

The ICSID Procedure: Mind the gap[♦]

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Abstract

International Investment Law is constantly changing; therefore the mechanisms available to solve its disputes have evolved. The International Centre for Settlement of Investment Disputes (ICSID) is the most important arbitral institution capable of administrate disputes between investors and member States of the Washington Convention. The annulment activity of ICSID awards has significantly increased in recent years. This paper explores all the variables affecting the annulment activity and suggests effective solutions in order to achieve the desirable *Finality Principle* in ICSID awards.

Key Words: Investments, World Bank, Annulment activity, Finality Principle, ICSID, Washington Convention, Bilateral Investment Treaties, Argentina, Vivendi and Sempra

Resumen

El Derecho Internacional de Inversión, está en constante desarrollo, por lo tanto, los mecanismos disponibles para solucionar sus controversias también han evolucionado. El Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), es la institución arbitral más importante en la materia, capaz de administrar controversias entre Inversionistas y Estados Miembros de la Convención de Washington. La anulación en laudos del CIADI ha aumentado dramáticamente en el reciente año, por esta razón, el presente artículo explora las diferentes variables que afectan la actividad de laudos anulados, así como propone soluciones eficaces para conseguir un principio de finalidad deseable en laudo arbitrales finales.

Palabras Clave: Inversiones, Banco Mundial, Anulación de Laudos, Principio de Finalidad, Convención de Washington, Tratados Bilaterales de Inversión, Argentina, Vivendi y Sempra.

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Introduction and Foundations

Introduction

International Investments between governments of developing countries and foreign private investors with the capacity to assist developing countries are an essential activity for the growth of any economy.² Investment transactions contribute immensely to utilize resources in a more efficient way by achieving benefits for the host governments of the investment and for the investors.

Worldwide organisations, institutions, chambers and rules among other structures have been created to improve, regulate and discuss the International Investment activity. To illustrate this, we can observe the World Bank, a financial institution, based in Washington, D.C., composed by one hundred and eighty seven shareholders, all of them called Member Countries³. One of the World Bank's primary objectives is to retrieve inconsistencies in the International Investment framework. This purpose becomes an important incentive when the investment is addressed to the economic progression of a developing country, where raw material such as manpower and natural resources are present but there is lack of capital and technology, which is usually possessed by the most industrialized countries.

Economical, environmental, political, legal and even cultural facts interact in all international investments; thus disputes between a State and an investor have always existed and are a latent possibility. All these potential obstacles increased the concern and aid the search for mechanisms capable of settling disputes among States and investors.

Furthermore, the absence of an appropriate forum for the settlement of disputes that would be reliable for international investors and the investment's host States used to present a severe obstruction to the encouragement of investments in developing countries, which motivated the international community to find a suitable solution capable of settling disputes on a neutral forum.⁴

Thus, in accordance with the World Bank proposal and in response to the absence of an institution specialised on the administration of investment disputes; in 1966 the International Centre for Settlement of Investment Disputes (ICSID) was founded as an independent organisation. ICSID counts with more than 150 member countries, all of them signatories of the Washington Convention (hereinafter the Convention), this body of rules is considered as

² Christoph Scheruer, "The Dynamic Evolution of the ICSID System" in Rainer Hofmann and Christian J. Tams (eds.), *The International Convention on the Settlement of Investment Disputes: Taking a Stock after 40 Years* (Europäischen Integration und Internationalen Wirtschaftsordnung, 7 Nomos, Baden-Baden 2007) 15

³For More information about the World Bank go to <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> accessed on 22 July, 2011.

⁴ Moshe Hirsch, *The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes*, (Martinus Nijhoff Publishers, 1993) 17

a step forward in the investment dispute dynamic,⁵ this multilateral treaty has been recently ratified by the countries of Qatar and Moldova.⁶

As mentioned before, the lack of an investment arbitration institution motivated the creation of the Centre, whose main objective was solving any potential international investment disputes that could arise. The uniqueness of this Centre in comparison with other arbitral institutions is that is designed (as well as limited) to address investment controversies claimed only by certain category of parties: a sovereign member state and a private investor (from another contracting state). In practice the investor is usually a multinational corporation,⁷ but also individuals can request a claim under ICSID arbitration.⁸

ICSID provides the administration of conciliation and arbitral investment proceedings. The creation of the Centre by the World Bank has been an incentive for the investment community, especially because it provides a set of accurate provisions carefully drafted, 'so as to blend the procedures of the common law with those of the civil law'⁹ named ICSID Arbitration Rules (ICSID Rules). These Rules along with the Convention, improved the settlement of the investment disputes' atmosphere. This improvement can be seen on the increasing amount of Bilateral Investment Treaties (BITs) where consent to arbitrate under Washington Convention or/and Additional Facility Rules can be found. So far, more than 2,400 BITs¹⁰ contain ICSID arbitration as a forum choice among other arbitration institutions¹¹ Additionally, another convincing factor of having an arbitral institution sponsored by the World Bank is the pressure parties face in complying with the award; as can be found on the World Bank Operational Manual¹²:

"[w]hen a dispute over default, expropriation, or governmental breach of contract comes to the attention of a Bankstaff member ... If, on this basis, the Regional vice president (RVP) decides not to make any new loans to the

⁵ Scheruer (n 1) 17

⁶ List of Contracting States and Other Signatories of the Convention <www.worldbank.org/icsid> accessed on 12 July 2011

⁷ Hirsch (n 3) 2

⁸ Emilio Agustin Maffezini v The Kingdom of Spain (ICSID Case No. ARB/97/7) Award November 13, 2000

<<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>> accessed on 12 July 2011

⁹ Alan Redfern, "ICSID – Losing its Appeal?", 3 (1987) Arb.Int'l 2 98

¹⁰ Haley St. Dennis, The Elephant in the room: Addressing International Investment Conditions to Improve Human Rights. Institute for Human Rights and Business (SOAS) <http://www.ihrb.org/commentary/staff/elephant_in_the_room.html>, accessed on 22 July 2011

¹¹ See as an example Energy Charter Treaty article 26 (4), Jordan- Russian Federation BIT, Germany- Oman BIT, Qatar- Turkey BIT, Finland- Ethiopia BIT, Thailand-Argentine BIT, US-Estonia BIT, Netherlands- Venezuela BIT, Spain-Venezuela BIT, Germany-Cameroon BIT, UK-Egypt BIT, US- Argentina BIT and France-Argentina BIT, et al.

¹² World Bank Operational Manual on Disputes over Default on External Debts, Expropriation, and Breach of Contract available on <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064641~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>> accessed 07 July 2011

member country or with the guarantee of the country, the RVP informs the relevant managing director and the Vice President and General Counsel. It is clearly seen that the World Bank legislate this manual in order to promote the voluntary fulfilment of ICSID awards”

There are other reasons that strengthen ICSID awards. Unlike awards enforced and recognized under the New York Convention (1958), ICSID is described as a ‘*self-contained system*’¹³ excluding the awards from any revision procedure not considered on the remedies available in the Washington Convention itself. This Convention does not establish any grounds where an ICSID award may be refused by a national court. It seems, that drafters of the Washington Convention tried to shield the final decisions made by the Arbitral Tribunals. Nevertheless, drafters left available to the parties an annulment mechanism.

Despite the fact of the mentioned ICSID advantages, experts recently have considered, that ICSID has achieved its purpose without overcoming high expectations regarding the Finality Principle. In contrast, there is the opinion that ICSID has brought to the investment field an important development of the law and argues that ICSID should be recognized for all the innovations to this special arbitration regime and unsuccessful experiences should be considered positively as teaching lessons for the future.¹⁴

All recent criticisms to ICSID, point out the (i) ambiguity on the Finality Principle and (ii) lack of effectiveness of the awards. Nevertheless, not all criticisms attribute ambiguity and lack of effectiveness to the same causes, neither give the same solutions.

The ambiguity on the Finality Principle can be found in the internal mechanism offered to review and annul an award. The mechanism basically offers to any of the parties the possibility to apply for the annulment of the award through an internal ICSID procedure. The application for the annulment is heard by a group of experts different from the Arbitral Tribunal; named *Ad hoc committee*. Here is when lack of effectiveness appears because every time an award is rendered it can be subject to annulment and as consequence the dispute can be restarted immediately *AMCO v Indonesia II*¹⁵ and *Vivendi v Argentina II*¹⁶ among other cases¹⁷ are examples of annulment and resubmission of the dispute.

¹³ Christoph H. Schreuer, Loretta Malintoppi, August Reinsh, Antony Sinclair, *The ICSID Convention: A commentary* (2nd ed. Cambridge University Press 2009) 1102

¹⁴ Hirsh (n 3) 155

¹⁵ *Amco Asia Corporation and others v Republic of Indonesia, Resubmission Proceeding* 24 June 2011 (hereinafter *Amco v Indonesia II*), 5 Int'l Arb. Rep., No. 11

¹⁶ *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic (ICSID Case Arb/97/03), Resubmission Proceeding* (hereinafter *Vivendi v Argentina II*) <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>> accessed on 10 June 2011

¹⁷ Pending cases: *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3)* (hereinafter *Enron v Argentina*), *Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16)* (hereinafter *Sempra v Argentina*) both available on

One of the most popular causes of the overactive annulment activity according to investment experts is the lack of consistent criteria through the ICSID generations and this is perfectly reflected on the lack of precedents. In other words, ICSID has developed rapidly over the last three generations, by means of their annulment activity. As a result of this and despite the lack of precedents, these generations established criteria concerning the scope of the *Ad hoc committee* regarding annulment decisions. But, just in 2010, four ICSID awards were annulled and none of the established annulment criteria were completely followed, opening the possibility for a fourth generation facing procedural challenges.

A more delicate and polarising opinion says that annulment should be seen as an extreme measure¹⁸ and not used as an appeal mechanism. Several and very different opinions can be found regarding the possibility of implementing an appeal mechanism on ICSID procedure. As stated earlier, ICSID was created with the effort of the World Bank, and it counts with an important number of signatory States. Because of the type of parties involved on this investment procedure any “defect” on the annulment mechanism is worth to be analysed and the investment community should offer a modest solution. The settlement of investment disputes raises complex issues of law and procedure that deserve to be solved.¹⁹

Foundations

The aim of this article is to shed light on the elements contributing to the procedural loopholes impacting the International Centre for the Settlement of Investment Disputes annulment activity in order to find solutions easy of being implemented.

The working hypothesis of this paper is to demonstrate that these elements are distinctive features affecting the annulment activity with the aim to find a procedural solution capable of retrieving the inconsistencies presented on the ICSID procedure.

First, we must review the arbitral mechanism to understand under which circumstances awards are rendered; this will prepare us for the next stage of discussion about ICSID challenges and its possible solutions. We will also analyse some of the inconsistencies presented all along the three (and fourth) generations.

<<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListPending>> accessed on 13 July 2011.

