordinary meaning of the text being given the prominent importance.³¹⁷ Interpretation based on other methodologies provided by Article 32 and 33 should not contradict with the text’s ordinary meaning. In light of a basic notion that languages used in treaty drafting are given great caution in order to pursue precision, it is safe to say that the use of two different legal terms in a single provision implies that they are referring to different meanings. No matter what the exact meaning is, the mere fact that ‘enforcement’ and ‘execution’ are used in the same provision implies that their ordinary meanings need to be interpreted differently. Therefore, the assertion that enforcement and execution have the same meaning contradicts with the general rule set forth in Article 31 of the Vienna Convention (1969). Although complies with Article 33 for reconciling the divergence between different versions, the interpretation equating enforcement and execution should not be adopted. In other words, if an interpretation yields a contradiction with the ordinary meaning of the text, it is by no means the ‘best’ reconciliation in the context of Article 33 of the Vienna Convention (1969).

³¹⁷ Vienna Convention Article 31(1) provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Secondly, equating enforcement and execution makes Article 54(3) redundant. The third subparagraph of Article 54 provides that execution of an ICSID award shall be governed by relevant national laws concerning execution of court judgment. If enforcement had the same meaning as execution, then it had been made clear in the first subparagraph that an ICSID award shall be executed as if it were a final judgment, the corollary of which is that national law governing the execution of court judgment shall apply to the execution of ICSID awards.

Thirdly, by equating enforcement and execution, the proceeding that declares the enforceability of an ICSID award has no position under the ICSID Convention, which will make the process facilitating the realization of awarded damages deficient. The effect of the recognition proceeding is to preclude future judicial and arbitral proceedings regarding the same issue, but it does not confirm that an ICSID award is enforceable in that country. Holding an ICSID award which has been confirmed by the local court as an enforceable title in that country, an investor can take various steps to realize the damage granted in the award, including directly demanding payment to the obligatory party relying on a court verdict, or seeking court assistance to execute the award, or using it as a leverage to achieve a settlement, etc., among which the execution proceeding is merely one choice out of many. However, if enforcement proceeding is not embodied in the ICSID Convention, then the court proceeding for execution becomes the only choice for investors after they obtaining a court order recognizing the ICSID award. This is a result going contrary to the purpose of the ICSID arbitration, i.e. the ICSID post-award mechanism should be relatively easy and effective.

Fourthly, even if equating enforcement and execution could reconcile the conflicts among the different versions of ICSID Convention, it nevertheless creates new conflicts between the ICSID Convention and other important treaties in the field of international arbitration, *inter alia* the

New York Convention. The New York Convention was enacted in 1958, eight years before the ICSID Convention and was referred to as a significant model when the ICSID Convention was drafted. As the most widely ratified treaty regarding international arbitration, the New York Convention is in an undoubtedly critical position and thus for subsequent treaties in the same field the reconciliation with the New York Convention is presumed as a necessary requirement. As a matter of fact, the ICSID Convention does show a pursuance of the harmony with the New York Convention. For instance, the grounds of ICSID annulment proceedings actually contain no innovation deviating from the grounds for refusal of recognition and enforcement under the New York Convention Article V.³¹⁸ From this perspective, in interpreting the ICSID Convention, the meaning of the same word used in the New York Convention should be taken into account. Under the New York Convention, enforcement means nothing but the declaration of enforceability of an arbitral award. Thereby, the view that enforcement equals execution does not conform to the New York Convention and should not be deemed as an appropriate interpretation. Finally, although the French version of the ICSID Convention reveals no difference between enforcement and execution on the face of Article 54, a French court nonetheless adopted a position that expressly distinguishes these two terms. In the case *Benvenuti & Bonfant v. Congo*, the Paris Cour d'appel stated in the decision that the lower court is limited to determine the authenticity of the award in the enforcement proceeding, and in latter part held that the issues of immunity concerns only execution but not enforcement.³¹⁹ Accordingly, the notion that the French version of the ICSID Convention requires a reading equating enforcement and execution is defeated by the French court practice.

³¹⁸ It is worth noting that ICSID does not contain public policy and arbitrability as the grounds for annulment, which however are the grounds for refusing recognition and enforcement under Article V of the New York Convention.

³¹⁹ Edward Baldwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, JOURNAL OF INTERNATIONAL ARBITRATION 23(1) 1–24 (2006).

The above pro-con analysis regarding the interpretation that equals enforcement to execution shows that this is not a helpful position given the limited advantage and the many more drawbacks.

- ***Opinion 3: Enforcement means declaration of enforceability***

Concurrence of the above point of view has been seldom found in other scholarly articles. A more widely accepted position is that enforcement is independent from execution—the former refers to the declaration of the arbitral award’s enforceability, and the latter is a step afterwards, which focuses on the real collection of assets as the award-granted damages. This understanding of the word ‘enforcement’ is in compliance with the New York Convention. Scholars and national courts also commonly adopt this position.

In the book *Guide to ICSID Arbitration*, the authors Lucy Reed, Jan Paulsson and Nidel Blackaby stress the distinction between enforcement and execution by stating that:

*Under the Convention, the recognition and enforcement of ICSID awards, on the one hand, and their execution, on the other, are distinct procedures. Typically, a prevailing party seeking to collect under an award 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.*³²⁰

Broches, despite using ‘enforce’ in a broader sense as afore-mentioned, also expressed that the word ‘enforce’ in Article 54(1) means that the pecuniary obligations ‘shall be enforceable’.³²¹

In the “*Recommended procedures for recognition and enforcement of international arbitration awards rendered under the ICSID Convention*”, the Committee on International Commercial Disputes of the New York City Bar mentions the debates regarding the meaning of enforcement

³²⁰ LUCY REED, JAN PAULSSON, AND NIGEL BLACKABY, *supra* note 28. at106.

³²¹ History of the ICSID Convention, Vol.II, World Bank ICSID, 1970, p.519

under the ICSID Convention and clearly isolates the three terms from each other. The report states as follows:

This Committee views recognition, enforcement and execution in the ICSID award context as points progressing along a single continuum as follows: (1) —recognition refers to confirmation or certification of an ICSID award as a final and binding disposition of claims, with res judicata effect; (2) —enforcement refers to converting the ICSID award into a judicial judgment that orders an award debtor to comply with the award, including paying any monetary sum due; and (3) —execution refers to coercive measures that an award creditor may take when an award debtor refuses to pay the converted award voluntarily.³²²

Some national courts hold the same opinion when dealing with the enforcement of ICSID awards. Besides the Paris Cour d'appel's position expressed in the *Benvenuti & Bonfant* case as mentioned above, the US District Court for the Southern District of New York in the decision of the case *LECTCO v. Liberia* used the words 'enforcement' and 'execution' obviously in different meanings by saying that there is no immunity from enforcement while there is immunity from execution.³²³

Interpreting the term 'enforcement' in Article 54 of the ICSID Convention as referring to the declaration of enforceability is more reasonable in the sense that it comports with its ordinary meaning commonly adopted in the realm of international arbitration. However, one may argue that this interpretation faces a difficulty in resolving the divergence between the English version and the French/Spanish versions of the ICSID Convention. Divergence of wording in different authentic versions is hard to avoid, which is by and large attributed to the intrinsic limitation of languages when a globally uniform definition of a term is lacking. A similar situation exists in

³²² COMMITTEE ON INTERNATIONAL COMMERCIAL DISPUTES, NEW YORK CITY BAR, RECOMMENDED PROCEDURES FOR RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS RENDERED UNDER THE ICSID CONVENTION, (2012), <http://www2.nycbar.org/pdf/report/uploads/20072262-ProceduresforAwardsunderICSID.pdf> (last visited Jun 16, 2014).

³²³ *LECTCO v. Liberia*, U.S. District Court, Southern District of New York, Judgment, 12 December 1986, 2 ICSID Reports 387/8.

the context of the New York Convention, which has five authentic versions in English, Chinese, Spanish, Russian and French. As for Article V of the New York Convention, the English text uses ‘may’³²⁴ and the Chinese, Spanish and Russian version also use the word basically of the same meaning as ‘may’.³²⁵ However, in the French version the relevant part can be translated in English as “recognition and enforcement of the award shall not be refused...unless...”³²⁶ The wording in the French text and other texts are divergent and lead to different readings about the discretion power of national courts—the ‘may’ language allows for discretion, but the ‘shall’ language denies discretion, thus it is nearly impossible to reconcile the difference without going against the ordinary meaning of the word in either French or other languages. As for this kind of dilemma existing both in the ICSID Convention and the New York Convention, it is very difficult to find a sound solution from the textual perspective, but might be easier from the real practice. At least, simply pursuing a superficial consistence of the wordings in different languages should not be the foremost consideration when interpreting the ICSID Convention.

Therefore, in interpreting Article 54 the term ‘enforcement’ is better to be understood as the process declaring an arbitral award’s enforceability. In light of this understanding of ‘enforcement’, the question regarding the ICSID award’s reviewability can be rephrased as that: Is a national court allowed to review an ICSID award in the proceeding of declaring the enforceability of the award, or can the court deny the enforceability of an ICSID award? The answer depends on the interpretation of the provision that equals ICSID awards to final judgments, as well as the relationship between Article 53 and 54.

³²⁴ The relevant language in the English version of the New York Convention Article V is as that “Recognition and enforcement of the award *may* be refused...only if...”.

³²⁵ Jan Paulsson, *May or Must Under the New York Convention: an Exercise in Syntax and Linguistics*, (1998) 14 ARBITRATION INTERNATIONAL, ISSUE 2., pp. 227–230

³²⁶ *Id.*

5.1.4. Assimilating ICSID awards to final court judgments in the enforcement proceedings

Article 54(1) assimilates ICSID awards to final judgments of national courts for the purpose of enforcement. This particular provision only affects the enforcement but not the recognition of an ICSID award. It is an innovation of the ICSID Convention, different from the common practice of enforcing international commercial arbitral awards in most cases governed by the New York Convention. Thus it is worthwhile to examine the purpose, implication and effects of this provision.

The *travaux préparatoires* shed some light on the purpose of the assimilation but also leave some confusion. During the Convention's drafting history, equating an ICSID award to a final judgment had been incorporated in the Preliminary Draft and survived all the subsequent drafts till becoming part of the final text. The purpose of the reference to a court judgment can be inferred from the following statement in the *Report of the Executive Directors on the Convention*:

*The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed.*³²⁷

This shows that the reference to court judgment is mainly for the consideration of execution. Specifically, it meant to ensure that national courts do not have to execute those ICSID awards in the circumstance where the same court judgment would not be executed. It is worth noting that

³²⁷ CHRISTOPH SCHREUER, *supra* note 28. at 1142. The Report of the Executive Directors on the Convention was approved along with the final text of the ICSID Convention by the World Bank and transmitted together with the Convention to all member states of the World Bank. It is part of the *travaux préparatoires* of the ICSID Convention. See [COMMITTEE ON INTERNATIONAL COMMERCIAL DISPUTES, NEW YORK CITY BAR, RECOMMENDED PROCEDURES FOR RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS RENDERED UNDER THE ICSID CONVENTION, \(2012\), http://www2.nycbar.org/pdf/report/uploads/20072262-ProceduresforAwardsunderICSID.pdf \(last visited Jun 16, 2014\)](http://www2.nycbar.org/pdf/report/uploads/20072262-ProceduresforAwardsunderICSID.pdf), and William Kirtley, *The Status of the Report of the Executive Directors on the ICSID Convention*, ICSID Review, (2012), pp. 1–13.

sovereign immunity is the main obstacle of execution that has been envisaged. As explained by Broches, the purpose of assimilating ICSID awards to final judgments is to “leave the rules on state immunity from execution unaffected”.³²⁸

Article 54 only refers to ‘final’ judgment, which is normally subject to no further judicial review.³²⁹ The reference to ‘final judgment’ infers that drafters of the ICSID Convention intended to exclude ordinary judicial remedies against the enforcement of ICSID awards. However, in certain exceptional circumstances, even a final judgment can be denied enforcement in the state where the national laws set forth some exceptions—this is not rare in many jurisdictions. Thus a corollary of Article 54 is that the enforcement of an ICSID award could be resisted in those countries where the same final judgment can be refused enforcement. This explanation is in accordance with the purpose of equaling ICSID awards to court judgments revealed in the statement quoted above. Further, it has been acknowledged during the drafting of the Convention that an ICSID award can be possibly denied enforcement according to national laws regarding the enforcement of a final court judgment. Therefore, the situation that the enforcement of an ICSID award may be subject to certain exceptional court review seems have been fully considered by the Convention drafters. Therefore the text of Article 54 implies that the enforcement of ICSID awards is not automatic but may be denied under national laws.

However, the *travaux préparatoires* also present some contradictory evidence to this position. In the First Draft of the Convention, there was a sentence added to the provision regarding the enforcement issue, stating that no review other than verification of the award’s authenticity

³²⁸ *Id.* at 1140.

³²⁹ *Id.* at 1142, citing Aron Broches, *Awards rendered pursuant to the ICSID Convention: binding force, finality, recognition, enforcement, execution*, ICSID review. 2(2) Fall 1987, pp. 317/8; Aron Broches, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965m Explanatory Notes and Survey of its Application*, 18 Yearbook Commercial Arbitration 627,701 (1993).

would be allowed.³³⁰ This sentence was however deleted afterwards.³³¹ Broches explains that this statement is unnecessary because ‘other portions’ of the provision are sufficiently explicit as to the unconditional enforcement of the award.³³² As for ‘other provisions’, Broches did not indicate any specific articles in the Convention, so it may refer to the rest part of Article 54 or other relative provisions. Nevertheless, as stated above, the provision in Article 54, especially the reference to final court judgments, infers that the enforcement of ICSID awards may not be unconditional because enforcement of final court judgments in most countries are not unconditional. Then the question is whether some other provisions in the ICSID Convention prove the unconditionality of the enforcement of ICSID awards. Among others, Article 53 that expressly excludes appeal and further remedies against ICSID awards raises concern. The following analysis will be devoted to the relationship between Article 53 and 54.

5.1.5. The relationship between Article 53 and Article 54

When reading Article 54 together with Article 53, a question arising is whether Article 53 blocks court review in the enforcement proceedings for ICSID awards. Article 53(1) provides that: “the award shall be binding on parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention”. Schreuer explains that those remedies available under the ICSID Convention are only confined to interpretation, revision and annulment as set forth in Articles 50 to 52.³³³ In this vein, it can be argued that no further review in the national court enforcement proceedings is allowed pursuant to Article 53.

³³⁰ CHRISTOPH SCHREUER, *supra* note 28. at 1140, citing History of the ICSID Convention, Vol.I, World Bank ICSID, 1970, p.248, 252.

³³¹ *Id.*

³³² *Id.* citing Aron Broches, *supra* note 310. at 314.

³³³ CHRISTOPH SCHREUER, *supra* note 28. at 1102

However, the above argument is challengeable if Articles 53 and 54 are deemed as establishing two different and independent obligations, which do not affect each other. This opinion contends that Article 53 only tackles the parties who are directly involved in a specific arbitration case, i.e. the investors and host states, and their obligation is to immediately comply with the ICSID awards. If an ICSID award is brought to the host state's court for enforcement, the court should confirm the enforceability of the award with no further review since complying with the ICSID award is a mandatory obligation for the host state. Article 54 refers to all other contracting states rather than the parties, who are obliged to recognize and enforce ICSID awards through its national courts. Thereby Article 54 applies to the enforcement proceedings in the home state's court or a third member state's court, because they are not the parties directly involved in the ICSID arbitration cases. According to this theory, when an ICSID award is sought enforcement in the host state, no court review is allowed due to Article 53's requirement; when the award is sought enforcement in the home state or a third state, i.e. a forum state, Article 54 applies and court review may be available under the national law. Therefore, even if a forum court exercises scrutiny on an ICSID award and refuses to enforce it, it does not violate Article 53.³³⁴ From this perspective, Article 53 should not form a basis to rebut the reviewability of ICSID awards in the enforcement proceedings.

The relationship between Article 53 and Article 54 is still a debatable question. In my opinion, the view that Article 53 and Article 54 apply to different situations will help ICSID awards to be complied and avoid confusion in the enforcement proceedings. In the later part concerning the enforcement of ICSID awards in the host states, this question will be analyzed in more details.

³³⁴ Stanimir A. Alexandrov, *Enforcement of ICSID Awards: Article 53 and 54 of the ICSID Convention*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 322–337 (2009). pp.322,323. Also see James W Barratt and Margarita N Michael, *supra* note 300.

5.1.6. Standard of review in the enforcement proceedings

Base on the above analysis, court review during the enforcement proceedings concerning ICSID awards is possible under the ICSID Convention. An ensuing question is what should be the standard of review? The above analysis regarding the implication of ‘enforce’ demonstrates that the enforcement proceeding is distinguished from the execution proceeding. Article 54 (3) provides that national laws govern the execution proceedings, thus the standard of review for the execution proceedings can be narrow or broad depending on the governing laws. If Schreuer’s opinion equaling enforcement with execution were accepted, then the above standard or review also applies to the enforcement proceedings. However, given the difference between enforcement and execution that has been explained above, the standard of review for the latter does not affect the former. In accordance with the basic policy of the ICSID Convention that preserve the finality of ICSID awards and facilitate the enforcement proceedings, court review over ICSID awards in the enforcement proceedings must be subject to strict limitations.

The drafting history of the Convention records the confrontation between Broches’ endeavors to exclude court intervention and some member states’ insistence on certain level of court discretion. The final text of the Convention is a compromise of these opponent positions rather than a triumph of either side. But still, enforcing ICSID awards should be much easier than enforcing non-ICSID awards under the New York Convention, and thus the scope of review in enforcing ICSID awards should be narrower than that under the New York Convention. Thereby, review on ICSID awards in the enforcement proceedings should be confined to the extremely rare procedural matters and excluded from any substantive review.

As a conclusion, four points need to be clarified when interpreting Article 54 with regard to the enforcement proceedings of ICSID awards. Firstly, ‘enforce’ or ‘enforcement’ in this context refers to the declaration of the enforceability of ICSID awards. Secondly, in Article 54 there is a loophole that allows court review in enforcing ICSID awards in the forum states in some exceptional situations, but not in the host states,. Thirdly, host states should obey the Article 53 obligation and enforce the ICSID awards against them with no further review. Fourthly, forum courts could only deny the enforcement of ICSID awards based on exceptional procedural matters, and should never review merits of the awards.

However, all of these perceptions are based on a theoretical analysis but are not fully confirmed and implemented in practice. In the following section, states’ practices regarding the enforcement of ICSID awards, *inter alia* the issues of reviewability of ICSID awards, the standard of review and the different application of Article 53 and 54 will be examined.

5.2. States’ Practices regarding the Enforcement of ICSID Awards

During the history of ICSID, voluntarily complying with the awards is the mainstream and thus only a few cases were litigated in national courts for enforcement. Up to now, all of the known enforcement cases were litigated in the United States, the United Kingdom and France. As the most important global business centers, these three countries are the places where many foreign states have their sovereign assets and thus become the popular forum states for enforcing ICSID awards. In this section, the US and France’s national legislations and case laws with regard to ICSID enforcement will be closely examined as they represent the typical examples of common law and civil law countries.

Moreover, China will be under discussion as a possible forum for future ICSID enforcement cases owing to its increasingly important role in the global market as well as its particular legal system. In the past, China was merely a foreign investment's destination, but nowadays it has obtained a 'dual-role' of both a capital importer and exporter. Along with the increasing number of Chinese investors going abroad and more than one hundred BITs signed by China,³³⁵ more ICSID arbitrations raised by Chinese nationals can be expected. In this sense, the Chinese legal environment concerning the enforcement of ICSID awards needs to be investigated.

Besides the forum states, Argentina as the most noticeable host state will also be in the focus of discussion. Since the Argentine government was involved in more than fifty ICSID cases and bears an immense amount of damage, it raises much concern about the enforcement issue, especially when an ICSID award against Argentina is brought to an Argentine court for enforcement. There is not many case law yet, so it is still uncertain whether an Argentine court will hinder the enforcement of an ICSID award against Argentina in a way of imposing judicial review on the award. To verify this risk or reduce this worry, the domestic laws and cases in Argentina deserve detailed analysis.

The analysis regarding states' practices will arrive at two conclusions: (1) in the forum states, although the case laws generally reveal a pro-enforcement stance adopted by many countries, it does not mean the nonexistence of the potential risks of court review, and the risks may become more realistic due to the current backlash against the investment arbitration; (2) as for the host state enforcement proceedings, the ICSID Convention prohibits judicial review on

³³⁵ Till 2015, there are 145 BITs signed by China. See the UNCTAD website, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42>, accessed on October 22, 2015

ICSID awards against the host state, however, some host states reveal hostility towards the enforcement of ICSID awards.

5.2.1. Enforcing ICSID awards in the forum states

As explained above, the U.S., France and China will be analyzed as the typical forum states for the enforcement of ICSID awards. The investigations will focus on the relevant national laws and legal practices in these three countries.

- *The US*

The United States is one of the most popular places for enforcing ICSID awards. The US government faces only a few cases before ICSID,³³⁶ and hitherto no judicial proceeding for enforcement of ICSID awards has been initiated against the United States. However, given that many other respondent states of ICSID cases are believed to have assets in the US and its court has a long history of pro-arbitration stance, seeking for enforcement in this country might be a good choice for prevailing investors. Up to now, there are only a handful of cases concerning the enforcement of ICSID awards, among which four cases, *LETCO*,³³⁷ *Enron*,³³⁸ *Sempra*,³³⁹ *Siag*,³⁴⁰ were decided by the same US court—the federal court in the Southern District of New York.³⁴¹ Given the important role of the US court in enforcing ICSID awards, it is worthwhile to examine

³³⁶ Until June 2014, there have been four cases against the U.S. government, see the list of cases in the ICSID website, available at <https://icsid.worldbank.org/ICSID/FrontServlet>, accessed on June 16, 2014

³³⁷ *LECTCO v. Liberia*, U.S. District Court, Southern District of New York, Judgment, 12 December 1986, 2 ICSID Reports 387/8.

³³⁸ *Enron Corp. v. Argentine Republic*. No. M-82 (S.D.N.Y. Nov. 20, 2007) (order recognizing ICSID award and enftering as a judgment)

³³⁹ *Sempra Energy Int'l v. Argentina Republic*, No. M-82 (S.D.N.Y. Nov. 14, 2007) (order recognizing ICSID award and enftering as a judgment)

³⁴⁰ *Siag v. Republic of Egypt*, 2009 WL 1834562, at *1.

³⁴¹ The other cases being aware of are two French cases: *Benvenuti & Bonfant v. Congo*, *SOABI v. Senegal*, and one UK case *AIG Capital Partners v. Kazakhstan*.

whether these ICSID awards have been subject to judicial review or whether future awards brought in the US for enforcement will be possibly challenged by the US court.

- Applicable laws regarding the enforcement of ICSID awards in the US

The First question that needs to be clarified is the applicable laws for enforcement of ICSID awards in the United States. As for international law, Article 54 of the ICSID Convention regarding the enforcement matter applies, *inter alia* the second sentence in Article 54(1) concerning the special scenario where a contracting state has a federal constitution governs the enforcement proceedings. The relevant part in Article 54 reads, “A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State.”³⁴²

Article 54(2) merely provides the general procedural requirement for the recognition and enforcement proceedings, i.e. a copy of award certified by the ICSID Secretary-General shall be furnished to a competent court or other authority, which the state should have designated for the purpose of recognition and enforcement.³⁴³ Other than that, there is no further detailed guidance for the process of enforcement in the forum country. This vacuum is understandable when considering the difficulty to reconcile the discrepancy of procedural laws in 150 signatory states belonging to either civil or common law systems. Accordingly, Article 69 of the Convention

³⁴² ICSID Convention, Article 54(1)

³⁴³ ICSID Convention, Article 54(2)

provides that “Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.”³⁴⁴

The US is one of the countries that issued such legislation. The 22 US Code § 1650a is entitled ‘Arbitration Awards under the Convention’, which provides that:

(a) Treaty rights; enforcement; full faith and credit; nonapplication of Federal Arbitration Act

An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.

(b) Jurisdiction; amount in controversy

*The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have exclusive jurisdiction over actions and proceedings under subsection (a) of this section, regardless of the amount in controversy.*³⁴⁵

This statute is in compliance with the provision in Article 54(1) stating that “a state with a federal constitution may enforce ICSID awards in or through its federal courts and may provide that such courts should treat the award as if it were a final judgment of the courts of a constituent state”. 22 US Code § 1650a *per se* does not set forth detailed procedural rules but establishes the jurisdiction of federal courts to recognize and enforce ICSID awards, thus the Federal Rules of Civil Procedure (FRCP) should govern the proceedings. The statute also provides that the pecuniary obligation granted by ICSID awards should be given ‘full faith and credit’ as if it were a final judgment of a court in one of the several states. The ‘full faith and credit’ clause is provided in Article IV of the US Constitution and applies to the recognition of state court

³⁴⁴ ICSID Convention, Article 69

³⁴⁵ Available at the U.S. Government Printing Office, <http://www.gpo.gov/fdsys/granule/U.S.CODE-2011-title22/U.S.CODE-2011-title22-chap21A-sec1650a>, accessed on June 16, 2014

judgments in federal court pursuant to 28 US Code § 1738. Further, all of the cases of enforcing ICSID awards in the US were litigated in the federal court in the Southern District of New York, thus the New York Civil Practice Law and Rules (CPLR) also applies.³⁴⁶ All of the above legislations constitute the applicable laws governing the enforcement proceedings of ICSID awards in US courts.

- Reviewability of ICSID awards under US domestic law

The 22 US Code § 1650a for implementing the ICSID convention explicitly excludes the application of the Federal Arbitration Act (FTA), thus ICSID awards are not subject to normal review procedures applying to the enforcement of other arbitral awards. However, some scholars, including Broches, worry that the second sentence in Article 54(1) regarding federal constitutions may open the floodgate for court review on ICSID awards in the United States.³⁴⁷ Generally a final court judgment is not subject to ordinary judicial review. However, under the applicable US law, no matter the Constitutional ‘Full Faith and Credit Clause’, the FRCP or the CPLR, enforcement of a final court judgment issued by a state court can be refused in some exceptional circumstances.

According to Article IV, section 1 of the United States Constitution, “full faith and credit shall be given to the public acts, records and judicial proceedings of every other state”. Equivalent to a final judgment of a state, an ICSID award should thereby be given full faith and credit in another state court. However, some limited exceptions apply to the full faith and credit principle, namely lack of due process, fraud, lack of jurisdiction, inadequate notice of judgment and inadequate

³⁴⁶ See *Siag v. Republic of Egypt*, 2009 WL 1834562, at *1.

