

**ICSID VERSUS NON-ICSID INVESTMENT TREATY ARBITRATION**  
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**I. Introduction. – II. ICSID and non-ICSID arbitration: differences of a general nature. – III. ICSID and non-ICSID arbitration: specific differences. a) Independence of the arbitrator; b) The Tribunal's jurisdiction; c) The arbitral proceeding; d) The challenge of the award; e) The enforcement of the award. – IV. Concluding remarks.**

**I. INTRODUCTION**

1. Bernardo Cremades, to whom this paper is dedicated, has been and still is extensively involved in investment treaty arbitration. The subject of this contribution seems therefore to match well one of Bernardo's fields of professional activity.
  
2. According to a qualified source, at the end of 2007 the cumulative number of known investment treaty arbitration cases reached 290<sup>1</sup>. 73 States were involved, 44 of developing countries, 15 of developed countries and 14 of South-East Europe and the Commonwealth of Independent State (CIS). Argentina ranked first with 46 claims, followed by Mexico with 18 and the Czech Republic with 14<sup>2</sup>. The same source indicates that the great majority of these cases (78%) were initiated on grounds of violation of a bilateral investment treaty (BIT), followed by the North American Free Trade Agreement (NAFTA) (13%) and the Energy Charter Treaty (6%), with two cases initiated on grounds of violation of the Central American Dominican Republic – United States Free Trade Agreement<sup>3</sup>. In 2008 known treaty-based investor-state dispute settlement cases have reached the number of 317, out of which 201 were filed with ICSID (or the ICSID Additional Facility), 83 under the

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<sup>1</sup> United Nations Conference on Trade and Development (UNCTAD), Latest development in investor – State dispute Settlement, ILA Monitor, N° 1 (2008), International Investment Agreements, UNCTAD/WEB/ITE/IIA/2008/3, p.1. The number of cases mentioned in the text does not include those exclusively based on investment contracts (*ibidem*, footnote 1).

<sup>2</sup> *Ibidem*, p. 2.

<sup>3</sup> *Ibidem*.

UNCITRAL Rules, 17 with the Stockholm Chamber of Commerce (“SCC”), five with the International Chamber of Commerce (“ICC”) and five were *ad hoc*<sup>4</sup>.

3. BITs, NAFTA, Energy Charter Treaty and other investment protection treaties offer to investors, as a rule, more than one alternative method of arbitration. Those most commonly referred to are the following: the ICSID Convention; the ICSID Additional Facility Rules; the UNCITRAL Arbitration Rules of 1976 (“UNCITRAL Rules”); the Rules of Arbitration of the ICC of 1998 (“ICC Rules”); the LCIA Arbitration Rules of 1998 (“LCIA Rules”); the Arbitration Rules of the Arbitration Institute of the SCC of 2007 (“SCC Rules”).
4. While BITs differ regarding offered methods of dispute settlement, the NAFTA and the Energy Charter Treaty identify specific methods.

Article 1120 in the NAFTA’s Chapter 11 on Investments provides:

“1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

- (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
- (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
- (c) the UNCITRAL Arbitration Rules.”

Article 26(4) of the Energy Charter Treaty provides:

“(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph 2(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

- (a) (i) the International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and National of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

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<sup>4</sup> UNCTAD, ILA Monitor N° 1 (2009), p. 2.

- (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the “Additional Facilities Rules”), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;
- (b) a sole arbitrator or *ad hoc* arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); or
- (c) an arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce.”

5. Out of the 290 investment treaty arbitration cases, 182 were filed with ICSID, including ICSID Additional Facility Rules (62%), 80 under the UNCITRAL Rules (28%), 14 under the SCC Rules (5%), 5 under the ICC Rules (2%) and 5 under *ad hoc* arbitration (2%) and few others in unknown *fora* (1%)<sup>5</sup>.

An attempt to analyse the reasons for the investor’s choice of a given method of dispute settlement among those alternatively offered by a BIT or a multilateral investment treaty (such as the NAFTA or the Energy Charter Treaty) may assist in identifying trends in the search for better investment protection through arbitration and possible grounds of dissatisfaction (or merely preference) for one specific method of dispute settlement.

In many cases, the choice of non-ICSID arbitration is due to the circumstance that one of the States involved is not a party to the ICSID Convention.<sup>6</sup> However, there are cases where either the investor or the State has chosen a method of arbitration other than the ICSID Convention, although the latter was available to it<sup>7</sup>.

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<sup>5</sup> *Ibidem*, pages 1-2.

<sup>6</sup> In the case of Canada and Mexico regarding disputes under NAFTA or of the Federation of Russia regarding disputes under BITs to which it is party. On March 14, 2008 Canada passed legislation enabling it to ratify the ICSID Convention; however, such ratification has not yet been made.

<sup>7</sup> In the case of the arbitration proceeding between *National Grid P.L.C. v. The Argentina Republic*, based on the BIT between United States and Argentina (both States being parties to the ICSID Convention), the investor has opted for the UNCITRAL Rules. In the case of the arbitration proceeding between *AWG Group Ltd v The Argentina Republic*, based on the BIT between the United Kingdom and Argentina (both States being parties to the ICSID Convention), Argentina did not agree to extend ICSID jurisdiction to the claims of AWG, thus making applicable UNCITRAL Rules but accepting ICSID administration of the case (Decision

The inquiry into the reasons for investors' choice cannot but be based on the review of the essential features of each method of arbitration and the respective pros and cons. To this end, the dispute settlement methods provided by investment treaties may be conveniently grouped in two categories, ICSID and non-ICSID, the former consisting of the ICSID Convention, the latter of all others (including ICSID Additional Facilities Rules).

## II. ICSID AND NON-ICSID ARBITRATION: DIFFERENCES OF A GENERAL NATURE

6. The arbitration system under the ICSID Convention differs in many important respects from the other systems of arbitration, including the Additional Facility Rules. This difference bears both upon the rules governing the proceeding and those governing the challenge of awards and their enforcement. In a recent contribution,<sup>8</sup> the advantages to investors of ICSID arbitration have been summarised as follows:

- It provides investors with direct access to a form of settlement of a dispute they may have with a host State.
- It extends the possibility of dispute settlement beyond the realm of national courts in the host State.
- Investors do not depend upon the willingness of their home State to exercise diplomatic protection on their behalf.
- The enforcement provisions of the ICSID Convention make it highly probable that final ICSID awards will be effectively enforceable.

7. The mentioned advantages hardly make all the difference between ICSID and non-ICSID systems of arbitration that may be chosen by an investor under the applicable investment treaty. Also such other systems offer in fact a direct access to a settlement of disputes with the host State with the effect of ousting national courts' jurisdiction, without the need of the home State's assistance through the exercise of diplomatic protection or otherwise, while the probability of effective enforcement of ICSID awards is presently not so high as expected.

The advantage of the ICSID Convention is rather the fact that the investment dispute is

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on Jurisdiction of August 3, 2006 in the consolidated case *Suez and others v. Argentina* and *AWG v. Argentina*, para. 4).

<sup>8</sup> Reinisch–Malintoppi, *Methods of Dispute Resolution*, The Oxford Handbook of International Investment Law, 2008, p. 701.

placed under the framework of an international treaty, which accordingly is the only source of regulation of all aspects of the dispute<sup>9</sup>. The ICSID Convention provides in fact a self-contained system of arbitration, fully autonomous and independent of any national legal systems, including the system prevailing at the place of an arbitration conducted under the Convention. This self-contained regulation covers all aspects of the arbitral proceedings and extends to the challenge of the awards, the latter being regulated only by the Convention, without any interference by national courts or other national authorities, no room for the application of the New York Convention being made regarding enforcement of an ICSID award.

8. The State party to the dispute is bound to respect the obligations undertaken by it under the ICSID Convention not only vis-à-vis the State of the investor's nationality but also all other State parties to the Convention. The fact that the State of the investor's nationality has to abstain from intervening during the currency of the arbitral proceedings<sup>10</sup> avoids that the dispute be influenced by political considerations. As explained by Professor Schreuer,

“[T]he arbitration procedure provided by ICSID offers considerable advantages to both side. The foreign investor no longer depends on the uncertainties of diplomatic protection but obtains direct access to an international remedy. The dispute settlement process is depoliticized and subjected to objective legal criteria.... In turn, the host State by consenting to ICSID arbitration obtains the assurance that it will not be exposed to an international claim by the investor's home State...”<sup>11</sup>

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<sup>9</sup> The text of the ICSID Convention is complemented by the arbitration rules, the administrative and financial regulation, the institution rules, and the conciliation rules of the Convention adopted by the Administrative Council of the Centre under Article 6(1).

<sup>10</sup> According to Article 27(1) of the ICSID Convention, “No Contracting State shall give diplomatic protection or bring an international claim in respect of a dispute which one of its nationals and another contracting state shall have consented to submit or shall have submitted to arbitration under this Convention, ...”.

<sup>11</sup> Schreuer, *The ICSID Convention, A Commentary*, 2001, p. 398. See also, I. Shihata, *Towards a Greater Depoliticization of Investment Disputes, The Roles of ICSID and MIGA*, ICSID Rev. – FILJ, 1 (1986).

However, once an award has been rendered settling the dispute, that same State may exercise diplomatic protection or bring an international claim for violation of the Convention should the State party to the dispute fail to comply with the award<sup>12</sup>.

9. Differently from the ICSID Convention, all other methods of arbitration, including ICSID Additional Facility Rules, provide for the conduct of arbitration under the rules chosen by the parties, which are complemented by the rules of procedure of the legal system of the place of arbitration. This means that, depending on the place of arbitration and therefore on the applicable legal system, non-ICSID arbitrations are subject to different rules of procedure, the award ensuing therefrom is subject to different means of recourse and the recognition and enforcement of such award is in principle governed by the New York Convention.

### **III. ICSID AND NON-ICSID ARBITRATION: SPECIFIC DIFFERENCES**

10. The analysis of the differences between ICSID and non-ICSID cases has now to concentrate on practical aspects. Reference shall be made hereafter to the independence of the arbitrator, the tribunal's jurisdiction, the arbitral proceeding, the challenge and the enforcement of the award in ICSID and non-ICSID cases.

#### *a) Independence of the arbitrator*

11. National laws and judicial precedents offer a worldwide regulation of the requirement of independence and impartiality<sup>13</sup> which should be satisfied by any arbitrator, either by

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<sup>12</sup> Article 27(1) of the ICSID Convention continues by providing: “.. unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute”.

