

Annulment of Arbitral Awards in Investment Arbitration – Distinctiveness of the ICSID Regime

By

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Dedicated

*To my parents and all my friends who supported me during all
this time*

Declaration

This is to certify that this dissertation is the result of an original research. The material has not been used in the submission for any other qualification. Full acknowledgement has been given to all sources used.

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Abstract

This dissertation focuses primarily in investment arbitration and the several procedural vehicles through which review of awards is realised. It examines the various procedural options that the parties in investment arbitration may deploy in cases where a frustrated party seeks to annul or set aside an award, which does not satisfy his interests.

These procedural review mechanisms have mainly been created to enhance transparency and consistency in the decision – making process. They ultimately provide for a higher level of legitimacy with the arbitration system. However, as you go through this paper, you will observe the specified way prescribed by the various legal instruments, that these mechanisms operate. They are essentially based on a limited and restrained function of the review process, with limited and narrowly – interpreted grounds for review of awards. In this way, finality of awards, as the ultimate purpose of all investment treaties and legal instruments, is fostered and the advantages of investment arbitration are preserved; efficiency and speed of the proceedings.

This paper also highlights the importance of consistency and correctness of arbitral decisions, which eventually cannot be absolutely sacrificed for finality. After all, it is legal certainty and accuracy of the decision – making that contribute to an increased legitimacy of the system. In this context, the practice and roles of ad hoc Committees in ICSID annulment procedure will be analysed, especially through past and recent practice, with reference to cases of utmost significance.

Reference has also been made to the possibility of reform of the system, by introducing a more substantive review of awards mainly through an appellate mechanism. As interesting and outstanding as it may look, this is quite unlikely for the time being, since investors and States have a keen desire to – as Mr Gaillard has stated - ‘close the books’ of a case instead of giving rise to perpetual proceedings.

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Introduction

International arbitration as an alternative dispute resolution method has indisputably thrived over the years, with particular focus given on international investment arbitration, mainly owing to several practical advantages; it has been defined as a time-efficient, confidential, flexible regime premised on the expertise of skilled practitioners. In 2012, the number of known treaty-based disputes that were initiated amounted to 58, being the highest number of investment disputes filed in one year.¹ The latter illustrates the greater confidence and importance that investors have attached on investor – State arbitration. It must be noted that the driving force behind this consequential growth of investment arbitration is the gradual evolution of foreign direct investment (FDI), which according to the Organisation for Economic Co-operation and Development (OECD) is deemed to be the key element of international economic integration and development.²

This great success of international investment arbitration lies on the long accepted concept that arbitral awards carry with them the notions of finality and fairness.³ Put differently, the scope of review of the awards remains limited in all States with a well – established legal system and has been seen as a last resort in cases where the parties' legal rights have undoubtedly been frustrated. However, the increasing review of the awards and its potential implications on the above – mentioned notions is a reality in the context of international investment arbitration. Tangible proof of this is the annulment regime that has been developed in contract and treaty – arbitrations and it is the purpose of this paper to address this issue in depth.

Below, the graphic display illustrates the gradual increase of investor – State cases filed within 2012, as compared with the previous years. Pursuant to the 2012 statistical update of United Nations Conference on Trade and Development

¹ <http://www.unctad.org/diae>

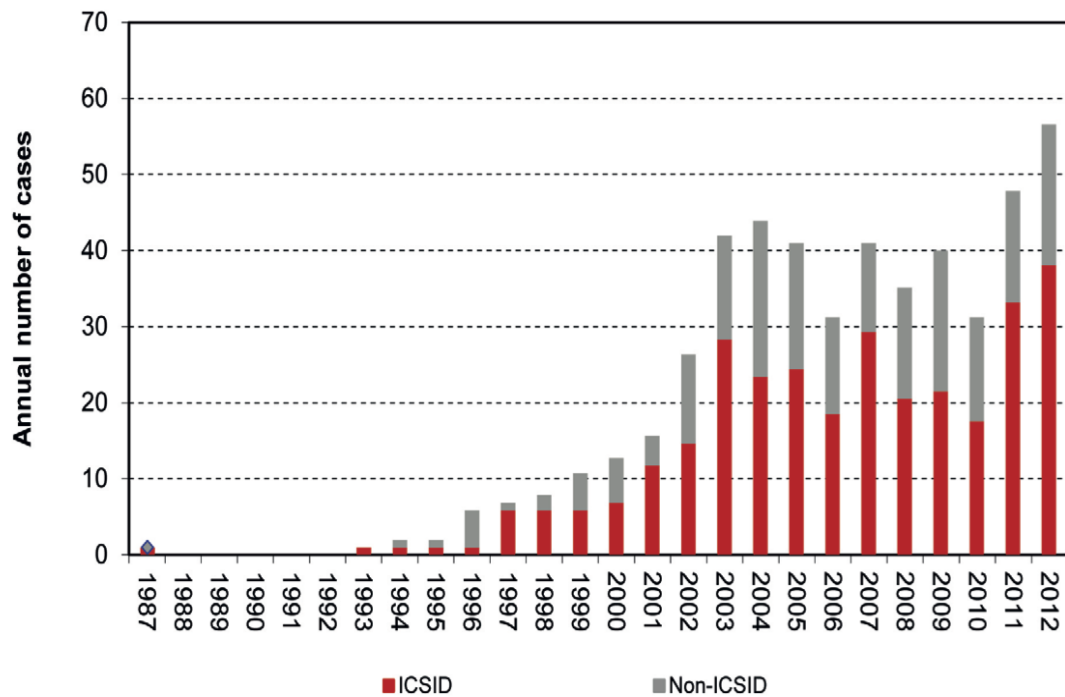
² <http://www.oecd-ilibrary.org/sites/factbook-2013->

² <http://www.oecd-ilibrary.org/sites/factbook-2013-en/04/02/01/index.html?itemId=/content/chapter/factbook-2013-34-en>

³ The Review of International Arbitral Awards, IAI Series no6 (E. Gaillard ed., 2010)

(UNCTAD), the overwhelming majority of respondents correspond to developing or in transition economies, while the majority of cases were still initiated by developed countries.⁴

Figure 1. Known ISDS cases⁵



Source: UNCTAD

⁴ <http://www.unctad.org/diae>

⁵ <http://www.unctad.org/diae>

39 of the 58 investor – State disputes were filed with the International Centre for Settlement of Investment Disputes (ICSID), seven were initiated under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules and five were filed with the Stockholm Chamber of Commerce (SCC). The International Chamber of Commerce (ICC) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) were allocated one case each. One case was not institutional (*ad hoc* arbitration) and the venues of five cases were unknown.⁶

1. Favor Arbitrandum

The perceived function of investment arbitration as an extremely efficient dispute resolution regime for investor – State disputes, has deterred the various national legal systems from attaching much weight to review or annulment proceedings with respect to arbitral awards. It is rather a matter of proper balance between the ultimate goals of arbitration; finality and fairness.⁷ On the one hand, finality of awards that allows the settlement of disputes to be achieved by means of limited review mechanisms; on the other hand, fairness and correctness of awards, which inevitably contribute to the viability of arbitration itself and can definitely be assured through a minimum judicial (or not) review.

This *favor arbitrandum* is also reflected in the global trend of national legislatures to lay down arbitration laws, entailing limited review mechanisms and grounds for challenge of arbitral awards.⁸ More illustratively, when several grounds for resisting enforcement or for challenging an award exist, these are usually, if not always, interpreted narrowly and restrictively, with the overwhelming majority of States being proponents of this long accepted proposition in the investment arbitration community.

⁶ <http://www.unctad.org/diac>

⁷ The Review of International Arbitral Awards, *supra* fn. 3

⁸ The Review of International Arbitral Awards, *supra* fn. 3

2. State sovereignty as the most important legal hurdle to the actual execution of awards – One step before annulment and enforcement review

We can see a growing number of concluded bilateral investment treaties and other investment treaties today, mainly owing to the recognition of foreign direct investment (FDI) as a crucial element for economic growth globally.

What truly distinguishes these treaties is the fact that they tend to function independently, without being subject to political interference of either host or home-governments. However, host-governments' exercise of political or regulatory powers is sometimes instigated by the need to preserve their sovereign immunity to external factors. It must be noted though, that this is the ultimate objective of these treaties, and as Wälde said, "Investment treaties as international law disciplines interfere in domestic regulatory and administrative sovereignty; that is their very purpose".⁹

The constant exercise of a state's regulatory powers undoubtedly stems from the emergence of a particular form that - the previously administrative state - has taken: the form of the regulatory state.¹⁰ Nowadays, in societies where the element of risk is diminished, regulations gain a preponderant role and confirm the regulatory character of the state, which possesses the constitutional power to redefine the major conflict between private interests and public interest. As a matter of fact, nothing is more incompatible with a state's ultimate goals towards economic development than a continuous persistence to the *status quo*.

