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Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?

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The question that the organizers of the IAI-ASIL Conference have asked me to address is set out in the title of this contribution: is the *ad hoc* committee's review different if the arbitration giving rise to the request for annulment is based on an investment treaty or an investment contract?¹ The answer is threefold: Yes, no, and maybe. No, because the annulment process is the same: same grounds for annulment, same scope of review, same procedure. Yes, because different issues justify different standards of review. Maybe, because different interests and policies in treaty disputes may call for some structural changes to the traditional arbitration mechanism.

This contribution first reviews the "no part" of the answer (section I), which is divided into three sub-answers: scope of review (subsection A), grounds for annulment (subsection B), and procedural rules (subsection C). It then proceeds to discuss the "yes part" (section II), which addresses the two areas where different issues may arise, *i.e.*, jurisdiction (subsection A) and applicable law (subsection B). It finally concludes with the "maybe part" of the answer (section III), which examines the need

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¹ In this contribution, the author does not specifically address arbitration based on national investment laws. Most considerations relating to arbitrations based on investment treaties apply equally to arbitrations based on investment laws. Differences exist with respect to the interpretation of the statutory rules providing for ICSID jurisdiction and in the area of the determination of the law governing the merits.

for transparency of the process (subsection A) and for consistency of the decisions (subsection B).

I. NO, THE REVIEW IS NOT DIFFERENT, BECAUSE THE ANNULMENT PROCESS IS THE SAME

A. Scope of Review

According to Article 53 ICSID Convention, the annulment process is not an appeal.² It entails no review of the merits,

² On the annulment of awards under the ICSID Convention, see primarily CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 881 *et seq.* (2001); see also Andrea Giardina, *ICSID: A Self-Contained Non-National Review System*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY* (R.B. Lillich and C. Brower eds., 1994); Philippe Pinsolle, *The Annulment of ICSID Arbitral Awards*, 1 J. WORLD INV. 243 (2000); Ibrahim F.I. Shihata and Antonio R. Parra, *The Experience of the International Centre for the Settlement of Investment Disputes*, 14 ICSID REV. – FOREIGN INV. L.J. 299, 338–41 (1999). For comments on the earlier annulment decisions, D.A. Redfern, *ICSID – Losing its Appeal?*, 8 ARB. INT'L 98 (1987); W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739 (1989); Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID REV. – FOREIGN INV. L.J. 321 (1991); David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV. – FOREIGN INV. L.J. 21 (1992); W. Michael Reisman, *Repairing ICSID's Control System: Some Comments on Aron Broches' "Observations on the Finality of ICSID Awards,"* 7 ICSID REV. – FOREIGN INV. L.J. 196 (1992); Jan Paulsson, *ICSID's Achievements and Prospects*, 6 ICSID REV. – FOREIGN INV. L.J. 380, 386–94 (1991). For comments on all annulment decisions, see Emmanuel Gaillard's yearly chronicle in *JOURNAL DU DROIT INTERNATIONAL*, entitled *Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.) – Chronique des sentences arbitrales*. On the annulment of awards based on investment treaties, see in particular David Williams, *International Commercial Arbitration and Globalization – Review and Recourse against Awards Rendered under Investment Treaties*, 4 J. WORLD INV. 251 (2003); Emmanuel Gaillard, *L'arbitrage sur le fondement des traités de protection des investissements*, 2003 REVUE DE L'ARBITRAGE [REV. ARB.] 853.

whether facts or law, and is limited to the grounds listed in Article 52(1) of the ICSID Convention. It is also well established that the interpretation of the annulment grounds should be neither extensive, nor restrictive, but merely reasonable.³ Similarly, there is no presumption, be it in favor or against annulment.

Further, following *MINE*, which was a contract arbitration, on the one hand, and *Wena* and *Vivendi*, which were treaty arbitrations, on the other, it is now clear that the *ad hoc* committee has a level of discretion when deciding whether or not to annul an award.⁴ An annulment should only be ordered in case of a material violation. The annulment test is not a hair-trigger test of automatic technical discrepancy.⁵

³ In particular, *Maritime International Nominees Establishment v. Republic of Guinea*, Decision partially annulling the award, Dec. 22, 1989, 4 ICSID REP. 79, ¶ 4.05 (1997); *Wena Hotels Limited v. Arab Republic of Egypt*, Decision on application for annulment, Feb. 5, 2002, 41 I.L.M. 933, ¶ 18 (2002) (the text of this decision is reproduced in this volume as Annex 2); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision on application for annulment, July 3, 2002, 41 I.L.M. 1135, ¶ 62 (2002) (the text of this decision is reproduced in this volume as Annex 4).

⁴ *MINE v. Guinea*, *supra* note 3, ¶¶ 4.09–4.10; *Vivendi v. Argentina*, *supra* note 3, ¶ 66 (“it appears established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annullable error is found”); *Wena v. Egypt*, *supra* note 3, ¶ 58 (with respect to departure from a rule of procedure), ¶ 83 (with respect to failure to state reasons).

⁵ For a criticism of the “hair-trigger” and technical discrepancy approaches adopted in *Klöckner I*, see Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, *supra* note 2, at 789, and Reisman, *Repairing ICSID’s Control System: Some Comments on Aron Boches’ “Observations on the Finality of ICSID Awards,”* *supra* note 2, at 203 *et seq.*

B. Grounds for Annulment

The same grounds, which are exhaustively listed in Article 52 of the ICSID Convention, govern annulment in treaty and contract arbitrations.

1. Irregular Constitution and Corruption

The grounds of irregular constitution (Art. 52(1)(a)) and corruption (Art. 52(1)(c)) have never been invoked in the history of ICSID.⁶ If they ever were, there would be no need for a detailed analysis to show that their application would not be different in proceedings for the annulment of a treaty award as opposed to a contract award.

2. Serious Departure from a Fundamental Rule of Procedure

By contrast, the ground of serious departure from a fundamental rule of procedure, which is provided for in Article 52(1)(d), was relied upon in all seven of the annulment decisions issued so far.⁷ It guarantees the parties' due process rights. The

⁶ Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, *supra* at 17.

⁷ The decisions on annulment issued to date are: Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, Decision annulling the award, May 3, 1985, 2 ICSID REP. 95 (1994) [hereinafter Klöckner I]; Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, Decision rejecting the parties' application for annulment, May 17, 1990 (unpublished) [hereinafter Klöckner II]; Amco Asia Corporation and others v. Republic of Indonesia, Decision annulling the award, May 16, 1986, 1 ICSID REP. 509 (1993) [hereinafter Amco I]; Amco Asia Corporation and others v. Republic of Indonesia, Decision rejecting the parties' applications for annulment of the Award and annulling the Decision on supplemental decisions and

protection of due process in arbitration does not vary depending on the basis for jurisdiction of the arbitral tribunal. In other words, the review under this ground is the same, whether it deals with the annulment of a treaty or a contract award.

