

The background of the cover is a detailed, sepia-toned map of Europe and the Mediterranean region. The map shows coastlines, rivers, and various place names. A dark blue semi-transparent rectangle is overlaid on the upper half of the map, containing the title and editor information in white text.

The Future of ICSID and the Place of Investment Treaties in International Law

Investment Treaty Law Current Issues IV

Edited by

**N. JANSEN CALAMITA, DAVID EARNEST
AND MARKUS BURGSTALLER**



**British Institute of
International and
Comparative Law**

*Annulment Faute de Mieux
Is There a Need for an Appeals Facility?*

*Alain Pellet**

The topic assigned to me by the organizers of this most interesting conference certainly is an exceptionally delicate one—not so much for its technicality: it raises interesting legal issues, but not more than many of those raised by the ‘ICSID law’ and probably much less than some; if it is particularly sensitive, it is because it happens to be a particularly ‘hot’ subject, on which scholars and practitioners hold radically opposite views which, in some cases turn to a truly ‘religious war’. As for me, I have no ready-made religion in this matter: having never sat in an *ad hoc* Committee (nor having had any Award annulled!), I have an entirely fresh and external view (maybe an academic approach) on the topic of this panel.

To make the problem simple, on one side we have the ones who are in favour of a strict interpretation of Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention); on the other side, those who advocate a dynamic interpretation which would *de facto* transform the annulment procedure into an appeals. Not being a ‘believer’, I see some merits in both views even though I tend to agree that this second view is probably more attractive *de lege ferenda* than from a purely positive approach of what the actual law is.

In fact, my naive and maybe over-simplistic approach is straightforward and can be summarized in two simple but, I would think, balanced propositions:

* Professor, University Paris-Ouest, Nanterre-La Défense; former Chairperson, ILC; Associé de l’Institut de Droit international. Many thanks to Benjamin Samson, PhD candidate and teaching assistant at University Paris-Ouest, Nanterre-La Défense for his most valuable assistance in the preparation and updating of this paper.

- (1) there probably is a need for a reform of the ICSID annulment mechanism and one of the possible changes could be the institution of a more truly appeals procedure; but
- (2) as long as such a procedure is not instituted, it has to be acknowledged that annulment is not appeal.

These are indeed commonplaces or probably should be not more than this. But, when a religious war is raging, both camps have a tendency to leave common sense aside and to 'wishfully think'. I will then briefly develop my common sense platitudes.

I. THE ICSID ANNULMENT MECHANISM—A NEED FOR REFORM?

The 'insiders' of the International Centre for Settlement of Investment Disputes (ICSID) system usually do not like to be reminded of the criticisms directed against this system. However, all of them are not to be simply brushed aside and they do not take away the merits of the system from other points of view. Moreover, I am convinced that most of these criticisms could probably be cured in large part if some kind of appeals facility were instituted within the ICSID mechanism.

This is true for the main (and, from my point of view, the most indisputable) of those criticisms: the continuing existence of too many contradicting positions in the case-law of ICSID or ICSID-like Tribunals, whether they relate to jurisdiction or to substantive principles (as for the procedural issues, the Secretariat is on watch). No need to insist. Just think of the 'pairs' of contradictory decisions in *Lauder* and *CME* (on the recognition of the principle of responsibility itself),¹ or the two *SGS* awards (on the scope of umbrella clauses).² Also think of the floating jurisprudence on the content of the principle of fair and equitable treatment³ or on the scope of a Most Favoured Nation (MFN) clause.⁴

¹ Compare *Ronald S. Lauder v Czech Republic* (London Arbitration), Award (3 September 2001) and *CME v Czech Republic* (Stockholm Arbitration), Award (13 September 2001), both under the UNCITRAL Rules of Procedure.

² Compare *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on jurisdiction (6 August 2003), and *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on jurisdiction (29 January 2004).

³ Compare eg *Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) and *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006).

⁴ Compare eg *Emilio Augustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on jurisdiction (25 January 2000), *Plama Consortium Limited v Bulgaria*, ICSID Case

The existing annulment mechanism is of little help to overcome the anarchic efflorescence of ICSID jurisprudence. As the *ad hoc* Committee in *M.C.I. Power Group* put it:

The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They are assisted in their task by the development of a common legal opinion and the progressive emergence of '*une jurisprudence constante*', as the Tribunal in *SGS v Philippines* declared.⁵

Now, as is well known—to borrow the terms of the same *SGS v Philippines* 2004 Tribunal: 'there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision.'⁶

Indeed, as the *Saipem v Bangladesh* Tribunal explained, even if ICSID tribunals are 'not bound by previous decisions[, at] the same time, [they] must pay due consideration to earlier decisions of international tribunals'; and, 'subject to compelling contrary grounds, [they have] a duty to adopt solutions established in a series of consistent cases.'⁷ Moreover, 'subject to the specifics of a given treaty and of the circumstances of the actual case, [they have] a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.'⁸ And, there exists no doubt a trend for 'investment tribunals, at least those constituted under the aegis of ICSID, [to] increasingly refer to previous decisions of other international jurisdictions, in particular those of other

No. ARB/03/24, Decision on jurisdiction (8 February 2005); *Gas Natural v Argentina*, ICSID Case No. ARB/03/10, Decision on jurisdiction (17 June 2005); *Suez Sociedad General de Aguas de Barcelona S.A., and Inter Aguas Servicios Integrales del Agua S.A. v Argentina*, ICSID Case No. ARB/03/17, Decision on jurisdiction (16 May 2006), *Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/03/19, Decision on jurisdiction (3 August 2006), *Telenor Mobile Communications A.S. v Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006), *Wintershall Aktiengesellschaft v Argentina*, ICSID Case No. ARB/04/14, Award (8 December 2008) and *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012).

⁵ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on annulment (19 October 2009) 24.

⁶ *SGS v Philippines* (n 2) 97. See also *AES Summit Generation Limited & AES-Tsiza Erömü Kft. v Hungary*, ICSID case No. ARB/07/22, Decision on annulment (29 June 2012) 99.

⁷ *Saipem v Bangladesh*, ICSID Case No. ARB/05/07, Decision on jurisdiction and Recommendation on provisional measures (21 March 2007) 67 (footnotes omitted).

⁸ *Ibid.*

- (1) there probably is a need for a reform of the ICSID annulment mechanism and one of the possible changes could be the institution of a more truly appeals procedure; but
- (2) as long as such a procedure is not instituted, it has to be acknowledged that annulment is not appeal.

These are indeed commonplaces or probably should be not more than this. But, when a religious war is raging, both camps have a tendency to leave common sense aside and to 'wishfully think'. I will then briefly develop my common sense platitudes.

I. THE ICSID ANNULMENT MECHANISM—A NEED FOR REFORM?

The 'insiders' of the International Centre for Settlement of Investment Disputes (ICSID) system usually do not like to be reminded of the criticisms directed against this system. However, all of them are not to be simply brushed aside and they do not take away the merits of the system from other points of view. Moreover, I am convinced that most of these criticisms could probably be cured in large part if some kind of appeals facility were instituted within the ICSID mechanism.

This is true for the main (and, from my point of view, the most indisputable) of those criticisms: the continuing existence of too many contradicting positions in the case-law of ICSID or ICSID-like Tribunals, whether they relate to jurisdiction or to substantive principles (as for the procedural issues, the Secretariat is on watch). No need to insist. Just think of the 'pairs' of contradictory decisions in *Lauder* and *CME* (on the recognition of the principle of responsibility itself),¹ or the two *SGS* awards (on the scope of umbrella clauses).² Also think of the floating jurisprudence on the content of the principle of fair and equitable treatment³ or on the scope of a Most Favoured Nation (MFN) clause.⁴

¹ Compare *Ronald S. Lauder v Czech Republic* (London Arbitration), Award (3 September 2001) and *CME v Czech Republic* (Stockholm Arbitration), Award (13 September 2001), both under the UNCITRAL Rules of Procedure.