When this sovereign immunity is substantially deployed by States as a major shield against the execution of "unfriendly" awards, a perpetual battle between the investor and the State concerned begins and arbitration proceedings are instituted which could later possibly lead to annulment applications. There are obviously cases where the investor has engaged in annulment applications as a defense against an award that

⁹ Wälde T. W. "Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues Based on Recent Litigation Experience" in Nobert Horn and Stefan Kröll, *Arbitrating Foreign Investment Disputes*, 2004

¹⁰ Santiago Montt, *State Liability in Investment Treaty Arbitration*, 2012

seems to harm his own legitimate interests. When initiating such procedures, one must bear in mind that the annulment regime was not designed to afford a second chance to the loser, but primarily to enhance the integrated notions of an award; finality and correctness. These two notions and the consequential dichotomy affecting the annulment regime will be addressed a little later in this paper. At first, reference must be made to the various annulment procedures that derive from investment treaties, multilateral or bilateral, and investment agreements between investors and States.

3. Different systems of review

A. Judicial Review of Awards – Enforcement Review

As Seneca once quoted “*Errare humamun est, sed in errore perseverare dementis*”, meaning that errors are undoubtedly human, but non-rectification of the error is substantially in contrast with the human nature and is deemed to be demented.¹¹ Arbitrators are skilled practitioners who administer justice pursuant to well and long – established legal maxims but at the same time, without being able to completely overcome their own temperamental inclinations. Consequently, it is of fundamental importance for their decisions to be checked and reviewed in the context of limited interventions on behalf of the courts or other legally authorised bodies.

It is, however, validly argued that judicial interference is contrary to the very purpose and concept of international arbitration.¹² The mere fact that parties chose to arbitrate their dispute and not to submit it to courts reflects their explicit expression of preference towards arbitration as a dispute resolution method and the potential exclusion of court interference. It also indicates their pure need for finality regarding the settlement of their dispute; in other words, the resubmission of the dispute to courts on the basis of a challenge or an application to set aside the award, simply

¹¹ Juan Fernandez – Armesto, *Different Systems for the Annulment of Investment Awards*, 2010

¹² Juan Fernandez – Armesto, *supra* fn. 11

wipes out the cost – efficient nature of arbitration and leads to perpetual proceedings, depriving the system of its ultimate virtue: finality.

In treaty arbitration, an investor has usually plenty of options as regards the procedural vehicles through which arbitration proceedings will be conducted. As a consequence, consideration should be given to the review mechanism following each specific regime. As complex as it may seem, the choice will essentially vary between an arbitral tribunal operating under the ICSID rules or an arbitral tribunal operating under the rules of the ICSID Additional Facility, United Nations Commission on International Trade Law (UNCITRAL), the Arbitration Institute of the Stockholm Chamber of Commerce, ICC or other.¹³ It is worthy of remark that most of the institutional arbitration rules entail provisions that lay down restricted and limited grounds for review of the awards, thus finality of the awards is substantially fostered.¹⁴

Typically, non – ICSID awards can be challenged and reviewed through national courts.¹⁵ Put differently, when institutional and contract restrictions are out of the picture, awards can be reviewed under two different jurisdictions¹⁶: i) in the courts of the State where the award was rendered or under the law of which the award was issued and ii) in the courts of the State where enforcement of the award is sought.

Given the vast scholarly commentaries and research on the dichotomy caused by the two ostensibly conflicting notions, these of finality and review, judges are usually cautious and feel restrained to abide by the restricted maxims on annulment and review of awards. Moreover, it is globally noticeable that national adjudicators show

¹³ Gaetan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin Volume 14 (Kluwer Law International 2009)*, pp 285 – 317

¹⁴ INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION, arts. 28(6), 29(2), http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf ; LONDON COURT OF INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES, arts. 26.9, 27.1, <http://www.lcia-arbitration.com/>

¹⁵ Christoph Schreuer, *ICSID Annulment Revisited*, Kluwer Law International 2003

¹⁶ Thomas W. Walsh, 2006, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, Berkeley Journal of international Law

a high level of deference towards arbitral tribunals and their decisions.¹⁷ The mere fact that partial annulment takes precedence over annulment of the whole award functions as a confirmation of this *favor arbitrandum*.¹⁸

Review in the courts of the “seat” of arbitration is usually dependent on the State’s arbitration statute. Some jurisdictions allow for complete finality of awards¹⁹ on the basis of “exclusion agreements” concluded by the parties who aim at waiving *ex ante* any rights to set aside an award. For example, the Swiss Federal Tribunal has accepted that waiver. The Federal Tribunal, notwithstanding the previous position, declared as invalid an alleged *ex ante* waiver in *Saluka*, claiming that despite the fact that the BIT provided for and confirmed the finality of the award, this confirmation could not prove sufficient to establish a waiver.²⁰

The most common grounds for review consist of issues of legitimacy of process, the validity of the arbitration agreement, the proper constitution of the tribunal and violation of due process. Nevertheless, the substantive part of the decision remains out of reach for the courts, enhancing in that way the finality of awards.

Challenging an award in the place where it is sought to be enforced means primarily confronting the New York Convention and its list consisting of limited and narrowly interpreted grounds for review and refusal of enforcement of an award. Article V of the New York Convention affords courts the power to review awards on the basis of some exhaustive grounds; violation of due process, proper notice of arbitration, public policy, incapacity of parties, invalidity of arbitration agreement etc.²¹ One must not disregard the fact that here again, the substantive correctness of the merits of the

¹⁷ Juan Fernandez – Armesto, Different Systems for the Annulment of Investment Awards, 2010

¹⁸ The Review of International Arbitral Awards, *supra* fn. 3

¹⁹ Thomas W. Walsh, 2006, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, Berkeley Journal of international Law

²⁰ Gaetan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, in Albert Jan van den Berg (ed), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin Volume 14 (*Kluwer Law International 2009*), pp 285 – 317

²¹ Convention on the Enforcement and Recognition of Foreign Arbitral Awards (June 10, 1958) (New York Convention)

award does not fall within the court review.²² As a result, the finality of the awards is enhanced through a minimum, to the possible extent, court interference.

The role of the UNCITRAL Model Law is eminent in the context of review of awards, as recourse to it is sought in cases where setting aside or refusal of enforcement of an award is pursued. The United Nations legal instrument for arbitration provides for a limited number of grounds for review²³, sticking to the well – established concept of *favor arbitrandum* and promoting finality of awards.

As a matter of fact, parties tend to choose a neutral, arbitration – friendly forum for the conduct of the proceedings, also taking into account several important factors, including the expertise of national judges as well as their stance towards arbitration.²⁴ In this case, unforeseeable and unreasonable annulments of awards are avoided and international arbitration manages to stand on some kind of impenetrable foundations.

B. Function of Annulment Under the ICSID Regime

The review of awards under the ICSID regime must be distinguished from enforcement review through national courts, as it carries with it some extremely distinctive features. It is a self – contained system of review operating under the auspices of ICSID. The annulment mechanism is said to serve a public aim; to protect the integrity and the quality of the ICSID system. As a consequence, it is not only private interest concerns that constitute the underlying basis in ICSID arbitrations and annulment procedures. At first, annulment is essentially a mechanism that offers the opportunity to address procedural flaws. As we can see from the exhaustively listed grounds for annulment under Article 52 of the Washington Convention as mentioned above, we can distinguish three categories of procedural flaws; i) integrity of the arbitral tribunal, ii) integrity of the procedure and iii) integrity

²² Thomas W. Walsh, 2006, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, Berkeley Journal of international Law

²³ Christoph Schreuer, *ICSID Annulment Revisited*, Kluwer Law International 2003

²⁴ Juan Fernandez – Armesto, *supra* fn. 11

of the award.²⁵ Thus, an award can be broadly protected against procedural errors under the ICSID Convention.

As a matter of fact, although public policy violations constitute a valid and much used ground for review and refusal of enforcement under the New York Convention, Article V(2)(a) and under the UNCITRAL Model Law in its Article 34(2), the ICSID Convention does not make any reference *per se* regarding public policy violation.