<sup>13</sup> Although the terms “independence” and “impartiality” are sometime used interchangeably, independence relates to the absence of significant connections with a party, its counsel or the object of the dispute while impartiality indicates the absence of prejudice or bias towards the case or a party. Reference in the text to “independence” shall include “impartiality” bearing in mind this difference.

dictating specific rules or by referring more generally to the standards applicable to the national judge.

Provisions regarding the arbitrator's independence and the duty of disclosure are found in the UNCITRAL Rules, the ICC Rules, the LCIA Rules and the SCC Rules, *i.e.* the arbitration rules which are referred to by the parties in non-ICSID cases. These rules, together with the practice of the institutions presiding over their application, are essential to give to the issue of the arbitrator's independence that international dimension that national courts are often reluctant to embrace. Subject to some variations, these rules prescribe a duty of disclosure, both at the outset and during the proceeding, of "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties"<sup>14</sup> or if "circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence"<sup>15</sup>. To better ensure the requirement of independence, the arbitration rules normally provide that the sole arbitrator or the chairman must have a nationality different from that of the parties, unless the latter have agreed otherwise<sup>16</sup>.

12. The situations that more frequently arise casting doubts on the arbitrator's independence have regard to the relations between the arbitrator and the party appointing him/her or its counsel<sup>17</sup>. Depending on the number of appointments and the time and duration this kind of relation may be held to establish a financial dependence of the arbitrator calling into question his/her independence. Also the appointment by a party of the same arbitrator in two (or more) related cases where the other arbitrators are different may cast doubts over that

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<sup>14</sup> According to the formula of the statement of independence that must be signed by all ICC arbitrators: ICC Rules, Article 7.2.

<sup>15</sup> LCIA Rules, Article 10.3; UNCITRAL Rules, Article 10; SCC Rules, Article 14(2).

<sup>16</sup> ICC Rules, Article 9(5); LCIA Rules, Article 6(1); SCC Rules, Article 13(5); UNCITRAL Rules, Articles 6(4) and 7 (3).

<sup>17</sup> This is the kind of relationship to which particular attention is given by the IBA Guidelines on Conflict of Interest in International Arbitration, approved by the IBA Council on 22 May 2004.

arbitrator's independence in view of his/her privileged knowledge of the facts of the different cases over the other members of arbitral tribunals sitting on the different cases.

13. Lack of independence by the arbitrator according to the applicable rules opens the way to his/her challenge. The competence to decide on the challenge is with the institution according to the applicable rules of arbitration<sup>18</sup>. The request must be filed within a short time limit following the knowledge by the concerned party of the ground for the challenge<sup>19</sup>. Before deciding on a party's request for challenge of an arbitrator, the institution may ask the other party, the concerned arbitrator and the other arbitrators (in case of a panel) to provide their comments on the requested challenge<sup>20</sup>. If the request is met, the institution proceeds to replace the challenged arbitrator and is free either to follow the original nomination process or to appoint a new arbitrator<sup>21</sup>.
14. In an administered arbitration, the institution may have the power to revoke an arbitrator who fails to perform his/her duties or is unable to perform his /her functions<sup>22</sup>. When an arbitrator is to be replaced, the reconstituted arbitral tribunal may determine if and to what extent the prior proceedings shall have to be repeated<sup>23</sup>. According to UNCITRAL Rules, if the presiding arbitrator is replaced any prior hearings shall have to be repeated<sup>24</sup>. There is no

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<sup>18</sup> ICC Court of Arbitration, ICC Rules, Article 11.3; the LCIA Court, LCIA Rules, Article 10.4; the Board, SCC Rules, Article 15(3), the appointing authority designated under Article 6, UNCITRAL Rules.

<sup>19</sup> ICC Rules, Article 11(2): 30 days, LCIA Rules, Article 10(4): 15 days; UNCITRAL Rules, Article 11(1): 15 days, SCC Rules, Article 15(2): 15 days.

<sup>20</sup> ICC Rules, Article 12(4).

<sup>21</sup> ICC Rules, Article 12(4); LCIA Rules, Article 11(1): the UNCITRAL Rules provide that the procedure applied to the appointment of the challenged arbitrator shall apply to his/her replacement.

<sup>22</sup> ICC Rules, Article 12(2); LCIA Rules, Article 10(2); UNCITRAL Rules, Article 13(2); SCC Rules, Article 16(1)(iii).

<sup>23</sup> ICC Rules, Article 12(4); SCC Rules, Article 17(3).

<sup>24</sup> UNCITRAL Rules, Article 14.



provision in the arbitration rules under consideration providing for the suspension of the proceeding until the arbitral tribunal is reconstituted<sup>25</sup>.

15. The competence of the institution to decide on the challenge does not prevent the party which is dissatisfied with the institution's decision to resort to the competent national court to obtain a new decision<sup>26</sup>. In a recent case, the Paris Court of Appeal has annulled an ICC award for lack of independence of one of the arbitrators (who was also the chairman of the arbitral tribunal) notwithstanding that a request for the challenge of that arbitrator had previously been examined and rejected by the ICC Court<sup>27</sup>. The challenge was based on the circumstance that the chairman had failed to give precise and full information during the proceeding regarding the relations between the law-firm to which he was structurally linked and the claimant in the arbitration. Following a partial award, the chairman had tendered his resignation. The partial award was annulled by the court for irregular composition of the arbitral tribunal under Article 1502.2 of the French code of civil procedure. In a UNCITRAL arbitration case, the District Court of The Hague found that the challenge of an arbitrator was justified and invited him to resign. This, despite a prior decision of the Permanent Court of Arbitration at The Hague (as appointing authority) dismissing the challenge<sup>28</sup>.

Under the English Arbitration Act 1996, the court retains the power to remove an arbitrator following the exhaustion by the applicant party of any available recourse to the arbitral institution<sup>29</sup>.

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<sup>25</sup> The English Arbitration Act 1996 provides that the arbitral proceedings may continue while an application to the court to remove an arbitrator is pending: Sect. 24(3).

<sup>26</sup> Some national laws allow the parties to exclude the national court's competence in the presence of institutional arbitration. This was the case of Italian law on arbitration of 1994 (Article 836 of the code of civil procedure, repealed by Legislative Decree No. 40 of 2 February 2006).

<sup>27</sup> Paris Court of Appeal, *Arrêt* of 12 February 2009, *S.A. J&P AVAX SA v. Société Tecnimont SPA*.

<sup>28</sup> District Court of The Hague, 18 October 2004 (available in English at <http://transnational-dispute-management.com>, in the case *Telekom Malaysia Berhad v. Republic of Ghana*).

<sup>29</sup> Arbitration Act 1996, Sect. 24 (2).

16. ICSID Convention provides that members of the Panels of Arbitrators designated by the Contracting States must have “high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment”<sup>30</sup>. In addition, except if the parties agree otherwise, no nationals of either the Contracting State party to the dispute or the Contracting State whose national is party to the dispute may be appointed as arbitrators<sup>31</sup>. This rule limits each party’s freedom under ICSID arbitration to select persons of their nationality as party-appointed arbitrator. It is a recognised advantage for a party in an international context to have as arbitrator a person of the same social, cultural and legal environment as a better interpreter of the party’s motivations and claims. The limitation prescribed by the ICSID system is however justified by the opportunity to avoid the State’s practice to appoint as arbitrators public officers of the same nationality, much to the detriment of the independence requirement in the eyes of the parties.

17. Independence and impartiality of all arbitrators are implied by the ICSID Convention and may give rise to a challenge of the arbitrator who fails to fulfil the relevant duty. An arbitrator may also be disqualified if he/she was not eligible for appointment. Each ICSID arbitrator must sign a declaration before or at the first session of the Tribunal, the text of which is as follows:

“To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between \_\_\_\_\_ and \_\_\_\_\_.

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<sup>30</sup> ICSID Convention, Article 14(1). Whenever the Chairman of the Administrative Council of ICSID has to appoint members of arbitral tribunals or annulment committees under, respectively, Article 40(1) and Article 52(3) of the Convention, it shall have to appoint persons from the Panel of Arbitrators designated by the Contracting States.

<sup>31</sup> ICSID Convention, Article 39(1); ICSID Arbitration Rule 1(3).

“I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.

“I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Others States and in the Regulations and Rules made pursuant thereto.

“Attached is a statement of (a) my past and present professional business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgement to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceedings.”<sup>32</sup>

18. The disqualification of an arbitrator for lack of the required qualities, which however must be “manifest”, or by reason of his/her ineligibility may be proposed by any party<sup>33</sup>. The proposal should be filed “promptly” and in any case before the proceeding is declared closed<sup>34</sup>. The decision regarding the proposed disqualification is entrusted to the other members of the Tribunal. If the latter are unable to agree or if a sole arbitrator is proposed to be disqualified, the decision on the disqualification shall be taken by the Chairman of the Administrative Council<sup>35</sup>. The proceeding shall be suspended until a decision on the proposed disqualification has been taken<sup>36</sup>. The peculiarity of this procedure is given by the circumstance that the decision on the disqualification is to be taken by the other members of the same tribunal. On the one hand, due to the erratic composition of ICSID tribunals it is difficult to secure a consistent practice regarding disqualification decisions<sup>37</sup>. On the other hand, the exercise of this power of disqualification may be a source of embarrassment for the other members of the tribunal who, being asked to take a sensitive decision regarding a

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<sup>32</sup> ICSID Arbitration Rule 6 (2). The same declaration is to be signed under the Additional Facility Arbitration Rules, Article 13(2).

<sup>33</sup> ICSID Convention, Article 57(1) and Arbitration Rule 1(3); Additional Facility Arbitration Rules, Article 15(1).

<sup>34</sup> ICSID Arbitration Rule 9(1); Additional Facility Arbitration Rules, Article 15(2).

<sup>35</sup> ICSID Convention, Article 58; Arbitration Rule 9(4); Additional Facility Arbitration Rules, Article 15(5)..

<sup>36</sup> ICSID Arbitration Rule 9(6); Additional Facilities Rules, Article 15(7).

<sup>37</sup> ICSID Secretariat normally provides assistance by informing about ICSID prior decisions in the field.

fellow arbitrator, may have an inclination to reject the request, except in case a manifest ground for disqualification exists. In this last regard, the view expressed by a well-known commentator may be shared that there may be “the public perception that the world of international arbitration is an exclusive club where the interests of members take priority over the parties’ interests”<sup>38</sup>.

19. ICSID rules do not provide any indication of the kind of relations that should be disclosed by an arbitrator to satisfy the parties of his/her independence. The practice in the field of international commercial arbitration offer useful guidance also in the case of ICSID arbitration. Thus, a continuing relationship with a party or counsel, making believe that a financial link exists, is to be disclosed<sup>39</sup>. As shown by some decisions, addressing challenge of ICSID arbitrators, ICSID has features of its own.