³⁴⁷ Aron Broches expressed regret for not having questioned the U.S. proposal of the way to deal with federal constitution, see CHRISTOPH SCHREUER, *supra* note 28. at 1132

opportunity to be heard,³⁴⁸ based on which the enforcement of a final judgment of a sister-state may be rejected.

Under the FRCP, Rule 60(b) enumerates several grounds for the relief from a final judgment, which include:

- (1) mistake, inadvertence, surprise, or excusable neglect;*
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under [Rule 59\(b\)](#);*
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;*
- (4) the judgment is void;*
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or*
- (6) any other reason that justifies relief.³⁴⁹*

The CPLR Article 5402(b) also allows New York court to reconsider a final judgment issued in another state, which provides “A judgment so filed has the same effect and is subject to the same procedure, defenses and proceedings for reopening, vacating, or staying as a judgment of the supreme court of [New York] and may be satisfied in like manner.”³⁵⁰

Therefore a question arises whether an ICSID award would be rejected enforcement in US court based on these above grounds. The mainstream scholarly opinion tends to negate the practical possibility of judicial review on ICSID awards in the United States. This position is underpinned mainly by three points. Firstly, most of the aforementioned exceptions are incorporated in the ICSID Convention as the grounds of annulment. Due to the self-contained feature of the ICSID review mechanism, review based on these matters should be carried out by an ICSID *ad hoc*

³⁴⁸ See Restatement (Second) of Conflict of Laws, ss. 103-105, 113-114, 117

³⁴⁹ FRCP. Rule 60(b)

³⁵⁰ N.Y. CPLR §5402(b)

committee rather than a national court.³⁵¹ Furthermore, even though Article 54 gives some leeway for court review, the review must be confined to extraordinary procedural matters but excluding from any reconsideration in merits.

Secondly, the case law of US courts shows that the threshold for refusing enforcement of a final judgment was set extremely high, strictly limited to ‘exceptional and extraordinary circumstances’ or a ‘grave miscarriage of justice’.³⁵² Thus these narrow exceptions are very unlikely to be applied to the enforcement of ICSID awards given the generally high quality of the award issued by the most eminent arbitrators.³⁵³

Thirdly, in the four cases regarding enforcement of ICSID award, namely, *LETCO*, *Enron*, *Sempra* and *Siag*, the US court granted enforcement immediately without any judicial review, which can be deemed as a reflection of the pro-enforcement stance employed by US courts. Noticeably in the *Siag* case, the decision cited CPLR 5402(b) but did not carry on any review on the award. It conforms to the scholarly interpretation of CPLR 5402(b) that this language “is not intended to expand the scope of review of a judgment that is entitled to receive full faith and credit”.³⁵⁴ It is noticeable, however, since *Enron* and *Sempra* are American cases, the favoring

³⁵¹ COMMITTEE ON INTERNATIONAL COMMERCIAL DISPUTES, NEW YORK CITY BAR, *supra* note 322. *Id.*

³⁵² Edward Baldwin, Mark Kantor, and Michael Nolan, *supra* note 319.p.12, citing *The Curry ex rel. Turner v. Adventist Health System/Sunbelt, Inc.*, 298 F.2d 586 (6th Cir. 2002); *Fox v. Brewer*, 620 F.2d 177 (8th Cir.1980); *United States v. Beggerly*, 524 U.S. 38 (1998).

³⁵³ COMMITTEE ON INTERNATIONAL COMMERCIAL DISPUTES, NEW YORK CITY BAR, *supra* note 322. pp.11-12. It states that: “22 U.S.C. §1650a should not be read to open the door to crative arguments based on narrow exceptions to the full faith and credit that ICSID awards are entitled to receive.”

³⁵⁴ *Id.* at 23, it cites the official commentary in the McKinney’s annotation this this provision in the CPLR, which states that:

The language [of subdivision b] is that the filed judgment is subject in New York to —the same procedures, defenses and proceedings for reopening, vacating or staying as a supreme court judgment is. That’s too sweeping, and would violate the full faith and credit requirement if applied literally. . . . An attempt by New York, in the guise of a motion to —reopen or —vacate the judgment on the presumed authority of CPLR 5402(b), to relitigate the merits despite the presence of jurisdiction in [another] court, would violate the full faith and credit requirement.

enforcement decisions of these two cases have limited effects to demonstrate the US courts' pro-enforcement stance regarding the ICSID awards involving another home state.

Based on the above analysis, although the second sentence in Article 54(1) of the ICSID Convention opens the gate for possible court review on ICSID awards in the enforcement proceedings before US court, the court practices basically diminish the practical possibility.

- ***France***

The United States is by no means the only jurisdiction where the enforcement of a final court judgment might be denied in some exceptional circumstances. In France, the French Code of Civil Procedure Article 595 provides several grounds for the reconsideration of a final judgment, which are actually quite similar to those under US law.³⁵⁵ Noticeably, in the only one French case for enforcement of an ICSID award, *Benvenuti & Bonfant v. Congo*, the Tribunal de grande instance employed a public policy review on the award.

In *Benvenuti & Bonfant*, the Tribunal de grande instance of Paris upheld the claim of enforcing an ICSID award against Congo in France, but asserted that the enforcement is subject to certain condition as that “no measure of execution, or even a conservative measure shall be taken

³⁵⁵ The grounds under Article 595 of the French Code of Civil Procedure are provided as follows:

“1) where it has come to light, subsequent to judgment, that the decision was obtained by fraud on behalf of the party in whose favour it was delivered;

2) where, since the judgment, decisive exhibits which had been withheld by the act of another party were discovered;

3) where the judgment was adjudicated on exhibits which, since the judgment, have been acknowledged or judicially declared to be false;

4) where the judgment was adjudicated on Statements, testimony or oaths which, since the judgment, have judicially declared false.”

See Edward Baldwin, Mark Kantor, and Michael Nolan, *supra* note 335. at 13.

pursuant to the said award, on any assets located in France, without the prior authorization of this Court.”³⁵⁶

Subsequently, the claimant requested the Tribunal de grande instance to remove this condition. The court denied this request and stated that the ICSID award does not contain anything that is in conflict with law and public order.³⁵⁷ This shows that the court considered public policy as a review ground when it determines the enforcement of an ICSID award. This position conflicts with the aforementioned standard of national court review regarding the enforcement of ICSID awards, i.e. only extraordinary procedural matters can be considered. The court practice here was probably attributed to the language of the French version of the ICSID Convention, which does not distinguish ‘enforcement’ and ‘execution’ in Article 54. Since Article 54(3) provides that execution of ICSID awards is governed by national laws, a French court may mistakenly consider the public policy matter in the enforcement proceedings as in the execution proceedings.

However, the condition for enforcement imposed by the lower court were denied in appeal. The Paris Cour d’appel expressly distinguished the enforcement and execution by stating that the lower court is only allowed to review the authenticity of an ICSID award for the purpose of enforcement, and further clarified that the issue of immunity only concerns the execution, but not the enforcement of ICSID awards.³⁵⁸

Therefore, in theory the enforcement of ICSID awards in France would be subject to court review because 1) the French law provides for exceptions of enforcing final judgments; 2) the

³⁵⁶ *Id.* at 6, it states in footnote 14 that: “the December 23, 1980 decision of the Tribunal de grande instance of Paris refusing enforcement and execution is not published, but significant components of that decision are found at 1 ICSID Rep. 370 and 108 Journal Du Droit International. 843.”

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 7

French version of the ICSID Convention does not differentiate ‘enforcement’ and ‘execution’, thus even when a claimant only seeks enforcement rather than execution of an ICSID award, the court may exercise public policy review on the award relying on Article 54(3), which sets forth the national law as the governing law for the execution proceeding. Nevertheless, legal practice in France has sent out a signal manifesting the French court’s stance of immediately enforcing an ICSID award without imposing any court review.

- *China*

Up to now there has been no concluded ICSID case against the Chinese government, nor any ICSID award sought for enforcement in China. However, as an active player in the international investment field with increasing importance, more involvement of China in the ICSID system can be anticipated. When Chinese government ratified the ICSID Convention in 1993, it made a reservation as to the jurisdiction of the ICSID arbitration. In the notification sent to the ICSID Secretary-General, it states “Pursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalization.”³⁵⁹

The similar restriction was also incorporated into most BITs entered into by China during the late 20th Century. Those BITs with restrictive dispute-resolution provisions were latterly called the old generation of Chinese BITs. However, along with more and more Chinese companies investing abroad, the restriction on investment arbitration jurisdiction became an unexpected

³⁵⁹ See the ICSID website, ICSID Membership—China, <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=ST30&tab=desig>, accessed on October 23, 2015

shackle for Chinese investors seeking remedy on international level. In this situation, the government began to negotiate broader dispute settlement provisions in BITs. For example, China amended its BITs with Netherlands in 2001 and with Germany in 2003, consenting to submit all investment disputes, at the request of foreign investors, to international arbitration. The new generation of Chinese BITs accepting ICSID arbitration for all investment disputes will help China to be better involved into the global market.

Before an ICSID award is brought in a Chinese court for enforcement, it is helpful to make some investigation into the legal system in China regarding this purpose. Although Article 69 of the ICSID Convention provides that a contracting state may issue legislation to implement the Convention, there has been no such legislation in China. Without specific guidance, the provision in Article 54 that equating ICSID awards to domestic final judgments directs to the application of the relevant parts in the PRC Civil Procedural Law (CPL) regarding enforcement of a final court judgment. Same as the US and France, the CPL provides limited exceptions based on which the enforcement of a final court judgment may be denied. Article 177 of the CPL states that:

If the president of a people's court at any level finds some definite error in a legally effective judgment or order of his court and deems it necessary to have the case retired, he shall refer it to the judicial committee for discussion and decision. If the Supreme People's Court finds some definite error in a legally effective judgment or order of a local people's court at any level, or if a people's court at a higher level finds some definite error in a legally effective judgment or order of a people's court at a lower level, it shall have the power to bring the case up for trial itself or direct the people's court at a lower level to conduct a retrial.

And Article 178 provides “If a party considers that a legally effective judgment or order has some error, he may apply to the people's court which originally tried the case or to a people's

court at the next higher level for retrial; however, execution of the judgment or order shall not be suspended.”

The above provisions only mention the general term ‘error’ but without further specification, which gives judges a wide space for discretion. Accordingly, some scholars note that an ICSID award enforcement action in a Chinese court would face some legal defenses.³⁶⁰ However, this position would be subject to the same objection raised under the US and France scenario, i.e. substantive review in the enforcement proceeding is not allowed under Article 54 of the ICSID Convention. It is also noteworthy that even in the annulment proceeding, ‘error’ in an award is beyond the scope of review.³⁶¹

Furthermore, the Chinese legal practice in terms of the enforcement of foreign arbitral awards under the New York Convention has shown a pro-enforcement stance. The Supreme People’s Court issued an official document named “Circular on Questions Concerning the Handling of Foreign Arbitration”, requiring lower courts to report to the higher courts before issuing an order refusing the enforcement of a foreign arbitral award; if the higher court agrees with the lower court’s decision, the Supreme Court must be consulted.³⁶² This procedure reveals that Chinese courts exercise great caution regarding the refusal of the enforcement of foreign arbitral awards, which could provide some positive confidence regarding the enforcement of ICSID awards in China.

³⁶⁰ Julian Ku, *The Enforcement of ICSID Awards in the People’s Republic of China*, 6 CONTEMPORARY ASIA ARBITRATION JOURNAL 31–48 (2013). p.42.

³⁶¹ See ICSID Convention Article 53(1)

³⁶² Julian Ku, *supra* note 360 at 41. It cites “Zui Gao Ren Min Fa Yuan Guan Yu Ren Min Fa Yuan Chu Li She Wai Zhong Cai Ji Wai Guo Zhong Cai Shi Xiang You Guan Wen Ti Tong Zhi” [Circular on Questions Concerning the Handling of Foreign Arbitration].

Today more and more Chinese scholars have called for the Supreme People's Court to issue an interpretation concerning the implementation of the ICSID Convention,³⁶³ with which it will be better predictable of the position employed by Chinese courts regarding the enforcement of ICSID awards.

5.2.2. Enforcing ICSID awards in the host states

Argentina tops the list of defendant states of ICSID cases and bears the largest number of damages awarded by ICSID tribunals.³⁶⁴ The boom of ICSID cases against Argentina began from the financial crisis occurring in the late 1990s, during which the Argentine government employed several expedient measures to save the domestic economy, such as the infamous 'pesification', which set the exchange rate between the US dollar and the Argentine peso as 1:1.³⁶⁵ These governmental actions caused huge losses to foreign investors and thereafter many investors brought claims against Argentina in the ICSID based on concession contracts or investment treaties. During the past years, Argentine government lost more ICSID arbitration cases than they won. Facing the huge amount of damages owing to investors and the domestic economic hardship, the Argentine government's willingness and ability to honor ICSID awards are substantially cast in doubt.

The above analysis shows that if an ICSID award disfavoring Argentina is brought to the home state or a third state for enforcement, the courts there will probably adopt a pro-enforcement

³⁶³ Julian Ku, *supra* note 360. at 42; Xiao Fang, *Guo Ji Tou Zi Zhong Cai Cai Jue Zai Zhong Guo De Cheng Ren Yu Zhi Xing* [Recognition and Enforcement of International Investment Arbitration Award in China], 6 *Jurists Review* 94, 95 (2011)

³⁶⁴ [Latest Developments in Investor-State Dispute Settlement - Unctad](http://unctad.org/en/Docs/webdiaeia20113_en.pdf), available at unctad.org/en/Docs/webdiaeia20113_en.pdf, accessed on December 7, 2012

³⁶⁵ Bechy L. Jacobs, *Pesification and Economic Crisis in Argentina: The Moral Hazard Posed By a Politicized Supreme Court*, UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW, VOL. 34, NO. 3, 391 (2003).

stance. However, if the award is brought to Argentina for enforcement, it is worried by some people that the Argentine government and courts may take various measures to resist the enforcement. One possible measure is to build Argentine court's authority on reviewing ICSID awards based on Article 54 of the ICSID Convention that allows judicial review in certain circumstances, and then hinder the enforcement relying on public policy or the unconstitutionality argument.

- Whether Article 54 applies when Argentine courts enforce an ICSID award against Argentina?

To determine whether an Argentine court has jurisdiction on reviewing an ICSID award disfavoring Argentina, the primary question is whether Article 54 of the ICSID Convention applies to the enforcement proceedings. As has been explained, theoretically Article 53 and 54 create two different obligations for different subjects: the former only applies to arbitration parties, who bear the obligation to comply with the ICSID awards, and the latter refers to all other contracting states, who have the obligation to recognize and enforce an ICSID award. A corollary of this view is that Article 53 requires the host state's court not to exercise any judicial review on the ICSID award against its government but only to enforce it immediately, while Article 54 allows possible court review when the award is brought to a forum court (in the home state or a third state) for enforcement. However, whether Article 54 applies to the enforcement of an ICSID award in the host state is arguable in practice. Regarding this issue, Argentina supports the applicability of Article 54, while some scholars and the ICSID per se support the opposite.

- (1) Argentina's position that supports the applicability of Article 54

The Argentine government holds the view that Argentine law applies to the enforcement of an ICSID award against Argentina. This position has been expressed by the Argentine government in several ICSID cases and other contexts. For instance, in the case *Continental v. Argentina*,³⁶⁶ both parties applied for annulment after the award was rendered. In Argentina's application for a stay of enforcement of the award, it denied the allegation raised by Continental regarding its non-compliance with the award of *CMS v. Argentina*³⁶⁷ based on the argument that "CMS has refused to follow the administrative formalities under Argentine law for a final decision of a local court to be paid, as provided for by Article 54 of the ICSID Convention."³⁶⁸

A similar assertion was also contained in other cases, including *Enron v. Argentina*,³⁶⁹ *Vivendi v. Argentina*³⁷⁰ and *Sempra v. Argentina*.³⁷¹ The motive behind Argentina's insisting on the applicability of Argentine law probably lies in the attempt to establish Argentine local court's jurisdiction on reviewing ICSID awards in order to resist the enforcement. This purpose becomes clearer in light of some high-level Argentine officials' statements. The Ministry of Economy of Argentina claimed that decisions of arbitral tribunals against the country would be "subject to local court review in Argentina if they disturb public order because they are unconstitutional, illegal or unreasonable or if they were handed down in violation of the terms and conditions

³⁶⁶*Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9)

³⁶⁷*CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8)

³⁶⁸*Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Argentina's Application for a Stay of Enforcement of the Award (23 October 2009), para 7(e).

³⁶⁹*Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), First Stay Decision, para 54-85; see *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Argentina's Application for a Stay of Enforcement of the Award (23 October 2009), footnote 27.

³⁷⁰*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Vivendi Stay Decision ¶¶ 31-37, see *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Argentina's Application for a Stay of Enforcement of the Award (23 October 2009), footnote 27.

³⁷¹*Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (March 05, 2009), para 32-53.

undertaken by the parties”.³⁷² Argentina’s former Attorney General, Horacio Rosatti also contended that ICSID does not have jurisdiction over Argentina if the Argentine Supreme Court found an award incompatible with the Argentine Constitution.³⁷³ These words reveal that Argentine government opines that domestic law should govern the enforcement of ICSID awards against it. If a prevailing investor has to go through some special court procedures required by Argentine law to enforce an ICSID award against Argentina, Argentine government may use public policy argument or the unconstitutionality argument to challenge the ICSID award and hinder the enforcement of the awarded pecuniary damages. These two arguments that might be employed by Argentine government in domestic court proceedings to challenge ICSID awards against it are respectively analyzed below.

The Argentine National Civil and Commercial Procedure Code (CCPC) contains a section on ‘Enforcement of Decisions’, under which Chapter I is for ‘Argentine Tribunals Decisions’ and Chapter II is for ‘Foreign Tribunals Decision—Foreign Arbitral Tribunals Awards’.³⁷⁴ Supposing Article 54 of the ICSID Convention applies to the enforcement proceedings of ICSID awards in Argentine courts, CCPC Chapter I should govern the proceedings since Article 54 requires an ICSID award to be enforced as if it were a final judgment of an Argentine court. Chapter I requires parties to meet some formality requirement before having a final judgment enforced and provides some grounds based on which the enforcement of a judgment could be denied. The grounds include that: (1) the award is forged; (2) it was paid in full; (3) there is an agreement between the parties to hold the enforcement of the award, or to reduce the award

³⁷²Argentina Economy: Ministry Denies Foreign Investors Discrimination, EIU Views Wire, October 26, 2004. Also see Edward Baldwin, Mark Kantor, and Michael Nolan, *supra* note 319.at 2.

³⁷³ *Id.* at 16.

³⁷⁴ Javier Robalino, *Enforcement of Foreign Awards against Sovereigns in South America--the Cases of Argentina and Ecuador*, in ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 425–451 (Doak Bishop ed., 2009). p.431.

amount, or a waiver, or (4) the enforcement was sought in breach of the statute of limitations.³⁷⁵

If CCPC Chapter I governs the proceedings of enforcing an ICSID award, the award may be subject to court review based on the above grounds.

Besides the CCPC grounds for denying enforcement of final judgments, various public policy matters under the current Argentine legal system might be used to challenge ICSID awards, namely the Constitutional rules and principles, general principles of law,³⁷⁶ good morals and justice standards,³⁷⁷ emergency law³⁷⁸ and reform laws.³⁷⁹ After the Argentine Constitution was amended in 1994, it is not a wild guess that the validity of ICSID awards might be challenged before an Argentine court based on the argument of unconstitutionality. Moreover, Ecuador and Bolivia also amended their Constitution on 2008 and 2009. In virtue of their anti-ICSID stance, the possibility of using the unconstitutionality argument to attack ICSID awards in these countries is not illusory.

³⁷⁵ *Id.* at 432.

³⁷⁶ See Carlos E Alfaro, Pedro Lorenti, *Argentina: The Enforcement Process of the ICSID Awards: Procedural Issues and Domestic Public Policy*, Mondaq, , June 2005, which states: “Article 14, Section 2nd of the Argentine Civil Code instructs the judges to recognize foreign court rulings only if they are compatible with the general principles embodied by the domestic law.

³⁷⁷ See Carlos E Alfaro & Pedro Lorenti, ARGENTINA: THE ENFORCEMENT PROCESS OF THE ICSID AWARDS: PROCEDURAL ISSUES AND DOMESTIC PUBLIC POLICY MONDAQ (2005), <http://www.mondaq.com/x/32803/Government+Contracts+Procurement+PPP/The+Enforcement+Process+Of+The+ICSID+Awards+Procedural+Issues+And+Domestic+Public+Policy> (last visited Nov 5, 2015). It states that the good moral and justice standards are widely incorporated to Argentine law.

³⁷⁸ See *Id.* It states: “The enactment of the so-called “emergency laws” became a regular practice in Argentina during the 90’s, and grew ever since. Theoretically, they are the State’s ultimate resource to face historical periods of terminal crises. In the Argentine practice, however, they were transmuted into usual legal tools that the administration in office may use to advance high-impact policy measures. The privatization process of State-owned companies during the 1990 decade – which in its moment was revolutionary - was performed under the umbrella of this type of regulations—mainly, laws 23.696 and 23.697 of 1989-. So it was the currency devaluation and the compulsory conversion to “pesos” of U.S. dollars obligations –the so-called “pesificación”- under law 25.561 of 2002 and the Presidential decree 214/2002. It is a common feature of these “emergency laws”, that they declare themselves to be “public policy laws” and that, therefore, their provisions are mandatory and prevail over the remaining legislation and the will of the people.”

³⁷⁹ See *Id.* It states: “This category makes reference to laws implementing policy decisions deemed of high relevance, due to which the government wishes to provide them with the features of “matters of public policy”, mainly their mandatory condition. The best example is law 23.928 of 1992, which regulated the so-called “convertibility” of the Argentine currency and pegged its value to the U.S. dollar’s, at a conversion rate of 1 to 1, finally abrogated by the above mentioned law 25.561 of 2002.”

The unconstitutionality argument can be based on two theories. The first theory is concerning Argentina's legal hierarchy. According to Section 75.22 of the Argentine Constitution, international treaties supersede the laws but are subordinated to the Constitution. Section 27 further stipulates that "the Federal Government is under the obligation to strengthen its relationships of peace and trade with foreign powers, by means of treaties in accordance with the principles of public law laid down by this Constitution". Pursuant to these clauses, the government may argue that the ICSID Convention as an international treaty should be subject to the public law principles of the Argentine Constitution.³⁸⁰ The second theory is regarding the amendment of the Argentine Constitution. The Argentinean Constitution was reformed in 1994, and the ICSID Convention was ratified thereafter, hence the new Constitution should apply to the procedure of ratifying the ICSID Convention. There is a special procedural requirement in the new Constitution that applies to "treaties of integration which delegate powers and jurisdiction to supranational organizations". Given the requirement of the transfer of domestic jurisdiction to the ICSID tribunal, the ICSID Convention can be deemed as a treaty of integration, which should be subject to the special procedure required by the Constitution. Nevertheless, the special procedure requirement has not been satisfied, thus it can be argued that the ratification of the ICSID Convention by Argentine government was unconstitutional.³⁸¹ If an ICSID award against Argentina is sought enforcement in an Argentine court, the Argentine government may argue that the enforcement of the award is unconstitutional.

(2) ICSID and scholarly opinions that refute the applicability of Article 54 and the unconstitutionality argument

³⁸⁰ *Id.*

³⁸¹ *Id.*

The annulment committee of *Continental v. Argentina*³⁸² expressly refutes the applicability of Article 54 of the ICSID Convention to the enforcement of ICSID awards in the host state. In the *Continental* case mentioned above, Argentina said that according to Article 54 the prevailing investor has to meet some formality requirement provided by Argentine law in order to get the ICSID award enforced. The *ad hoc* committee disagreed with Argentina's contention and held that "The Committee notes that in three other cases, ad hoc committees have found that this position of Argentina is inconsistent with Argentina's obligation under Article 53 of the ICSID Convention to carry out without delay the provisions of the award without the need for enforcement action under Article 54 of the ICSID Convention."³⁸³

That is to say, Argentina as the state party shall fulfill the obligation provided by Article 53, i.e. complying with the ICSID award without delay, which shall not be negated by resorting to Article 54. This ruling reinforces the distinction between the two obligations established by Article 53 and 54 respectively. Accordingly, in an Argentine court the enforcement proceeding regarding an ICSID award against the government is regulated by the special procedure established by the ICSID Convention rather than Argentine law, and thus the court has no jurisdiction to deny the enforceability of the award by relying on Argentine law.

Some scholars also criticize the invocation of domestic law to hinder the enforcement of ICSID awards in the host states. For instance, Wenhua Shan opines that domestic law cannot be invoked in the first place provided the purpose is to deny the effect of the ICSID Convention. The Vienna Convention on the Law of Treaties (1969) Article 27 provides that "a State may not invoke the provisions of its internal law as justification for its failure to perform according to treaty". It is

³⁸² *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9

³⁸³ *Continental Casualty Company v. Argentine Republic*, Decision on Argentina's Application for a Stay of Enforcement of the Award (23 October 2009), para 12.

evident that, in case the argument of unconstitutionality is established, the Argentine government could adopt it to refuse payment of the huge amount of damage awarded by ICSID tribunals. If this is the way that the unconstitutionality argument is utilized, the Argentine Constitution cannot be invoked pursuant to the Vienna Convention (1969). In addition, Article 46 of the Vienna Convention (1969) states that: “A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance”. A violation is only “manifest” if “objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith”.³⁸⁴ This condition is particularly high, thus it must be very difficult to prove that the Argentine government’s ratification of ICSID was a manifest violation. Thus, Shan asserts that in any sense the unconstitutionality argument will not succeed. As for the unconstitutionality argument based on the amendment of the Argentine Constitution, some observers contend that ICSID Convention does not fall into the category of “integration treaty”, but merely a treaty of “cooperation”, so that the special procedure for ratifying the ICSID Convention does not necessarily to be fulfilled.³⁸⁵ The above analysis defeats the justification of relying on host state’s domestic procedural law or constitutional law to scrutinize ICSID awards.

In summary, although Argentine government advocates the applicability of Article 54 of the ICSID Convention to the enforcement proceedings in the host state, this opinion lacks theoretical basis and has been refuted by ICSID per se. Thus, if an ICSID award against Argentina is sought enforcement in an Argentine court, the court should declare the enforceability of the ICSID

³⁸⁴ Wenhua Shan, *supra* note 36. at 5.

³⁸⁵ Carlos E. Alfaro & Pedro M. Lorenti, *The Growing Opposition of Argentina to ICSID Arbitral Tribunals: A Conflict between International and Domestic Law?*, 6 J. WORLD INVEST. & TRADE 417 (2005). pp. 425-29. Also see Wenhua Shan, *supra* note 36. footnote 42.

award without any review based on its national laws. As a conclusion, when an ICSID award is sought enforcement in the host state, the respondent government should not invoke Article 54 of the ICSID Convention to hinder the enforcement, but should honor the award as required by Article 53.

- *The Cartellone case*

Although theoretical analysis denies the rationality for Argentine courts to review ICSID awards in the enforcement proceedings, it is still worrisome based on the resistant gesture of Argentina that the court may carry on judicial review regardless of violating the ICSID Convention. In many scholarly articles, the Argentine case *Jose Cartellone Construcciones v. Hidroelectrica Norpatagonica S.A.* has been frequently mentioned as a sign implying this possibility. However, despite its popularity, this point of view deserves cautious reexamination.

The *Cartellone* case was decided by the Federal Supreme Court of Argentina on June 1, 2004. In this case, the dispute concerns a contract between an Argentine construction company and a state-owned company. In the arbitration clause of the contract, both parties agreed that the arbitral award would not be subject to appeal. The arbitration tribunal found in favor of the claimant and rendered an award requiring the respondent to pay the amount of damage for the adjustment of a credit and the application of legal interest rates.³⁸⁶ Then the claimant sought enforcement of the award in an Argentine court. The respondent challenged the date from which the interest was calculated, whereas the claimant argued that the award was not subject to appeal as agreed by both parties and thus the court cannot review merits of the award. The Supreme Court of Argentina declared the award void for the reason that the date from which the interest

³⁸⁶ Silvia Karina Fiezzoni, *supra* note 45. at 60

was calculated had gone beyond the relevant terms of reference, and held that the interest rate applying to the defendant's debt was almost four times higher than the amount contractually agreed, which thus would produce an unreasonable result.³⁸⁷ Regarding the issue of the waiver to the right of appeal the court invoked the Argentina Civil Code Article 827, which provides that "rights granted with the aim at public policy cannot be waived", and determined that the waiver at issue was invalid. More specifically, the court stated that: "[the arbitrator's] decision can be judicially challenged when it is unconstitutional, illegal or unreasonable".³⁸⁸

Some authors argue that the Argentine Supreme Court established a precedent through the *Cartellone* case, namely that Argentine judicial authorities can review an arbitral award even when the right of appeal has been waived, which causes concern that the door is open for local court review regarding the enforcement of ICSID awards in Argentina despite the explicit requirement of non-appealability set forth in Article 53 of the ICSID Convention.³⁸⁹

Yet this argument is very weak in virtue of at least two shortcomings. Firstly, *Cartellone* specifically concerns a local arbitration rather than an international one, and the waiver of appeal was based on contractual agreement. Unlike this fact pattern, the ICSID award is rendered by an international judiciary authority, with the basis of consent given by an investment contract between investor and host-state, or investment treaties between countries. Thus it is doubtful whether the *Cartellone* decision can be invoked as a proper precedent when it comes to the enforcement of ICSID awards.

³⁸⁷New Argentine Supreme Court Decision Concerning Judicial Review of Arbitration Awards: A Preliminary, The Newsletter of Marval, O'Farrel & Mairal, June 30, 2004. Also see Bechy L. Jacobs, *supra* note 365.

³⁸⁸ *Id.*

³⁸⁹ This opinion can be found in several articles, e.g. Edward Baldwin, Mark Kantor, and Michael Nolan, *supra* note 319.at 15; Javier Robalino, *Enforcement in South America, The Cases of Argentina and Ecuador* - Chapter 16 - Enforcement of Arbitral Awards Against Sovereigns, JurisNet, 2009, p.435.

Secondly, the court of the *Cartellone* case used no peculiar line of reasoning but only conformed to the common practice regarding the same issue in many jurisdictions. As for the scenario where parties mutually agreed to exclude appeals in the post-award proceedings, the mainstream position is to void the party-agreed waiver of appeal and implement judicial review on the arbitral award. According to the in-depth analysis of Tibor Varady, “party autonomy in connection with arbitration has hitherto normally been perceived as autonomy regarding the arbitration proceedings proper, rather than party autonomy regarding court control of the award”,³⁹⁰ thus in countries where there are no legislative provisions allowing contractual restriction of judicial review, courts are reluctant to respect parties’ agreement on exclusion of appeal.³⁹¹ Several cases in different countries exemplify this consideration. In the case *Methanex Motonui Ltd v. Spellman* (2004),³⁹² the New Zealand Court of Appeal determined not to respect a contract stipulation of excluding appeal.³⁹³ In two US cases, *Hoelt v. MVL Group Inc. (2003)*³⁹⁴ and *Mactec v. Gorelick (2005)*,³⁹⁵ none of the contractual clauses regarding non-appealability was upheld by courts.³⁹⁶ An Indonesian court also rendered a similar decision to annul an arbitral award when the parties agreed to eliminate the right of appeal.³⁹⁷ Thus, the Argentine *Cartellone*

³⁹⁰ Tibor Varady, *The Elusive Pro-Arbitration Priority in Contemporary Court Scrutiny of Arbitral Awards*, 2 in COLLECTED COURSES OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW 341–474 (2009). See Section II. The Impact of Party Autonomy on the Scope of Court Scrutiny of Arbitral Awards, p. 20.

³⁹¹ *Id.* pp.17-20

³⁹² *Methanex Motonui Ltd v. Spellman*, CA 171/03, 3 NZLR 454 (2004)

³⁹³ Tibor Varady, *supra* note 390. at 18

³⁹⁴ *Hoelt v. MVL Group Inc.* 343 F.3d 57 (2d Cir. 2003)

³⁹⁵ *MactecInc. v. Steven Gorelick*, 427 F. 3d 821 (October 26, 2005)

³⁹⁶ Tibor Varady, *supra* note 390. pp.18-19

³⁹⁷ Edward Baldwin, Mark Kantor, and Michael Nolan, *supra* note 319. at 17. The article states that “In April 1998, Karaha Bodas Corp. (KBC) instituted arbitration proceedings against Perusahaan Minyak Dan Gas Bumi Negara (‘Perusahaan’), an Indonesian State-owned company, pursuant to an agreement containing an arbitration provision. That agreement provided for UNCITRAL ad hoc arbitration and limited the rights of the parties to challenge any resulting award. Despite this limitation, Pertamina sought to vacate the award in Switzerland and Indonesia. The Swiss court rejected Pertamina’s action on procedural grounds. The Indonesian district court, however, annulled the award, finding in part that the award was contrary to the award. Recently, though, the Indonesian Supreme Court overturned that lower court decision, finding that the district court had no “authority to examine and adjudicate” the award to KBC.”

case is in line with these court decisions mentioned above and should not be deemed as a particular signal of Argentina's potential tendency to put ICSID awards under local court scrutiny.

In summary, some of Argentina's anti-ICSID comments and actions may appear as indications of the state's resistance towards the enforcement of ICSID awards; in addition, some scholarly opinions aggregate this anxiety. However, the ICSID Convention and the general international law principles set forth in the Vienna Convention leave no viable possibility for court review on the ICSID awards against the Argentine government when an Argentine court enforces the awards.

Summary

Section 1 of this chapter shows that, contrary to the popular assumption that the ICSID Convention establishes an automatic enforcement proceeding, the interpretation of Article 54 reveals a loophole embodied in the provision that allows for court review on ICSID awards in the enforcement proceedings in some exceptional circumstances. This assertion should be clarified with further explanations. Firstly, the 'enforcement' in the context of Article 54 refers to the court's declaration of the enforceability of the ICSID awards. Secondly, Article 54 applies only when an ICSID award is sought enforcement in a forum state, which can be the investor's home state or a third state. If the award is brought to the host state for enforcement, the respondent government should not invoke Article 54 to put the award under judicial review; rather it should comply with the awarded obligations pursuant to Article 53. Thirdly, despite that judicial review on ICSID awards is possible during the enforcement proceedings in a forum state, the scope and standard of review should be strictly confined to exceptional procedural matters.

Section 2 firstly examines the legal systems and practices of the US, France and China as the significant forum states where ICSID awards were or will be sought enforcement. It shows that, although judicial review on ICSID awards might be available in these countries, a generally pro-enforcement stance can be envisaged in the forum states. As for the scenario of enforcing ICSID awards in the host states, Argentina is under investigation as a typical example. It appears that Argentine government tends to rely on Article 54 of the ICSID Convention and hinder the enforcement of ICSID awards against it through judicial review in its national court. This attempt can be defeated for lacking of theoretical justification and the rejection of ICSID per se. However, due to the loophole in Article 54, the unclear relationship between Article 53 and Article 54, and especially the increasing tendency of the backlash against investment arbitration, refusing enforcement of ICSID awards in the forum states and the host states is not unlikely in the future. Chapter 6 will discuss the execution proceedings that contain other challenges to the effectiveness of ICSID awards and the proposed solutions regarding these challenges will be discussed in Chapter 7.

Chapter 6

Execution of ICSID Awards and Sovereign Immunity

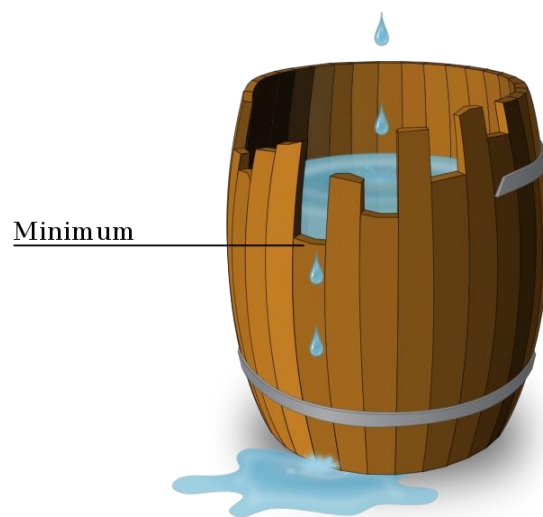
The first chapter of this thesis explains that, if the respondent party refuses to honor an ICSID award, the prevailing party can bring the award in any ICSID member state's court for recognition (confirming the award's *res judicata* effect), enforcement (declaring the award's enforceability) and execution (court-assisted collection of the money judgment). As has been analyzed in the above chapters, the ICSID Convention requires an ICSID award to be automatically recognized and in principle prevents judicial review in the enforcement proceedings unless in some exceptional situations. In contrast, when it comes to the execution stage, the shield of the self-contained feature vanishes and the sovereign states may impose direct and significant influence on an ICSID award in two ways: firstly, the municipal law of the state where execution is sought determines whether an ICSID award can be executed in that state;³⁹⁸ and secondly, the respondent state can plea sovereign immunity to avoid some of its assets from being seized.³⁹⁹

Compared to the commercial arbitration which is between two private parties, the ICSID arbitration has one private party and one state party. Thus, sovereign immunity is not a matter involving in the execution of commercial arbitral awards, but will come to play when an ICSID award is sought execution. If the respondent state successfully invokes sovereign immunity, the

³⁹⁸ See ICSID Convention, Article 54(3): "Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."

³⁹⁹ See ICSID Convention, Article 55: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

prevailing party may only have a favorable award in paper but no real money in reality. The self-contained feature does not extend to the execution stage, thus when an ICSID award needs to be executed the ICSID arbitration comes to the weak point owing to the sovereign immunity. If an ICSID award survives all the challenges in the review and the enforcement stages but finally ends up with no payment, the advantage of ICSID arbitration is of little value. In this sense, if we have a bucket called ICSID, then the plank of ‘execution mechanism’ is cut short due to the sovereign immunity, thus the entire capacity of the bucket is reduced (see the illustration below).



For a prevailing party with a favorable ICSID award in hand, the biggest concern is whether the damage granted by the award can be really collected. If no money or asset can be finally possessed by the winning party, the practical effectiveness of the ICSID mechanism will be cast in doubt, which may deter investors from using ICSID to solve investment disputes with host states. To help the ICSID arbitration stay appealing to its users, this shortest plank should be paid more attention. Under this chapter, the execution of ICSID awards and sovereign immunity will be investigated. Section 1 will examine the hurdles before execution under the ICSID Convention, and Section 2 will analyze how difficult it is to execute an ICSID award in practice.

Since the host state may have assets in different places including its own territory, the investor's home state or a third state, and the host state is directly involved in the ICSID arbitration case while the home state or a third state is not, the following discussion will distinguish two scenarios of ICSID execution: one is in the host state, and the other is in the forum state (home state or a third state). Based on the problems regarding the execution of ICSID awards found in this chapter, the next chapter will propose some possible solutions to enhance the effectiveness of ICSID awards.

6.1. Hurdles before the Execution of ICSID Awards

According to the ICSID Convention, execution of ICSID awards is governed by the domestic law of the state where execution is sought. With probably no exception, national laws in most civilized countries set a procedural bar—sovereign immunity—to hinder the forcible execution against a sovereign state unless some exceptions apply. In the context of ICSID arbitration, to overcome the host state's plea of sovereign immunity is usually an unavoidable and very difficult task for the investors seeking execution of ICSID awards. This section will focus on what specific hurdles arising from sovereign immunity should be expected by investors during the process of executing ICSID awards.

6.1.1. Sovereign immunity against execution

At the outset, the basic characteristics of sovereign immunity deserve some explanations. Currently, although the specific legislations vary, in most countries the national laws adopt a restrictive sovereign immunity concept and recognize certain exceptions to this principle. Further, the distinction between the immunity from jurisdiction and the immunity from execution should be stressed—in terms of the execution of ICSID awards, only the latter is at stake.

- *From the absolute to the restrictive sovereign immunity concept*

The principle of sovereign immunity finds its root back to the time when the first nation-state emerged in 1648.⁴⁰⁰ Thereafter it became widely recognized based on a global consensus that immunity from other territorial jurisdictions is critical to the dignity and independence of a sovereign. For a long period, the application of sovereign immunity was absolute, i.e. a sovereign nation can plea immunity in any situation to avoid being sued in a judicial proceeding. Since the twentieth century, the notion of sovereign immunity has gradually evolved from the ‘absolute’ version to a ‘restrictive’ version.⁴⁰¹ Although the absolute doctrine still dominates in a few countries such as China, now many other countries accept that the application of sovereign immunity should be exempted in some circumstances. The most commonly recognized exceptions are 1) the state waives its sovereign immunity, and 2) the activity of the state is of a commercial nature or the sovereign asset at issue is used for commercial purpose.

The shifting from absolute to restrictive sovereign immunity concept was by and large fueled by the changing role of states. Besides implementing public and political functions, states have been more and more involved in commercial activities and sometimes in fact acted as private actors. When a state participates in commercial activities as a private actor, allowing the state to invoke sovereign immunity vis-à-vis the private party in order to circumvent judicial remedy will generate unfair results. Thus the restrained application of sovereign immunity is in accordance with the changing reality of state activities and the basic legal principle of fairness and justice.

⁴⁰⁰ Craig S. Miles, *Sovereign Immunity*, in ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 35–71 (Doak Bishop ed., 2009). p. 36. It states: “After the break-up of western Christendom following the Treaty of Westphalia in 1648, the nation-state emerged [...]”.

⁴⁰¹ *Id.*

As for the investment arbitration, the restrictive doctrine of sovereign immunity opens the door for investors to utilize the exceptions of sovereign immunity to seek forcible execution against host states' assets. However, restriction of sovereign immunity does not mean that investors can overcome this defense with ease.

- *Sovereign immunity from jurisdiction v. sovereign immunity from execution*

Specifically, sovereign immunity has two subcategories, i.e. immunity from jurisdiction and immunity from execution, which need to be clearly distinguished. The two concepts play at different stages and have different effects on international arbitral awards.

Immunity from jurisdiction protects states from being sued. When an arbitral award against a state is brought to a national court, immunity from jurisdiction would hinder the court from recognizing and enforcing the award unless the respondent state waives its immunity. According to the ICSID Convention, a state waives its immunity from jurisdiction once it consents to ICSID arbitration. However, even if immunity from jurisdiction has been waived and the court can recognize and enforce the award, immunity from execution may still prevent forcible attachment of certain assets belonging to the respondent state.⁴⁰² In this sense, immunity from execution is distinguished from immunity from jurisdiction and acts as “the last bastion of state immunity”.⁴⁰³ In the context of ICSID arbitration, whether a state's waiver of sovereign immunity extends to the execution stage deserves some analysis, which will be discussed in the third subsection.

- *Sovereign immunity from execution v. effectiveness of arbitral awards*

⁴⁰² Craig S. Miles, *supra* note 400. at 42

⁴⁰³ *Id.* at 43

As pointed out by Emmanuel Gaillard, sovereign immunity from execution is incompatible with the principle of the effectiveness of arbitral awards.⁴⁰⁴ An arbitration is carried out only if the two parties voluntarily agreed so. A legitimate expectation underlying this agreement is the principle of the effectiveness of arbitral awards, i.e. the awarded obligation will be carried out by the losing party.⁴⁰⁵ However, if one party of the arbitration is a sovereign state, whether the award will be enforced is determined by the state due to the principle of immunity. In this sense, Bruno Oppetit asserts that incorporating sovereign immunity in the context of execution of arbitral award would lead to the situation where states are conferred “an exorbitant prerogative...to hold itself to its obligations only when it is inclined to do so.”⁴⁰⁶ Therefore, although the ICSID review and enforcement mechanisms are designed as highly self-contained so that the effectiveness of ICSID awards will be well protected during these proceedings, when it comes to the execution stage, the effectiveness of ICSID awards is under substantive risk once the state exercises sovereign immunity. According to the wooden bucket theory, the volume of water that a bucket can hold is not determined by the longest slat but the shortest one; similarly, the effectiveness of the ICSID award is diminished due to the execution mechanism regardless how solid the protection is provided by the review and enforcement mechanisms.

6.1.2. Drafting of the ICSID execution mechanism and the changing circumstances after the enactment of the ICSID Convention

Given the conflict between sovereign immunity and the effectiveness of arbitral awards, as well as the initial drafters’ endeavor to build the self-contained review and enforcement mechanisms

⁴⁰⁴ Emmanuel Gaillard, *Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities—Three Incompatible Principles*, 179, 181 (Emmanuel Gaillard ed., 2005)

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

in order to preserve the effectiveness of ICSID awards, the rationale behind the drafting of the ICSID execution mechanism appears confusing. In the following, the factors leading to the provisions regarding the ICSID execution and the changing of the initial considerations will be investigated, which in fact form some of the reasons behind the difficulties of executing ICSID awards.

- ***Drafting of the ICSID execution mechanism***

The *travaux préparatoires* of the ICSID Convention show that incorporating sovereign immunity in the execution of ICSID awards was taken for granted by drafters and state delegates. Firstly, when the Convention was drafted, the notion of absolute sovereign immunity still had strong influence comparing with the restrictive sovereign immunity. At that time, exceptions to the immunity from execution were very rare. Secondly, under the customary law, it is an obligation of any state to respect the immunity of other states in virtue of the principle of sovereign equality. Due to the above reasons, the text of Articles 54(3) and 55 faced few objections during the drafting, and no provision regarding the waiver of immunity from execution was incorporated in the Convention.

Moreover, some strategic compromises are necessary for achieving a consensus among all members when drafting a multilateral treaty, such as the ICSID Convention. While excluding sovereign immunity from execution would perfectly preserve the effectiveness of ICSID awards, this idea would be highly contested by states who need to protect their sovereign assets under the cover of immunity. Thus the drafting history of the ICSID Convention shows that the decision to give full effect of the national laws concerning sovereign immunity was based on a strategic

compromise to avoid “determined opposition of developing countries”⁴⁰⁷ and to pursue the wide ratification of the Convention.⁴⁰⁸

In addition, the drafters of the ICSID Convention did not envisage that the execution of ICSID awards against host states would be severely hindered by sovereign immunity. Firstly, there was an assumption during the drafting that host states will voluntarily honor ICSID awards and thus there is little possibility to trigger forcible execution against states. Most of the drafters believed that, once a host state loses an ICSID case, the government will not choose to default the payment of damages based on several side effects of nonpayment, for instance, impaired reputation of an ideal investment destination for future investments, losing future opportunity to get loans from the World Bank, potential risks of diplomatic protection measures, etc. Secondly, sovereign immunity is merely a procedural bar, successfully invoking which only hinders the execution on certain assets but does not affect the existence of the respondent state’s obligation to comply with the award pursuant to Article 53 of the ICSID Convention. Thirdly, the text of Article 55 uses a negative expression (“*Nothing in Article 54 shall be construed as [...]*”), which means that the ICSID Convention neither denies nor supports sovereign immunity.⁴⁰⁹

Based on the above facts and considerations, the drafting of the ICSID execution mechanism did not encounter substantive objections, nor was it expected that a number of difficulties for investors to seek execution of ICSID awards would arise. Nevertheless, all of the rationales underpinning the drafting of the ICSID execution mechanism have changed or been proven wrong, which brings up more obstacles of the execution of ICSID awards.

⁴⁰⁷ *Id.* at 1154, citing Alan Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 *Recueil des Cours* 331, 403 (1972-II)

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 1145

- *Changing circumstances after the enactment of the ICSID Convention*

During the past decades since the enactment of the ICSID Convention, at least three circumstances that were underlying the drafting of the ICSID execution mechanism have been changed. Firstly, as stated above, the mainstream theory of sovereign immunity has turned from the absolute to the restrictive version, and in most countries certain exceptions to sovereign immunity have been widely recognized.

Secondly, along with the changing landscape of the global capital market, nowadays developing countries do not wish to apply sovereign immunity in every case regarding the execution of arbitral awards. Nowadays there emerges a new trend that more and more countries have been changing from a unilateral role to a dual-role as both the host state and home state of international investment. Investors and their home states wish to diminish the barrier of sovereign immunity, thus the developing countries' strong desire on sovereign immunity decreases when they also act as the home state of their own nationals investing overseas. In this circumstance, fully recognizing sovereign immunity in the ICSID Convention is no more an unavoidable price for the exchange of more ratifying countries.

Thirdly, the Convention drafters' assumption of no default of host states has been proven wrong. The recent backlash against investment arbitration and the increasing number of states who refuse to honor ICSID awards deepens the worry that states will take advantage of sovereign immunity to hinder the execution of ICSID awards.

The loss of fair rationale underpinning the drafting of the ICSID execution provisions reveals the incompatibility between the law in book and the reality. This incompatibility also implies that there will be more difficulties as for the execution of ICSID awards than those expected by the

drafters. In the following, five possible barriers before the execution of ICSID awards against sovereign states will be analyzed.

6.1.3. Barriers to the execution of ICSID awards

Departure from the absolute sovereign immunity concept opens the door for execution of arbitral awards on sovereign assets, however, it does not mean the readiness of execution. Based on the above analysis regarding the sovereign immunity's theories and the ICSID Convention's drafting, the barriers before the execution of ICSID awards under current situation can be summarized as the following four aspects.

Firstly, a state's consent to the ICSID arbitration only implies its waiver of immunity from jurisdiction, rather than immunity from execution. Once a state consents to the ICSID arbitration, it is deemed as waiving its immunity from jurisdiction and subject to the adjudication of ICSID tribunal. A question arising is whether this waiver of sovereign immunity extends to the matter of execution. If not, even if an investor obtains a waiver of immunity from the host state before the arbitration starts, the state may still retain the right of invoking sovereign immunity when the award is sought to be executed. Regarding this question, the ICSID Convention has a clear position. Article 55 addresses the relationship between immunity from jurisdiction and immunity from execution, stating that Article 54 does not affect the applicability of the forum law relating to immunity from execution. Therefore, the fact that a state gives up its sovereign immunity from jurisdiction by consenting to ICSID arbitration does not deprive it the right to invoke sovereign immunity regarding the execution of ICSID awards.

Secondly, although many countries accept the restricted application of sovereign immunity, the exceptions to sovereign immunity are still very limited. For example, a commonly recognized

exception is the ‘commercial exception’, which means that if the sovereign assets or actions are of a commercial nature, the state’s plea of sovereign immunity might be defeated,⁴¹⁰ but the criteria of this exception are generally very strict. Moreover, there is an “exception to exception” – if the assets at issue qualify the ‘specially protected assets’, which usually refers to the assets of a foreign state’s central bank or that used for military purposes or diplomatic missions, sovereign immunity will prevent forcible execution against these assets even if commercial features are involved. This “exception to exception” is widely recognized in many countries, such as the United States, the United Kingdom, France, China, etc.

Thirdly, due to the inconsistency of the legislations and legal practices in different countries regarding sovereign immunity, it becomes even harsher for investors to seek execution of ICSID awards. In terms of the exceptions from sovereign immunity, municipal laws in different jurisdictions vary. Although most countries adopt the restrictive sovereign immunity concept and limit it with certain exceptions, some countries still prefer the absolute theory, such as China.⁴¹¹ As for the criteria of applying exceptions to sovereign immunity, states also employ different approaches. The endeavor to develop a uniform sovereign immunity law at the global level has not proved fruitful. Up to now, there is only one multilateral treaty—the European Convention on State Immunity — which is in force, but is merely ratified by eight states.⁴¹² Another international treaty, the United Nations Convention on Jurisdictional Immunities of States and

⁴¹⁰ The “commercial test” as the criteria for the exceptions from sovereign immunity is adopted in many countries’ legislations, for instance the US, the UK, France, Germany, Australia, etc.

⁴¹¹ Dahua Qi, *State Immunity, China and Its Shifting Position*, 7 CHINESE JOURNAL OF INTERNATIONAL LAW 307–337 (2008). pp. 307-337.

⁴¹² See the website of the Council of Europe, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=&DF=&CL=ENG>, accessed on 11 September 2014.

Their Property, has not entered into force due to the insufficient number of ratifying states.⁴¹³

The ICSID Convention provides that an ICSID award could be sought execution in any member state of the Convention, however the various legislations and case laws with regard to sovereign immunity increase the uncertainty to collect damages against host states in different countries.

Fourthly, the recently emerging backlash against the investment arbitration reflects the reluctance of some states towards honoring ICSID awards. Argentina's rhetoric and actions send out a message that it may take measures to resist the enforcement of ICSID awards. Bolivia, Ecuador and Venezuela, which denounced the ICSID Convention and expressed aggressive anti-ICSID rhetoric, may also take measures to avoid paying damages. The ICSID Convention builds a solid wall, despite with some weak points, to repel external attacks on ICSID awards at the stage of annulment, recognition and enforcement, however, when it comes to execution, the door is wide open for national courts' intervention due to sovereign immunity from execution. Therefore, it is not a wild guess that the recalcitrant respondent states may utilize sovereign immunity as a weapon to prevent their assets from being executed.