Moreover, although review of the merits of ICSID awards is not foreseen, ad hoc Committees when addressing, for instance, whether the tribunal exceeded its powers failing to apply the proper law or whether its reasoning does not correspond to its conclusions, it sometimes, though inevitably, overstep its narrow mandate and comes very close to interfering with the merits of the decision.²⁶

C. Annulment versus Enforcement Review

As mentioned above, an investor who seeks redress in investment arbitration is afforded a variety of procedural options under investment treaties. This discretionary choice on behalf of the investor proves to be a pivotal value in investment treaty arbitration, as the investor has the opportunity to engage in any type of arbitration that best suits his specific interests and serves his purpose. Typically, the choice will vary between an arbitration conducted under the ICSID Rules or the ICSID Additional Facility, UNCITRAL, the Arbitration Institute of the Stockholm Chamber of Commerce or ICC Rules.²⁷

There seems to be several differences between the various institutions with respect to the administration of the proceedings as well as the challenge of the awards. On the

²⁵ Schuetz, C. C. Legitimacy and Inconsistency: Is Investment Arbitration Broken and Can It Be “Fixed”? Is the ICSID Annulment Mechanism Broken and Could It Be Improved? In ? in Investment Treaty Arbitration and International Law Vol. 3 (Ian A. Laird, Todd J. Weiler eds) 2010

²⁶ Schuetz, C. C., *supra* fn. 25

²⁷ Gaetan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, in Albert Jan van den Berg (ed), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin Volume 14 (*Kluwer Law International 2009*), pp 285 – 317

one hand, the ICSID regime offers plenty of advantages with its self – contained system of review and on the other hand court intervention in non – ICSID proceedings appears to be more prominent.

For example, in ICSID arbitration proceedings the standards for annulment are quite strictly laid down in the text of the Convention and the need for legal certainty can be satisfied in a higher degree. In non – ICSID arbitration on the other hand, the determination of the standards of review will usually depend on the “seat” of the arbitration and the respective arbitration statutes of the jurisdiction chosen, a concept which does not exist under the ICSID regime on the basis that no specific jurisdiction constitutes the “seat” of ICSID arbitration.²⁸ ICSID arbitrations are often considered to be “seatless arbitrations”, excluding any notions of *locus arbitri*, which suits mostly in commercial arbitration.²⁹ The choice, though, of the place of arbitration is not a faculty assigned to the parties in treaty arbitration; treaty tribunals shall most often determine the “seat” by choosing a neutral and arbitration – friendly jurisdiction. It must be noted that although ICSID regime is considered as an autonomous system with a well – established set of rules, this is not always the case in contrast with national courts which can validly rely on a wide assortment of similar arbitration cases, facilitating the issuance of a decision on the matter at hand.

As far as the discretionary power of annulment and setting aside review is concerned, the Washington Convention confers to ad hoc Committees a certain amount of discretion regarding the decision on annulment, under Article 52(3) of the Convention. Article 34(2) of the UNCITRAL Model Law also adopts this discretionary policy, affording the courts the right to decide on whether a setting aside of an award is justified, in case one or more of the grounds have been met.³⁰

Concerning the various standards applied in the review of the awards, reference should be made primarily to jurisdictional objections. While courts tend to interpret jurisdictional errors by addressing the issue of correctness in the tribunal’s decision

²⁸ Juan Fernandez – Armesto, *supra* fn. 11

²⁹ Rowan Platt, “The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?”, *Journal of International Arbitration*, (Kluwer Law International 2013 Volume 30 Issue 5) pp. 531 - 560

³⁰ Broches, A., 1990, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration*, para. 5 ad Art. 34

asserting or denying jurisdiction, the ad hoc Committees, adhering to the text of the Washington Convention, adopt a more restrictive approach and address mainly the issue of whether the manifest excess of powers as to jurisdictional errors. For instance, the English High Court in *Occidental Petroleum v. Ecuador* interpreted the applicable standard of review as follows: “It is now well – established that a challenge to the jurisdiction of an arbitration panel under section 67 proceeds by way of a re – hearing of the matters before the arbitrators...The test for the Court is this: was the tribunal correct in its decision on jurisdiction? The test is not: was the tribunal entitled to reach the decision that it did.”³¹

Moreover, failure to state reasons³² is regarded as a common ground for annulment in ICSID annulment proceedings. For instance, four annulment decisions of ad hoc Committees were based on this ground for annulment; namely, the *MINE v. Government of Guinea* case, which was annulled in part; the *Mitchell v. Democratic Republic of the Congo* case, which was annulled in full by asserting that “...Such an inadequacy of reasons is deemed to be particularly grave, as it seriously affects the coherence of the reasoning and, moreover, as it opens the door to a risk of genuine abuses...”³³; the *Enron v. Argentine Republic* case where the award was annulled in part and *CMS v. Argentine Republic* case, also annulled in part.³⁴

In conclusion, the practice shows that ad hoc Committees tend to see themselves as guardians of the ICSID system and essential contributors to international investment law and as a result they take a more strict approach during annulment proceedings, often seek to correct any perceived errors of law themselves, avoiding the undesirable, sometimes, annulment. On the contrary, although courts similarly exercise their allocated authorities with proper restraint, they often engage in a more deferential approach towards the setting aside of awards and the expertise of the tribunals. The two systems of review, although they share many similarities, they

³¹ Gaetan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin Volume 14 (Kluwer Law International 2009)*, pp 285 – 317

³² Art. 52(2)(e) of the Washington Convention

³³ *Patrick Mitchell v. Democratic Republic of the Congo*, Case No. ARB/99/7

³⁴ *Background Paper on Annulment for the Administrative Council of ICSID*, 2012 in icsid.worldbank.org

nevertheless show real differences when ad hoc Committees and courts wield their authority in annulment and enforcement review respectively.

4. A Proper Balance Between “Finality” and “Correctness”

A. “Finality” over “Correctness” or Vice-Versa?

In the context of ICSID arbitration, it is now a long accepted suggestion in the investment arbitration community that annulment procedure³⁵ and the proper scope of review are determined by two seemingly conflicting principles: finality on the one hand and correctness, on the other.³⁶ We can find proponents of both of the principles, namely those who perceive finality as the ultimate value in arbitration and tend to adopt a more restrictive policy when it comes to the scope of review, and those who are advocates of correctness and opt for a more amplified scope of review.³⁷ As complex as it may be, nothing in this discourse suggests that these two notions are deemed to be determinative factors of the annulment committees’ decisions, but rather consideration should be paid to a vast amount of complicated factors affecting such decisions.³⁸

It is now well – established that investor - State arbitrations have as their primary purpose to enhance finality, offering only a limited number of grounds for review and fostering the expeditious and economic settlement of disputes.³⁹ Given the vast scholarly debate, it is not certainly accurate whether the finality concerns the dispute itself or the finality of the awards.⁴⁰ As a matter of fact, on the understanding that the

³⁵ annulment procedure as a self-contained process of review, constitutes one of the distinctive features of investment arbitration under the Convention on the Settlement of Investment Disputes Between States and National of Other States (ICSID Convention)

³⁶ Evseev, D., 2008, *Living with Indeterminacy: A Practical Approach to ICSID Annulment Reasoning*, in Juris Conference on International Investment Arbitration; Investment treaty arbitration and international law; Vol. 1; T.J. Grierson Weiler, editor

³⁷ Eric A. Schwatz, 2004, *Finality at What Cost? The Decision of the Ad Hoc Committee in Wena Hotels v. Egypt* in ANNULMENT OF ICSID AWARDS (Emmanuel Gaillard and Yas Banifatemi, Eds.)

³⁸ Evseev, D., 2008, *Living with Indeterminacy: A Practical Approach to ICSID Annulment Reasoning*, in Juris Conference on International Investment Arbitration; Investment treaty arbitration and international law; Vol. 1; T.J. Grierson Weiler, editor

³⁹ C. Schreuer, L. Malintoppi, A. Reinisch, & A. Sinclair, *The ICSID Convention: A Commentary* 1102 (Cambridge U. Press 2009)

⁴⁰ Tai-Heng Cheng, *Finality and Justice in ICSID Arbitration*

finality of awards constitutes one of the most significant elements in international investment arbitration and the ICSID regime, it can be validly argued that finality should only then be compromised, when there is an egregious violation of procedural justice. Notably, under the ICSID Convention there is no possibility to appeal an award on the merits by means of an annulment application.⁴¹ Therefore, an *ad hoc* Committee's mandate is essentially restricted to a limited review, based on either jurisdictional or procedural errors under Article 52(1) of the Convention.