20. The explosion of BITs in the more recent phase has determined a parallel increase of arbitration cases brought before ICSID based on violation of a bilateral treaty. Leaving aside other investment protection treaties, such as the NAFTA or the Energy Charter Treaty, it is a recognised fact that more and more BITs tend to follow a common scheme both as to standards of protection and formulation of individual standards. This commonality has brought about a parallel commonality of the type of disputes that are referred to ICSID arbitration. Disputes follow infact a similar pattern both as to claims by investors and defences by States (including objection to jurisdiction). ICSID cases being a matter of public

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<sup>38</sup> Malintoppi, *Independence, Impartiality and Duty of Disclosure of Arbitrators*, The Oxford Handbook, p. 805.

<sup>39</sup> An arbitrator in *Amco Asia v. Indonesia* (ICSID Case Arb/81/1) had given tax advice to the individual who controlled the claimant and, in addition, the arbitrator’s law firm and claimant’s counsel had a profit sharing arrangements and a joint office. The other arbitrators rejected the proposed challenge noting that some degree of acquaintance is not sufficient to disqualify an arbitrator unless there is a “manifest” or “highly probable” lack of impartiality, that did not exist in the particular case (reported in Malintoppi, *Independence, Impartiality, cit.*, pp. 794-795).

record, the name of the arbitrators involved in each case and –through awards that most of the time are published – the decisions they have taken are in the public domain.

21. The end result of this situation is that, when selecting an arbitrator for a new case, utmost attention is devoted by the parties to the position taken by prospective candidates regarding issues that most likely will be considered in the new arbitration. While investors will tend to give preference to those personalities that have expressed a favourable position to the investment protection, States will concentrate their attention on those personalities whose record shows an attitude favouring States' position in general<sup>40</sup>. Since this process of selection involves inevitably also the presiding arbitrator, be it to be chosen by the parties (or their appointed arbitrators) or by ICSID, the result is that a long time is normally required before an agreement is found and a tribunal is fully constituted.

22. The above-described factors conditioning the selection of investment treaty arbitrators, being more psychologically than rationally motivated, do not render justice to the independence and impartiality of those personalities that normally act as arbitrators in treaty investment disputes. Be that as it may, these same factors may prompt a party to challenge the arbitrator appointed by the other party in view of decisions taken by the former in other cases involving similar questions or by reason of opinions expressed in doctrinal writings on question to be determined by the tribunal. Two cases addressing challenge of arbitrators in cases involving ICSID are illustrative.

23. In the ICSID case *Saipem SPA v. The Peoples' Republic of Bangladesh* (Case N° ARB/05/7) the State objected to the arbitrator appointed by the claimant-investor in view of the

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<sup>40</sup> The above considerations explain why comments in private circles point to a kind of classification of the best known arbitrators as either “investor-oriented” or “State-oriented”.

professional relations of such arbitrator with claimant's counsel and the fact that he had expressed opinions in his writings showing preconceived positions regarding some central issues of the arbitration. The other arbitrators rejected the challenge, considering that there was no evidence of impropriety in the relations with claimant's counsel and that doctrinal opinions expressed in the abstract do not affect the arbitrator's impartiality and independence.

24. In an UNCITRAL case, *Telekom Malaysia Berhard v. Republic of Ghana*<sup>41</sup>, the arbitrator appointed by the claimant had disclosed that he had been instructed to act as counsel for one of the parties in the annulment of an ICSID award relied upon by the State in the UNCITRAL arbitration. The State having objected to the appointment of this arbitrator, the latter resigned as counsel in the ICSID annulment case after the District Court of The Hague had invited him to do so or, in the alternative, to resign as arbitrator.

25. Even if the reasons adduced by the State for objecting to the arbitrator appointed by the investor in both the above cases might have offered the basis for the challenge of an arbitrator also in a purely commercial arbitration, these precedents are relevant as showing the extent to which the involvement in investment treaty arbitrations in different capacities – as arbitrator, as counsel, as doctrinal commentator in the field – might be seen by a party as a sign of lack of independence<sup>42</sup>.

b) *The tribunal's jurisdiction*

26. According to Article 25(1) of the ICSID Convention

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any

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<sup>41</sup> *Supra*, point 15 and footnote 25.

<sup>42</sup> In both cases the disputed arbitrators were authoritative personalities in the field of investment arbitration.

constituent subdivision or agency of a Contracting State designated to the Centre by the State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally”.

The provision, which is part of Chapter II (“Jurisdiction of the Centre”), is the core of ICSID arbitration system. It determines ICSID jurisdiction to deal with a case and the tribunal’s competence to adjudicate the dispute *ratione materiae* and *ratione personae*”<sup>43</sup>.

When ICSID arbitration is chosen on the basis of a particular BIT or another investment treaty, the jurisdictional requirements of the chosen treaty will have to be considered to the extent they integrate the Convention’s rules regarding covered “investments” and covered “investors”.<sup>44</sup>

27. Leaving aside the issue of consent<sup>45</sup> and questions arising directly from the provisions of the BIT relied upon by the investor<sup>46</sup>, the jurisdictional objections that more frequently have been raised by respondent States have regard to the requirement under Article 25(1) of ICSID Convention that the dispute

- a) be of a legal nature;
- b) arise directly out of an investment<sup>47</sup>.

Neither of these requirements is provided by BITs or by the arbitration rules to be applied in non-ICSID cases, including ICSID Additional Facility Rules<sup>48</sup>. A requirement that is common to all these cases is that the dispute relates to an “investment”. However, the notion

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<sup>43</sup> Schreuer, *The ICSID Convention – A Commentary*, 2001, p. 89.

<sup>44</sup> Bernardini, *Investment Arbitration under the ICSID Convention and BITs*, Global Reflections on International Law, Commerce and Dispute Resolution, *Liber Amicorum in honour of Robert Briner*, 2005, p. 85 *seq.*

<sup>45</sup> “Consent of the parties is the cornerstone of the jurisdiction of the Centre”: Report of the Executive Directors of the World Bank on the Convention of 6 August 1964, para. 22.

<sup>46</sup> Such as the requirement of prior submission of an investment dispute to local courts or the inapplicability of the BIT to investments made prior to its coming into force, or the requirement that the investment be made “in accordance with the laws of” the host State (Carlevaris, *The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals*, *Journ. World Invest.*, Feb. 2008, p. 35 *seq.*).

<sup>47</sup> Emphasis added in a) and b) in the text.

<sup>48</sup> The Additional Facility Rules are applicable precisely in case “disputes do not arise directly out of an investment”: Article 2(b).

of investment as applied by ICSID cases may differ from the notion prevailing under non-ICSID cases.

*a) be of a legal nature*

28. The Report of the Executive Directors of the World Bank on the Convention clarifies that

“the expression <legal dispute> has been used to make clear that while conflict of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation”<sup>49</sup>.

An authoritative commentator characterizes a legal dispute as follows:

“The dispute will only qualify as legal if legal remedies such as restitution or damages are sought and if legal rights, based on, for example, treaties or legislation are claimed. Consequently, it is largely in the hands of the claimant to present the dispute in legal terms”<sup>50</sup>.

29. Whenever the claimant’s case is based on an investment treaty, it may be assumed that the case is based on legal rights that the claimant alleges have been granted to it under the relevant treaty. Such treaties are not mere statements of good will or good intentions toward the investor and the investments originating from the concerned States, giving rise only to a conflict of interests rather than a conflict of rights. Although it may not be excluded that the specific facts of the case show the absence of a legal dispute, this remains a theoretical proposition. The record shows that this kind of jurisdictional objection has never been accepted in arbitrations based on an investment treaty<sup>51</sup>.

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<sup>49</sup> Report, *cit.*, para. 26.

<sup>50</sup> Schreuer, *The ICSID Convention, cit.*, p. 105.

<sup>51</sup> *Duke Energy International Peru Investment No. 1, Ltd v. Republic of Peru* (ICSID Case No. ARB/03/28), Decision on Jurisdiction, 1 February 2006, para. 90; *Metalpar S.A. y Buen Aire S.A. c/ República Argentina* (ICSID Case No. ARB/03/5), Decision on Jurisdiction, 27 April 2006, para. 98; *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Jurisdiction, 27 April 2006, para. 88; *Suez, Société Générale de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A v. The Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Jurisdiction, 16 May 2006, para. 37 ; *L.E.S.I. S.p.A. et ASTALDI S.p.A. c/ République algérienne démocratique et populaire*, (ICSID Case No. ARB/05/3), Decision of 12 July 2006, para. 68 ; *AWG Group Ltd. v. the Argentina Republic*, (ICSID Case No ARB/03/19), Decision on Jurisdiction, 3 August 2006, para. 37; *Jan de*



*b) arise directly out of an investment*

30. The objection to jurisdiction that the dispute does not arise directly out of an investment is generally based on the contention that the State's measures which are complained of by the claimant were not specifically directed at the claimant's investment but were of general application. This interpretation has been rejected by ICSID tribunals with the argument that Article 25(1) of the Convention requires only a connection of a sufficient degree of directness between the dispute submitted to arbitration and claimant's investment, the adverb "directly" being not related to the link between the measure and the investment but to the link between the dispute and the investment<sup>52</sup>.

31. Several ICSID cases have highlighted how the notion of "investment" under Article 25(1) of the Convention should be construed. According to the test applied by these cases<sup>53</sup>, the following elements must be present: a) a contribution of money or other assets of economic value; b) a certain duration; c) an element of risk; d) a contribution to the host country's development. Other cases have held that these elements "must be considered as mere examples and not necessarily as elements that are required for" the existence of an investment<sup>54</sup>.

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*Nul N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, 3 August 2006, para. 75; *Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction, 21 March 2007, para. 95.

<sup>52</sup> *El Paso v. Argentina, cit.*, para. 100; *AWG Group v. Argentina, cit.*, para. 29; *L.E.S.I S.p.A. et ASTALDI S.p.A., cit.* para. 74; *Saipem v. Bangladesh, cit.*, para. 114.

<sup>53</sup> The so-called "Salini test", from the case *Salini Costruttori S.p.A. v. Morocco* (ARB/00/4, Decision on Jurisdiction of 23 July 2001, para. 52). The test has been applied by *Saipem S.p.A. v. Bangladesh* (Case No. ARB/05/07, Decision on Jurisdiction of 21 March 2007) to assert jurisdiction and by *Malaysian Historical Salvors San Bhd. V. Malaysia* (Case No. ARB/05/10, Decision on Jurisdiction of 17 May 2007) to deny jurisdiction since the underwater salvaging project "did not benefit the Malaysian public interest in a material way..." (para. 131).