Therefore, the execution mechanism set up by the ICSID Convention brings up a number of difficulties for investors to forcibly collect damages against host states owing to the matter of sovereign immunity. In this sense, the execution mechanism may severely impair the effectiveness of ICSID awards just like the shortest plank that diminishes the capacity of a bucket. In the following section, states' practice regarding the execution of ICSID awards will be examined to find out how the execution mechanism works in reality. If the afore-mentioned

⁴¹³ See the website of the United Nations Treaty Collection (Oct. 29, 2014), https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en, accessed on October 29, 2014

obstacles occur and new hurdles arise in practice, then refinement of the ICSID execution framework needs to be considered.

6.2. States' Practices regarding the Execution of ICSID Awards.

Since 1966 when ICSID was founded, not many arbitral awards have been brought in national courts for execution. Among those identified cases going through the post-award adjudicative proceedings, only three are related to the execution of ICSID awards,⁴¹⁴ namely *LETCO v. Argentina*,⁴¹⁵ *AIG v. Kazakhstan*,⁴¹⁶ and *Benvenuti & Bonfant v. Congo*.⁴¹⁷ These three cases were respectively litigated in the United States, United Kingdom and France. The above three countries are global business centers and the home states of most international investors, where many other countries have their assets that can be detected and possibly attached by prevailing investors. It is noticeable that all of the three countries are not the investment's host states in the above cases, thus they fall into the category of 'forum state' as defined in Chapter 5. A forum state can be the home state of investors or a third state as a member of the ICSID Convention. For the convenience of discussion, this chapter distinguishes the forum state and the host state as for the execution of ICSID awards. The first subsection will analyze the domestic legislations and case laws with regard to the execution of ICSID awards in the US, UK and France, which could show a general picture of the execution proceedings in the forum states. Besides, although with no decided cases yet, China as the biggest emerging capital-exporting state may also have execution cases in the future, thus it will be under discussion as well.

⁴¹⁴ Most of the published court decisions regarding enforcement of ICSID awards does not touch the matter of attachment of assets to execute on ICSID awards, for instance, the US cases *Siag v. Egypt* (2009 WL 1834562 (S.D.N.Y)) and *Blue Ridge v. Argentina* (735 F.3d 72) do not concern the issue of execution.

⁴¹⁵ *Liberian Eastern Timber Corporation v. The Government of the Republic of Liberia*, 650 F. Supp. 73, (SDNY 1986)

⁴¹⁶ *AIG Capital Partners Inc and another v. The Republic of Kazakhstan and The National Bank of Kazakhstan* [2005] EWHC 2239 (Comm).

⁴¹⁷ See ICSID Reports Vol.I, p.368-376

The second subsection focuses on the execution of ICSID awards in the recalcitrant host states. The execution proceeding comes to play only when the respondent states are reluctant to pay, thus it is conceivable that executing an ICSID award in the recalcitrant host state cannot be easy. Up to now, there has been no execution case litigated in the host state. Through the analysis below, the possible situation of the execution proceedings in the host states will be briefly depicted.

6.2.1. Execution of ICSID awards in the forum states

In this subsection, the domestic laws, *inter alia* the law about sovereign immunity from execution, and the cases relating to the execution of ICSID awards in the US, UK, France and China will be discussed.

a. The US

- The US law regarding sovereign immunity from execution

As noted in the preceding chapter, the US enacted a domestic legislation, 22 US Code §1650a, to facilitate the application of the ICSID Convention in its territory. This statute authorizes federal district courts the exclusive jurisdiction over cases concerning enforcement of ICSID awards.⁴¹⁸

According to Article 55 of the ICSID Convention, immunity from execution entirely depends on domestic laws. The US statute governing sovereign immunity is the Foreign Sovereign Immunity Act (FSIA), codified as Title 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611 of the United States Code. The FSIA regulates the immunity from jurisdiction as well as the immunity from execution. As has been expounded above, when an ICSID award against a host state is brought to

⁴¹⁸ See 22 US Code § 1650a(b)

an American court for enforcement, the state has no plea of sovereign immunity from jurisdiction, but still reserves the right to invoke the FSIA provisions regarding immunity from execution to defend against the forcible attachment of its sovereign assets.

For investors, it is not an easy task to overcome the defense of immunity from execution under US law. The FSIA provides that in principle a foreign state should be immune from attachment arrest and execution,⁴¹⁹ which however can be exempted when a two-tiered test set forth in §1610 (a) is satisfied. §1610 (a) reads as follows:

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States:

Provided

, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

⁴¹⁹ 28 US Code § 1609: “subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in section 1610 and 1611 of this chapter.”

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

The above provision shows that to meet the first-tier test for the exception of immunity from execution, the sovereign assets at issue must be used for a commercial activity in the United States. To satisfy this test, several elements need to be demonstrated, namely, the commercial nature of the state's activity, the commercial purpose of the sovereign property and the location of the property (must be in the US). The burden of proof is on the investors who seek execution. However, due to information-asymmetry between sovereign states and private individuals, it is usually very difficult for investors to collect evidence regarding the host state's assets.

Besides the "commercial activity" test, there is also a second-tier test, i.e. one of the seven requirements listed under §1610 (a) (1) ~ (7) must be met. Among others, the three requirements in §1610 (a) (1), (2) and (6) deserve special attention. To meet one of the three requirements, the claimant need to prove that the respondent state has waived the immunity from execution (§1610(a) (1)), the property to be attached is or was used for the commercial activity upon which the claim is based, which is also called the 'linkage requirement' (§1610(a) (2)), or the judgment is based on an order confirming an arbitral award rendered against a foreign state (§ 1611(a) (6)). It is usually a heavy burden for the investor to demonstrate the respondent state's waiver of immunity from execution or to locate certain assets satisfied with the linkage requirement. However, the §1610(a) (6) requirement can be met more easily and thus represents a pro-execution position under US law. These three requirements will be analyzed respectively below.

§1610(a) (1) infers that under US law states can only waive immunity from execution with regard to commercial assets. If the assets are not used for commercial purpose, the court in *LNC Investments, Inc. v. Republic of Nicaragua*⁴²⁰ decided that a foreign state cannot waive its sovereign immunity with regard to the execution of non-commercial assets.⁴²¹ However, it has been widely accepted at a global level that commercial assets of a state can be executed regardless of the immunity from execution. In this sense, the requirement of a waiver regarding commercial assets does not make much sense. Furthermore, since the FSIA does not allow states to waive the immunity from execution with regard to non-commercial assets, investors cannot seek attachment on this kind of assets even if a waiver has been obtained.

§1610(a) (2) provides a “linkage requirement”—to satisfy which, the investor must demonstrate that there is a direct connection between the property at issue and the underlying claim. Investors may face substantive difficulty to establish the nexus between the property at issue and the claim. The 2004 UN Convention on Jurisdictional Immunities of States and Their Property eliminates this linkage requirement, which represents a development to facilitate execution. Unfortunately, the Convention has not been ratified by any country.

§1611(a) (6) requires that the judgment of execution should be based on an order confirming an arbitral award rendered against a foreign state. Considering the pro-arbitration stance under US law, it can be expected that US courts would follow Article 54 of the ICSID Convention that requires member state courts to recognize ICSID awards as binding. In this case, getting an order confirming an ICSID award would probably face little resistance. Once the ‘commercial activity’ test and the §1611(a) (6) requirement were satisfied, the investor could establish an exception to

⁴²⁰ No. 96 Civ. 6360 (JFK), 2000 WL 745550, at *5 (S.D.N.Y. June 8, 2000)

⁴²¹ Id. Also see Craig S. Miles, *supra* note 400; Dahua Qi, *supra* note 411 at 54.

the immunity from execution. Hence, § 1611(a) (6) is an important step in facilitating the execution of ICSID awards.

As mentioned in the last section, although many states accept that sovereign immunity should be restricted by certain exceptions, their national laws also recognize some “exception to exception”, which widens the application of sovereign immunity again. Under US law, one ‘exception to exception’ is the ‘specially protected assets’. Even if the FSIA §1610 test has been met, execution on ICSID awards may still be barred if the assets at issue fall under the category of ‘specially protected assets’. Under the FSIA § 1611, three kinds of sovereign assets are specially protected from forcible executions. The first one is the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunity Act.⁴²² The second one is the property of a foreign central bank or monetary authority held for its own account.⁴²³ The requirement of “held for its own account” of the central bank or authority is to distinguish the properties genuinely used for the central bank activity or used for other financial transactions. This immunity can be waived by such bank or its parent foreign government, if the waiver is explicit.⁴²⁴ The third one is military property—the property shall be, or intended to be, used in connection with a military activity and is of a military character or under the control of a military authority or defense agency.⁴²⁵ The last two categories of assets are also widely recognized as specially protected assets in several other jurisdictions, including UK, Canada and Australia.

⁴²² 28 US Code § 1611 (a)

⁴²³ 28 US Code § 1611 (b)(1)

⁴²⁴ *Id.*

⁴²⁵ 28 US Code § 1611 (b)(2)

Furthermore, the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes 1961 (hereinafter to be referred as the Vienna Convention on Diplomatic Relations), of which the US is a member state, also provides the specially protected assets. The Vienna Convention on Diplomatic Relations shields the property used for diplomatic purposes under the diplomatic immunity. Article 22(3) of the Vienna Convention on Diplomatic Relations provides that “the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from attachment or execution.” In the 2004 UN Convention, the similar provision can be found, which states that the property, including any bank account, which is used or intended for use for the purposes of the diplomatic mission of the state or is consular posts, special missions, missions to international conferences, are protected from execution.⁴²⁶ Although the UN Convention has not come into force, it helps to establish a better understanding of the matter of diplomatic immunity. The issue of diplomatic immunity was discussed in *LETCO v. Liberia II* before a US court, which will be analyzed in the next subsection.⁴²⁷ All in all, investors will face another hurdle to seek execution in the US if the assets at issue fall under the ‘specially protected assets’ category.

In summary, the US law regarding sovereign immunity imposes a number of difficulties on the execution of ICSID awards. The possible obstacles that may hinder the execution mainly lie on the heavy burden of proof regarding the ‘commercial activity’ test, demonstration of state’s waiver of immunity from execution and the linkage requirement, as well as the ‘specially protected assets’ as an exception to exception. In spite of the difficulties, the FSIA § 1611(a) (6) reveals some pro-arbitration or pro-execution position of the US legislation. In the following, the cases regarding the execution of ICSID awards in the US will be examined.

⁴²⁶ Article 21(1)(a) of the United Nation Convention on Jurisdictional Immunities of States and Their Property (2004)

⁴²⁷ 659 F.Supp. 606

- Cases regarding the execution of ICSID awards

Up to 2015, only two cases regarding the execution of an ICSID award were litigated in the United States.⁴²⁸ Both cases are between the Liberian Eastern Timber Corporation (“LETICO”) and Liberia. There are two separate decisions, *LETICO I*⁴²⁹ and *LETICO II*,⁴³⁰ concerning different assets and regarding different issues of sovereign immunity under US law. Through these two cases, the general position employed by US courts with regard to the execution of ICSID awards can be reflected. Moreover, a recent case *NML v. Argentina* reveals some changes of US courts regarding sovereign immunity from execution. Although the *NML* case is not about the execution of an ICSID award, it may have some significant impact on the execution of ICSID awards in the future.

(1) *LETICO I*

In *LETICO I*, the critical issue is the ‘commercial activity’ test. LETICO had a concession granted by the Liberian government in 1970, relying on which LETICO can harvest and exploit over 400,000 acres of Liberian timber. Later Liberia terminated the concession and LETICO initiated ICSID arbitration against the host state government pursuant to the concession agreement. The ICSID tribunal rendered an award granting \$8,793,280 plus interest in favor of LETICO, which was sought to be enforced by LETICO in the US federal court for the Southern District of New York. The court entered a judgment for \$9,076,857.25 and issued a writ of execution. The properties LETICO sought to execute were the tonnage fees, registration fees and other taxes that

⁴²⁸ There are more U.S. cases regarding the enforcement of ICSID awards, for instance *Siag v The Arab Republic of Egypt*, *Sempra v Argentina*, *Enron v Argentina*, *Blue Ridge Investments, LLC as purchaser and assignee of the Award rendered in favour of CMS in the case CMS v Argentina*, but the cases regarding the execution matters are only *LETICO I* and *LECTICO II*.

⁴²⁹ *LETICO v. Liberia I*, 650 F.Supp. 73 (S.D.N.Y 1986)

⁴³⁰ *LETICO v. Liberia II*, 659 F.Supp. 606 (D.D.C 1987)

the Liberian ship-owners located in the US owe to the Liberian government. Liberia moved to vacate the judgment and to enjoin the issuance of executions to seize the properties.⁴³¹

Liberia argued that under the FSIA, the ICSID award cannot be enforced through execution against the ship-owners and the agents.⁴³² The issue is, according to the FSIA § 1610, whether the fees LETCO sought to attach is used for commercial activity in the United States.⁴³³ Liberia contended that the fees were collected as taxes designed to raise revenues for the Republic of Liberia and, as such, are sovereign assets rather than commercial assets, which are immune from execution.⁴³⁴ LETCO responded that, despite the undisputable fact that the properties are tax revenues ultimately payable to Liberia, 27% of the property was retained for operating and administrative expenses and profits by United States corporations or citizens who rendered services in collecting the funds, which made those payments constituting commercial activities.⁴³⁵

The court did not endorse LETCO's methodology of dividing the assets into commercial and non-commercial portions and said that "this rather fine distinction is without substance".⁴³⁶ According to the court, the fact that Liberia employed US citizens instead of utilized the services of its consulate employees stationed in the US did not change the nature of the registration fees or taxes as sovereign assets; in other words, the method of collecting the amount due to the Liberian ship-owners does not destroy the nature of that collection. Accordingly, the court decided that collecting the registration fees and taxes were the exercise of sovereign power rather

⁴³¹ *LETCO v. Liberia I*, 650 F.Supp. 73 (S.D.N.Y 1986), at 74-76

⁴³² *Id.* at 73

⁴³³ *Id.* at 75

⁴³⁴ *Id.* at 77

⁴³⁵ *Id.*

⁴³⁶ *Id.*

than commercial activity and thus enjoy immunity from execution.⁴³⁷ Moreover, the court confirmed that LETCO was not enjoined from issuing executions with respect to any properties that are used for commercial activities.⁴³⁸

(2) *LETCO II*

In the following year, LETCO brought the judgment confirming the ICSID award to the federal court for the District of Columbia and attempted to execute on several bank accounts used for the functioning of the Liberian Embassy.⁴³⁹ The court again decided that the assets are immune from attachment under both the Vienna Convention on Diplomatic Relations and the FSIA.⁴⁴⁰

Firstly, the court discussed whether the bank accounts at issue are covered by the diplomatic immunity under the Vienna Convention on Diplomatic Relations. According to Article 25 of the Convention, which provides that “the receiving State shall accord full facilities for the performance of the functions of the mission”, the court stated that the Liberian Embassy would lack the “full facilities” if the bank accounts used or intended to be used for purposes of the diplomatic mission were attached.⁴⁴¹ LETCO argued that “only the funds maintained on the premises of the mission are to be afforded diplomatic immunity because only property described in Article 22(3) of the Vienna Convention on Diplomatic Relations is exempt from attachment”.⁴⁴² The court refuted that Article 22(3) has exclusive authority to determine which property enjoys diplomatic immunity from attachment and concluded that, although no specific provision in the Vienna Convention on Diplomatic Relations affords the diplomatic immunity to

⁴³⁷ Id.

⁴³⁸ Id.

⁴³⁹ *LETCO v. Liberia II*, 659 F.Supp. 606 (D.D.C 1987)

⁴⁴⁰ Id.

⁴⁴¹ Id. at 608

⁴⁴² Id.

bank accounts for diplomatic missions, the bank accounts enjoy diplomatic immunity considering the consistency with the agreement set forth in Article 25 as well as the intention of the parties to the Vienna Convention on Diplomatic Relations.⁴⁴³

Secondly, to make the conclusion clear, the court further discussed whether the bank accounts at issue were immune from execution under the FSIA. *LECTO* employed the same segmentation methodology as used in *LETCO I*, arguing that some portions of the funds in the bank accounts are used for commercial activities, such as the transactions to purchase goods or service from private parties. The court stated that “if any portion of a bank account is used for a commercial activity then the entire account loses its immunity”,⁴⁴⁴ however, if the funds used for commercial activity are “‘incidental’ or ‘auxiliary’, not denoting the essential character of the use of the funds, [they] would not cause the entire bank account to lose its mantle of sovereign immunity.”⁴⁴⁵ Here, the main portions of the embassy’s banks accounts were utilized to maintain “the full facilities of Liberia to perform its diplomatic and consular functions as the official representative of Liberia in the United States of America” and the payment of salaries and wages of diplomatic personnel and various ongoing expenses were only incurred in connection with diplomatic and consular activities necessary to the proper function of the Embassy,⁴⁴⁶ thus the public nature of the embassy’s bank accounts were not affected. In addition, the court stressed some characteristics of the “commercial activity” test: (1) the concept of “commercial activity” should be defined narrowly because sovereign immunity, rather than the exceptions to it, remains the rule;⁴⁴⁷ (2) the “rule of thumb” to distinguish commercial activity and public activity is that

⁴⁴³ Id.

⁴⁴⁴ Id. at 610

⁴⁴⁵ Id.

⁴⁴⁶ Id.

⁴⁴⁷ Id.

“if the activity is one in which a private person could engage, it is not entitled to immunity”.⁴⁴⁸

As a conclusion, the funds in the bank accounts were used for those activities of public or governmental nature and only a public entity rather than private party may use the funds to perform diplomatic mission. Therefore, the court decided that the bank accounts of the Liberia Embassy do not meet any exception under the FSIA and thus enjoy the immunity from execution.

Viewed from the above two cases, it can be seen that US courts incline to a relatively conservative position regarding sovereign immunity from execution. As for the “commercial activity” test, the courts of these two cases introduced some specific rules respectively, namely (1) the method of collecting the property does not affect the nature of the collection activity, and (2) if some portion of the assets is used for a commercial activity, the nature of the entire assets will not change if the commercial activity is auxiliary. These two rules restrict the scope of the ‘commercial activity’ exception. With regard to the property used for diplomatic missions, the court of *LETCO II* confirmed that the property at issue was covered by diplomatic immunity according to the Vienna Convention on Diplomatic Relations, even though the property is not enumerated under Article 22(3) of the Convention, which again reflects that US courts tend to support sovereign immunity rather than the exceptions.

(3) *Argentina v. NML* and the ‘discovery immunity’ with regard to foreign sovereign assets

As aforesaid, due to information asymmetry, it is a very hard task for private creditors to locate the respondent state’s assets that might be available for execution. Under the US legal system, judgment creditors usually need to seek discovery of the state’s assets, i.e. to collect information

⁴⁴⁸ Id. citing *Practical Concepts, INC. v. Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C. Cir. 1987)

from the state or third parties regarding the potentially attachable sovereign assets.⁴⁴⁹ On June 16, 2014, The US Supreme Court decided the case *Republic of Argentina v. NML Capital*,⁴⁵⁰ where the court rejected Argentina's plea that the discovery of its assets should be prevented due to sovereign immunity.⁴⁵¹ This is a landmark case that raises close concerns in and outside the US. Some scholars assert that the *NML* case would change the rules of the game in terms of execution against foreign sovereigns.⁴⁵² This case does not relate to an ICSID award, but still might substantially influence the execution of ICSID awards in the United States.

- Background of the *NML* case—the battle between the vulture funds and Argentina

NML Capital is a Cayman Islands-based offshore unit of the US hedge funds Elliot Management Corporation. It is one of the so-called “vulture funds”, which refer to the hedge funds that buy debts from the secondary markets for discounted prices (usually for pennies on a dollar) and seek full repayment of the original loan from the debtor to make huge profits. They especially target on the poor and financially distressed countries, such as Argentina.⁴⁵³ In the former Argentine President Christina Fernandez de Kirchner's speech addressed the UN General Assembly on September 24, 2014, she criticized the vulture funds and said that some of them made profits of 1600% within one year.⁴⁵⁴ During the past years, the battle between Argentina and the vulture funds has always been in the spotlight and provoked controversies.

⁴⁴⁹ Robert K. Kry, *Asset Discovery Against Foreign Sovereigns after NML*, 87 NYSBA JOURNAL 40 (2014).

⁴⁵⁰ 134 S. Ct. 2250 (June 16, 2014)

⁴⁵¹ Id.

⁴⁵² Robert K. Kry, *supra* note 472 at 4. Also see the Jubilee page about the NML case, available at <http://www.jubileeusa.org/whatwedo/debt-related-issues/vulturefunds/argentina.html>, accessed on October 27, 2014. The US Supreme Court's decision raised high attentions, which was covered in the Wall Street Journal, the Financial Times and the Washington Post.

⁴⁵³ See Vulture Funds, JUBILEE USA NETWORK, <http://www.jubileeusa.org/ourwork/vulturefunds.html> (last visited Oct 28, 2014).

⁴⁵⁴ Video of Christina Fernandez de Kirchner's speech in the UN General Assembly can be accessed on <http://gadebate.un.org/countries/argentina>. It also says that NML can make a profit of over 1000% through the legal

In 2001, Argentina defaulted on its external debt for about \$81 billion.⁴⁵⁵ In 2005 and 2010, Argentina restructured the debts by offering a deal with 70% bondholder “haircut”, and 93% creditors accepted this restructuring.⁴⁵⁶ NML purchased some of Argentina’s debts with discounted price and then rejected the restructuring as one of the holdouts.⁴⁵⁷ In New York courts, NML sued Argentina for the full payment of the debts and prevailed in all eleven actions against Argentina.⁴⁵⁸ Along with the US District judge Thomas Griesa’s decision in November 21, 2012, Argentina need to pay \$1.3 billion to the holdout creditors according to US court judgments.⁴⁵⁹ Besides, Judge Griesa enjoined Argentina from paying other creditors that restructured through certain American banks before the holdouts have been paid in full.⁴⁶⁰ This judgment was issued on the day when Argentina planned to pay the other creditors, thus Argentina is said to be forced into “technical” default due to the enjoinder of the payment.⁴⁶¹

- US Supreme Court’s decision on *Argentina v. NML* regarding the ‘discovery immunity’

Argentina did not comply with the court judgment to pay the holdout creditors in full.⁴⁶² Thus NML sought discovery of Argentina’s assets for execution of the judgment. In 2010, NML

actions against Argentina in the US courts, see *Argentina Forced into A “Technical” Default*, LAB (2014), <http://lab.org.uk/argentina-forced-into-a-technical-default> (last visited Nov 5, 2015).

⁴⁵⁵ Id.

⁴⁵⁶ Id.

⁴⁵⁷ Id.

⁴⁵⁸ See *Republic of Argentina v. NML Capital*, 134 S. Ct. 2250 (June 16, 2014)

⁴⁵⁹ *Judge Orders Argentina to Pay Holdout Investors*, The New York Times (Nov. 22, 2012), <http://www.nytimes.com/2012/11/23/business/global/us-judge-orders-argentina-to-pay-holdout-bondholders.html>

⁴⁶⁰ *Argentina Forced into A “Technical” Default*, LAB (Aug. 2, 2014), <http://lab.org.uk/argentina-forced-into-a-technical-default>

⁴⁶¹ Vulture Funds, *supra* note 453. Also see *Argentina Forced into A “Technical” Default*, *supra* note 454.

⁴⁶² Argentina tried to avoid complying with the New York Court judgments and took several measures to pay the other creditors that restructured. Before December 15, 2013, the due date of Argentina’s debt set by Judge Griesa’s decision, Argentina negotiated with NML. The negotiation failed and Argentina defaulted its debt. Thereafter, Argentina’s Senate approved a debt-swap bill that allows Argentina to pay the restructured creditors and circumvent the US financial institutions. On September 29, 2014, Judge Griesa finds Argentina in contempt of court.

served subpoenas to two non-party banks in search of Argentina's assets.⁴⁶³ The US District Court for the Southern District of New York denied Argentina's motion to quash the subpoena issued to one bank and granted judgment creditor's motion to compel non-party banks to comply with the subpoenas.⁴⁶⁴ Then Argentina appealed and brought the case to the Supreme Court. Generally, the US Federal Rule of Civil Procedure allows judgment creditors to obtain discovery from judgment debtors and any other person in aid of the execution.⁴⁶⁵ However, Argentina argued that the normally broad scope of discovery in aid of execution is limited in this case by principles of sovereign immunity.⁴⁶⁶ Thus, the main issue in the Supreme Court proceeding is whether the Foreign Sovereign Immunities Act (FSIA) "imposes [a] limit on a United States court's authority to order blanket post-judgment execution discovery on the assets of a foreign state used for any activity anywhere in the world".⁴⁶⁷

Regarding the question whether sovereign immunity prevents discovery of a foreign state's assets, US case law before the *NML* case is inconsistent. In *Rubin v. Islamic Republic of Iran*,⁴⁶⁸ persons identified as victims of terrorism who had obtained judgments against Iran sought discovery of all Iran's property in the United States.⁴⁶⁹ The court refused plaintiff's demand of discovery based on the finding that the FSIA prevents blanket discovery regarding all of a sovereign's property and thus only the discovery relating to the attachable property is allowed.⁴⁷⁰

⁴⁶³ *Republic of Argentina v. NML Capital*, 134 S. Ct. 2250 (2014).

⁴⁶⁴ *Id.*

⁴⁶⁵ Federal Rule of Civil Procedure 69(a)(2) states that: "In aid of the judgment or execution, the judgment creditor [...] may obtain discovery from any person—including the judgment debtor—as provided in the rules or by the procedure of the state where the court is located."

⁴⁶⁶ *REPUBLIC OF ARGENTINA V. NML CAPITAL*, 134 S. Ct. 2250 (2014).

⁴⁶⁷ *Id.*

⁴⁶⁸ 637 F. 3d at 795

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* Also see Robert K. Kry, *supra* note 449 at 41.

In the subsequent case *EM Ltd. v. Republic of Argentina*,⁴⁷¹ which shared the nearly identical factual background with the *NML* case, court upheld plaintiff's claim of the discovery into Argentina's assets all over the world.⁴⁷²

The US Supreme Court's decision of *NML* is in line with the case of *EM Ltd*, i.e. allowing the discovery about Argentina's assets. The Supreme Court reasoned that the FSIA only contains two kinds of sovereign immunity—immunity from jurisdiction and immunity from execution, and there is “no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets.”⁴⁷³ Argentina argued that “if a judgment creditor could not ultimately execute a judgment against certain property, then it has no business pursuing discovery of information pertaining to that property”,⁴⁷⁴ thus discovery of the assets that do not fall within an exception to execution immunity under the FSIA is forbidden.⁴⁷⁵ The court disagreed with Argentina's argument and stated that the FSIA only immunizes the foreign sovereign's assets in the United States, thus even if there was a ‘discovery immunity’ as alleged by Argentina, it would not shield Argentina's assets outside the United States.⁴⁷⁶ Therefore, the court denied that Argentina could invoke sovereign immunity under the FSIA to ban the investors from collecting information in order to locate Argentina's assets worldwide.