B. Ad hoc Committees' Practice – A Striking Discrepancy in their Approach of “Finality” and “Correctness”?

Much criticism revolved around the issue of several *ad hoc* committees' decisions, where the latter were “accused” of intervening in the merits of the case and exceeding in that way their mandate. There have also been some disparities of the much-debated issue of the differences between an appeal and an annulment as a result of the *ad hoc* Committee decisions in *CMS*⁴² and *SEMPRA*⁴³. This inconsistency in the decisions has been said to radically undermine the legitimacy of the ICSID regime and is assumed to be a result of the inherent conflict between the two ambiguous notions; finality and correctness.⁴⁴

On the other hand, there seems to be a completely adverse side. Reference must be made to *Wena* and *Vivendi*, two historically significant decisions that are considered to have altered the previously blurred landscape over annulment decisions. What can be drawn from these decisions is an alternative stance on behalf of *ad hoc* Committees that has been noticed; more specifically, it is a matter of borderline cases, where the Committees have overestimated efficiency and finality and as a result

⁴¹ Platt, R., 2013, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, *Journal of International Arbitration*, Kluwer Law International 2013 Volume 30 Issue 5, pp. 531 - 560

⁴² *CMS Gas Transmission Co. v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment, para. 158, 25 Sep. 2007)

⁴³ *Sempra Energy Int'l v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on Annulment, 29 Jun. 2010

⁴⁴ A. Bjorklund, 2005, *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*, in *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law*

undermine their discretionary powers as regards annulment, by interpreting extremely narrowly the respective provisions.⁴⁵

It is worthy of remark that the ICSID Convention itself lists a limited number of remedies against an award, reinforcing the view that finality outweighs consistency and correctness.⁴⁶ The text of the Convention provides for an autonomous, self-contained system of review, deterring the parties from having recourse to national courts. In this regard, Article 53 provides that awards “shall be binding on the parties and shall not be subject to any appeal or other remedy except those provided for in this Convention”.

As Dr. Emmanuel Gaillard has noted, parties value the ability to “close the books” on a case and put it behind within a reasonable time.⁴⁷ Investor’s preference for finality over correctness can be justified by the fact that in most of the cases, the outcome favors the investor over the State – party to the arbitration. The investors, however, do bear in mind that incorrect arbitral decisions have been issued, as the notorious *Czech Republic* cases and the ICSID case *SGS v. Pakistan*. Similarly with the *SGS* case, the *Lauder* case have surprisingly brought commentators to the conclusion that much more importance should be attached to consistency and correctness, rather than to finality of awards; in this way, they believe the legitimacy of the ICSID process will be ensured.⁴⁸

As has been noticed by Evseev, the principle of correctness usually seems to go hand in hand with the notion of consistency.⁴⁹ It is also noticeable that consistency promotes accuracy and legal certainty as regards arbitral decisions. It is true that when ad hoc Committees have as their quest the correctness of awards, they indeed

⁴⁵ IAI INTERNATIONAL ARBITRATION SERIES No.1, ANNULMENT OF ICSID AWARDS, E. Gaillard and Y. Banifatemi eds. 2004

⁴⁶ Clapham, J., 2009, “Finality of Investor-State Arbitral Awards: Has the Tide Turned and is there a Need for Reform?”, *Journal of International Arbitration*, (Kluwer Law International 2009 Volume 26 Issue 3) pp. 437 - 466

⁴⁷ Evseev, D., 2008, *Living with Indeterminacy: A Practical Approach to ICSID Annulment Reasoning*, in Juris Conference on International Investment Arbitration; Investment treaty arbitration and international law; Vol. 1; T.J. Grierson Weiler, editor

⁴⁸ Jason Clapham, “Finality of Investor-State Arbitral Awards: Has the Tide Turned and is there a Need for Reform?”, *Journal of International Arbitration*, (Kluwer Law International 2009 Volume 26 Issue 3) pp. 437 - 466

⁴⁹ Evseev, D., supra fn. 47

contribute to the legitimacy of the ICSID regime by promoting a high level of accuracy in their decisions. Arbitrators are skilled practitioners trained and equipped to serve the uniformity of law. Nevertheless, taking also into account that there is not any binding legal precedent in international arbitration, one should wonder why so much weight is attributed to consistency within the system. On the contrary, there are several other significant factors affecting annulment decisions and their outcome, that a lingering concentration on a perpetual discussion over the notions of finality and correctness can only constitute an abstraction from the arguments actually put forward and can add some value to the case at hand.

5. The ICSID System and The *ad hoc* Committee's Mandate

A. Restrained powers of the ad hoc Committees under the ICSID Convention

The vast majority of investment disputes until today have been submitted to the International Centre for Settlement of Investment Disputes (ICSID); by the end of 2012, this number was equal to 314 cases brought under the ICSID Convention and the ICSID Additional Facility rules, out of 514 known treaty – based cases on the whole.⁵⁰ Over the years, this evolution has transformed ICSID arbitration into an outstanding legal system for the settlement of the overwhelming majority of investment disputes.⁵¹

The annulment procedure under the ICSID system was designed primarily to confer on the ad hoc Committees limited powers of review, these being restricted to procedural errors in the decision, thus excluding any review on the merits and waiving any right of recourse to national courts.⁵² This is justified taking into consideration the fundamental goal of the ICSID system: to promote the finality of

⁵⁰ <http://www.unctad.org/diae>

⁵¹ Gaillard, E., 2004, *The Extent of Review of the Applicable law in Investment Treaty Arbitration*, Annulment of ICSID awards, iai series on international arbitration no1

⁵² Platt, R., 2013, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?", *Journal of International Arbitration*, (Kluwer Law International 2013 Volume 30 Issue 5) pp. 531 - 560

awards.⁵³ As the Committee held in *Vivendi v. Argentine Republic*: “It is agreed by all that Article 52 does not introduce an appeal facility but only a facility meant to uphold and strengthen the integrity of the ICSID process”; similarly in *Mitchell v. Democratic Republic of the Congo* the Committee noted that: “No one has the slightest doubt – all the *ad hoc* Committees have so stated, and all authors specializing in the ICSID arbitration system agree – that an annulment proceeding is different from an appeal procedure and that it does not entail the carrying out of a substantive review of an award.” also, in *Continental Casualty v. Argentine Republic* the Committee’s decision reinforced the above statements by holding that: “An ICSID award is not subject to any appeal or to any other remedy except those provided for in the ICSID Convention. In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1).”

The investor’s choice to pursue an annulment simply allows him to ensure at a higher level the existence of integrity and correctness in the decision – making process, undermining, even temporarily, as Mr Evseev has noted, the finality of the award at hand. The annulment procedure is the only available remedy for challenging an ICSID award and this is illustrated in the text of the Convention itself under its Article 53(1): “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”⁵⁴

A. *The ad hoc Committees’ approach through recent case law and practice*

The self – contained annulment procedure must be distinguished from any appellate mechanism which would require a review on the substantive part of a tribunal’s decision; instead, as mentioned above, the *ad hoc* Committee’s task is essentially restrained in identifying any procedural flaws in the decision and either exercising its discretionary power to annul the award, or merely declaring those discrepancies as

⁵³ *Background Paper on Annulment for the Administrative Council of ICSID*, 2012 in icsid.worldbank.org

⁵⁴ C. Schreuer, L. Malintoppi, A. Reinisch, & A. Sinclair, *The ICSID Convention: A Commentary* 1102 (Cambridge U. Press 2009)

insufficient to justify an annulment. The *ad hoc* Committee can exercise its discretionary power and either annul an award fully or in part and evidence of this statement is provided through a variety of decisions; in *Vivendi v. Argentine Republic*, for instance, the *ad hoc* Committee upheld this rationale and ruled as follows: “[W]here a ground for annulment is established, it is for the *ad hoc* committee, and not the requesting party, to determine the extent of the annulment. In making this determination, the committee is not bound by the applicant’s characterisation of its request, whether in the original application or otherwise, as requiring either complete or partial annulment of the award.”⁵⁵ Uniformly, in *SEMPRA v. Argentine Republic*, the *ad hoc* Committee’s stance was more or less the same: “Once an *ad hoc* committee has concluded that there is one instance of manifest excess of powers (or any other ground for annulment), which warrants annulment of the Award in its entirety, this will be the end of the *ad hoc* committee’s examination. Since annulment of an award in its entirety necessarily leads to the loss of the *res judicata* effect of all matters adjudicated by the Tribunal, it is unnecessary to consider whether there are other grounds - whether in respect of the same matter or other matters - that may also lead to annulment. On the other hand, an *ad hoc* committee will need to proceed differently where it decides not to annul the Award or decides to annul the Award only in part. In those instances it will be necessary for the *ad hoc* committee to examine all of the grounds invoked by the applicant in support of its application.”⁵⁶

Moreover, *ad hoc* Committees have shown much deference to this strict interpretation of their mandate; for example in *Consortium v. Kingdom of Morocco*, the Committee held that “The sole purpose of Article 52 is to provide for an exceptional remedy in cases where there has been a manifest and substantial breach of a number of essential principles set out in this Article.” In addition, in *CMS v. Argentine Republic* the Committee’s ruling as regards its mandate under ICSID Convention was the same: “The Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist.”

⁵⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi I)*, ICSID Case No. ARB/97/3, Decision on Annulment, para. 69 (July 3, 2002)

⁵⁶ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, paras. 78-79 (June 29, 2010).

