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SUPERVISOR
DR. YOUSEPH FARAH

DISSERTATION

A CRITICAL ASSESSMENT OF THE ANNULMENT PROCEDURE UNDER ICSID RULES

ABSTRACT

International Centre for Settlement of Investment Disputes (ICSID) Convention (the Convention) has an important place among the international arbitration systems, since it provides for the self-contained resolution opportunity for the investment disputes. It contains all necessary provisions to govern the arbitral proceeding from the application to enforcement of the award. Furthermore, the Convention also includes its own control methods for allegedly defective awards. Among them, annulment is the one on which the debates mostly turn because of the differences between its objects set by the Convention and its interpretation and application by the ad hoc committees. This dissertation mainly aims at a critical assessment of the annulment procedure under the Convention, considering the objects and structure of annulment. To that end, in this dissertation, the whole procedure of the annulment mechanism will be examined with a critical approach, while referring relevant applications of the ad hoc committees where relevant. Finally, there will be comparison between the annulment mechanism of the Convention with the setting aside method of the United Nations Commission on International Trade Law Model Law to emphasise the special aspects of the both annulments systems. The main argument of this dissertation is that the annulment mechanism is a special-purpose remedy which is restricted to particular grounds in order to ensure only procedural fairness of the awards, so it should be held within the limits envisaged by the Convention and not be compelled to transform into appeal mechanism so as to review the merits of the disputes.

Key words: ICSID, Arbitration, Annulment, Committee, Grounds

LIST OF THE ANNULMENT CASES REFERRED TO

Amco Asia Corp., Pan American Development Ltd and PT Amco Indonesia v. Republic of Indonesia (ICSID Case No. ARB/81/1)

- Decision on Annulment, May 16 1986 (hereinafter: **Amco I**) (1 ICSID Reports 509)
- Resubmitted Case: Decision on Annulment, December 3 1992 (hereinafter: **Amco II**) (9 ICSID Reports 9)

Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on Annulment, September 1 2009 (hereinafter: **Azurix**) <http://italaw.com/sites/default/files/case-documents/ita0065.pdf> accessed 15.09.2014

CDC Group Plc v. Republic of the Seychelles (ICSID Case No. ARB/02/14), Decision on Annulment, June 29 2005 (hereinafter: CDC) (11 ICSID Reports 237)

CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8) Decision on Annulment, September 25 2007. (hereinafter: **CMS**) <http://italaw.com/documents/CMSAnnulmentDecision.pdf> accessed 15.09.2014

Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3)

- Decision on Annulment, July 3 2002 (hereinafter: **Vivendi I**) (6 ICSID Reports 340)
- Resubmitted Case: Decision on Annulment, August 10 2010 (hereinafter: **Vivendi II**) <http://italaw.com/documents/VivendiSecondAnnulmentDecision.pdf> accessed 15.09.2014

Continental Casualty Company v. Argentine Republic (ICSID Case No. ARB/03/9), Decision on Annulment, September 16, 2011 (hereinafter: **Continental**) <http://www.italaw.com/sites/default/files/case-documents/ita0231.pdf > accessed 15.09.2014

Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru (ICSID Case No. ARB/03/28), Decision on Annulment, March 1 2011 (hereinafter: **Duke**) <http://italaw.com/documents/DukevPeruFinal_1Mar2011_Eng.pdf> accessed 15.09.2014

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Annulment, July 30 2010 (hereinafter: **Enron**) <http://italaw.com/documents/EnronAnnulmentDecision.pdf> accessed 15.09.2014

Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (ICSID Case No. ARB/03/25), Decision on Annulment, December 23 2010 (hereinafter: **Fraport**) < http://italaw.com/documents/Fraport-Annulment-Decision.pdf> accessed 15.09.2014

Helnan International Hotels A/S v. Arab Republic of Egypt (ICSID Case No. ARB/05/19), Decision on Annulment, June 14 2010 (hereinafter: **Helnan**) <

http://www.italaw.com/sites/default/files/case-documents/ita0400_0.pdf> accessed 15.09.2014

Hussein Nuaman Soufraki v. United Arab Emirates (ICSID Case No. ARB/02/7), Decision on Annulment and Dissenting Opinion, June 5 2007 (hereinafter: **Soufraki**) < http://www.italaw.com/sites/default/files/case-documents/ita0800.pdf> accessed 15.09.2014

Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru (ICSID Case No. ARB/03/4), Decision on Annulment, September 5,2007 (hereinafter: **Lucchetti**) < http://www.italaw.com/sites/default/files/case-documents/ita0277.pdf > accessed 15.09.2014

Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Societe Camerounaise des Engrais (ICSID Case No. ARB/81/2) Decision on Annulment, May 3 1985 (hereinafter: **Klöckner I**) (2 ICSID Reports 95)

Malaysian Historical Salvors, SDN, BHD v. Malaysia (ICSID Case No. ARB/05/10) Decision on Annulment, April 16 2009 (hereinafter: **Malaysian Historical Salvors**) <http://www.italaw.com/sites/default/files/case-documents/ita0497.pdf > accessed 15.09.2014

Maritime International Nominees Establishment v. Republic of Guinea (ICSID Case No. ARB/84/4) Decision on Annulment, December 22 1989 (hereinafter: **MINE**) (4 ICSID Reports 79)

MCI Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador (ICSID Case No. ARB/03/6) Decision on Annulment, October 19 2009 (hereinafter: **MCI Power**) http://www.italaw.com/sites/default/files/case-documents/ita0502.pdf

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (ICSID Case No. ARB/01/7) Decision on Annulment, March 21 2007 (hereinafter: **MTD**) (13 ICSID Report 500)

Patrick Mitchell v. Democratic Republic of the Congo (ICSID Case No. ARB/99/7) Decision on Annulment, November 1 2006, (hereinafter: **Mitchell**) <http://www.italaw.com/sites/default/files/case-documents/ita0537.pdf> accessed 15.09.2014

Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan (ICSID Case No. ARB/05/16) Decision on Annulment, March 25 2010 (hereinafter: **Rumeli**) <http://www.italaw.com/sites/default/files/case-documents/ita0729.pdf> accessed 15.09.2014

Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16) Decision on Annulment, June 29 2010 (hereinafter: **Sempra**) <http://www.italaw.com/documents/SempraAnnulmentDecision.pdf> accessed 15.09.2014

Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4) Decision on Annulment, February 5 2002 (hereinafter: **WENA**) (6 ICSID Reports 129)

1 INTRODUCTION

International arbitration is a kind of dispute resolution system the main object of which is to grant cost and time effective, objective and final solutions to the parties against ordinary courts. Among the international arbitration systems, the Convention appears as a self-contained and de-localized one, which includes all necessary regulations and institutions to execute the solution for investment disputes from beginning of the arbitration to enforcement of the award.[1] Nevertheless, the solutions it produced sometimes need to be checked to scrutinise whether or not the solution process is conducted pursuant to procedural rules or whether the authority granted to solve the dispute is used within the determined limits.[2] However, the Convention stipulates these checks of the awards to be made within its system pursuant to its provisions;[3] and exclude control or oversight by any national or international courts or tribunals.[4]

The methods in the Convention against the awards are supplementation, interpretation, revision and annulment of the award. Among these, the annulment is the only remedy to set the award aside and invalidate its enforceability partly or completely; while the others rehabilitates the award without prejudice to its integrity and finality. With these methods, the Convention mainly seeks to balance between the need to check the awards and its main objects to provide efficient and final solutions to the disputes, since tendency toward one of them causes system to loss either its appeal or its coherency. Therefore, it does not envisage any other mechanism to check and ensure the correctness of the award as an appeal or does not equip the annulment system to do so as if an appeal mechanism. In this context, on the assumption that investors need final and binding protections against the political risks of investing in a foreign country;[5] the annulment system only aims at safeguarding the integrity of the dispute solution system and finality of the award while removing the defects in the

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[1] ICSID, "Background Paper on Annulment for the Administrative Council of ICSID" (August 15, 2012) <http://goo.gl/JBfzCb> accessed 11.09.2014, p3

[2] Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Durham, NC: Duke University Press 1992), p1

[3] ICSID, n1, p3

[4] Katia Yannaca-Small, "Improving the System of Investor-State Dispute Settlement: An Overview", OECD Working Papers on International Investment, 2006/01 <http://dx.doi.org/10.1787/631230863687> accessed 11.09.2014, p4

[5] Tai-Heng Cheng, "The Role of Justice in Annulling Investor-State Arbitration Awards" (2013) 31 Berkeley J. Int'l Law 236, p238

procedure and outcomes of the arbitration proceeding.[6] Therefore, the committees are supposed to assess the validity and finality of the tribunal's award, not of the dispute itself.[7] Even if the committee disagrees with the substantive decision of the tribunal; it could decide on annulment of the award only in the case of egregious procedural injustices.[8]

In this context, this dissertation aims at a critical assessment of the annulment procedure under the Convention, considering the objects and structure of annulment and its distinctive feature from the appeal mechanism and judicial review of the arbitral awards. Therefore, it examines the whole procedure of the annulment mechanism from application to post annulment procedure with a critical approach. It also refers to the ICSID cases which are relevant to the topics to show the practical implications of the ad hoc committees (the committee). Finally, it compares the annulment mechanism of the Convention with the setting aside method of the United Nations Commission on International Trade Law (UNCITRAL) Model Law that includes comprehensive alternative arbitration rules under which the non-ICSID investment arbitrations take place to emphasise the differences.

Meanwhile, this dissertation mainly argues that the annulment mechanism is a special-purpose remedy which is restricted to particular grounds in order to ensure only procedural fairness of the awards, so it should be held within the limits envisaged by the Convention and not be compelled to transform into appeal mechanism so as to review the merits of the disputes.

2 PROCEDURE

2.1 Application

Article 52 of the Convention includes procedural rules of annulment proceeding and the grounds for annulment. According to Arbitration Rule 53, the implementations of these rules are implied by Arbitration Rules.

In this context, both Article 52 and Arbitration Rule 50 provide that application for annulment has to be made by the parties to the original disputes to the Secretary-General in

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[6] David Caron, "Framing the Work of ICSID Annulment Committees" (2012) 6(2) World Arbitration & Mediation Review 173, p175-176

[7] David Collins, "ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?" (2013) 30(4) Journal of International Arbitration 333, <http://ssrn.com/abstract=2246756 > accessed 11.09.2014, p4

[8] Paul Friedland, Paul Brumpton, "Rabid Redux: The Second Wave of Abusive ICSID Annulments" (2012) 27(4) Am.U. Int'l L. Rev. 727, p728

writing. The Secretary-General could accept the application or refuse it on the grounds that the decision is a not a final award or the application has not been made by the parties or within the time limits, but other claims about the parties and decisions and the validity of waive from the annulment are for the committees to address in the annulment proceeding.[9]

According to Article 52(2), except corruption cases, the parties could make applications within the 120 days after the award have been rendered. Nevertheless, if the parties apply for supplementation or rectification, the time will run from the date on which the decision was rendered according to Article 49(2). Application for annulment on the ground of corruption could be made within 120 days after discovery of the corruption in any event within three years after the date of the award, so the time of discovery should be expressed in the application and it could be checked by the Secretary-General or the committee.[10]

In my view, establishing the time limit could contribute to annulment procedure in serving to integrity of the system and the efficacy and finality of the awards, since the continuous exposure of the awards to annulment might cause the annulment to be abused by the parties and thereby will undermine enforcement of the awards and the benefits of the arbitration. However, it seems a bit longer compared to the time limit of the Model Law, so it should be 90 days or less so as to contribute to the purpose of the quick and binding solutions.

On the other hand, Arbitration Rule 50 stipulates that the application includes details about the grounds. In this regard, according to the committee in Wena raising new arguments related to the ground invoked timely is possible for the parties, since the Convention does not stipulate any requirement of completeness of the application except the requirement to invoke one or more of the grounds and this does not harm the opposing party's right.[11] Similarly, the committee in Soufraki said that despite a new ground could not be invoked during the annulment because of time limits, but the parties could raise new arguments to flesh out grounds already invoked in application.[12]

In this context, it seems to me that it is not needed to give detailed information about the issues allegedly entailing annulment, because by virtue of grammatical interpretation, the wording of the Arbitration Rule 50 requires only stating specifically which of the grounds is being alleged but not the facts which allegedly constitute the basis of these grounds.

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[9] Christoph Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of other States*. (2nded. New York : Cambridge University Press 2009), p930

[10] Schreuer, Commentary, n9, p1027

[11] Wena, para.19

[12] Soufraki, para.33

Considering that the committees' authorities are determined by the Convention and the parties' agreement, for the committees to seek such perfectness in the application which is not stipulated by the Convention and moreover to reject the application due to such an alleged deficiency would cause the excess of its power.

2.2 The Decisions Subject to the Annulment

Article 52 envisages the annulment for only the awards. Award is a kind of decision that concludes the proceeding.[13] In this sense, while the decisions declining jurisdiction is subject to the annulment,[14] the other decisions lacking in this aspect such as interim decisions about the procedural orders or provisional measures could not be subject to annulment.[15] For instance, the Secretary-General rejected the applications for annulment of decision on jurisdiction and procedural order saying that the decisions were not final awards.[16] Nevertheless, once incorporated in final award, these decisions could be made subject to the annulment.[17] Additionally, the tribunal's order on the discontinuance of the proceeding upon the parties' agreement to settle the dispute or to discontinue the proceeding according to Arbitration Rule 43(1) is not subjected to annulment, but if the tribunal records such a settlement in the form of its award, this will be open to annulment.[18]

According to Article 49, decision on supplementation of awards is the part of the award, so this decision is subject to annulment.[19] For instance, the committee in Amco II accepted the separate application for annulment of supplemental award by consolidating this with the previous application for annulment of the original award.[20] Nevertheless, there is no such an

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[13] ICSID, n1, p12

[14] UNCTAD, "Post-Award Remedies and Procedures" (New York and Genova, 2003) <http://unctad.org/en/docs/edmmisc232add7_en.pdf> accessed 11.09.2014, p13

[15] Schreuer, Commentary, n9, p921

[16] Schreuer, Commentary, n9, p921-922, 930

[17] R. Doak Bishop, Silvia M. Marchili, *Annulment Under the ICSID Convention* (Reprinted. Oxford: Oxford University Press 2012), p37

[18] Schreuer, Commentary, n9, p925

[19] UNCTAD, n14, p14

[20] Schreuer, Commentary, n9, p925

explicit determination for the decisions on interpretation and revision or even on annulment, so annulment is not available for these decisions.[21]

In this regard, I am of the opinion that if the annulment would be possible for each provisional decision, it would increase the time and the cost of reaching the final and enforceable solution, because parties which guess that they would lose the arbitration could prefer to submit each trivial decision of the tribunal to the annulment for the purpose of delaying the enforcement of the award. Thus the fact that the annulment is only possible for the final award seems to fit the purpose of the annulment and arbitration. However, in this context, the decision affirming the jurisdiction is worth being mentioned separately. Any erroneous decision affirming jurisdiction could give rise to the erroneous decisions on the matters and even irrecoverable damages in the parties' rights in case of absence of stay of enforcement. Even there could be a stay of enforcement, if the committee would decide to annul the award due to lack of jurisdiction, the cost and time of proceeding would be wasted. Therefore, this decision is as important as the decision declining the jurisdiction, so as in the second one, it should be submitted to the annulment once this decision is rendered without waiting the final award in cases that this decision on jurisdiction is manifestly wrong.

2.3 Right of the Parties

Article 52 authorizes only either party to the original arbitration to request annulment. They can do so separately or together as in Klöckner II and Amco II; but no one other than parties have opportunity to initiate the annulment procedure such as any organ of ICSID or third parties alleging to be affected by the awards.[22]

Nevertheless, in my opinion, one important point should be taken into consideration while evaluating the ones which should have the right to apply for annulment. This is that one of the parties to the investment dispute is a contracting state so the awards potentially affect rights of others such as tax payers who might undertake costs or all citizens. Therefore, similar to possibility of public participation in arbitration proceeding, the annulment should be open to the application of the others who prove really and by persuasive evidences that their direct rights have been violated by the defects in the award and that there is direct causal link between these defects and their generous losses. On the other hand, since the annulment is only review on procedural issues, the third parties should only be allowed to allege the procedural defects but not issues on merits of the disputes. This could contribute to the transparency of the annulment procedure and advance its legitimacy and acceptability in the eye of the public.

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[21] Schreuer, Commentary, n9, p925

[22] Schreuer, Commentary, n9, p916

According to Article 52, the parties "may" apply for annulment so it is discretionary. Nevertheless, there are some debates on whether the parties could waive the right to seek annulment in advance. While some commentators argue that waiver in advance is possible in any case, some others regard waiver as possible for the grounds on which the parties have disposal; but not for those related directly to scope of ICSID jurisdiction for instance non-investment disputes, since these are directly related to the integrity and legitimacy of the ICSID arbitration and benefits of the ICSID system rather than private interest of the parties.[23]

However, I think that this issue should be considered under general principles of contract law, since the disputes at stake arise from a contract between the parties and moreover the arbitration is a system based on the parties' agreement. Because every issue including waive declared by the party could affect the other parties' decision on concluding the agreement, to allow the party to do otherwise would affect the predictability and reliability of the agreements and undermine the commercial purpose and benefits of the contract. In concluding an agreement, if the party considers this waiver as conflicting with its own interests, it could forgo the agreement. Therefore, as requirement to honour the agreement, any waive of right to annulment should be possible, so the committees should admit its validity and preclude the waiving party from applying for the annulment. However still it should be considered that there might be some cases required to be considered by the committees that could justify the withdrawing of the waiver such as involvement of the other party's deception in decision on this waiver.

2.4 Ad Hoc Committee and Proceeding

Ad hoc committees are appointed from the Panel of Arbitrators by the Chairman of the Administrative Council. However, Article 52(3) provides that arbitrators who were the member of the original tribunal or are of the same nationality as any such member or a national of the state party to the dispute or of the state whose national is a party to the dispute or are designated to the Panel of Arbitrators by either of those states, or have acted as a conciliator in the same dispute could not assigned to the committee. On the other hand, despite the Article 53 does not stipulate anything about the conflicts of interest in terms of any direct or indirect links between the arbitrators and one of the parties such as legal or business relationships; Arbitral Rule 6 requires the arbitrators to clarify such a relation with the parties.[24]

From my point of view, the selection of the committee seems suitable for the purpose of making the parties feel comfortable about that the control mechanism will be conducted

[23] Schreuer, Commentary, n9, p919

[24] Schreuer, Commentary, n9, p1035

absolute objectivity. Since annulment is only remedy for the parties to have the award defective by the procedural errors invalidated, a review made by a new committee which has different perspective and considerations from original tribunal and also independent from the parties' interference constitutes a kind of guarantee in the view of the parties.

On the other hand, the reference to Article 44 in Article 52 implies that annulment proceeding will be conducted in accordance with the Section 3 and the Arbitration Rules. In this context, any issue not covered by this Section or the Arbitration Rules or any rules agreed by the parties will be decide by the committee. However, Article 52 does not refer to Article 46-47 related to additional claims, counterclaims and provisional measures so they are not to be applied to annulment proceeding. Additionally, despite Article 52 does not refer to replacement and disqualification of conciliators and arbitrators, the committee in Vivendi I said that that by the reference of Arbitration Rule 53, Arbitration Rule 9 is applicable to the member of committee in case of a proposal to disqualify a member of the committee.[25]

Finally, Article 52(5) entitles the committee to stay enforcement of the award pending its decision so as to suspend a party's obligation to abide by and comply with the award and a contracting state's obligation to enforce the award.[26] On the other hand, according to Arbitration Rule 54, upon the request of the parties in application, enforcement of the award will also be stayed provisionally, but if the committee does not decide to continue this stay, it will automatically be terminated.

2.5 Discretion to Annul

Article 52(3) grants the committee the authority to annul the award or any part thereof. In ICSID cases, the committees' approaches to this provision have been different from each other. According to the committee in Klöckner I, this provision could be interpreted in two ways and it adopted the hair-trigger approach or "technical discrepancy" approach among them.[27] The committee said that any grounds for annulment having been found in principle cause total or partial annulment of the award and the committee does not have any discretion

[25] Vivendi, Decision on the Challenge to the President of the Committee, 3 October 2001, paras.3–13

[26] Schreuer, Commentary, n9, p1063

[27] Michael Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration" (1989) 4 Duke Law Journal 739, p762,777

to do otherwise.[28] This approach requires the annulment once a ground has been found regardless of the materiality or gravity of a violation.[29]

The other approach, mentioned but not accepted in Klöckner I, is consequentialist one which ignores such a technical discrepancy that does not constitute a "material violation" of the standards of the Convention.[30] This approach was embraced by the committee in Amco II saying that the Article 52 grants the committee a measure of discretion as is clear the use of terms such as "manifest", "serious" and "fundamental".[31] Therefore, The committee *"must guard against the annulment of awards for trivial cause"*[32] and it believes that annulment is clearly not needed to remedy procedural injustice and it would undermine the binding force and finality of ICSID Awards[33] or the ground for annulment either did not harm the applicant or not substantially affect the arbitral award; pursuant to principle of *"no annulment without grievance"*,[34] the committee may refuse to exercise its authority to annul an award even in case of established grounds.[35] Similarly, the committees in MINE, Wena and Vivendi also adopted this approach.[36]

In the lights of these approaches, I could say that the tribunal consists of people so they might make mistakes in conducting the proceeding or rendering the award such as in documentation or oral or written hearings even if the award seems to be perfect. Therefore rather than mere existence of the defects, their substantive impact on the awards should be paid regard and unless the defects could have affected the award manifestly, the tribunal's decision should be respected by considering that the annulment is not appeal. If the otherwise would be desired, the Convention would have included strict terms forbidding discretion of the committee instead of the words permitting this, additionally there would have been no need to a new committee to review the disputes to check mere existence of any defect, but this

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[28] Klöckner I, para.179

[29] Michael Reisman, "Control Mechanisms in International Dispute Resolution" (1994) 1 U.S.-Mex.L.J. 129, p133

[30] Reisman, Breakdown, n27, 777

[31] Amco II, para.1.20

[32] Vivendi para.63

[33] Amco II, para.1.20

[34] Klöckner para.179

[35] Amco II, para.1.20

[36] Christoph Schreuer, "Three Generations of ICSID Annulment Proceedings" in Emmanuel Gaillard, Yas Banifatemi (eds), *Annulment of ICSID Awards* (New York: Juris Publishing 2004) p.17-42, p19

could have been done by any official even any computer. In this context, even if the committee found any immaterial defects, it should exercise its discretion in favour of not annulling the award, because this seems to fit for purpose of the annulment more.

Additionally, according to Article 53, the committees could annul any part of the award as well as entire award. It should be said that the partial annulment has importance to contribute to efficacy of system by enabling unannulled parts to keep its binding nature and enforceability while allowing the partial injustice to be fixed.

In this context, the committee of Klöckner I said that *"partial annulment would seem appropriate if the part of the award affected by the excess of powers is identifiable and detachable from the rest."*[37] However, as the committee in MINE emphasised, if annulled part is inextricably linked to or constitutes the basis of the rest of award, the rest part also cannot survive the partial annulment.[38]

On the other hand, as said in MINE, the parties also could request partially or completely annulment of the award,[39] but the committee in Vivendi I said that to what extent the award would be annulled is under the Committee's discretion though.[40] Nevertheless, in MINE, the committee said that a committee may annul an award or any part thereof only pursuant to the scope of the request of the parties, unless by necessary implication annulment entails the annulment of other portions.[41] However, in my opinion, since the wording of the Convention does not include any reference to parties' application when mentioning the authority of the committee, the committee is not bound by the scope of parties' application in deciding on entire or partial annulment. Moreover, since the annulment serves to the purpose of the finality and binding nature of the award and integrity of the arbitration system, determination of to what extent the award would be annulled therefore enforceable or binding by the parties' applications would have violated the other party's rights and contradicted with these purposes of the annulment.

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[37] Klöckner I, para.80

[38] MINE, para.6.112

[39] MINE, para.4.07

[40] Vivendi I, para.69

[41] MINE, para.4.08

3 GROUNDS

The annulment is a system that has to be used within the limits of the Convention. One of the important limits is the grounds for the annulments stated by the Convention in Article 52. Therefore, the parties could not invoke any ground outside these grounds and the committees also could not annul the award for any grounds different from these. The grounds for annulment concern only procedural irregularities but not the substantial issues pursuant to the purpose of the annulment mechanism.[42] However, some committees have been appeared to interpret these grounds very extensive so as to enable the substantive review of the merits of the disputes.

3.1 Improper Constitution of the Tribunal

3.1.1 Context

This ground covers the situations such as a departure from the parties' agreement on the method of constituting the tribunal or an arbitrator's failure to meet the nationality or other requirements to become a member of the tribunal.[43]

The Convention sets out some rules determining constitution of tribunal. Article 14 requires arbitrators to have high moral character and competence in law, commerce, industry or finance and to be relied upon to exercise independent judgment. Therefore, if an arbitrator does not have one of these qualifications, this may lead the improper constitution of the tribunal.[44] However the committee in Klöckner I regarded *"any sign of partiality"* not as improper constitution of the tribunal but rather as a *"serious departure from a fundamental rule of procedure"*.[45]

Article 39 stipulates that the majority of the arbitrators will be nationals of states other than the contracting State party to the dispute and the contracting state national of which is a party to the dispute; however, it does not apply when if the sole arbitrator or each individual member of the tribunal has been appointed by agreement of the parties. In this context, the debates in some cases turned on that the regard should have been paid to the effective

[42] Albena P. Petrova, "The ICSID Grounds for Annulment in a Comparative Perspective: Analysis and Recommendations for the Future" (2006) 10 Vindobona Journal of International Commercial Law & Arbitration 287, p301

[43] ICSID, n1, p41

[44] Schreuer, Commentary, n9, p935

[45] Klöckner I, para.95

nationality rather than the formal nationality, because the nationality of the parties controlling the local company might be different from the legal nationality.[46]

The parties are supposed to present all their claims about the constitution of the tribunals during the arbitration promptly, failing that, the party could be deemed to have waived its right to object pursuant to Arbitration Rule 27 unless it proves that it has learned the facts on improper constitution later.[47] Failure to raise any objection cast doubt on the bona fide of the party and may imply abuse of this ground by the party for whom the award is unfavourable.[48]

In this regard, for me, the tribunal is in the centre point of the proceeding. It is the one which will hear the dispute, examine the arguments, evaluate the evidences, and apply the law thereto. Considering the tribunal's latitude to conduct the proceeding and even to select the applicable law, tribunal's constitution has such an effect as to go into the roots of the parties' rights and duties. Therefore, the parties' preferences and reliance on the Convention's method in selection of the arbitrators have to be paid regard and respected in order to persuade them that the most appropriate and most fair solution to their issues has been established. If the tribunals ignore this, the award will face with the risk of the annulment.

3.1.2 ICSID Cases

In CDC, the applicant contented the impartiality of the arbitrator, but the committee said that the absence of timely objection caused the party to be deemed to have waived its right; moreover the record of proceeding did not support the assertion of impartiality.[49]

In Vivendi II, Argentina claimed that the tribunal constituted improperly due to alleged conflict of interest on the part of the arbitrator, and the arbitrator did not properly disclose the situation and it lost the opportunity to challenge, thus violated the general principles of impartiality and due process and thereby caused improper constitution of the tribunal and a serious departure from a fundamental rule of procedure.[50] The committee decided that the conduct and attitudes of the arbitrator implied that the arbitrator exercised independent judgement not impaired; moreover this improper constitution had no material effect on the final decision, which was in any event unanimous.[51]

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[46] Bishop, n17, p49

[47] Schreuer, Commentary, n9, p937

[48] Schreuer, Commentary, n9, p937

[49] CDC, para.53-55

[50] Vivendi II, para.18

[51] Vivendi II, paras.232-239

In Azurix, the committee held that the committee could only examine whether the procedures for constituting the tribunal, including the procedure for challenging arbitrators have been properly complied with by the tribunal and could not examine merits of tribunal's finding such as whether or not decision on disqualification of a member was correct.[52]

3.2 Manifest Excess of Power

The committee in Soufraki said that the boundaries of the tribunal's power are determined by Article 25 concerning jurisdictional issues and Article 42 governing the applicable law and by subjective limits set by the parties' consent.[53] In conducting the proceeding and rendering the award, the tribunal has to observe these limits, so if it has no jurisdiction or is lacking in the parties' consent or does not apply the proper law to the dispute, it will be exceeding its powers.[54]

Nevertheless, according to Article 52(1), only manifest excess of powers justify the annulment. However, in ICSID case law, manifestness has been considered in different meanings. In Wena, CDC, Mitchell and Repsol, it was argued that it refers to the self-evident excess of power that could be perceived easily with certainty and immediacy without deep analysis or elaborate interpretations.[55]

On the contrary, some committees associated manifestness with the seriousness of its consequences rather than easy perception.[56] According to the committee in Vivendi I, if the excess of power is material namely "*clearly capable of making a difference to the result*", then it becomes a manifest.[57] Nevertheless, the committee of Soufraki adopted a mixed approach by saying that "*…manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.*"[58]

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[52] Azurix, paras.279-282

[53] Soufraki, para.37

[54] Schreuer, Commentary, n9, p938

[55] Wena, para.25; CDC, para.41; Repsol, para.36

[56] Philippe Pinsolle, "Jurisdictional Review of ICSID Awards" (2004) 5(4) Journal of World Investment and Trade 613, p8

[57] Bishop, n17, p67

[58] Schreuer, Commentary, n9, p939

In Klöckner I, the committee brought a *"tenable standard"* to the manifestness.[59] The committee said that tribunal's answers seemed to be tenable and not arbitrary, so they did not constitute the manifest excess of powers.[60] Similarly, some committees such as that of Rumeli and Duke adopted similar approach by rejecting the annulment when the tribunal's position is reasonable or tenable.[61]

Pirrwitz criticised the committee of Klöckner for not clarifying of "manifest" apart from substituting the criteria of *"tenable and not arbitrary"* which are not defined so are of equal vagueness.[62] Reisman criticised also from the different viewpoint that this "tenable standard" is a liberal, extremely tolerant holding, puzzling and lack of reference to an encompassing system of law, thus it is quite subjective.[63] Therefore it carries a risk of resulting in reviewing the substance of the tribunal's decision.[64]

Nevertheless, from my personal point of view, manifetness implies the volume of the excessiveness; therefore it excludes the small excess of power but concerns about only overdosage. It follows from this that the award should not be annulled because of the small and negligible defects having no substantive effects on the award such as modifying or reversing it. To determine the manifetness logically requires subjective considerations, therefore it has been left to the committees' discretion, already inevitably. That is because, otherwise Article 52 should have provided strict and maybe long list of all possible situations causing manifest excess of power. Considering the complexity of business life, it might not be possible. Given that the Convention does not establish a system of stare decisis and having the ad hoc nature, the committees have been constituted for only resolving a specific case[65] and given enough discretion in doing so, they should be expected to develop any method it sees practical and convenient to determine the manifestness and apply the issue before it only to settle this dispute. Since their methods do not constitute jurisprudence and bind the other

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[59] Bishop, n17, p68

[60] Klöckner I, para.4

[61] Rumeli para.96; Duke para.99

[62] Bjorn Pirrwitzt, "Annulment of Arbitral Awards under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" (1988) 23 Tex. Int'l L. J. 73, p97

[63] Reisman, Breakdown, n27, p766

[64] Bishop, n17, p68

[65] Elizabeth Martinez, "Understanding the Debate over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Gas Cases" (2012) 23 Duke Journal of Comparative & International Law 149, p180

committees, they should not be supposed to establish detailed criteria and to define these. Therefore, the point which deserves to be criticised should not be that but whether they exercise their authority within the limit of Convention. The most important limit here is, of course, not to cross the line of appeal, which is strictly excluded. Despite there is no such a second degree control mechanism that could evaluate this, the remedy for this is not to disregard their discretional power entirely, but may be self-control mechanism of the committees.

Besides all these, to determine the manifestness, the committees could apply two methods: firstly they could try to determine existence of an excess of powers, then look for its manifestness.[66] Alternatively, they could apply a prima facie test under which they could undertake merely a summary examination to determine if any alleged excess of powers is so egregious as to be manifest.[67] Nevertheless, these approaches eventually need to define the manifestness.

3.2.1 Jurisdictional Issues

3.2.1.1 Assessment of the Jurisdiction

The jurisdiction of the ICSID requires legal disputes arising directly out of an investment between a contracting state and a national of another contracting state, and consent of the parties to submit this dispute to the ICSID.[68] Therefore, as the committee in Soufraki said, if the tribunal asserts its jurisdiction over a person or a state that does not satisfy nationality requirements; or over a subject-matter which is not within the definition of investment or is not a legal dispute; or over an issue that is not included in the submission of the parties, it exceeds its power.[69] Similarly, as the committees in Vivendi I and Soufraki said, because the tribunal is not authorized to decline to rule on a dispute having all jurisdictional requirements;[70] failure by the tribunal to exercise its jurisdiction constitutes excess of power.[71]

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[66] Klöckner I, para.4

[67] Schreuer, Commentary, n9, p940

[68] Vincent O. Nmehielle, “Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)” (2001) 7 Ann. Surv. Int'l & Comp. L. 21, p26

[69] Soufraki, para.42

[70] Schreuer, Commentary, n9, p947

[71] Vivendi I, para86; Soufraki para.43

However, the parties should make its objections against the cases of lack of jurisdiction or failure to exercise jurisdiction promptly in course of proceeding in making first submission or if they know of the facts later once these come into their knowledge.[72]

Some commentators such as Pirrwitz and Kaufmann-Kohler argue that there are no "degrees" in lack of jurisdiction,[73] namely any tribunal either has jurisdiction or it does not, there is nothing between them.[74] Similarly, Pinsolle said that the tribunal *"cannot be half-right or half-wrong when it comes to jurisdictional issues"*, so the lack of the jurisdiction causes arbitral tribunal to necessarily committee a manifest excess of powers.[75]

Nevertheless, some committees such as in Azurix, and Enron[76] maintain that the ICSID Convention adopts the principle of "*competenz-competenz"* by saying that *"the tribunal shall be the judge of its own competence"* in Article 41.[77] Since the grounds for annulment do not discriminate between jurisdictional errors and errors concerning the merits of the dispute, the committee may annul the award only where the tribunal has manifestly acted without jurisdiction[78] or when its decision on competence was manifestly wrong.[79]

However, as for me, this issue should be considered within its realities. That is to say; as seen from the components of the jurisdiction, deciding the jurisdiction requires the tribunal's great efforts. Firstly, the Convention does not provide for the definition of investment and legal dispute which may lead the tribunals.[80] On the other hand, it might be hard sometimes to determine the nationality due to the shareholders that have the control on the investors. Moreover, considering the complexity of the investment disputes due to their volume and

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[72] Bishop, n17, p70

[73] Pirrwitzt, n62, p99

[74] Gabrielle Kaufmann-Kohler, "Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?" in Emmanuel Gaillard (ed), *Annulment of ICSID Awards : a Joint IAI-ASIL Conference* (Bern: Stämpfli 2004) p.189-221, p198-199

[75] Pinsolle, n56, p616

[76] Azurix paras.63-68; Enron para.69

[77] William Park, "The Arbitrator's Jurisdiction to Determine Jurisdiction" in Albert Jan van den Berg (ed) *International Arbitration 2006: Back to Basics? ICCA Congress Series No. 13 (Montreal 2006)* (The Netherlands: Kluwer Law International 2007) p.55-153, p56

[78] Azurix, para.68

[79] Bishop, n17, p72

[80] Georges Delaume, "ICSID Arbitration in Practice" (1984) 2 Int'l Tax & Bus. Law 58, p64

intricate structure extending to different economic and legal areas, to determine the content of the submission to the tribunal, viz, scope of the consent of the parties could also be difficult matter. Most importantly, the decision on jurisdiction is not of mere procedural but rather substantive issue. Therefore, the committee should evaluate the jurisdictional issues only in the light of the tribunal's record without embarking on deep analysis by taking into account all these facts along with the fact that the committee is not a superior authority so as to re-examine all the facts of the disputes over again and that the authority to decide on the jurisdiction is granted the tribunal. Nevertheless, this evaluation should not be such a cursory one as to leave any manifest error in the tribunal's assessment without any sanction.

3.2.1.2 ICSID Cases

In Klöckner, Klöckner argued that the tribunal exceeded its power by arrogating the jurisdiction in Cameroon's counterclaim on management functions despite the Management Contract led the ICC arbitration.[81] The committee said that the tribunal regarded the ICSID clauses in other two agreements as an "essential jurisdictional guarantee" for both parties; and its relinquishment could neither be presumed nor accepted if there was no clear evidence,[82] thereupon this interpretation of the tribunal was tenable not arbitrary regardless of its correctness and did not constitute a manifest excess of powers.[83]

In Amco I, Indonesia claimed that the tribunal did not have the jurisdiction because dispute related to an action of Indonesia Army which would constitute an international tort was different from an investment dispute.[84] The committee decided that international tort and investment disputes were not *"mutually exclusive categories"*, so the tribunal was competence on the dispute.[85]

In Vivendi I, the claim by Argentina that the tribunal did not have jurisdiction because Concession Contract pointed out the domestic courts for any contractual disputes, but the committee said that it did not exclude the jurisdiction arising directly out of the BIT.[86]

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[81] Richard Happ, Noah Rubins, *Digest of ICSID Awards and Decisions: 1974-2002* (Oxford: Oxford University Press 2013), p48

[82] Klöckner, para.52

[83] Klöckner, para.52

[84] Bishop, n17, p80

[85] Happ, n81, p63

[86] Bishop, n17, p82

In Soufraki, the applicant argued that the tribunal investigated the nationality of the investor who wanted to invoke the BIT, and reached the results contrary to the certificates of nationality issued by the Italy and thereby it exceeded its power.[87] However, the committee considered that it was clearly within the power even the duty of the tribunal to decide on its jurisdiction to verify that the party's nationality since it was a prerequisite to its competence.[88]

In Malaysian Historical Salvors, the tribunal decided that the dispute was not related to an investment so not within the scope of its competence; upon this, the applicant claimed that tribunal applied an overly-restrictive definition of the investment.[89] The committee held that tribunal did not take the definition of investment in the BIT and the Convention's approach to the concept of investment and moreover ignored the small economic, cultural and historical contributions in assessing existence of an investment, so exceeded its powers by failing to exercise the jurisdiction.[90]

In Lucchetti, the tribunal declined to exercise jurisdiction over Lucchetti's claims under the BIT by applying the "*ratione temporis"* exception in the BIT and the applicant claimed that the tribunal misinterpreted article of BIT.[91] The committee rejected the claim saying that the tribunal's treaty interpretation was not inconsistent with well-known and widely recognised international rules of treaty interpretation.[92]

In Repsol, Petroecuador asserted that the tribunal had manifestly exceeded its powers by deeming itself competent on the issue by referring to the wrong contract and despite there was no legal dispute and the Ecuadorian authorities had already settled the issue so it constituted an administrative res judicata.[93] The committee rejected the claim saying that dispute and its jurisdiction resulting from a modified agreement having replaced an old one. On the other hand the administrative authority and the tribunal dealt with the different aspects of the issues and furthermore the administrative authority could not constitute res judicata for the tribunal,

[87] Bishop, n17, p75, Schreuer, Commentary, n9, p947

[88] Soufraki, para.57

[89] Malaysian Historical Salvors, para.28

[90] Malaysian Historical Salvors, para.80

[91] Lucchetti, para.31-35

[92] Lucchetti, para.116

[93] Schreuer, Commentary, n9, p952

additionally this authority also said that this dispute could be submitted to the ICSID arbitration, so there was no excess of power by the tribunal.[94]

In Rumeli, the applicant contended that Rumeli's investment did not have qualification of the investment in terms of the Turkey-Kazakhstan BIT and the Foreign Investment Law, so the tribunal had no jurisdiction.[95] The committee did not accept this claim by saying that it required the committee to reconsider the evidence and this was outside the scope of its powers.[96]

In Enron, Argentina sought annulment claiming that the tribunal exceeded manifestly its powers in exercising jurisdiction over the claimants' claims, despite not the claimants but a local company some shares of which was owned by the claimants was a party to the License on which alleged interference was grounded.[97] Argentina contended that if both a company and a shareholder would be given the opportunity to bring a claim in respect of a violation of the rights of the company, it would case the risk of double recovery, however, the committee declined to annul the award upon this request saying that if such a situation was potentially to arise, it would be ensured by government negotiators or regulators that no such double recovery or effects occur.[98] Apart from that, Argentina also claimed that the tribunal lacked jurisdiction due to the existence of a forum selection clause in the Licence which envisaged federal courts' jurisdiction over disputes concerning the License.[99] The committee decided that a breach of Licence might also amount to a breach of the BIT, and that where this was the case, a forum clause in the Licence would not preclude an ICSID tribunal from determining a claim for breach of the BIT.[100]

3.2.2 Issues about the Applicable Law

In Klöckner, the committee opined that Article 42 could not be taken as stating simple advice or recommendations to the arbitrators or an obligation without sanction.[101] According to the committee, the sanction of non-compliance with Article 42 is envisaged in Article 52(l)(b) as a ground for annulment, because it is impossible "*to imagine that when they*

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[94] Schreuer, Commentary, n9, p952

[95] Rumeli, paras.85-86

[96] Rumeli, para.96

[97] Enron, para.84

[98] Enron, paras.123-125

[99] Enron, paras.130,138

[100] Enron, para.142

[101] Klöckner I, para.58

drafted Article 52, the Convention's authors would have forgotten the existence of Article 42."[102] Nevertheless Pirrwitz criticised this approach saying that from this point of view, any defects in the award which would otherwise remain sanctionless must be subject to review.[103]

However, as far as I am concerned, Article 42 is different from the any other sanctionless provision. First of all, application of the relevant law constitutes pillars of rendering fair awards alongside collection and evaluation the facts of the disputes duly. In this context, even if the procedure concerning the facts has been conducted properly, the non-application of the proper law would have such a magnitude impact as to change the award and thereby affects the parties' rights radically. Therefore, to ensure at least procedural fairness of the award requires the relevant law to be applied. Secondly, it should also be added that applying the proper law has importance also with regard to the reasoning of the award which enables the parties to comprehend the motives behind the award and understand the results, since the reasoning covers both legal and factual parameters. Additionally, as also said by the committee in MINE, the tribunal is expected to respect the parties' autonomy which is given by Article 42 in selecting the applicable law, so to apply this law.[104]

Besides all of these, the dimension of the application of the proper law with regard to the present topic is that the parties' agreement on applicable law forms part of arbitration agreement which determines the limits of tribunal's power, so disregarding this agreement by the tribunals leads it to exceed its power.[105] Even if applicable law is selected by the tribunal according to second sentence of the Article 42(1), selection of law is also part of the contractual arrangement between the parties because by incorporating the Convention into their agreement to arbitrate, the parties consent to the residual rule of Article 42(1).[106]

3.2.2.1 Determination of the Applicable Law

In ICSID case law, the committees exhibited different approaches about to what extent the committees should evaluate tribunal's decisions on this issue, although they agreed on the importance of the applicable law.[107] The committees in Klöckner I and Wena opined said that to determine the applicable law instead of the tribunal is not the responsibility of the

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[102] Klöckner I, para.58

[103] Pirrwitzt, n62, p104

[104] MINE, para.5.03

[105] MINE, para.5.03; Duke, para.95

[106] Schreuer, Commentary, n9, p959

[107] Bishop, n17, p89

committees, but the committee could only take the award as it is.[108] The committee in CDC said that their task is not to examine the correctness of the legal analysis or interpretation by the tribunal but evaluate whether the tribunal *"endeavoured to apply"* proper law or not.[109] In this regard, the Soufraki committee pointed out the distinction between the failure to apply the proper law and an error in the application or interpretation of this law,[110] and the commitee in Amco I added that the first one is a ground for annulment but the second one is a ground for appeal.[111] Nevertheless, the committee of Klöckner I emphasized manifestness of the error in law,[112] and the committee of MTD, which was followed by the committee of Azurix later on[113], said that the notion of endeavouring to apply the law is not a merely subjective matter, even when purporting to apply the relevant law if the tribunal actually applies different law; the award will be annulled provided that this error is manifest.[114] The committees in Soufraki and Sempra supported this view adding that in some cases misinterpretation or misapplication of the relevant law may be so egregious that it could amount to failure to apply the proper law and thereby to lead manifest excess of power.[115] Some other committees such as in MINE, CMS and Rumeli also took the same view.[116] However, the MCI Power and Lucchetti committees remarked that when more than one interpretation of the provision is possible, selecting one of them could not cause manifest excess of power.[117]

In this issue, I think that the committee should not attempt to re-examine the merits of the dispute, re-select the applicable law nor re-apply this law to the merits. That is because this authority primarily belongs to the tribunal and the exclusion of the appeal in ICSID Convention could be given as clear evidence of this idea. Therefore, it should only check whether or not procedural issues have been followed properly by the tribunal in these steps and intervene only if the error in one of them is so manifest and obvious that could be discerned without deep examination pursuant to purpose of the annulment and its limits

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[108] Klöckner I, para.73; Wena, para.39

[109] CDC, para.45

[110] Soufraki, para.85

[111] Amco I, para.23

[112] Klöckner I, para.61

[113] Azurix, para.136

[114] MTD, para.47

[115] Soufraki, para.86; Sempra, para.164

[116] MINE, para.5.04; CMS, para.136; Rumeli para.78

[117] MCI Power, para.52; Lucchetti, para.112

determined by the Convention. The most important limit is here again not crossing the line of the appeal.

Another dimension of the error in application of the law is failure to apply some provisions of the applicable law. The committee in Duke said that *"the obligation upon a tribunal under Article 42(1) of the ICSID Convention to apply, inter alia, 'the law of the Contracting State' is a reference to the whole of that law,… not to any particular portion of it."*[118] Therefore, failure to apply some provisions should not lead a manifest excess of powers if the tribunal determined the applicable law properly and purported to apply it to the dispute.[119] Nevertheless, the committee in Amco I took the view that failure by the tribunal to apply some provisions of the law enough to annul the award.[120] However, Pirrwitz criticized the committee for characterizing every error in law as a failure to apply it and thereby disregarded the purposes of the "manifestness" requirement.[121]

3.2.2.2 ICSID Cases

In Klöckner, the tribunal referred to a basic principle of French civil law *"as is indeed the case under other national codes which* [the tribunal] *know of"* in dealing with *"the duty of full disclosure to a partner"*.[122] The applicant alleged that the tribunal did not apply the contracting state's (Cameroonian) law based on French law.[123] However, the committee said that to determine whether the law of the contracting state was applied or not, it should have understood whether this "basic principle" was a part of positive law of contracting state, but it was impossible by reading the award since it did not make no precise reference to legal sources;[124] moreover, even so, the tribunal would not have applied the contracting state's law by referring to only this one "basic principle".[125] On the other hand, from the expression of "other national codes", the committee questioned whether the tribunal applied the general

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[118] Duke, para.212

[119] Bishop, n17, p92

[120] Bishop, n17, p92

[121] Pirrwitzt, n62, p109

[122] Klöckner I, para.66

[123] Klöckner I, paras.57-63

[124] Klöckner I, para.71

[125] Klöckner I, para.68

principles of law.[126] However, it said that even this was the case, these principles were *"complementary (in the case of a "lacuna" in the law of the state), or corrective"* so could be applied only after having determined and applied the law of the state party so the tribunal had exceeded its power manifestly by not applying "the law of the contracting state."[127]

In Amco I, against the allegation of Indonesia, the committee dealt with the question whether invocation of "equitable consideration" by the tribunal implied that it based its decision on the principle of *"ex aequo et bono"* despite not having any authority to do so.[128] The committee said that since equitable considerations could indeed form part of the law of Indonesia or international law, it could not automatically amount to decision *ex aequo et bono*.[129]

In MINE, Guinea argued that the tribunal failed *"to apply any law, much less the correct law"* as to both liability and damages, but the committee said that despite the tribunal erred in citing Article 1134 of the French Civil Code, the corresponding provision of the applicable Guinean law has the same number and the same contents as this, so this could not entail the annulment.[130]

In Wena, it was claimed that the tribunal violated Article 42 by not applying Egyptian law, the committee remarked that the fact that treaty rules had been applied to the dispute was not contrary to Egypt law, because according to Egyptian Constitution, treaties had the force of law within their legal system.[131]

In Helnan, Helnan asserted the tribunal failed to apply the relevant treaty standard by deciding that Helnan did not exhaust the local remedies before applying the ICSID arbitration; despite BIT did not require doing so. [132] The committee accepted that such a requirement deprived it of pursuing its direct treaty claim, and thereby did not comply with the treaty, so the tribunal exceeded its power manifestly.[133] Neverteless, the committee decided not to annul

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[126] Klöckner I, para.69

[127] Klöckner I, paras.69-79

[128] Happ, n81, p63

[129] Amco I, paras.24-27

[130] MINE, paras.2.05,6.40

[131] WENA, paras.21,42-46

[132] Arthur Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2011)* (The Netherlands: Martinus Nijhoff Publishers 2012), p74

[133] Helnan, paras.53-55

the award on the ground that the tribunal's finding on this issue did not affect the rest of the award.[134]

In Sempra, Argentina argued that the tribunal applied customary international law - Article 25 of the ILC- instead of BIT, so manifestly exceeded its powers by its failure to apply Article XI of BIT.[135] The committee said that despite*"[a]s a general rule, a treaty will take precedence over customary international law",*[136] the tribunal has held that *"the substantive criteria of Article XI simply cannot find application where rules of customary international law do not lead to exoneration in case of wrongfulness, and that Article 25 "trumps" Article XI in providing the mandatory legal norm to be applied."*[137] And therefore the tribunal regarded customary international law as the primary law to be applied but not the BIT. The committee decided that the tribunal, thereby, made a fundamental error in identifying and applying the applicable law, thus exceeded its power.[138] Moreover, since it was obvious from a simple reading of the reasons, it was manifest as well.[139]

In Enron, against the similar reasons invoked for annulment, the committee did not see any annullable error in tribunal's equating customary international law to the Article XI of the BIT,[140] but it had a problem with the way the tribunal had interpreted that provision.[141] The committee finds that in reaching that conclusion, the tribunal did not in fact apply Article 25(2)(b) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue, so to failed to apply the applicable law so as to cause annulment.[142]

On the contrary, in CMS, against the similar allegations, the committee said that Article XI and Article 25 have different operation and content; but disregarding this fact the tribunal

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[134] Helnan, para.57

[135] Sempra, para.120

[136] Sempra, para.176

[137] Sempra, paras.208

[138] Sempra, paras.208-209

[139] Sempra, paras.218-219

[140] Enron, para.403

[141] Christoph Schreuer, "From ICSID Annulment to Appeal Half Way Down the Slippery Slope" (2011) 10 The Law and Practice of International Courts and Tribunals 211, p220

[142] Enron, paras.392,393

applied customary international law so made a manifest error of law.[143] Nevertheless, despite applying it cryptically and defectively, the tribunal applied it, so there was no manifest excess of powers.[144]

These last three decisions are of the clear examples of the inconsistency which is one of the reasons of criticism about the annulment system.[145] Inconsistency appears in the cases which have similar disputes but different awards and the main reason of the inconsistency is interpretation and implementation of the same provisions in different ways.[146] In my opinion, it should be deemed to be normal for the annulment mechanism, since the committees have discretional power in interpreting and implicating the provisions. Therefore, each committee is result-oriented to evaluate the issue before it, and while doing this, it is not bound by the decisions of any other committee or of superior body. On the other hand, this issue should be analysed under its own conditions and by comparing the alternative methods. The annulment is a relatively young system so as to establish similar implications and interpretations compared to the national judicial systems. These require so many cases to be submitted to the annulment and the decisions of these cases to be criticised and analysed by the commentators and experts. On the other hand, the disputes before the committees are complex issues each of which may have special aspects and extend to the different legal and economical even political systems compared to the local cases. Therefore, it should not be argued that allegedly inconsistent cases are the exactly same. Additionally, even if the appeal mechanism would be established, it is not guarantee that the inconsistency will not appear again, because in national judicial systems, this mechanism is often seen to produce inconsistent decisions also. Moreover, any superior authority would need any other superior authority to scrutinise its decisions, which would be open to produce vicious circle. Besides, the committees are of the nature which is special to their purposes, so any attempt to establish jurisprudence in this system could destroy its essence by putting pressure on the committees to focus on rendering sample decisions for the succeeding committees or tribunals instead of solving its issue which is reason for its being. Above all, the solution to the inconsistent decision is relatively simple in the ICSID system than that in the national courts systems, because it is self-contained system. For instance, assignment of the same or similar members to the annulment committees or consolidation of the disputes which have the common parties in similar issues

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[143] CMS, paras.130-131

[144] CMS, para.136

[145] Collins, n7, p3; Irene Ten Cate, "International Arbitration and the Ends of Appellate Review" (2012) 44 International Law and Politics 1109, p1175

[146] Kenneth Vandevelde, *Bilateral Investment Treaties- History, Policy, and Interpretation* (New York: Oxford University Press 2010), p456

could cause stability and consistency in similar or following cases.[147] Also in order to establish the consistent way of interpretation of the provisions, the constitution of a permanent authority could be possible to render preliminary rulings to decide on a question of law upon the original tribunal's request.[148]

3.3 Corruption on the part of an Arbitrator

Corruption, by its very nature, leads the arbitrator involved therein to bias forward the party to the corruption. However, despite mere biased behaviour could point out to a serious departure from a fundamental rule of procedure, it itself not be enough to prove the corruption but there must be improper payment to the arbitrator accompanying it.[149] In case that an arbitrator engaged in such a corruption, once the party learns this, it should request the disqualification.[150]

On the other hand, to prove the corruption contains practical difficulty compared to the other grounds which the parties could notice during the proceedings or from the award itself, therefore the time of application in case of corruption has been envisaged longer than that of the other grounds.[151] Nevertheless, this ground is not limited to cases of corruption evidenced by a court judgment or a showing of *"reasonable proof that corruption might exist"*; however still it could be said that the mere allegation is not enough but there must be sufficient supporting evidence.[152]

3.4 Serious Departure from a Fundamental Rule of Procedure

[147] Christian Tams, "An Appealing Option? The Debate About an ICSID Appellate Structure" (June 3, 2006) *Essays in Transnational Economic Law Working Paper No. 57* <http://ssrn.com/abstract=1413694> accessed 11.09.2014, p37

[148] Christoph Schreuer, "Why Still ICSID?" (2012) 3 Transnational Dispute Management 1 <http://www.univie.ac.at/intlaw/wordpress/pdf/why_still_icsid.pdf> accessed 11.09.2014, p.6-7

[149] Schreuer, Commentary, n9, p978

[150] ICSID, n1, p46

[151] Philippe Pinsolle, "The Annulment of ICSID Arbitral Awards" (2000) 1(1) Journal of World Investment and Trade 243, p249; Schreuer, Commentary, n9, p979

[152] ICSID, n1, p46

Due process is a must for arbitration like legality.[153] Observance of proper procedure is of vital importance in order to ensure the legitimacy and integrity of the arbitral proceeding.[154] This ground constitutes a guarantee for the parties' due process rights.[155] Therefore, in spite of the tribunal's broad latitude to carry out the proceeding; unequal and arbitrary treatment, impartiality, denial of basic due process during the proceedings constitute the reasons for the annulment.[156]

3.4.1 Rules of Procedure under the ICSID Convention

The rules regulating the arbitral procedure are set forth in ICSID Arbitration Rules which are of international in nature.[157] Therefore these are more detailed than those of other arbitration institutions which allow for supplementation by domestic law when necessary.[158] Despite these rules include some basic norms as to affect proceeding fundamentally,[159] but all of them could not be deemed to be "fundamental rule of procedure".[160] In ICSID case law, the committees identified *"the equal treatment of the parties"; "the right to be heard"; "an independent and impartial tribunal"; "the treatment of evidence and burden of proof"*, and *"deliberations among members of the tribunal"* as fundamental rules of procedure.[161]

Annulment according to Article 52(1)(d) requires there requirements to be met together: the rule at stake must be fundamental; there must be a departure from that rule; this departure must be serious one.[162] Therefore, the committees tried to determine the scope of these words.

The first component of this ground is fundamentality of the rule, so violation of an ordinary rule is not enough for annulment.[163] The fundamental rules represent minimal

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[153] Julian Lew, Loukas Misteiis, Stefan Kröll, *Comparative International Commercial Arbitration* (The Netherlands: Kluwer Law International 2003), p674

[154] Schreuer, Commentary, n9, p979

[155] Kaufmann-Kohler, n74, p192

[156] Noah Rubins, "Judicial Review of Investment Arbitration Awards" in Todd Weiler (ed) *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (New York: Transnational 2004) p.359-390, p368

[157] Georges Delaume, "ICSID Arbitration Proceedings" (1986) 4 Int'l Tax&Bus. Law 218, p221

[158] Delaume, Proceeding, n157, p221

[159] Bishop, n17, p129

[160] MINE, para.5.06

[161] ICSID, n1, p47

[162] Fraport, para.180

standards of procedure in international law.[164] According to the committee in CDC, rules of natural justice, which are those concerned with the essential fairness of the proceeding are fundamental,[165] and according to the committee in MINE, Article 18 of the UNCITRAL Model Law envisaging equal treatment and full opportunity of presenting their arguments for the parties are clear examples of these.[166] In this sense, it is fundamental procedural rule that each party has to be given equal opportunities to submit its oral or written claims, pleadings and evidences and to be heard before an independent and impartial tribunal.[167] The lack of meaningful deliberation by the tribunal constitutes also departure from a fundamental rule of procedure.[168]

Secondly, it must be established that there was a departure. However, considering that the ICSID Convention and Arbitration Rules give the tribunal significant amount of discretion in conducting the proceeding and accepting and assessing the witness and evidence, to establish this departure seems harder for the parties.[169] For instance, the committee in Rumeli rejected the application for annulment on the rationale mentioned.[170]

As for the seriousness, the committee in MINE said that any departure which is substantial such as to deprive a party of the benefit or protection which the rule intends to provide is serious.[171] According to the committee in WENA, if the departure from a rule leads the tribunal to reach substantially different conclusion from what it would have awarded when

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[163] Schreuer, Commentary, n9, p980

[164] Matthias Scherer, "ICSID Annulment Based on Departure from Rule of Procedure" in Alexander J. Bělohlávek, Naděžda Rozehnalova (eds) *Czech and Central European Yearbook of Arbitration 2011: The Relationship between Constitutional Values, Human Rights and Arbitration* (New York: Juris Publishing 2011) p.211-226, p213

[165] CDC, para.49

[166] MINE, paras.5.05-5.06

[167] Wena, para.57; Luccetti, para.122, Vivendi I, para.85

[168] CDC, para.49

[169] Lise Johnson, "Annulment of ICSID Awards: Recent Developments" *IISD IV Annual Forum for Developing Country Investment Negotiators, Background Papers* (New Delhi, October 27-29, 2010) <http://www.iisd.org/pdf/2011/dci_2010_annulment_icsid_awards.pdf> accessed 11.09.2014, p9

[170] Rumeli, para.104

[171] MINE, para.5.05.

this rule would have been observed, then this departure is serious.[172] On the other hand, the committees in CDC, Azurix and Enron adopted a mixed position by defining the seriousness according to these definitions together.[173]

In addition to all these, the parties are supposed to raise the objection in event of any violation of the fundamental procedural rules at the time of occurrence.[174] As mentioned before, otherwise Arbitration Rules 27 envisages the party to be deemed to have waived its right to object.[175] However, the party who was not aware the action violating the rules could not be deemed to lose its right to invoke this ground.[176]

In this sense, to my way of thinking; despite the rules of procedure seem to relate to the technical issues that govern how the tribunal conducts proceeding; some of them might have such a drastic impact on the parties' rights and the fate of the dispute. Absence of enough opportunity for the parties to raise their arguments or respond the other parties' claims and lack of enough evaluation of evidence or witness could lead the completely opposite award, since the existence of these opportunities may have rebutted some issues constituting basis for the conclusion or revealed some new ones which are likely to change the result. On the other hand, impartiality constitutes the guarantee for objectivity of the arbitration and thereby for the parties' rights since only unbiased evaluation of the facts and law without any prejudice is capable of producing fair results acceptable for everyone. In addition to all these, the stipulation of seriousness makes the annulment proceeding free from the mechanical procedure leading automatic annulment even in the presence of trivial mistakes in proceeding. The existence of any defects should not cause the annulment so as to safeguard purpose of the arbitration and its benefits such as final and quick solution.

3.4.2 ICSID Cases

In Klöckner I, the claimant alleged that among the member of tribunal, any deliberation did not take place.[177] The committee accepted that deliberation among the arbitrators was a "basic rule of procedure", moreover such deliberation was required to be real and not merely apparent,[178] but still rejected the claim by saying that the applicant could not establish its

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[172] Wena, para.58

[173] CDC, para49; Azurix, paras.51-52; Enron, para.71

[174] Bishop, n17, p134

[175] Klöckner I, para.88

[176] Fraport, para.207

[177] Klöckner I, para.84

[178] Klöckner I, para.84

claim; on the contrary some references in the award to a minority opinion advanced "within the tribunal" was indicating some deliberation.[179] Additionally, the committee rejected the claim regarding the irregularity of the arbitral procedure on the ground that the claimant did not raise the objection timely and deemed to waive its right pursuant to Arbitration Rule 27.[180] The claim of the impartiality of the tribunal was also rejected by the committee on the ground that in examining various elements and features of the award, there was no sufficient evidence to establish the impartiality.[181]

In Wena, the applicant contended that it was not offered the opportunity to address the issue of the appropriate rule of interest and thus it was deprived of its right to be heard.[182] The committee said that the parties must have foreseen that the tribunal could use the compound interest which was being generally used by international tribunals since they admitted it as being among appropriate methods.[183] Additionally, the applicant contended that the tribunal's acceptance the existence of a consultancy agreement as "undisputed" caused the burden of proof to be reversed.[184] The committee rejected the claim saying that this claim was also of a purely factual issue not procedural one, besides the applicant did not show the impact of the issue on the award and did not demonstrate why, and in respect of which fundamental rule of procedure, the burden of proof would have been reversed.[185]

In Vivendi I, the claimant argued that the tribunal decided on dismissal of the Tucuman claims considering the question which was not adequately canvassed in argument.[186] But the committee said that the tribunal proceeded with abundant care and rendered a densely reasoned award, so there was no basis for this claim.[187] The claimant also contended that the tribunal's decision came unannounced so that they had no opportunity to present their

[179] Klöckner I, para.85

[180] Klöckner I, para.88

[181] Klöckner I, para.111

[182] Wena, para.66

[183] Wena, para.69-70

[184] Wena, para.59

[185] Wena, para.60-61

[186] Vivendi I, para.82

[187] Vivendi I, para.83

arguments on the decision.[188] The committee, examining the records, said that parties were provided for fair and equal proceeding, so rejected it.[189]

In Azurix, Argentina alleged that the tribunal did not consider the documents pointed by it in their request likely to prove the corruption, but the committee said that it was not a serious departure from a fundamental rule of procedure for a tribunal to decline to consider an issue that it considered to be irrelevant, merely because one of the parties considered it to be important.[190]

In Duke, Peru contented that the tribunal omitted to apply Peruvian law chosen by the Parties so it departed from a fundamental rule of procedure, but the committee declined this claim saying that Peru failed to identify such fundamental rule of procedure.[191]

In Fraport, Fraport argued that the tribunal departed seriously from a fundamental rule of procedure by disregarding the principles of "*nullum crimen sine lege* and *in dubio pro reo"* in determining whether a criminal law had been violated and by relying upon evidence admitted after the close of proceedings in denial of Fraport's right to be heard.[192] The committee said that these principles could not be regarded as having a procedural character, but related to the determination of the scope of the substantive law.[193] However, the committee accepted the second claim saying that a failure by tribunal to give opportunity to make submissions on evidence presented by its opponent constitutes serious departure from a fundamental rule of procedure.[194]

In Enron, Argentina argued that three separate procedural matters in proceeding caused serious departure from a fundamental rule of procedure.[195] Firstly, Argentina said that the tribunal admitted a witness statement that was made in violation of his confidentiality obligations.[196] The committee said that when the tribunal accepted the witness statement, there was no any court's decision implying violation of his confidentiality, moreover the

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[188] Vivendi I, para.84

[189] Vivendi I, para.85

[190] Azurix, paras.232-244

[191] Duke, paras.167-169

[192] Fraport, para.120

[193] Fraport, para.191

[194] Fraport, paras.200,218

[195] Enron, paras.151-154

[196] Enron, para.175

court's injunction which was issued later on did not include any reason for the tribunal not to consider the witness statement.[197] Additionally, Argentina could not show any authority proving that it would amount to a serious violation of a fundamental rule of procedure though.[198] Therefore the committee rejected this claim.[199] Secondly, Argentina claimed its right of defence and the equality of treatment between the parties were violated, because the claimant's expert report was admitted after Argentina produced its rejoinder.[200] The committee said that the tribunal could admit an expert report submitted after the deadline if there were justifying reasons, so the committee rejected this claim as well.[201] The third is that the tribunal's decision to close the proceedings allegedly divested Argentina of chance to challenge the members of the tribunal.[202] But upon the fact that Argentina could not clearly state that on what basis it would have brought such a challenge or why it did not so earlier, before the proceedings were closed, the committee regarded this claim vague and rejected.[203]

In Helnan, Helnan alleged that the conclusion in the award failed to mention its pleadings and so there was serious departure from a fundamental rule of procedure.[204] The committee said that Helnan was given sufficient opportunity to advance its arguments and these were plainly considered and summarised in the award, anyway the right to be heard does not entail a tribunal to consider and evaluate expressly every argument in the award.[205]

In Continental, Continental argued that the tribunal applied the incorrect burden of proof and standard of proof.[206] The committee stated that despite this could be annullable error, there was no persuasive evidence implying that this occurred in the present case.[207]

3.5 Failure to State the Reasons

[197] Enron, paras.175-176

[198] Enron, paras.170-177

[199] Enron, para.178

[200] Enron, para.185

[201] Enron, paras.188,192

[202] Enron, paras.154,206-207

[203] Enron, paras.207-209

[204] Helnan, paras.28-29

[205] Helnan, para.38

[206] Continental, para.134

[207] Continental, para.136

Article 48(3) requires the award to state the reasons upon which it is based. Reasons are important to the legitimacy of the decision,[208] since they show how and why the tribunal reached this result.[209] Therefore, tribunals have a duty to identify, and to let the parties know the factual and legal premises underlying their decisions,[210] even when they are granted some discretion by law or authorized to decide *ex aequo et bono*.[211] In this context, this ground *"aims at ensuring the parties' right to ascertain whether or to what extent a tribunal's findings are sufficiently based on the law and on a proper evaluation of relevant facts".*[212]

3.5.1 Applicable Standards

The Convention does not stipulate to what extent the tribunal should include reasons and to what extent the committee could evaluate the reasoning of the tribunal.[213] Therefore, the committees interpreted this requirement differently, despite there is a general acceptance that Article 52(1)(e) does not enable them to evaluate the quality, correctness and persuasiveness of reasons,[214] so even if the reasons are incorrect or unconvincing once the reasons have been stated, the award could not be annulled on this ground.[215] Still, among the all grounds for annulment, the most risky is the present one in terms of leading the committee to review of award's substantive correctness and to cross the line between the annulment and appeal.[216]

3.5.1.1 Sufficient Reasons

The committee of Klöckner I said that the requirement of statement of reasons does not point out any purely formal or apparent reasons, but "sufficiently relevant" reasons having some substance to enable the arbitral tribunal's reasoning on facts and on law to be followed,

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[208] Fraport, para.250

[209] Christoph Schreuer, "ICSID Annulment Revisited" (2003) 30(2) Legal Issues of Economic Integration 103, p112

[210] Wena, para.79

[211] Schreuer, Commentary, n9, p999

[212] Lucchetti, para.98

[213] Bishop, n17, p152

[214] Wena, para.79; CDC, paras.70,75

[215] Juan Fernández-Armesto, "Different Systems for the Annulment of Investment Awards" (2011) 26(I) ICSID Rev-FILJ 128, p141

[216] Schreuer, Revisited, n209, p111

thus capable of justifying the result.[217] Contrary, purely "apparently relevant" reasons are of no use in providing substantive control of legality at which Article 52 aims.[218] The committee in Amco I, supporting this view, said that a reasonable connection between the bases and the conclusions must be established, so the reasons referred to in Article 52 could be taken as "sufficiently pertinent reasons".[219] Despite the committee of Soufraki emphasized sufficiency of reasons, it said that it could not look into their correctness.[220] Otherwise, as emphasised in MINE, it may go into the substantive analysis of the award as if appeal mechanism.[221] Therefore, the committee in MINE stated that if "*the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion*", the requirement to state reasons is fulfilled even if it includes an error of fact or of law,[222] or, as added by the committee of CDC, *"even if this Committee were to disagree with the Tribunal's legal conclusions".*[223] Similarly, some other committees such as that of Vivendi I, CMS, MTD adopted this approach.[224]

3.5.1.2 Non-Frivolous and Non-Contradictory Reasons

According to the committee of Mitchell, the tribunal fails to state reasons either when the reasons do not exist at all, or when the reasons are so inadequate that the coherence of the reasoning is seriously affected.[225] In this context, the committees in MINE and CDC pointed out that the contradictory and frivolous reasons are inadequate to explain clearly how the award has been reached due to lack of this coherency.[226] Frivolous reason refers manifestly irrelevance of a particular reason due to manifest error in its content, while contradictory

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[217] Klöckner I, paras.119-120

[218] Klöckner I, para.120

[219] Amco I, para.43

[220] Soufraki, paras.128,131

[221] MINE, para.5.08

[222] MINE, para.5.09

[223] CDC, para.75

[224] Vivendi I, para.64; CMS, para.55; MTD, para.78

[225] Mitchell, para.21

[226] MINE, para 5.09; CDC, para.70

reasons mean that there is manifest incoherence between the reasons.[227] According to the committee in Klöckner I, *"genuinely"* contradictory reasons cancel each other out and thereby result in failure to state reasons,[228] but the committee in Rumeli said that the contradictory reasons would lead to a total absence of reasons only if they completely cancel each other out.[229] On the other hand, the committee in Mitchell said that the contradiction at the same time must be so apparent that the committee cannot engage in an analysis of the merits.[230] The committee in Klöckner I added that in case of contradictory reasons, the committee still should consider whether the award was sufficiently well founded by other reasons and whether this failure caused any harm to the party seeking annulment pursuant to the principle of *"no annulment without grievance"*.[231] In the same meaning, the committee in Vivendi I said that the reasons at stake must itself be also necessary to the tribunal's decision.[232]

The main reason behind incoherency of the reasoning is that different legal traditions differ in their modes of expressing reasons and arbitrators also have varying levels personal ability and legal backgrounds.[233] Moreover tribunals sometimes must often struggle to balance conflicting considerations.[234] Therefore, in ICSID case law, as by the Vivendi I committee, it was generally accepted that the tribunals should have a degree of discretion in their reasoning, and their reasoning may be different such as being succinctly or at length.[235] Furthermore, the committee in Wena said that implicit reasoning also could be acceptable provided that they could be reasonably inferred from the terms used in the decision.[236] The committees of Soufraki and Rumeli added that in such cases, it is for the committees to follow and clarify

[227] David Caron, "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal" (1992) 7(1) ICSID Rev-FILJ 21, p44

[228] Klöckner I, para.116

[229] Rumeli, para.82

[230] Mitchell, para.21

[231] Klöckner I, para.116

[232] Vivendi I, para.64

[233] Vivendi I, para.64; Reisman, Breakdown, n27, p764-765

[234] Vivendi I, para.65

[235] Vivendi I, para.64

[236] Wena, para.81

the tribunal's implicit ratiocination as well as explicit one and thereby to reconstruct and explain the award before concluding that the reasoning is insufficient.[237]

In this context, from my point of view, the emphasis of the Convention on the reasoning has importance, since no parties could be expected to abide by the award which could affect its rights and duties substantially without comprehending motives and rationale behind it. Therefore, the tribunal has an exact obligation to give enough reasoning for its decision. Nevertheless, in such a complex case as investment disputes, there might be so many complicated and contradictory arguments required to be considered so establishing the clear link between the finding and the result might be difficult. In this sense, since the main object in reasoning is to enable the parties to understand the award; if the award is not completely lack of reasons, the committee should help the parties to understand the reasoning. Therefore, firstly it should avoid subjective consideration in evaluating the contradictions of the reasons. Then even if contradiction is objectively obvious and manifest, it should evaluate whether the contradictory reasons have any significant impact on the award. The allegedly contradictory reasons which could not affect the quality and legitimacy of the award objectively should be ignored. On the other hand, the committee should deem itself to be the one which could discern the implicit reason and absence of reason. Therefore, even if the causal link between the facts and the results have not been implied expressly if it is easily understood or inferred from the way the tribunal followed, it could clarify an existing one and thereby make it simple to be understood by the parties pursuant to its mission and vision to ensure legitimacy of decision process and integrity of arbitration mechanism, and should do so. However the committee should not try to establish a reasoning which did not exist in original award, and stop at the limit of appeal. Therefore, even if the manifestness or seriousness have not been referred for this ground, any immaterial and ineffective mistakes should not be allowed to lead annulment and waste of time and cost, so the committees should act in an active manner to solve the issue rather than adopting technical approach which requires annulment without any substantial error.

3.5.1.3 ICSID Cases

In Klöckner, the applicant alleged that the award contained a contradiction of reasons about violation of duty of full disclosure; the committee said that despite certain ambiguities in language, the two reasons were not contradictory.[238] The applicant alleged also that the tribunal adopted hypothetical reasons in the award instead of facts or definite legal

[237] Soufraki, para.24; Rumeli, para.138

[238] Klöckner I, paras.121-123

arguments.[239] The committee said that the applicant had to show that but did not. Moreover its analysis was equivalent to an appellant's criticism that did not make no or an inadequate distinction between the "*ratio decidendi"* and overabundant considerations and it lost sight of the fact that an arbitrator might be perfectly entitled to reason where necessary on the basis of hypotheses such as in accounting the potential damages.[240]

In MCI Power, the applicant argued that the award rests on contradictory reasons because none of the reasons were adequate ground for tribunal's conclusion. [241] The committee said that the applicant's complaint was based on an alleged improper interpretation, it was not within the ambit of Article 52(1)(e) but that of Article 52(1)(b).[242] The committee added the tribunal answered – rightly or wrongly but without any apparent contradiction – the parties' respective contentions on jurisdiction, which was sufficient for the purposes of Article 52(1)(e).[243]

In Enron, contrary to Argentina's claim, the committee considered that since there were no rigid or formulaic requirements about tribunal's reasoning, if the tribunal's own reasons were sufficiently apparent, tribunal did not need to refer to the reasoning in a previous ICSID cases or any other arbitration or judicial decision.[244] On the other hand, against the other claim that the tribunal did not state reasons for rejecting the applicability of two legal excuses under Argentine law, the committee considered that despite the principle of *"imprevisión"* was dealt with relatively briefly, it was easy to understand the tribunal's reasoning.[245]

In Fraport, Fraport contended that the tribunal failed to give reasons for its finding that Fraport violated the local law. [246] The committee rejected the claim saying that Fraport tried to open a new argument not presented to the tribunal. [247] Moreover, in reaching its conclusion,

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[239] Klöckner I, para.124

[240] Klöckner I, para.126

[241] MCI Power, para.86

[242] MCI Power, para.86

[243] MCI Power, para.86

[244] Enron, paras.94-95

[245] Enron, paras.284-286

[246] Fraport, para.251

[247] Fraport, para.263

the tribunal did not have to give reasons for the criminal liability or to the existence of a guilty since these were questions of interest to a criminal court.[248]

3.5.2 Failure to Address Every Question Submitted to the Tribunal

3.5.2.1 Context

Article 48(3) imposes the obligation to deal with every question submitted on the tribunal, Despite Article 48(3) does not define the "question"; the committees seem to have agreed that "question" is a crucial or decisive argument acceptance of which would have altered the tribunal's decisions.[249] Nevertheless, this requirement is not expressly determined as a ground for annulment.

In this regard, some committees regarded failure to deal with every question submitted to the tribunal as causing annulment under the scope of different grounds.[250] According to the Amco I committee, this would amount to failure to state reasons or in particular situations to a serious departure from a fundamental rule of procedure or to a manifest excess of power as the case may be.[251] According to this approach, failure to deal with some issue would entail the annulment in every case but for the different reasons.

However, the committee in Vivendi I said that tribunals could not be obliged to address every argument raised in the awards, if the arguments actually considered are capable of leading to the conclusion and if all questions submitted to a tribunal are expressly or implicitly dealt with.[252] Recently, the committees in Enron, Helnan and Rumeli explained that the requirement to deal with each question does not require the tribunal to answer or comment on all arguments in connection with those questions.[253]

Furthermore, the committee in MINE said that in such a case supplementation under Article 49(2) is a sufficient remedy.[254] But it added that if supplementing the award could not avail and requires reconsideration in the light of the tribunal's decision on the "omitted" question, "*failure to deal with a question may render the award unintelligible and thus*

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[248] Fraport, para.269

[249] Schreuer, Commentary, n9, p1020

[250] Bishop, n17, p187

[251] Amco I, paras.30-32

[252] Vivendi I, para.87

[253] Enron, para.72, Helnan, para.36; Rumeli, para.84

[254] MINE, para.5.13

subject to annulment for failure to state reasons."[255] The committees in Wena, CDC and Rumeli adopted the same approach.[256] The committees of Repsol and Togo Electricty also embraced this position but said that this case should be deemed as a potential manifest excess of power.[257]

In this context, I share the view of these committees, because it should be remembered that annulment is not an only remedy against the award having some defects. The Convention establishes supplementation, interpretation and revision. Supplementation is envisaged to be remedy for question omitted to be decide. Additionally, the parties could request the interpretation of the award if they are unsatisfied about the meaning or scope of the award. The annulment is violent remedy for such errors, since they could be easily fixed by only supplementation or interpretation without harming the core and finality of the award. Therefore, the committees should also not permit the annulment to be abused by the parties that only try to have the award unfavourable to them annulled by requesting annulment instead of these.

Besides, the other debate is whether the tribunal is supposed to deal with questions directly or indirect treatment is sufficient. In Klöckner I, the latter was not regarded sufficient, on the contrary, the committee of MINE mentioned about admissibility of implicit treatment.[258] In Rumeli, it was said that *"if the arguments of the parties have been correctly summarized and all the claims have been addressed, there is no need explicitly to address each and every one of the arguments raised in support of the particular claims, and it is in the discretion of the tribunal not to do so."*[259]

3.5.2.2 ICSID Cases

In Klöckner, Klöckner argued that its submission on the contractual clauses limiting liability was not considered.[260] The committee accepted this claim, saying that award had nothing on this essential question and contained no reason on this topic.[261]

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[255] MINE, para.5.13

[256] Wena, para.101; CDC, para.71; Rumeli, para.81

[257] Bishop, n17, p190

[258] Bishop, n17, p.192

[259] Rumeli, para.84

[260] Klöckner I, para.148

[261] Klöckner I, para.149

In MINE, upon the applicant's claim that the tribunal did not consider its some arguments, the committee partially annulled the award on the ground that if these arguments had been accepted, it would have caused a radical reduction of the damages claim.[262] It also added that the tribunal either failed to consider them, or considered them but thought that these arguments should be rejected, but still the tribunal was not free from its duty to give reasons for its rejection.[263]

In Azurix, Argentina asserted that the tribunal failed to take properly into account Azurix's alleged breach.[264] The committee noted that the tribunal ultimately considered the claim and agreed with Argentina's claim; however it did not consider it to be material to its decision as understood implicitly from the award.[265]

In Helnan, the applicant alleged that to the tribunal did not address some claims.[266] The committee said that the Article 52(1)(e) permits annulment on the ground that the award has failed to state the reasons on which *"it"* is based, so annulment was not permitted for the arguments of parties that the tribunal did not deem it necessary to discuss.[267]

In Continental, Continental alleged that tribunal failed to consider or decide upon the argument about obligation of Argentina to pay compensation.[268] The committee said tribunal's reasons for rejecting the argument which was implicit in the considerations and conclusions contained in the award and it was satisfied with this.[269]

4 POST-ANNULMENT PROCEDURE

The annulment procedure comes to the end when the committee renders its decision. If the committee refuses the request, this will bring the process to the end irreversibly, even if the decision on annulment seems to include any legal or material defects.[270] However, decision on annulment of the award erases it on legal area as if the award never existed, thereupon the

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[262] MINE, para.6.98-6.100

[263] MINE, para.6.101

[264] Azurix, para.243

[265] Azurix, para.244

[266] Helnan, para.34

[267] Helnan, para.36

[268] Continental, para.110

[269] Continental, para.131

[270] