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THE RULE OF PRECEDENT AND THE FUNDAMENTAL RULES OF PROCEDURE: A Look into the emergence of the precedent in the ICSID Annulment System through Article 52(d) of the Washington Convention

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ABSTRACT

The International Centre for Settlement of Investment Disputes (ICSID) has established itself as the preeminent forum for international investment arbitration, handling a significant majority of known treaty-based investment disputes. With the endorsement of 2,191 Bilateral Investment Treaties (BITs) that authorize ICSID arbitration as a preferred method for investor-state dispute settlement (ISDS), its jurisdiction extends across 158 contracting states spread over five continents.

This study centres on the annulment system outlined in Article 52 of the ICSID Convention. Unique in nature, ICSID owes its ability to offer prompt and effective arbitral procedures, coupled with the assurance that awards will be unappealable, to its annulment mechanism.

The investigation aims to examine the emergence of a potential rule of precedent within the annulment system as a means to address existing criticisms of the ICSID regime's lack of coherence and predictability and raises the question of whether precedent can provide clarification for ambiguous provisions by establishing interpretive boundaries for annulment committees. The chosen methodology involves an extensive review of bibliographical sources and relevant documents, complemented by an empirical analysis focused on one of the most frequently invoked grounds for annulment: a serious departure from a fundamental rule of procedure. Through this analysis, the study uncovers the interpretations and trends established by ICSID annulment decisions concerning the fourth ground for annulment under Article 52.

The first chapter presents a comprehensive review of ICSID's annulment history and procedural framework. The second chapter examines ICSID practice and the role of precedent within the annulment system. Finally, the third chapter concludes by offering a review of the annulment

application based on a serious departure from a fundamental rule of procedure, presenting trends revealed through the analysis of annulment decisions.

INTRODUCTION

Prevalent over all other forums for international investment arbitration, the International Centre for Settlement of Investment Disputes (ICSID) is the leading international organization for investment arbitration, concentrating more than half of all known treaty-based investment disputes. [1]

The primacy of the organization is demonstrated by the 2191 different Bilateral Investment Treaties (BIT) providing consent for ICSID arbitration as an investor-state dispute settlement (ISDS) method[2] and the extension of the organization's reach, spanning over five continents and 158 contracting states[3]. Founded in 1965 under the auspices of the World Bank, ICSID and its constituting treaty, the Convention on The Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter, ICSID Convention), established an original dispute regime that would keep it the Meca of dispute settlement for a one-trillion dollar industry during more than fifty years.[4]

Though a plethora of different characteristics can be credited for its success, this work focuses on the profoundly scrutinized annulment system created by Article 52 of the ICSID Convention. A truly original mechanism, ICSID owes to annulment its ability to offer expeditious and effective arbitral procedures while ensuring investors and Contracting States that awards will be subject to no appeal, and eventual mistakes of the procedure will be dealt with by experts appointed to an *ad hoc* Committee.

[1] "Investment dispute settlement navigator", United Nations Conference on Trade and Development (UNCTAD), June, 2023, https://investmentpolicy.unctad.org/investment-dispute-settlement

[2] "International Investment Agreements Navigator", United Nations Conference on Trade and Development (UNCTAD), June, 2023. https://investmentpolicy.unctad.org/international-investment-agreements

[3] "Database of ICSID Member States", World Bank, June, 2023. https://icsid.worldbank.org/about/member-states/database-of-member-states

[4] OECD, "OECD International Direct Investment Statistics 2022 (Paris: OECD Publishing, Paris), 2023. https://doi.org/10.1787/deedc307-en.

In this sense, this investigation proposes to analyze the emergence of a potential rule of precedent in the annulment system as a means to counterpose current criticism of the ICSID regime's lack of coherence and predictability[5] and pose the question of whether precedent can clarify cloudy provisions and create interpretative boundaries for annulment committees. The chosen methodology to perform the task was an extensive bibliographical and documental review, combining it with an empirical-oriented investigation of one of the three most invoked grounds for annulment, a serious departure from a fundamental rule of procedure[6], unveiling what meanings ICSID annulment decisions established for Article 52's fourth ground for annulment.

[5] See Gabriel Bottini, Present and Future of ICSID Annulment: The Path to an Appellate Body?, *ICSID Review - Foreign Investment Law Journal*, Volume 31, Issue 3, October 2016, 712–727; Juan Fernández-Armesto, Different Systems for the Annulment of Investment Awards, *ICSID Review - Foreign Investment Law Journal*, Volume 26, Issue 1, Spring 2011, Pages 128–146; Gloria Maria Alvarez, "The ICSID Procedure: Mind the Gap", Revista E-Mercatoria 10, no. 2 (July-December 2011): 163-202.

[6] "Updated Background Paper on Annulment for the Administrative Council of ICSID", International Centre for Settlement of Investment Disputes, 53 , May, 2016. https://icsid.worldbank.org/sites/default/files/publications/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf

THE HISTORY AND PROCEDURE OF ICSID ANNULMENT SYSTEM

This first chapter has the aim of presenting a comprehensive overview of the ICSID annulment system enabling a deeper discussion of the placement of precedent and the meaning of ground Article 52(1)(d), a serious departure from a fundamental rule of procedure, in the mechanism.

Starting from the ICSID annulment system's history and purpose, the chapter discusses the contraposition between the principles of finality and correctness, consecutively, examines annulment's scope and finishes with an extensive coverage of the mechanism's procedure.

The History and Purpose of The ICSID Annulment System

From its conception, the ICSID's annulment was thought to be an extraordinary measure taken by parties against an award based on narrowly defined grounds[7].