² Compare *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on jurisdiction (6 August 2003), and *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on jurisdiction (29 January 2004).

³ Compare eg *Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) and *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006).

⁴ Compare eg *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on jurisdiction (25 January 2000), *Plama Consortium Limited v Bulgaria*, ICSID Case

The existing annulment mechanism is of little help to overcome the anarchic efflorescence of ICSID jurisprudence. As the *ad hoc* Committee in *M.C.I. Power Group* put it:

The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They are assisted in their task by the development of a common legal opinion and the progressive emergence of '*une jurisprudence constante*', as the Tribunal in *SGS v Philippines* declared.⁵

Now, as is well known—to borrow the terms of the same *SGS v Philippines* 2004 Tribunal: 'there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision.'⁶

Indeed, as the *Saipem v Bangladesh* Tribunal explained, even if ICSID tribunals are 'not bound by previous decisions[, at] the same time, [they] must pay due consideration to earlier decisions of international tribunals'; and, 'subject to compelling contrary grounds, [they have] a duty to adopt solutions established in a series of consistent cases.'⁷ Moreover, 'subject to the specifics of a given treaty and of the circumstances of the actual case, [they have] a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.'⁸ And, there exists no doubt a trend for 'investment tribunals, at least those constituted under the aegis of ICSID, [to] increasingly refer to previous decisions of other international jurisdictions, in particular those of other

No. ARB/03/24, Decision on jurisdiction (8 February 2005); *Gas Natural v Argentina*, ICSID Case No. ARB/03/10, Decision on jurisdiction (17 June 2005); *Suez Sociedad General de Aguas de Barcelona S.A., and Inter Aguas Servicios Integrales del Agua S.A. v Argentina*, ICSID Case No. ARB/03/17, Decision on jurisdiction (16 May 2006), *Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/03/19, Decision on jurisdiction (3 August 2006), *Telenor Mobile Communications A.S. v Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006), *Wintershall Aktiengesellschaft v Argentina*, ICSID Case No. ARB/04/14, Award (8 December 2008) and *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012).

⁵ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on annulment (19 October 2009) 24.

⁶ *SGS v Philippines* (n 2) 97. See also *AES Summit Generation Limited & AES-Isiza Erömü Kft. v Hungary*, ICSID case No. ARB/07/22, Decision on annulment (29 June 2012) 99.

⁷ *Saipem v Bangladesh*, ICSID Case No. ARB/05/07, Decision on jurisdiction and Recommendation on provisional measures (21 March 2007) 67 (footnotes omitted).

⁸ *Ibid.*

- (1) there probably is a need for a reform of the ICSID annulment mechanism and one of the possible changes could be the institution of a more truly appeals procedure; but
- (2) as long as such a procedure is not instituted, it has to be acknowledged that annulment is not appeal.

These are indeed commonplaces or probably should be not more than this. But, when a religious war is raging, both camps have a tendency to leave common sense aside and to 'wishfully think'. I will then briefly develop my common sense platitudes.

I. THE ICSID ANNULMENT MECHANISM—A NEED FOR REFORM?

The 'insiders' of the International Centre for Settlement of Investment Disputes (ICSID) system usually do not like to be reminded of the criticisms directed against this system. However, all of them are not to be simply brushed aside and they do not take away the merits of the system from other points of view. Moreover, I am convinced that most of these criticisms could probably be cured in large part if some kind of appeals facility were instituted within the ICSID mechanism.

This is true for the main (and, from my point of view, the most indisputable) of those criticisms: the continuing existence of too many contradicting positions in the case-law of ICSID or ICSID-like Tribunals, whether they relate to jurisdiction or to substantive principles (as for the procedural issues, the Secretariat is on watch). No need to insist. Just think of the 'pairs' of contradictory decisions in *Lauder* and *CME* (on the recognition of the principle of responsibility itself),¹ or the two *SGS* awards (on the scope of umbrella clauses).² Also think of the floating jurisprudence on the content of the principle of fair and equitable treatment³ or on the scope of a Most Favoured Nation (MFN) clause.⁴

¹ Compare *Ronald S. Lauder v Czech Republic* (London Arbitration), Award (3 September 2001) and *CME v Czech Republic* (Stockholm Arbitration), Award (13 September 2001), both under the UNCITRAL Rules of Procedure.

² Compare *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on jurisdiction (6 August 2003), and *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on jurisdiction (29 January 2004).

³ Compare eg *Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) and *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006).

⁴ Compare eg *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on jurisdiction (25 January 2000), *Plama Consortium Limited v Bulgaria*, ICSID Case

The existing annulment mechanism is of little help to overcome the anarchic efflorescence of ICSID jurisprudence. As the *ad hoc* Committee in *M.C.I. Power Group* put it:

The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They are assisted in their task by the development of a common legal opinion and the progressive emergence of '*une jurisprudence constante*', as the Tribunal in *SGS v Philippines* declared.⁵

Now, as is well known—to borrow the terms of the same *SGS v Philippines* 2004 Tribunal: 'there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision.'⁶

Indeed, as the *Saipem v Bangladesh* Tribunal explained, even if ICSID tribunals are 'not bound by previous decisions[, at] the same time, [they] must pay due consideration to earlier decisions of international tribunals'; and, 'subject to compelling contrary grounds, [they have] a duty to adopt solutions established in a series of consistent cases.'⁷ Moreover, 'subject to the specifics of a given treaty and of the circumstances of the actual case, [they have] a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.'⁸ And, there exists no doubt a trend for 'investment tribunals, at least those constituted under the aegis of ICSID, [to] increasingly refer to previous decisions of other international jurisdictions, in particular those of other

No. ARB/03/24, Decision on jurisdiction (8 February 2005); *Gas Natural v Argentina*, ICSID Case No. ARB/03/10, Decision on jurisdiction (17 June 2005); *Suez Sociedad General de Aguas de Barcelona S.A., and Inter Aguas Servicios Integrales del Agua S.A. v Argentina*, ICSID Case No. ARB/03/17, Decision on jurisdiction (16 May 2006), *Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/03/19, Decision on jurisdiction (3 August 2006), *Telenor Mobile Communications A.S. v Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006), *Wintershall Aktiengesellschaft v Argentina*, ICSID Case No. ARB/04/14, Award (8 December 2008) and *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012).

⁵ *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on annulment (19 October 2009) 24.

⁶ *SGS v Philippines* (n 2) 97. See also *AES Summit Generation Limited & AES-Tsiza Erömi Kft. v Hungary*, ICSID case No. ARB/07/22, Decision on annulment (29 June 2012) 99.

⁷ *Saipem v Bangladesh*, ICSID Case No. ARB/05/07, Decision on jurisdiction and Recommendation on provisional measures (21 March 2007) 67 (footnotes omitted).

⁸ *Ibid.*

ICSID tribunals.⁹ This trend, which can also be observed among *ad hoc* committees themselves,¹⁰ certainly deserves to be encouraged, but this proves not to be enough to put an end to the jurisprudential cacophony¹¹—and, while I concur with the position of the *ad hoc* Committee in *CCC v Argentina* according to which '[a]lthough there is no doctrine of binding precedent in the ICSID arbitration system, the Committee considers that in the longer term the emergence of a *jurisprudence constante* in relation to annulment proceedings may be a desirable goal',¹² it must be acknowledged that, for the time being, it is just this: 'a desirable goal'.

It must be noted however that, by itself, the exclusion of the *stare decisis* principle is not a bar to the standardisation of the case-law: civil law systems also do not know of the rule of the precedent and yet contradictions of decisions are no more frequent than in common law countries or, at least, when they occur, they do not last for a long time.

That said, this is not because of the existence of an appeals system: in France—however centralized a country it is, as well as in Germany or Italy (which are federal or quasi-federal States), quite a number of appellate bodies co-exist without any of them having a superior authority. In fact the unity of

⁹ J Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24/2 *Journal of International Arbitration* 129–158.

¹⁰ See *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on annulment (19 October 2009) 25: 'The parties in the present case have also relied on past decisions of *ad hoc* committees which are referred to in this decision. Although there is no hierarchy of international tribunals, as acknowledged in *SGS v Philippines*, the Committee considers it appropriate to take those decisions into consideration, because their reasoning and conclusions may provide guidance to the Committee in settling similar issues arising in these annulment proceedings and help to ensure consistency and legal certainty of the ICSID annulment mechanism, thereby contributing to ensuring trust in the ICSID dispute settlement system and predictability for governments and investors'.

¹¹ Being acknowledged that 'one needs to approach the question of consistency with some caution and clarity in terms of one's objectives. For example, several discussions and debates on the substantive obligations in investment agreements have revealed that countries' intent with respect to the interpretation of a similar provision in their investment agreements may differ in some respects. Thus, the development of consistent international legal principles needs to be balanced by respect for the intent of the parties to specific agreements. Even where the intent of the countries may differ in some respects in relation to similar provisions in their investment agreements, there could be a value in encouraging consistency in interpretation across the agreements of a particular country or countries where the intent of the parties do [*sic*] not differ.' K Yannaca-Small, 'Annulment of ICSID Awards: Limited Scope But Is There Potential?', in *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 629; see also B Legum, 'Options to Establish an Appellate Mechanism for Investment Disputes' K Sauvart (ed) in *Appeals Mechanism in International Investment Disputes* (OUP 2008) 235.

¹² *Continental Casualty Company v Argentina*, ICSID Case No. ARB/03/9, Decision on annulment (16 September 2011) 84. See also *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on annulment (30 July 2010) 66.

the jurisprudence is insured not by a supreme appellate body but precisely by kinds of annulment mechanisms through respectively the French *Cour de Cassation*, the Italian *Corte Suprema di Cassazione* or, in a more complicated way due to the German judicial federalism, the Constitutional Court (*Bunderversfassungsgericht*) and the Federal Superior Courts (*Obere Bundesgerichte*). In all three systems—but the same is true *mutatis mutandis* for all 'Latin' judicial systems whether in Europe, in Africa or in Latin America—the 'regulating supreme Court' is not an appellate body: generally speaking, it cannot review the factual basis of the decision of the first tribunals or of the courts of appeal and even the grounds for legal review can be limited. And yet it works reasonably well.

This is not to say that there is no need for an appeals facility within the ICSID system; but if there is a need it must be explained for other reasons than the chaotic development of the ICSID jurisprudence.¹³ An (improved) annulment mechanism can be efficient enough if the purpose is simply to avoid conflicts of jurisprudence.

The most convincing argument in favour of a more complete appeals facility might be as simple as this: 'Justice must not only be done, it must also be seen to be done.'¹⁴ And a right for a two-stage procedure is nowadays commonly accepted: even though it is not a 'fundamental human right', in civil matters, for claims involving large amounts of money, it is as of right in most if not all domestic laws¹⁵ and one can wonder whether this requirement is not part—or is not becoming part—of the rule of law system.¹⁶ Now, it is certainly true that two different degrees of jurisdiction do not guarantee a more 'exact' or 'well-founded' decision than a single one. It can, on the contrary offer two different opportunities to make mistakes and it makes heavier and more costly a procedure which was conceived for being expeditious and relatively cheap. Although I am not sure both expectations are

¹³ In any case, as aptly noted by Katia Yannaca-Small, the chances for consistency would 'be reinforced by the existence of a common appeals body which would handle not only ICSID awards but also UNCITRAL awards and awards rendered by the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) and other *ad hoc* arbitral tribunals' (Yannaca-Small (n 11) 629).

¹⁴ Justice Gordon Hewart in *Rex v Sussex Justices ex parte McCarthy* (1924), 1 KB 256 (1923) All ER 233.

¹⁵ See J van Compernelle and A Saletti (eds) *Le double degré de juridiction* (Bruylant 2010) 368; A Abdessamed, 'Le principe de double degré de juridiction et les juridictions pénales internationales' (2008) *Revue trimestrielle des droits de l'homme* (referring to MA Abu Rannat, 'Étude sur l'égalité dans l'administration de la justice', United Nations, 1972).

¹⁶ See however ECHR, *Tasnik et Kaounis v Greece*, Application No. 3142/08, Judgment (14 January 2010) 33 'La Cour note [...] que l'article 6 de la Convention n'astringe pas les États contractants à créer des cours d'appel ou de cassation (voir, notamment, Delcourt c. Belgique, 17 janvier 1970, sections 25–26, série A n° 11).' —English text not available.

always confirmed in the day-to-day practice but this is not a sufficient reason to make it worse.

However, again, in the measure that the right to a double hearing is granted in domestic law in the most quantitatively important civil cases and seen as a fundamental guarantee against arbitrary decisions, there seems to be no reason why this would not apply at the international level as well and I must say that I am not really convinced by the standard argument based on the special necessities of business. They are not more pressing than the protection of fundamental human rights and not more convincing at the international level than in domestic laws. In any case, this might be more an argument for a call to a strict respect of the delays fixed in the ICSID Arbitration Rules (and in particular in Articles 2, 4, 13, 41 and 46) and for locking a possible future appeals proceeding into strict delays—but not to reject its possibility.

And I must say that, although I am conscious to plead against the tide, I see the United States 2002 Trade Act followed by the 2004 US Model Bilateral Investment Treaty (BIT) and the recent multiplication of free trade or trade promotions agreements providing for the possible establishment of bilateral appellate bodies as both an additional threat on the consistency of the international investment case-law and an argument in favour of an ICSID appeals facility.¹⁷ As noted by the ICSID Secretariat in its 2004 Discussion Paper on 'Possible Improvements of The Framework for ICSID Arbitration':

In any event, as indicated above, a number of countries are committing themselves to an appeal mechanism. It would in this context seem to run counter to the objectives of coherence and consistency for different appeal mechanisms to be set up under each treaty concerned. Efficiency and economy, as well as coherence and consistency, might best be served by ICSID offering a single appeal mechanism as an alternative to multiple mechanisms.¹⁸

Indeed, Articles 53 (1) and 54 (1) of the ICSID Convention exclude any appeal against an award rendered by an ICSID tribunal. Fair enough. Now, are we sure that *if* such an award is appealed on the basis of a bilateral clause (or of a future special agreement), the appellate bilateral body thus created would decline to exercise its jurisdiction? I am not. And are we sure that if

¹⁷ See also M Dimsey, *The Resolution of Investment Disputes: Challenges and Solutions* (Eleven International Publishing 2008) 180–1.

¹⁸ ICSID Secretariat, Possible Improvements of The Framework for ICSID Arbitration, Discussion Paper, 22 October 2004, para 23, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14).

the appeals body declares that the award in question is ill-founded and null and void, this decision would not prevail before the domestic courts of the State (or States) involved? I am not either. What I am sure of is *first*, that if this were to happen, it would not enhance legal stability, security and predictability of the international law of investment and, *second (and in any case)*, that these bilateral clauses bear witness of the general (still diffuse) feeling mentioned above that the possibility of an appeal against an ICSID tribunal's award would be in line with the 'rule of law' principle or, at least, would enhance the general feeling that justice is done.

In this respect, the OECD Working Paper on 'Improving the System of Investor-State Dispute Settlement' is still relevant to avoid the risk of increased fragmentation of the dispute settlement system engendered by these foreseen bilateral appellate bodies '[a]lternatively, one single, preferably institutionally-managed and widely accepted appeals mechanism could be created.'¹⁹ This is not the place to come back on the discussions which followed the ICSID Secretariat proposal of 2004²⁰. Suffice it to recall that in the words again of the OECD paper—

The main advantages put forward in discussions were consistency, the possibility of rectification of legal errors and, possibly serious errors of fact, the fact that the review would be confined to a neutral tribunal instead of national courts and that it would enhance effective enforcement.²¹

And I would add that Professor Christian Tams' impertinent question must not be taken too lightly. It is the suggestion that by setting up an appeals mechanism, States could influence the results of investment arbitration in their favour, and thus correct what is perceived to be an 'investor bias' allegedly informing some ICSID decisions.²² Although Tams himself rejects the objection, and for not unconvincing reasons,²³ the recent Philipines'

¹⁹ Organization for Economic Co-operation and Development (OECD), *Improving the System of Investor-State Dispute Settlement: an Overview*, OECD Working Papers on International Investment, 2006/1, para 32.

²⁰ ICSID Secretariat (n 18).

²¹ OECD (n 19) para 37. See also Yannaca-Small (n 11) 630–1 and C Stockford, 'Appeal versus Annulment: Is the ICSID Annulment Process Working or Is It Now Time for an Appellate Mechanism?', in IA Laird and TJ Weiler, *Investment Treaty Arbitration and International Law* (NY, JurisNet 2012) vol 5, 334–40.

²² C Tams, 'An Appealing Option? The Debate about an ICSID Appellate Structure' in C Tietje, G Kraft and R Sethe (eds), *Essays in Transnational Economic Law*, No. 57, 2006, 32, <http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Hefft57.pdf>.

²³ *Ibid.*, 31–3.

proposal²⁴ not to speak of the recent denunciation of the Convention by Bolivia (2 May 2007), Ecuador (6 July 2009) and Venezuela (24 January 2012) testify for unease in certain circles and, as I have recalled earlier in this paper, Justice must, definitely, be seen to be done...

The existence of a 'strong' appeals procedure might also help to cure another worrying trend: the attempt to use simultaneously or successively various review (or quasi-review) procedures.²⁵ Thus, in *Siemens v Argentina*, Argentina lodged successively applications for annulment²⁶ then revision²⁷; in *Pey Casado v Chile*, the original applicant initiated a procedure for revision²⁸ and the defendant asked for the annulment of the Award.²⁹ In *Enron v Argentina*, the claimant filed a request for revision of the Award,³⁰ which has been rejected by the Tribunal.³¹ The Applicant then filed an application for annulment.³² In *Continental Casualty v Argentina*, both parties requested the rectification of the Award,³³ and Continental made an application for annulment of that same award.³⁴ The tribunal having rectified the Award,³⁵ Argentina submitted an application for partial annulment of the Award as rectified³⁶ while the annulment proceedings were still pending.³⁷ In the same spirit, although more imaginatively, in 2011, Ecuador filed an application against the United States concerning the interpretation of Article II (7) of the

²⁴ *The Philippines' Proposal to Analyse the Potential for Establishing Guidelines on the Implementation of Article of the ICSID Convention* and, for an update *ICSID to Prepare 'Background Paper' on Annulment Process, Following Request by Philippines; German Investor Criticizes Effort by Philippines*, 5 October 2011; <http://www.iareporter.com/articles/>.

²⁵ See eg Yannaca-Small (n 11) 623-5.

²⁶ *Siemens v Argentina*, ICSID Case No. ARB/02/8, Application for annulment (16 July 2007).

²⁷ *Ibid.*, Application for revision (9 July 2008); Request for discontinuance made during the revision proceeding, (12 August 2009); Order taking note of the discontinuance (9 September 2009).

²⁸ *Pey Casado v Chile*, ICSID Case No. ARB/98/2, Application for revision (17 June 2008), declared inadmissible on 18 November 2009.

²⁹ *Ibid.*, Application for annulment, 6 July 2009; no decision on the request for annulment at the time when the present paper was finalized.

³⁰ *Enron v Argentina*, ICSID Case No. ARB/01/3, Application for revision (16 July 2007).

³¹ *Ibid.*, Decision on revision (25 October 2007) 59.

³² Application for annulment (7 March 2008); Decision on annulment (30 July 2010).

³³ *Continental Casualty Company v Argentina*, ICSID Case No. ARB/03/9, rectification and supplementary request by Continental (16 October 2008) and by Argentina (6 November 2008); Decision on the rectification of the Award (23 February 2009) (not public).

³⁴ *Ibid.*, Application for annulment (14 January 2009); Decision dismissing the application (16 September 2011).

³⁵ *Ibid.*, Decision on the rectification of the Award (23 February 2009) (not public).

³⁶ *Ibid.*, Application for partial annulment of the Award, submitted by Argentina (8 June 2009).

³⁷ Decision on annulment (16 September 2011) (n 34).

Ecuador-USA BIT.³⁸ A few months earlier, in *Chevron v Ecuador*, Ecuador had been found liable for the violation of this article;³⁹ the United States considers that, through these proceedings, Ecuador seeks the review of the Award rendered in the *Chevron v Ecuador* case.⁴⁰

This said, globally, the cons probably balance the pros even if some of the arguments of the 'anti-appeals' are far from convincing. This is the case, in particular of the quite popular argument based on 'finality', according to which, by contrast with domestic law judicial settlement or the WTO mechanism, the ICSID awards are final and, therefore, time and money saving.⁴¹ The argument is flawed on several accounts:⁴²

- 'with finality comes the risk of having to live with a decision that is simply wrong, or inconsistent with other decisions on similar disputes rendered by other arbitration panels'⁴³;
- the award rendered by an appeals body would be as 'final' and finally binding as an award in first instance;
- 'more final' than an award delivered after a review procedure having resulted in an annulment since a determination that the original award is null will generally induce the seizing of a new arbitral tribunal, the decision of which taken in conformity with the *ad hoc* Committee's prior decision can be brought before a new *ad hoc* committee. 'Due to the lack of *stare decisis* in ICSID arbitration and the *ad hoc* Committee's resulting discretion, the second *ad hoc* Committee would not necessarily follow the reasoning of the first *ad hoc* Committee. The end result could be an infinite regress of arbitrations and annulment proceedings'⁴⁴;
- the review procedure as it exists is time and costs consuming as well.⁴⁵

³⁸ *Republic of Ecuador v United States of America*, PCA Case No. 2012-5 (28 June 2011).

³⁹ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award (30 March 2010) and Final Award (31 August 2011).

⁴⁰ *Republic of Ecuador v United States of America*, PCA Case No. 2012-5, Memorial of the Respondent United States of America on Objections to Jurisdiction, 51, <http://italaw.com/sites/default/files/case-documents/ital1060.pdf>

⁴¹ See eg SM Marchili, 'ICSID Annulment: A Saga of Virtue and Vice', in IA Laird and TJ Weiler (n 21) 303; or D Weiss, 'Panel discussion' *ibid* 353.

⁴² See eg C Stockford (n 21) 340-1; see also Yannaca-Small (n 11) 631.

⁴³ Stockford (n 21) 341; see also Yannaca-Small, *ibid*.

⁴⁴ C Cathey Schuetz, 'Legitimacy and Inconsistency: Is Investment Treaty Arbitration Broken and Can It Be 'Fixed'? Is The ICSID Annulment Mechanism Broken and Could It Be Improved?' in Laird and Weiler (n 21) 274.

⁴⁵ Stockford (n 21) 342-3.

This is certainly true but, although unfortunately ICSID proceedings, as they are, tend to be more and more lengthy even when a review is not requested, it is not a persuasive reason for adding delays to the already existing excessive delays. And it is not self-evident that just fixing strict time-limits⁴⁶ would suffice to avoid an increase in the costs. As I have often noted, law-firms (including very big ones) tend to work at the last minute and succeed in producing on time very (too) lengthy written pleadings; but clearly an appeals procedure would request more work, even more pages and, then, more costs.⁴⁷

From my points of view, the other most convincing arguments which can be made against full appeals are:

- the risk to encourage the losing party to make appeals, therefore increasing the number of challenges against the awards (and delaying the decision);⁴⁸
- more important, the danger to incite a 'wealthy loser' to adopt a delaying strategy in view of forcing the winner to compromise;
- 'Lastly, one should not forget one potential drawback of appeals systems, which may be seen as the 'authority argument' turned on its head. As has been noted, while potentially increasing the authority of some decisions, a move towards a two-tiered system of dispute settlement risks undermining the authority of the first level decision. Even if a two-level process of dispute settlement eventually produced decisions that were more authoritative than the ones presently rendered, this increase in authority would have to be measured against a loss of authority of the first level awards.'⁴⁹

Overall, there is a case for further reflecting on some kind, but not any kind, of appeals mechanism. In this respect, I would think that the 2004 Secretariat's proposals for an appeals 'facility'⁵⁰ better than appeals 'mechanism' are still commendable in spite of the mixed reception they received. As a reminder, the main proposals were as follows:

- an ICSID appeals facility should be optional and, in light of the unlikely entry into force of an amendment to Articles 53 and 54 of the ICSID Convention, it should merely be offered to the States having concluded a bilateral or multilateral treaty providing for an appeal;

⁴⁶ As suggested by Stockford (n 21) 343.

⁴⁷ See Yannaca-Small (n 11) 631.

⁴⁸ See *ibid* 631-2; see also Rosenthal, 'Panel discussion' (n 21) 351.

⁴⁹ Tams (n 22) 31, 16. See also Stockford (n 21) 343.

⁵⁰ ICSID Secretariat, in the work cited (n 18) Annex.

- it should function within the ICSID's general framework in order to preserve the integrity and self-contained character of the ICSID Convention so aptly described by Aron Broches in his 1991 article,⁵¹ which, in great part, remains extremely actual;
- it could be offered in the framework of any form of arbitral investment dispute settlement;
- the appellate body would be composed of persons of recognized authority in the field. I would suggest that they should not participate in ICSID or other investment cases in another capacity after their appointment in the appellate body). Moreover, I would think (contrary to the ICSID Secretariat's proposal) that their number should be less than twelve and that, in principle, they should sit in plenary composition, at least for cases posing issues of principle in order to establish a *jurisprudence constante*. If this is not accepted, Professor McRae's *caveat* on the 'intransposability' of the WTO Appellate Body experience to the settlement of investment disputes⁵² would have been premonitory. However I suggest that there is no fatality here;
- this said, I also agree with the 2004 Secretariat's proposal that, while this 'appellate body' should be recognized the power to uphold, modify, or reverse the appealed award, its jurisdiction should be restricted to a limited number of motives including the five grounds already listed in Article 52, to which serious errors of fact might be added.

However, this restriction points to an important aspect. In reality, such an appellate body would not be an 'appeals mechanism' properly said. It would simply be an improved annulment mechanism and I would think that this is what is needed. Just that or maybe, even less than that. Simply a proper implementation of the annulment mechanism we have.

II. THE ICSID ANNULMENT MECHANISM—A NEED FOR EFFECTIVE APPLICATION

While there is room for debate on the possible creation of a true appeals mechanism or, probably more realistically (and sufficiently), an improved review facility, one thing is certain, until such a reform is carried out (if it is to be), the existing requirements of Article 52 of the ICSID Convention (together with those of Articles 53 and 54) must be strictly respected. All that is in it—but nothing more.

⁵¹ A Broches, 'Observations on the Finality of ICSID Awards' (1991) 6 *FILJ* 320-379.

⁵² See D McRae, 'The WTO Appellate Body: A Model for an ICSID Appeals Facility?', *Journal of International Dispute Settlement* (2010) 371-87; see also Tams (n 22) 25 and Dimscy (n 17) 179-180. *Contra* Stockford (n 21) 332-33 and 342-3.

As Silvia Marchili, noted, '[t]he rather faulty application of Articles 52 and 53 of the Convention by certain panels should not have as a natural consequence the reform of the system. Rather, the investment arbitration community should focus on improving the application of the annulment standards [...]'.⁵³

As is well known, virtually all *ad hoc* committees pay lip service to the idea that the remedy offered by Article 52 'is in no sense an appeal'.⁵⁴ But, having said this, many hasten to treat it as if it were an appeal. As Professor Schreuer has aptly noted, 'In particular, the distinction between annulment and appeal is repeated like a mantra at the beginning of almost every decision. (...) This professed self-restraint is not always evident in the actual decisions'.⁵⁵

In the case of an appeal, the appeals body can confirm the original decision or modify it. Contrary to an appeal,⁵⁶ annulment is 'a limited remedy in that an ad hoc committee is not a court of appeal. It cannot rehear the substance of the dispute. It can only consider whether the award should be annulled, in whole or in part, on one of the following grounds specified in Article 52',⁵⁷ respectively:

⁵³ Marchili (n 41) 306.

⁵⁴ *Klöckner v Cameroon*, ICSID Case No. ARB/81/2, Decision on annulment (3 May 1985).
⁵⁵ See also *Amco v Indonesia*, ICSID Case No. ARB/81/1, Decision on annulment (16 May 1986) (23), 38–44; *MINE v Guinea*, ICSID Case No. ABR/84/4, Decision on annulment (22 December 1989) (5.04), (5.08); *Amco v Indonesia*, ICSID Case No. ARB/81/1, Resubmitted Case, Decision on annulment (3 December 1992) 1.14, 7.19, 8.08; *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Decision on annulment (5 February 2002) 18; *Vivendi v Argentina*, ICSID Case No. ARB/97/3, Decision on annulment (3 July 2002) 62, 64; *CDC v Seychelles*, ICSID Case No. ARB/02/14, Decision on annulment (29 June 2005) 34–7; *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on annulment (1 November 2006) 19–20; *Soufraki v UAE*, ICSID Case No. ARB/02/7, Decision on annulment (5 June 2007) 20, 24; *Repsol v Petroecuador*, ICSID Case No. ARB/01/10, Decision on annulment (8 January 2007) 38; *MTD v Chile*, ICSID Case No. ARB/01/7, Decision on annulment (21 March 2007) 31; *CMS v Argentina*, ICSID Case No. ARB/01/8, Decision on annulment (25 September 2007) 43, 44, 135, 136, 158; *M.C.I. Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment (19 October 2009) 24; *Rumeli v Kazakhstan*, ICSID Case No. ARB/05/16, Decision on annulment (25 March 2010) 70; *Semptra v Argentina*, ICSID Case No. ARB/02/16, Decision on annulment (29 June 2010) 73, 74; *Enron v Argentina* (n 13) 63–5; *Vivendi II v Argentina*, ICSID Case No. ARB/97/3, Decision on annulment (10 August 2010) 247; *Sociedad Anónima Eduardo Vieira v Chile*, ICSID Case No. ARB/04/7, Decision on annulment (10 December 2010) 234–6; *Fraport v Philippines*, ICSID Case No. ARB/03/25, Decision on annulment (23 December 2010) 76, 272 and 277 and *AES Summit Generation* (n 7) 15, 17, 33 and 171.

⁵⁶ C Schreuer, 'From ICSID Annulment to Appeal: Half Way Down the Slippery Slope', *The Law and Practice of International Courts and Tribunals* (2011) 216. See also Dimsey (n 17) 162–4.

⁵⁷ See eg D Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal', *7 Foreign Investment Law Journal* (1992) 24.

⁵⁸ P Nair and C Ludwig, 'ICSID Annulment Awards: the fourth generation?' *The*

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.⁵⁸

Moreover, contrary to an appeals body, the *ad hoc* committee cannot substitute its own decision on the merits to that of the original award. Its only choice is between (i) confirming the original award or (ii) declaring it void in whole or (iii) in part.⁵⁹ All it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one.⁶⁰ Moreover, '[t]he Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision'.⁶¹

However, even leaving aside the first two annulment decisions, in which the *ad hoc* Committees re-examined the substance of the case,⁶² a series of more recent decisions⁶³ consider that the *ad hoc* committee enjoys a margin of discretion, even though an annulable error was detected:

It appears to be established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annulable error is found. Article 52(3) provides that a committee 'shall have the authority to annul the award or any part thereof,' and this has been interpreted as giving committees some flexibility in determining whether annulment is appropriate in the circumstances. Among other things, it is necessary for an ad hoc committee to consider the significance of the error relative to the legal rights of the parties.⁶⁴

International Journal of Commercial and Treaty Arbitration (Herbert Smith February 2011) 1, http://www.herbertsmith.com/NR/rdonlyres/27B56F9805154CDB942A61CA137F0EB5/18034/8878_ICSIDAnnulmentAwardsthefourthgeneration_d3.pdf (italics in the original).

⁵⁸ Article 52 (1) ICSID Convention.

⁵⁹ Article 52 (3) ICSID Convention.

⁶⁰ *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile*, ICSID Case No. ARB/01/7, Decision on annulment (21 March 2007) 54.

⁶¹ Article 52 (5) ICSID Convention.

⁶² *Klöckner v Cameroon*, ICSID Case No. ARB/81/2, Decision on annulment (3 May 1985) and *Amco v Indonesia*, ICSID Case No. ARB/81/1, Decision on annulment (16 May 1986) (corresponding to C Schreuer's 'first generation'—see 'Three Generations of ICSID Annulment Proceedings' in E Gaillard and Y Banifatemi (eds) *Annulment of ICSID Awards*, IAI Series No. 1 (2004) 17–42.

⁶³ Corresponding to Schreuer's 'third generation' characterized by a more balanced approach, *ibid.*

⁶⁴ *Vivendi v Argentina*, ICSID Case No. ARB/97/3, Decision on annulment (3 July 2002) 66.

An interesting manifestation of this 'measure of discretion' appears in a few annulment decisions where the *ad hoc* committee finds that the Award is vitiated on one of the grounds entailing annulment, but does not draw any concrete consequence from its finding. The best example of this mere substitution of reasons (*substitution de motifs*) is probably given by the Decision on annulment in the *CMS v Argentina* of 25 September 2007, where the Committee found that the Tribunal's findings based on the umbrella clause ought to be annulled for failure to state reasons⁶⁵ but declared that:

99. Although the Tribunal's finding of liability must be annulled, it does not follow that the Award as a whole is affected. As the *Vivendi* Annulment Committee found, severable parts of an award which are not themselves annulled will stand, a situation expressly contemplated in Article 52(3) of the ICSID Convention.⁶⁶

As a consequence, the Committee declared that, its

[F]inding on the umbrella clause does not entail the annulment of the Award as a whole. It entails only annulment of the provisions of paragraph 1 of the operative part of the Award under which the Tribunal decided that '[t]he Respondent breached its obligations... to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty'.⁶⁷

But since this Tribunal's finding was made *obiter*, and was not the basis for the compensation awarded by the Tribunal, the Committee, drew no consequence from this annulment except that it decided to make no order as to the costs of representation before it.⁶⁸

Similarly, in the case concerning *Helnan v Egypt*, the *ad hoc* Committee annulled the original Award since 'the Tribunal has manifestly exceeded its powers within the terms of Article 52 (1) (b) of the ICSID Convention'.⁶⁹ But it decided that, since this did not affect the *ratio* of the Award,

See also *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on annulment (1 November 2006), *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No. ARB/05/10, Decision on annulment (16 April 2009), *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Decision on annulment (25 September 2007), *Sempra v Argentina*, ICSID Case No. ARB/02/16, Decision on annulment (29 June 2010) or *Enron v Argentina* (n 12).

⁶⁵ *CMS v Argentina* (n 64) 97 and 163 (1).

⁶⁶ *Ibid.*, 99.

⁶⁷ *Ibid.*, 100.

⁶⁸ *Ibid.*, 162.

⁶⁹ *Helnan International Hotels A/S v Egypt*, ICSID Case No. ARB/05/19, Decision on annulment (14 June 2010) 55.

[T]he annulment of the Tribunal's finding in paragraph 148 can have no effect on the rest of the Award, including the dismissal of the Claimant's claims in paragraph 3 of the dispositif, which must continue to stand.⁷⁰

Many *ad hoc* committees have endorsed this wide meaning in order to maximize their freedom of appreciation.

In principle, '[t]he pertinence for the reasoning, its fairness, its convincing character are without consequence in the annulment procedure, because all these notions derive from the substance of the reasoning and are indifferent for the needs of the external control of the existence of reasons as wanted by the authors of the Washington Convention'.⁷¹ However, while annulment decisions routinely start by assessing the proper role of an *ad hoc* committee in accordance with the letter and spirit of Article 52, this professed self-restraint is not always found in the body of the decisions. This is particularly so with respect to the second ground of annulment (Manifest excess of powers—*Excès de pouvoir manifeste*) which does not correspond to a well-established term of the art.⁷²

While there is general agreement that failure to apply the proper law may amount to excess of powers⁷³ within the meaning of Article 52, as explained by Christoph Schreuer, this concept in turn 'is not without ambiguity. It can be interpreted as a failure to identify correctly and apply the proper system of law, such as international law, French law or Argentinean law. But it has also

⁷⁰ *Ibid.*, 57; see also 73 (1)—the reasoning of the Committee on the exhaustion of local remedies is anything but clear.

⁷¹ E Gaillard, *CIRDI: Chronique des Sentences Arbitrales* (2009) 361 (translated by K. Yannaca-Small (n 11) 622).

⁷² See however, the *Abyei Arbitration*: 'In public international law, it is an established principle of arbitral and, more generally, institutional review that the original decision maker's findings will be subject to limited review only. The relevant case law draws a clear distinction between an appeal on the merits—to determine whether the original decision was legally and factually 'right or wrong'—and a review of whether the decision-maker that rendered a decision exceeded its powers. A reviewing body that is seized of the issue of putative excess of powers will not 'pronounce on whether the [original] decision was right or wrong,' as this question is legally irrelevant within an excess of powers inquiry.' (*The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)*), Final Award (22 July 2009) 403, quoting from *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906*, Judgment, *ICJ Reports 1960*, p. 192, 214, cited with approval in *Case concerning the Arbitral Award of July 31, 1989 (Guinea-Bissau v Senegal)* (1991) ICJ Rep 62, 25.

⁷³ Schreuer (n 55) 216. See also I Marboe, 'The Annulment of ICSID Awards', in C Knahr, C Koller, W Rechberger and A Reinisch (eds) *Investment and Commercial Arbitration—Similarities and Divergences* (Eleven International Publishing 2010) 101 and 105-6, Yannaca-Small, (n 11) 614, K Dohyun, 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: the Need to Move Away From an Annulment-Based System' (2011) 86 *NYU L Rev.* 260-1 and J Fernández-Armesto, 'Different Systems for the Annulment of Investment Awards' (2011) 26 *FILJ* 139, Marchiù (n 41) 289.

An interesting manifestation of this 'measure of discretion' appears in a few annulment decisions where the *ad hoc* committee finds that the Award is vitiated on one of the grounds entailing annulment, but does not draw any concrete consequence from its finding. The best example of this mere substitution of reasons (*substitution de motifs*) is probably given by the Decision on annulment in the *CMS v Argentina* of 25 September 2007, where the Committee found that the Tribunal's findings based on the umbrella clause ought to be annulled for failure to state reasons⁶⁵ but declared that:

99. Although the Tribunal's finding of liability must be annulled, it does not follow that the Award as a whole is affected. As the *Vivendi* Annulment Committee found, severable parts of an award which are not themselves annulled will stand, a situation expressly contemplated in Article 52(3) of the ICSID Convention.⁶⁶

As a consequence, the Committee declared that, its

[F]inding on the umbrella clause does not entail the annulment of the Award as a whole. It entails only annulment of the provisions of paragraph 1 of the operative part of the Award under which the Tribunal decided that '[t]he Respondent breached its obligations... to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty'.⁶⁷

But since this Tribunal's finding was made *obiter*, and was not the basis for the compensation awarded by the Tribunal, the Committee, drew no consequence from this annulment except that it decided to make no order as to the costs of representation before it.⁶⁸

Similarly, in the case concerning *Helnan v Egypt*, the *ad hoc* Committee annulled the original Award since 'the Tribunal has manifestly exceeded its powers within the terms of Article 52 (1) (b) of the ICSID Convention'.⁶⁹ But it decided that, since this did not affect the *ratio* of the Award,

See also *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on annulment (1 November 2006), *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No. ARB/05/10, Decision on annulment (16 April 2009), *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Decision on annulment (25 September 2007), *Sempra v Argentina*, ICSID Case No. ARB/02/16, Decision on annulment (29 June 2010) or *Enron v Argentina* (n 12).