Concluded cases: KlöcknerIndustrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (ICSID Case No. ARB/81/2) (hereinafter Klockner v Cameroon), Maritime International Nominees Establishment v. Republic of Guinea (ICSID Case No. ARB/84/4) (hereinafter MINE v Guinea) both available on <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded>> accessed 13 July, 2011, Albert Jan van den Berg (ed), ‘Maritime International Nominees Establishment (MINE) v. The Republic of Guinea’ Final award of 6 January 1988 (1989) XIVYBCA 82

¹⁸ Christopher Scheruer, ‘Three Generations of ICSID Annulment Proceedings’ in Emmanuel Galliard and Yas Banifatemi, (eds), *Annulment of ICSID Awards* (IAI Series, Jurish Publishing, Inc. 2004).

¹⁹ Audley Sheppard and Hugo Warner. Editorial Note. Appeals and Challenges to Investment Treaty Awards: Is it time for an International Appellate System? [2005] 2/2 BIICL 3

In the second chapter we will focus on all the procedural features affecting the annulment activity. At first, the discussion will be dedicated to an analysis of lack of jurisprudence discussion and its interaction with the annulment activity. Secondly we shall look at the behaviour of the *Ad hoc committee* and how easy it is to erase the differentiation line between been a court of appeal and a court of annulment and what are the consequences of doing it. Third, we will observe the gaps after an award has been rendered and before the annulment application has been made. As a fourth point, we will observe the interaction of the Bilateral Investment Treaties towards the annulment activity and how they are responding to this procedural gap. Lastly, we will consider the Argentinian experience as the member state facing the largest number of procedures under ICSID.

The third chapter will focus on the divergent opinions the investment community has regarding the procedural challenges the Centre is facing. This topic has been the subject matter of several debates in different forums all around the world by academics, practitioners, arbitrators and ICSID staff.

At the final chapter, we shall present conclusions reached on the basis of the analysis of the ICSID procedure, development of the annulment generations, the limits between court of appeal and annulment, the lack of jurisprudence, the contribution of the BITs, the Argentinian experience and the feedback of ICSID users have on this matter.

Is important to bear in mind that during the development and at the outset of the study, according to the Convention, the Centre cannot publish an award without the consent of the parties, therefore some information is restricted and a complete and substantial analysis of the material was difficult.

Chapter I

1.1 The Arbitral Procedure at ICSID

By December 2011, ICSID had register 331 cases²⁰ a small number in comparison with other arbitration institutions. ICSID arbitration procedure contains particular feature²¹ such as a *neutral and self-contained system* (i), *increasing transparency* (ii) and a *clear and* (iii) *reasonable cost schedules*.

The *neutral and self-contained system* contains two important elements, the first is stated on the Washington Convention, establishes that the 'law of the seat has no impact whatsoever on the proceedings'²², the second relevant element as it will be analysed carefully, regards the internal mechanism for the rectification, interpretation, revision and annulment where ICSID awards are "final" and they are not subject to any appeal or review by national courts.

²⁰ ICSID Caseload Statistics Issue 2011-1, available on <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>> accessed 07 July 2011

²¹ Lucy Reed, Jan Paulsson and Nigel Blackaby. Guide to ICSID Arbitration. (Kluwer International Law, 2006) ch 1, 13

²² *ibid* 14

Rules 32(2) and 37(2) of ICSID Arbitration rules promote the *increasing transparency* on the Centre. ICSID offers the possibility for non-disputes parties to attend the oral hearings .giving the opportunity to member States (especially developing countries) to show them as friendly investment States and capable to make public its legal duties and rights on a legal proceeding²³.

Finally, the *clear and reasonable cost schedules*, ICSID administrative fees are relatively low, and provide a transparent cost structure. However, the rates for the Arbitral Tribunal, Conciliators and *Ad hoc committee* are considerable, especially if the procedure lasts for a long time and then if it faces a first or even a second annulment; the fix rate, per day, can be of \$3,000.00 USD, in addition to certain allowances and reimbursement of expenses.²⁴

ICSID's Arbitration Procedure follows the same basic procedural standards of any other relevant international arbitration institution concerning features like: the appointment of arbitrators, time management and the figure of the Secretary General and its supervision duties which plays an important position also in ICC arbitrations.

Before understanding the internal annulment mechanism of ICSID, it is important to review the arbitral procedure. As mentioned before, overall the arbitration procedure of the Centre follows the same structure as in any other arbitration institution, thus we should focus on the particularities of the procedure rather than the similarities.

First, any party can file a written Request for Arbitration to the Secretary General of the Centre as stated on Article 36(1) of the Convention, cases of a host State as the claimant has been very rarely seen, usually it is the investor who claims its rights in arbitration. This request shall contain all relevant information concerning the issues of the dispute.

It can be said that in order to grant the request of arbitration, on a *prima facie* stage the Secretary-General will considerer if the Centre has jurisdiction over the dispute, according to the pre requisites provided in Article 25 of the ICSID Rules. The main objective of this initial scrutiny is to avoid that the arbitration mechanism can be used to consider irrelevant claims that clearly do not fall within the jurisdiction of the Centre. If after the 'pre-*prima facie*' stage scrutiny the Secretary does not grant the jurisdiction over the claim, this decision cannot be challenged in any forum; this is an exclusive power granted to the Secretary-General in this stage of the proceedings, and the rejection is a drastic but effective fence to access arbitration proceedings at the Centre. Nevertheless, at a later stage the Arbitral Tribunal will do a more careful revision on the jurisdiction requirements in order to determine if they in fact have authority over the dispute.²⁵

Assuming the Secretary-General finds jurisdiction on the *pre prima facie* study, the Secretary has to proceed to constitute the Arbitral Tribunal. A series of administrative rather than procedural steps have to be followed. First it is necessary to proceed with the appointment of the arbitral tribunal. As mentioned earlier the appointment method is like any

²³ Ibid 14 15

²⁴ Ibid

²⁵ Hirsh (n 3) 41

other in the arbitration institution around the world. A default provision can be found on Article 37 (2)(b) of the Convention that provides that if the parties do not agree upon the number of arbitrators neither on the selection system the Arbitral Tribunal should be compounded by three arbitrators, one appointed by each party and the chairman appointed by an agreement of the parties. The parties may appoint arbitrators either from the Centre's panel or from outside the Centre's list. Parties should bare in mind a time limit of 90 days after notice of registration of the request to appoint the Arbitral Tribunal if not, the Chairman of the Administrative Council will appoint at the request of either party, the arbitrator or arbitrators who have not yet been appointed.²⁶

It is worth considering the provision contained on Article 39 of the Convention, which provides that "*the majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute*". It can be understood that by this provision, ICSID drafters had the aim of constituting tribunals not only composed by experts with a high-level of understanding in the arbitration field, but also with neutral opinions towards the "nationality" of the parties involved in the dispute.

After the Arbitral Tribunal is constituted, some preliminary steps²⁷ should be taken into account:²⁸ the language or languages to be use in the proceeding which have to be chosen from one of the official languages accepted by the Centre;²⁹ it can be English, Spanish or French; fixing a certain number of sequence pleadings, expert appointment (including *amicus curie*).³⁰

The Washington Convention does not include any provision about the applicable substantive law of the procedure. At first glance, parties are free and should choose the substantive law applicable to the dispute, in absence of this choice by the parties, the Arbitral Tribunal will decide. Article 42 of the Convention serves as guidance for the Arbitral Tribunal in deciding the applicable law to the dispute, having to consider national and international norms.³¹ Article 42 of the Convention, blends two important procedural principles: flexibility and certainty. On the one hand, parties can choose the applicable law (Flexibility), and on the other, because in case parties do not comply on choosing the applicable law, the Arbitral Tribunal will fill this void (Certainty). Usually, the applicable law is that of the host State in concurrence with Private? International Law.³²

²⁶ R 4 ICSID Arbitration Rules

²⁷ *ibid* R 21

²⁸ *Ibid* R 20

²⁹ *ibid* R 22

³⁰ The most recent application the Centre has had regarding the participation of an *amicie curiae*, is the case *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No. ARB/09/12) (hereinafter *Pac Rim*), Procedural Order No. 8, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> accessed 23 July, 2011.

³¹ Hirsh (n 3) 28

³² United Nations Conference on Trade and Development (UNCTAD), *Applicable Law, Course on Dispute Settlement in International Trade, Investment and Intellectual Property*, <http://www.unctad.org/en/docs/edmmisc232add5_en.pdf> accessed 23 July 2011

Washington Convention provides that the law of the place where the proceedings are being held does not have any influence on the proceedings, unlike in commercial arbitration. This reaffirms one of the most important characteristic of ICISD as neutral, delocalized and independent of the nationality of the parties involved. ICSID users can agree the sitting of the Tribunal, in absence of choosing a venue to conduct the proceedings; it can be conducted in Washington, D.C.³³

Provisional measures play an important role in any arbitration proceedings. The measures are often requested to the tribunal, and should be granted in order to protect any legal rights involved that can be easily jeopardized during the proceedings. . However, under ICSID arbitration proceedings, the Arbitral Tribunal can only ‘recommend’ provisional measures; there is no coercive power from the tribunal to grant the measures as an order or as an award.³⁴ Nevertheless, the arbitral tribunal is always vigilant to the behaviour of the parties during the proceedings and can take it into account when rendering the final decision. A provisional measure granted as a recommendation might contain lack of coactivity and therefore lack of enforceability, however there have been some ICSID Arbitral Tribunal recommendations with a “*strongly influence*”³⁵ to national courts. This prohibition is consistent with the aim of creating an autonomous judicial mechanism, independent of municipal legal systems in order to ensure neutrality.³⁶

After an award has been rendered, a set of post awards remedies are offered by the Centre. As described by Alan Redfern³⁷ the provisions of the Convention as to interpretation and revision of an award are sensible and non-contentious.

The first option can be found on Article 49(2) of the Convention, supplementation and rectification; the remedy is designed for enabling the arbitral tribunal to correct minor omissions and technical mistakes and not for a substantive review of the decision.³⁸

In Article 50 of the Washington Convention, there is a second post-award remedy called *interpretation*, a simple “lack of clarity” is not enough to grant the interpretation of the award, there must be a real dispute concerning a misunderstanding on reading the decision. There is no explicit time limit to request the interpretation (in contrast with the supplementation and rectification). It is important to precise which parts of the award are the ones required to be interpreted. The only objective of this remedy is to make clear any misunderstandings on the meaning of the award. Only the Arbitral Tribunal can exercise this faculty and in the case this is not possible, a new tribunal will be constituted.³⁹

³³ Hirsh (n 3) 30

³⁴ Art 47 Washington Convention

³⁵ Albert Jan van den Berg (n 16)

³⁶ Hirsch (n 3) 31

³⁷ Redfern (n 8) 4

³⁸ United Nations Conference on Trade and Development (UNCTAD), Post Award Remedies and Procedures, Course on Dispute Settlement in International Trade, Investment and Intellectual Property, available on <www.unctad.org/en/docs/edmmisc232add7_en.pdf> accessed 23 July 2011

³⁹ Ibid 9

A third post award remedy is found in Article 51 of the Convention that establishes the revision mechanism. This remedy should be requested only when new facts have been discovered and this situation would be decisive for altering the sense of the decision rendered. The request should be made within the 90 days from the time when the new facts were discovered and this right expires 3 years after the award was granted. As in the other remedies, the Arbitral Tribunal has the authority to do the revision on the award.

The last remedy for the ICISD awards is the annulment, described on Article 52 of the Washington Convention. From a descriptive point of view, the annulment procedure is an easy mechanism to understand the consequences and the elements involved on the procedure as will be discussed on the following chapters of this article. Meanwhile, is important to understand how it works.

Parties can have 120 days after the award was rendered to request the annulment procedure, the application has to be submitted to the Secretary General, and must state all the arguments upholding the annulment request. If the application of annulment is granted, it is possible that the *Ad hoc committee* requests that the reasons contained in the application have to be exhaustively explained during the remainder of the annulment process.

The annulment remedy is a unique characteristic of ICSID arbitrations among other arbitration institutions and it possess some advantages.⁴⁰ The first advantage of this remedy as it is drafted consists in that the possibility of annulment encourages arbitrators to render an award exhaustively reasoned and grounded. Secondly, the same arbitral tribunal does not make the revision of the award, an *Ad hoc committee* is constituted with greater chances of having a new and clearer opinion towards the possible errors of the award. The appointment of the *Committee* is made by the President of the World Bank and the selection is done from the Panel of Arbitrations designated by the member States in accordance with the Articles 12 to 16 of the Washington Convention. Moreover, the grounds to annul an award are not discretion of the *Ad hoc committee*, these criteria are clearly stated and were created to avoid any abuse on exceeding jurisdictional powers or evident injustice,⁴¹ the grounds are:

'(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceed its powers; (c) that there was corruption on the part of a member if the Tribunal; (d) that there has been serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based'.⁴²

⁴⁰ Prof. David D. Caron, Margarete Stevens, Antonio R. Parra and Robert W. Hawkins. Birth of an ICSID Case- Act I, Scene I (2008) 24/1 Arb.Int'l<<http://www.kluwarbitration.com/document.aspx?id=ipn28345>> accessed on 7 July 2011

⁴¹ Redfern (n 8)

⁴² Washington Convention Art 52 (1) and Arbitration Rules of ICSID R 50

The annulment proceedings can produce 3 different outcomes: (1) the application for annulment is refused, (2) partial annulment of the award, (3) total annulment of the award. In other words, *a decision to annul does not replace the award with a new decision*.⁴³ The consequence of these provisions are that the award is legally destroyed, allowing the parties to restart the same dispute on ICSID proceedings. There is only one restriction for the appointment of the *Ad hoc committee*: a member that acted, as a part of the Arbitral Tribunal cannot join the *Committee* unless otherwise agreed by the parties.

1.2 Generations Of Setting Aside Proceedings

In the first 19 years of ICSID, the annulment procedure was never requested.⁴⁴ In the Summer of 2010, four ICSID awards were annulled and none of the established criteria by the previous *Ad hoc committee* was completely followed. This has allowed practitioners to refer to it as a “hot summer for annulments”⁴⁵ while others describe it as a “wake up call”⁴⁶ for the investment community.

The issue can be understood from the following chart⁴⁷ were in the past 3 ICISID generations, the annulment activity remain steady while since 2001, the activity of the *Ad hoc committees* has risen dramatically.

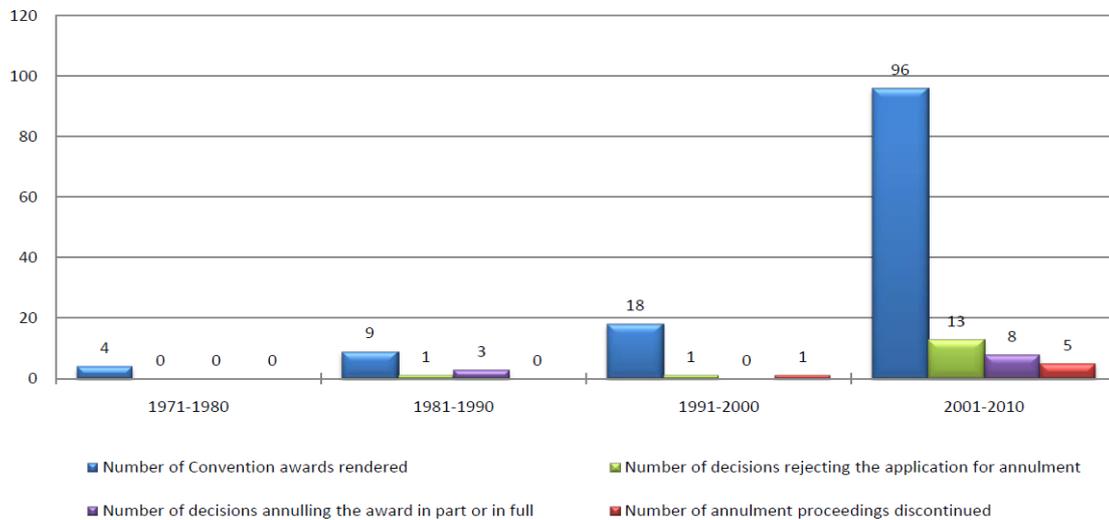
⁴³ UNCTAD (n 39) 31

⁴⁴ Francisco Gonzalez de Cossio, *Arbitraje de Inversion*, (1era Edicion Editorial Porrua 2009) 230

⁴⁵ Lucy Reed , “Editorial Note”, 5 (2010) 5 GAR 1

⁴⁶ Professor Loukas Mistelis. The Many Faces of International Arbitration. CIArb Alexandre Lecture 23 November 2010

⁴⁷The ICSID Caseload-Statistics Issue 2011-2, <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement9>> accessed 27 July 2011



As mentioned earlier, one of the most relevant particularities of an ICSID procedure are the remedies in order to review an award. Unlike other awards, made under different arbitration rules, awards rendered by ICSID are not entitled to any kind of appeal. In contrast, these awards can only be subject of interpretation, revision or annulment.⁴⁸ While the request of interpretation or revision was designed as a frequent remedy for ICSID users, applications for annulment are an “extraordinary remedy”;⁴⁹ this is because, as it was mentioned above, when an Ad hoc committee annuls an award the legal consequence is the destruction of the award in order to reinitiate a new dispute.⁵⁰

In the 1980’s, the First Generation of annulment started with two cases: *Klockner* and *AMCO* where both awards were set-aside on the ground that the arbitral tribunals went beyond its’ faculties by failing to state accepted reasons.⁵¹ This criteria applied by both *ad hoc committees* developed a wave of criticisms and concerns, when the *Ad hoc committee* decided regarding the lack of reasoning of the Arbitral Tribunal, automatically they looked into the merits of the dispute, confusing the differences between an appeal and an annulment. Moreover, by annulling an award under the grounds of “exceeding powers”, it was catalogued as a very low criteria to ground an annulment. Thus, the performance of the Committees was criticized for two main reasons: the unclear difference between and appeal and an annulment body, the concept of finality was distorted, the process was delayed and increased the arbitration cost of *Klockner* and *AMCO* cases (because they were re-submitted) by interpreting the decisions of the award on a very broad sense.

⁴⁸ R 50 ICSID Rules, Art 52 Washington Convention

⁴⁹ Promod Nair and Claudia Ludwig, “ICSID Annulment Award: Time for reform” 5 (2010) 5 GAR 18

⁵⁰ R 55 (1) ICSID

⁵¹ Tai-Heng Cheng, “Reconsidering ICSID Awards” [2011] Kluwer Arbitration Blog <<http://kluwerarbitrationblog.com/blog/2011/05/11/reconsidering-icsid-awards/>> accessed 05 July 2011

In the award of *Klockner* the Arbitral Tribunal decided that the claimant did not comply with the contractual obligations, therefore decided that *Klockner* was not entitled to the amount claimed. The investor requested for the annulment of the award, and it was granted unanimously by the *Ad hoc committee*: the arguments were grounded on the fact that the award had to be totally annulled because the Arbitral Tribunal did not apply the proper law and therefore the entire decision was affected with a wrong choice of applicable law.⁵²

In *AMCO v Indonesia*, the Arbitral Tribunal granted a US\$3,200,000 award in favour of Amco. On March 1985, the respondent - Indonesia- requested the annulment of the final decisions, on the grounds used in the *Klockner* case, subsequently the same arguments have been used in almost all the cases on the annulment process history as it was announced by Alan Redfern: '*the grounds on which this annulment was sought were very much the same as those in the Klockner case- and they are likely to become commonplace, if the fashion for seeking annulment on ICSID awards catches on*'.⁵³

On the second annulment procedure, the *Ad hoc committee* studied carefully all the arguments presented by Indonesia. Based on the "excess of powers" allegation, the *Committee* held that 'the Tribunal manifestly exceeded its powers by failing to state reasons for its calculation of the amount of investment'.⁵⁴ The wrong calculation was attributed to the failure of the Tribunal of not fulfil the computing requirements according the applicable law - Indonesian law-. And this action fell under the ground of manifest violation of the Tribunal's authority. The agreement stipulated that AMCO would invest US\$3,000,000 in the project. According to Indonesian law, the investor was required to register the entire amount of the investment capital with the Bank of Indonesia. The *Committee ruled* that the entire amount of the investment duly registered consisted only of US\$983,992, in contrast to the ruling of the tribunal that AMCO invested US\$2,472,490. The *Committee* was of the opinion that the deviation from the agreed amount was in fact substantive and justified the termination of the agreement by Indonesia.⁵⁵

Damages were claim by Amco using as part of the arguments for doing so the revocation of a license made by the Government of Indonesia. Aldan Redfren has made a strong criticism to the *Ad hoc committee* considering that its' decision as an excess of authority as annulment court by enquiring into the merits of a revocation license made by Indonesia to Amco. In this commentator's opinion the *Ad hoc committee* lost track of its faculties and the limits of its decisions when decided not to grant damages:

[T]he Tribunal, not forming part of the Indonesia judicial system, could only award compensation to P.T. Amco for damages, if any, sustained by it from the revocation order. The amount such compensation was of course dependent whether or not the revocation was justified on substantive grounds.

⁵² *Klockner v Cameroon*, Ad hoc Committee Decision on the Annulment of May 3, 1985, ICSID Rev.—FILJ 89 (1986)

⁵³ Redfern (n 8) 15

⁵⁴ *ibid* 17

⁵⁵ Nair and Ludwig (n 48)

By enquiring into the merits of the revocation, despite the finding of lack of due process, the *ad hoc committee* appears to have acted as Court of Appeal.⁵⁶ The consequences of the annulment deprived Amco from USD\$ 3.2 million. Despite that fact, the *Committee* recognized that the takeover by the army and the hotel's police staff was clearly a breach of international law, but did not grant for compensation to Amco for such prejudice. Furthermore, the *Committee* did not dissent from the Arbitral Tribunal conclusion that the principle of "due process had not been followed by the relevant Indonesian authority in the revocation of the investment licence".⁵⁷

All in all, the *Ad hoc committee* studied the substantive dispute rather than sticking to their annulment faculties; this case is an example of what an annulment court should not do, especially because if ICSID was created to protect foreign investments, the decision of the *Committee* was not at all fulfilling with the proposes of ICSID and the Convention. In 1987, Redfern anticipated the decision of AMCO as an open door for a wave of annulments. The First Generation, was enough to understand that the function of the *Ad hoc committee* and the mechanism of annulment showed some defects as it can be read from Alan Redfern's article "ICSID – Losing its Appeal?" but it has took more than one generation to understand the fissures on the procedure.

The Second Generation of annulments started on 1989 and it lasted thirteen years. On this second stage, the annulment resolutions tried to hit back the first criticisms when their Committees refused the applications for the annulment of AMCO II and Klockner II. The Second Generation can be clearly illustrated by *MINE v Guinea*,⁵⁸ in this case the respondent -Guinea- applied for the annulment of the proceedings on the portion corresponding to the payment of damages to MINE as consequence of a breach of contract by Guinea. The *Ad hoc committee* did a more thorough scrutiny of the final award and without exceeding its faculties as an annulment court dismissed the request of Guinea on the grounds that it had been a breach of contract. However, it granted the second request reasoned on the fact that the Tribunal did not provide an accurate study of the merits of the case at the *quantum of damages* stage; therefore only damages determination was annulled.

On a superficial review, it seems that on the Second Generation the *Ad hoc committees* acted more vigilant by treating the procedure annulment not as an extension of ICSID arbitration, but as "High-Court of Annulment" that should be activated only when the judgment of the Arbitral Tribunal is notoriously failing under the grounds of ruled on Article 52 of Washington Convention. At first sight, criticisms can be positive to these generational changes. Nevertheless, this was the beginning of uncertainty on the Investment Arbitration precedents, this change of criteria between the first and the second generation must have been consider as a "yellow light" for the ICSID drafters regarding the necessity of having precedents. A couple of questions arise from the assessment of these two generations: Is it necessary to have precedents that help us to draw the scope of the role of the *Ad hoc*

⁵⁶ Redfren (n 8) 16

⁵⁷ *ibid* 18, S Ripinsky and K Williams, 'Wena Hotels LTD v Arab Republic of Egypt (ICSID case No. ARB/98/4)', *Damages in International Investment Law* (BIICL, 2008)

⁵⁸ *Mine v Guinea* (n 16)

committee? Is ICSID contributing to the formation of a coherent legal criteria for International Investment Law?.⁵⁹ These questions will be examined in the Second Chapter (2.1) of this document.

During the Second and Third Generations, a steadier and more coherent set of criteria for the annulment was underway. In 1993, Moshe Hirsh predicted an eloquent stage on the *Ad Hoc Committees* reasoning and stated that -inconsistent decisions from the *Ad hoc committees* may not have a great impacting in the future- unfortunately he fail on this prediction. Hirsh suggested that inconsistent rulings of any given *Ad hoc Committee* should not been considered as binding precedent for the futures *Ad hoc committees*. Hence, futures committees will not only need to adopt the wide interpretation given to the grounds of annulment in the Convention. Hirsch also asserted on the reasoning of the Third Generation *Ad hoc committees* saying that they would decide that there are no grounds for annulling an award due to a mistake in applying the law.

The Third Generation started on 2002 and rather than analysing it through cases, the situation of a particular member state stands out from its participation in the Investment Arbitration field: Argentina. The country is currently facing three relevant procedures, one against Vivendi Universal, a second one against CMS Gas Transmission, and the third case: *Wena Hotels v Egypt*.⁶⁰ In the same sequence of criteria the three *Ad hoc committees* gave a most balanced approach about their duties as annulment committee, which means that they will not automatically annul an award under very ambiguous criteria, unlike in the First Generation. Even if the *Ad hoc committee* found errors on the final decision. Annulment should only be granted in the case of an award containing serious defects.

The *Wena* proceeding was under the provisions of the Egypt- UK BIT, all the reasoning made by the *Committee* can be described on the statement that: even when the Arbitral Tribunal made a mistake on the award, the *Ad hoc Committee* should not mechanically annul the proceedings, to retrieve the defects made by the Tribunal, as consequence, the application for annulment was declined.

In *Compania de Aguas de Aconquija and Vivendi Universal v Argentina*⁶¹ the *Ad hoc Committee* imposed some limits to its attributions when they recognized that even if an annulable error is found (like Hirsh commented) the *Committee* has to have a certain amount of discretion when evaluates whether or not an award has to be annulled:

*“[I]t appears to be established than ad hoc committee has a certain measure of discretion as to whether to annul an award, even if an annulable error is found...”*⁶².

⁵⁹ Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals- An empirical Analysis’[2008] 19/2EJIL 301

⁶⁰ Ripinsky and Williams (n 60)

⁶¹ Nair and Claudia Ludwig (n 48) 19, Vivendi v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment, ICSID Review – Foreign Investment Law Journal [2001] 16 ICSID Rev.—FILJ 641

⁶² Nair and Ludwig (n 48)

In other words, “the committee **shall have the authority to annul the award**”⁶³. Therefore the dissolution of the award is not an obligation when a legal failure has been found on the award, it will remain at the complete discretion and the legal thinking of the *annulment court* whether or not to dissolve the award.

This criteria was confirmed in *CMS Gas Transmission Company v Argentina*:

*“[T]he scope of this mandate allows annulment as an option only when certain specific condition exists ... the Committee cannot simple substitute its own view of the law and its own appreciation of the facts for those of the Tribunal”*⁶⁴

While for commentators like Promod Nair, the Third Generation at ICISD “*has come in praise for successfully navigating a course between the Scylla of complete fairness and the Charybdis of absolute finality*”⁶⁵ for other investment expert is “bad enough that tribunals made errors. It is worse that these errors cannot be corrected even after they are discovered”,⁶⁶ because ICSID procedure does not provide any stage on the procedure where these legal mistakes can be retrieved.

A second question arises from the behaviour of the Third Generation Committees: Is there a gap on ICSID procedure? If the *Ad hoc Committee* considers that there are some legal mistakes on the awards that cannot be amended because they exceed the function of the mechanism, then is that an indicator that there should be a procedure between the final award of the Arbitral Tribunal and the annulment of the *Ad Hoc Committee* capable of amending these errors? This Second question should be analysed on the Second Chapter (2.2-2.3).

Despite the lack of precedents on the ICSID framework and the differences rendered on each generation, it can be concluded that a set of similar criteria were applied by the *Committees* among the 3 generations:

- They have a narrow and limited mandate;
- They cannot correct errors of law;
- They enjoy certain degree of discretion;
- They may reconstruct the reasons if the tribunal has failed to provide them; and
- They may not automatically annul an award even if the tribunal makes a mistake in its search for appropriate law”⁶⁷

Regardless of these set of criteria, the standards of the reasoning of the *Ad hoc Committee* is far from been clear. After several of annulment decisions, in 2010 raised the question of

⁶³ Art 52 (3) Washington Convention.

⁶⁴ Nair and Ludwig (n 48) 19

⁶⁵ *ibid*

⁶⁶ Tai-Heng Cheng (n 50)

⁶⁷ Nair and Ludwig(n 48) 19

the threshold of annulment proceedings which embraces *Sempra v Argentina*, *Enron v Argentina*, *Helnan v Egypt*⁶⁸ and *Vivendi v Argentina II*.

The cases of *Sempra* and *Enron* are cases under the BIT USA-Argentina and are a consequence of the financial crisis in Argentina. The concept of necessity was claimed by the State in both procedures and the Arbitral Tribunal in both cases equated the definition of *necessity* provided on BIT with the concept on necessity according to International Law standards. The approach made by *Ad hoc committee* in both cases is not coherent or compatible. On *Sempra*, the *Ad hoc committee* decided that necessity on the BIT cannot be the same 'necessity' of the customary law - obviously in International Law necessity would require higher standards and the context cannot be the same on International Law and Investment Law, thus the final award was annulled under the grounds of falling to apply the law. In contrast, in *Enron*, the *Committee* agreed on the equity made by the Arbitral Tribunal between these two standards of necessity. However they fail to apply essential legal elements on the necessity defence such as if the implantation of these measures was the only way for Argentina "to safeguard an essential security interest".⁶⁹

The main criticisms at the time regarding the contrasting annulment decision in *Sempra* and *Enron* focused on the blurred limits on the *Committees'* faculties. There is no faculty granted in the Washington Convention, neither on the ICSID rules that allows the *Committees* to annul an award because of an error on the applied law - *CMS v Argentina* annulment decision is a clear example of not annulling an award on the grounds of an error of law.

The annulment on *Helnan v Egypt* was partially granted under the grounds that the tribunal had manifestly exceeded its powers when it said that the investor should have required first an exhaustive assistance from its local courts before starting any procedure at ICSID. This decision was not within the scope of the criticisms like *Enron* or *Sempra*, actually, this decision was tagged as properly done under the faculties an *Ad hoc committee* possess.

Then, *Vivendi II* appears on stage again but this time the criticisms concentrated no on the decision but on the Arbitral Tribunal. The *Committee* expressed very strong criticisms against the Arbitral Tribunal because one of the members of did not disclose its' position at the Board of a Swiss Bank that held shares in the Investor's Company (*Vivendi*). The annulment of the award was requested under the arguments of failing to fulfil with an essential rule of procedure and the Tribunal was then not properly constituted. The annul *Committee* strongly criticised the arbitrator who failed to disclose its position at the board arguing that the ICSID credibility was jeopardized. Despite the hard criticism to the unattended disclosure and the recognition of serious errors on the award, the *Committee* decided to do not warrant the annulment.

Looking to the decisions made on *Sempra* and *Enron*, it is clear that the *Ad hoc Committee* needs guidelines regarding the limits of its' authority and the scope of its decisions. It is

⁶⁸ Helnan International Hotels A/S v. Arab Republic of Egypt (ICSID Case No. ARB/05/19) on <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> accessed on 1st July 2011.

⁶⁹ Nair and Ludwing (n 48) 20.

common to see different outcomes when the parties or the applicable law are different, but in *Sempra* and *Enron*, parties and BITs involved were very similar, and the *Ad hoc Committee* expressed opposite legal arguments. Moreover, if the *Committees* are going to second guess tribunals' interpretation of facts and application of law, the annulment decisions are degenerating into an exercise of academic rivalry where the members of an annulment committee strive to prove they are better arbitrators than those whose awards are reviewing.⁷⁰ In addition, it is becoming a frequent argument that “there are errors on the awards- but we cannot amend them”; this should raise even more concerns about a procedural gap on ICSID because the Centre was not created to render “good but with errors-awards”. An award not only affects the interest of an investor, it also affects those of a host State, usually developing countries, especially when they are deemed to pay on the awards substantial amounts of money.

With the description of the previous cases, we can have a better understanding of the developing jurisprudence in ICSID, and the procedural behaviour of the *Ad hoc committee*. The task of identifying the procedural gaps and failures of ICSID is not easy, it has to be done carefully and all elements should have to be taken into account, yet the previous framework is important to be understood completely in order to identify the procedural gaps, the effect of precedents, parties and the BITs regarding this procedural challenges and the possible solutions.⁷¹

CHAPTER II

2.1 Lack Of ICSID Jurisprudence

ICISD chain of decisions has set a roller-coaster threshold for annulment decisions, sometimes high and sometimes low and inaccurate. Moreover the annulment procedure has been confused with an appeals procedure⁷² creating a body of investment law unpredictable and incoherent.⁷³

Stability and predictability are essential elements on mechanisms aiming to provide benefits for any modern economy. ICSID arbitration should not be the exception. The Centre, as the main investment arbitration institution in the world should contribute to have a more predictable framework which not varies from committee to committee.

Setting aside the relevant ICSID Generational cases, a high profile example of the need of having a stable framework are the inconsistent decisions in the *SGS* cases.⁷⁴ Both cases,

⁷⁰ *ibid* 21.

⁷¹ Hirsch (n 3) 38.

⁷² Fauchald (n 58), *Patrick Mitchell v Republic of the Congo* (ICSID Case No.ARB/99/7) [2005] 20 ICSID Rev.—FILJ 587..

⁷³ *ibid* Fauchald.

⁷⁴ *SGS Societe Generaale de Sureillance SA v Islamic Republic of Pakistan*, Decision on Jurisdiction 6 August 2003 and *SGS Societe General de Surceillance SA v Republic of Philippines*, Decision on Jurisdiction 29 January 2004 both available on

involved a pre-shipment inspection services agreement and therefore the legal issues to decide were very similar, the Arbitral Tribunals had to decide the request of SGS to elevate the contractual claims to BIT claims as it is the propose of the *umbrella clause*. One important factor in the two cases was that the umbrella clauses was drafted slightly different. In the case of *SGS v Pakistan* the clause stated: “*shall constantly guarantee the observance of commitments*”⁷⁵; whereas in the *SGS v Philippines* the relevant clause provided that the parties shall “*observe any obligation it has assumed with regard to specific investments*”.⁷⁶ The wording was evidently different yet the Arbitral Tribunals focused their efforts on understanding the literal meaning of the provision instead of going further and trying to understand the propose of *umbrella clauses*.

The Pakistan Tribunal issued the award first; they rejected the SGS’s understanding of the *umbrella clause*. The Arbitral Tribunal argued that the word “commitments” was not wide enough to include contractual claims. The award was available to the Philippines tribunal and yet the latter disagreed with the former, albeit the remark that the Tribunals “*should seek to act consistently with each other*”⁷⁷. The Philippine’s Tribunal went further than the mere grammatical interpretation of the award by reasoning that the clause “*means what it says*”⁷⁸ therefore a commitment or obligation to pay was included in the contract.

The SGS cases are not the only example. As mentioned earlier, in the case of *Sempra* and *Enron*; different tribunals reached different solutions even when the legal merits to solve were the same. In legal practice this is not something new and there is always going to be dissenting opinions, nevertheless, the actual status of ICSID does not have any path for solving this situation which is extremely concerning for the investment community. Judith Gill⁷⁹ described three important issues in connection with the debate of inconsistent decisions. The first is predictability, this characteristic is important for parties and practitioners. Where a case turns on its facts, of course there is no case equal to another, but when the issues involved are similar legal issues expected to have an important degree of predictability, investors and States have the desire to predict the outcome of their cases and is not much comfort to them to learn that the answer to that crucial question may well depend on the constitution of the Tribunal or on purely linguistic differences rather than on legal facts. Audley Sheppard and Hugo Warner also share this concern, they expressed the view that if investment users, such as States, investors and practitioners are concerned about the different meanings of expropriation, jurisdiction or fair and equitable treatment; those differences might be the result of different arbitral tribunals perspectives.

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> accessed on 16 July 2011.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Judith Gill, *Inconsistent Decisions: An Issue to be Addressed or a Fact of life?*, [2005] 2/2 BIICL, Richard H. Kreindler, *Inconsistent ICSID awards- Is there a need for an Appellate Structure?* in Rainer Hofmann/Christian J. Tams (eds), *The International Convention on the Settlement of Investment Disputes: Taking a Stock after 40 Years (Europäischen Integration und Internationalen Wirtschaftsordnung, 7 Nomos, Baden-Baden 2007)*.

Gill, gives a very strong criticism to ICSID concerning a second element on the structure of precedents, which is reputation, not only for the Centre but also for the congruency on the reasoning of each Arbitral Tribunal. Gill expressed the concern that users of the system may become disenchanted by the decision making process if it is perceived as something of a lottery and the outcome of the decision is consequence of who is appointed as Arbitral Tribunal rather than of the legal issues of the case.⁸⁰

Nevertheless, inconsistent decisions on investment arbitration should be an issue that does not need to be addressed, it should be seen as a fact of life and many of the decisions, while not formally having the status of a binding precedent, have persuasive effect on future disputes. This is so, for two reasons: (1) the situation by no means is unique to investment arbitration: a national court delivers non- consistent verdicts regularly. In England, for example, the question of whether specific words are needed to consider an arbitration agreement made in one contract as part of the terms of another contract was subject to differing approaches over several years following the *Aughton Ltd v M F Kent Services* decision. Inconsistent decisions (2) will give rise to one approach being generally more preferable than another and so it will be more adopted more frequently thereafter.⁸¹ In contrast, James Crawford⁸² considers that if there is a degree of inconsistency, both in terms of reasons that are given and, some would say, in terms of results reached as in the *Vivendi Annulment* and the *Philippines v SGS* decisions, then you can see inconsistency may be a problem.

Doak Bishop agrees on seeing inconsistency, as something the investment community should learn how to deal with. Bishop argues that inconsistency should be seen as a good thing on an appropriate level. Investment International arbitration is a new area in law that needs to properly evolve over a period of time. Moreover, actual *Ad hoc committees* are carefully reviewing the previous mistakes made earlier decisions; they are refining the law from one case to the next one. Unfortunately, this comments made by Bishop were made in 2004, he predicted a positive and careful behaviour of the *Committees* to the annulment activity, which unfortunately with *Sempra* and *Enron* annulments, the positive criticism of Bishop cannot remain valid.⁸³

A set of questions arises from analysing the absence of an eloquent ICSID jurisprudence: Why the lack of precedents is so important regarding the annulment activity? How the existence of a consistent and predictable judgment criteria will be retrieve the procedural gaps on ICSID? VV Veeder⁸⁴ has made the most important contribution by explaining why the lack of precedents affects directly the annulment activity. He considers that as long as there is an important lack of consistency on the outcomes of the ICSID awards, especially when the disputes come from the same BIT (*Sempra* and *Enron*, are a good example) or the same national law, annulment is always going to be desirable and the principle of finality

⁸⁰ *ibid* Gill.

⁸¹ *ibid* Gill, Sheppard and Warner (n 18) 3.

⁸² J. Crawford; "Panel One: Is There a Need for an Appellate System? - An introduction", [2005] 2/2 BIICL.

⁸³ Doak Bishop, The case for an appellate panel and its scope of review, [2005] 2/2 BIICL.

⁸⁴ VV Veeder QC, The necessary safeguards of an Appellate System, [2005] 2/2 BIICL 10.

will be the most unwanted principle on the investment arena. It was once thought that the absence of finality could create a defective processes. Today, that appeal seems to have done not harm but much good to ICSID general reputation and popularity. It is for the common good of the parties and investment arbitration generally.⁸⁵

How can we solve the lack of inconsistency among ICSID decisions? Practitioners prefer to remain positive towards inconsistency rather to give solutions to the lack of precedents. This is not surprising at all considering they are the ones participating on the tribunals and committees that render all the different decisions catalogued as inconsistent, however trying to reach a consensus among them is a hard task. Nigel Blackaby⁸⁶ takes a risk and offers a solution for inconsistency. Blackaby suggests the possibility of creating a power in ICSID to consolidate cases where similar issues of law or fact are in question. He further suggests looking at the possibility of bringing a type of class action (subject perhaps to separate assessment of jurisdictional issues) where a single industry is involved. This consolidation has been implemented in some Argentinean cases, that will be disused in this chapter.

When parties do not have precedents and they have an award not favourable to them, the possibility of annulment comes as one of the first thoughts; obviously more for the practitioners, when they have an award not favourable to their clients the annulet mechanism becomes a very attractive litigation technique. The relationship between the lack of precedents and annulment activity is stronger of what it seems. Precedents on ICSID would give a filter to access the annulment mechanism, in other words, if an award is grounded under consistent precedents, the chances of annulment for the award would be reduced on a significant percentage.

The solution of last resort, yet it might be the most effective, is also suggested by Blackaby who considers the possibility of an Appeal Tribunal broader than the current annulment process, which seems to be an attractive solution in the pursuit of ensuring some degree of consistence. He emphasizes the following idea:

“[A]rbitration as a process without appeal might sit well with the exigencies of commerce is reconsidered in the field where there are states in question and where citizens of those states will have to finance the ultimate payment of damages awards from taxation. A narrow appeal on specific points of law could avoid the risk of incoherent jurisprudence.”⁸⁷

This possibility leads us to the questions: is ICSID ready to have a Court of appeal? Could an Appellate body solve the problems and the procedural challenges presented?⁸⁸

⁸⁵ *ibid* 11

⁸⁶ Nigel Blackaby, *Testing the Procedural Limits of the Treaty System: The Argentinian Experience*, [2005] 2/2 *BIICL* 29

⁸⁷ *ibid* 30.

⁸⁸ Christian J. Tams, *Is there A Need for an ICSID Appellate Structure?* in Rainer Hofmann/Christian J. Tams (eds) 237.

2.2 The Ad Hoc Committee. Court of Appeal or Court of Annulment?

The concepts of Court of Appeal and Court of Annulment are usually mentioned when the reasoning of the *Ad hoc Committee* is being revised. The main criticism concerning ICSID and the mechanisms of appeal and annulment are two: (i) the consequences of the faculties exercised by the annulment committee and (ii) if it is time for an ICSID Appellate Structure that contributes to the finality, efficiency and consistent decisions of ICSID framework?

Before getting into these criticisms, it is important to understand the meaning of annulment and appeal.⁹⁰ Annulment is “the act of nullifying or making it void”⁹⁰ in contrast, an Appeal is “a proceeding undertaken to have a decision reconsidered by a higher authority [...] and it can be also named as a review proceeding”.⁹¹ It can be said that the consequences of an annulment decision are concerning the procedural legitimacy whereas an appeal decision is not only the review of the procedural legitimacy but also its substantive accuracy.⁹²

One of the problematic consequences of the legal reasoning of the *Ad hoc committees* is the blurred line of acting as Court of Annulment or as a Court of Appeal. *Ad hoc committees* often emphasise that their task is only regarding annulment and their actions are different from appeal, although decisions of the *Committees* have not been coherent with it.⁹³

Unfortunately, annulment tribunals have not always complied with the text and spirit of Article 52.⁹⁴ This is because decisions rendered by the *Ad hoc Committees* seems to go out of the scope of Article 52 by having a broader conception of annulment.⁹⁵ The best example to illustrate this situation can be seen when cases like *Klockner I* and *Amco I* created big concerns since both *Committees* revised the merits of the case causing a confusion between annulment and appeal.⁹⁶ As explained earlier, the following ICSID Generations remained alleviated and steady by rendering more eloquent decisions and tried to be more careful about annulling awards for trivial reasons.⁹⁷

The Second consequence of the faculties exercised by the Annulment Tribunals, is the total

⁹⁰ Bryan A. Garner (ed), *Black's Law Dictionary* (Abridged Eight Edition, Thomson West 2009).