The system was inspired by the International Law Commission's Draft on Arbitral Procedure of 1952 and did not exist in the earliest draft of the convention, only appearing in the preliminary version of 1963 with a very different text from the one known today[8]. It read:

> (1) The validity of an award may be challenged by either party on one or more of the following grounds:
> (a) that the Tribunal has exceeded its powers;
> (b) that there was corruption on the part of a member of the Tribunal; or
> (c) that there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.[9]

Four of the five grounds for annulment were present in the preliminary version with the noticeable absence of the now first ground for annulment, that the tribunal was not properly

[7] R. Doak Bishop and Silvia M. Marchili, *Annulment under the ICSID Convention* (Oxford: Oxford University Press, 2012), 13-15.
[8] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 2-4.
[9] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 4.

constituted. A series of other differences can also be pointed out between the preliminary and the final version and will frequently trace back to the debates held by the parties involved in the drafting process and their policies of choice[10]. Furthermore, the debates that followed the introduction of the annulment provision in the preliminary draft did not dispute the relevance of an annulment mechanism – as there was a reasonable consensus over the necessity of preventing flagrant cases of excess of jurisdiction and injustice -, they alternatively expressed a pool of diverse views on how the annulment system should be designed and operate[11].

Despite contrasting suggestions for the mechanism's drafting[12], the majority of changes that would compose Article 52 final version were aimed at restricting the remedy's application. An example would be the incorporation of manifest and serious as qualifiers for different grounds of annulment in pursuance to convey a sense of gravity to limit the remedy's scope[13].

In his book about the history of ICSID, World Bank's consultant, Antonio R. Parra writes:

> In the discussions of post-award remedies, several proposals were made to broaden the scope of the annulment remedy. These included proposals to make the remedy available for all excesses of jurisdiction, rather than just manifest ones; to extend the remedy to cover manifestly incorrect applications of the proper law; to make it sanction misconduct generally on the part of an arbitrator, as well as corruption; and to give parties an immediate right of redress after a tribunal had decided it was properly constituted, without having to wait for the award to invoke the remedy. The proposals were defeated after delegates had argued that they might unduly detract from the finality of the awards[14].

[10] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 4.
[11] Bishop and Marchili, *Annulment under the ICSID Convention*, 13.
[12] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 5-6.
[13] Bishop and Marchili, *Annulment under the ICSID Convention*, 14.
[14] Antonio R. Parra, *The History of ICSID* (Oxford: Oxford University Press, 2012), 87.

It becomes clear that the agreement surrounding the necessity of establishing a remedy for abuse was actively weighed against the principle of finality[15]. The group of delegates comprised of international legal experts and government officials understood that the annulment system should not pose a threat to the finality of the awards, instead, the system was supposed to harmonize correctness with it[16].

Alike deference for the finality principle is not unusual among practitioners and scholars engaged in arbitration. On the contrary, the principle is part of arbitration's liturgy and dates back to some of the classics of international public law.

Jurist and philosopher Emer de Vattel wrote that "once the contending parties have entered into articles of arbitration, they are bound to abide by the sentence of the arbitrators: they have engaged to do this; and the faith of treaties should be religiously observed"[17]. Vattel subscribes to the prevailing notion that arbitral awards should be binding and final, yet, interestingly, the Swiss later affirms that if an arbitral sentence is evidently unjust and unreasonable no attention should be paid to it[18].

His remarks are evidence that finality was not considered to be absolute and there has been a continuous debate over the possibility of reviewing arbitral awards, but by establishing "unjust and unreasonable" as standards for the reconsideration of awards, Vattel strays from the thresholds authorized to except awards finality in the ICSID Convention. Yannick Radi recalls that annulment aims to guarantee procedural justice and as such, the ICSID annulment system

[15] The principle of finality asserts that arbitral awards must be final and binding over the parties. The ICSID system establishes it in Article 53 by its determination that awards shall not be subject to any appeal and is a consequence of the recognized principles of *pacta sunt servanda* and *res judicata*.
[16] Bishop, R. Doak and Marchili, Silvia, *Annulment under the ICSID Convention*, 13-15.
[17] Emer Vattel, *The Law of Nations* (Indianapolis: Liberty Fund, 1797), 277-278.
[18] Vattel. *The Law of Nations*, 278.

is centred around ensuring the integrity, propriety and fairness of the settlement of disputes conducted under the ICSID rules[19], not the reasonableness of the award's reasons.

Unless the arbitral tribunal was not properly constituted; manifestly exceeded its powers; was involved in corruption acts; seriously departed from a fundamental rule of procedure or; failed to state the reasons for its awards, finality should stand and the award will bind both parties whether they consider it to be just and reasonable or not. ICSID's annulment system is not part of the Convention to protect the correctness of awards but to safeguard the integrity of the procedure. It may sound arbitrary for general law scholars, but the structure derives its logic from arbitration's nature.

Arbitration is a voluntary dispute settlement method where parties necessarily need to provide consent for the procedure to occur. When opting for arbitrating a dispute, parties must accept in good faith the result of the procedure as they were the ones who chose the process. Only because of their consent are arbitrators allowed to decide on the issues of the dispute and determine the solution that they consider appropriate to resolve the conflict. If the parties themselves decided that the arbitrator's judgment is the relevant and final one, who could then replace their decision?

Different authors sustain the idea that there is no superior judge who can revise arbitral awards[20]. Once parties legitimately appoint an arbitral tribunal, they accept their authority over the dispute and must bear the consequences of its decision independently if it is right or wrong. Comprehending this distinct dynamic is that the ICSID annulment system offers a unique control mechanism for the finality of awards grounded on the correctness of the procedure.

[19] Yannick Radi, *Rules and Practices of International Investment Law and Arbitration* (Cambridge: Cambridge University Press, 2020), 468.
[20] Bishop and Marchili, *Annulment under the ICSID Convention*, 7-8.

Bishop and Marchili explain how ICSID's original control mechanism departs from other dispute regimes, confirming the benefit that is offered to investors

> No court or tribunal of the host State is empowered to review an ICSID award on the merits. In fact, no domestic or international court can invalidate or qualify an ICSID award in any respect. This is perhaps the most remarkable feature of the system. (…) Articles 52 and 53 of the Convention ensure the finality and legal certainty of ICSID awards. Together with the limited grounds for annulment, the fact that only ICSID annulment Committees are empowered to analyze ICSID awards for purposes of annulment is considered an important advantage of this venue and constituted an advance forward for the protection of investments. The finality of ICSID awards is thus an intrinsic advantage over other systems.[21]

It is undisputed among annulment *ad hoc* Committees that the Convention does not authorize the replacement of the tribunal's original decision for their own[22]. Their exclusive role is to decide on the voidness of an arbitral award once a request for annulment is presented by one of the parties, thus gatekeeping the two main goals of drafters: correctness and finality.