⁶⁵ *CMS v Argentina* (n 64) 97 and 163 (1).

⁶⁶ *Ibid.*, 99.

⁶⁷ *Ibid.*, 100.

⁶⁸ *Ibid.*, 162.

⁶⁹ *Helnan International Hotels A/S v Egypt*, ICSID Case No. ARB/05/19, Decision on annulment (14 June 2010) 55.

[T]he annulment of the Tribunal's finding in paragraph 148 can have no effect on the rest of the Award, including the dismissal of the Claimant's claims in paragraph 3 of the dispositif, which must continue to stand.⁷⁰

Many *ad hoc* committees have endorsed this wide meaning in order to maximize their freedom of appreciation.

In principle, '[t]he pertinence for the reasoning, its fairness, its convincing character are without consequence in the annulment procedure, because all these notions derive from the substance of the reasoning and are indifferent for the needs of the external control of the existence of reasons as wanted by the authors of the Washington Convention'.⁷¹ However, while annulment decisions routinely start by assessing the proper role of an *ad hoc* committee in accordance with the letter and spirit of Article 52, this professed self-restraint is not always found in the body of the decisions. This is particularly so with respect to the second ground of annulment (Manifest excess of powers—*Excès de pouvoir manifeste*) which does not correspond to a well-established term of the art.⁷²

While there is general agreement that failure to apply the proper law may amount to excess of powers⁷³ within the meaning of Article 52, as explained by Christoph Schreuer, this concept in turn 'is not without ambiguity. It can be interpreted as a failure to identify correctly and apply the proper system of law, such as international law, French law or Argentinean law. But it has also

⁷⁰ *Ibid.*, 57; see also 73 (1)—the reasoning of the Committee on the exhaustion of local remedies is anything but clear.

⁷¹ E Gaillard, *CIRDI: Chronique des Sentences Arbitrales* (2009) 361 (translated by K Yannaca-Small (n 11) 622).

⁷² See however, the *Abyei Arbitration*: 'In public international law, it is an established principle of arbitral and, more generally, institutional review that the original decision maker's findings will be subject to limited review only. The relevant case law draws a clear distinction between an appeal on the merits—to determine whether the original decision was legally and factually 'right or wrong'—and a review of whether the decision-maker that rendered a decision exceeded its powers. A reviewing body that is seized of the issue of putative excess of powers will not 'pronounce on whether the [original] decision was right or wrong,' as this question is legally irrelevant within an excess of powers inquiry.' (*The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)*), Final Award (22 July 2009) 403, quoting from *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906*, Judgment, *ICJ Reports 1960*, p. 192, 214, cited with approval in *Case concerning the Arbitral Award of July 31, 1989 (Guinea-Bissau v Senegal)* (1991) *ICJ Rep* 62, 25.

⁷³ Schreuer (n 55) 216. See also I Marboe, 'The Annulment of ICSID Awards', in C Knahr, C Koller, W Rechberger and A Reinisch (eds) *Investment and Commercial Arbitration—Similarities and Divergences* (Eleven International Publishing 2010) 101 and 105–6, Yannaca-Small, (n 11) 614, K Dohyun, 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: the Need to Move Away From an Annulment-Based System' (2011) 86 *NYU L Rev*, 260–1 and J Fernández-Armesto, 'Different Systems for the Annulment of Investment Awards' (2011) 26 *FILJ* 139, Marchili (n 41) 289.

been interpreted in a stricter sense as the failure to apply a particular rule of law.⁷⁴

The difference was explained with great clarity in *Continental v Argentina*:

91. In the Committee's view, it will amount to a non-application of the applicable law for a tribunal to apply, for instance, the law of State X to determine a dispute when the applicable law is in fact the law of State Y or public international law. However, if the applicable law is the law of State X, and if the tribunal in fact applies the law of State X, it is not the role of an annulment committee to determine for itself whether the tribunal correctly identified all of the provisions of the law of State X that were relevant to the case before it, or whether the tribunal gave adequate consideration to each of those specific provisions and to the relationship between them, since this would be to venture into an enquiry into whether the tribunal applied the law correctly. Questions as to the relevance of particular provisions of the applicable law, and of their legal effect and interaction with other provisions of the applicable law, go to the substantive legal merits of the case and are within the power of a tribunal to decide. A tribunal's decision on such questions cannot amount to a manifest excess of power.

(...)

93. In some cases it may be an annulable error if a tribunal fails to consider a specific provision of the applicable law. For instance, suppose that a claimant brings a claim for damages under provision A of an investment treaty, and the respondent State specifically pleads in response that it has a defence to the claim under provision B of the treaty. In this case, it may well be an annulable error for the tribunal to find that there has been a breach of provision A, and to award damages to the claimant, without giving any consideration at all to the potential application of the defence in provision B.

94. However, in such a case [...t]he failure to consider provision B would be unlikely of itself to constitute a manifest excess of power by reason of failure to apply the applicable law, as the tribunal has nonetheless applied the investment treaty, which is the law that it was required to apply.⁷⁵

⁷⁴ Schreuer (n 55) 217.

⁷⁵ *Continental Casualty Company v Argentina* (n 12) 91–4 (footnotes omitted). See also *CMS v Argentina* (n 65), where the *ad hoc* Committee found that the Tribunal had made several errors of law (see paras 49–50 and 128–135) and had applied the law 'cryptically and defectively' but refused to annul the Award since 'it applied it' (para 136). It has been rightly noted that, in spite of the confirmation of the Award, '[t]his conclusion significantly weakened the legitimacy of the tribunal's decision in the eyes of Argentina and other ICSID member states. Unsurprisingly, Argentina refused to pay the victorious foreign investor the \$133.2 million award', K Dohyun, 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: the Need to Move Away From an Annulment-Based System' (2011) 86 *NYU L Rev* 277–8.

More recently, the *ad hoc* Committee in *AES Summit v Hungary* strongly and persuasively re-emphasized 'the distinction between non-application and mere misapplication of the applicable law.'⁷⁶ And it added:

Whilst the precise boundaries of these concepts can be difficult to gauge, the Committee is mindful of the criticism that has been levelled against certain *ad hoc* committees for overstepping the line between annulment and appeal. The prevailing, and correct, view in modern investment jurisprudence must be understood as setting a very high threshold. [...⁷⁷].

(...)

Finally, the Committee considers that annulment for non-application of the applicable law is only sustainable where there has been a failure to apply the proper law *in toto*.⁷⁸

However, many *ad hoc* committees have endorsed the wider interpretation in order to maximize their freedom of appreciation. Thus, in several cases, *ad hoc* committees criticized the Tribunal having rendered the award—which was consequently annulled—for having endorsed a wrong definition of an 'investment'.⁷⁹ Besides the fact that the law is far from stabilized in this respect, it can be held that by venturing on that ground, the committees in those cases went beyond their limited functions.⁸⁰ Another, even more telling, example of a total confusion between an annulment proceeding allegedly based on an alleged excess of power (Article 52 (1) (b)) and an appeal is given by the annulment decision in *Enron v Argentina*: in this lengthy decision,⁸¹ the Committee challenges the Tribunal's interpretation of Art 25 of the ILC Articles on the Responsibility of States, then applies its own interpretation to the relevant facts and annuls the Award since it considers that the effectiveness of the other means available to Argentina to cope with the situation, less prejudicial to investors' rights should have been assessed by the Tribunal.⁸² As convincingly noted, '[t]his reasoning is truly

⁷⁶ *AES Summit Generation* (n 7) 33.