<sup>54</sup> *M.C.I. Power Group L.C. and New Turbine Inc. v. Ecuador* (Case No. ARB/03/06, Award of 31 July 2007). On the issue, generally, see E. Gaillard "Identify or define? Reflections on the evolution of the concept of investment in ICSID practice", in *International Investment Law for the 21<sup>st</sup> Century. Essays in Honour of Christopher Schreuer*, (OUP, 2009, Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich, eds.) p.403.

32. Even if objections to jurisdiction based on Article 25(1) of ICSID Convention have not been accepted by ICSID tribunals, their filing by respondent States has caused and continue to cause considerable delay to the proceeding (as an average, two years pass between the date of the tribunal's first session and the decision on jurisdiction), the objection been normally decided as a preliminary question, separate from the merits of the dispute<sup>55</sup>. In order to limit this negative result, by virtue of an amendment to the ICSID Arbitration Rules the tribunal is now empowered to expeditiously consider and decide an objection that "*the claim is manifestly without legal merit*"<sup>56</sup>. However, the applicability of this rule may only have regard to a limited number of cases.

*c) The arbitral proceeding*

33. Once the tribunal is fully constituted, ICSID proceeding follows a scheme that is common to commercial arbitration proceedings and to proceedings in non-ICSID cases, including the division into a written phase followed by an oral phase<sup>57</sup>. Parties' autonomy prevails in providing for the most convenient conduct of the proceeding depending on the circumstances of the particular case. ICSID Convention provides that

"Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question"<sup>58</sup> (emphasis added).

Few aspects are worth mentioning.

*i) The Convention's exclusive regulation*

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<sup>55</sup> ICSID Convention, Article 41(2); Arbitration Rule 41(3)

<sup>56</sup> Arbitration Rule 41(5) (6), in force as of 10 April 2006.

<sup>57</sup> ICSID Convention, Chapter IV, Section 3; Arbitration Rules, Chapters II (Working of the Tribunal), III (General Procedural Provisions) and IV (Written and Oral Procedure).

<sup>58</sup> ICSID Convention, Article 44.

34. As already mentioned, ICSID most relevant feature is that, contrary to non-ICSID cases, the proceeding is regulated only by the Convention and the rules issued thereunder and, to the extent allowed, by the will of the parties. There being no seat of the proceeding in the legal sense, the rules of procedure of the place where ICSID tribunals or annulment committees hold meetings and hearings have no room for application.

*ii) The Centre's assistance to tribunals and committees*

35. The assistance provided by the Centre's Secretariat to tribunals and annulment committees is a prominent feature of ICSID proceedings. Under the Administrative and Financial Regulation, a Secretary is appointed by the Centre's Secretary General for each case<sup>59</sup>. The Secretary shall represent the Secretary-General in performing all functions assigned to the latter by the Convention, Regulations or Rules with regard to the individual proceeding, in acting as the channel between the parties and the tribunal (or annulment committees) and the Centre. Users of ICSID system and members of tribunals and annulment committees regard as highly valuable the Secretariat's work in view of the close assistance and continuous information regarding ICSID practice.

*iii) The tribunal's and committee's inquisitorial power*

36. A significant inquisitorial role is given to tribunals and annulment committees by providing that, except if the parties otherwise agree, they may, if deemed necessary

“a) call upon the parties to produce documents or other evidence and b) visit the scene connected with the dispute and conduct such inquiries there as [it] may deem appropriate.”<sup>60</sup>

A similar inquisitorial power is provided by some arbitration rules governing non-ICSID cases.<sup>61</sup>

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<sup>59</sup> ICSID Administrative and Financial Regulation, Regulation 25.

<sup>60</sup> ICSID Convention, Article 43 and 52(4); Arbitration Rule 34.

*iv) Production of documents*

37. The experience of treaty-based investment disputes shows the great extent to which production of documents or other evidence is requested by the parties during the proceeding. This request causes major problems to arbitral tribunals regarding the admissibility and relevance of the requested evidence and the weight to be assigned to it following compliance by the other party with such request or with the tribunal's order to produce. The massive character of the "request to produce" which is frequently experienced is in part explained by the circumstance that an investment dispute is characterised by the absence of that contractual relationship which is a source of documents and other evidence readily available to the parties in the course of the contract performance by reason of their continuing relationship. For the same reason non-ICSID cases share to a large extent the same experience.

*v) Provisional measures*

38. Of some interest is the analysis of an ICSID tribunal's power to grant provisional measures as compared to the power of arbitral tribunals in non-ICSID cases. The ICSID Convention provides that

"Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party"<sup>62</sup>.

A similar provision is present in the arbitration rules applicable in non-ICSID cases<sup>63</sup>. All such rules provide for the arbitrators' power to require security in connection with the measures and for the parties' right to exclude the arbitrators' power to order interim

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<sup>61</sup> UNCITRAL Rules, Article 24(3); ICC Rules, Article 20; LCIA Rules, Article 22. Under the SCC Rules, the tribunal may order a party to produce documents or other evidence only "at the request of a party": Article 26(3).

<sup>62</sup> ICSID Convention, Article 47; see, also Arbitration Rules 39.

<sup>63</sup> ICC Rules, Article 23; LCIA Rules Article 25; UNCITRAL Rules, Article 26; SCC Rules Article 32.

measures. The law of the place of arbitration is to be considered, particularly regarding the extent to which such power may be exercised by arbitrators.<sup>64</sup>

39. Rather than going through a detailed analysis of differences between ICSID and non-ICSID cases regarding interim measures<sup>65</sup>, it is worth mentioning a particular aspect which makes ICSID's regulation less advantageous to the parties when compared to non-ICSID cases. This concerns the situation confronting a party that, having filed a request for arbitration, requires an urgent measure of protection at a time when the tribunal is not yet constituted. Following para. 6 of Arbitration Rule 39, which was added in 1984<sup>66</sup>, only the ICSID tribunal may recommend provisional measures, except if the parties, when consenting to ICSID arbitration, have agreed that such measures may be requested from any judicial or other authority prior to or after the institution of the proceeding<sup>67</sup>. In view of the manner by which the arbitration agreement is concluded under an investment treaty, it is not realistic to think that the parties' agreement regarding resort to national courts will be reached before the date of registration of the request for arbitration,<sup>68</sup> or that it may be reached at all.

40. Thus, in an ICSID arbitration the party requiring a provisional measure has to wait for the tribunal to be constituted in order to have its request acted upon<sup>69</sup>. Considering the long

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<sup>64</sup> According to the Italian code of civil procedure, an arbitrator sitting in Italy has no power to grant interim measures (Article 818).

<sup>65</sup> Such as the difference between the power of an ICSID tribunal to "recommend" interim measure and that of a non-ICSID tribunal to "order" the measures in question. The legislative history of this particular provision of the ICSID Convention shows that the decision not to grant the tribunal the power to order interim measures was taken in view of the respect to be accorded to States' national policy reasons. As ICSID experience shows, measures taken by ICSID tribunals, although only recommended, are generally respected,

<sup>66</sup> The reasons for this addition are explained by Schreuer, *The ICSID Convention, cit.*, Article 26, paras 83-85.

<sup>67</sup> ICSID Arbitration Rule 39(6).

<sup>68</sup> Which is the date when the proceeding is deemed to have been instituted according to Institution Rule 6(2).

<sup>69</sup> A mitigation to this situation is offered by Arbitration Rule 39 (4), providing that "If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the

period of time normally required to constitute a tribunal<sup>70</sup> and the urgency associated with provisional measures, the solution offered by the ICSID system appears unsatisfactory.

41. In order to deal with this problem, the rules of arbitration applicable in non-ICSID arbitrations offer various solutions. First of all, all such rules provide that measures of protection may be requested by a party also to a state court, such a request being expressly considered not incompatible with the arbitration agreement<sup>71</sup>.

Some of these systems of arbitration have in addition regulated how to handle a request for measures of protection which is filed before the tribunal is constituted.

42. As of 1 January 1990, ICC Rules for a Pre-Arbitral Referee Procedure are in force, offering a means of obtaining urgent measures prior to referral to arbitration and the constitution of an ICC arbitral tribunal. These measures are ordered by a referee selected by the parties or, in the alternative, appointed by the Chairman of the ICC International Court of Arbitration. Measures so ordered are binding until the referee or a court or the arbitral tribunal (once constituted) decides otherwise. To be applicable, the Rules in question must have been accepted expressly by the parties in addition to the ICC Rules of Arbitration. The solution is helpful in a commercial arbitration where the contract out of which the dispute arises may, in addition to the standard arbitration clause, make reference also to the Rules for a Pre-Arbitral Referee Procedure. The requirement of an express acceptance makes these Rules of no avail in a treaty-based arbitration where, as a rule, the State's offer of arbitration refer only to the standard ICC arbitration clause, not also to the Rules for a Pre-Arbitral Referee Procedure.

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request, so that the request and observations may be considered by the Tribunal promptly upon its constitution”.

<sup>70</sup> *Supra*, para. 22.

<sup>71</sup> ICC Rules, Article 23(2); LCIA Rules, Article 25(3); UNCITRAL Rules, Article 26(3); SCC Rules, Article 32(4).

43. Contrary to the ICC system of arbitration, the LCIA Rules incorporate provisions for an expedited formation of the arbitral tribunal in case of exceptional urgency, the urgency to be substantiated by the party applying for such expedited formation<sup>72</sup>. This provision facilitates also the prompt examination of a request for measures of protection, the urgency normally associated with these measures justifying the expedited formation of the arbitral tribunal. The advantage with respect to the ICC system is represented by the direct incorporation of this procedure into the LCIA Rules. Reference by an investment protection treaty to LCIA Rules as one of the offered methods of arbitration does not require, therefore, any additional mutual consent at the time the offer is accepted by the investor in order for the expedited formation of the arbitral tribunal to be implemented.

44. In March 2009 the SCC Arbitration Institute has announced the intent to amend the existing rules of arbitration regarding interim measures<sup>73</sup> by regulating a request for such measures made before the case has been referred to the arbitral tribunal. The draft that has been circulated provides for the appointment of an “Emergency Arbitrator on Interim Measures”, with the power to issue any emergency decision on interim measures within a very short time limit from the date of the party’s application. The decision shall be binding on the parties until the emergency arbitrator or the arbitral tribunal (once constituted) decide otherwise. The advantage of the system is given by the incorporation of this new regulation into the SCC Rules through an Appendix to the Rules. Accordingly, reference in an investment treaty to the SCC Rules shall include the specific rules contained in this Appendix. As currently drafted,<sup>74</sup> the entry into force clause makes the new rules applicable

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<sup>72</sup> LCIA Rules, Article 9.