In addressing their authority to annul or not an award, many *ad hoc* Committees have repeatedly reinforced the discretionary nature of their powers; for instance, in *Consortium v. Kingdom of Morocco* the Committee held that “[The Committee] should therefore refrain from making an annulment decision too hastily. It must do so only in case of manifest error, substantial breach or, more specifically, whenever the breach is such that, if it had not been committed, the Tribunal would have reached a different outcome than the one reached. To this extent, the *ad hoc* Committee retains a measure of discretion.”⁵⁷

Importantly, an annulment can only be based on the limited – neither narrowly nor broadly - interpreted grounds which are listed exhaustively in Article 52 of the Convention: i) that the Tribunal was not properly constituted, ii) that the Tribunal has manifestly exceeded its powers; iii) that there was corruption on the part of a member of the Tribunal; iv) that there has been a serious departure from a fundamental rule of procedure or v) that the award has failed to state the reasons on which it is based.⁵⁸ This is also embraced in several cases and *ad hoc* Committee’s decisions; for instance, in the *Klockner v. Cameroon* case, the *ad hoc* Committee held that “...in accordance with Article 52(1), the grounds on which an application is founded can only be the five grounds provided for in the Convention.” In *Wena Hotels v. Egypt*, the Committee reinforced the previous statement by noting that “The power for review is limited to the grounds of annulment as defined in [Article 52 of the ICSID Convention]”. Furthermore, in *CMS v. Argentine Republic* the Committee, adhering to this concept, stated that “...an *ad hoc* committee is not a court of appeal and that its competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention”. The same was the phrasing of another famous annulment decision in *SEMPRA v. Argentine Republic*: “Annulment review is limited to a specific set of carefully defined grounds (listed exhaustively in Article 52(1) of the ICSID Convention).” The limited grounds upon which an annulment application can be filed demonstrates the purpose of the ICSID drafters to restrain the review of awards only to egregious errors of law and violations of fundamental principles of law within the realm of the investment arbitration community.

⁵⁷ *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 226 (January 18, 2006)

⁵⁸ Schreuer, C., 2003, “ICSID Annulment Revisited”, *Kluwer Law International* 2003

Although ad hoc Committees have asserted that they mainly review manifest errors of law - that they only “scratch the surface” – that is not the case always. Even if the latter allegation appears to be settled law in the ICSID community, when exercising its task, an ad hoc Committee, sometimes, gets quite into detail in order to explain whether the tribunal was right or wrong in its decision.⁵⁹

As evident as it may be, although there seems to be a crystallization of some principles regarding the approach and the stance of the Committees in the application and interpretation of these grounds, there are still some decisions amplifying the dichotomy between finality and correctness and undermining the desirable consistency and legal certainty in their application. Much criticism has been exerted by virtue of various *ad hoc* Committee’s decisions, on the basis that they exceeded their narrow mandate under the Convention by intruding into the merits of arbitral awards and reconstructing some parts therein⁶⁰, instead of just annulling the award or dismissing the application. As a result, some confusion emerged as to the borderline between appeal and annulment mechanisms and it was further augmented due to the ad hoc Committee’s decisions in *CMS*⁶¹ and *SEMPRA*⁶². However, in a recent annulment decision - *AES v. Hungary* – the Committee’s approach to this matter purported to rectify the previous decisions’ arbitrariness by holding that “As unambiguously expressed in Article 53 of the Convention, an award is not subject to an appeal. Annulment must therefore be different from appeal. It is well settled in international investment arbitration that an *ad hoc* committee may not substitute its own judgment on the merits for that of a tribunal.”⁶³ The same stance is adopted by the Committee in *Duke Energy v. Republic of Peru*, in stating that “An *ad hoc* committee, which is not an appellate body, is not called upon to substitute its own

⁵⁹ *Annulment and Judicial Review – How “Final” is an Award?*, 2009, in *Investment Treaty Arbitration and International Law Vol. 2* (Ian A. Laird, Todd J. Weiler eds)

⁶⁰ Platt, R., 2013, “The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?”, *Journal of International Arbitration*, (Kluwer Law International 2013 Volume 30 Issue 5) pp. 531 - 560

⁶¹ *CMS Gas Transmission Co. v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment, para. 158, 25 Sep. 2007

⁶² *Sempra Energy Int'l v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on Annulment, 29 Jun. 2010

⁶³ *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Hungary*, ICSID Case No. ARB/07/22, Decision of the *Ad Hoc* Committee on the Application for Annulment, para. 15 (June 29, 2012)

analysis of law and fact to that of the arbitral tribunal.”⁶⁴

This apparent inconsistency in the ICSID annulment regime appears to be linked with the inherent tension between the notions of finality and correctness.⁶⁵ Considering that finality constitutes the primary goal of ICSID awards, *ad hoc* Committees should bear that in mind and yield precedence to finality over accuracy.⁶⁶ This is embraced in *M.C.I. v. Republic of Ecuador* where the *ad hoc* Committee held that “It is an overarching principle that *ad hoc* committees are not entitled to examine the substance of the award but are only allowed to look at the award insofar as the list of grounds contained in Article 52 of the Washington Convention requires... Consequently, the role of an *ad hoc* committee is a limited one, restricted to *assessing the legitimacy of the award and not its correctness*. The Committee cannot for example substitute its determination on the merits for that of the tribunal...”⁶⁷ Similarly in *AMCO v. Republic of Indonesia*, the *ad hoc* Committee’s point of view is stated as such: “The *ad hoc* Committee may refuse to exercise its authority to annul an Award if and when annulment is clearly not needed to remedy procedural injustice and annulment would unwarrantably erode the binding force and finality of ICSID Awards.”⁶⁸

C. The complexity of the tasks of an ad hoc Committee

It is noteworthy that in the end, the role and tasks of the *ad hoc* Committees have proved to be something more than complex, often requiring an intensive interpretation of international investment law notions, which illustrates some lack of uniformity in the jurisprudence of investment arbitration. It is interesting how Broches addresses this issue: “Annulment is an essential but exceptional remedy. It is well understood

⁶⁴ *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the ad hoc Committee, para. 144 (March 1, 2011)

⁶⁵ A. Bjorklund, *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*, in *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law* 504–505, 512 (T. Weiler ed., May 2005)

⁶⁶ Walsh, T. W., 2006, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, Berkeley Journal of International Law

⁶⁷ *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, para. 24 (October 19, 2009)

⁶⁸ *Amco Asia Corporation and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.20 (December 17, 1992)

that the grounds listed in Article 52(1) are the only grounds on which an award may be annulled. However, the application of that paragraph places a heavy responsibility on the *ad hoc* committees, which must rule on requests for annulment. For example, in relation to a Tribunal's alleged "excess of powers" they may have to make fine distinctions between failure to apply the applicable law, which is a ground for annulment, and incorrect interpretation of that law, which is not. With respect to allegations that a tribunal's failure to deal with questions submitted to it constitutes a serious departure from a fundamental rule of procedure, or failure to state the reasons on which the award is based, they will have to assess the relevance of those questions, that is to say, their nature and potential effect, had they been dealt with, on the tribunal's award. They are also likely to be called on to give specific meaning to such terms as "manifest," "serious departure" and "fundamental rule of procedure" in judging the admissibility of claims for annulment."

"After these determinations have been made on the basis of objective legal analysis, the *ad hoc* committees may be faced with the delicate final task of weighing the conflicting claims of finality of the award, on the one hand and, on the other, of protection of parties against procedural injustice, as defined in the five sub-paragraphs of Article 52(1). This requires that an *ad hoc* committee be able to exercise a measure of discretion in ruling on applications for annulment."⁶⁹

As Christoph Schreuer notes "The two decisions in *Wena* and *Vivendi* rendered in 2002 demonstrate that ICSID's review mechanism has found its proper place. It has abandoned the early activism of the *Klockner* case and now presents itself as what it was designed for: an unusual remedy for unusual situations. The recent cases have helped to dispel the fears about frequent attacks on awards for trivial reasons leading to protracted and expensive litigations."⁷⁰

⁶⁹ Broches, A., 1995, "Observations on the Finality of ICSID Awards" in Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law, supra note 15, at 354 & 355

⁷⁰ Schreuer, C., 2004, *Three Generations of ICSID Annulment Proceedings* in IAI INTERNATIONAL ARBITRATION SERIES No.1, ANNULMENT OF ICSID AWARDS, E. Gaillard and Y. Banifatemi eds.