A look at the *ad hoc* decisions in *MINE*, a contract arbitration, and in *Wena*, a treaty arbitration, confirms this observation. Referring to *MINE*, the *Wena* Committee stated that the ground of Article 52(1)(d) was only met if the violation caused the Tribunal to reach a result substantially different from the one that would have otherwise prevailed:

In order to be a "serious" departure from a fundamental rule of procedure, the violation of such rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such rule been observed. In the words of the *ad hoc* Committee's Decision in the matter of *MINE*, "the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide."⁸

3. Failure to State Reasons

Failure to state reasons, which is enumerated in Article 52(1)(e) and relates to Article 48(3), was equally often invoked. Here again, the requisite standards for reasoning are identical for contract and investment arbitrations. For purposes of Article 52(1)(e), it is irrelevant whether the reasons are correct or convincing; otherwise, the *ad hoc* committee would be drawn into a review of the merits. The test is met as long as the reader is able

rectification, Dec. 17, 1992 (unpublished) [hereinafter *Amco II*]; and those listed in note 3.

⁸ *Wena v. Egypt*, *supra* note 3, ¶ 58, quoting *MINE v. Guinea*, *supra* note 3, ¶ 5.05.

to follow the train of thought of the tribunal, even if the latter made mistakes of fact and law.

These standards were set in *MINE*, quoted in *Wena* in detail and restated in *Vivendi* in fewer words:

[T]he requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph 1(e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention.⁹

Although they concur on these general standards, the *Wena* and *Vivendi* Committees appear to diverge on their implementation. Under *Vivendi*, the reasons may be stated "succinctly or at length" and annulment should only occur in a clear case, *i.e.*, when the failure to state reasons leaves "the decision on a particular point essentially lacking any expressed rationale" and that point is "necessary to the tribunal's decision."¹⁰ *Wena* is less demanding. Reasons may be implied "provided they can be reasonably inferred from the terms used in the decision." What is more, if the award is lacking reasons, the "remedy need not be the annulment of the award." The reasons can be supplied by the *ad hoc* committee whenever it is in a position to do so on the basis of its knowledge of the dispute.¹¹

⁹ *MINE v. Guinea*, *supra* note 3, ¶ 5.08; *Wena v. Egypt*, *supra* note 3, ¶ 77; *Vivendi v. Argentina*, *supra* note 3, ¶ 64.

¹⁰ *Vivendi v. Argentina*, *supra* note 3, ¶¶ 64–65.

¹¹ *Wena v. Egypt*, *supra* note 3, ¶¶ 81–83.

It remains to be seen how future *ad hoc* committees will deal with this difference. It is submitted that the approach adopted in *Wena* is preferable. As the *Wena* Committee noted, the purpose of the duty to state reasons is that the parties are entitled to understand the tribunal's thinking,¹² understand why they are found to be right or wrong. That purpose is met if the committee supplies the reasons from the context of the award and the record. Remanding the award to the tribunal would merely yield the same result at a higher cost and after a longer period of time.

4. Manifest Excess of Powers

This ground deals with jurisdiction and applicable law. A tribunal may manifestly exceed its powers when it exercises jurisdiction which it does not have, fails to exercise jurisdiction which it does have, or fails to apply the proper law to the merits of the dispute.¹³

Though less frequently than the two previously considered grounds, this ground was relied upon in the earlier contract arbitration annulment proceedings as well as in *Wena* and *Vivendi*.¹⁴ Its application in practice shows certain differences between investment and contract arbitrations. They are reviewed in the "yes part" below.

¹² See *Wena v. Egypt*, *supra* note 3.

¹³ SCHREUER, *supra* note 2, at 932.

¹⁴ Lack of jurisdiction was raised in *Amco I*, *supra* note 7, *Wena v. Egypt*, *supra* note 3, and *Vivendi v. Argentina*, *supra* note 3. Failure to exercise existing jurisdiction was discussed in *Vivendi v. Argentina*, *supra* note 3. Failure to apply the proper law was dealt with in *Klöckner I*, *supra* note 7, *Amco I*, *supra* note 7, *MINE v. Guinea*, *supra* note 3, *Wena v. Egypt*, *supra* note 3 and *Vivendi v. Argentina*, *supra* note 3. See also Schreuer, *supra* note 6.

C. *Procedural Rules Governing Annulment Proceedings*

The same rules of procedure govern annulment proceedings irrespective of the basis for jurisdiction of the Centre. They are set forth in Article 52 of the Convention, as well as in Chapter VII of the Arbitration Rules.

For instance, partial annulment was granted in both *MINE* and *Vivendi*.¹⁵ *Vivendi* specified that it was not open to the Respondent to “counterclaim” for total annulment when the Claimant had filed a request for partial annulment only, but that it was for the *ad hoc* committee to determine the extent of the annulment. The reason for the committee’s power to decide the scope of the annulment is simply that certain grounds for annulment affect the award as a whole, while others affect only a part of it.¹⁶ This rationale obviously applies to contract arbitrations as well.¹⁷

As another example, one may cite *Wena*’s admission of new arguments in support of annulment, which were not included in the initial request for annulment, but fell within the scope of the annulment grounds raised at the outset.¹⁸ Based on the interpretation of Arbitration Rule 50(1)(c), one can see no reason why this rule would not apply to annulments in the area of contract arbitration.

¹⁵ *MINE v. Guinea*, *supra* note 3, ¶¶ 4.07 and 8.01; *Vivendi v. Argentina*, *supra* note 3, ¶¶ 67–70 and 109. See also Carlos Ignacio Suarez Anzorena, *Vivendi v. Argentina: On the Admissibility of Requests for Partial Annulment and the Ground of a Manifest Excess of Powers*, *supra* at 123.

¹⁶ *Vivendi v. Argentina*, *supra* note 3, ¶ 68.

¹⁷ The *ad hoc* Committee in *Vivendi v. Argentina* noted that its conclusion was “reflected in the difference in language between Articles 52(1) and 52(3)” and that it was “further supported by the *travaux* of the ICSID Convention” (*Vivendi v. Argentina*, *supra* note 3, ¶ 69).

¹⁸ *Wena v. Egypt*, *supra* note 3, ¶ 19.

Despite this absence of differences in the rules governing the annulment procedure, there are two particular aspects of the process where the specificities of investment arbitration may call for distinct rules. They are discussed in the “maybe” part of this contribution.

II. YES, THE REVIEW IS DIFFERENT IN MATTERS OF JURISDICTION AND APPLICABLE LAW

Differences first arise because the basis for jurisdiction is different: treaty provision *versus* arbitration clause. They further arise because the primary source of law for the claims is not the same: treaty *versus* contract and law chosen by the parties. In other words, differences exist in connection with both jurisdiction and applicable law. They pose different questions to treaty arbitrators and contract arbitrators. As a consequence, they also impact on the *ad hoc* committee’s review of certain issues of jurisdiction and applicable law in the context of the ground for annulment of manifest excess of power.

A. *Jurisdiction*

The differences which arise out of the basis for jurisdiction reside in increased technicality (paragraph 2) and reduced role for the parties’ interest (paragraph 3). Before addressing these issues, one preliminary matter should be addressed: what is “manifest” excess in matters of jurisdiction?

1. “Manifest” Excess and Jurisdiction

Two *ad hoc* decisions deal with annulment requests for lack of jurisdiction, *Klöckner I*, a contract arbitration, and *Vivendi*, a treaty arbitration. *Klöckner I* interpreted a specific agreement

providing for ICC arbitration. It criticized the Arbitral Tribunal for having affirmed jurisdiction, but nevertheless upheld the Award on the ground that the Tribunal's findings were "tenable and not arbitrary," and thus did "not constitute the manifest excess of powers which alone would justify annulment under Article 52(1)(b)."¹⁹

By contrast, *Vivendi* interpreted a treaty provision and shared the Tribunal's position.²⁰ Therefore, it did not reach the stage of addressing the requirement of "manifestness." Bearing this in mind, it is nevertheless striking that the Decision contains no mention at all of a restriction of the sort applied by the *Klöckner* Committee. One remark by this Committee would rather tend to indicate the contrary.²¹ Hence, one may venture to say that the *Vivendi* Committee had no restriction of manifestness in mind.

Now back to our question: are the standards of review different? On the face of these two decisions, they appear to be. It is submitted, however, that they should not be different. Whatever the basis for jurisdiction, treaty or contract, the requirement of manifestness appears inapposite in the context of jurisdiction.²² A tribunal either has jurisdiction or it does not; there is nothing in

¹⁹ *Klöckner I*, *supra* note 7, ¶¶ 4 *et seq.*

²⁰ *Vivendi v. Argentina*, *supra* note 3, ¶¶ 72 *et seq.* Thereafter, the Committee annulled part of the award, not because the Tribunal lacked jurisdiction, but because it had failed to exercise jurisdiction properly vested in it.

²¹ In the context of an argument that there was a contradiction between the Tribunal's reasons on jurisdiction and those on the merits, the Committee stated as follows: "But Argentina also argued that the Tribunal lacked jurisdiction in any event. If this is right, it was a manifest excess of power for the Tribunal to consider the merits" (*Vivendi v. Argentina*, *supra* note 3, ¶ 72).

²² For a discussion of the arguments and citations, see SCHREUER, *supra* note 2, at 935.

between. In other words, any exercise of jurisdictional power without proper jurisdiction is a manifest excess of power.

2. Increased Technicality of Jurisdictional Issues in Treaty Arbitration

Compared to contract arbitration, jurisdiction in treaty arbitration raises issues of increased complexity and technicality. As the following illustrations show, the increased technicality is primarily linked to the often difficult coexistence of treaty and contract dispute resolution mechanisms. Like in contract arbitrations, a finding of jurisdiction will entail reviewing the requirements of investor, investment, and consent.²³ In addition, jurisdiction over treaty claims will often involve drawing the line between treaty and contract claims and between treaty and contract dispute resolution systems. It may also include a review of requirements such as the “fork in the road” option, waiver of remedies, exhaustion of local remedies, or most-favored nation clauses applied to dispute resolution provisions.²⁴

The *Wena* and *Vivendi ad hoc* Committees have drawn the line between treaty and contract claims very clearly. In a nutshell, the *Vivendi* Tribunal declined to consider certain claims of the investor on the ground that they involved issues of contract performance. The contract, a concession agreement between the investor and the Province of Tucumán, Argentina, contained an exclusive forum selection clause in favor of the local

²³ Art. 25 of the ICSID Convention.

²⁴ Francisco Orrego Vicuña, *Bilateral Investment Treaties and the Most-Favored-Nation Clause: Implications for Arbitration in the Light of a Recent ICSID Case*, in ASA SPECIAL SERIES NO. 19, INVESTMENT TREATIES AND ARBITRATION 133 (G. Kaufmann-Kohler and B. Stucki eds., 2002); Emilio Agustín Maffezini v. Kingdom of Spain, Decision on objections to jurisdiction, Jan. 25, 2000, 40 I.L.M. 1129 (2001).

administrative courts. The investor had not resorted to the Tucumán courts, but preferred to submit the dispute to ICSID arbitration under the Argentine-French investment treaty.

The Tribunal held that the investor should have brought action in the local courts because its claims arose “almost exclusively from alleged acts of the Province of Tucumán that relate directly to its performance under the concession contract.”²⁵ It emphasized that its decision was not equivalent to imposing a requirement of exhaustion of local remedies under the BIT, which would have been contrary to the wording of the treaty. Rather, it was compelled by the impossibility of separating contract breaches and treaty violations without interpreting the concession contract. Yet under the contract, such interpretation was the task of the local courts. Thus, it was only in the event of a denial of justice in these courts that the investor could have pursued its claims in an ICSID arbitration.²⁶

The *ad hoc* Committee did not follow this line. It distinguished between the different causes of action, treaty and contract, and the respective dispute resolution systems, ICSID arbitration and local courts. It stressed that a State can “breach a treaty without breaching a contract and vice versa.”²⁷ As a result, it annulled that part of the Award.

But what about the “impossibility” of separating the two types of claims and the need to interpret the contract in the treaty arbitration? Was this not an obstacle to the jurisdiction of ICSID?

²⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Award, Nov. 21, 2000, 40 I.L.M. 426, 429 (2001), quoted in the *ad hoc* decision ¶ 11. The text of this decision is reproduced in this volume as Annex 3.

²⁶ *Id.* ¶ 80.

²⁷ *Vivendi v. Argentina*, *supra* note 3, ¶ 95.

No, said the *ad hoc* Committee. First, the applicable BIT expressly provided that the arbitrators may apply the terms of a “special agreement” to an “investment regulated by” such an agreement, at least insofar as necessary to determine whether there had been a breach of the treaty.²⁸ Second, even in the absence of such provision, an exclusive forum clause in the contract (absent a requirement of exhaustion of local remedies) cannot deprive the investor from bringing its treaty claims in the competent treaty forum.

A number of other ICSID decisions have dealt with the interaction between dispute resolution clauses in investment treaties and in investment contracts. The issue is whether jurisdiction exists under the investment treaty, even in the presence of a choice of the local courts embodied in the underlying contract. It arose in particular in *Salini v. Morocco*.²⁹ The Tribunal affirmed jurisdiction over claims asserting a violation of the treaty (including those which coincided with breach of contract claims), irrespective of a clause in favor of the host State courts in the investment contract. It did so on the ground that the courts “chosen” in the contract “cannot be opted for,” *i.e.*, their jurisdiction over administrative contracts is mandatory under national law.³⁰ In other words, the forum selection clause is a mere restatement of an existing rule of mandatory jurisdiction, not a true choice. As such, it does not rule out treaty jurisdiction.

²⁸ Vivendi v. Argentina, *supra* note 3, ¶ 110 (referring to Art. 10 of the Argentine-French BIT).

²⁹ Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on jurisdiction, July 23, 2001, 42 I.L.M. 609 (2003); Lanco International, Inc. v. Argentine Republic, Preliminary decision on jurisdiction, Dec. 8, 1998, 40 I.L.M. 457 (2001); see also Robert Azinian and others v. United Mexican States, Award, Nov. 1, 1999, 5 ICSID REP. 272, ¶ 83 (2002).

³⁰ Salini v. Morocco, *supra* note 29, ¶ 27.

If the result of this decision is consistent with the distinction between treaty and contract dispute settlement mechanisms, the reasons are not. Even where the local courts are truly chosen, *i.e.*, they have no pre-existing mandatory jurisdiction, the treaty arbitrator has jurisdiction over treaty claims (whether or not they coincide with contract claims is irrelevant for these purposes).³¹ This is clear from the *Vivendi ad hoc* Committee Decision. It also flows from *obiter dicta* in *Wena*. It is further apparent from the recent Decision on jurisdiction in *CMS v. Argentina*, where the Tribunal held in unambiguous terms that:

the clauses in the License or its Terms referring certain kinds of disputes to the local courts of the Republic of Argentina is not a bar to the assertion of jurisdiction by an ICSID tribunal under the [Argentina-US] Treaty, as the functions of these various instruments are different.³²

The first award issued under the ASEAN Agreement applies the same rule.³³

Concurrent jurisdiction thus appears well established in case law. Although legally unquestionable, it is doubtful that it is the better solution in practice. It implies a duplication of efforts with an unavoidable waste of resources. It also entails the risk of contradictory decisions. As a matter of general policy, it is thus preferable to concentrate the dispute resolution in one forum.³⁴

³¹ Of the same opinion, see Emmanuel Gaillard and Yas Banifatemi, *Introductory Note to Salini*, 42 I.L.M. 606, 608 (2003).

³² *CMS Gas Transmission Company v. Argentine Republic*, Decision on jurisdiction, July 17, 2003, 42 I.L.M. 788 (2003).

³³ *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar*, Award, Mar. 31, 2003, 42 I.L.M. 540 (2003).

³⁴ SCHREUER, *supra* note 2, at 359 in respect of Klöckner I, where concurrent jurisdiction was the result of the parties' intent, unlike the situation involving a contract and an investment treaty. See also Emmanuel Gaillard,

Some treaties seek to achieve this concentration by requiring the claimant to waive any other remedies when filing for arbitration, or by providing a “fork in the road” option. For instance, NAFTA requires investors to waive local remedies in order to proceed with arbitration.³⁵ The Tribunal in *Waste Management* dismissed the claim on the ground that the investor had given no clear and unequivocal waiver.³⁶ Similarly, other treaties establish a “fork in the road,” *i.e.*, they provide that by seeking compensation in local courts the investor makes an irrevocable choice and thereby waives its right to resort to the treaty dispute settlement method.³⁷

Where it exists, concurrent jurisdiction entails the risks of double recovery in parallel proceedings and of conflicting decisions. The first one of these risks was addressed by the *Wena* Committee in the context of manifest excess of power for failure to apply the proper law. In *Wena*, there had been a previous domestic Egyptian arbitration on the basis of lease agreements binding the investor and a State-owned Egyptian entity, followed by an ICSID arbitration under the investment treaty entered into by Egypt and the United Kingdom. The Committee made the distinction

Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.) – Chronique des sentences arbitrales, JOURNAL DU DROIT INTERNATIONAL [J.D.I.] 161, 237 (2003).

³⁵ Art. 1121.

³⁶ *Waste Management, Inc. v. United Mexican States*, Award declining jurisdiction, June 2, 2000, 15 ICSID REV. – FOREIGN INV. L.J. 214 (2000); for more on this topic, see, in particular, Axelle Lemaire, *Le nouveau visage de l'arbitrage entre État et investisseur étranger : le chapitre 11 de l'ALENA*, 2001 REV. ARB. 43, 68; Henri C. Alvarez, *Arbitration under the North American Free Trade Agreement*, 16 ARB. INT'L 393, 403 (2000). Contrary to *Waste Management*, other decisions held that bringing investment arbitration was a constructive waiver (see, in particular, *Ethyl Corp. v. Government of Canada*, Award on jurisdiction, June 24, 1998, available at www.naftaclaims.org).

³⁷ Discussed, *e.g.*, in *Vivendi v. Argentina*, *supra* note 3, ¶ 103.

between the leases which were commercial in nature and the investment treaty which dealt with matters of a governmental nature, namely the standards of protection accorded by the State to foreign investors. These two instruments gave rise to different types of disputes, governed by potentially different bodies of rules, and subject to different dispute settlement methods.³⁸ The lease agreements constituted the investment, which triggered the application of the BIT. This connection did not, however, imply an "amalgamation of different legal instruments and dispute settlement arrangements," with the result that "the private and public functions of these instruments are thus kept separate and distinct."³⁹

Even if the two categories of disputes are separate and distinct, the ultimate purpose is a common one, *i.e.*, compensation of the investor for its losses. This is "where the relationship between one dispute and the other becomes relevant."⁴⁰ If partial compensation was granted in one proceeding, it must be taken into account in the other "so as to prevent a kind of double dipping in favor of the investor."⁴¹

The second risk inherent in concurrent jurisdictions mentioned above is the risk of contradictory decisions. It was in particular addressed in *Azinian v. Mexico*, a NAFTA case brought under the ICSID Additional Facility Rules.⁴² In essence, a city in Mexico had granted US investors a waste collection concession,

³⁸ *Wena v. Egypt*, *supra* note 3, ¶ 31.