The Scope of The ICSID Annulment System

The annulment remedy's scope is described in the first paragraph of the Article 52 of the ICSID Convention. It provides:

> Article 52
> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;
> (c) that there was corruption on the part of a member of the Tribunal;
> (d) that there has been a serious departure from a fundamental rule of procedure; or
> (e) that the award has failed to state the reasons on which it is based[23]

[21] Bishop and Marchili, *Annulment under the ICSID Convention*, 15-16.
[22] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 38-47.
[23] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 26.

From the plain text is possible to infer that annulment is a remedy against awards and a request for it can only be based on one or more of the five annulment grounds listed in the article's first paragraph[24]. Annulment Committees are bound by the scope of the request made by parties and are not authorized to annul any part of the award that has not been challenged; doing so would consist in an *ultra vires* decision[25].

This is not to say that Committees do not have discretion in appreciating annulment requests. In principle, Committees are empowered to uphold the request in full or partially, abiding by their discretion[26]. Deciding that the request is meritorious, Committees should annul the award, enabling parties to start new proceedings if so they wish[27].

When exercising its discretion, an Annulment Committee typically conducts a thorough review of the grounds raised for annulment and the arguments presented by the parties. Their decisions are bound to a limited scope of review as ICSID Convention provides for a high threshold for annulment, demanding proof of serious flaws in the arbitral process or the award itself.

In conclusion, ICSID's Annulment Committees exercise discretion within the confines of the ICSID Convention and the grounds for annulment provided therein. Their role is to safeguard

[24] The distinction is relevant since there are provisional decisions that arbitral tribunals can adopt that are not subjected to annulment. Article 47 of the Convention authorizes tribunals to recommend provisional measures preceding the award's final decision and, alongside other initial rulings, these judgments only become susceptible to annulment once they are integrated into the tribunal's award. The classical example in literature is early decisions on jurisdiction . Even if one of the parties disagrees that the tribunal has jurisdiction over the dispute, the decision can only be challenged once the jurisdiction is affirmed in an award. Until then, in spite of their disagreement, they should participate in good faith in the arbitral proceedings. See Radi, *Rules and Practices of International Investment Law and Arbitration,* 470.

[25] Radi, *Rules and Practices of International Investment Law and Arbitration,* 470.

[26] Exceptionally, the annulment of fractions of the award may demand the annulment of other parts. The possibility was established in ICSID practice through the 1989 decision on the Maritime International Nominees Establishment (MINE) v. Guinea case.

[27] Radi, *Rules and Practices of International Investment Law and Arbitration,* 470-471.

the integrity of the arbitral process and ensure compliance with the principles of due process while respecting the finality of the tribunal's award[28].

The Procedure of The ICSID Annulment System

The ICSID annulment procedure is described in Article 52 of the Convention, with special reference to paragraph four where is stated 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"[29].

For this analysis, following the order of comment in the ICSID's Background Paper on Annulment[30], the examination is divided into four different phases: the application for annulment; the constitution of the *ad hoc* Committee; the annulment proceeding; and the decision on annulment.

The Application for Annulment

Applications for annulment are completely voluntary and can be initiated by either party of a dispute by submitting a request to the ICSID Secretary-General. As determined by Article 52(3), the application must be filed within 120 days of the award with the exception of+ the

[28] Though there are scholars who adhere to the "hair-trigger thesis" of *Klöckner I* that annulment Committees are bound to determine annulment if a serious disfigurement of the arbitral process has occurred, the majority of authors sustain that annulment Committees have a margin of discretion when analyzing annulment claims arguing that the expression "shall have the authority" written in Article 52(3) indicates discretion. See Pinsolle, P. (2000). The Annulment of ICSID Arbitral Awards. *Journal of World Investment*, 1(1), 243-[ii].

[29] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 27.

[30] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID".

ground of corruption, when the application shall be made within 120 days after the discovery of the corruption act and counts counting with three years of limitation starting on the date which the award was rendered[31].

The request should include the identification of the award, the date of the application, detailed grounds for annulment based on Article 52(1) of the ICSID Convention, and the required fee[32]. Since the entry of effect of the ICSID Convention, a total of 182 annulment proceedings have been initiated with 149 concluded and 33 still pending a decision[33].

Payment of Costs

For the start of the annulment proceeding, the Background Paper on Annulment recalls that is the Applicant's responsibility to make the advance payments requested by ICSID unless otherwise agreed by the parties. The payments are aimed at covering hearing expenses such as transcription, translation, interpretation, ICSID's administrative fee, and the fees and expenses of the *ad hoc* Committee[34] – also referred to as "Costs of Proceeding"[35].

The payments do not reflect the ultimate allocation of costs, which is decided by the *ad hoc* Committee in its decision on annulment. Therefore, the Applicant should be prepared to cover the entire proceeding, subject to the Committee's final decision on costs[36], being worth noticing

[31] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 26.
[32] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 9.
[33] "ICSID Case Database", International Centre for Settlement of Investment Disputes (ICSID), June, 2023. https://icsid.worldbank.org/cases/case-database.
[34] According to the Updated version of the Background Paper on Annulment, since July 2010 costs of proceedings have averaged around USD 388,000. The *ad hoc* Committee members' fees and expenses constituted 74% of these costs while the hearing and ICSID's administrative fee accounted for the remaining amount.
[35] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 17-18.
[36] According to the Updated version of the Background Paper on Annulment published in 2016, there was a trend in past *ad hoc* Committees to divide equally between the parties the Costs of Proceedings, determining that each

that authors like Barbara Helene Steindl have made critics of the ICSID's advancement of cost dynamic, fearful of the damaging relationship between advancement and the discontinuance of annulment proceedings[37].