6. The exhaustively listed grounds for annulment under Article 52(1) of the ICSID Convention

Limited grounds for review under Article 52(1)

The annulment procedure is governed by Article 52(1) of the Washington Convention in which five possible grounds for annulment are set forth: i) improper constitution of the tribunal; ii) manifest excess of powers; iii) corruption on the part of a member of the tribunal; iv) serious departure from a fundamental rule of procedure and v) failure to state reasons on which the award is based.⁷¹ These five grounds constitute the only threat to an ICSID award and the specific provision of the Convention should be construed pursuant to its object and purpose, neither narrowly nor broadly.⁷² This is foreseen by many annulment decisions embracing the reasonable use and interpretation of the grounds for annulment. For instance, in *SEMPRA v. Argentine Republic*, the *ad hoc* Committee held that “As for the interpretation of grounds for annulment there is compelling support for the view that neither a narrow nor a broad approach is to be applied...Nor is there any preponderant inclination “*in favorem validitatis*”, i.e. a presumption in favour of the Award’s validity” in response to the Argentine Republic’s application for annulment of the award.⁷³ Uniformly, in *Mitchell v. Democratic Republic of the Congo*, the Committee’s approach coincides with the previous one in stating that “[T]he grounds for annulment set out in Article 52 must be examined in a neutral and reasonable manner, that is, neither narrowly nor extensively.”⁷⁴

Out of the five grounds for annulment circumscribed in Article 52 of the ICSID Convention, only the four of them were invoked during annulment proceedings; these are: i) improper constitution of the tribunal; ii) manifest excess of powers; iii) serious

⁷¹ Alvarez, G. A., 2010, *ICSID Annulment Procedure: A Balancing Exercise Between Correctness and Finality*, in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, 2010 Rio Vol.15, Kluwer Law International 2011, pp. 289 - 305

⁷² *Background Paper on Annulment for the Administrative Council of ICSID*, 2012 in icsid.worldbank.org

⁷³ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for Annulment of the Award, para. 75 (June 29, 2010)

⁷⁴ *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 19 (November 1, 2006)

departure from a fundamental rule of procedure and iv) failure to state reasons on which the award is based.⁷⁵ The most frequent grounds invoked by the parties are i) manifest excess of powers, ii) serious departure from a fundamental rule of procedure and iii) failure to state reasons.⁷⁶ As a consequence, these three grounds and their respective interpretation from ad hoc Committees shall be emphasized in this paper.

I. Manifest Excess of Powers

This ground for annulment primarily refers to incidents where the tribunal either exceeded its mandate by overstepping the scope of the parties' arbitration agreement, by including in its decision certain points, which were not contemplated by the parties or by failing to apply the proper law. Essentially, Article 52(1)(b) of the ICSID Convention deals mainly with the Tribunal's jurisdiction and the issue of the applicable law. The expression *excès de pouvoir manifeste* stems from the French administrative law and it was substantially linked with arbitration law during attempts to establish a system for the review of arbitral awards.⁷⁷

The provision requires that the excess of powers be "manifest" and most of the ad hoc Committees have interpreted this notion as an "excess" that is obvious and self-evident.⁷⁸ Some of the Committees have also attached weight to the interaction between the "manifestness" and the outcome of the decision of the Tribunal and whether the former materially affected the latter.⁷⁹

i) Lack, Excess or Non – Exercise of jurisdiction

⁷⁵ *Background Paper on Annulment for the Administrative Council of ICSID*, 2012 in icsid.worldbank.org

⁷⁶ Juan Fernandez – Armesto, *supra* fn. 3

⁷⁷ El-Kosheri, A., 2010, *Review of ICSID Awards Based on a Manifest Excess of Powers*, The Review of International Arbitral Awards, IAI Series no6 (E. Gaillard ed.) p. 268

⁷⁸ *Vivendi II*, para. 245 ("must be 'evident'"); *Repsol*, para. 36 ("obvious by itself"); *Azurix*, para. 68 ("obvious"); *Soufraki*, para. 39 ("obviousness"); *CDC*, para. 41 (citing *Wena*, para. 25 ("clear or 'self-evident'"));

⁷⁹ *Klöckner I*, para. 52(e) ("the [Tribunal's] answers seem tenable and not arbitrary"), *Vivendi I*, para. 86 ("clearly capable of making a difference to the result"); *Soufraki*, para. 40 ("at once be textually obvious and substantially serious")

The ICSID Convention strictly circumscribes some certain criteria that have to be fulfilled in order for a Tribunal to assert jurisdiction.⁸⁰ These criteria are mandatory both for the parties and the tribunal; therefore, derogation from these rules, even by agreement, cannot be justified. It is now settled law that a tribunal is competent to decide on jurisdictional objections on its own on the basis of the commonly acknowledged principle of *competence – competence*.⁸¹ As a result, an annulment can only then be justified when, on the basis of a jurisdictional determination on behalf of the Tribunal, the competence exercised by the latter is evidently outside the scope of its mandate, leading in “manifest” excess of powers.

In this context, the *ad hoc* Committee in *Klockner* noted: “Clearly, an arbitral tribunal’s lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an ‘excess of powers’. Consequently, an applicant for annulment may not only invoke lack of jurisdiction *ratione materiae* or *ratione personae* under Articles 25 and 26, but may also contend that the award exceeded the tribunal’s jurisdiction as it existed under the appropriate interpretation for the ICSID arbitration clause.”⁸² However, the *ad hoc* Committee, despite its allegations against the Tribunal’s decision, held that in the absence of any arbitrary element in the decision – making process of the Tribunal, the application could not lead to annulment.

In the *Vivendi* case, the application for annulment was based on the fact that the Tribunal had exceeded its powers by asserting and exercising jurisdiction that it did not actually had. The *ad hoc* Committee rejected the applicant’s statements and in this regard it made a general statement in the following terms: “It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have..., but also if it fails to exercise a jurisdiction which it possesses under those instruments... The failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances

⁸⁰ ICSID Convention, Article 25(1)

⁸¹ *Enron*, para. 69 (citing *Azurix*, para. 67); *Azurix*, para. 67; *Soufraki*, para. 50

⁸² *Klockner Industrie – Anlagen GmbH and others v. Republic of Cameroon* (ICSID case No. ARB/81/2), Decision on Annulment of 3 May 1985, para. 4

where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52(1)(b)."⁸³

The Decision on Annulment in *Vivendi v. Argentina* constitutes a very interesting decision as it advances, first and foremost, the jurisprudence of annulment and secondly, by virtue of its specific content regarding the dichotomy between contract and treaty claims in investment treaty arbitration.

Another significant case is *Mitchell v. Democratic Republic of Congo* where the *ad hoc* Committee alleged that a manifest excess of powers was committed by the tribunal by virtue of exercising jurisdiction despite the fact that one of the requirements set forth in Article 25 was not met.⁸⁴ It is interesting that the Committee in this case was accused of overstepping the borderline between annulment and appeal.⁸⁵

ii) Failure to apply the proper law

Failure to apply the proper law is a valid and commonly – used ground for annulment of an ICSID award. The legal basis of this ground is set forth in Article 42(1) of the ICSID Convention, which provides as follows: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.” Thus, it is easily understood that in case that the Tribunal disregards the parties' agreement as to the applicable law, this can lead to an excess of powers;⁸⁶ similarly, an award decided on the basis of an *aequo et bono* judgment of

⁸³ *Compañía de Aguas del Aconquija S.A. & Vivendi Universal, S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, paras. 73-80

⁸⁴ *Patrick Mitchell v. Democratic Republic of Congo* (ICSID Case ARB/97/3), Decision on the Application for Annulment of the Award of 1 November 2006, para. 46

⁸⁵ Alvarez, A. G., 2011, *ICSID Annulment Procedure: A Balancing Exercise Between Correctness and Finality* in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, 2010 Rio Volume 15 (*Kluwer Law International 2011*) pp. 289-305

⁸⁶ Broches, A., 1991, *Observations on the Finality of ICSID Awards*, 6 ICSID REV. - FOREIGN INV. L.J. 321,345-6

the Tribunal also may lead to an excess of powers.⁸⁷

Ad hoc Committees have frequently drawn the line between an erroneous application or misinterpretation of law and the application of the wrong governing law; the latter includes instances where tribunals do not apply any law or merely apply a law, which is not prescribed by Article 42(1) of the Convention. For example, the Committee in *CDC* stated that: “Common examples of such ‘excesses’ are a tribunal deciding questions not submitted to it or refusing to decide questions properly before it. Failure to apply the law specified by the parties is also an excess of powers.” “...so it exceeds its powers where it acts in contravention of that consent (of the parties)”⁸⁸

It has been held that merely an erroneous application of the proper law, will rarely lead to annulment of the award, even if it affects the correctness of the decision.⁸⁹ The Committees, in reviewing this ground for annulment, have narrowly interpreted their tasks and have adopted the view that i) their role is necessarily and legally constrained to simply ensure that the proper law was applied and not that the proper law was correctly applied⁹⁰ and ii) that in order to be competent to annul an award, the errors must be “manifest”.

In the absence of a parties’ agreement, Article 42(1) designates the law to be applied in the dispute by tribunals; in this case the tribunal shall apply “the law of the Contracting State party to the dispute (including its rules on the conflict of laws) *and* such rules of international law as may be applicable.” As Mr Gaillard has pointed out, international law plays an important role in this regard; many *ad hoc* Committees have argued that international law takes precedence on the understanding that the host State’s law contains gaps or there is discordance in the enunciation of their provisions.⁹¹ For instance, the *ad hoc* Committee in *Klockner* held that Article 42(1)

⁸⁷ *Amco I*, paras. 23 & 28; *Amco II*, para. 7.28; *Klöckner I*, para. 79; *MINE*, para. 5.03; *Enron*, para. 218 (quoting *Azurix*, para. 136); *MTD*, para. 44; *CMS*, para. 49

⁸⁸ *CDC Group plc. v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Annulment Proceeding Decision of 29 June 2005, para. 40

⁸⁹ Dolzer, R. and Schreuer, C., 2008, *Principles of International Investment Law* (Oxford University Press)

⁹⁰ Schreuer, C. H., 2001, *The ICSID Convention: A Commentary*, para. 167 in Verhoosel, G., *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin Volume 14 (Kluwer Law International 2009)*, pp 285 – 317

⁹¹ Gaillard, E., 2004, *The Extent of Review of the Applicable law in Investment Treaty Arbitration*, Annulment of ICSID awards, *supra* fn. 48, pp. 229-230

“...gives these principles (perhaps omitting cases in which it should be ascertained whether the domestic law conforms to international law) a dual role, that is, *complementary* (in the case of a "lacuna" in the law of the State), or *corrective*, *should the State's law not conform on all points to the principles of international law.*”
“Article 42(1) therefore *clearly does not allow the arbitrator to base his decision solely on the "rules " or "principles of international law.*”

II. *Failure to State Reasons*

This ground for annulment is prescribed in Article 48(3) of the ICSID Convention and is deemed to be “the most difficult ground for annulment to apply and to analyze”.⁹² According to Dolzer and Schreuer the rationale behind the obligation of a tribunal to state reasons is to adequately explain especially to the parties, the way and grounds on which the tribunal reached its decision.⁹³

The *ad hoc* Committees’ practice on the interpretation of this ground is still divergent. In *MINE*, the *ad hoc* Committee explained that the reasoning of an award should be such as to warrant that the parties be able to “follow the reasoning of the tribunal on points of fact and law”.⁹⁴ The *ad hoc* Committee further maintained that an inquiry in the adequacy of the tribunal’s reasoning could essentially lead to an interference with the merits of the decision, in contravention with Article 53 of the ICSID Convention, which explicitly excludes any remedy of appeal.

The *ad hoc* Committee in *Wena* made some general remarks as to the obligation of a tribunal to state reasons: “Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal’s reasons are to be stated. The object of both provisions is to ensure that the parties will be able to understand the Tribunal’s reasoning. This goal does not require that each reason be stated expressly. The Tribunal’s reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision”. The

⁹² Schreuer, C., 2004, *Three Generations of ICSID Annulment Proceedings*, p. 33 in IAI INTERNATIONAL ARBITRATION SERIES No.1, ANNULMENT OF ICSID AWARDS, E. Gaillard and Y. Banifatemi eds. 2004

⁹³ Dolzer, R. and Schreuer, C., *supra* fn. 87, p.284

⁹⁴ *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment of 22 December 1989, para 5.08

Committee's stance in *Wena* was more liberal in stating that "in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of article 52(1)(e)..." and "if the *ad hoc* Committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the tribunal's conclusions can be explained by the *ad hoc* Committee itself."⁹⁵ Even worse, the *ad hoc* Committees went so far as to reconstruct the reasons missing from the awards in *Amco I*⁹⁶ and *MINE*⁹⁷ and denied to annul on this ground.⁹⁸ This demonstrates for one more time, that *ad hoc* Committees may sometimes "cross the line" between annulment and appeal, which has resulted in much adverse criticism by commentators and scholars.

Recent practice shows that a tribunal's reasoning is often linked with allegations of insufficient or contradictory reasons. In *Vivendi*, for instance, the *ad hoc* Committee found that "contradictory reasons cancel each other out" and that an *ad hoc* Committee should take into account that their mere existence does not necessarily amount to an illogical reasoning but it might simply reflect some actually "conflicting considerations" of the tribunal's panel.⁹⁹ Moreover, in *CDC*, the *ad hoc* Committee emphasised its restricted role in annulment proceedings by stating that when applying Article 52(1), the *ad hoc* Committee has to make sure that it "does not intrude into the legal and factual decision – making of the tribunal" and that the reasons stated by the tribunal must be "coherent, i.e. neither 'contradictory' nor 'frivolous'".¹⁰⁰

It can be inferred from a variety of arbitral awards, that the tribunals' reasoning often represents a minimalistic approach; that, consequently, might sometimes question the

⁹⁵ *Wena Hotels v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on the Application by the Arab Republic of Egypt for Annulment of the Award of 8 December 2000, para. 83

⁹⁶ *Amco Asia Corporation and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.20 (December 17, 1992)

⁹⁷ *MINE v. Guinea*, supra fn. 92

⁹⁸ Schreuer, C., *Three Generations of ICSID Annulment Proceedings*, p. 34, supra fn. 90

⁹⁹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi I)*, ICSID Case No. ARB/97/3, Decision on Annulment, para. 69 (July 3, 2002); see also Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, pg. 36 in IAI INTERNATIONAL ARBITRATION SERIES No.1, ANNULMENT OF ICSID AWARDS, E. Gaillard and Y. Banifatemi eds. 2004

¹⁰⁰ *CDC Group plc. v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Annulment Proceeding Decision of 29 June 2005, para. 70

legitimacy and the goals of the ICSID regime¹⁰¹ and as a result, the notion of finality seems to emerge again and possibly prevail over any discrepancies in the tribunals' reasoning.

III. *Serious Departure from a Fundamental Rule of Procedure*

As Dolzer and Schreuer have pointed out “The seriousness of the departure requires that it is more than minimal and that it must have a material effect on the party...A rule is fundamental only if it affects the fairness of the proceedings”.¹⁰² This ground for annulment has been invoked in several cases but did not prove to be very successful.

For instance, the *ad hoc* Committee in *CDC* stated that: “A departure is serious where it is substantial and such as to deprive the party of the benefit or protection which the rule was intended to provide...The violation of such a rule must have caused the tribunal to reach a result substantially different from what it would have awarded had the rule been observed. As for what rules of procedure are fundamental, the drafters of the Convention refrained from attempting to enumerate them, but the consensus seems to be that only rules of natural justice – rules concerned with the essential fairness of the proceeding – are fundamental.”¹⁰³

i. 'Impartiality' falling within the ground of procedural violations

Impartiality has also raised concerns as a fundamental and essential requirement of the arbitration proceedings in general, and specifically as an element that affects the fairness of the proceedings and amounts to a ‘serious departure from a fundamental rule of procedure’. In this regard, even though the *ad hoc* Committee in *Klockner* embraced the importance of impartiality in the proceedings and in ICSID arbitration in general by stating that “...a sign of partiality, must be considered to constitute,

¹⁰¹ Alvarez, G. A., 2010, *ICSID Annulment Procedure: A Balancing Exercise Between Correctness and Finality*, in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, 2010 Rio Vol.15, Kluwer Law International 2011, pp. 289 - 305

¹⁰² Dolzer, R. and Schreuer, C., *supra* fn. 87, p. 283

¹⁰³ *CDC v. Seychelles*, *supra* fn. 86, para. 49

within the meaning of Article 52(1)(d), a ‘serious departure from a fundamental rule of procedure’ in the broad sense of the term ‘procedure’...”¹⁰⁴, it nevertheless declined to annul the award on this ground.

ii. *The ‘right to present one’s case’ as a ground for annulment*

Moreover, there are many cases where the parties alleged a violation of their right to be heard; put differently, they asserted that the arbitrators based their decision on some arguments that were not contemplated by the parties before. Notwithstanding the general principle that an award should be based on the arguments presented by the parties themselves and therefore, the parties must be accorded a fair opportunity to present their cases, the *ad hoc* Committees have generally declined the concept according to which tribunals are strictly restrained in the parties’ arguments.¹⁰⁵ In *Vivendi*, for example, the claimants claimed that they had no opportunity to elaborate on an issue, which in fact proved to be a decisive point of the decision of the tribunal and therefore failed to present their cases. The *ad hoc* Committee, though, even if it casted a certain degree of doubt in the Tribunal’s approach, it rejected the parties’ arguments in stating as follows: “From the record, it is evident that the parties had a full opportunity to be heard at every stage of the proceedings. They had ample opportunity to consider and present written and oral submissions on the issues, and the oral hearing itself was meticulously conducted to enable each party to present its point of view. The Tribunal’s analysis of issues was clearly based on the materials presented by the parties and was in no sense *ultra petita*. For these reasons, the Committee finds no departure at all from any fundamental rule of procedure, let alone a serious departure.”¹⁰⁶

In *Klockner*, the *ad hoc* Committee, although it did abide by the general concept adopted by other *ad hoc* Committees, it went even further rejecting the respective argument as to this ground and stating that “Within the dispute’s ‘legal framework’, arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties...Even if it is generally desirable

¹⁰⁴ *Klockner*, supra fn. 80, para. 95

¹⁰⁵ Schreuer, C., *Three Generations of ICSID Annulment Proceedings*, p. 30, supra fn. 90

¹⁰⁶ *Vivendi v. Argentine*, supra fn. 52, para. 85

for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a ‘serious departure from a fundamental rule of procedure’.¹⁰⁷

General remarks

As surprising as it may be, *ad hoc* Committees seem to approach such issues with a certain amount of discretion that sometimes undermines the integrity and legal certainty of the ICSID system. *Ad hoc* Committees have undoubtedly been afforded discretionary powers when exercising their tasks concerning the annulment of awards and they certainly avail themselves of this particular right; they can either annul an award if they assume it is necessary to do so, whether by virtue of a ‘manifest excess of powers’ or a ‘failure to state reasons’ or due to a ‘serious departure from a fundamental rule of procedure, or maintain the finality and binding force of the award by rejecting the application for annulment. However, they must be very cautious with respect to the thin borderline between annulment and appeal mechanisms and thus, it is certainly not their task to reconstruct any missing or flawed reasons in the tribunal’s award or to try to explain in several paragraphs how the tribunal concluded its decision. This is apparently beyond their mandate and could possibly cast some serious doubts to the very legitimacy of the system. Finality is unambiguously the primary concern of investors and States but it cannot in any way, under such circumstances, outweigh the fairness and correctness of the decision – making process.

7. Is There a Need for Reform?

There is a broad consensus as to the evidenced extensive recourse to the ICSID annulment procedure and the attitude of *ad hoc* Committees that seems to raise some concerns about an alleged inconsistency in the system.¹⁰⁸ *Ad hoc* Committees have

¹⁰⁷ *Klockner*, supra fn. 80, para. 91

¹⁰⁸ Sacerdoti, G. and Recanatì, M., 2013, *Chapter 11: From Annulment to Appeal in Investor – State Arbitration: Is the WTO Appeal Mechanism a Model?*, in Jorge A. Huerta-Goldman, Antoine

frequently treated alleged errors of law or fact in tribunal's awards as a 'stepping-stone' to proceed to a review on the merits of the decisions. Consequently, this has caused some serious concerns amongst the investment arbitration community, especially with respect to the fact of whether the annulment proceedings have begun to resemble more to an appellate mechanism. *Wena* and *Vivendi* are two examples of a more 'legitimate' – within the legal maxims in ICSID arbitration – approach of *ad hoc* Committees where annulment was seen an exceptional remedy and would only then be justified, when alleged irregularities in the awards would inevitably lead to a different outcome if not committed. Although some *ad hoc* Committees were seriously accused of intruding into the merits of the tribunals' decisions, as in *Mitchell* where Professor Gaillard stated: "in basing its review on the 'coherence' of the reasoning, the *ad hoc* Committee clearly engages in substantive review of the award at issue, in the same manner as the *Amco* and *Klockner* decisions...The review of the 'coherence' of the reasoning...relates to the substance of the reasons stated and the correctness of the reasoning"¹⁰⁹, yet recent practice proves to be more promising; in recent applications for annulment, *ad hoc* Committees adopted the view of a more constrained standard of review, i.e. in *Continental v. Argentina*, *Duke Energy v. Peru*, *AES v. Hungary* and others.

In light of two other significant cases, namely the *Lauder* and *SGS* cases, there have been vast scholarly commentaries about the need of coherence and consistency in investor – State dispute process, possibly outweighing the need for finality.¹¹⁰ On the basis of these two cases, Frank points out that an appellate body would "promote correct decision making and legal reasoning..." and that "an appellate body could restore faith in the system, promote consistency, provide predictability, and reduce the risk of inconsistent decisions to make the system sustainable and legitimate in the long term".¹¹¹

It is an undisputable fact that investors and States continue to prefer finality in investor – State arbitration. This can be clearly demonstrated if one were to examine

Romanetti, et al. (eds), WTO Litigation, Investment Arbitration and Commercial Arbitration, Global Trade Law Series, Vol. 43, *Kluwer Law International 2013*, pp. 327-356

¹⁰⁹ Gaillard, E., 2007, *A Black Year for ICSID*, 4 *Transnat'l Dispute Mgt*

¹¹⁰ Clapham, J., *supra* fn. 36

¹¹¹ Frank, D. S., 2005, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law Through Inconsistent Decisions*, Rev. 1521, 1568

the attitude of States towards the recent proposals of reform regarding the ICSID Convention and UNCITRAL Model Law. As far as the respective reforms to the ICSID regime and the introduction of an appellate body are concerned, the ICSID Secretariat went through a Discussion Paper in 2004 in order to ascertain whether “an appellate mechanism is desirable to ensure coherence and consistency in case law generated in ICSID and other investor-to-State arbitrations initiated under investment treaties”¹¹² The desirable response was not met though, and States seemed to attach more importance to finality over consistency and correctness.¹¹³

As a general positivism concerning investment arbitration seems to prevail, Broches also notes, with respect to ICSID awards, that: “My conclusion is that after a breaking-in phase, traumatised by the exorbitant *Klockner I* pronouncements, the ICSID annulment process is ‘on track’, as subsequent decisions have rejected and corrected *Klockner*’s flawed interpretation of Article 52 and re-established annulment as the extraordinary and limited remedy designed by its drafters.”¹¹⁴

Last but not least, it has been submitted that the creation of an appellate mechanism for the review of arbitral awards would indisputably foster consistency and legitimacy in the decision – making process.¹¹⁵ Nonetheless, one cannot disregard the main elements that still render arbitration a much desirable method of dispute resolution: speed, efficiency, flexibility, finality. Should an appellate body be created, we would have to face a two-tier system; a first-instance and a second-instance tribunal. As a result, that could in fact deter parties from having recourse to arbitration at all; it would undermine finality of awards, speed and efficiency of arbitration as a whole and in the end, it would affect the very legitimacy of the system.

¹¹² ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, October 22, 2004

¹¹³ Clapham, J., *supra* fn. 36

¹¹⁴ Broches, A., 1991, *Observations on the Finality of ICSID Awards*, 6 ICSID Rev. 321-322 and Broches, 1993, *On the Finality of Awards: A Reply to Michael Reisman*, 8 ICSID Rev. 102

¹¹⁵ Nilsson, A. and Engleson, O., 2013, *Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?*, *Journal of International Arbitration, Kluwer Law International*, Vol. 30 Issue 5, pp. 561-579

Conclusions

It is now more evident than ever that investor-State arbitration continues to present an unrivalled growth within the realm of international arbitration. Investors and States are even more willing to seek relief and recourse to investment arbitration, taking into account its several practical advantages: the jurisprudence of tribunals has managed to increase in an even higher degree its consistency; finality of awards as an ultimate goal is now embraced more and more by *ad hoc* Committees, eliminating adverse outcomes by previous decisions¹¹⁶, and the legitimacy of the system seems to be preserved by recent practice in the investment arbitration community of tribunals and *ad hoc* Committees.

As mentioned above, investors and States continue to prefer finality over correctness and accuracy, since the overwhelming majority of investors manage to achieve the desirable outcome through investment arbitrations and do not need a second round of annulment or review proceedings, and States – especially the capital-exporting ones – tend to see themselves as potential investors in arbitrations, therefore attaching more importance to finality over substantive accuracy. Certainly, there is a part of the community that support accuracy and correctness of awards in a manner that could possibly outweigh finality. Nonetheless, we should bear in mind that investment arbitration was primarily created to serve the interests of the ‘key players’ in this field; investors and States. Were a more substantive review of awards to be established¹¹⁷, this would obviously be in contrast with the desires of the parties in such arbitrations.

In addition, it is clear that the multiple regimes of maxims and the diversity of institutions and their respective goals might render the accomplishment of consistency even more difficult. However, the goal remains more or less the same: to promote foreign investments and offer a certain degree of protection to investors. Tribunals and *ad hoc* Committees are well aware of this concept and try, as recent practice shows, to embrace notions such as consistency, predictability, accuracy and legal

¹¹⁶ i.e. in *Amco and Klockner*

¹¹⁷ for instance an appellate body, as discussed above

certainty, without at the same time undermining finality. In the end, it is rather a matter of proper balance.

Finally, annulment as a remedy against incorrect awards should only then be deployed by parties, where there are extreme and rare circumstances of fundamental importance that require intervention, either through enforcement review in State courts or by means of an annulment application within the internal self – contained system of ICSID.