³⁹ *Id.* ¶ 33.

⁴⁰ *Id.* ¶ 49.

⁴¹ The same reasoning, *i.e.*, that the co-existence of separate proceedings is a matter to be taken into account when computing the quantum, is used in *Tradex Hellas S.A. v. Republic of Albania*, Decision on jurisdiction, Dec. 24, 1996, 14 ICSID REV. – FOREIGN INV. L.J. 161 (1999).

⁴² *Supra* note 29.

the concession contract being governed by Mexican law and subject to the jurisdiction of Mexican courts. Some months later, the city cancelled the concession alleging misrepresentations by the investors. The latter challenged the cancellation in the local courts, which upheld the cancellation. The investors then brought a NAFTA arbitration against the Mexican Government. Although it dismissed the claim for the reason that the cancellation of the concession did not amount to a treaty violation, the Tribunal noted that it was not bound by the local court's determination in the following terms:

an international tribunal called upon to rule on a Government's compliance with an international treaty is not paralyzed by the fact that the national courts have approved the relevant conduct of public officials.⁴³

In sum, this sampling of jurisdictional issues in treaty arbitrations shows the particularly complex and technical nature of these matters. They require strict legal analysis, not loose standards and vague notions such as manifestness of excess of powers. If the jurisdictional requirements are not dealt with rigorously, there is a risk that the present hostility towards investment arbitration may grow and that disillusioned States withdraw their consent,⁴⁴ an unfortunate prospect that a proper understanding of the relevant standards can certainly avoid.

⁴³ Robert Azinian v. Mexico, *supra* note 29, ¶ 98; on the topic of prevalence of decisions of international tribunals over those of national courts, especially at the enforcement stage, see Gaillard, *supra* note 34, at 237–38.

⁴⁴ See, e.g., Nigel Blackaby, *Public Interest and Treaty Arbitration*, in ASA SPECIAL SERIES NO. 19, INVESTMENT TREATIES AND ARBITRATION 145–46 (G. Kaufmann-Kohler and B. Stucki eds., 2002).

3. The Reduced Role of the Parties' Intent

An additional consideration supports the conclusion just reached. It is related to the role of the parties' intent in creating jurisdiction.

Jurisdiction based on a specific arbitration agreement is, by its very nature, specific. It is shaped to meet the particular needs of a given investment, *e.g.*, by providing certain definitions of investor or investment, or by defining the scope and the nature of the dispute submitted to arbitration. Beyond matters dictated by the ICSID Convention, the parties' intent when entering into an arbitration agreement will be construed by reference to rules of private law on the interpretation of contracts. These will make room for subjective elements and leave some margin for assessment by the arbitrators.

By contrast, jurisdiction over treaty claims is defined in the abstract for an unlimited number of future investments. By nature, more objective criteria will prevail. The relevant provisions will be construed by application of rules on the interpretation of treaties, which primarily require consideration of the objects and purposes of the treaty.⁴⁵ This means that the intent of the parties to the dispute, or at least of one of them, is without significance. It also means that the same dispute resolution provision (or provisions of identical contents) may be applied over and over again—a potential recurrence that calls for consistent decisions, which is an additional characteristic to be addressed below.

⁴⁵ Vienna Convention on the Law of Treaties, May 23, 1969, U.N.T.S., VOL. 1155, at 331.

B. *Applicable Law*

It is generally agreed that the failure to apply the proper law under Article 42(1) of the ICSID Convention may constitute manifest excess of power and lead to an annulment. It is also well established that failure to apply the proper law is not equivalent to an error in the application of the law.⁴⁶

Article 42(1) of the ICSID Convention provides that the arbitral tribunal must apply the rules of law chosen by the parties. In the absence of a choice, it must apply the law of the host State "and such rules of international law as may be applicable."

Failure to apply the proper law was raised as a ground for annulment in *Klöckner I* and *Amco I*. In both cases, the parties had not chosen the applicable law, which was determined in accordance with the second part of Article 42(1). It was accepted that a violation of Article 42(1) found its sanction in Article 52.⁴⁷ The ground was construed broadly and the awards annulled. The same ground was also invoked in *MINE*, where the parties had chosen the host State's law, and in *Wena*, where the Arbitral Tribunal had resolved the dispute essentially by application of the relevant bilateral investment treaty. In both cases, annulment was denied. Finally, the ground was invoked, but was not a basis for the Decision in *Vivendi*.⁴⁸

The comparison between *Amco I* and *Klöckner I*, on the one hand, and *Wena*, on the other, brings to light certain differences with respect to the role of international law, which have a bearing

⁴⁶ *Wena v. Egypt*, *supra* note 3, ¶ 22. For a discussion of the earlier decisions in this respect, see SCHREUER, *supra* note 2, at 943 *et seq.*

⁴⁷ A proposition that has been challenged (see SCHREUER, *supra* note 2, at 945, and the references cited therein).

⁴⁸ Schreuer, *supra* note 6.

on the review by the *ad hoc* Committee. Before turning to these differences, let us again address the requirement for manifestness.

1. Manifest Excess of Powers

In their analysis of the Tribunal's application of the law, the *ad hoc* Committees in *Amco I* and *Klöckner I* seemed to disregard that the excess, *i.e.*, in this context the failure to apply the law designated in Article 42, needed to be manifest in order to give rise to an annulment.⁴⁹ By contrast, *Wena* insisted on the requirement of manifestness in the following terms:

The excess of power must be self-evident rather than the product of elaborate interpretations one way or another. When the latter happens the excess is no longer manifest.⁵⁰

Such insistence appears justified in this context. Indeed, while inapposite in the area of jurisdiction, the manifest nature of the excess is well placed here. In the absence of such a requirement, the committee's review would almost inevitably turn into a reassessment of the merits.

As in the area of jurisdiction, the standards of review themselves are no different depending on the basis of jurisdiction; the differences lie elsewhere.