<sup>73</sup> SCC Rules, Article 32.

<sup>74</sup> SCC Arbitration Institute, SCC Rules on an Emergency Arbitrator on Interim Measures, Entry into Force clause: “These Rules enter into force on 1 October 2009 and will replace the former SCC Rules. These Rules

in all cases in which a request for arbitration is received by the SCC Institute<sup>75</sup> after 1 October 2009.

*d) The challenge of the award*

45. Means of recourse against an ICSID award are regulated by the ICSID Convention, Non-ICSID awards may be challenged according to the applicable State law, normally the law of the seat of arbitration.

*i) Revision*

46. The analysis will briefly consider those means of recourse against the award that are regulated only by few arbitration systems and which are in any case of limited application, such as revision (or revocation) and third-party opposition.

ICSID Convention regulates revision of awards whenever a fact is discovered “*of such a nature as decisively to affect the award*”, if such fact was unknown to the tribunal and to the applicant, not due to the latter’s negligence<sup>76</sup>. The request for revision is submitted to the same tribunal which rendered the award or, if this is not possible, to a new tribunal to be constituted to that purpose. Pending a decision on the revision, the tribunal may or not confirm the stay of the enforcement of the award, which is provisionally applied whenever a request for revision is filed<sup>77</sup>. The outcome of the process of revision is either the confirmation of the award or a change of points of the award as requested by the applicant<sup>78</sup>. ICSID practice indicates that three requests for revision has been filed until now<sup>79</sup>.

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will be applied to any arbitration commenced on or after 1 October 2009, unless otherwise agreed by the parties”. The Draft New Rules with Notes, of March 2009, is available on [http://www.chamber.se/filearchive/2/25120/Rules\\_on\\_an\\_Emergency\\_Arbitrator\\_on-Interim\\_Measures\\_NOTES.pdf](http://www.chamber.se/filearchive/2/25120/Rules_on_an_Emergency_Arbitrator_on-Interim_Measures_NOTES.pdf)

<sup>75</sup> This being the date on which the arbitration is deemed to commence: SCC Rules, Article 4.

<sup>76</sup> ICSID Convention, Article 51; Arbitration Rule 51.

<sup>77</sup> Arbitration Rule 54(2)(3).

<sup>78</sup> Arbitration Rule 50(1)(c)(ii).

<sup>79</sup> The first request was filed on January 29, 1999 regarding the Award of February 21, 1997 in the case *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo*; a second request for revision registered on July 9, 2009 relates to the *Siemens A.G. v. Argentine Republic*



47. Contrary to the ICSID Convention, neither the Model Law nor the majority of the national legal systems that have not adopted the Model Law regulate revision (or revocation) of awards. Specifically, no such means of recourse is contemplated by English, French, Swiss and Swedish laws on arbitration, *i.e.* the European legal systems within which the place of an investment treaty arbitration is more frequently located<sup>80</sup>. Third party opposition and revision as means of recourse against an award are contemplated by few legal system. French law regulates “*révision*” and “*tierce opposition*” only if the arbitration is not international, therefore not regarding awards rendered in an investment treaty arbitration.

*ii) Annulment*

48. By far the most important and widespread means for challenging an award is the recourse for annulment. The ICSID system must be differentiated from the other systems of arbitration in many regards, as shown by the following analysis.

*Grounds for annulment*

Under the ICSID Convention, a party may request the annulment of the award for one or more of the following grounds:

- “a) the Tribunal was not properly constituted;
- b) the Tribunal has manifestly exceeded its powers;
- c) there was corruption on the part of a member of the Tribunal;
- d) there has been a serious departure from a fundamental rule of procedure;
- e) the award has failed to state the reasons on which it is based”<sup>81</sup>.

49. Under the ICSID system, the grounds for annulment are limited and exhaustive.

They cannot be excluded by the parties. They cannot transform the annulment

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Award rendered on February 6, 2007. A further request relates to the *Victor Pey Casado and President Allende Foundation v. Republic of Chile* Award of 8 May 2008, the application for revision having been registered on June 17, 2008.

<sup>80</sup> Dutch Law of 2 July 1986, amending the Code of Civil Procedure, regulates in Article 1068 revocation of an award if, after the award is made, fraud or the forgery of documents on which the award was based is discovered, or a party obtains documents which would have influenced the decision but were withheld as a result of acts of the other party. If the grounds for revocation are found to be correct, the judge shall set aside the award, in whole or in part.

<sup>81</sup> ICSID Convention, Article 52(1).

proceedings into an appeal. The grounds more usually invoked, often in combination, are: manifest excess of powers<sup>82</sup>; serious departure from a fundamental rule of procedure<sup>83</sup>; failure to state reasons<sup>84</sup>. The other two grounds (improper constitution of the tribunal and corruption of an arbitrator) have never been invoked. The circumstance that the excess of powers must be “*manifest*” or that the departure from a rule of procedure has to be “*serious*” and must concern a rule that is “*fundamental*” is indicative of the object and purpose of the Convention to provide for a very high threshold for annulment.

50. The annulment of a non-ICSID award (including an award rendered under the Additional Facility Rules) is regulated by the rules of procedure of the law of the place of arbitration. This law controls grounds of recourse, time-limits for filing a recourse, competent court, effects of the annulment and sometime whether an appeal against the lower court’s decision is available. Considering that, most frequently (but not limited to), Paris, London, Stockholm and Geneva are chosen as the place of investment treaty arbitration in Europe, it is worth examining the

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<sup>82</sup> *Klöckner Industrie Anlagen v. United Republic of Cameroon*, 3 May 1985, (1985) 2 ICSID Rep., 95; *Amco Asia v. Republic of Indonesia*, 16 May 1986, (1986) 1 ICSID Reports, 509; *Maritime International Nominees Establishment v. Republic of Guinea*, 22 December 1989, 3 ICSID Rev.–FILJ, 1990, 95; *Compañía de Aguas del Aconquija and Vivendi International v. The Republic of Argentina*, 3 July 2002, IAI Arbitration Series- n. 1, *Annulment of ICSID Awards*, 2004, Annex 4; *Wena Hotels v. Arab Republic of Egypt*, 5 February 2002, IAI Arbitration Series n. 1, cited, Annex 2; *Patrick Mitchell v. The Democratic Republic of Congo*, 1 November 2006; *MTD Equity v. Chile*, 21 March 2007.

<sup>83</sup> *Klöcker v. Cameroon*; *Wena Hotels v. Egypt*; *Vivendi v. Argentina*,; *MTD v. Chile*, *supra* note 81.

<sup>84</sup> *Klöckner v. Cameroon*, *supra* note 81; *CMS GAS Transmission Co. v. The Republic of Argentina*, 25 September 2007; *Vivendi v. Argentina*, *supra* note 81; *CDC Group v. Republic of Seychelles*; *Wena Hotels v. Egypt*, *supra* note 81; *MTD v. Chile*, *supra* note 81, *Mitchell v. Congo*, *supra* note 81.

procedural rules prevailing at these places, as well as the rules of the Model Law, regarding challenge of awards<sup>85</sup>.

51. The Model Law provides that an award may be set aside if:

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

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

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

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

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

(b) the court finds that:

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

(ii) the award is in conflict with the public policy of this State”<sup>86</sup>.

52. Legal systems that have not adopted the Model Law provide for grounds for annulment which differ in part from those of the Model Law.

Thus, under Swedish law an award is invalid, in whole or in part:

“ 1. if it includes determination of an issue which, in accordance with Swedish law, may not be decided by arbitrators;

2. if the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system; or

3. if the award does not fulfil the requirements with regard to the written form and signature in accordance with section 31, first paragraph”<sup>87</sup>.

Under the Swedish law an award may be set aside:

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<sup>85</sup> UNCITRAL Model Law of 21 June 1985 is commonly held as the most updated regulation of international commercial arbitration. It has been adopted by the internal legislation of more than fifty States.

<sup>86</sup> Model Law, Article 34.

<sup>87</sup> Swedish Arbitration Law of 1 April 1999, Article 33.

“1. if it is not covered by a valid arbitration agreement between the parties;  
2. if the arbitrators have made the award after the expiration of the period decided on by the parties; or where the arbitrators have otherwise exceeded their mandate;  
3. if arbitral proceedings, according to section 47, should not have taken place in Sweden;  
4. if an arbitrator has been appointed contrary to the agreement between the parties or this Act;  
5. if an arbitrator was unauthorized due to any circumstances set forth in sections 7 or 8; or  
6. if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case”.<sup>88</sup>

53. Under Swiss law an award may be set aside:

“a. where the sole arbitrator has been incorrectly appointed or where the arbitral tribunal has been incorrectly constituted;  
b. where the arbitral tribunal has wrongly declared itself to have or not to have jurisdiction;  
c. where the award has gone beyond the claims submitted to the arbitral tribunal, or failed to decide one of the claims;  
d. where the principle of equal treatment of the parties or their right to be heard in adversarial procedure has not been observed;  
e. where the award is incompatible with public policy”<sup>89</sup>.

54. The French Code of Civil Procedure provides in Article 1504 that,

“The action for setting aside is available against arbitral awards rendered in France in international arbitration, on the grounds of Art. 1502. No recourse is available against court orders granting exequatur of such awards. However, the setting aside procedure, within the limits of the case before the court, entails *ipso jure* recourse against the order of the enforcement court or termination of the action before it”.

The grounds under Article 1502 are the following:

“1. If the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is valid or that has expired;  
2. if the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;  
3. if the arbitrator has not rendered his decision in accordance with the mission conferred upon him;  
4. if due process has not been respected

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<sup>88</sup> Swedish Arbitration Law, Article 34.

<sup>89</sup> Swiss Private International Law (“PIL”) of 18 December 1987, Article 190.

5. if recognition or enforcement is contrary to international public policy”<sup>90</sup>.

(iii) *Competence*

55. Under the ICSID Convention, the decision on the request for annulment is rendered by a three-member *ad hoc* Committee appointed by the Chairman of the Administrative Council from ICSID Panel of Arbitrators<sup>91</sup>. The grounds for annulment must be raised by the party in its request for annulment. Only if it considers that the Centre’s jurisdiction and the Tribunal’s competence is doubtful, the *ad hoc* Committee may raise *ex officio* the manifest excess of powers of the tribunal, even if this ground was not raised by the applicant party<sup>92</sup>.

56. A recourse for annulment of against an award rendered in Sweden is filed with the Swedish Court of Appeal. In rare cases the latter may grant leave to appeal to the Supreme Court.

In France, the competence is with the Court of Appeal<sup>93</sup>.

Under Swedish law<sup>94</sup> and Swiss law<sup>95</sup> the parties may agree in writing to exclude setting aside proceedings for all or some of the grounds where none of the parties has its residence or place of business in the Country. The condition under Swedish law, however, is that the parties’ relationship is of a commercial nature, which may not be the case of the relationship established under an investment treaty.

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<sup>90</sup> New French Code of Civil Procedure (“NCPC”), Articles 1502 and 1504.

<sup>91</sup> ICSID Convention, Article 52(3); Arbitration Rule 52.

<sup>92</sup> Under the Arbitration Rule 41 (2), the Tribunal may consider on its own initiative whether the dispute is within the Centre’s jurisdiction and its own competence. It may be held that an *ad hoc* Committee might raise a question of jurisdiction on its own motion under Arbitration Rule 41(2), the latter being applicable to the annulment proceedings pursuant to Arbitration Rule 53.

<sup>93</sup> NCPC, Article 1505.

<sup>94</sup> Swedish Arbitration Law, Article 51.

<sup>95</sup> Swiss PIL, Article 192(1).

57. The grounds for annulment under national laws do not normally allow a revision of the merits of the case. They are in general meant to be exhaustive but not so limited in number and narrowly worded as under the ICSID Convention. However, a manifest excess of powers or a serious departure from a fundamental rule of procedure (as provided by the ICSID Convention as grounds for annulment) may well encompass the majority of the grounds for annulment contemplated by national laws. Thus, one of the grounds most frequently found by national courts, the fact that the arbitrator has decided issues outside the scope of its authority, corresponds to a “*manifest excess of powers*” under Article 52(1)(b) of the ICSID Convention.

58. What distinguishes the grounds for annulment under non-ICSID systems is the reference by national laws to principles of the domestic system that their courts have to respect and apply. This is the case of the non-arbitrability of disputes under the *lex fori* or the conflict of the award with the State’s public policy, two grounds that under the Model Law may be raised by the annulment court *ex officio*<sup>96</sup> and that under Swedish law cause the invalidity of the award<sup>97</sup>. In France, the award may be annulled if it is contrary to international public order.<sup>98</sup>

*(iv) Stay of enforcement*

59. Under the ICSID system, the enforcement of the award is provisionally stayed if so requested by the party in its application for annulment until the *ad hoc* Committee, once constituted, is in a position to rule on such request.<sup>99</sup>

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<sup>96</sup> Model Law, Article 34(b).

<sup>97</sup> Swedish Arbitration Law, Article 33.

<sup>98</sup> Article 1504, referring to Article 1502(5), NCPC: Devolvé-Rouche-Pointon, *French Arbitration Law and Practice*, 2003, p. 257 ss.

<sup>99</sup> ICSID Convention, Article 52(5); Arbitration Rule 54(2)).

Upon its constitution, the Committee shall decide whether stay of enforcement should be continued. Unless a decision to continue is taken by the Committee within 30 days following its constitution, the stay shall be terminated. It shall also be terminated at any time thereafter if so decided by the Committee upon request by either party.<sup>100</sup>

ICSID practice shows the tendency of *ad hoc* Committees to confirm the provisional stay of enforcement until a final decision on the request for annulment is taken. In a certain number of cases the continuation of the stay has been made subject to the applicant providing a bank guarantee or other form of security in favour of the other party for the full amount of the award<sup>101</sup>. In other cases no security has been ordered,<sup>102</sup> while in a third series of cases a formal declaration by the applicant State of readiness to fulfil the award in case of rejection of the request for annulment has been accepted in lieu of a security<sup>103</sup>.

60. In non-ICSID cases the recourse for annulment has not automatically a suspensive effect. Under Swiss law, the stay of enforcement is granted only if the recourse is held to have chances of success and if the immediate enforcement would expose the applicant to serious difficulties or to the risk, in case of a successful recourse, of non-recovery of the amount paid under the award. In France, both the time-limit for filing the recourse for annulment of the award and the filing of this recourse stay automatically the enforcement of the award unless the arbitrators

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<sup>100</sup> Arbitration Rule 54(3).

<sup>101</sup> Among others, *Amco Asia v Indonesia*, *supra* note 81; *Wena Hotels v. Egypt*, *ibidem*; *Southern Pacific (Middle East) v. Egypt*; *Repsol Ecuador v. Empresa Estatal Petróleos del Ecuador*.

<sup>102</sup> Among others, *Mine v. Guinea*, *supra* note 81.

<sup>103</sup> As in the following annulment proceedings: *CMS v. Argentina*:

[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC505\\_En&caseId=C4](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC505_En&caseId=C4) ;

*Azurix v. Argentina*:

[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC692\\_En&caseId=C5](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC692_En&caseId=C5)

have stated otherwise<sup>104</sup>. The continuation of the arbitral proceeding is not stayed in France if the recourse is against a partial award. In any case, if the arbitral tribunal has ordered the provisional enforcement of the award, then there will be no stay of enforcement<sup>105</sup>.

Under of the Model Law<sup>106</sup> and the English Arbitration Act<sup>107</sup>, a recourse against a partial award on jurisdiction does not suspend the arbitral proceeding. However, in England the High Court may<sup>108</sup> enjoin the continuation of the arbitral proceeding upon provision by the applicant party of a security, if so justified by the circumstances.

61. Contrary to the stay of enforcement of an ICSID award, which prevents its enforcement in the territory of any Contracting State, stay of enforcement ordered in the context of a non-ICSID award prevents the enforcement only in the territory of the court ordering the stay. Enforcement abroad is governed by the rules of the New York Convention which provide that enforcement of a foreign award “*may be refused*” if the party against which enforcement is invoked furnishes proof that

“the award.... has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”,<sup>109</sup>

where the word “may” suggests some discretion by the court to overrule the defence and to grant the enforcement of the award.<sup>110</sup>

*(v) Decision on jurisdiction*

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<sup>104</sup> NCPC, Article 1506.

<sup>105</sup> NCPC, Article 1500, with reference to Article 1479.

<sup>106</sup> Model Law, Article 16(3).

<sup>107</sup> Arbitration Act 1996, Sect. 67(2).

<sup>108</sup> Under the Supreme Court Act 1981.

<sup>109</sup> New York Convention of 1958, Article V(1) (e).

<sup>110</sup> van den Berg, *The New York Arbitration Convention of 1958*, 1981, p. 265



62. Another difference between ICSID and non-ICSID systems of arbitration concerns the availability of a recourse against the decision upholding jurisdiction. Under the ICSID system only an award denying jurisdiction may be challenged, no recourse being immediately available against a “decision” (which is not an award) upholding jurisdiction. Such decision may be challenged in the context of a recourse for annulment of the award on the merits, normally on the ground of manifest excess of powers of the tribunal.

63. Under all national systems that have adopted the Model Law the arbitral tribunal may rule on a plea by a party that it does not have jurisdiction either in the award on the merits or as a preliminary question<sup>111</sup>. If jurisdiction is upheld as a preliminary question, either party may request the competent court to rule on the matter with a decision which is subject to no appeal. Pending such a decision the arbitral tribunal may continue the proceeding and make an award. The same rules apply under Swedish law.<sup>112</sup> Under the Swiss law, setting aside proceeding may be instituted against the arbitrators’ decision denying or upholding jurisdiction within thirty days following its communication<sup>113</sup>, failing which the decision becomes *res iudicata*.<sup>114</sup>

(vi) *Effects of the recourse for annulment*

64. Under the ICSID system the only effect of a successful recourse for annulment is the setting aside of the award, in whole or in part depending on the applicant’s request and the *ad hoc* Committee’s findings. The latter has no power to vary the

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<sup>111</sup> Model Law, Article 16(3).

<sup>112</sup> Swedish Arbitration Act, Section 2: see Franke, *ICCA International Handbook on Commercial Arbitration*, Sweden, Suppl. 32, December 2000, p. 15.

<sup>113</sup> Swiss PIL, Article 190(2) (b) and (3).

<sup>114</sup> Poudret-Besson, *Droit comparé de l’arbitrage international*, 2002, p. 426.

award or to remit it to the arbitral tribunal for reconsideration. Following annulment, the dispute may be resubmitted to a new arbitral tribunal, in whole or only for the part not covered by the *res judicata* effect in case the award was annulled only partially<sup>115</sup>. An annulled ICSID award may not be enforced in the territory of any Contracting State, since it has lost its binding force<sup>116</sup>.

65. Some national systems regulate other effects of the recourse for annulment, in addition to the total or partial annulment of the award<sup>117</sup>.

Under the Model Law the court, if so requested by a party, may suspend the annulment proceeding to give the arbitral tribunal an opportunity to complete or correct the award, thus eliminating the grounds for its annulment<sup>118</sup>. The same rule applies under Swedish law.<sup>119</sup>

English law provides for a different solution. In case of challenge of the arbitrator's substantive jurisdiction, the court may confirm or "vary" the award<sup>120</sup> or set it aside in whole or in part<sup>121</sup>. In case of serious irregularity affecting the tribunal, the proceeding or the award, the court may either remit the award to the tribunal, in whole or in part, for reconsideration<sup>122</sup> or set it aside in whole or in part<sup>123</sup>. The only solution under French and Swiss laws is the annulment of the award. However, in case of annulment the Swiss Federal Tribunal remits the case

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<sup>115</sup> Among others, the following disputes have been resubmitted to new tribunals: *Klöckner v. Cameroon; Amco Asia v. Indonesia; Mine v. Guinea; Vivendi v. Argentina*.

<sup>116</sup> ICSID Convention, Article 53 (1).

<sup>117</sup> The annulment may relate only to a part of the award if so requested by the applicant, provided that that part is severable from the rest of the award.

<sup>118</sup> Model Law, Article 34(4).

<sup>119</sup> Swedish Arbitration Law, Article 35. This differs from the solution under German law, which provides for the transmission of the award by the court to the arbitral tribunal, where appropriate and upon a party's request, following its annulment, not before: *Zivilprozessordnung*, as amended by the law on arbitration of 22 December 1997, Sect 1059(4).

<sup>120</sup> Arbitration Act 1996, Sect 67(3)(b). In this case the variation becomes part of the award: Sect. 71(2)

<sup>121</sup> *Ibidem*, Sect 67(3)(c).

<sup>122</sup> *Ibidem*, Sect. 68(3)(a). In this case, the arbitral tribunal "shall make fresh award": Sect. 71(3).

<sup>123</sup> *Ibidem*, Sect. 68(3)(b).

to the arbitral tribunal for a new decision which has to conform to the “*considérants*” of the “*arrêt de renvoi*” of the Federal Tribunal<sup>124</sup>. A radical solution is envisaged by Dutch law: unless the parties have agreed otherwise (also by reference to rules of administered arbitration), if the award is set aside the jurisdiction of the court shall revive<sup>125</sup>.

66. Under non-ICSID systems, an award which has been annulled in the country in which it has been rendered may, that notwithstanding, be recognised and enforced in some other States. It is the case of those States that do not recognize in their legal system the ground on the basis of which the award was annulled, in application of Article VII of the New York Convention or on other grounds<sup>126</sup>.

(vii) *Annulment decisions and precedential value*

67. Under the ICSID system, annulment decisions do not form part of a “jurisprudence”, meaning by that that such decisions do not constitute binding precedents. For various reasons, including the varied composition of *ad hoc* Committees (whose members often act also as arbitrators or are chosen from the same professional *milieu* as the arbitrators) and the different language of the various treaties, decisions of *ad hoc* Committees hardly have such a degree of

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<sup>124</sup> Lalive-Poudret-Reymond, *Le droit de l'arbitrage interne et international en Suisse*, 1989, p. 440.

<sup>125</sup> The Netherlands, Law on Arbitration of 2 July 1986, Sect. 1067. This means that the parties' arbitration agreement becomes null and void.

<sup>126</sup> This solution is well established in France following the decision of the Cour de Cassation in the cases *Norsolor* (9 October 1984, *Rev. arb.* 1985, 431), *Hilmarton* (23 March 1994, *Rev. arb.* 1994, p. 327) and, more recently, *Putrabali Adyamulia c. Rena Holding et Moguntia Est Epices* (29 June 2007, *Rev. arb.* 2007, p. 507). The same solution was adopted in the United States by the Federal District Court for the District of Columbia on 31 July 1996 in the case *Chromalloy Aereoservices v. Arab Republic of Egypt* (*ICCA Yearbook*, 1997, p. 1001; ILM 1996, p.1359). However, this solution appears no longer accepted in the United State following the decision of the US Court of Appeals District of Columbia of 25 May 2007 in *Termorio S.A. E.S.P. and Lease Co. Group LLC v. Electricadora Dela Atlantico S.P. and others*, 487 Federal Reports. 3<sup>rd</sup> Series; *Rev. Arb.* 2007, p. 553, note by Paulsson.

homogeneity as to ensure their consistency and coherence<sup>127</sup>. These decisions may constitute a more or less persuasive precedent for subsequent *ad hoc* Committees depending on the authority of the members of the Committee, the quality of the reasoning and the coherence of the conclusions<sup>128</sup>. In the present status of development of the ICSID system it would be rather unsafe for a party to rely on such decisions, due to their non-homogeneous and non-coherent character, when evaluating whether the challenge of an award is warranted under the given circumstances.

68. The debate originated by the first two annulment decisions<sup>129</sup> due to their extensive interpretation of the grounds for annulment (leading to a re-examination of the merits) has centered on the role of *ad hoc* Committees, emphasis being laid on the risk, inherent in an expansive role, of transforming the annulment in an appeal proceeding. Subsequent decisions have helped in restoring the confidence in the system for their more balanced approach<sup>130</sup>. More recently, the ICSID system has been held “to have established with reasonable clarity the extent and limits of the grounds for annulment under Article 52”<sup>131</sup>. One award was annulled

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<sup>127</sup> Homogeneity has been held to be one of the conditions for awards to have an influential value like court decisions, in addition to their publicity (which is normally the case in the ICSID system) and their non revision by the courts: Fouchard, Gaillard, Goldman, *International Commercial Arbitration*, 1999, p. 184.

<sup>128</sup> As stated by the *ad hoc* Committee in the *Azurix v. Argentina* annulment proceedings, such decisions “are single examples of the exercise of jurisdiction under Article 52(5) in particular circumstances” (Decision on the Argentine Republic Request for a Continued Stay of Enforcement of the Award, December 28, 2007).

<sup>129</sup> *Klöckner v. Cameroon*, and *Amco Asia v. Indonesia*, *supra* note 81.

<sup>130</sup> *Mine v. Guinea*, *supra* note 75; *Klöckner v. Cameroon II* (unpublished), *Amco Asia v. Indonesia II* (unpublished); *Wena v. Egypt*, *supra* note 81, *Vivendi v. Argentina*, *supra* note 81.

<sup>131</sup> *MTD v. Chile*, *supra* note 81, par. 54. On ICSID annulment experience, Schreuer, *Three Generations of ICSID Annulment Proceedings*, IAI Arbitration Series n.1, *supra*, note 81, p. 17.

at the end of 2006<sup>132</sup> while in 2007 out of five annulment applications four were dismissed<sup>133</sup> and one only partially accepted<sup>134</sup>.

69. An in-depth analysis of annulment decisions rendered so far under the ICSID system would be beyond the scope of this study. It is worth mentioning the emergence of a level of consensus on the interpretation and practical application of certain grounds for annulment. Thus, failure to apply the proper law is generally held to constitute a “*manifest excess of powers*”<sup>135</sup> while the bad or erroneous application of the proper law is not a ground for annulment<sup>136</sup>. Thus, further, it has been held that in order to annul an award for failure to state reasons this failure

“must leave the decision on a particular point essentially lacking in any expressed rationale, and second, that point must itself be necessary to the Tribunal’s decision”.<sup>137</sup>

Other decisions appear to indulge on a number of *obiter dicta* prompted by some sort of pedagogic inclination of certain *ad hoc* Committees that would have been more justified in the initial phase of the ICSID annulment experience<sup>138</sup>.

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<sup>132</sup> *Patrick Mitchell v. Democratic Republic of Congo* (Case No. ARB/99/7, Decision on Annulment of 7 November 2006).

<sup>133</sup> *Empresa Lucchetti v. Peru* (Case No. ARB/03/4, Decision on Annulment of 5 September 2007); *MTD Equity Sdn Bhd & MTD Chile v. Chile* (Case No. ARB/01/7, Decision on Annulment of 21 March 2007); *Soufraki v. United Arab Emirates* (Case No. ARB/02/7 Decision on Annulment of 5 June 2007); *Repsol YPF Ecuador SA v. Empresa Estatal Petróleos del Ecuador* (Case No. ARB/01/10, Decision on Annulment of 8 January 2007).

<sup>134</sup> *CMS Gas Transmission Company v. Argentina* (Case No. ARB/01/8, Decision on Annulment of 25 September 2007).

<sup>135</sup> *Klöckner v. Cameroon*, *supra* note 81; *Amco Asia v. Indonesia*, *supra* note 81; *Mine v. Guinea*, *supra* note 81.

<sup>136</sup> Among others, *Mine v. Guinea*, *supra* note 81, paras 5.03-5.04; *Repsol YPF Ecuador v. Petroecuador*, 8 January 2007; *CMS v. Argentina*, 25 September 2007 (par. 158).

<sup>137</sup> *Vivendi v. Argentina*, *supra*, note 81, para. 65. Similar views have been expressed by other annulment committees: *Wena Hotels v. Egypt*, *supra* note 81, para 83; *Mine v. Guinea*, *supra* note 81, para 5.08; *MTD v. Chile* *supra* note 81, para. 50.

<sup>138</sup> Lalive, *Concluding Remarks*, IAI Arbitration Series n. 1.

70. In non-ICSID systems courts' judgments, including those following a recourse against the awards, are part of the national jurisprudence. Although the precedential value of courts' judgments may differ in civil law jurisdictions, still a party may place sufficient reliance on prior judgments being upheld by subsequent courts' decisions when it has to evaluate whether to bring a challenge against a non-ICSID award. This is, in particular, the experience of French and Swiss systems, where a rich jurisprudence is available due to the great number of arbitral proceedings being held in France and Switzerland but where annulment of awards is not frequent<sup>139</sup>.

71. Reported challenges of investment treaty awards in national courts total approximately the number of twenty at the end of 2008<sup>140</sup>. In addition, another

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<sup>139</sup> In France, in 5% of the cases, according to a report by Dominique Hascher, judge at the Special Section for arbitration of the Court of Appeal, at a meeting in Paris of the local bar association on 23 November 2006; in Switzerland, in 7% of the cases: Dasser, *International Arbitration Proceedings in Switzerland: a Statistical Analysis*, ASA Bulletin, 2007, n. 3, p. 452.

<sup>140</sup> These challenges are reported in ITA/Investment Treaty Arbitration ( 5 April 2009). They concern the following cases:

- *Canfor Corp. and US Tembec et al v. US and Terminal Forest Products Ltd v. US*, (UNCITRAL – NAFTA), Joint Order of 10 July 2007, Reasons for judgment- Application for Set Aside, 5 May 2008;
- *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Final Award, 14 March 2003, Judgment of 15 May 2003 of the Svea Court of Appeal;
- *Eureka B.V. v. Republic of Poland*, Partial Award of 19 August 2005, Belgian Court decision of... ;
- *European Media Venture v. Czech Republic*, UNCITRAL Award on Jurisdiction, 15 May 2007, High Court (Commercial Court) Decision of 5 December 2007 (dismissing the application to set aside the Award);
- *Feldman v. Mexico*, Award of 16 December 2002, Judgement of the Ontario Court of Appeal of 11 January 2005;
- *France Telecom v. Lebanon*, Award of 22 February 2005, Swiss Federal Tribunal Decision of 10 November 2005, dismissing the challenge of the main award ;
- *International Thunderbird Gaming v. Mexico*, Award of 26 January 2006, Judgment of the US District Court for the District of Columbia of 14 February 2007;
- *Loewen Group Inc. and Raymond L. Loewen v. United States*, Award of 13 December 2004, United States District Court dismissing Motion to vacate the Award, 31 October 2005;
- *Metalclad Corporation v. Mexico* (ICSID CASE No. ARB/97/1), Award of 30 August 2000, Review of British Columbia Court, 2 May 2001;
- *Nagel v. Czech Republic*, SCC Case 49/2002, Award of 2003, challenged in Swedish courts.
- *Occidental Exploration and Production Co.v.The Republic of Ecuador* (LCIA case No. UN3467), Award of 11 July 2004, Judgment of the High Court of Justice of 2 March 2006;
- *Pren Nreka v. Czech Republic*, UNCITRAL, Arbitral Award, February 2007, Recourse en annulations, Court d'Appel de Paris, Arrêt of 25 September 2008.

challenge of a LCIA partial award of 22 May 2006 was dismissed by the High Court of Justice, Queen's Bench Division-Commercial Court.<sup>141</sup> By far and large recourses for annulment have been rejected, which confirms the national courts' favour for the finality of the arbitral award<sup>142</sup>. The stability of investment treaty awards in non-ICSID cases appears therefore higher than in the case of annulment proceeding concerning ICSID awards.

*e) The enforcement of the award*

72. The ICSID Convention regulates in Section 6 the recognition and enforcement of the award by establishing the following principles:

- i. the award is binding on the parties, subject only to the remedies available under the Convention<sup>143</sup>;
- ii. the award is to be recognised and the pecuniary obligations imposed by it are to be enforced by each Contracting State within its territory as if it

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- *Petrobart Limited v. Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce (Energy Charter Treaty), Award not set aside by Swedish courts (January 2007).
  - *Saar Papier Vertriebs GmbH v. Poland*, Award, 1995, Decision of the Swiss Federal Tribunal, 20 September 2000, dismissing the challenge of the interim award; Decision of the Swiss Federal Tribunal, 1 March 2002, dismissing the challenge of the final award.
  - *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award of 17 March 2006, Swiss Federal Tribunal Decision of 7 September 2006, dismissing the challenge of the award;
  - *S.D. Myers Inc. v. Canada*, UNCITRAL (NAFTA) Award of 30 December 2002, Review by Federal Court of Canada of 13 January 2004;
  - *Sedlmayer v. Russian Federation*, Award of 7 July 1998, Judgement of the Svea Court of Appeal of 15 June 2005.
  - *Swembalt AB, Sweden v. Latvia*, UNCITRAL Award, 23 October 2000, Challenge in Danish courts.
  - *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF/00/2) Award, 29 May 2003, Tembec Motion to Vacate Consolidation Order, 17 February 2006, United States Opposition to Motion to Vacate, 28 March 2006, Tembec Reply in Support of Motion to Vacate, 25 April 2006.

<sup>141</sup> *Elektrim S.A. v. Vivendi Universal and others*, High Court (Commercial Court) Decisions of 30 January 2007.

<sup>142</sup> For a review of the Swiss experience, see Scherer-Heiskanen-Moss, Domestic Review of Investment Treaty Arbitration – The Swiss Experience, ASA Bulletin Vol. 27, No. 2, 2009, p. 256.

<sup>143</sup> ICSID Convention, Article 53.

were a final judgment of a court of that State, subject only to the filing of a copy of the award certified by the Secretary-General<sup>144</sup>;

- iii. execution of the award shall be governed by the law concerning execution of judgments in force in the State where execution is sought<sup>145</sup>;
- iv. the law in force in each State relating to immunity of that State or of a foreign State from execution is not derogated<sup>146</sup>.

73. This complex of rules is held to ensure an efficient system of recognition and enforcement of ICSID awards. The obligation to recognise an award as binding renders the award *res iudicata* in each Contracting State.<sup>147</sup> In case of success by the investor, failure by the State to abide by and comply with this obligation would be a breach of the ICSID Convention justifying the intervention of the State of the investor's nationality in the exercise of diplomatic protection or by bringing a claim under Article 64 of the Convention before the International Court of Justice. No *exequatur* is needed in order to enforce an ICSID award, the control of the enforcement court being limited to ascertaining the authenticity of the award certified by ICSID Secretary General<sup>148</sup>.

The obligation to respect the binding force of the award is not derogated by the reference made by Article 54(2) to the application of the local law regarding execution of judgment, this being only a procedural requirement.

74. Article 55 of ICSID Convention preserves the law in force in each Contracting State regarding immunity from execution of that State or of any foreign State. As

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<sup>144</sup> ICSID Convention, Article 54(1)(2).

<sup>145</sup> ICSID Convention, Article 54(3).

<sup>146</sup> ICSID Convention, Article 55.

<sup>147</sup> Schreuer, *The ICSID Convention, cit.*, Article 54, para. 44.

<sup>148</sup> As recognised by the Paris Court of Appeal, 26 June 1981 (case *Benvenuti and Bonfant v. Congo*, Award of 15 August 1980), 1 ICSID Reports 369, 371.



explained by the Report of the Executive Directors on the Convention, this provision is a follow-up of Article 54 requiring Contracting States “to equate an award rendered pursuant to the Convention with a final judgment of its own courts”<sup>149</sup>. The defence of State immunity is limited to those measures of execution that are taken to enforce the pecuniary obligations imposed by the award. The defense is in any case provided only with regard to the execution of the award, not to its recognition.<sup>150</sup>

75. The described rules of the ICSID Convention ensure a better and safer enforcement of ICSID awards when compared to the situation facing the enforcement of a non-ICSID award. This is due not so much to the diplomatic protection of the State of the investor’s nationality, theoretically available also in case of failure by a State to comply with a non-ICSID award,<sup>151</sup> but rather to the particular value given to an ICSID award in the domestic legal order of all Contracting States. Such value being equated to that of a final judgment of a court of any such States, an ICSID award does not face the kind of objections to its recognition and enforcement that are available to the party against which a non-ICSID award is sought to be recognised and enforced under the New York Convention<sup>152</sup>.

76. Once the hurdles facing the party requesting enforcement of a non-ICSID award are overcome and the award is granted the leave for enforcement in the territory where enforcement is sought, the defense of sovereign immunity from execution will

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<sup>149</sup> Report of the Executive Directors, ICSID Reports, para 43.

<sup>150</sup> ICSID Convention, Articles 54(1) and 55.

<sup>151</sup> Although with a more limited scope, in the absence of the kind of State intervention provided by Article 64 of the ICSID Convention.

<sup>152</sup> Specifically, under Article V of that Convention.

equally apply to ICSID and non-ICSID awards according to the law of the enforcement State regulating such immunity.

#### IV. CONCLUDING REMARKS

77. The analysis so far conducted of the differences in regulation between ICSID and non-ICSID investment treaty arbitration is far from being exhaustive. It permits however to draw some conclusions regarding the pros and cons of selecting one system of arbitration rather than another, whenever any such option is available to the investor.<sup>153</sup>

78. ICSID Convention was meant to offer a method of dispute settlement in the field of investment minimizing the risk that the presence of a State as party and the highly sensitive object of the dispute – the investment - give more relevance to political rather than purely legal considerations<sup>154</sup>. This objective has been largely achieved, even if critical remarks have been voiced, particularly from some Latin American States<sup>155</sup>.

79. By far the advantage of arbitration under ICSID Convention is represented by a regulation that is fully autonomous and self-standing, exclusive of any form of intervention by natural legal systems or national courts of law. The other advantage of ICSID is held to be the State's enforcement commitment, although "its true value

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<sup>153</sup> It is not the purpose of this study to single out differences among the various non-ICSID systems of arbitration.

<sup>154</sup> Shihata, *Towards a Greater Depoliticization of Investment Disputes*, *cit.*

<sup>155</sup> The Republic of Bolivia has denounced the Convention on 1 May 2007, with effect from 3 November 2007.

is hard to gauge”<sup>156</sup>, particularly when compared to the system of enforcement of non-ICSID awards under the New York Convention.<sup>157</sup>

However, ICSID advantages have some limitations in specific areas.

80. In the field of measures of protection, the need to wait for the tribunal to be fully constituted, coupled with the long time normally required to get that result, compels the concerned party to wait to obtain the needed protection in a situation where urgency is the rule<sup>158</sup>. This inconvenience is to some extent mitigated in non-ICSID cases by solutions offered by the rules of administered arbitration<sup>159</sup>.

81. The long time normally needed for a tribunal to be constituted and operational is another critical aspect of the ICSID system. The delay is mostly due to the time required for the selection of the president of the tribunal. The utmost care devoted by ICSID to this process is understandable in view of the importance of this function as the true engine of the proceeding and a factor of equilibrium within the tribunal. However, the users’ perception is that the length of the process, mostly due to the State’s objections to the proposed candidates, is not always justified and that the search for consensus should not be unlimited.

82. Users’ perception of problems posed by ICSID mechanism extends to the requirement of “investment” under Article 25(1) of the Convention. The test that various decisions have elaborated to identify the presence of a covered investment<sup>160</sup> has met with some disfavour by investors.

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<sup>156</sup> According to T. Wälde, OGEMID release, 22 February 2007.

<sup>157</sup> *Supra*, para. 82.

<sup>158</sup> *Supra*, para. 39.

<sup>159</sup> *Supra*, paras. 41-44.

<sup>160</sup> The “Salini test”: *supra*, para. 31 and footnote 51.

83. The real challenge for the ICSID system is the annulment of awards. After more than forty years of application, the system is perceived to be unsteady. The general view is that the experience of annulment of investment treaty awards before national courts, in a more recent and limited period of time, has produced a more consistent and stable jurisprudence, favourable to the finality of awards. This is the case in France, Sweden, Switzerland and United Kingdom, the countries were more frequently the seat of a non-ICSID proceeding is located<sup>161</sup>.

84. One of the reasons for this difference in result between ICSID and non-ICSID systems, perhaps the most significant one, is the fact that ICSID annulment decisions are entrusted to personalities of various legal backgrounds and practical experience,<sup>162</sup> called upon to pass judgment on the work performed by other personalities who, sometime, have greater experience and authority. Furthermore, prior ICSID decisions, although offering useful guidance, do not have a precedential value. On the contrary, decision on the challenge of non-ICSID awards are the competence of a body of judges of a higher level of jurisdiction,<sup>163</sup> sometime with a specific knowledge and experience in the field,<sup>164</sup> expected to follow the precedents established by other courts of the same State, thus ensuring a higher level of consistency and predictability of the national jurisprudence.

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<sup>161</sup> As stated by an eminent and much regretted expert in the field, Thomas Wälde, “a SCC challenge is a much more predictable matter than an ICSID annulment (and I wait challenges on this)”, OGEMID release cited in footnote 154.

<sup>162</sup> Even if these personalities are selected among those designated by Contracting States in the Panels of Arbitrators there is no assurance that they be fully qualified to sit in annulment committees.

<sup>163</sup> As a rule, courts of appeal are designated by national laws as the body of the judiciary competent to rule on challenge of awards.

<sup>164</sup> Such as, in France, the special section of the Court of Appeal competent for recourses against awards.

85. One way for ICSID to cope with the above-mentioned problems would be to select a group of qualified personalities having already gained an experience in the field of award annulment, to be appointed on a more stable basis as members of annulment committees. Among other requirements, the persons so selected should refrain from sitting in ICSID tribunals so as to be perceived as a higher level of jurisdiction within the system. One advantage of this approach is that it requires no amendment of the ICSID Convention, the Chairman of the Administrative Council having the power to appoint members of annulment Committees<sup>165</sup>.

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<sup>165</sup> ICSID Convention, Article 52(3).