- Influence of the *NML* case on the execution of ICSID awards against foreign sovereigns' assets

⁴⁷¹ 695 F. 3d 201 (2d Cir. 2012)

⁴⁷² *Id.*

⁴⁷³ *REPUBLIC OF ARGENTINA V. NML CAPITAL*, 134 S. Ct. 2250 (2014).

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

The *NML* case can be deemed as a big step towards a more restrictive sovereign immunity in the US legal system. It might have potential influence on the future cases regarding the execution of ICSID awards in the United States. However, it is also noteworthy that *NML* has not opened the floodgate of discovery into state's assets due to its limited application.

Investors seeking execution of ICSID awards in the US may be benefitted by *NML* for easier discovery of the respondent state's assets. The worldwide discovery established by the *NML* decision is a very powerful tool for investors to locate host states' assets in any country and to easily gather much more related information. In addition, this ruling makes host states' resistance to the collection of their assets more burdensome.

However, states still have many ways to block the discovery. The Supreme Court's decision in *NML* only tackles the FSIA, but the court pointed out that "other sources of law" might restrict the discovery.⁴⁷⁷ For example, the host state may invoke the Vienna Convention on Diplomatic Relations to repel the discovery of its diplomatic assets. The Vienna Convention on Diplomatic Relations provides that "archives and documents of the mission shall be inviolable at any time and wherever they may be," and that diplomats and their administrative staff may not be compelled to testify.⁴⁷⁸ States can also invoke the "secret privilege" to hold sensitive national security information.⁴⁷⁹ In addition, according to the comity principle, states may invoke their own laws to hinder the discovery. Furthermore, the Supreme Court stressed in the *NML* decision that district courts have discretions and may consider comity interests as well as the burden that the discovery might cause to the foreign state when deciding the matter of discovery.⁴⁸⁰

⁴⁷⁷ *REPUBLIC OF ARGENTINA V. NML CAPITAL*, 134 S. Ct. 2250 (2014).

⁴⁷⁸ Vienna Convention on Diplomatic Relations, Art. 18, 1961, Article 24, 31, 37

⁴⁷⁹ Robert K. Kry, *supra* note 449 at 42.

⁴⁸⁰ *Id.* at 43

Therefore, the *NML* case reveals a sharp restriction of sovereign immunity under US law and sends a signal of pro-arbitration stance of US courts. Nevertheless, the *NML* decision also has certain limitations and may not be applied in other cases. Another possible problem with the *NML* case is that it opens the door not only towards pro-arbitration stance, but also towards politics—some states that are disliked by the forum are more likely to lose the shield of sovereign immunity in the execution proceedings. All in all, after *NML* the landscape of the execution on foreign sovereign's assets in the US has changed more or less and will probably make the execution of ICSID awards in the US easier than before.

In summary, the above analysis shows the basic features of the US legal system with regard to the execution of ICSID awards. On one hand, US law imposes some difficulties on investors to overcome host states' sovereign immunity defense when seeking execution on ICSID awards, for instance the heavy burden of satisfying the 'commercial activity' test and further requirements, as well as the 'exception to exception'—the question regarding the specially protected assets. Furthermore, the two cases concerning execution of ICSID awards (*LETSCO I* and *LETSCO II*) reveal US courts' conservative attitude regarding sovereign immunity from execution. On the other hand, US law also embodies some pro-arbitration provisions that may facilitate the execution of arbitral awards, such as the FSIA § 1610(a) (6). It is noteworthy that the recent case *NML v. Argentina* reflects the US Supreme Court's changing attitude towards a more restrictive sovereign immunity may help investors to execute ICSID awards in the United States.

b. The UK

- The UK law regarding sovereign immunity from execution

In the United Kingdom, the *Arbitration (International Investment Disputes) Act* was passed in 1966 to implement the ICSID Convention. As provided by the Act, an ICSID award sought recognition and enforcement shall be registered in the High Court.⁴⁸¹ The award registered under the Act “shall, as respect the pecuniary obligations which it imposes, be of the same force and effect for the purpose of execution as if it had been a judgment of the high Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, [...]”⁴⁸²

The UK law dealing with sovereign immunity from execution is the State Immunity Act (“SIA”). Similar to the FSIA under US law, the SIA also provides that in principle sovereign immunity from execution should apply to a foreign state (Section 13(2)).⁴⁸³ However, the exceptions to applying immunity from execution under the SIA diverge from that under the FSIA. Instead of a two-tiered test required by the FSIA, the SIA provides for two single-tiered exceptions to the immunity from execution regarding arbitral awards, namely the ‘waiver exception’ and the ‘commercial use exception’.

Section 13(3) of the SIA provides the waiver exception, which states that:

Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

⁴⁸¹ Section 1(2) of the *Arbitration (International Investment Disputes) Act 1966*

⁴⁸² Section 2 of the *Arbitration (International Investment Disputes) Act 1966*

⁴⁸³ SIA Section 13(2) provides that “(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale”.

This provision requires the waiver of immunity from execution to be explicit (in writing) and thus excludes implied waiver, which nevertheless is allowed under US law. According to some commentators, unlike the FSIA that does not allow a state to waive immunity from execution regarding non-commercial assets, the SIA recognizes a state's waiver regardless what property is related.⁴⁸⁴

Section 13(4) of the SIA provides the commercial use exception, which states that "Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; [...]". The standard "for the time being in use or intended for use for commercial purpose" focuses of the purpose of the assets, and thus distinguishes from the US criteria that stresses the nature of the activity for which the assets are used. What's more, the SIA does not require further conditions besides the commercial use test. Section 13(5) further provides that the significant evidence of the commercial or non-commercial use of certain property is the certificate of the head of a foreign state's diplomatic mission in the United Kingdom or the person for the time being performing this functions.⁴⁸⁵

Under UK law, there also exists the "exception to exception", i.e. the question regarding the 'specially protected assets'. Section 14(4) of the SIA provides that the property of a foreign state's central bank or other monetary authority is immune from execution with no regard of the commercial use. Further, since UK is also a signatory country of the Vienna Convention on Diplomatic Relations, the properties used for diplomatic missions enjoy diplomatic immunity in UK courts as well.

⁴⁸⁴ Craig S. Miles, *supra* note 400 at 62.

⁴⁸⁵ SIA Section 13(5): "The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved."

- *AIG v. Kazakhstan*

AIG Capital Partners Inc v. Kazakhstan is regarding the execution on an ICSID award litigated in the UK.⁴⁸⁶ In this case, the primary issue concerns the execution of certain property of the Kazakhstani central bank. The claimant AIG engaged in a project in Kazakhstan to develop a residential housing complex in the country. After the construction begun, the government of Kazakhstan announced that the project was canceled because the land was required for a national arboretum and thereafter seized the project property.⁴⁸⁷ AIG initiated ICSID arbitration against the government of Kazakhstan and the ICSID tribunal awarded damages of US\$ 9,951,709 plus interest in favor of AIG. Kazakhstan did not pay any part of the damage, so AIG registered this award in the High Court of UK and then tried to attach the cash and securities by third parties (“AAMGS”) in London (the “London assets”) pursuant to a Global Custody Agreement with the National Bank of Kazakhstan (“NBK”), which is the central bank of Kazakhstan.⁴⁸⁸ The issue is whether the London assets are immune from execution.

The claimant AIG argued that, although the assets are held by AAMGS in name of NBK, they are ultimately held for the beneficiary ownership of Kazakhstan, thus they are not the property of the central bank.⁴⁸⁹ Additionally, the assets are “for the time being, in use or intended for use for commercial purposes” under the meaning of Section 13(4) of the SIA.⁴⁹⁰ Therefore, AIG contended that the “commercial use” exception applies and the London assets held by AAMGS are not immune from execution.

⁴⁸⁶ *AIG Capital Partners Inc v. Kazakhstan*. [2005] APP.L.R. 10/20

⁴⁸⁷ *Id.* at 1.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 7

⁴⁹⁰ *Id.*

The government of Kazakhstan refuted the two arguments of AIG. Firstly, Kazakhstan argued that the cash accounts held by AAMGS represent a debt due by AAMGS to the NBK, thus they are the property of the central bank.⁴⁹¹ Secondly, the London assets form part of the National Funds of Kazakhstan, the purpose of which is “[to ensure] stable social and economic development of the country, accumulation of financial resources for future generations, [and] reduction of the vulnerability of the economy to the influence of unfavorable external factors”,⁴⁹² thus they are not used for commercial purpose but in the exercise of sovereign authority and immune from execution.⁴⁹³

The court upheld Kazakhstan’s counter arguments and decided that: 1) the London assets held by AAMGS are property of NBK and therefore enjoy immunity from execution under Section 14(4) of the SIA; 2) even if the London assets do not constitute the property of a central bank pursuant to Section 14(4), they are still immune from execution because the purpose of them is not for commercial use.⁴⁹⁴

In summary, the above analysis reveals two major observations regarding the execution of ICSID awards in the UK. In terms of the legislations in the UK and US regarding sovereign immunity from execution, some divergences are found. As for exceptions to immunity from execution, UK law requires a one-tier test, whereas US law requires a two-tier test. However, under UK law a state’s waiver must be expressed, while in the US implied waiver is also acceptable. Thus it is hard to say which state offers a more favorable legal system for executing ICSID awards. As for the case law, the AIG jurisprudence indicates that there is no more ease for investors to

⁴⁹¹ Id. at 8

⁴⁹² Id. at 3

⁴⁹³ Id. at 8

⁴⁹⁴ Id. at 20

overcome the bar of sovereign immunity in the UK—at least for the specially protected assets such as the central bank accounts, behind which lie considerable political reasons.

c. France

France is famous for its arbitration-friendly position. In French law, there are few procedural hurdles as for the recognition and enforcement proceedings of ICSID awards.⁴⁹⁵ Even so, investors still face a number of challenges due to sovereign immunity when they come to the execution phase.

- The French law regarding sovereign immunity from execution

There is no statutory provision in French law regarding the issue of sovereign immunity. In practice, sovereign immunity is regulated by court-defined rules.⁴⁹⁶ Compared to the sovereign immunity acts in the US and UK, the judge-made rules in France are more flexible and ready to evolve, which are more favorable to facilitate the execution of arbitral awards. In this sense, France still keeps the title of pro-arbitration forum in terms of award's execution.

In principle, sovereign assets of foreign states are immune from forcible execution in France, except for two situations—1) immunity from execution is exempted; 2) the state has waived its immunity from execution.⁴⁹⁷

Under the first situation, certain assets may be seized if its origin and intended use is private, and a nexus between the assets and the underlying claim can be demonstrated.⁴⁹⁸ However, French

⁴⁹⁵ Sarah Francois-Poncet, Branda Horrigan & Lara Karam, *Enforcement of Arbitral Awards against Sovereign States or State Entities--France*, in *ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS* 355–379, 355 (Doak Bishop ed., 2009).

⁴⁹⁶ Id. at 359

⁴⁹⁷ Id. at 358

courts have not developed consistent criteria to decide whether the property is for private use—some courts considered the nature of the activity, while other courts looked at the nature of the assets.⁴⁹⁹ Besides this private use exception, the case *Republique Democratique du Congo*⁵⁰⁰ also developed a new rule that certain foreign asset is not immune from execution if it is related to a civil operation.⁵⁰¹ In this case, Congo failed to pay the maintenance fee of a building used to house its personnel including diplomatic agents, against which the court granted judicial sale of the building in favor of the co-owners' association.⁵⁰² This evolution reflects that exceptions to immunity from execution in France have more flexibility to change through case law.

Under the second situation, it is confirmed by French cases that a state may waive its sovereign immunity from execution. However, contrary to the common practice in most other countries, some French courts decided that a state's consent to arbitration not only means waiver of immunity from jurisdiction, but also extends to immunity from execution.⁵⁰³ In the case *Bec Freres I*,⁵⁰⁴ court decided that “by agreeing to arbitration, [...] the [state] accepted the common rules of international trade, and thereby waived its immunity from jurisdiction and, given that agreements must be executed in good faith, its immunity from execution”.⁵⁰⁵ In the subsequent case *Creighton* regarding the challenges of an ICC arbitral award, the Cour de Cassation followed the same vein and stated that when a state enters into an ICC arbitration agreement, it undertakes to carry out the resulting award in accordance with Article 24(2) of the ICC Rules

⁴⁹⁸ Id. at 360 and 373

⁴⁹⁹ Id.

⁵⁰⁰ Civ. 1, January 25, 2005, *Republique Democratique du Congo v. Syndicat des coproprietaires de l'immeuble Residence Antony Chatenay*, 9 REC. DALLOZ 620 (2005)

⁵⁰¹ Sarah Francois-Poncet, Branda Horrigan, and Lara Karam, *supra* note 495 at 361.

⁵⁰² Id.

⁵⁰³ Id. 370

⁵⁰⁴ CA Rouen, June 20, 1996, *Societe Bec Freres v. Office des cereales de Tunisie*, 1997 REV. ARB. 263

⁵⁰⁵ Sarah Francois-Poncet, Branda Horrigan, and Lara Karam, *supra* note 495 at 370.

and accordingly waives its immunity from execution.⁵⁰⁶ The *Bec Freres I* and *Creighton* decisions suffered severe criticisms because they are contradict with the widely accepted view that a state's consent to arbitration does not mean a waiver of immunity from execution. Under the pressure of the criticisms, a subsequent case adopted a new rule that "an agreement to arbitrate may be deemed as a waiver of immunity from execution, such waiver will not constitute a blanket authorization to enforce against any and all state assets. Some assets, such as those used for sovereign activities and by diplomatic delegations, would still be immune from execution".⁵⁰⁷

As for the "exception to exception", French courts consider the assets of a foreign central bank as being immune from execution regardless the commercial or non-commercial use.⁵⁰⁸ As a member state of the Vienna Convention on Diplomatic Relations, France admits that the assets used for diplomatic missions enjoy diplomatic immunity.⁵⁰⁹

When execution of an arbitral award against a constituent subdivision or entity of a state is requested, difficulties may arise if the award was rendered against the state rather than the state entity. Regarding this question, the general rule is that the assets of the state entity can be attached only if the entity is an emanation of the state. In *Benvenuti & Bonfant v. Congo*, a French case concerning the execution of an ICSID award, the most noticeable issue is regarding this situation.

- *Benvenuti & Bonfant v. Congo*

⁵⁰⁶ Id.

⁵⁰⁷ Id. at 372

⁵⁰⁸ Id. at 363-366

⁵⁰⁹ Id. at 366-369

Benvenuti & Bonfant (“B&B”), an Italian company, sued the Republic of Congo in ICSID and obtained a favorable award. After being granted an exequatur in French court, B&B wanted to attach the funds held by a French bank on behalf of the Banque Commerciale Congolaise (“BCC”). The issue is whether BCC is an emanation of Congo and thus is liable for payment of the award against Congo.⁵¹⁰ Regarding the issue about state’s emanation, the general standard employed by French court is that, if an entity has no separate legal personality and is mere an administrative organ of the state, the entity is deemed as an emanation of that state.⁵¹¹ In this case, B&B claimed that BCC is under the control of Congo, which makes it a part of the state.⁵¹² Moreover, as contended by B&B, BCC received funds from the Congolese Treasury, which thus shows that BCC is an emanation of Congo.

The *Cour d’appel* disagreed with the arguments raised by B&B. The court stated that the control exercised by a state over an entity is not sufficient to enable dependent entities to be an emanation of that state.⁵¹³ Considering that BCC is a limited liability company performing commercial banking operations on its own account, on behalf of third parties or as part of a consortium, the court held that BCC is not an emanation of Congo and thus has no obligation to pay the damages granted in the ICSID award.⁵¹⁴ The B&B case shows that, although France is famous for its arbitration-friendly position, the court decision does not give more ease to the investor seeking execution of an ICSID award. One significance of this strict approach employed by French court is to protect private properties from being unduly attached as public property by some investors. In the situation where some investor tries to take certain private property by

⁵¹⁰ Benvenuti & Bonfant v. Banque Commerciale Congolaise and Others, ICSID Rep. Vol1, 373 (1987).

⁵¹¹ Sarah Francois-Poncet, Branda Horrigan, and Lara Karam, *supra* note 495 at 374.

⁵¹² BENVENUTI & BONFANT V. BANQUE COMMERCIALE CONGOLAISE AND OTHERS, *supra* note 510 at 374.

⁵¹³ Id.

⁵¹⁴ Id.

alleging that the property is belonged to the host state but should be exempted from sovereign immunity, the *Benvenuti & Bonfant v. Congo* approach could prevent the private property from being seized as sovereign property.

The above analysis about French law and relevant cases shows that the judge-made laws regarding sovereign immunity in France are complex and inconsistent, and the investors seeking execution of ICSID award did not have an easier life in France. However, compared to the sovereign immunity act in the US and the UK, French law does have more flexibility to change and the exceptions to immunity from execution indeed have been expanded in the past years. Thus, more evolutions in favor of execution of arbitral awards are probably expectable in France in the future.

d. China

China has not been a forum of any case regarding execution of an ICSID award. With the increasing number of Chinese investors going abroad, there might be some cases in the future brought in China by Chinese investors against the host states. In this sense, it is worth investigating whether China is a preferable forum for investors to seek execution of ICSID awards.

Unlike the above countries with clear endorsement of the restrictive theory of sovereign immunity, China is still deemed as a staunch advocate of the absolute sovereign immunity concept.⁵¹⁵ As a factual matter, there is barely any legislation in China specifying the issue of

⁵¹⁵ Dahua Qi, *supra* note 411.; Guo Yanxi, 中国关于主权豁免问题的对策 (Sovereign Immunity—China's Future Policy), 法学 (Jurisprudence) (Vol.3, 1995), 38-39; Zeng Tao, 中国在国家及其财产豁免问题上的实践及立场 (China's Practice and Position in Relation to Immunity of States and Their Property), 社会科学 (Social Science) (Vol.5 2005), 51-55; Huang Jin and Ma Jingsheng, *Immunities of States and Their Property: The Practice*

sovereign immunity, except for one statute in 2005 addressing the immunity from attachment enjoyed by the assets of foreign central banks.⁵¹⁶ Besides, no case up to now has been brought in Chinese People's Courts regarding the sovereign immunity issue.⁵¹⁷

However, although in Mainland China the issue of sovereign immunity has not been touched in practice, a case regarding the execution of an arbitral award against the Republic of the Congo was brought in a Hong Kong court. This case reveals that the absolute immunity is supported by China in practice.

Before analyzing the case, it is worth explaining the unique legal system in Hong Kong prior and after the transfer of sovereignty from the UK to the People's Republic of China (PRC) in 1997 (usually referred to as "the Handover"). Before 1997, Hong Kong was under British rule for 99 years, and its legal system was based on the English common law and rules of equity. At that time, the UK *State Immunity Act* (SIA) applied in Hong Kong, pursuant to which a restrict approach of sovereign immunity was adopted. After the Handover, Hong Kong becomes the Special Administrative Region (SAR) of the PRC under the model of "One Country, Two Systems", meaning that Hong Kong has its own Constitution—the *Basic Law of the HKSAR*, enjoys a high degree of autonomy and retains its current political, social, commercial and legal systems for 50 years since the Handover, but with the exception of foreign and defense affairs, which are in charge by the PRC Central Government.⁵¹⁸

of the People's Republic China, Hague Yearbook of International Law (1988), 163–181; Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, 1 Journal of Chinese Law (1987), 23–32.

⁵¹⁶ *Id.* at 316. The statute is the Law of the People's Republic of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures, adopted by the National People's Congress on October, 2005

⁵¹⁷ *Id.* at 317

⁵¹⁸ See the *Basic Law of the HKSAR*, Article 5, 11, 12, 17, 19

As for Hong Kong's position with regard to sovereign immunity after the Handover, it remained unclear for a long time due to the absence of specific legislation addressing this matter.⁵¹⁹ This situation was lasting until 2011 when the Hong Kong courts decided the case *FG Hemisphere Associates LLC v. Democratic Republic of the Congo & Ors.*⁵²⁰ Along with this case, it becomes clear that the absolute sovereign immunity applies in Hong Kong.

FG Hemisphere, an American hedge fund, is the assignee of two ICC arbitral awards, originally held by a Yugoslav company Energoinvest, against the Democratic Republic of Congo (DRC).⁵²¹ After successfully obtaining the order for enforcement of the two awards from Hong Kong court, FG Hemisphere sought to attach US\$104 million, which was the entry fee for an agreement about mineral exploitation rights due from a consortium of Chinese enterprises to the DRC.⁵²² The Court of First Instance upheld the non-commercial nature of the transaction and stated that no further discussion regarding sovereign immunity was necessary.⁵²³

During the appeal, the Court of Appeal addressed the matter of sovereign immunity and decided that the restrictive doctrine applies in Hong Kong because this is a rule of customary

⁵¹⁹ Mayer Brown, SOVEREIGN IMMUNITY AND ENFORCEMENT OF ARBITRAL AWARDS: NAVIGATING INTERNATIONAL BOUNDARIES, <http://www.mayerbrown.com/files/Publication/2e0f7077-9b25-430e-8b70-6a8f8c1a9d76/Presentation/PublicationAttachment/1be4c54c-bfc2-4d78-9403-85e37c560f43/12270.PDF> (last visited Oct 5, 2014).

⁵²⁰ FACV Nos. 5,6 and 7 of 2010, dated 8 June 2011 and 8 September 2011.

⁵²¹ Hong Kong / 10 February 2010 / Court of Appeal, In the High Court of the Hong Kong Special Administrative Region / FG Hemisphere Associates LLC [HK] v. Democratic Republic of the Congo et al. / CACV 373/2008 & CACV 43/2009, New York Convention Guide, http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=686&seule=1, accessed on November 10, 2014

⁵²² Mayer Brown, *supra* note 519 at 10.

⁵²³ *Id.*

international law and thus the common law recognized in Hong Kong, which did not infringe upon the powers reserved for the PRC under the *Basic Law*.⁵²⁴

Before the Court of Final Appeal made its decision, the Standing Committee of the National Peoples' Congress (SCNPC) issued an interpretation of the *Basic Law* Article 13 and 19. The interpretation confirmed that the Central People's Government (CPG) has the power to determine the rules or policies on state immunity to be applied in Hong Kong and concluded that Hong Kong must adopt the absolute sovereign immunity as the same of the PRC.⁵²⁵ In accordance with this interpretation, the Hong Kong Court of Final Appeal reasoned that, although the common law applies in Hong Kong, it must be subject to such modifications, adaptations, limitations or exceptions as are necessary to bring its rules into conformity with Hong Kong's status as a Special Administrative Region of the PRC and to avoid any inconsistency with the *Basic Law*.⁵²⁶ Moreover, the *Basic Law* provides that the CPG is responsible for foreign affairs relating to Hong Kong, thus the matter of sovereign immunity that is deemed as "foreign affairs" within the meaning of Article 19 of the *Basic Law* should be subject to the CPG's determination.⁵²⁷ Therefore, the court concluded that the absolute sovereign immunity applies.

After the *Congo* case, the Hong Kong courts' position in favor of the absolute doctrine of sovereign immunity has been recognized internationally. This is not a good signal for investors

⁵²⁴ Id. at 11. The dissenting opinion in the Court of Appeal's decision stated that the restrictive doctrine had gained popularity in the international community, but there had been insufficient uniformity and consistency required to attain the status of customary international law.

⁵²⁵ See the *Interpretation of paragraph 1, article 13 and article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress*, adopted at its 22nd Session on 26 August 2011.

⁵²⁶ *Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC* FACV No 5 of 2010 (8 June 2011)1 & (8 September 2011)2 CFA

⁵²⁷ Mayer Brown, *supra* note 519 at 11.

wishing to execute arbitral awards in Mainland China and in Hong Kong. Although scholars have been calling for a shift from the absolute to the restrictive notion regarding sovereign immunity,⁵²⁸ and the SCNPC and the CPG's actions suffered severe criticisms for interfering in Hong Kong's judicial process, investors are still facing substantial obstacles before the execution of arbitral awards in China.

6.2.2. Execution of ICSID awards in the reluctant host states

Forcible execution of an arbitral award only happens when the respondent party refuses to pay. Thus, it is not a wise choice for investors to seek execution in the national courts of the reluctant host states. In fact, all of the known cases regarding the execution of ICSID awards were carried out in the home states or a third state. Assuming that an investor wishes to execute an ICSID award in the host state, some obstacles can be envisaged.

The first obstacle might be the difficulty of obtaining a court judgment declaring the enforceability of the ICSID award. As analyzed in Chapter 5, although Article 53 of the ICSID Convention requires a host state to recognize an ICSID award and enforce the pecuniary obligations immediately, some host states may still have strong motivations to hinder the enforcement through national courts' judicial review. Without a court judgment allowing for enforcement of an ICSID award in the host state, it will be almost impossible for investors to obtain local courts' assistance for execution of the award.

Secondly, even if the host state's court issued an order allowing for the enforcement, the investor should anticipate more resistance during the execution proceedings. Given that the municipal law

⁵²⁸ E.g. Dahua Qi, *supra* note 411.

controls the execution of ICSID awards, it is imaginable that the host states may rely on sovereign immunity to repel forcible attachment on their sovereign assets.

Moreover, there might be additional obstacles imposed by the host state's municipal law. For example, Argentine law sets up some procedural conditions for the attachment of state assets. According to the Argentine Complementary Law on Budget ("CLB"), all funds, securities and other means aimed at covering the national budget or to make the disbursements provided for in the national budget cannot be subject to attachment, and the freedom to use, transfer or dispose of those funds, securities and means cannot be limited in any way.⁵²⁹ CLB also provides that if state or its agencies is required to make payment pursuant to a judgment, the amount is paid only if sufficient funds were budgeted.⁵³⁰ Thus, even if the court decided a certain amount of damage is payable by the state to the investor, the real payment is still subject to the national budget.

Even though some obstacles of executing ICSID awards in the host states can be predicted, there is no real case affirming host states' resistance as such. Contrary to the conjecture about some host states' hostility, there are also some voice negating this assertion. For example, in the 2014 UN General Assembly meeting, Argentine President Cristina Kirchner claimed that it is an untrue condemnation of developed states that Argentina will default the debts owing to foreign investors, and Argentina will honor the international arbitral awards against it. Disregarding the complex political issues between states, investors are advised to seek execution of ICSID awards in the home state or a pro-arbitration third state to avoid unpredictable results of the execution proceedings in the host states.

⁵²⁹ Decree No. 1, 110/05, see Javier Robalino, *Enforcement of Foreign Awards against Sovereigns in South America—the Cases of Argentina and Ecuador*, in *Enforcement of Arbitral Awards against Sovereigns* 425, 434 (Doak Bishop ed., 2009).