2. The Increased Role of International Law

The differences arise from the fact that different sources of law govern the dispute in treaty and in contract arbitrations. Disputes arising out of investment contracts fit perfectly into the

⁴⁹ *Klöckner I*, *supra* note 7, ¶ 79; *Amco I*, *supra* note 7, ¶¶ 57 *et seq.*

⁵⁰ *Wena v. Egypt*, *supra* note 3, ¶ 25. Similarly, albeit not as clear, *MINE v. Guinea*, *supra* note 3, ¶¶ 6.31–6.43

framework of Article 42. This comes as no surprise, as that provision was designed with this type of dispute in mind. The same is not true of treaty disputes, which are essentially subject to international law, first and foremost to the treaty itself.⁵¹

This observation begs the question of the role of international law on the merits in ICSID practice. As a first step in attempting to respond to this question, an examination of the Decision rendered by the *ad hoc* Committee in *Wena* may be of interest. The *Wena ad hoc* Committee first inquired whether the parties had chosen the applicable law under the first sentence of Article 42(1). To answer the inquiry, it resorted to the distinction between treaty and contract. In the lease contracts between the investor and an Egyptian entity, the parties had agreed on the application of Egyptian law. However, the leases were not the subject matter of the ICSID arbitration, which dealt with claims against the State under the relevant BIT. Consequently, there was no choice of law by the parties pursuant to Article 42(1) and the Committee proceeded to determine the proper law according to the second sentence of that provision.

The Arbitral Tribunal had applied treaty law. Was this admissible? What was the interaction between national and international law? The Committee noted the existence of divergent views on the role of international law in this context, either restrictive or expansive. It did not give the preference to one approach over the other. Rather it held:

There seems not to be a single answer as to which of these approaches is correct. The circumstances of each case may justify one or another solution. However, it is not this

⁵¹ Article 1131(1), NAFTA supports this observation, as the arbitral tribunal must resolve the dispute “in accordance with this Agreement [NAFTA] and applicable rules of international law.” Contrary to Article 42, there is no mention of any law chosen by the parties nor of the host state’s law.

Committee's task to elaborate precise conclusions on this matter, but only to decide whether the Tribunal manifestly exceeded its power with respect to Article 42(1) of the ICSID Convention. Further the use of the word "may" [and such rules of international law as may be applicable] in the second sentence of this provision indicates that the Convention does not draw a sharp line for the distinction of the respective scope of international and domestic law and, correspondingly, that this has the effect to confer on to the Tribunal a certain margin or power for interpretation What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host state can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.⁵²

Having set these parameters, the Committee went on to examine the law applied in the challenged Award. It emphasized that international treaties that are ratified are incorporated into domestic law by virtue of the Egyptian Constitution, with the result that the Tribunal had not applied "rules alien to the domestic legal system" of the host State nor rules "in derogation of the Egyptian law and policy."⁵³ Thus, it held that by applying the investment treaty the Tribunal had not exceeded its powers. It is not entirely clear whether it reached this conclusion because the treaty was part of Egyptian law or because Article 42(1) authorized the application of international law under the circumstances. True enough, the distinction is academic here. It would not be, however, in a dualist legal system when the treaty has not been transformed into municipal law.

⁵² *Wena v. Egypt*, *supra* note 3, ¶¶ 39–40.

⁵³ *Id.* ¶¶ 44–45.

The Committee further considered some specific complaints about the law applied in the Award, one of which is particularly relevant for our purposes. The Tribunal had awarded compound interest by reference to international law and practice, while the BIT was silent on matters of interest and Egyptian law limited the award of interest. Where the treaty is silent, did the arbitrators have to resort to the host State law or were they empowered to rely on international law and ICSID practice? The Committee found the answer in the treaty itself, specifically in the provision defining “prompt, adequate, and effective compensation” as the market value of the assets immediately before the expropriation. This definition required that the compensation not be eroded by the passage of time. By granting compound interest in line with international business practices, the Tribunal had merely enforced the treaty.

Except for the general statements at the outset of the discussion, the decision is essentially cautious when it comes to implementing the role of international law: there is no objection against the application of the treaty as it is part of municipal law, nor is there an objection against the application of international law and practice about interest as they materialize the rules laid down in the treaty (which is part of municipal law).

What does *Wena* add to ICSID practice? With respect to the situations in which an ICSID tribunal may apply international law pursuant to Article 42(1), it confirms the understanding which arises out of the history of the ICSID Convention. Others have analyzed the history in detail.⁵⁴ It suffices to recall the results of

⁵⁴ W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold*, 15 ICSID REV. – FOREIGN INV. L.J. 362, 379 (2000), quoting among other sources Dr. Broches, *The Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States: Applicable Law and Default Procedure*, in *International Arbitration*, in LIBER AMICORUM FOR MARTIN DOMKE 12, 16–17

the analysis. Article 42 allows for the application of international law⁵⁵ in the following circumstances:

- (i) the parties have made a choice of international law (Art. 42(1), first sentence);
- (ii) the application of international law is called for by national law (Art. 42(1), second sentence, beginning);
- (iii) the subject matter of the dispute is directly regulated by international law (Art. 42(1), end);
- (iv) to fill a gap in the applicable national law (Art. 42(1), end; so-called complementary or supplemental function); and
- (v) to correct the result of national law which violates international law (Art. 42(1), end; corrective function).

In investment arbitrations, the subject matter will primarily be governed by the investment treaty. Be it under situation (ii) or (iii) referred to above, the tribunal will apply the treaty (and disregard non-treaty national law) without running a risk of not

(P. Sanders ed., 1967): "The history of the provision leaves no doubt, in my opinion, that the tribunal may apply international law (i) where national law calls for its application, (ii) where the subject matter is directly regulated by international law (a case which may not be easily distinguishable in practice from (i)) and (iii) where national law or action taken thereunder violates international law;" Ibrahim F.I. Shihata and Antonio R. Parra, *Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention*, 9 ICSID REV. – FOREIGN INV. L.J. 183, 190 *et seq.* (1994).

⁵⁵ On this topic, see also Emmanuel Gaillard, *The Extent of Review of the Applicable Law in Investment Treaty Arbitration*, *infra*, at 223.

applying the proper law under Article 42(1). And if the treaty contains no express rule on a specific question, it may enforce the purposes of the treaty by reference to international rather than national law, *i.e.*, it still acts within the scope of situation (iii) described above. To reach this conclusion, there is no need to argue for a more expansive application of international law than the one initially envisaged.

The contribution of *Wena* rather relates to the scope of review of the *ad hoc* committee. Indeed, it adopts a restrictive view of annulments for failure to apply the proper law. It affirms that there is a level of discretion in the arbitrators' assessment of the interaction between international and national law. At the same time, it insists that the excess must be manifest or "self-evident." Put together, these two factors make annulments on this ground unlikely. This is certainly a welcome achievement. It is in line with the purposes of the Convention, which rules out a review of the merits.