The Constitution of an *Ad Hoc Committee*

Once the application for annulment is registered, it is the duty of the Chairman of the Administrative Council to appoint a three-member *ad hoc* Committee to decide on the request[38]. The role of the *ad hoc* Committee is to reject the application or annul the award, either in whole or in part, based exclusively on the grounds mentioned in Article 52 of the ICSID Convention, as it is already established that the Committee's function is not to review the content of the award, but rather to address the application for annulment. Abiding by Article 52(6), if the award is annulled and the parties wish to resubmit the dispute, the new tribunal is then tasked with issuing a new ruling on the merits[39].

The members of the ad hoc Committee must be chosen from the ICSID Panel of Arbitrators, which in its turn is composed of up to four designees by each ICSID Contracting State and ten designees of the Chairman of the Administrative Council[40]. According to Article 14 of the ICSID Convention, these individuals are expected to possess high moral character, recognized competence in relevant fields of law, commerce, industry or finance, and the ability to exercise

party should bear its incurred legal fees and expenses, but in recent years, the majority of Committees have determined that the Applicant should bear all costs when an application for annulment is unsuccessful and a minority ruling that the losing party should bear all the legal fees and expenses.

[37] Barbara Helene Steindl. "ICSID Annulment vs. Set aside by State Courts," Yearbook on International Arbitration 4 (2015): 191-193.

[38] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 26.

[39] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 27.

[40] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 12-13.

independent judgment[41]. Also, Article 52(3) prevents the appointment of any individual who served in the original arbitral tribunal; any individual of the same nationality as any such member; any national of a State party to the dispute or of the State whose national is a party to the dispute; any individual appointed to the Panel of Arbitrators by either of those states and; any individual who has acted as a conciliator in the same dispute[42].

The Chairman of the Administrative Council is only empowered to select *ad hoc* Committee members from the Panel of Arbitrators[43] within the aforementioned criteria and is not authorized to make appointments outside of it, unlike the appointment of tribunal members by parties, that are primarily chosen to attend to their specific considerations of whom would constitute a proper arbitrator[44].

Lastly, while there is no obligation for the Chairman to consult the parties regarding ad hoc Committee appointments, the Background on Annulment Paper affirms that has been the practice of ICSID to inform the parties of the proposed appointees and provide their curricula vitae for review, thus enabling for parties the opportunity to raise concerns about potential lack of qualifications or any conflicts of interest[45].

[41] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 15.
[42] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 26-27.
[43] The Panel on May 4, 2023 consists of more than hundreds of individuals the Chairman and the 135 Contracting States. See International Centre for Settlement of Investment Disputes (ICSID). "Database of ICSID Member States | ICSID," 2022. https://icsid.worldbank.org/about/member-states/database-of-member-states.
[44] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 17-18.
[45] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 14.

The Annulment Proceeding

The annulment proceeding itself starts once the *ad hoc* Committee members accept their appointments, and the Secretary-General of ICSID informs the parties about the composition of the Committee.

The party initiating the annulment process is typically referred to as the "applicant," while the other party becomes the "respondent" or "respondent on annulment."; usually, the roles switch from those in the original arbitration proceeding, at the pace that the claimant becomes the respondent in the annulment proceeding[46].

A Secretary is appointed from ICSID staff to assist the *ad hoc* Committee and the parties. Most of the time is preferred that the secretary of the Committee be the same person that served as the secretary for the arbitral tribunal, providing continuity with the procedural history. However, parties are entitled to request a different person, and practice shows that the secretariat uses to accommodate such requests[47].

As previously stated, several articles of the ICSID Convention will apply to the annulment proceedings, with necessary modifications to reflect its particular nature. Articles 41-45, 48, 49, 53, and 54 apply to the *ad hoc* Committee proceeding, however, the applicability of other provisions of the Convention has been controversial, having *ad hoc* Committees held debates concerning the applicability of Article 47, regarding a Tribunal's power to recommend provisional measures, and the interpretation of Article 52(4) raising questions about whether

[46] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 15.
[47] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 15.

an *ad hoc* Committee member can be challenged for a manifest lack of required qualities[48] as stated in Article 14(1) of the Convention[49].

In that sense, the procedure before an *ad hoc* Committee generally follows the same principles as before an arbitral tribunal, with Committees holding the obligation to respect the right of both parties to be heard and ensure equality among them[50]. The procedural agreements from the original proceeding usually are brought into force for the annulment proceedings, and the *ad hoc* Committee holds an initial session with the parties to discuss procedural matters and make adjustments based on their mutual agreement[51].

Typically, the parties agree on a timetable for written pleadings, including the application for annulment, memorial, counter-memorial, reply, and rejoinder, as well as an oral hearing. As of April of 2026, the time allocated for written pleadings was limited to around three months per party for the first round and two months per party for the second round[52].

Parties normally submit the factual and legal evidence from the original proceeding alongside their written pleadings in the annulment proceeding[53]. Following the submission of written pleadings, an oral hearing takes place, regularly lasting one to two days. During the hearing,

[48] Even though Article 52(4) does not allow for a member of the annulment Committee to be challenged, two different arbitral tribunals rejected the thesis that an *ad hoc* Committee member cannot be disqualified and affirmed that *ad hoc* Committees have the power to rule on disqualifications claims; the Committees were acting on the Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic case, and the Nations Energy, Inc. and others v. Republic of Panama case.
[49] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 15-16.
[50] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 17.
[51] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 17.
[52] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 17.
[53] Record before the *ad hoc* Committees normally is limited to the factual evidence presented in the original arbitral tribunal, however, the possibility of admitting new factual evidence is recognized, such as certain grounds could require the addition of new factual evidence.

the focus is usually on oral arguments, and in some instances, may engage legal experts whose opinions are to be considered in the annulment proceeding[54].

During or shortly after the hearing, the Committee requests submissions from parties regarding costs and can also invite them to file post-hearing briefs[55]. Once the presentation of the annulment case is completed, and the Committee has made progress in its deliberations, the proceeding is closed and the *ad hoc* Committee, following the command of rules 38(1) and 46, is required to issue the decision on annulment within 120 days from the date of closure[56].

Concerning the time lapse between the finish of hearings and the publishment of annulment decisions, the Background Paper on Annulment recollects that out of the 25 decisions on annulment issued since January 2011, 22 were delivered within one year of the hearing with an average time from the hearing to the issuance of 7 months. For the same period, the average duration of an annulment proceeding, from the registration of the application for annulment to the issuance of the decision, was 24 months[57].