⁹¹ *ibid.*

⁹² Andreas Von Staden, *Towards Greater Doctrinal Clarity in Investor-State Arbitration: The CMS, Sempra, and Enron Annulment Decisions* (December 15, 2010). U. of St. Gallen Law & Economics Working Paper No. 2010-13. Available at SSRN: <http://ssrn.com/abstract=1725909> Accessed on 18 May 2011.

⁹³ Christoph Schereuer (n 17).

⁹⁴ Tams (n 87)232.

⁹⁵ Susan D. Frank, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*. *Fordham Law Review*, Vol. 73, p. 1521, 2005. Available at SSRN: <http://ssrn.com/abstract=812964> accessed 20 June 2011

⁹⁶ George R. Delaume, *The Finality of Arbitration Involving States: Recent Developments* [1989] 5 *Arb. Int'l* 21,32 (1989), David D. Caron. "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal" [1992] Available at: http://works.bepress.com/david_caron/43 accessed on 10 June 2011.

⁹⁷ *Vivendi* (n 64).

annulment of the award *ergo* the total destruction of the award. In the best scenario, the total annulment of the award will permit the Claimant to submit again the entire dispute, but it can happen that the *Ad hoc Committee* annuls the decision partially generating not only a *res judicata* effect but also a possible resubmission of a 'partial *unsolved dispute*' to a new ICSID tribunal.

For a better understanding, Michael Reisman gave the best description of how an *Ad hoc Committee* can generate these problematic consequences. Going back to basics, Reisman⁹⁸ uses as reference the *AMCO I* annulment decision. As mentioned earlier, in this case the *Ad Hoc Committee* partially annulled the award. Thus, according to the ICSID arbitration rules the dispute can be submitted to a new tribunal. This new tribunal had the task to narrow or at least tried to narrow the scope of its jurisdiction. A question arises here, is this new Arbitral Tribunal in front of a new dispute? The answer is no, it would be naive to think the dispute will start on its most pure status. Moreover, to try to solve a dispute with a previous partial *res judicata* effect transforms any ICSID tribunal into a Court of Second Instance. As we will see on the solutions proposed by investment experts, Reisman recommends a sort of guidelines to the subsequent arbitral tribunals and suggest them to have a broad and inclusive concept of *res judicata*.⁹⁹

This is a very philosophical analysis, in practice, the *res judicata* consequences do not affect the procedural mechanism of ICSID, certainly the hard task is only for the new Arbitral Tribunal. It has to cut up what is already *res judicata* and what is yet to be decided. In this case, where the *Ad hoc committee* made a partial annulment, the possible solutions to study the entire dispute again, there is nothing on the ICSID Rules, neither in the Washington Convention that prohibits the new Arbitral Award to study the resubmission of the dispute from zero. Nevertheless the nature of this new Arbitral Tribunal regarding its status as Second Court or Court of Appeal remains in doubt.

The Court of Appeal on ICSID is also been discussed from another perspective. The early stages of this discussion have been attributed to Professor Lauterpacht,¹⁰⁰ but since 2004¹⁰¹ and lately with *Sempra* and *Enron* the discussion has become stronger. Commentators have wondered if is time for an ICSID reform that contributes to the finality principle. An Appeal Court is one of the most ambitious solutions for ICSID procedural challenges, this

⁹⁸ Michael W. Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration" (1990). Faculty Scholarship Series. Paper 874. http://digitalcommons.law.yale.edu/fss_papers/874 accessed 1 June 2011.

⁹⁹ *Ibid.*

¹⁰⁰ Kenneth S. Carlston, The Process of International Arbitration, [1949] 10/02 The Cambridge Law Journal 307 available on <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=2866796> accessed on 23 may 2011

¹⁰¹ Possible Improvements of the Framework for ICSID Arbitration. ICSID Secretariat Discussion Paper 2004. Available http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14 accessed on 14 November 2010.

would retrieve not only the gap on the procedural mechanism but also it would bring consistency on the decisions rendered. First, it is important to understand what are the possible benefits that could bring an appeal mechanism and then the obstacles that could be brought by a possible implementation.

Uncertain ICSID awards can affect the predictability and reliability of the mechanism of dispute settlement.¹⁰² Any legal dispute mechanism should provide to its users a control system capable to amend the possible legal and procedural failures made on the awards. When an award is rendered, two characteristics are expected: justice and finality. Nowadays ICSID might offer a delayed justice but is far from offer finality. Nevertheless, we should know that investment arbitration has recently emerged and therefore “breakdowns in legal controls are not necessary calamities or systematically dysfunctional”,¹⁰³ mistakes are necessary in order to develop precedents, this task would be easier for ICSID if could count with an Appeal Control because it has been said that “all contemporary arbitration must invent its own control system”.¹⁰⁴

The necessity of an ICSID Appeal Court can be sustained with different arguments. For instance, the *Ad hoc Committee* cannot contribute the finality principle just because they do not have the powers to correct the tribunal’s awards with a more accurate decision.¹⁰⁵ Therefore the dispute is not solved, it remains pending for a new tribunal. In this concern, it should be important to considerate the success of the WTO appellate body. It consists of seven people where three of whom sit on any particular case, the appellate process is limited to issues of law and legal interpretations and they have the authority to grant an upholding, modification or reversion of the legal findings and conclusions of the panel. Also, timing is important on the appellate process, which normally would take 60-90 days.¹⁰⁶ The experience on the WTO suggests the benefits of having a permanent Appeal Body capable of doing the scrutiny of the issues concerning jurisdiction, admissibility, fundamental errors of procedure that affect directly the outcome of the award, also would be important that this mechanism would be able to review matters such as due process issues like Article V of the New York Convention.¹⁰⁷

A brave proposal is the one that suggests the implementation of an appeal mechanism as an additional facility. This means, that no need of amendment has to be done to the Washington Convention, neither to the ICSID rules, although it would be contradictory with Art 53 of the Convention, which provides that final decisions are not subject to any appeal.

Before explaining all the obstacles the implementation of an appeal court might bring, it is important to describe the arguments suggesting that a Court of Appeal, on ICSID, can solve

¹⁰² Tams (n 87) 236.

¹⁰³ Reisman (n 97).

¹⁰⁴ Ibid.

¹⁰⁵ Bishop (n 82).

¹⁰⁶ Ibid.

the procedural breakdowns. The first benefit would be consistency, the Secretariat has recognised that an appeal mechanism “would be intended to foster coherence and consistency in the case law”,¹⁰⁸ the establishment of a Court of Annulment will unite a seemingly fragmented body.¹⁰⁹ The best example of ICSID lack of consistency, are the recently *Sempra* and *Enron* cases, as mentioned before these two different decisions were rendered within the same legal system, (US- Argentina BIT). These opposite decisions have left not only the investors but also the investment community with the feeling that is not the law that determines the dispute but the reasoning of the Tribunal members. The same exercise can be applied to the former *SGS* cases, although in these cases the BITs were different, the decisions rendered did not concern strictly on the law but it depended on the legal and literal interpretation of the umbrella clauses made by the Arbitral Tribunals.

An appeal mechanism would contribute to more uniform standard and interpretation of Investment Law, *ergo* consistent decisions? The answer is yes. If two different arbitral tribunals rendered different decisions, regarding similar or almost identical legal facts. A court of Appeal will produce consistent bodies of case law, for example, which decision of the *SGS* cases should prevail in the case the parties could submit the decision to an appeal, also it will provide to the investor an environment of confidence towards the ICSID arbitration process. In addition, consistency will bring fairness; similar cases should be dealt with similar criteria in order to provide an accurate standard for concepts such as umbrella clauses. An important argument that should be mentioned against an appeal court concerning the principle of inconsistency is the approach criteria of ICISID as an individual approach system, “ICSID is there for the parties, and not for interested observers keen on systematic consistency”¹¹⁰ this is to say that ICISD objective is to produce a solution only to the parties involved in the dispute, rather than give identical results in different cases.

The second argument supporting a Court of Appeal is the pursuit of accuracy on the decisions rendered by the arbitral tribunal. Decisions will be more accurate if they go through an appeal or review by a higher court.

*“[A]n arbitrator can cloak profoundly unfair or wrongful conduct in the guise of meticulous procedural formalities, and only the possibility of some substantive review on the merits can effectively check such conduct.”*¹¹¹

An appellate court would have the opportunity to focus only on the controversial issues between the parties that the Arbitral Tribunal could not solve. A fully reasoned decision would be rendered in order to solve the controversial arguments. Undoubtedly, a second revision to a dispute is the best filter to eliminate errors on the award.¹¹²

¹⁰⁸ ICISID Secretariat (n 102).

¹⁰⁹ Tams (n 87)239.

¹¹⁰ Ibid.

¹¹¹ Gary B. Born, Annulment of International Arbitral Awards- B. Grounds for Annulling International Arbitral Awards, GBorn, International Commercial Arbitration. Born, (Kluwer Law International 2009 ch 24 2653).

¹¹² Lord Justice Dyson, Finality on a Arbitration and Adjudication: The Eversheds Lecture 2000, 66 Arbitration 288 (2000).

Another argument against the implementation of a court of appeal is finality. It has been argued that to submit a decision rendered by the Arbitral Tribunal to an Appeal Court might delay the arbitral process. But, is not finality already distorted with the actual gap on ICSID? It has to be understood that the principle of finality has a different meaning in Investment Arbitration Law. Complexity is higher because of the elements involved: important amounts of money are claimed, a State is always involved as a party, the applicable law is usually international treaties. Parties may not want finality, specially the loser party. The result could be so important to them, is a big possibility that both of them want the result of the award to be reviewable.¹¹³ An argument against this is provided by Christian J. Tams who says that the decision in favour of a second level of dispute settlement would also risk undermining the authority of the first level decision. But is not this happening with the *Vivendi II* decision? Where the *Ad hoc committee* hardly criticized the reasoning of the Arbitral Tribunal concerning the non-disclosure of the relationship of one of the members of the arbitral tribunal with a Swiss Bank shareholder of the claimant? The appeal court solution has to be observed as a positive solution to fix ICSID fissures.

The implementation is the biggest obstacle of a Court of Appeal. Amendments or ratification to the ICSID Convention requires the approval of all 157 member countries, and is far reaching to get the consensus of all the members. For that reason, the implementation of an appeal stage on ICSID can be done in two feasible ways. The first one is to agree an appeal procedure on the same document parties agreed ICSID jurisdiction, the best example is CAFTA, which will be analysed in the next chapter. Alternatively, ICSID members in pursuant of an appeal mechanism can agree a soft law document such as a Protocol.¹¹⁴ The implantation of an appeal court in a protocol or in treaties will clearly circumvent Article 53 and there is no legal impediment that could prevent the Parties on doing so.¹¹⁵

2.3 The Gaps on ICSID Annulment Procedure

The gap on ICSID can be found on the radical options offered by ICSID rules after an award has been rendered. As mentioned before the available remedies are soft and only useful to correct formal mistakes. In contrast, if a substantive mistake needs to be retrieved the option available is the annulment. That is a drastic measure, especially if most of the content of the award is correct and only partial amendments have to be made.