Does the restrictive view resulting from *Wena* apply to treaty arbitrations only or does it also cover awards rendered on the basis of contracts? The issues in *Wena* were specific to treaty arbitrations as they hinged upon the application of the treaty, its status and objectives. In contract arbitrations, there will often be a choice of law under the first sentence of Article 42(1). International law will then only come into play to fill gaps or correct the result of the application of national law. In the absence of a choice, there is *a priori* no legitimate reason not to resort to the host State's law. It will be sufficient for the intervention of international law to be confined to the supplemental and corrective functions.

To sum up, the determination of the applicable law arises in a different setting and poses different questions in treaty and contract arbitrations. In both cases, the review will be limited by

the requirement of manifestness. In treaty arbitration, it will be further restricted by the discretion granted to the arbitrators in assessing the interaction of international and national law in the specific circumstances before them.

III. PERHAPS THE REVIEW PROCESS SHOULD BE DIFFERENT TO ACCOUNT FOR PUBLIC INTEREST

Investment arbitration may involve sensitive issues of public interest.⁵⁶ It determines the legality of regulatory and administrative actions of States, with potentially wide economic and political impact. While it affords investors proper access to justice, it is at the same time an instrument of good governance.⁵⁷ Yet it uses a dispute resolution method shaped for commercial disputes that lack these characteristics.

Some believe that arbitration is ill-suited to resolve investment disputes⁵⁸ or that investment dispute resolution is in a state of transition between international commercial arbitration and a yet undeveloped form of international quasi-judicial review of the regulatory conduct of States.⁵⁹ The fact remains that, at present, arbitration is offered in a vast number of investment

⁵⁶ Blackaby, *supra* note 44; Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923 (2003).

⁵⁷ Thomas Wälde and Todd Weiler, *Investment Arbitration under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of Conduct to Economic Regulation*, in ASA SPECIAL SERIES NO. 19, INVESTMENT TREATIES REGULATION AND ARBITRATION 159, 168 (G. Kaufmann-Kohler and B. Stucki eds., 2002).

⁵⁸ Brigitte Stern, *International Economic Relations and the MAI Dispute Settlement System*, in the 7th Geneva Global Arbitration Forum, 16(2) J. INT'L ARB. 118, 128 (1999).

⁵⁹ Wälde and Weiler, *supra* note 57, at 220.

treaties and parties are increasingly resorting to it. The immediate question in practice is thus how to reconcile the public nature of investment disputes with the traditionally private nature of arbitration. Stated differently, the question is how to procedurally accommodate the public interest component present in investment arbitration.

At the level of the review of awards, two aspects of public interest may require adaptations of the mechanisms of traditional arbitration: the call for transparency of the process and the need for consistency of the decisions.

A. Transparency

1. Participation of Public Interest Groups as Parties or as *Amici Curiae*

More and more, public interest groups expect to have a say in arbitrations that may affect the interests which they advocate. This expectation mainly relates to the arbitration proceedings as such, but it may also arise at the annulment stage. Can it be accommodated? If so, in what procedural form?

Several tribunals have addressed these issues,⁶⁰ in particular two NAFTA tribunals sitting under the UNCITRAL Rules. The following three rules emerge from their decisions.

⁶⁰ Methanex Corp. v. United States of America, Decision of the tribunal on petitions from third parties to intervene as "*amici curiae*," Jan. 15, 2001, available at www.naftaclaims.com; see also 16(1) MEALEY'S INT'L ARB. REP. 6 (2001); United Parcel Service of America Inc. v. Government of Canada, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, Oct. 17, 2001, available at www.naftaclaims.com. See also Aguas del Tunari v. The Republic of Bolivia, Letter of the president of the tribunal, Jan. 2003, available at www.earthjustice.org.

First, the tribunal has no power to allow the participation of outsiders as *parties* in the arbitration. Failing the consent of all involved, the tribunal lacks jurisdiction over these outsiders. Similarly, without party status, outsiders are not permitted to attend oral hearings, since oral hearings are private as a result of Article 25(4) of the UNCITRAL Arbitration Rules.

Second, the procedural powers vested in the tribunal pursuant to Article 15 of the UNCITRAL Arbitration Rules authorize the arbitrators to accept *amicus curiae* briefs from non-parties.⁶¹ This prerogative is limited to written submissions and it is for the tribunal to decide what weight to attribute to these submissions.

Third, it is within the tribunal's discretion whether to accept *amicus curiae* briefs or not and, if so, under what conditions. In the exercise of its discretion, the tribunal will consider the particular circumstances of the arbitration, including the risk of unfair treatment which the extra burden in meeting these submissions may create for one of the parties,⁶² the importance of the public character of the matters in issue, the petitioners' own real interest in these matters and the likelihood that their input may assist the tribunal, as well as the value of greater transparency.⁶³ In

⁶¹ This does not apply to NAFTA State Parties not parties to the arbitration, which the Treaty authorizes to make submissions "on a question of interpretation of this Agreement" (Art. 1128).

⁶² The position of the NGOs will generally support the respondent State party and may thus impose an additional burden on the claimant, especially if it raises arguments not brought forward by the respondent; see Methanex, *supra* note 60, ¶ 50; Patrick Dumberry, *The Admissibility of Amicus Curiae Briefs in NAFTA Chapter 11 Proceedings: Some Remarks on the Methanex Case, A Precedent Likely to Be Followed by Other NAFTA Arbitral Tribunals*, 2001 ASA BULL. 74, 85.

⁶³ United Parcel Service of America Inc. v. Canada, *supra* note 60, ¶¶ 69–70; Methanex v. USA, *supra* note 60, ¶¶ 36–37, 48 *et seq.*

Methanex, the Tribunal weighed these factors and declared that it was minded to accept a submission from a private association for the protection of the environment in the following terms:

There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between private parties. This is not merely because one of the Disputing Parties is a Contracting State. . . . The public interest in this arbitration arises out of its subject matter There is also a broader argument . . . : the Chapter 11 arbitral process could benefit from being perceived as more open and transparent, or conversely harmed if seen as unduly secretive.⁶⁴

These decisions dealt with the arbitration proper. The same claim for transparency can be voiced in the context of the annulment of an award. In the court proceedings to set aside the NAFTA *Metalclad* Award, the Supreme Court of British Columbia responded to this claim by allowing an NGO to film the hearings in their entirety and to post the film on the Internet.⁶⁵

As these cases show, arbitration finds certain ways to adapt to the need for transparency in investment disputes. Whether they will be sufficient in the long term to satisfy the legitimate expectation of the public for more information is an open issue.