⁵³⁰ *Id.* at 435

Summary

Based on a wrong assumption that respondent states would not default ICSID awards, the ICSID Convention leaves the execution of ICSID awards completely under the control of domestic laws, including the laws regarding sovereign immunity. As a result, basically an ICSID award will be executed only if the investor can overcome the respondent state's plea of sovereign immunity. The investigation of the legal systems and case laws of selected jurisdictions shows that, not mentioning the recalcitrant host states, even in forum states with pro-arbitration fame, investors will face a number of obstacles to overcome the hurdle of sovereign immunity and thus have a small chance to successfully execute ICSID awards against the host state's assets. Although the deadlock for executing ICSID awards is not a great problem currently faced by investors, it keeps growing along with the backlash against the investment arbitration. In this situation, the effectiveness of ICSID awards will be cast into serious doubt.

However, it is worth noting that restricting sovereign immunity and promote execution of ICSID award is not the straightforward answer. Sovereign immunity is never a pure legal issue but tangled with economic, political and international relationship considerations. Currently several recalcitrant states who refuse to voluntarily comply with ICSID awards are suffered in distressed domestic economy. Sovereign immunity is a necessary shield to protect their national interests especially during economic hardship. If the forum courts take a pro-execution stance and deny sovereign immunity without considering the host state's financial difficulty, the host state may face greater hardship, which could prevent it from debouching from the crisis and regain the capacity to pay back other creditors. Therefore, the balance between investors and host states should be taken into consideration when discussing the issue of execution of ICSID awards. In

the next chapter, some proposed solutions to enhance the effectiveness of ICSID awards and balance the ICSID post-award framework will be discussed.

Chapter 7

Possible Ways to Enhance the Effectiveness of ICSID Awards through Enforcement and Execution Mechanisms

The issuance of an ICSID award does not necessarily mean the end of an investment dispute. If the respondent party, in most cases the host state, refuses to voluntarily honor the ICSID award, the investor may take action to enforce the award and then seek execution of the reliefs. If the endeavor of enforcement and execution turn out to be a failure, then the award will become a paper with no meaning and the ICSID arbitration will lose its appeal as an effective way of dispute settlement. Therefore, it is critical to preserve the effectiveness of ICSID awards through viable and efficacious enforcement and execution mechanisms.

Chapters 5 and 6 expounded the main challenges faced by the ICSID enforcement and execution mechanisms. Firstly, although the ICSID Convention provides that an ICSID award is enforceable in all member states, court review over the award in domestic enforcement proceedings is still possible. Further, the recalcitrant states' anti-ICSID stance aggravates the risk of ICSID awards being denied enforcement. Secondly, sovereign immunity is a great hurdle to block the execution of ICSID awards and now the states' laws and court practices show that it is very hard for investors to overcome a state's plea of immunity. Especially during the current backlash against ICSID, some host states have taken various measures to thwart the enforcement and execution of ICSID awards, from taking advantage of the pitfall of the ICSID Convention to violating international obligations, the effectiveness of ICSID awards now face greater risks. Therefore, this section will discuss some possible ways to improve the ICSID enforcement and

execution mechanisms in response to the challenges, and thus enhance the effectiveness of ICSID awards. Suggestions will be proposed and expounded from the perspective of the ICSID framework *per se*, the investors, the states, and the *ex post* recourses in case of failure of enforcement and execution.

7.1. Possible Changes within the ICSID Framework

7.1.1. ICSID should take self-scrutiny regarding the quality of its awards

The fact that many ICSID awards have been left unenforced is attributed to both intrinsic and extrinsic reasons. Intrinsically, defective quality of ICSID awards may deter voluntary compliance and increase hardship in enforcement. Extrinsically, shortcomings of the ICSID enforcement and execution mechanisms may undermine the effectiveness of ICSID awards. Before discussing the possible improvement of the enforcement and execution proceedings, it might be worth considering that ICSID should take some self-scrutiny regarding the quality of its awards in order to enhance ICSID awards' effectiveness from the internality.

The quality of an arbitral award mainly depends on the level of fairness of the decision, in both substantive and procedural aspects. In addition, consistency among all the awards issued by the same institution enhances legitimacy and quality of a single award. An arbitral award with high quality would have a better chance to be complied or enforced, and vice versa. As explained in Chapter 3, the annulment proceeding – the prominent mechanism that controls the quality of ICSID awards – gives priority to the value of finality rather than fairness. Based on this theory, the ICSID Convention only allows for certain exceptional procedural matters as the grounds of annulment, and excludes the appellate proceedings that can preserve substantive fairness and consistency of arbitral awards. As for the three aspects relating to an award's quality, i.e.

procedural fairness, substantive fairness and consistency, the ICSID control mechanism only touches the first one but not the latter two. Thus, besides the refinement of the annulment proceedings, ICSID should also take some studies to detect the deficiencies in terms of substantive fairness and consistency of its awards and contemplate strategies to improve in order to avoid the awards being left unenforced due to the unsatisfied quality. Suggestions regarding the evolvement of ICSID annulment proceedings are discussed in Chapter 4, and this subsection will focus on ICSID's self-scrutiny regarding substantive fairness and consistency of ICSID awards.

- Substantive fairness

ICSID tribunals usually include outstanding and respectful scholars and practitioners in the field of international law, thus the substantive quality of their decisions can be assured to some extent. However, along with the backlash against ICSID arbitration these years, more and more challenges regarding the fairness of ICSID awards have been raised. Criticisms mainly target the alleged bias of the arbitrators from the western developed countries who are in favor of investors, the huge amount of damages awarded against the host states, the conflicts between arbitrators' decisions and public law principles, etc. Comprehensive analysis about all of the above issues will be too long to fit into this thesis. The ICSID Administrative Council needs to invite experts to closely discuss these challenges against the matter of substantive fairness, and provide guidance to arbitrators to help them strike balance between the interests of investors and states, as well as between public law and private law.

- Consistency

The inconsistency of ICSID awards or annulment decisions has been severely criticized by commentators, especially when the fact patterns and the main issues in two or more cases are generally identical but the results are conflicting. This is a big challenge to the legitimacy of ICSID arbitration and may give excuse to the incompletion of ICSID awards. Examples of inconsistency within ICSID include the conflicting decisions concerning the ‘umbrella clause’ in *SGS v. Pakistan*⁵³¹ and *SGS v. Philippine*⁵³², ‘MFN treatment’ in *Plama v. Bulgaria*⁵³³ and *Maffezini v. Spain*⁵³⁴, and ‘necessity defense’ in *Continental v. Argentina*⁵³⁵ and *LG&E v. Argentina*⁵³⁶. Annulment committees are also challenged for rendering conflicting decisions, such as the *CMS* case and *Sempra* case in the issue of application of law.

Under the current ICSID Convention, an ICSID award cannot be annulled on the basis that it is inconsistent with previous decisions, because no ground of annulment can be found fitting with this situation. Moreover, due to the exclusion of the appellate procedure from the ICSID system, there is no appellate body that can regulate the issue of consistency among all ICSID decisions. As discussed in Chapter 3, introducing the appellate procedure into the ICSID system may not be a feasible resolution—in this situation, another option is to involve inconsistency as an annulment ground by expansively interpreting the scope of Article 52(1).⁵³⁷ If this kind of interpretation turns to be farfetched, ICSID should consider adopting some prevention measures, such as providing guidance to arbitrators with regard to the issue of consistency.

⁵³¹ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13)

⁵³² *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6)

⁵³³ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24)

⁵³⁴ *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7)

⁵³⁵ *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9)

⁵³⁶ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1)

⁵³⁷ See Chapter 4, Section 2

All in all, the ICSID governing body should seriously consider some possible improvements to enhance the quality of ICSID awards, which may promote better compliance and smooth enforcement of the awards.

7.1.2. Possible amendments of the ICSID Convention and the Regulations and Rules

Multilateral international treaties usually make some compromises on certain provisions to moderate the conflicts among states in exchange for a wider ratification of the treaty. The drafting history of the ICSID Convention shows the same situation and thus the Convention *per se* has some shortages in ensuring the effectiveness of ICSID awards during the enforcement and execution proceedings. Firstly, by assimilating the enforcement of ICSID awards to the enforcement of the final court judgments in the forum state, the ICSID Convention leaves a loophole in Article 54 allowing for potential court review on the ICSID awards when the same court judgments are possibly reviewable. Secondly, the ICSID Convention gives domestic laws full authority to govern the execution of ICSID awards and expressly preserves states' right to invoke sovereign immunity from execution, thus investors have to face considerable obstacles to overcome sovereign immunity when seeking execution of ICSID awards. Due to these Convention provisions, an ICSID award may be left unenforced or unexecuted, which could impair the effectiveness of the ICSID arbitration.

The above problems could be corrected to some extent by revising the relevant provisions in the ICSID Convention or the ICSID regulations and rules. Possible amendments include closing the loophole for court review in the enforcement proceedings and incorporating a waiver provision regarding sovereign immunity from execution. The possible changes within the ICSID framework will be discussed below.

- Amendment procedures for the ICSID Convention and the regulations and rules

At the outset, the procedure of amending the ICSID Convention and the regulations and rules need to be explained. According to the relevant provisions, once one or more contracting state(s) propose(s) an amendment of the Convention, the ICSID Administrative Council, which is composed of one representative of each contracting state, should decide by a majority of two-thirds of its members regarding whether to circulate this amendment to all contracting states for ratification.⁵³⁸ Only unanimous ratification of all contracting states will lead to the amendment of the ICSID Convention.⁵³⁹ However, unanimous ratification is very hard to achieve given the big number of signatory states (150 by 2015) and the disparity in states' interests in terms of international investment. Thus the ICSID Convention has never been amended and future amendment might be very unlikely to happen.

As an alternative to the amendment of the Convention, a more modest way is to amend the ICSID Arbitration Rules. To complement the ICSID Convention, the ICSID Administrative Council adopted several regulations and rules, one of which is the Rules of Procedure for Arbitration Proceedings (the Arbitration Rules). Amendment of the regulations and rules does not require unanimous ratification but only a two-thirds majority vote of the Administrative Council. The most recent amendment of the Arbitration Rules was in 2006. It is noteworthy that the Arbitration Rules should not conflict with the ICSID Convention.

- Closing the loophole for possible court review in the enforcement proceedings

⁵³⁸ See Article 65, 66 of the ICSID Convention.

⁵³⁹ See Article 66 of the ICSID Convention.

Although the designers of the ICSID arbitration intended to create a self-enforcing mechanism for ICSID awards, the provisions in the ICSID Convention nevertheless leave a loophole for possible judicial reviews in the enforcement proceedings. As for the enforcement proceedings, Article 54 assimilates ICSID awards to final court judgments of the state where enforcement is sought, which means that an ICSID award may be subject to court review if the local law allows for review on some final court judgments. This is the case in a number of jurisdictions including the US, UK, France and China.

Moreover, in lack of a clarification of the interrelation between Article 53 and Article 54, an ICSID award may be denied enforcement in the host state. Article 53 stipulates party's obligation to promptly comply with the ICSID awards against them. As explained in Chapter 5, when investors seek enforcement of an ICSID award in the host state, the state party should not ask the local court to deny the enforcement by invoking Article 54.⁵⁴⁰ However, this relationship between Article 53 and Article 54 is not quite clear from reading the text of these two provisions. By taking advantage of this ambiguity, Argentine government relies on Article 54 and requires the prevailing investors to follow the administrative formalities under Argentine law that applies to the enforcement of a final court judgment as the precondition of its compliance with ICSID awards. In this process, the ICSID awards against Argentina might be subject to court review based on Argentine law.⁵⁴¹

The loophole in Article 54 and the obscure relationship between Articles 53 and 54 make ICSID awards vulnerable to potential court review and may result in refusal of the enforcement of ICSID awards. If the ICSID Convention could be amended in the future, it might be helpful to

⁵⁴⁰See Chapter 5, Section 5.1.5

⁵⁴¹See Chapter 5, Section 5.2.2

expressly state that no review other than verification of the award's authenticity would be allowed in national court, so that the loophole open for possible court review in the enforcement proceedings could be closed. In addition, the interrelation between Articles 53 and 54 should be explicitly clarified in the Convention by saying that Article 54 do not apply to the enforcement proceedings in the host states. However, introducing the above contents regarding the interrelationship between Articles 53 and 54 in the Arbitration Rules may not be feasible before the Convention is amended as to the related matters, because currently such interpretation is supported by no Convention texts.

- Introducing a waiver provision with regard to sovereign immunity from execution in the ICSID Convention

Article 54(3) of the ICSID Convention states that execution of ICSID awards is governed by domestic laws and Article 55 provides that state parties preserve the right to invoke sovereign immunity from execution. There is no other provision in the Convention stipulating a waiver of sovereign immunity from execution. The execution mechanism set forth in the ICSID Convention produces a number of barriers for investors seeking execution of ICSID awards. However, the analysis in Chapter 6 demonstrates that the circumstances that lead to the drafting of the above provisions have changed since the adoption of the ICSID Convention—in short, there is a strong trend towards a restrictive sovereign immunity; more and more developing countries have turned to the dual-role of both host state and home state of international investment and thus are no longer staunch advocates of the absolute sovereign immunity concept; and some recalcitrant host states' attitudes have defeated the assumption that states will not default the obligation ordered by ICSID awards. The changed circumstances reveal that investors now face more hurdles when seeking execution of ICSID awards.

In this situation, a Convention amendment introducing a waiver of sovereign immunity from execution to facilitate the execution of ICSID awards could be rational, particularly if some caveat were added. The waiver provision can set forth the scenarios where host states waive their immunity from execution, for instance the assets sought by investors are used for a commercial purpose. This provision could solve the problem of forum shopping caused by the diverging local laws regarding the exceptions to sovereign immunity and provide investors a viable way to overcome states' defense of sovereign immunity.

However, this amendment will be extremely hard to achieve. Immunity from execution is the last bastion for states to protect their sovereign assets. By consenting to ICSID arbitration, the host state has implicitly waived its immunity from jurisdiction, thus the only chance to invoke sovereign immunity to defend the attachment of its assets is at the execution stage. In this sense, states are unlikely to agree on a waiver provision regarding immunity from execution in the ICSID Convention. Furthermore, it is impossible to introduce a waiver provision in the Arbitration Rules due to the conflict with the ICSID Convention.

7.1.3. Securing compliance through annulment committees' decisions on a conditional stay of enforcement

Considering the difficulty of amending the ICSID Convention, it is easier to make changes through practice. One possible way to avoid non-compliance of ICSID awards is to ask *ad hoc* committees to place a conditional stay of enforcement in an annulment proceeding as a guarantee of the respondent parties' compliance with the awards.

Once an ICSID award is rendered, parties are obliged to promptly comply with the award. However, if either party requests annulment of the award, enforcement can be stayed. When an

application of annulment is filed, the ICSID Secretary-General will grant a provisional stay, until the *ad hoc* committee is composed and decides whether to grant the continuation of stay. While the provisional stay is granted automatically, the continuation of stay is subject to committee's discretion. According to Article 52(5) "[t]he Committee may, if it considers that the circumstances so require, stay enforcement pending its decision." This provision is silent as to whether certain conditions can be imposed to the stay. Previous annulment cases show that many *ad hoc* committees did not read this silence as a denial of their power to grant conditional stay of enforcement.⁵⁴²

The conditions granted by the committees can be in the form of a letter of assurance ('comfort letter') or financial security, such as a bank guarantee. If the annulment is denied, the award debtor should carry on its obligation as assured in the comfort letter, otherwise the award creditor may enforce on the guarantee without being hindered by the plea of sovereign immunity. Thus, by requiring certain conditions on a host state's application of stay, the investor can go around the host state's plea of sovereign immunity to the extent of the state's guarantee and secure at least partial collection of the awarded damages.

To achieve a better effectiveness of the conditional stay of enforcement, relevant provisions can be incorporated in the ICSID Arbitration Rules as guidance for future *ad hoc* committees' practice. Currently, Rule 54 in the Arbitration Rules is titled "Stay of Enforcement of the Award", but does not deal with the matter of the conditions for stay of enforcement. Future amendment of this rule can introduce the specific grounds of imposing conditions, the types of

⁵⁴²Up to mid-2014, in seven published annulment decisions financial security was ordered, and in *Venvedi v. Argentina* and *Rumeli & Telsim v. Kazakhstan* it was granted on alternative basis. See Inna Uchkunova, Much Ado about Nothing—Conditional Stay of Enforcement in Annulment Proceedings under the ICSID Convention, *Arbitration Int.* 2014, 30(2), 283-344

conditions and the punitive sanctions in the case of non-compliance of the conditions. In specific, the amended provision can enumerate the most frequent scenarios as the grounds of *ad hoc* committees' consideration for imposing a condition, which include but are not limited to: the award debtor makes it clear that it will not comply with the obligations in an ICSID award; the debtor seeks to move its assets after the issuance of the initial award and during the annulment proceedings; the debtor has a history of non-payment or non-compliance of the condition for stay of enforcement in previous cases; the annulment application is frivolous or dilatory, etc. The list is not exclusive and the enumerated scenarios do not necessarily lead to the posting of conditions but depend on *ad hoc* committee's discretion. The condition ordered by the committee should be a "reasonable assurance". What is reasonable depends on "all the circumstances of a case as a whole".⁵⁴³ *Ad hoc* committee should also take into consideration the economic hardship of the respondent state, if there is any, as well as the potential harms in the state's interests that caused by posting a security, especially when the state face numerous cases and great financial burden.

In summary, within the ICSID framework there are several ways to enhance the effectiveness of ICSID awards, including ICSID's self-scrutiny regarding the quality of its awards, amendment of some provisions of the ICSID Convention and the ICSID Arbitration Rules, and applying for conditional stay of enforcement during the annulment proceedings. However, it is noteworthy that amending the ICSID Convention is of small possibility under the current ICSID system. In the following, some possible measures outside the ICSID framework for the pursuance of a more effective post-award mechanism will be discussed.

7.2. Investors' Strategies to Secure the Enforcement of ICSID Awards

⁵⁴³*Enron Cooperation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Oct. 7, 2008), para 46

Investors can employ several strategies to fight against the deficiencies of the ICSID enforcement and execution mechanisms, including avoiding the non-pecuniary damages, utilizing the waiver of sovereign immunity from execution, choosing the proper place of execution and seeking assignment of the award.

7.2.1. Avoiding the issuance of non-pecuniary damages

Article 54 of the ICSID Convention only provides that the expedited enforcement mechanism only applies to the pecuniary damages issued in ICSID awards, rather than the non-pecuniary damages. The rationale is that non-pecuniary damages against sovereign states, such as specific performance, are usually impossible to be enforced by the forum court. Thus investors are encouraged to pursue monetary damages and avoid non-pecuniary damages to the extent possible, so that they can take advantage of the expedited enforcement proceeding provided by the ICSID Convention.

There are three possible ways for investors to avoid the issuance of non-pecuniary relief. Firstly, investors can frame their claims only in terms of pecuniary damages. Secondly, if an investment agreement between a host state and an investor provides ICSID arbitration as an option of dispute resolution, the investor can insert a clause therein eliminating an arbitral tribunal's authority to issue non-monetary remedies, which however depends on the negotiation with the state party. Thirdly, some bilateral investment treaties (BITs) or free trade agreements (FTAs) refine arbitral tribunal's power merely to pecuniary damages and restitution of property complemented by alternative pecuniary damages, such as the US FTAs with Chile and Singapore

and the 2012 US Model BIT.⁵⁴⁴ If one of the BITs or FTAs constitutes the basis of consent of ICSID arbitration, non-pecuniary remedies can be avoided. If the damage that has been issued is in non-pecuniary form, the investor can ask for alternative pecuniary damages in case of the state's non-performance, such as liquidated damages or penalties.⁵⁴⁵

7.2.2. Waiver of immunity from execution

For investors, obtaining a waiver of immunity from execution will be a useful strategy to increase the possibility of a successful execution against the host state. State's waiver of immunity refers to two aspects: immunity from jurisdiction and immunity from execution. As for post-award issues of international arbitration, the principle of sovereign immunity prevents a state from being sued in a foreign court for enforcement of arbitral awards (in light of immunity from jurisdiction) and shields its sovereign assets from judicial attachment (in light of immunity from execution). The ICSID Convention Article 54 authorizes the court of any member state the jurisdiction to enforce an ICSID award, thus a respondent state should not plead immunity from jurisdiction to hinder the ICSID enforcement proceedings.⁵⁴⁶ However, state's consent to ICSID arbitration does not infer a waiver of immunity from execution. Article 55 of the ICSID Convention expressly preserves state's right to invoke sovereign immunity to restrain the execution of sovereign assets.⁵⁴⁷

⁵⁴⁴ See Article 10.25 of the US FTAs with Chile and Singapore (January, 2004), available at <http://www.ustr.gov/trade-agreements/free-trade-agreements>; and Article 34 of the 2012 US Model BIT, available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>

⁵⁴⁵ LUCY REED, JAN PAULSSON, AND NIGEL BLACKABY, *supra* note 28 at 183.

⁵⁴⁶ Article 54(1) of the ICSID Convention states that: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."

⁵⁴⁷ Article 55 of the ICSID Convention states that: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

If an investor obtains the host state's waiver of immunity from execution, attachment of sovereign property when the state refuses to pay will be easier and smoother. Nevertheless, it is not easy to obtain the waiver. Firstly, only if there is an investment agreement between the investor and the state, getting a waiver of sovereign immunity will become possible. It is very rare to find a state's waiver in bilateral investment treaties (BITs), because a waiver in treaties requires reciprocity between treaty parties, i.e. both the host state and the home state need to waive their immunity, but states are usually unwilling to do so.⁵⁴⁸ States are also reluctant to grant a waiver clause in an investment contract. As stated by Gaillard Emmanuel, "a waiver of immunity from execution is a grave decision that calls for the greatest restraint".⁵⁴⁹ Practice also shows that express waivers of immunity from execution are not very frequent. But still, investors are advised to require an express waiver clause, in whole or in part, in case the host state does not honor its legal commitment under ICSID arbitration. If the state refuses to grant any waiver of immunity from execution, this might be a warning of the state's unwillingness to comply. In practice, whether a waiver is granted and to what extent it is granted depends on the negotiation power of the host state and the investors. In many cases, one party of an investment agreement is a big-scale, wealthy and powerful transnational corporation, and another party is a developing country longing for capital, where the investor has very strong bargaining power to obtain a waiver of sovereign immunity from the host state. However, it is also noteworthy that this situation might result in imbalance in favor of the transnational corporation.

Even if a waiver has been obtained, another question may arise whether the waiver is valid in the state where execution of an ICSID award is sought. The validity of a waiver depends on the

⁵⁴⁸ Inna Uchkunova and Oleg Temnikov, *supra* note 452 at 1–16.

⁵⁴⁹ Emmanuel Gaillard, *Some Notes on the Drafting of ICSID Arbitration Clauses*, 3 ICSID REVIEW, FILJ 136, 146 (1988).

municipal law of different jurisdictions. Due to the divergences of different countries' sovereign immunity laws, a waiver might be valid in one place but void in another. Thus, investors should bear in mind the issue of validity when requiring a waiver from the host state. Investors should pay special attention to the form of the waiver (explicit or implicit) and the treatment to different sovereign assets (commercial, non-commercial and specially protected assets). Nevertheless, when negotiating the waiver, it is very difficult and time-consuming for investors to fully investigate the municipal laws of the states where the host state has assets and execution might take place. Thus, the validity of a waiver of immunity from execution seems to be a tricky question to investors. Investors are advised to draft an expressed waiver clause in the investment contract and specifically cover the host state's diplomatic assets. What's more, because the validity of a waiver is ultimately decided by the local law where execution is sought and the future execution forum is unknown yet to the investors during the contract drafting, the waiver clause should be as general as possible, rather than merely fixing on some specific jurisdictions.

7.2.3. Choosing the proper place of execution

Choosing an appropriate place to initiate the execution proceeding is an important consideration for investors. Two major questions may affect the choice of the place, namely (1) where is the location of the attachable sovereign assets, and (2) whether the national legal system is pro-arbitration and more restrictive in sovereign immunity. Litigating in a country where the host state has attachable assets and the local law and court's position are favorable for execution, investors may have a good chance to get paid. Some strategies regarding the above two aspects may help investors to select a better execution forum.

Due to information asymmetry, it is usually a difficult task for private investors to locate the host state's assets. The US Supreme Court rejects sovereign immunity from discovery under the FSIA in *Argentina v. NML*.⁵⁵⁰ If investors seek execution in the US, this case may provide them a strong tool to find information regarding the host states' assets.⁵⁵¹ Another useful tactic is to obtain a list of attachable assets from the host state. This is not yet a common practice in the field of international investment, but may be possible in the future. In the case *Mitchell v. Congo*, the investor agreed to indicate his address and provide a list of assets that could be attached if the host state Congo (DRC) prevailed in the annulment proceeding, on the condition that Congo does the same.⁵⁵² This method can help investors search for host state's assets relying on the list provided by the state, but the state may not have sufficient incentive to provide this list in exchange of the one from the investor. If the anticipated interests of a successful execution proceeding overweighs the litigation cost, investors could also initiate parallel proceedings in several pro-arbitration jurisdictions to increase the possibility of success.

7.2.4. Assignment

There have been numerous practices that the original award holder transferred its interest in an arbitral award to a third party—in many cases a hedge fund or a so-called “vulture fund”.⁵⁵³ For example, CMS (a US company) assigned an ICSID award against Argentina to Blue Ridge

⁵⁵⁰ 134 S. Ct. 2250 (June 16, 2014).

⁵⁵¹ See the related discussion in Chapter 6

⁵⁵² *Patrick Mitchell v. Democratic Republic of Congo*, ICSID No ARB/99/7, Decision on the Stay of Enforcement of the Award (30 November 2004), para 17. See Inna Uchkunova and Oleg Temnikov, *supra* note 452 at 17.

⁵⁵³ Konstantin Pilkov, ASSIGNMENT OF BENEFITS OF ARBITRAL AWARDS: PROBLEMATIC ENFORCEMENT IN UKRAINE KLUWER ARBITRATION BLOG (2014), <http://kluwerarbitrationblog.com/2014/06/02/assignment-of-benefits-of-arbitral-awards-problematic-enforcement-in-ukraine/> (last visited Nov 5, 2015). Also see Inna Uchkunova and Oleg Temnikov, *supra* note 452. It states that “Assignment of benefits of arbitral awards is a standard business practices worldwide, undertaken by companies involved in international trade and supported by credit insurers.”

Investment, LLC, an American hedge fund,⁵⁵⁴ and Energoinvest (a Yugoslav company) assigned its ICC awards against the Democratic Republic of Congo (DRC) to FG Hemisphere (an American hedge fund).⁵⁵⁵ This can be a possible way for investors to collect some portion of the awarded damages without going through the enforcement and execution proceedings and taking the risk of non-payment due to sovereign immunity. However, it is arguable whether this assignment is legitimate and the enforcement of the assigned award in certain jurisdictions may face obstacles.

Some doubts are raised regarding the legitimacy of the assignment of arbitral awards. In the book *Commentary of the ICSID Convention*, Schreuer asserted that only the original party of ICSID arbitration may seek recognition and enforcement of the award.⁵⁵⁶ Argentina challenged before the *Sempra v. Argentina ad hoc* committee the legality of the assignment of arbitral awards under international law.⁵⁵⁷ The *Sempra* committee did not directly address the legitimacy of the assignment but only stated that this assignment does not affect Argentina's obligation to comply with the award.⁵⁵⁸ State courts may also question the legitimacy of an assignment and deny the enforcement of the assigned award. For example, a scholar states that the laws do not provide for this situation, thus the Ukrainian courts will probably refuse to enforce an assigned award due to the rather formalistic position.⁵⁵⁹

⁵⁵⁴ Inna Uchkunova and Oleg Temnikov, *supra* note 452 at 21.

⁵⁵⁵ Hong Kong / 10 February 2010 / Court of Appeal, In the High Court of the Hong Kong Special Administrative Region / FG Hemisphere Associates LLC [HK] v. Democratic Republic of the Congo et al. / CACV 373/2008 & CACV 43/2009, New York Convention Guide, http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=686&seule=1, accessed on November 10, 2014

⁵⁵⁶ CHRISTOPH SCHREUER, *supra* note 28 at 1146.

⁵⁵⁷ *Sempra Energy International v. Argentina Republic*, ICSID Case No ARB/02/16, Decision on the Argentina Republic's Request for a Continued Stay of Enforcement of the Award (5 March 2009), para 71

⁵⁵⁸ *Id.* para 72

⁵⁵⁹ Konstantin Pilkov., *supra* note 553.

In addition, the involvement of vulture funds may complicate this matter by adding politically sensitive elements. Vulture funds are heavily criticized by some countries, especially those trapped in the swamp of sovereign debts (such as Argentina), for jeopardizing sovereigns' national interests. In those cases between vulture funds and sovereign states in debts, political considerations are usually unavoidable. For instance, in the series of *NML* cases, the US and French governments sent amicus brief to the US Supreme Court, asking the court take into consideration of the adverse influence on international relationships if the court sides with *NML*.⁵⁶⁰ Therefore, assignment may be a possible way for investors to partially realize their interests, but in current situations it bears substantial controversy and uncertainty. On the other hand, if the investor fails to enforce an award and the host state shows no intention of settlement, then it will be very hard to assign this award to others.

Therefore, investors can take several measures to preserve their interests granted by ICSID awards. Each measure has its limitations and the effect is highly depending on the host state's good will, thus investors should be well advised to make the best of these strategies.

7.3. Improvements from State's Perspective

The analysis in Chapters 5 and 6 shows that, due to some states' laws and their court practice, there might be a number of obstacles in front of the enforcement and execution of ICSID awards. In this section, recommendations to facilitate ICSID enforcement and execution from state's perspective will be discussed. Forum states where enforcement or execution is sought and the recalcitrant host states will be tackled separately.

7.3.1. Suggestions regarding the laws and court practice in the forum states

⁵⁶⁰ Vulture Funds, *supra* note 453.

Enforcement and execution proceedings face different challenges and call for different cures, thus the two aspects need to be discussed respectively.

- Enforcement proceedings

According to the elaborations in Chapter 5 Section 2, an ICSID award may not be properly enforced in a third country's court because of two potential risks. Firstly, in those countries where the final court judgment may be denied enforcement under certain exceptional situations, ICSID awards will face the same risk under Article 54 of the ICSID Convention. Secondly, the lack of a clear distinction between the enforcement proceeding and the execution proceeding under the local law of certain countries may hinder the enforcement of ICSID awards.⁵⁶¹

To prevent these risks that may block the enforcement of ICSID awards in national courts, states can set up specific domestic rules to ensure swift enforcement of ICSID awards. The ICSID Convention Article 69 requires that “[e]ach Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories”. However, less than half of the ICSID member states have promulgated domestic laws or taken relative measures pursuant to this provision.⁵⁶² In most countries with these laws, the related provisions are short and brief, failing to set forth detailed procedural rules for the enforcement proceedings with regard to ICSID awards.⁵⁶³ This situation cannot help ensure the

⁵⁶¹ See relevant discussions in Chapter 5.

⁵⁶² By September 2014, there are 63 out of 159 signatory states of the ICSID Convention have taken legislative or other measures to meet the Article 69 requirement. See *Contracting States and Measures Taken by Them for the Purpose of the Convention* (September 2014), ICSID, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&Measure_s=True&language=English, accessed on November 27, 2014

⁵⁶³ For example, the US enacted 22 U.S. Code § 1650a as the legislation required by the ICSID Convention Article 69, which only has two paragraphs and does not specify detailed procedural rules for the enforcement of ICSID Awards. The UK enacted the Arbitration (International Investment Disputes) Act 1966, including nine articles and no detailed procedural rules, too.

swift enforcement proceeding of ICSID awards. Thus, all member states should promptly enact relative legislations and provide particular rules with regard to the enforcement of ICSID awards to meet the Article 69 requirement.

As for the specific recommendations for the rules concerning ICSID enforcement proceedings, a report prepared by the New York City Bar raises a concern whether an *ex parte* procedure in national courts better suits the enforcement of ICSID awards. In the US most cases regarding ICSID enforcement were litigated in the District Court for the Southern District of New York. In 2012, the New York City Bar issued a *Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered under the ICSID Convention*, where some reforms regarding ICSID enforcement proceedings were proposed.⁵⁶⁴ One major suggestion is the adopting of an *ex parte* procedure for the recognition and enforcement of ICSID awards.⁵⁶⁵ In specific, it suggests that the claimant should submit an *ex parte* application specifying the reliefs it seeks, an accompanying affidavit re-affirming the reliefs, background information of the arbitration and further requirements under the New York Civil Practice Law and Rules (CPLR), and a certified copy of the ICSID award.⁵⁶⁶ In terms of service, the report states that the claimant need not provide any notice to the other party during the proceeding, but only requires the creditor to mail a copy of the judgment to the debtor after the proceeding.⁵⁶⁷

The New York City Bar's recommendation of an *ex parte* procedure may facilitate the enforcement of ICSID awards but violates the basic legal principles. Firstly, this *ex parte*

⁵⁶⁴ New York City Bar, *Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered under the ICSID Convention*, July 2012, available at <http://www2.nycbar.org/pdf/report/uploads/20072262-ProceduresforAwardsunderICSID.pdf>, accessed on November 27, 2014

⁵⁶⁵Id.

⁵⁶⁶Id. at 26

⁵⁶⁷Id. at 26, 27

procedure deprives the respondent parties the opportunity to be heard before national courts, which does not comply with the principle of due process. Secondly, in general *ex parte* application should be used only if there is genuine emergency,⁵⁶⁸ however, award creditors may not necessarily seek enforcement in emergency situations. Thirdly, before filing an *ex parte* application, the moving party should notify the other party rather than merely mail the judgment after the proceeding. The city bar's proposal reflects an excessive pro-ICSID position and may lead to unfair advantage for investors. Therefore, despite the *ex parte* procedure may facilitate enforcement of ICSID awards, it may not and should not be adopted due to its violations of basic legal principles and the imbalance between investor and states.

Therefore, ICSID member states should promptly enact related legislations (if there is still no one yet), and revise the relative domestic laws to facilitate the implementation of the ICSID Convention. However, states should avoid extremist legal mechanisms favoring the ICSID arbitration and try to facilitate ICSID enforcement while striking balance between investors and states.

- Execution and sovereign immunity

As discussed in Chapter 6 Section 2, states' laws and court practices regarding sovereign immunity bring up three principal difficulties for investors to execute ICSID awards in forum courts. Firstly, most national laws set forth strict conditions for the exceptions to sovereign immunity from execution. Secondly, the sovereign immunity laws vary in different countries, which brings up the issue of forum shopping. Thirdly, case law regarding execution of ICSID

⁵⁶⁸ Federal *Pro Se* Clinic, *How to Submit an Ex Parte Application*, Public Counsel, <http://www.publiccounsel.org/tools/assets/files/0452.pdf>, accessed on January 8, 2015

awards shows that generally courts tend to take a conservative approach and upheld host states' sovereign immunity.

In response to the above situations, three suggestions regarding sovereign immunity from the perspective of states can be put forward. Firstly, states should push their domestic laws to a more restrictive version of sovereign immunity, i.e. the space of sovereign immunity should be restrained more. Nowadays, states are more and more involved in the international capital market as private actors, which require the exemption of sovereign immunity when disputes arise between private parties. Too strict criteria of the exceptions to sovereign immunity will lead to abuse of sovereign power in commercial relationships and put unreasonably heavy burden on private investors to overcome the states' immunity plea when trying to collect damages. The hurdle of execution due to the solid defense of sovereign immunity may deter investors from exporting money overseas. Therefore, to comply with the rapid development of international investment, states should take steps to loosen the requirements of the exceptions to sovereign immunity from execution.

Secondly, states should cooperate to foster the enactment of an international treaty regulating sovereign immunity, such as the UN Convention on Jurisdictional Immunities of States and Their Property. As alternative, international organizations can issue a model law on sovereign immunity to provide a uniform guidance for states to evolve their domestic laws.

Thirdly, court practices with respect to sovereign immunity and execution of ICSID awards should strike balance between the interests of investors and host states. On one hand, sovereign immunity is a necessary to protect states' national interest, especially for those host states in economic hardship. On the other hand, sovereign immunity prevents investors from collecting

damages and impairs the effectiveness of ICSID awards. To strike balance between the interest of investors and states regarding the execution issues is nearly a ‘mission impossible’, but this idea should always be born in mind by forum courts in order to avoid the extremist position unilaterally in favor of either side.

7.3.2. Suggestions regarding the laws and court practice in the host states

The recalcitrant states that refuse to comply with ICSID awards and take actions to hinder the enforcement of ICSID awards are the biggest challenge to the effectiveness of ICSID awards. Some of the states chose the anti-enforcement position not entirely out of bad will but because of their domestic economic or political crisis that makes the payment very difficult. The situation becomes even worse when a host state simultaneously faces tens of ICSID arbitration cases and bears several billion dollars’ damages, which is the very case of Argentina. When standing in between host states and investors, the court dealing with enforcement or execution of ICSID awards may face the dilemma of upholding the effectiveness of ICSID awards while preserving the interest of host states. This dilemma is hard to resolve at the enforcement stage but better to avoid through *ex ante* measures. To prevent facing another explosion of ICSID cases, states should reconsider the defense clauses in the international investment agreements and call for a mechanism on international level to help the countries in financial distress restructure debts. The national necessity defense in BITs and customary international laws is a powerful tool for host states to protect its self-interests during crisis, which is however still suffering a lot of controversies in theory and in practice.⁵⁶⁹ Debt restructuring is also a heated topic in recent years because of the dramatic “Argentina—vulture funds” fighting, and now the UN and the IMF have stepped in to build an international mechanism to balance the interests of states and investors in

⁵⁶⁹ See Chapter 3 Section 4.

terms of external debts.⁵⁷⁰ These topics are out of this paper's theme and deserve much closer analysis in other articles, but the idea here is to prevent the impairment as for the effectiveness of ICSID awards at a previous stage by reducing cases against the states during emergency situation.

7.4. *Ex post* Recourse in case of Failure of Enforcement and Execution

The ICSID enforcement and execution proceedings provide possible remedies for investors when host states refuse to voluntarily honor the ICSID awards. However, these proceedings cannot fully guarantee host states' compliance in every case. There are generally three possible scenarios where an ICSID award is not complied with in the face of the ICSID enforcement and/or execution proceedings, namely (1) the forum court refuses to enforce an ICSID award; (2) the forum court refuses to execute an ICSID award by attaching certain properties of the host state; (3) the host state refuses to honor the forum court judgment of enforcing an ICSID award against it. Although the first scenario rarely happens at present, there still exists the possibility under the current ICSID framework, as explained in Chapter 5, that the forum courts may employ judicial review and deny the enforcement of an ICSID award. As for the second and third scenarios, examples are easily found in practice. Even if the ICSID system is refined as suggested, non-compliance with ICSID awards cannot be completely precluded if the recalcitrant host states thwart the enforcement of ICSID awards. If the reliefs granted by an ICSID award cannot ultimately turn into realistic interests of the investor, it means a failure of the arbitration

⁵⁷⁰ *NML Capital v. Argentina*, Jubilee USA, <http://www.jubileeusa.org/whatwedo/debt-related-issues/vulturefunds/argentina.html>, accessed on November 29, 2014. It says on October 6, 2014, the IMF releases a new proposal aimed at preventing holdouts from blocking debt restructurings (<http://www.jubileeusa.org/whatwedo/debt-related-issues/vulturefunds/argentina.html#sthash.WbpKPAeN.dpuf>), and on September 23, 2014, UN Human Rights Council adopts a resolution condemning "vulture funds" (<http://www.jubileeusa.org/whatwedo/debt-related-issues/vulturefunds/argentina.html#sthash.WbpKPAeN.dpuf>).

as a way of resolving disputes, and thus some *ex post* measures outside the ICSID framework might be called upon to enforce the award or settle the dispute through other channels.

The ICSID Convention provides for diplomatic protection and the International Court of Justice (ICJ) proceedings as the recourse for the failure of enforcing an ICSID award. The World Bank's influence on host states and the post-award settlement can also be employed to encourage host states' compliance with ICSID awards or solve the disputes in an alternative way. These measures and their effects will be analyzed in this section.

7.4.1. Diplomatic protection

Before the creation of the investment arbitration between states and private investors, diplomatic protection was a commonly adopted method to solve international investment disputes. Diplomatic protection only refers to state-to-state actions. Prior to the emergence of the investment arbitration system, an investor could ask its home state to take diplomatic actions against the host state when a dispute arose out of an investment.

Diplomatic protection as a way of dispute settlement is generally counter-productive. The home state's decision of whether to protect the investors and in which way to tackle the dispute is mainly based on political considerations, such as the relationship with the host state and the importance of the investing company as for the home state, etc. Legal certainty is lacked in the process and the actions taken by the home state may generate new disputes. To avoid the adverse effects of diplomatic protection and provide a legal proceeding to replace the political proceeding, the investment arbitration between investors and states was introduced. When dispute arises, investors may directly initiate arbitration proceedings against host states without relying on their home states, and the investors' right to seek diplomatic protection and the home

state's right to exercise diplomatic protection are suspended by the ICSID Convention once arbitration has been referred to. However, when the remedies ordered by an ICSID award cannot be realized due to the state party's in compliance, the investor's right to pursue diplomatic protection revives. Article 27(1) of the ICSID Convention provides as follows:

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

According to this provision, the host state's failure to comply with the ICSID award is the only trigger of the revival of diplomatic protection. Once diplomatic protection becomes available, the home state can take a wide range of actions against the host state under the customary international law. The UN International Law Commission (ILC) Draft Articles on Diplomatic Protection (2006), a codification of the customary international law regarding diplomatic protection, states as such:

[D]iplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.⁵⁷¹

Thus, the diplomatic measures taken by the home state must be peaceful and only for the purpose of encouraging the host state to comply with the ICSID award. The forms of action include negotiations, exerting political or economic pressures on the host state, freezing the host state's assets that located in the home state, espouse claims against the host state before the International

⁵⁷¹Draft Articles on Diplomatic Protection, Article 1, United Nations, 2006, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf, accessed on May 25, 2014.

Court of Justice (ICJ), initiating a state-to-state arbitration and so on.⁵⁷² It is noteworthy that, due to the discrepancy of the national powers between different states, as well as the politically sensitive matters in terms of international relationships, diplomatic protection might be abused by the investor's home state. In order to preserve the efficiency of the international investment system, states should restrain the effects of diplomatic protection to merely securing the host state's compliance with ICSID awards.

A recently emerging and remarkable economic measure is the US government's suspension of Argentina's trade benefit due to its non-compliance with ICSID awards favoring American nationals. The effects and future use of this measure deserve some analysis.

- The US government's suspension of Argentina's trade benefits due to its non-compliance with ICSID awards

In 2012 the US government suspended Argentina's trade benefit under the Generalized System of Preference (GSP) as a response to Argentina's failure in honoring the ICSID awards favoring Azurix and CMS Gas.⁵⁷³ The GSP scheme is based on the "Enabling Clause" in the General Agreement on Tariffs and Trade 1947 (GATT), which enables developed members to give differential and more favorable treatment to developing countries.⁵⁷⁴ In the US, the GSP scheme is designed to promote economic growth in the developing world by providing preferential duty-

⁵⁷² For example, the 2012 U.S. Model BIT provides state-to-state arbitration as an option for resolving investment disputes. See 2012 U.S. Model BIT, Article 37, available at <http://www.state.gov/documents/organization/188371.pdf>, accessed on May 25, 2014.

⁵⁷³ Roger Alford, *Using Trade Remedies to Enforce Arbitration Awards*, Kluwer Arbitration Blog, March 22, 2014, <http://kluwerarbitrationblog.com/blog/2014/03/22/using-trade-remedies-to-enforce-arbitration-awards/>, accessed on May 25, 2014

⁵⁷⁴ *Special and differential treatment provisions*, World Trade Organization, http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, accessed on November 23, 2014

free entry for up to 5,000 products when imported from one of 122 designated beneficiary countries and territories.⁵⁷⁵

The US GSP statute provides that a country cannot be designated as a beneficiary developing country (BDC) for the GSP scheme in some situations, one of which is that “such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association [...]”.⁵⁷⁶ Introducing this clause into the statute was in the background of the Indian government’s refusal to honor several arbitral awards in favor of US citizens in the 1970s. The Office of the United States Trade Representative sets up a GSP Subcommittee of the Trade Policy Staff Committee, to which any person may petition to request modification to the list of BDC based on the countries’ eligibility.⁵⁷⁷ In 2009 and 2010, Azurix (an American company) and Blue Ridge Investment (an American hedge fund, had previously purchased the *CMS* award) requested to suspend Argentina’s BDC status as Argentina failed to comply with the *Azurix* and *CMS* ICSID awards.⁵⁷⁸ In 2012, US President Barak Obama declared the suspension of Argentina’s trade benefit under the GSP scheme due to its failure to act in good faith in enforcing arbitral awards in favor of US citizens.⁵⁷⁹

It is still too soon to tell how effective this action is. It can be anticipated that this action may induce Argentina to comply with the arbitral awards favoring US investors due to the influence of this suspension of trade benefit on its economy, and may also deter other developing countries

⁵⁷⁵ GSP, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp>, (last visited Nov 23, 2014).

⁵⁷⁶ 19 U.S. Code § 2462(b)(2)(E)

⁵⁷⁷ GSP, *supra* note 575.

⁵⁷⁸ Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: the Use of Trade Benefit to Secure Compliance with Arbitral Awards*, 44 GEO. J. INT’L L. 503 (2013).

⁵⁷⁹ *Id.*

from ignoring their obligations ordered by ICSID awards. Until now, the US seems the only country incorporating the compliance with arbitral awards as one condition of the involvement of the GSP system. If positive effect of this action regarding encouraging compliance with ICSID award is demonstrated, similar trade-related measures can be developed more widely, not only in those developed WTO member countries engaged in the GSP scheme. Other kinds of trade-related sanctions that could be used in the case of failure to enforce arbitral awards may include, as some scholar suggests:⁵⁸⁰

- Exclusion of goods or services of the delinquent debtor country from procurement by the government of the unpaid creditor;
- Refusal to provide political risk insurance and other financial support to investment in the delinquent debtor country;
- Refusal of export credit agencies to provide support for transactions in the delinquent debtor country;
- Opposition to loans and other support from international financial institutions;
- Denial of foreign aid.

The US proceedings of imposing the sanction under GSP can provide guidance for the future use of other trade-related countermeasures to induce compliance with arbitral awards. According to the US experience, utilizing such countermeasures should be regulated by specific legal rules, via transparent proceedings and provide direct petition channels for individual investors who attempt to seek this remedy.

However, the adverse effects of trade-related countermeasures also need to be stressed. Due to the loss of trade benefits under the US GSP scheme, Argentina has to face a higher tariff rate, which makes its exported goods more expensive and less competitive in the US market. On the other hand, US customers will bear the higher prices of Argentine goods and have fewer choices in the market. From the perspective of international trade, this will lead to a lose-lose situation.

⁵⁸⁰ Theodore R. Posner, *Good Faith Recognition and Enforcement of Arbitral Awards as a Criterion for Eligibility Under the United States General System of Preferences*, Proceedings of the Annual Meeting (American Society of International Law), Vol.106 (March 2012), pp 125,129

Furthermore, because of the harm on Argentine economy, this kind of trade-related sanctions may jeopardize Argentina's potential to increase GDP and its capacity to pay back other arbitral award creditors and other external creditors. Even if Argentine government has no intention to default its obligations, as their President Cristina Fernandez's spoke in the UN General Assembly on September 24, 2014,⁵⁸¹ a weak economy due to various trade sanctions will not help the country to carry on its international obligations.

Therefore, taking trade-related countermeasures by home states is a possible way to induce host states to honor their legal commitments under ICSID arbitration and may generate positive effects as for other states' compliance with the awards. However, great caution is in need given the tremendous influence on the targeted country's economy and even the entire global market if the biggest players are involved. The rules regarding trade countermeasures under the WTO system can be consulted, which require that the countermeasures should be proportionate to the host state's unfulfilled obligations, not for punishment purpose, and issued in transparent process.⁵⁸²

- Requirements for non-trade related countermeasures

⁵⁸¹ President Cristina Fernandez's speech in the UN General Assembly on September 24, 2014, UN General Assembly (Sep.24, 2014), <http://gadebate.un.org/countries/argentina>, accessed on November 30, 2014

⁵⁸² Facundo PEREZ-AZNAR, COUNTERMEASURES IN THE WTO DISPUTE SETTLEMENT SYSTEM, studies and working paper, available at <http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDoQFjAD&url=http%3A%2F%2Fwww10.iadb.org%2Fintal%2Fintalcdi%2FPE%2F2009%2F02758.pdf&ei=Ef56VNrJK7HV7AahYHoAg&usg=AFQjCNGdZZ9RMylj2pfRvnUsj0As2OZubw&bvm=bv.80642063.d.ZGU>, accessed on November 30, 2014

As for the non-trade related countermeasures, some prerequisites under customary international law should be obeyed. The ILC Draft Articles on Responsibility of States for International Wrongful Acts set forth several requirements in Articles 49 to 53, including the following:⁵⁸³

- There has to be a breach of international obligation;
- There has to be a prior demand for redress to the responsible state;
- The countermeasures have to be proportional to the injury suffered;
- The countermeasures have to be temporary and terminated as soon as the respondent state has complied with its obligations;
- The countermeasures cannot violate certain norms of international law, including the obligations to refrain from the threat or use of force, obligations for the protections of fundamental human rights, obligations of a humanitarian character prohibiting reprisals, etc.

If a home state attempts to take non-trade related countermeasures against a noncomplying host state, the measures should be conforming to these above requirements in order to avoid violation of customary international law.

7.4.2. ICJ proceedings

In the case of failure to enforce an ICSID award, the investor can rely on the ICSID Convention to ask its home state to espouse a claim in favor of it before the International Court of Justice (ICJ). Article 64 of the ICSID Convention provides that “[a]ny dispute arising between Contracting States concerning the interpretation or application of this Convention...shall be referred to the International Court of Justice”. However, there has been no ICJ case initiated by a state on behalf of its nationals regarding the compliance with ICSID awards. Although the ICJ proceeding is available under the ICSID Convention as a remedy against the recalcitrant host state, it may not be an ideal choice.

⁵⁸³ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission (2001), Article 49-53

The limitations of the ICJ proceedings in dealing with the non-compliance with ICSID awards lie in the following aspects. Firstly, the political sensitivity and the complex ramifications of the inter-state adjudication may deter the home state to initiate claims against the host state in the ICJ. The home state has full discretion over whether to take international judicial actions against another country in favor of its nationals. The decision-making is resting on a series of complex considerations in international politics and economy, but not on the need of the investors. Thus investors are not guaranteed with an ICJ proceeding against the host state once they apply so.

Secondly, usually the investor has to meet some requirements for the home state's espousal of a claim on its behalf, such as exhausting the local remedies, which increases the burdens of investors. For example, the US Department of State sets forth the requirements as such:

*Under international law and practice the United States does not formally espouse claims on behalf of U.S. nationals unless the claimant can provide persuasive evidence demonstrating that certain prerequisites have been met. The most important of these requirements are that the claimant was at the time the claim arose and remains a U.S. citizen that all local remedies have been exhausted and the claimant has demonstrated that attempting to do so would be futile, and that the claim involves an act by the foreign government that is considered wrongful under international law.*⁵⁸⁴

Thirdly, the ICJ proceeding usually takes as long as several years and the final judgment still do not guarantee the host state's honoring of its legal obligations. As for the disputes arising out of business interest, this way of dispute settlement enjoys little preference based on a cost-benefit analysis.

Fourthly, the ICJ may consider public policy as a defense of the respondent state's non-compliance of the ICSID awards. As was elaborated above, unlike the New York Convention, the ICSID Convention does not recognize public policy as a ground of denying the enforcement

⁵⁸⁴*Bilateral Investments, Other Bilateral Claims and Arbitrations*, U.S. Department of State, <http://www.state.gov/s/l/c7344.htm>, accessed on May 25, 2014.

of an ICSID award. However, if a case regarding the compliance of an ICSID award is brought to the ICJ, it is not clear whether the court will decide pursuant to the ICSID Convention or follow the ICJ precedent where public policy was invoked and accepted by the court as a defense to the enforcement of treaty obligations. In the ICJ case *Guardianship of Infant* (1958) between Netherlands and Sweden, the Dutch government brought the claim on behalf of a Dutch infant residing in Sweden.⁵⁸⁵ The judge considered the Swedish public policy and ruled for the respondent Sweden.⁵⁸⁶ Theoretically, when it comes to the issue regarding compliance with ICSID awards, the ICJ's ruling should not be conflict with the ICSID Convention, but this hypothesis has not been tested in practice.

Viewed from the above aspects, it can be seen that the ICJ proceedings may not be an ideal choice for the investors as recourse for the failure of enforcing an ICSID award.

7.4.3. The influence of international financial institutions

The system of international investment is supported by the interaction between different players, mainly the investors, host states, home states and international organizations, *inter alia* the World Bank and the International Monetary Fund (IMF) that are endowed with financial functions. When ICSID arbitration fails due to the non-compliance with the award, the investor and its home state may seek to leverage the host state through the influence of international financial institutions.

- The World Bank

⁵⁸⁵*Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of November 28, 1958, ICJ REP. 1958, p 55.

⁵⁸⁶ Id. See Lucy Reed & Lucy Martinez, *Treaty Obligations to Honor Awards and Diplomatic Protection*, in *Enforcement of Arbitral Awards against Sovereigns* 13, 31 (Doak Bishop ed., 2009).

The World Bank has considerable significance to the developing countries through providing billions of dollars in loans, grants and other types of financial and technical assistance to their governments and private companies. ICSID was established by the World Bank in 1966 as one of its separate arms. Thanks to the prestige and influence of the World Bank, the ICSID Convention was widely ratified and the awards are voluntarily honored in most cases. When a host state refuses to comply with an ICSID award, investors and their home states can take the World Bank loans as a lever to induce compliance.

An example of using the World Bank loans as leverage is as follows. The US voted against the World Bank loans to Argentina after its failure to comply with the ICSID award in favor of Azurix, an American company. Azurix lobbied the US Congress through the Representative Jone Culberson, who requested the US government to pursue all courses of action available to encourage Argentina to immediately comply with its obligations.⁵⁸⁷ Two months later, the US voted against extending certain loans to Argentina in the World Bank.⁵⁸⁸ However, this method has obvious drawback from the perspective that the big and powerful countries that provide funding to the World Bank loans can take the initiative and have more say. This power-based mechanism is not fair to the developing countries and thus should be replaced by a neutral mechanism established by the World Bank itself.

The World Bank created an independent sanction system through the Operational Manual OP 7.40, revised in 2012. This system meant to address fraud and corruption in Bank-financed projects,⁵⁸⁹ which may also be used to deal with the non-compliance with ICSID awards.

⁵⁸⁷ Charles B. Rosenberg, *supra* note 578 at 517.

⁵⁸⁸ *Id.*

⁵⁸⁹ Elizabeth Lin Forder, *The World Bank's Sanction System as an Example*, Proceedings of the Annual Meeting (American Society of International Law), Vol.106 (March 2012), pp. 122, 122

According to the manual, the World Bank could block or refrain from making new loans to member countries that are unwilling to take steps to resolve the disputes over its failure to pay external debt or making no reasonable efforts to settle disputes over unlawful expropriation of property of aliens.⁵⁹⁰ A host state's refusal of an ICSID award may fall under the above category (depending on the subject matter of the dispute) and thus the World Bank may impose sanctions on the state pursuant to the manual. This sanction system can expressly involve the failure of complying with ICSID awards as a matter of cause that triggers sanctions.

- A reward system to encourage compliance

Almost all the above-mentioned measures to induce compliance with ICSID awards are “countermeasures”, based on the idea of “punishment”. In the current situations where many recalcitrant host states are suffering from economic hardships, these countermeasures may compel those states to pay back certain creditors; however, they would worsen the states' domestic economy, impair their potentials for future development and jeopardize their capacity to carry on the monetary obligations towards other creditors. Hence, probably a reward system in bringing about compliance, as usually be adopted by some environmental institutions, may generate more beneficial results in terms of international politics and economy, as well as favor the interest of both host states and home states. This kind of project can be led by certain international financial institutions, such as the World Bank, IMF, the Inter-American Development Bank or the Asian Infrastructure Investment Bank. As for those host states experiencing economic crisis or sovereign debt crisis, such as Argentina, new international loans

⁵⁹⁰*Operational Manual OP 7.40*, The World Bank, available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064628~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184~isCURL:Y,00.html>, accessed on November 24, 2014

can be issued or increased as the reward for their good faith compliance with the obligations under international arbitral awards. This project can facilitate, rather than impair, the debtor states' sustainable development and provide the possibility of their future compliance with the obligations owing to other creditors. Harmonious development of the developed and developing states will be beneficial to the investment arbitration system, the international investment realm and the entire global market.

7.4.4. Post-award settlement

If the investor fails to enforce an ICSID award, post-award settlement can be considered. Compared to the costly and time-consuming judicial proceedings of enforcement, settlement is more flexible and efficient. Despite that in the settlement the investor has to renounce some of its rights granted under the award, the prompt receipt of a discounted amount of damages without causing additional judicial expenses and other troubles is still preferable to some business players. Parties can reach a post-award settlement through negotiation or a third-party mediation. Settlement can be in various forms, besides discounted payment, also including establishing a frame for the payment of the award or trading the compensation awarded by the tribunals for a new concession contract.⁵⁹¹

It is worth noting that, in the context of ICSID arbitration, due to the involvement of sovereign states, hostile pressures may be exerted by the state and the final settlement may be very unfavorable for the investor.⁵⁹² In this situation, the investor can seek judicial remedies to invalidate the settlement and enforce the award in full. One practical example is the ICSID case

⁵⁹¹Crina Baltag, *Enforcement of Arbitral Awards against States*, 19 Am. Rev. Int'l Arb. 391, 404

⁵⁹² It is worth noting that, in some situations, investors may also exert durations on the state in order to achieve a favorable settlement.

Desert Line Projects LLC v. The Republic of Yemen.⁵⁹³ The claimant Desert Line obtained a commercial arbitral award against Yemen and sought enforcement of the award in Yemen. There was also a settlement agreement signed by the two parties, the provisions under which were much less favorable for Desert Line than the award. Desert Line claimed that the settlement was signed under pressure imposed by Yemen and brought the case to the ICSID. The ICSID tribunal stated that in post-award settlement, the winning party of the arbitration needs to give up certain rights while being compensated by “equivalent advantages”, or in other words, “each party waives its rights and claims arising out of a dispute on a *quid pro quo* basis”.⁵⁹⁴ In the current case, the claimant’s renunciation was so large, which indicated the lack of an authentic negotiation.⁵⁹⁵ Therefore, the tribunal decided that the settlement was unenforceable because the claimant was under duress in the negotiation and thus the arbitral award should be implemented in full.⁵⁹⁶ Therefore, post-award settlement can be employed in the case of non-compliance with ICSID awards, and the host state’s hostile pressure should be taken into account in order to avoid unjust result.

Therefore, if the investor fails to enforce an ICSID award against the recalcitrant state, there are some *ex post* measures that can be taken by the investor or its home state to further induce the host state’s compliance or reach a settlement. Although a new judicial proceeding before the ICJ may not be an efficient way, other measures, from trade-related countermeasures to the World Bank sanction system, can be possible options. All these measures should consider the balance between investors and host states.

⁵⁹³ *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17 (Feb. 6, 2008)

⁵⁹⁴ *Id.* para 176

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.* para 205

Summary

The ICSID arbitration, a unique mechanism of dispute resolution with a short history of less than four decades, is not free from shortcomings. The above suggestions may help to improve the ICSID enforcement and execution proceedings and provide investors and the member states some guidance for better utilizing this mechanism. However, every suggestion has its limitations, and a one-size-fits-all solution is hard to find to make the ICSID awards perfectly enforceable. Currently, due to the backlash against ICSID, this mechanism faces more difficulties and calls for more dynamic and pragmatic measures to preserve its viability. With this background, the balance between investors and host states is of critical importance. The economic hardship of some recalcitrant host states should be taken into consideration during the process of enforcement and execution, and the international society should come up with certain mechanisms to deal with the issue of external debts of states in financial distress. Cooperation and sustainable development of every country is crucial for the entire realm of international investment.

Conclusion

The ICSID arbitration had been gaining popularity as a semi-public dispute resolution system during the past four decades, however the recent years began to witness backlash against it. The most remarkable rhetoric and countermeasures, ranging from denouncing the ICSID Convention to hindering enforcement of ICSID awards, are mostly from state parties, especially some developing countries in Latin America. This newly emerging situation urges reconsideration of the ICSID arbitration from the perspective of states' reaction.

Within the ICSID framework, the review and enforcement mechanisms define the most distinctive feature of the ICSID arbitration, which also face more challenges under the backlash. The review mechanism, *inter alia* the annulment proceeding, experienced constant changes in terms of the standard of review. On the one hand, the ICSID Convention fails provide a clear standard due to textual ambiguity. On the other, external circumstance also has more or less influence on the annulment committees' practice. A noticeable tendency showing recently is that the annulment standard becomes more expansive than before, which might be affected by the respondent states' desire of a wider space of post-award review. This tendency deserves criticism, since a lower annulment threshold may turn the extraordinary annulment remedy into a routine, which conflicts with the Convention drafters' pursuance for finality of ICSID awards and efficiency of the arbitration process. Therefore, albeit some states desire expanded post-award review and even an appellate mechanism within the ICSID framework, the annulment proceeding should return to the track of restrictive review.

Along with increasing cases against host states and huge amount of damages waiting to pay, the enforcement of ICSID awards may face more and more risks. Firstly, due to the loophole in the

ICSID Convention, some respondent states may attempt to put the disfavoring awards under national court review in order to pursue denial of enforcement. Moreover, states' plea of sovereign immunity from execution is not prevented by the ICSID Convention, so that investors will face considerable obstacle to collect awarded damages if the respondent state is hostile to the ICSID award. Although non-compliance of ICSID awards is not a big problem now, the rising wave of backlash may escalate the tension. Before this potential risk becoming true, some refinement of the ICSID system can be employed to diminish the Convention's loophole and enhance the effectiveness of ICSID awards. At the same time, investors can use some strategies to secure the enforcement of ICSID awards and states could also make some improvement for the sake of a more harmonious investment market.

As a unique dispute resolution system at a very young age, the ICSID arbitration must be sensitive to the changes of the external environment. New situations always bring up new problems and also generate new opportunities. Even if the initial motive of establishing ICSID were for the benefit of private investors, the changing landscape of the global capital market has called for more concerns on the side of states. The backlash against ICSID must be treated seriously in order to achieve better balance between investors and states, so that the ICSID arbitration can stay appealing to all users and develop sustainably.

Bibliography

- Books and articles:

1. Carlos E Alfaro & Pedro Lorenti, ARGENTINA: THE ENFORCEMENT PROCESS OF THE ICSID AWARDS: PROCEDURAL ISSUES AND DOMESTIC PUBLIC POLICY MONDAQ (2005), <http://www.mondaq.com/x/32803/Government+Contracts+Procurement+PPP/The+Enforcement+Process+Of+The+ICSID+Awards+Procedural+Issues+And+Domestic+Public+Policy> (last visited Nov 5, 2015).
2. Carlos E. Alfaro & Pedro M. Lorenti, *The Growing Opposition of Argentina to ICSID Arbitral Tribunals: A Conflict between International and Domestic Law?*, 6 J. WORLD INVEST. & TRADE 417 (2005).
3. Asim Imdad Ali, *Non-compliance and Ultimate Remedies under the WTO Dispute Settlement System*, 14 JOURNAL OF PUBLIC AND INTERNATIONAL AFFAIRS (2003).
4. Stanimir A. Alexandrov, *Enforcement of ICSID Awards: Article 53 and 54 of the ICSID Convention*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 322–337 (2009).
5. Guillermo Aguilar Alvarez & W. Micheal Reisman, *How Well Are Investment Awards Reasoned?*, in THE REASONS REQUIREMENT IN INVESTMENT ARBITRATION 13 (2008).
6. Freya Baetens, *Enforcement of Arbitral Awards: “To ICSID or Not to ICSID” Is Not The Question*, in THE FUTURE OF ICSID (Todd Weiler & Ian Laird eds., 2013).
7. Edward Baldwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, JOURNAL OF INTERNATIONAL ARBITRATION 23(1) 1–24 (2006).
8. James W Barratt & Margarita N Michael, *The “Automatic” Enforcement of ICSID Awards: The Elephant in the Room?*, THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW 2014, <http://globalarbitrationreview.com/reviews/58/the-european-middle-eastern-african-arbitration-review-2014/>.
9. Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-state Arbitration Awards*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 302–321 (2009).
10. Anoosha Boralessa, *Enforcement in the United States and United Kingdom of ICSID Awards against The Republic of Argentina: Obstacles that Transnational Corporations May Face*, 17 N.Y.INT’L L. REV. 53 (2004).

11. Aron Broches, *Awards rendered pursuant to the ICSID Convention: binding force, finality, recognition, enforcement, execution*, ICSID REVIEW. 2(2) FALL 1987.
12. Aron Broches, *Observations on the Finality of ICSID Awards*, ICSID REVIEW (1991) 6 (2) 321–366.
13. Doak Bishop & Silvia Marchili, ANNULMENT UNDER THE ICSID CONVENTION (2012).
14. Doak Bishop, ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS (2009).
15. Mayer Brown, SOVEREIGN IMMUNITY AND ENFORCEMENT OF ARBITRAL AWARDS: NAVIGATING INTERNATIONAL BOUNDARIES, <http://www.mayerbrown.com/files/Publication/2e0f7077-9b25-430e-8b70-6a8f8c1a9d76/Presentation/PublicationAttachment/1be4c54c-bfc2-4d78-9403-85e37c560f43/12270.PDF> (last visited Oct 5, 2014).
16. Tai-Heng Cheng, *The Role of Justice in Annulling Investor-State Arbitration Awards*, 31 BERKELEY J. INT'L L. 236.
17. Leon Chung and Jamie Stollery, *Australia Goes against the Trend with Investor-State Dispute Settlement*, <http://www.lexology.com/library/detail.aspx?g=1b4fc432-f5d3-4a57-9d0c-f8edc6a2d992>
18. Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis*, <http://www.homburger.ch/fileadmin/publications/IPRG190.pdf>, accessed on June 11, 2013.
19. Roberto Echandi, *Non-Compliance with Awards: The Remedies of Customary International Law*, 106 in PROCEEDINGS OF THE ANNUAL MEETING 118–122 (2012).
20. Silvia Karina Fiezzoni, *Study on the Challenges and Countermeasures of Latin America against ICSID*, 2011.
21. Mark Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, ICSID review. 2(1) Spring 1987
22. Susan Frank, *Development and Outcomes of Investment Treaty Arbitration*, 50 Harv. Int'l, Rev, 435 (2009)
23. Elizabeth Lin Forder, *The World Bank's Saction System as An Example*, 106 in PROCEEDINGS OF THE ANNUAL MEETING 122–125 (2012).
24. Emmanuel Gaillard, *Some Notes on the Drafting of ICSID Arbitration Clauses*, 3 ICSID REVIEW, FILJ 136 (1988).
25. Emmanuel Gaillard, *Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities – Three Incompatible Principles*, in STATE ENTITIES IN INTERNATIONAL ARBITRATION (2008), http://www.jurispub.com/cart.php?m=product_detail&p=6587.

26. Charity L. Goodman, *Uncharted Water: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449 (2007).
27. Leo Gross, "Treaty Interpretation: The Proper Role of an International Tribunal," 63 A28M SOCY INTL L PROC 116 (1969).
28. Bechy L. Jacobs, *Pesification and Economic Crisis in Argentina: The Moral Hazard Posed By a Politicized Supreme Court*, UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW, VOL. 34, NO. 3 (2003).
29. Lise Johnson, *The 2012 US Model BIT and What the Changes (or lack thereof) Suggest about Future Investment Treaties*, Political Risk Insurance Newsletter, Volume VIII, Issue 2, November 2012
30. Herbert Kronke, Patricia Nacimiento, Dirk Otto, Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards-A Global Commentary on the New York Convention*, Wolters Kluwer, 2010
31. Robert K. Kry, *Asset Discovery Against Foreign Sovereigns after NML*, 87 NYSBA JOURNAL 40 (2014).
32. Julian Ku, *The Enforcement of ICSID Awards in the People's Republic of China*, 6 CONTEMPORARY ASIA ARBITRAION JOURNAL 31–48 (2013).
33. Pierre Lalive, *Concluding Remarks*, in ANNULMENT OF ICSID AWARDS (2004).
34. Celine Levesque, *Encouraging Greater Use of Alternative Dispute Resolution in Invesetor-State Dispute Settlement: Opportunities and Challenges*, 106 in PROCEEDINGS OF THE ANNUAL MEETING 29–32 (2013).
35. Tsai-Yu Lin, *Systemic Reflection on Argentina;s Non-compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?*, 5 CONTEMPORARY ASIA ARBITRAION JOURNAL 1 (2013).
36. Oscar Lopez, *Smart Move: Argentina to Leave the ICSID*, Cornell International Law Journal Online, <http://cornellilj.org/smart-move-argentina-to-leave-the-icsid/>, accessed on December 21, 2015
37. Craig S. Miles, *Sovereign Immunity*, in ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 35–71 (Doak Bishop ed., 2009).
38. Irmgard Marboe, *ICSID Annulment Decisions: Three Generations Revisited*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY—ESSAYS IN HONOR OF CHRISTOPH SCHREUER (2009).

39. Tatyana A. Mikhailova & Felton (Mac) Johnston, ENFORCING ARBITRAL AWARDS AGAINST SOVEREIGNS: PROCESS AND PITFALLS, <http://www.robertwraypllc.com/enforcing-arbitral-awards-against-sovereigns-process-and-pitfalls/> (last visited Jun 5, 2014).
40. Promod Nair & Claudia Ludwig, ICSID ANNULMENT AWARDS: THE FOURTH GENERATION? LEXOLOGY (2015), <http://www.lexology.com/library/detail.aspx?g=7218cb56-7a64-426f-8cc0-8475303444e6>.
41. Luke Nottage, *The “Anti-ISDS Bill” before the Australian Senate*, Kluwer Arbitration Blog, August 28, 2014, <http://kluwerarbitrationblog.com/blog/2014/08/28/women-in-arbitration-in-brazil/>, accessed on September 29, 2015.
42. Jan Paulsson, *ICSID’s Achievements and Prospects*, ICSID REV-FILJ 387 (1991).
43. Jan Paulsson, *May or Must Under the New York Convention: an Exercise in Syntax and Linguistics*, (1998) 14 ARBITRATION INTERNATIONAL, ISSUE 2.
44. Albena P. Petrova, *The ICSID Grounds for Annulment in a Comparative Perspective: analysis and Recommendations for the Future*, 10 VJ 287 (2006).
45. Konstantin Pilkov, ASSIGNMENT OF BENEFITS OF ARBITRAL AWARDS: PROBLEMATIC ENFORCEMENT IN UKRAINE KLUWER ARBITRATION BLOG (2014), <http://kluwerarbitrationblog.com/2014/06/02/assignment-of-benefits-of-arbitral-awards-problematic-enforcement-in-ukraine/> (last visited Nov 5, 2015).
46. Sarah Francois-Poncet, Branda Horrigan & Lara Karam, *Enforcement of Arbitral Awards against Sovereign States or State Entities--France*, in ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 355–379 (Doak Bishop ed., 2009).
47. Theodore R. Posner, *Good Faith Recognition and Enforcement of Arbitral Awards as a Criterion for Eligibility under the United States General System of Preferences*, 106 in PROCEEDINGS OF THE ANNUAL MEETING 125–129 (2012).
48. Dahua Qi, *State Immunity, China and Its Shifting Position*, 7 CHINESE JOURNAL OF INTERNATIONAL LAW 307–337 (2008).
49. LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION (2010).
50. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, DUKE L.J. (1987).
51. Michael Reisman, SYSTEM OF CONTROL IN INTERNATIONAL ADJUDICATION & ARBITRATION (1992).
52. Michael Reisman, *Reflection on the Control Mechanism of the ICSID System*, in THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS (2008).

53. Charles Rosenberg, *The Intersection between International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, , <https://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00213000503.PDF> (last visited May 25, 2014).
54. Javier Robalino, *Enforcement of Foreign Awards against Sovereigns in South America--the Cases of Argentina and Ecuador*, in *ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS* 425–451 (Doak Bishop ed., 2009).
55. Wenhua Shan, *From “North-South Divide” to “Private-Public Debate”*: *Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, *NW.J.INT’L L. & BUS.*
56. Andrea Kupfer Schneider, *Error Correction and Dispute System Design in Investor-State Arbitration*, 5 *Y.B. On Arb. & Mediation*
57. Christoph Schreuer, *ICSID Annulment Revisited*, *LEGAL ISSUES OF ECONOMIC INTEGRATION* 30(2) 103–122 (2003).
58. Christoph Schreuer, *Non-pecuniary Remedies in ICSID Arbitration*, 20 *ARBITRATION INTERNATIONAL* 325 (2004).
59. Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in *ANNULMENT OF ICSID AWARDS* 17–42 (2004).
60. Christoph Schreuer, *THE ICSID CONVENTION-A COMMENTARY* (2nd ed. 2009).
61. Zhang Shouzhi, *POST-AWARD SETTLEMENT FOR INTERNATIONAL ARBITRATION CHINA LAW INSIGHT* (2012), <http://www.chinalawinsight.com/2012/04/articles/dispute-resolution/postaward-settlement-for-international-arbitration/>.
62. Andrea Saldarriaga, *Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement*, *ICSID REVIEW*, VOL. 28, NO. 1 (2013) 197.
63. Andreas von Staden, *Reestablishing Doctrinal Clarity and Correctness: Treaty Exceptions, Necessity, and the CMS, Sempra, and Enron Annulment Decisions*, October 9, 2010, *Czech Yearbook Int’l L.*, vol. 2
64. Leon E. Trakman, *The ICSID under Siege*, 45 *CORNELL INTERNATIONAL LAW JOURNAL* 603 (2012).
65. Leon E. Trakman & Kunal Sharma, *Indonesia’s Termination of the Netherlands–Indonesia BIT: Broader Implications in the Asia-Pacific?*, *Kluwer Arbitration Blog*, August 21, 2014, <http://kluwerarbitrationblog.com/blog/2014/08/21/indonesias-termination-of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/>, accessed on September 29, 2015.
66. Inna Uchkunova & Oleg Temnikov, *Enforcement of Awards under the ICSID Convention--What Solutions to the Problem of State Immunity?*, 29 *ICSID REVIEW* (2014).

67. Inna Uchkunova, *Much Ado About Nothing--Conditional Stay of Enforcement in Annulment Proceedings under the ICSID Convention*, 30 ARBITRATION INTERNATIONAL 283 (2014).
68. Tibor Varady, *The Elusive Pro-Arbitration Priority in Contemporary Court Scrutiny of Arbitral Awards*, 2 in COLLECTED COURSES OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW 341–474 (2009).
69. Tibor Varady, *Control of Arbitral Awards and the Relevance of Newly Discovered Facts*, in Liber Amicorum Kresimir Sajko, Zagreb 2012, 435-451
70. Diana Marie Wick, *The Counter-productivity of ICSID Denunciation and Proposals for Change*, 11 J.Int'l Bus.&L.239
71. Louis T. Wells, [*Backlash to Investment Arbitration: Three Causes*](#), The Backlash against Investment Arbitration, Kluwer Law International, 2010
72. Michael Waibel, *Sovereign Defaults before International Court and Tribunals*, Cambridge University Press, 2011
73. Ante Wessels, *Investor-to-State Dispute Settlement Is A Rigged System*, FFII Blog, May 28, 2014, <https://blog.ffii.org/investor-to-state-dispute-settlement-is-a-rigged-system/>, accessed on October 8, 2015
74. Michael Wilson, *The Enron v. Argentina Annulment Decision: Moving a Bishop Vertically in The Precarious ICSID System*, 43 U. MIAMI INTER-AM. L. REV. 347.
75. Yearbook of the International Law Commission, 1958, Vol. II

- Reports:

1. BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATION COUNCIL OF ICSID (2012), available _____ at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment_English.pdf.
2. COMMITTEE ON INTERNATIONAL COMMERCIAL DISPUTES, NEW YORK CITY BAR, RECOMMENDED PROCEDURES FOR RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS RENDERED UNDER THE ICSID CONVENTION, (2012), available at <http://www2.nycbar.org/pdf/report/uploads/20072262-ProceduresforAwardsunderICSID.pdf>
3. PROFITING FROM INJUSTICE, TNI, available at <https://www.tni.org/en/briefing/profitting-injustice>

- Cases:

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).
2. *Klöckner v. Republic of Cameroon*, Decision on the Application for Annulment Submitted by Klöckner Against the Arbitral Award, ICSID Case No. ARB/81/2 (1983).
3. *Amco v. Indonesia*, 1 ICSID Reports 515/6, 1 ICSID Reports 515/6 (1986).
4. REPORT OF THE SECRETARY-GENERAL TO THE ADMINISTRATIVE COUNCIL, (1986).
5. *Liberian Eastern Timber Corporation v. the Government of the Republic of Liberia (LETICO I)*, 650 F. Supp. 73 (1986).
6. *Liberian Eastern Timber Corporation v. the Government of the Republic of Liberia (LECTICO II)*, 659 F.Supp.606 (1987).
7. *Benvenuti & Bonfant v. Banque Commerciale Congolaise and Others*, ICSID Report, Vol.1 (1987).
8. *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award, ICSID Case No. ARB/84/4 (1988).
9. *Wena Hotels LTD. v. Arab Republic of Egypt*, Decision on the Application by the Arab Republic of Egypt for annulment of the Arbitral Award, ICSID Case No. ARB/98/4 (2000).
10. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision on Annulment, ICSID Case No. ARB/97/3 (2002).
11. *CDC Group PLC v. The Republic of Seychelles*, Decision of the *Ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, (2005).
12. *AIG Capital Partners Inc v. Kazakhstan*, APP.L.R 10/20 (2005).
13. *CMS Gas Transmission Company v. Argentine Republic*. Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8 (2007).
14. *Hussein Nuaman Soufraki v. The United Arab Emirates*, Decision of the *Ad hoc* Committee on the Application for Annulment of Mr. Soufraki, ICSID Case No. ARB/02/7 (2007).
15. *Azurix Corp. v. The Argentina Republic*, Decision on the Application for Annulment of the Argentina Republic, ICSID Case No. ARB/01/12 (2009).
16. *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (2010).
17. *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (2010).
18. Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel, (2011).
19. *Occidental Petroleum Corporation v The Republic of Ecuador*, Award, ICSID Case No. ARB/06/11 (Oct. 5, 2012)

20. Republic of Argentina v. NML Capital, 134 S. Ct. 2250 (2014).

- Website articles:

1. *Argentina Forced into A “Technical” Default*, LAB (2014), <http://lab.org.uk/argentina-forced-into-a-technical-default>, accessed on November 5, 2015
2. *French Supreme Court Upholds Argentina’s Immunity despite Waiver*, Conflict of Laws. Net, <http://conflictoflaws.net/2013/french-supreme-court-upholds-argentinas-immunity-despite-waiver/>.
3. *GSP*, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp>, accessed on November 23, 2014
4. Investment Treaty News (ITN), May 9, 2007, http://www.iisd.org/pdf/2007/itn_may9_2007.pdf, accessed on October 2, 2013
5. *Vulture Funds*, JUBILEE USA NETWORK, <http://www.jubileeusa.org/ourwork/vulturefunds.html>, accessed on October 28, 2014