A Request for Stay of Enforcement

At the beginning of the annulment proceeding or at any moment during its duration, Article 52(5) of the Convention allows either one of the parties involved to request a stay of enforcement for all or part of the arbitral award[58]. The stay of enforcement may pertain to

[54] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 21-22.
[55] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 22.
[56] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 117-121.
[57] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 22-23.
[58] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 27.

different aspects of the original decision, such as damages, costs, or other forms of relief, potentially being partial or a full stay[59].

In the case that the request is made on the application for annulment, the Secretary-General must inform both parties and the provisional stay remains in effect until the ad hoc Committee, commanded by Arbitration Rule 54, gives priority to the matter, and makes a ruling on the request[60].

Both parties have the opportunity to present their observations before the Committee reaches its decision, and the annulment Committees must consider the specific circumstances of each case when evaluating requests for a continued stay of enforcement. Factors taken into account include the risk of non-recovery of awarded sums if the award is annulled, non-compliance with the award if it is upheld, previous instances of non-compliance with other awards or failure to pay arbitration costs, adverse economic consequences for either party and the overall balance of both parties' interests[61].

If a stay is granted, the ad hoc Committee has the authority to modify or terminate it based on the request of either of the parties and according to Arbitration Rule 54(3) if the stay is not terminated during the proceeding, it automatically ends upon the issuance of the *ad hoc* Committee's final decision on the annulment[62].

[59] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 18.
[60] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 126-127
[61] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 19.
[62] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 127.

The Decision on Annulment

Annulment proceedings are usually concluded by the *ad hoc* Committee's decision on annulment[63], which can result in one out of four results: first, the Committee can reject all annulment grounds and keep the award in its integrity; secondly, the annulment Committee can uphold one or more of the grounds of annulment regarding a fraction of the award, leading up to a partial annulment; thirdly, the Committee can uphold one or more of the grounds for annulment concerning the entirety of the award, resulting in full annulment or; fourthly, the Committee can exercise its aforesaid discretion to not annul the award, even if an error was identified[64].

The *ad hoc* Committee's decision on annulment is not considered an award and is not subject to further annulment proceedings, however, it carries the same binding force, recognition, and enforcement of an award[65]. Similar to them, the decision must include the elements required for an award and provide the reasons for its conclusions[66].

Despite some *ad hoc* Committees examining all grounds raised, prominent annulment decisions have expressed the view that if an award is fully annulled based on one ground, there is no need to examine other potential grounds for annulment. The same stands for when a portion of the award is partially annulled on one ground, the *ad hoc* Committees choose to not

[63] Other possibilities for concluding annulment procedures aside from Committee decisions exist such as the reach of a settlement by the parties where one party does not object to the other' request for discontinuation; the applicant party fails to pay the requested advances for covering the Costs of Proceeding or; the parties fail to take any steps in the proceeding for six consecutive months. See footnote 41.

[64] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 23.

[65] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 27.

[66] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 25-27, 121, 126.

consider alternative grounds for annulment of the same portion, being the position of the Committees in the cases of MINE, Vivendi I, Occidental, and TECO[67].

THE ICSID ANNULMENT SYSTEM'S PRACTICE AND THE RULE OF PRECEDENT

During its lifespan, the ICSID annulment rate has never been high. Out of the 587 cases concluded as of the June of 2023, 149 reached annulment proceedings, with only 107 being terminated by a decision on annulment[68], and an even smaller number of decisions – nineteen, according to ICSID's last report on caseload[69] – actually applying the remedy of annulment. Despite its narrow application, the annulment remedy constituting the only route to challenge the finality of ICSID awards has been the subject of constant scrutiny by practitioners and scholars[70].

Professor Christoph Schreuer[71] wrote in 2004 that the history of annulment proceedings could be described in terms of three generations. His work influenced many authors who would later appropriate his categorization to conduct their research investigating ICSID's annulment practice[72]. The professor affirmed that ICSID's starting annulment cases, *Klöckner I* and *Amco*

[67] International Centre for Settlement of Investment Disputes, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 24.
[68] International Centre for Settlement of Investment Disputes, "ICSID Case Database".
[69] International Centre for Settlement of Investment Disputes, "THE ICSID CASELOAD — STATISTICS ISSUE 2023-1,", 17.
[70] Albeit annulment represents the only measure capable of cancelling an arbitral award, it is worth mentioning that the process is one of three post-award remedies present in Section 5 of the ICSID Convention. It is accompanied by the remedies of interpretation for when parties are disputing the meaning or scope of an award (Article 50) and revision to deal with the discovery of a fact of such a nature as decisively affect the award (Article 51). Outside the scope of Section 5, Article 49(2) renders the possibility of rectification for any clerical arithmetical or similar error in the award.
[71] Christoph Schreuer, "Three Generations of ICSID annulment Proceedings" in Annulment of ICSID Awards, ed. Emmanuel Gaillard (New York: Juris Publishing, 2004), 17-18.
[72] See Gloria Maria Alvarez, "The ICSID Procedure: Mind the Gap", Revista E-Mercatoria 10, no. 2 (July-December 2011): 163-202; Fenghua Li, "The Divergence of Post-Award Remedies in ICSID and Non-ICSID Arbitration: A Perspective of Foreign Investors' Interests", The Chinese Journal of Comparative Law, Volume 4, Issue 1 (March 2016); Irmgard Marboe, 'ICSID ANNULMENT DECISIONS: THREE

I constituted a first concerning generation raising criticism for "improperly crossing the line between annulment and appeal"[73]; *MINE, Klöckner II* and *Amco II* would form the second generation and; the third was substantiated by the decisions in *Wena* and *Vivendi*[74].

Among the decisions of a particular generation, Schreuer pointed out common traits that linked them together, but all three were measured by the same standard: how much they conformed to the ICSID annulment's limits. The changing aspect from the first to the second generation was that while *Klöckner I* and *Amco I* failed to apply annulment as it was intended, acting as an appeal tribunal and raising concerns over the functionality of the annulment remedy in the ICSID system, the second generation lifted these concerns by narrowing their analysis to the scope provided by the Convention, but only the third demonstrated that the annulment process had reached a proper balance intervening solely in serious and important cases[75].

In the years that followed Professor Schreuer's writing, the usage of the annulment remedy sparked, with 25 new annulment proceedings registered between 2005 to 2010, a 78% increase from the number of proceedings registered during the four previous decades, yet significantly lower than the 49 registered during the following quinquennial[76]. In the view of parties, the idea of annulment as an extreme measure had been abandoned and requests for annulment only became more popular as the years progressed.

A paradigm change was also expected to take place with the increasing number of annulment procedures, but Schreurer's third generation showed a remarkable influence over the

GENERATIONS REVISITED', in Christina Binder and others (eds), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (Oxford, 2009; online edn, Oxford Academic, 1 Sept. 2009); Vladimír Balaš, ' Review of Awards', in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), The Oxford Handbook of International Investment Law (2008; online edn, Oxford Academic, 18 Sept. 2012)

[73] Schreuer, "Three Generations of ICSID annulment Proceedings" in Annulment of ICSID Awards, 18.

[74] Schreuer, "Three Generations of ICSID annulment Proceedings" in Annulment of ICSID Awards, 18.

[75] Schreuer, "Three Generations of ICSID annulment Proceedings" in Annulment of ICSID Awards, 18-19.

[76] International Centre for Settlement of Investment Disputes, "ICSID Case Database".

succeeding annulment decisions. Irmgard Marboe analyzed ICSID *ad hoc* Committees' decisions five years after the publishing of Schreuer's investigation and noticed that

> The analysis of recent ICSID annulment decisions has shown that the majority of them can be classified as appertaining to Professor Schreuer's 'third generation' of ICSID annulment proceedings. Explicitly or implicitly referring to this concept, they have shown a very cautious approach. They have made it repeatedly clear that annulment must be distinguished from appeal and that an ad hoc Committee may not analyze the merits of the case or substitute its own determination for that of the tribunal.[77]

Annulment Committees then reassured the place of finality within the ICSID system and repeatedly asserted the different nature of annulment, recognizing time and again that *ad hoc* Committees are not appealing tribunals and are not authorized to replace the views of the original arbitral tribunal for their own. It would only be after 2010, when four ICSID awards got annulled with none following the annulment's established criteria completely, that scholars would start noticing the surging of a fourth generation of ICSID annulment and start to heavily scrutinize the system's lack of predictability[78].

Previously to that time, it was not only expected that annulment Committees departed from the decisions of the first generation, but annulment Committees were effectively under criticism just as authors prematurely denounced an existential threat to the annulment system that never came to be[79]. Generations two and three were successful at proving that the ICSID annulment was capable of performing its annulment duties as designed by drafters, yet the regularly

[77] Irmgard Marboe, "ICSID ANNULMENT DECISIONS: THREE GENERATIONS REVISITED", in Christina Binder and others (eds), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (Oxford, 2009; online edn, Oxford Academic, 1 Sept. 2009), 218.
[78] Vladimír Balaš, "Review of Awards', in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), The Oxford Handbook of International Investment Law (Oxford, 2008; online edn, Oxford Academic, 18 Sept. 2012), 1149; Gloria Maria Alvarez, "The ICSID Procedure: Mind the Gap", Revista E-Mercatoria 10, no. 2 (July-December 2011): 168. See Promod, Nair, and Claudia Ludwig. "ICSID Annulment Awards: The Fourth Generation?" Global Arbitration Review, October 2010. https://globalarbitrationreview.com/article/icsid-annulment-awards-the-fourth-generation.
[79] See Alan Redfern, "ICSID - Losing its Appeal?", Arb.Int'l 2 98, 1987.

appointed inconsistencies among arbitration awards[80] and the 2010's annulment decisions highlighted the permanent risk of erratic decisions upon a lack of authoritative precedents.

ICSID Convention's Article 53 fixes the limits of the award's effects, explaining in its first sentence that "the award shall be binding on the parties" [81] and in its second paragraph extends the same binding effect to "any decision interpreting, revising or annulling such award"[82]. From its plain reading is clear that drafters meant for awards to hold *inter partes* effects in opposition to broader *erga omnes* powers.

Professor Schreuer's Commentary on the ICSID Convention recognizes that Article 53(1) can be interpreted as an exclusion of the principle of binding precedent to successive ICSID cases, with nothing in the Convention's *travaux préparatoires* suggesting a desire for the application of the *stare decisis* doctrine[83] to the ICSID system[84]. The option is both defended and criticized by different voices[85] nevertheless, some arguments advocating for *stare decision*'s absence are particularly persuasive. Tarcisio Gazzini recalls that the doctrine does not apply to international investment law, the same way is not for international public law in general, as even permanent

[80] Stephan W Schill. *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*. Edited by Loretta Malintoppi, August Reinisch, Christoph H. Schreuer, and Anthony Sinclair. 3rd ed. (Cambridge: Cambridge University Press, 2022), 1451-1452; Stanimir A. Alexandrov, *On the Perceived Inconsistency in Investor-State Jurisprudence* (Oxford: Oxford University Press), 2011; Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle*, 4th edition (Oxford: Hart Publishing, 2020), 177-180.

[81] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 27.

[82] International Centre for Settlement of Investment Disputes, "ICSID convention, regulations and rules. International Centre for Settlement of Investment Disputes", 27.

[83] The doctrine of *stare decisis* is a concept originated from common law tradition where a judge is obliged to follow precedents established in prior decisions. It derives from the rule of law principle that like cases must be decided alike.

[84] Schill, *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1450-1451.

[85] See Gabriel Bottini, Present and Future of ICSID Annulment: The Path to an Appellate Body?, *ICSID Review - Foreign Investment Law Journal*, Volume 31, Issue 3, October 2016, 712–727; Juan Fernández-Armesto, Different Systems for the Annulment of Investment Awards, *ICSID Review - Foreign Investment Law Journal*, Volume 26, Issue 1, Spring 2011, Pages 128–146; Gloria Maria Alvarez, "The ICSID Procedure: Mind the Gap", Revista E-Mercatoria 10, no. 2 (July-December 2011): 163-202.

international tribunals like the International Court of Justice are not bound to apply its previous determinations[86].

Holding a specific tribunal for a specific case is one of arbitration's distinctive features[87], and as cited by Gloria Maria Alvarez, critics sometimes overlook that "ICSID is there for the parties, and not for interested observes keen on systematic consistency"[88]. Moreover, the proposal that the lack of *stare decisis* doctrine amounts to a disregard for precedent is simply untrue. Repeatedly ICSID tribunals defended the relevance of a harmonious development for investment law, not only engaging in the systematical consideration and reference of previous decisions from ICSID tribunals [89] but also engaging in referencing other international adjudication bodies such as the Permanent Court of International Justice, the International Court of Justice, and the European Court of Human Rights[90].

ICSID system's general view on the role of precedent is remarkably summarized by *SGS v. Philippines* arbitral tribunal:

> The ICSID Convention provides only that awards rendered under it are 'binding on the parties' (Article 53(1)), a provision which might be regarded as directed to the *res judicata* effect of awards rather than their impact as precedents in later cases. In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development

[86] Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Oxford & Portland, OR: Hart Publishing, 2016), 292.

[87] Alexandrov, *On the Perceived Inconsistency in Investor-State Jurisprudence*, 67.
[88] Alvarez, *The ICSID Procedure: Mind the Gap*, 188.
[89] Gazzini, *Interpretation of International Investment Treaties*, 292.
[90] Schill, *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 875.

> of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision.[91]

As later reaffirmed by the *AES v. Argentina* tribunal, on the place of *stare decisis*, the ICSID engages in the development of a *jurisprudence constante* dedicated to resolving difficult legal issues at the rate that previous decisions are echoed in new ones, effectively fabricating a *de facto* ICSID case law[92]. Assuming then that this proposition is true, some regularity should be expected from the application of annulment grounds by Committees, thus enabling the identification of rising precedents.

IDENTIFYING RULING PRECEDENTS FOR A SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

To identify the existence of ruling precedents in the application of Article 52(1)(d), the ICSID Case Database was utilized for the collection of decisions. The results were filtered to present only arbitration cases submitted to annulment proceedings already concluded and with annulment decisions published. Qualitative analysis was conducted to narrow the sample to decisions where at least one of the parties claimed a violation of Article 52(1)(d), a serious departure from a fundamental rule of procedure, resulting in the twenty-three final decisions analyzed[93].

[91] ICSID Case Database. "SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6)," n.d, 37. https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/02/6.

[92] Schill, *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 876.

[93] The decisions were *Iberdrola Energía v. Guatemala (2015); Malicorp Limited v. Egypt (2013); Caratube International Oil Company v. Kazakhstan (2014); Impregilo v. Argentina (2014); Joseph C. Lemire v. Ukraine (2013); Libananco Holdings v. Turkey (2013); Occidental Petroleum Corporation And Occidental Exploration And Production Company v. Ecuador (2015); Saur International v. Argentina (2016); Total S.A. v. Argentina (2016); Suez, Sociedade General De Aguas De Barcelona And Vivendi Universal v. Argentina (2017); El Paso Energy International Company v. The Argentine Republic (2014); Venoklim Holding v. Venezuela (2018); Standard Chartered Bank (Hong Kong) v. TANESCO (2018); Fraport v. Philippines (2010); Sociedad Anónima*

The decisions were reviewed for authoritative references to past annulment decisions either concurring with them or reasoning based on them to establish dissent. Particular attention was given to *verbatim* reproductions in-text and express references in footnotes and after careful analysis the findings were divided into six categories: scope; application requirements; definition of serious departure; definition of a fundamental rule of procedure; given examples of fundamental rules of procedure and; the relationship between ICSID Convention Article 52(1)(d) and Arbitration Rule 27.

The Application Scope for Article 52(1)(d)

Five decisions reproduce the understanding that the scope of the ground of "a serious departure from a fundamental rule of procedure" has a wide connotation since the Convention's *travaux préparatoires*, including principles of natural justice, but does not encompass ordinary failings to observe arbitral rules; they are *Total S.A. v. Argentina*, *El Paso Energy International Company v. Argentina*, *Venoklim Holding v. Venezuela*, Fraport v. Philippines, and *MINE v. Guinea*.

The Application Requirements for Article 52(1)(d)

Eduardo Vieira v. Chile (2010); MINE v. Guinea (1988); Compañia De Aguas Del Aconquija v. Vivendi (2002); Continental Casualty v. Argentina (2011); Lucchetti v. Peru (2007); Repsol v. Petroecuador (2007); Helnan v. Egypt (2010); Azurix v. Argentina (2009); Tidewater Investment SRL And Tidewater Caribe v. Venezuela (2016). See International Centre for Settlement of Investment Disputes. "ICSID Case Database", (ICSID), June, 2023. https://icsid.worldbank.org/cases/case-database.

Ten annulment decisions[94] recognize a double requirement for the application of annulment abiding Article 52(1)(d): first, the departure from a rule of procedure must be serious and; second, the rule must be fundamental. Out of these ten, *Iberdrola Energía v. Guatemala, El Paso Energy International Company v. The Argentine Republic*, and, *Occidental v. Ecuador* refer to a third requirement of a material impact on the award rendered.

The Definition of "serious departure" for Article 52(1)(d)

Eight annulment decisions make references to previously established standards for the interpretation of serious departure however, four different and incompatible standards are cited, sometimes by the same decision. *Iberdrola Energía v. Guatemala*, *Malicorp Limited v. Egypt*, and *Venoklim Holding v. Venezuela* reference the *MINE v. Guinea* definition for a serious departure identifying it through both quantitative and qualitative criteria, that the departure must be substantial and need to be such as to deprive a party of the benefit or protection which the rule was intended to provide"[95].

Wena's criteria is followed in four decisions[96] and relies on MINE's definition to create a different requirement providing that in order for a departure to be serious the violation of such rule must have caused the tribunal to reach a result substantially different from what would

[94] *Iberdrola Energía v. Guatemala (2015); Malicorp Limited v. Egypt (2013); Caratube International Oil Company v. Kazakhstan (2014); Occidental Petroleum Corporation And Occidental Exploration And Production Company v. Ecuador (2015); Saur International v. Argentina (2016); Total S.A. v. Argentina (2016); El Paso Energy International Company v. The Argentine Republic (2014); Venoklim Holding v. Venezuela (2018); Standard Chartered Bank (Hong Kong) v. TANESCO (2018); Fraport v. Philippines (2010).*

[95] ICSID Case Database, "Iberdrola Energía v. República de Guatemala, ICSID Case No. ARB/09/5", 2015, 26. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C582/DC5374_Sp.pdf

[96] Malicorp Limited v. Egypt (2013); Caratube International Oil Company v. Kazakhstan (2014); Occidental v. Ecuador (2015); Suez, Sociedade General de Aguas de Barcelona and Vivendi Universal v. Argentina (2017).

have been awarded if the rule had been observed[97]. *CDC v. Seychelles* standard identifies a serious departure by both the depriving of a benefit and a substantial impact on the award rendered, being referred by *Iberdrola Energía v. Guatemala and Total v. Argentina*.

Conclusively, *Suez, Sociedade General de Aguas de Barcelona and Vivendi v. Argentina* referenced Caratube's decision distinguishing itself and Wena by recognizing that the applicant however is not required to prove that the violation of the rule of procedure was decisive for the outcome, or that the applicant would have won the case if the rule have been applied since it would impose an unrealistically burden of proof on the applicant[98].

The Definition of "fundamental" for Article 52(1)(d)

Wena v. Egypt's standard for recognizing fundamental rules is the more stable precedent being repeated through four annulment decisions[99], identifying the rules as referring "to a set of minimal standards of procedure to be respected as a matter of international law"[100].

Registered Examples of Fundamentals Rules of Procedure for Article 52(1)(d)

Eight out of the twenty-three annulment decisions provided examples of which rules could be considered fundamental rules of procedure. Equal treatment of the parties, the right to be heard, an independent and impartial tribunal, the treatment of evidence and burden of proof, and

[97] ICSID Case Database, "Malicorp Limited v. Arab Republic of Egypt, ICSID Case No. ARB/08/18", 2013, 12. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C461/DC3572_En.pdf
[98] ICSID Case Database, "Suez, Sociedad General De Aguas De Barcelona S.A.
And Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19", 2013, 33-34. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C19/DC10372_En.pdf
[99] *Iberdrola Energía v. Guatemala* (2015)*; Malicorp Limited v. Egypt* (2013)*; Suez, Sociedade General de Aguas de Barcelona and Vivendi Universal v. Argentina* (2017) *and; Venoklim Holding v. Venezuela* (2018).
[100] ICSID Case Database, "Malicorp Limited v. Arab Republic of Egypt, ICSID Case No. ARB/08/18", 11.

deliberations among the members of the tribunal were consistently mentioned in all eight decisions[101], with express references to AMCO I, AMCO II, and Wena in *Joseph C. Lemire v. Ukraine,* and AMCO II, *CDV v. Seychelles*, and *Joseph C. Lemire v. Ukraine* in *Saur International v. Argentina.*

Relationship between Article 52(1)(d) and Arbitration Rule 27

From the selected sample, three decisions contained pronouncements concerning the relationship between Article 52(1)(d) and Arbitration Rule 27[102]. *Fraport v. Philippines, Sociedad Anónima Eduardo Vieira v. Chile*, and *Joseph C. Lemire v. Ukraine* consistently declared the precluding effects of Rule 27, affirming that if a party failed to promptly protest a serious procedural violation, the violation is deemed waived[103].

[101] The Eight decisions where similar examples of fundamental rules of procedure were *Iberdrola Energía v. Guatemala* (2015)*; Impregilo v. Argentina* (2014)*; Joseph C. Lemire v. Ukraine (2013); Saur International v. Argentina* (2016)*; Total S.A v. Argentina* (2016)*; Suez, Sociedade General de Aguas de Barcelona and Vivendi Universal v. Argentina* (2017)*; Venoklim Holding v. Venezuela* (2018) and*; Standard Chartered Bank v. Tanesco* (2018).

[102] "A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object". See International Centre for Settlement of Investment Disputes (ICSID), "ICSID convention, regulations and rules.", 2006, 113.

[103] ICSID Case Database, "Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25", 76-77, 2010. https://www.italaw.com/sites/default/files/case-documents/ita0341.pdf; ICSID Case Database, "Sociedad Anónima Eduardo Vieira v. Republic of Chile (ICSID Case No. ARB/04/7)", 84, 2010. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C238/DC1851_Sp.pdf; ICSID Case Database, "Joseph C. Lemire v. Ukraine (ICSID Case No. ARB/06/18)", 43, 2013. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C87/DC4912_En.pdf

CONCLUSION

The emerging role of precedent within the International Centre for Settlement of Investment Disputes annulment system is a significant development that can have a profound impact on investment arbitration practice. Despite being too early to declare the rising of a coherent body of investment case law, the increasing number of annulment decisions referencing and relying on previous decisions, using them as a foundation to build their own reasoning is a remarkable improvement for those who criticized ICSID for a lack of coherence and predictability.

It is noticeable that upon the enlargement of the pool of precedent to draw from, there has been a noticeable increase in the referencing of annulment decisions, indicating an expanding recognition of the value of precedent in shaping subsequent rulings, particularly after 2010.

Some precedents are naturally less controversial than others, and since *stare decisis* is a foreign concept to international law, the dispute over the meaning of particular provisions was to be expected. Still, some defining lines can start to be drawn on the application of Article 52(1)(d) as the research showed that relative consensus exists over topics such as the requirements for the annulment's remedy application based on a serious departure of a fundamental rule of procedure and the different rules of procedure that can claim the title of fundamental.

Finally, the increasing referencing of annulment decisions within the ICSID annulment system is a valuable tool for showing investment actors the system's reliability and perhaps even attracting major players that remain fearful of joining the International Centre for Settlement of Investment Disputes.

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