⁷⁷ Then the Committee quotes from the *Soufraki* annulment committee (*Soufraki v UAE*, ICSID Case No. ARB/02/7, Decision on annulment (5 June 2007) 86).

⁷⁸ *AES Summit Generation* (n 7) 33–5.

⁷⁹ See eg *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on annulment (1 November 2006) 25–48; or *Malaysian Historical Saviors, SDN, BHD v Malaysia*, ICSID Case No. ARB/05/10, Decision on annulment (16 April 2009) 56–82.

⁸⁰ For convincing criticisms of those decisions, see eg Dimsey (n 17) 164; Marchili (n 41) 292–3.

⁸¹ The simple fact that the annulment decision is longer than the Award (170 p. v 139 p.) is a sign.

⁸² *Enron v Argentina* (n 12); see in particular paras 367–71, or 393; see also *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Decision on annulment (29 June 2010) 186 and 219.

baffling. The Tribunal had correctly identified the governing law. It had also correctly identified the relevant rule and had applied it. But the *ad hoc* Committee found an excess of powers because it disagreed with the way the Tribunal had interpreted that rule. More specifically, the *ad hoc* Committee found that 'the process of reasoning' applied by the Tribunal was defective and that this constituted an excess of powers.⁸³

It is indeed the Committee's reasoning in *Enron* which seems to be defective; as more reasonably noted by the *ad hoc* Committee in *MINE v Guinea*:

The adequacy of the reasoning is not an appropriate standard of review under paragraph 1(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention.⁸⁴

And one can only endorse Professor Schreuer's conclusion according to which:

If one is to take the annulments in *Sempra* and *Enron* as an indication of current practice, an *ad hoc* committee can annul an award whenever it disagrees with the way a tribunal interprets an applicable rule. In other words, failure to apply the proper law as a form of excess of powers has undergone two permutations: first the proper law became the proper rule. Second, the rule's application became its correct application.⁸⁵

This could validly be the practice of an appeals body, not of an Article 52 *ad hoc* review Committee.

The other grounds for annulment enumerated in Article 52 (1) of the ICSID Convention lend themselves less to this kind of drifting, although the 'failure to state reasons' [Article 52 (1) (e)] has laid to extensive interpretations which can be seen as pulling towards requests for annulment towards appeals proceedings.

The problems concerning the failure to state reasons are in most respects very similar to those concerning the failure to apply the proper law. Exactly as the latter should only be found in case of failure to apply a proper system of law as a whole and not an erroneous application of a given legal rule, the failure to state reasons can only be invoked when a Tribunal fails to state any

reason, by contrast with failure to state convincing reasons.⁸⁶ For this reason too, the annulment decision in *Enron* is questionable since in that case the *ad hoc* Committee concluded 'that the Tribunal [...] failed to state reasons for that decision, within the meaning of Article 52 (1) (e) of the ICSID Convention' for the reason that '[t]he Tribunal nowhere states expressly that it finds the requirement in Article 25 (1) (b) of the International Commission on the Responsibility of States for Internationally Wrongful Acts 2001 (ILC) [on the state of necessity] not to be satisfied in this case. The Committee considers it unclear whether the Tribunal ultimately did make such a finding or not.'⁸⁷ This again goes beyond what is provided for in Article 52 of the Convention.

Without taking part in the 'religious war' concerning the usefulness of an appeals facility and entering into a more detailed discussion of what are the limits of an *ad hoc* committee, it seems hardly controversial that:

- Firstly, there are limits (which for the main part can be discovered by common sense with a view to give a real meaning, *effet utile*, to the careful drafting of Article 52⁸⁸) and the 'extraordinary and narrowly circumscribed' nature of this remedy—to repeat the words used by Aron Broches⁸⁹—must be preserved;
- Secondly, one of these common sense limits is that *ad hoc* committees are not school masters and should abstain from lecturing the 'first instance' panels when a position on a particular aspect of the award concerned is not necessary for the annulment decision. Here again Professor Schreuer's criticism of the posture assumed by arbitrators behaving like educators cannot but be approved: 'Some *ad hoc* committees seem to believe that they have a pedagogical function. That they have superior insights which it is their duty to impart upon the investment arbitration community. In some of the recent cases *ad hoc* committees assumed the role of supreme court judges whose task is to give policy guidelines or of educators who dispense gratuitous advice';⁹⁰

⁸⁶ See *Continental Casualty Company* (n 12) 100 and the cited case-law; see also para 103. See also *Vivendi I*, ICSID Case No. ARB/97/3, Decision on annulment (3 July 2002) 64, and *AES Summit Generation* (n 6), which accept that 'annulment may be permitted in the exceptional circumstance that a tribunal's reasons are so contradictory that they effectively amount to no reasons at all.' (para 53 of *AES Summit Generation*).

⁸⁷ *Enron v Argentina* (n 12) 384.

⁸⁸ On the drafting history of this provision, see eg A Broches, 'Awards Rendered pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 *ICSID Review* 298–303.

⁸⁹ *AES Summit Generation* (n 6) 17.

⁹⁰ Schreuer (n 55) 223. The question whether the *ad hoc* committees could resort to *obiter dicta* is a different one.

⁸³ Schreuer (n 55) 220 (footnotes omitted).

⁸⁴ *MINE v Republic of Guinea*, ICSID Case No. ABR/84/4, Decision on annulment (22 December 1989) 5.08.

⁸⁵ Schreuer (n 55) 221; see also Nair and Ludwig (n 57) 3.

- Thirdly (and this will probably be more controversial), in conformity with the rules concerning the appointment of the members of the *ad hoc* committees, it would probably be commendable that, as far as possible, the Chairperson of the Administrative Council (who enjoys some discretion in that matter) insures some continuity in the composition the Committees in order to promote the continuity and consistency of the jurisprudence.⁹¹ This might be too romantic a view; but, if so, it is certainly essential that participants in *ad hoc* committees do not see themselves as legislators, pushing for their own ideas in one direction or another, but more as ‘consolidators’ and ‘formalizers’ of the existing law.⁹²

This, indeed, should be the first item on the agenda, correctly applying the annulment mechanism provided for in Article 52 of the Convention. Then, but only second, time should come for a dispassionate debate on the improvement of the existing system and/or the creation, in parallel or instead, of an appeals facility. Further, a unified mechanism for the settlement of investment disputes might be envisaged; but this belongs to a remote future and is a wild goal as long as the international (or transnational) law of investments mainly consists of a web of bilateral commitments on which the transplant of a centralized system could not work; such a system could only be realistically foreseen if and when a global multilateral convention on the protection of investments could be adopted—it is not something for tomorrow or the next... In any case, it is important to proceed step by step and not to jeopardize a system which remains fragile and, although it is indeed not immune from criticisms, whose advantages certainly prevail over its inconveniences. For the present time, annulment *faute de mieux* is the most sensible conclusion.

⁹¹ For discussions of more radical proposals, see eg T Wälde, ‘Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy’, in (2008/2009) *Yearbook on International Law and Policy* 505–84; or Yannac-Small (n 11) 623–5.

⁹² See Dimsey (n 17) 177–8 and Stockford (n 21) 328–9 (citing B Daly and F Smith, ‘Comment on the Differing Legal Frameworks of Investment Treaty Arbitration and Commercial Arbitration as Seen Through Precedent, Annulment, and Procedural Rules’, in AJ van den Berg (ed) *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 163; or Tams (n 22) 25.