The decisions allowing *amicus curiae* briefs were decided by application of the UNCITRAL Arbitration Rules, in particular of Article 15(1). Would the outcome be different if the ICSID Convention were to govern? The answer is “no”—the Convention contains provisions comparable to the UNCITRAL Rules and,

⁶⁴ *Methanex v. USA*, *supra* note 60, ¶ 49.

⁶⁵ Emmanuel Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.) – Chronique des sentences arbitrales*, 129 J.D.I. 189, 195 (2002).

hence, the same analysis would prevail. An ICSID tribunal has no power to add parties. However, under Article 44, it has procedural powers comparable to those provided in Article 15 UNCITRAL Rules. The privacy of the oral hearings⁶⁶ is no bar to the admission of written submissions and there are no other provisions which could impede the admission of *amicus curiae* briefs. The same rules apply to the annulment proceedings.⁶⁷

Reasonable minds may differ as to whether *amicus curiae* briefs make sense at the annulment level, as the review does not extend to a reassessment of the merits.⁶⁸ With this reservation in mind, the ICSID *ad hoc* Committee could in principle assume the power to decide on the acceptance of such briefs.

2. Treaty *Versus* Contract Arbitrations

These observations apply primarily to treaty arbitrations. They are, however, not entirely alien to contract arbitrations, which often involve some level of public interest. There appears to be no sharp line between treaty and contract arbitrations in terms of the presence or lack of public interest. It is more a matter of the intensity and directness of the public interest at stake. Therefore, as a rule, *amicus curiae* briefs could be accepted in contract as well as in treaty arbitrations, subject always to the discretion of the tribunal taking all circumstances into consideration.

⁶⁶ Art. 32(2) of the ICSID Arbitration Rules.

⁶⁷ As a result of the reference in Article 52(4) of the ICSID Convention and in Article 53 of the ICSID Arbitration Rules.

⁶⁸ *United Parcel Service of America Inc. v. Canada*, *supra* note 60, ¶ 71 (considered that the third party submissions were to deal only with the merits of the dispute, not with jurisdiction or other procedural issues).

B. Consistency of Decisions

With the boom of investment arbitrations, there will be more and more awards dealing with the same issues, sometimes involving the same measures taken by the same State under the same legislation. The Argentine Emergency Law imposing reductions of tariffs and other restrictions on all regulated public utilities is the perfect example.

This is a new scenario.⁶⁹ It is new because in classic contract arbitrations, the claims arise out of a single measure taken in connection with a specific investment. It is also new because in earlier financial crises, there were either fewer BITs available or fewer claims brought by investors.

In this new scenario, one cannot rule out that different panels may reach different results, although they refer to the same BIT and the same State measure. Such inconsistencies run counter to the uniform development of the law. There is a risk that inconsistent decisions discredit the system. As a result, States, investors, and the public may lose confidence in the dispute resolution mechanism. Admittedly, the risk is lower in investment arbitrations which are governed by the ICSID Convention than in others. This is due to the fact that ICSID has a built-in annulment mechanism, while other systems depend on setting aside procedures before national courts. The US Federal Trade Act of 2002 expressly addresses this concern for coherence. It sets as a negotiating objective of the United States the pursuit of investors' protection by "providing for an appellate body or similar

⁶⁹ On these issues see in particular, Blackaby, *supra* note 44, at 153–54.

mechanism to provide coherence in the interpretation of investment provisions in trade agreements.”⁷⁰

Even if the risk of incoherence is less in ICSID Convention arbitrations, it is not negligible. Under the existing rules, *ad hoc* committees cannot correct incoherent interpretations of identical treaty rules. Even assuming an error in the application of the law, there is no manifest excess within the meaning of Article 52 of the ICSID Convention. And even if *ad hoc* committees were empowered to correct divergent interpretations, there is no assurance that the *ad hoc* decisions themselves would be consistent. Indeed, the composition of the committees changes⁷¹ and no *stare decisis* rule applies.

How then can the risk of inconsistent decisions be avoided? Action could be taken either at the annulment stage or, preferably in this author’s view, at the level of the arbitration itself. At the annulment level, one may think of extending the grounds for review to include an appeal on points of law, possibly combined with the creation of a permanent annulment body. Proposals along these lines have been put forward,⁷² especially in the NAFTA context. The drawback is a likely increase in annulment requests

⁷⁰ Sec. 2102(b)(3)(G)(iv), 19 USC 3801; on this topic, see Barton Legum, *The Introduction of an Appellate Mechanism: the U.S. Trade Act of 2002*, *infra*, at 289.

⁷¹ Even if attempts are made to draw the committee members from a limited circle (*see* Paulsson, *supra* note 2, at 391).

⁷² For an appeal on points of law, *e.g.*, Blackaby, *supra* note 44, at 156. For a standing international appeal system for investment arbitrations, along the lines of the WTO Appellate Body, Wälde and Weiler, *supra* note 57, at 172. For an overall discussion of the reform of the control-mechanism in NAFTA Chapter 11 arbitrations, where the problem is more acute because of the involvement of national courts, Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues and Methods*, 36 VAND. J. TRANSNAT’L L. 1381 (2003).

with a related loss of efficiency, both in terms of costs and time needed to reach a final decision. There is a delicate balance between the search for finality and the search for quality.⁷³ That balance may well be disturbed by opening the door wider to annulments.

Another possible solution may be to introduce a consultation mechanism at the level of the arbitration proceedings. Any ICSID tribunal could request guidance about legal issues from a permanent consultative body.⁷⁴ A possible model may be provided by the procedure of Article 234 (formerly 177) of the EEC Treaty, pursuant to which national courts of Member States request interpretative rulings from the European Court of Justice on matters of European law. If properly designed, such a mechanism would ensure consistency, without the drawbacks of a full-fledged appellate procedure.

Yes, no, and maybe—the answer is manifold. The “maybe part” of it is a reflection of an ongoing evolution, which will obviously be the focus of developments in the years to come.

⁷³ Paulsson, *supra* note 2, at 391.

⁷⁴ Such a function of an independent body with interpretative jurisdiction is very different from the one provided in Art. 1131(2) of the NAFTA, pursuant to which the States party to the treaty may issue joint interpretations of the treaty. It is submitted that the proposed consultation mechanism would meet the definition of a “similar mechanism” in Section 2102(b)(3)(G)(iv) of the US Federal Trade Act.