An example, that deserves to be mentioned is the ICC arbitration rules. According to Article 27 of these rules, before the award is final, a draft has to be sent to the ICC Court, this Court can make not only formal modifications to the award but also the Court can draw the attention of the Arbitral Tribunal to substantive matters that should be amended, notwithstanding the Arbitral Tribunal is free to make the changes or not. By comparing the procedures offered in different arbitral institutions it is easier to see the *gap* on ICSID. If this mechanism seems hard to implement in ICSID, it would be important to consider, if the Secretary General can make *prima facie* scrutiny of the request of annulment before

¹¹³ Veeder (n83).

¹¹⁴ Bishop (n 82).

¹¹⁵ Tams (n 87) 241.

constituting the *committee*, just as its' obligation to analyse the jurisdiction when a request of arbitration has been filed to the Centre. Again, the obstacle of reforming the Convention is faced, but it would be a slight change that should be considered.

Another *gap*, less obvious, is the lack of a provision that permits the parties to submit a motion to the Arbitral Tribunal in order to have an award reconsidered. If the arbitral tribunal can reconsider formal mistakes why not give it the power to amend substantive mistakes, after the wave of annulments of 2010 a new solution for the ICSID gap was proposed. This solution suggests the possibility to grant to the Arbitral Tribunal powers similar to those granted to the judges of the U.S. Federal District Court. This would permit to the tribunal to review important facts that were missed in good faith maybe due to the complexity of the dispute. The response expected by granting these faculties to the tribunal is reducing failures of legal reasoning on the awards.¹¹⁶ This solution, will also defeat the increasing concern by States and Investors not only about losing a dispute on ICSID but of losing due to errors in the award that cannot be amended or rectified. The second concern can be avoided by widening the faculties of the Arbitral Tribunal, not permitting that the losing parties request the annulment of the award in order to avoid an immediate compliance with the award.

To grant these faculties to the ICSID Arbitral Tribunal might produce more benefits than an appeal court. An amend made by the arbitral tribunal would take less time than appointing a new (appeal) tribunal, obviously the expenses of the procedure will be lower if the mistakes of the award are solved in one instance. Unlike an appellate body, the arbitral tribunal does not have to study the merits of the dispute again.¹¹⁷ Going beyond the problems regarding the implementation of these faculties, the intention here is to describe real powers the Arbitral Tribunal could have under ICSID that the drafters, maybe intentionally did not provide. For sure to introduce these faculties to the actual ICSID arbitration rules is almost impossible especially due to the consensus needed from all member states. Accordingly, it seems more feasible the implementation of an Appeal Court on the Investment Treaties such it was made in the Dominican Republic – Central America Free Trade Agreement (CAFTA).

2.4 The Impact of the Investment Treaties on the Annulment Activity

The current problematic of implementing solutions on the ICSID framework has lead to find new possibilities within the investment infrastructure. Such is the case of the investment treaties and the United States.

One of the most important principles in arbitration is party autonomy. This autonomy is clearly exerted when States agree to join a treaty. The agreements made on these types of international bodies of law should be respected (with the exception of mandatory laws) and

¹¹⁶R 60 (b) of the U.S. Federal Rules of Civil Procedure sets wider grounds for relief a judgment or order made by the court, the court may do so on motion or on its own, with or without notice., on <<http://www.law.cornell.edu/rules/frcp/Rule60.htm>>accessed on 1 August 2011 and Tai-Heng Cheng (n 50).

¹¹⁷Ibid.

applied by any arbitral tribunal, in case a dispute arises. Therefore, States have seen on the investment treaties an answer to the issues of consistency and efficiency under ICSID.

In 2002, after some threats to the U.S. sovereignty and NAFTA experiences,¹¹⁸ the American Congress signed the U.S. Trade Act¹¹⁹ with the aim of improving fair trade standards and investment stability. This Act promotes the implementation of an appeal mechanism in subsequent trade agreements signed by the United States. Thus, the government started to negotiate some Trade Agreements with Jordan, Morocco, Peru, Australia, Chile, Singapore, Central America and the Caribbean, among other countries.¹²⁰

The aim of this appeal mechanism is to achieve coherence in all U.S. investment treaties (Free Trade Agreements),¹²¹ nowadays the CAFTA is the best example of implementation of a Court of Appeal into an Investment Treaty converting the previous theoretical discussions into a new dynamic in the arbitration mechanisms. The mentioned treaty includes the following provision:

*"[W]ithin three months of entry into force of the Agreement, the FTC shall establish a negotiating group to develop an appellate body or similar mechanism to review awards rendered by tribunals under the Investment Chapter of the Agreement. Such appellate body or similar mechanism shall be designed to provide coherence to the interpretation of the investment provisions in the Agreement."*¹²²

The implementation of the appellate body has to be done through an amendment to the agreement, in order to do this, the negotiating group has to consider: (1) the limits and the scope of the review, (2) transparency, (3) the relationship between the applicable law and the arbitration rules, and (4) the relationship between the domestic and international law.¹²³

As usually happens with ambitious solutions, it seems everything stayed in good intentions, the discussion has been in stand-by for some years, the glow has gone off regarding an appellate mechanism.¹²⁴ This is because, a non-ICSID award is subject to be set-aside in national courts, unless the procedural law provides for a "self-contained" challenge mechanism. The appellate mechanism on CAFTA would need to adopt the role

¹¹⁸ D.A. Gantz; "Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement" [2009]TDM 4 (2009)

¹¹⁹ Barton Legum, The Introduction of an Appellate Mechanism: the U.S. Trade Act of 2002 in Emmanuel Galliard and Yas Banifatemi (eds) (n 17), Barton Legum, Visualizing an Appellate System in?, [2005] 2/2 BIICL , and Gantz (n 120)

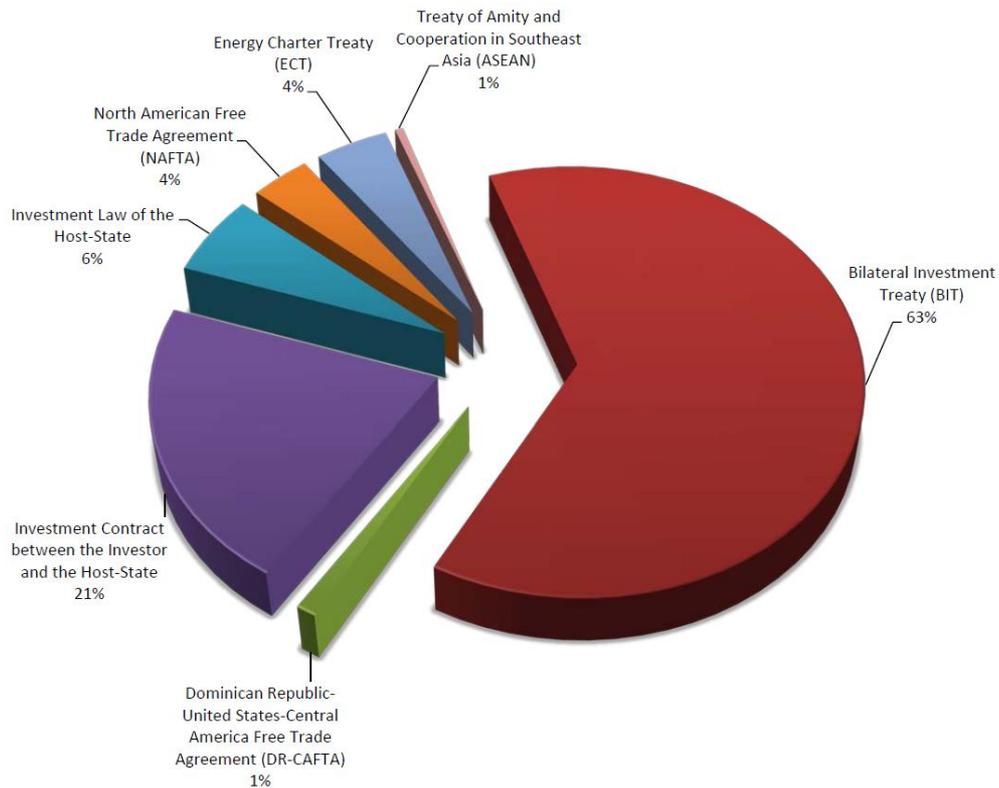
¹²¹ Trade Promotion Authority Act of 2002 S. 2102(b)(3)(G)(iv).

¹²² Anex 10 –F CAFTA 2.

¹²³ D.A GANTZ (n 120) 135.

¹²⁴ Melinda Hodgson, Elements of architecture for a CAFTA appellate mechanism. ABA Fall meeting 2009 "Towards a CAFTA Appellate Mechanism" on <http://www.google.co.uk/url?sa=t&source=web&cd=1&ved=0CCUQFjAA&url=http%3A%2F%2Fapps.americanbar.org%2Fintlaw%2Fall09%2Fmaterials%2FHodgsonCAFTAAppellateMechanism.pdf&ei=h1RBTn9FMTChAe54NzBCQ&usq=AFQjCNFR8SSpJ71G5CZWEudYGW2-MKoaawA> accessed on 10 June 2011.

of the *Ad hoc Committee* in order to serve a sort of *one-stop shop* for purposes of review of the arbitral awards. The actual status of CAFTA members (also signatories of ICSID) can be seen perfectly on the case *Pac Rim*, were the applicable law is the Investment Law of El Salvador and CAFTA.¹²⁵



¹²⁵ Pac Rym Case a CAFTA case pending on ICSID (n 19).

2.5 Same Parties, Several Annulments? Or Different Parties, Several Annulments?

The task of understanding the weaknesses of ICSID can be studied better in the contest of the Argentinean experience but also under this perspective solutions can be found. This is because when it comes to scrutinize the performance of the ICSID Arbitral Tribunals the Argentinian experience deserves to be revised. Certainly the government of Argentina has an opinion regarding the procedural challenges ICSID might have, it can be said that ICSID has played an essential part on settling Argentinean disputes after the financial crisis.

The figures say that from 331 cases ICSID has administrated since January 2002, Argentina has been respondent in 49 of them. Almost half of all the new ICISID cases registered have named Argentina as defendant. Now, there are 26 cases pending to be solved where the State is been judged.¹²⁶

First of all, it is important to understand the reasons that produced the Argentinian crisis. In the early 1980s, Argentina suffered from an unstable economy and foreign investors were not interested in the country. A set of financial reforms were made in order to attract investment; the first one was the fixing 1 to 1 the Argentine currency to US Dollar, and the second; the privatization of public services through an international public tendering process. These measures (provisionally) succeeded; US\$23 billion approx. entered to the Argentine Treasure. Transnational companies started to play a role in the Argentine infrastructure: CMS Energy, Pan American, Gas Natural, Endesa of Spain, National Grid of the UK, Vivendi and ENRON among others. Nevertheless, Argentina remained on a permanent recession and in January 2002 the “Emergency Law” was applied. The most important effect was that the Peso fell dramatically reaching four Argentinean Pesos to one US Dollar. The sum of all these events were new in the history of Investment Arbitration Treaties, all the investors with assets in Argentina considered the value of their investment was affected severely and they looked for the dispute resolution mechanism in order to claim damages to Argentina.¹²⁷

The wave of claims against Argentina was a fact that ICSID was not prepared for, this was the first time a phenomenon like this occurred to an arbitration institution, which undoubtedly has led to test the system to its limits. First of all ICSID had to address the issue of State measures in breach of core promises and the alleged concept of ‘necessity’ which has caused so many contradictory opinions among the investment experts.

Tribunals have made several judgments to the Argentinean measures taken during the crisis. The responsibility of these Tribunals is double; they have to render carefully decisions that cannot be appealed in case a mistake is found on the reasoning. On of the biggest problems of administrating cases with the same party (Argentina) is that most of the disputes shared similar facts,¹²⁸ with 49 cases the possibility of having 49 different outcomes on the award is possible. Decisions are exposed and vulnerable if consistency and coherency is expected. There is a concern that inconsistency will provide the best excuse for the host state of the investment to refuse the enforcement of the award arguing

¹²⁶ ICSID Secretariat (n102) , Nigel Blackaby (n 85).

¹²⁷ *ibid* Blackaby.

that it “is politically unacceptable to enforce inconsistent decisions”.¹²⁹ As mentioned before, inconsistency and lack of coherency among the awards is not *per se* a problem, the concern is addressed when similar standards are been revised and the outcomes are the different. Umbrella clause, fair and equitable treatment, necessity; is expected that these concepts are similar within the framework of a country.

ICSID has been tested with important amounts of caseload. Unlike the recent criticisms to the annulment activity, this was the first challenge the institution faced and tried to solve, by consolidating cases¹³⁰ were the dispute arises in the similar sector or with similar investors by encouraging arbitrators to sit in more than one arbitral tribunal.¹³¹ Moreover, ICISID has encouraged the coordination of similar proceedings, as in the water concession cases,¹³² where a similar Arbitral Tribunal was constituted and a single procedural hearing was fixed for all the cases. This consolidation of cases in ICSID was well accepted among the investment practitioners. Nevertheless, it has not been successfully implemented. In the cases were an identical arbitral tribunal was appointed, one of the arbitrators presented his resignation from the tribunal (*Cammuzzi* case), while the award of *Sempra* could not avoid the wave of annulments in 2010. At first glance, the consolidation seems to be an efficient system to unify criteria and efficient timing on the arbitral procedure. Nevertheless, consolidation is only a partial solution and does not solve substantially the problem of annulments, this ‘piecemeal’ offered for the arguments looking for an appeal procedure. With the three cases annulled in 2010, where Argentina was party, the investment community discovered that consolidation was solving just part of the problem, and confirmed the argument that is time for a reform in ICSID.

The last decisions annulled involving Argentina proved that ICISD needs an integral re-design. The technique of consolidation is working in commercial arbitration when “parties have submitted to arbitration arising from different contracts”, parties also seek to join proceedings¹³³ as consequence of the multiparty participation in commercial transactions. Should be time as well for ICSID to sets clear rules for joinder, multiparty and or consolidation proceedings, in some extent this might look for a more uniform legal reasoning. It should bear in mind that this is only part of the solution; an award consequence of joinder proceedings can also be annulled with the actual procedural gap.

¹²⁹ *ibid.*

¹³⁰ Carlos Ignacio Suarez Anzorena, Multiplicity of Claims under BITs [2005] 2/2 BIICL, Ricardo Ortiz, Los tratados bilaterales de inversiones y las demandas en el CIADI: la experiencia Argentina a comienzos del siglo XXI, Red por la Justicia Social en las Inversiones Globales on <http://es.justinvest.org/reportes-y-analisis/> accessed on 09 August 2011.

¹³¹ *Sempra* and *Cammuzzi* shared identical tribunals. Pan American Energy and BP Exploration cases with a single tribunal.

¹³² *Vivendi* Cases (n 64).

¹³³ Julian Lew, Loukas A Mistelis and Stefan M Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 406.

Chapter III

3.1 Investment Community. Brief Proposals and Silent Solutions.

This paper has reviewed the annulment road of ICSID. The investment community has used any possible chance to express its approval or not to this unique arbitration system and its challenges. If we are allowed to do consensus, it can be said that the proposals can be allocated in five groups:

- a) To amplify the scope of the Arbitral Tribunal.
- b) A Court of Appeal
- c) Guidelines for the *Ad hoc committee*
- d) Prima facie analysis of the annulment by the Secretary- General
- e) Case law in the form of precedents

The implementation of any of these proposals has to be done through:

- (1) An amendment on the Washington Convention, as well as ICSID Rules.
- (2) A Protocol signed by all the Member Countries
- (3) Creation of Appeal Facility Rules – but as mentioned earlier it clash with Art 53 Washington Convention.
- (4) Inserting an Appeal mechanism on the Investment Treaties

The Silent Solutions

Two solutions, outside ICSID procedure, have been offered for the investment community although have not been strongly discussed. The essential characteristic of the silent solutions is that they do not contradict the provision of Art 53 of the Convention.

3.2 The International Court Of Justice

The chaos of implementation of all the possible solutions to fill the gap on ICSID procedure has lead experts to seek alternatives outside the investment scope. The Washington Convention in Art 6 gives the first solution where States members can request the assistance of The International Court of Justice (ICJ) when a dispute arises from the interpretation or application of the Washington Convention. The International Court of Justice is seen as the “highest international tribunal”, therefore its hierarchy and reputation can assist to the ICSID proceeding.

This suggestion is strengthened by the *CMS v Argentina case* where the Arbitral Tribunal did frequent references to the *case Gabčíkovo Nagymaros* thus respecting the implicit high hierarchy of the International Court of Justice. It should not be understood however that the ICJ role substitutes the proposal of an appeal court, but it can review disputes arisen from the violations made based on errors the interpretation of an investment treaty. The interpretation treaty conflict should be a State – State dispute, therefore the type of claims

made by a State might differ for the ones an investors usually request and creativity should be applied on the legal reasoning presented to the Court.¹³⁴

The European Court of Justice

This is a more regional solution rather than one applicable to all ICISID members. It is attractive but it will only benefit a reduced percentage of the investment users. The preliminary mechanism offered by the ECJ, function as in interim measure in the ICSID proceedings. If an Arbitral Tribunal under ICSID has a conflict on interpreting: previous decisions of ICSID tribunals or concerning the interpretation of a treaty. While the ECJ is clarifying the conflictive interpretation, the ICSID proceeding should remain in pause, until the decision is rendered. The contribution of the ECJ would be directly benefitted to have ICSID awards with less inconsistencies and law fragmentation would be reduced significantly.¹³⁵ Some administrative issues should be discussed, such as whether the parties can request to the Tribunal for an ECJ clarification, or it should be discussed the outcome of the ECJ decision should be binding. It would be better if the Arbitral Tribunal has the discretion regarding to the abovementioned requests. it.¹³⁶, maybe if there is an European-ICSID-decisions, they can be precedents *de facto* by all the other investment users.

¹³⁴ Art 92 of the United Nations Charter. A detailed proposal is given by Christian J. Tams in (n 87) 223.

¹³⁵ Christoph Schreuer, Diversity and Harmonization of Treaty Interpretation in Investment Arbitration, [2006] 2 TDM, 23.

¹³⁶ G. Laufman-Kohler, In search of transparency and consistency: ICSID reform proposal, [2005] 2/5 TDM.

Conclusions

Several factors are involved in the international investment activity; the possibility of having a dispute between investors and the host-country of that investment is always a latent possibility. In response to the lack of a reliable forum for investors and States, the World Bank created the International Centre for the Settlement of Investment Disputes under the Washington Convention, which rapidly had a significant approval counting with more than 150 contracting States.

The Washington Convention offers an arbitration mechanism specialized on administering disputes arising from an investment. As any other relevant arbitration institution, ICSID offers a set of clear rules that guide the parties through the procedure. Nevertheless, this arbitration procedure offers a “self-contained system” due to the fact that, unlike other non-ICSID awards, they can be challenged in National Courts; ICSID awards can only be subject to the remedies provided within the Rules.

Most of the remedies are considered “soft” remedies and are only useful when “technical” mistakes are found in the final awards. However, only if the award contains a serious violation under Art 52(1) of the Convention, the consequence is the annulment of the award by an *Ad hoc committee*. The consequences of annulling an award is that the dispute can be resubmitted to the Centre on an unlimited number of times, this affects drastically the principle of finality, which should guarantee any arbitration proceedings. Moreover, the annulment activity on ICSID has been measured by Three Generations, and recently four awards were annulled without fulfilling any of the criteria previously established on the former generations. Experts attribute this to different factors yet along this paper is clearly understood that the biggest problem on ICSID procedure is the existing gap after an award is rendered and before the annulment of the *Ad hoc committee*. Annulment is a drastic measure and there is no option to review the award after it is rendered. Furthermore, features such as the lack of precedents and guidelines to the Committee, plus frequent confusions between a court of appeal and a court annulment made by the *Ad hoc Committee* affects substantially the performance of the institution.

The problems of ICSID do not stop here, the solutions offered count with a wide range of complexity in the implementation. A substantial change on the procedure (such as broader faculties to the Arbitral Tribunal, *prima facie* of the annulment request by the Secretary General or the creation of a Court of Appeal) requires the amendment of the Washington Convention, and since the consent is required from all the signatory members, the investment and academic community looks pessimistic in the task of achieving consensus.

There are other possibilities that do not require an inside change of the Convention such as the elaboration of guidelines for the *Ad hoc Committee* in order to enhance coherency in their decisions as well as drawing the line between appeal and annulment functions. A protocol is also a viable option, but the content of it should be carefully drafted in order to avoid contradicting any provision in the Convention, especially if the objective of the Protocol is a Court of Appeal.

The Argentina factor, obliged the ICSID staff to be creative and use the rules the best they could, and consolidation seems a good solution, nevertheless is only a partial solution, and it cannot stop the annulment activity *per se*. The development of Free Trade Agreement, should be observed, the Pac Rym case pending on ICSID can be the beginning of a new Appeal Investment mechanism, we must remain vigilant on this era of new US Treaties and its contribution to the finality and coherency principles.

The silent solutions, should be exhaustively discussed, specially the option offered by the International Court of Justice, the claims made by the State- representing the investor should contain more than creativity, not only the State has to really prove a violation made to the country. While the European Court of Justice is a tool that should be used by the ICSID European users, in order to generate consistency and EU-ICSID precedents.

When ICSID was designed, had the best intentions to contribute to the investment field and provide for a balance to the investors and developing countries. The aim should not be forgotten: the annulment history remains pending, and the creativity of the investment community should answer the wakeup call.

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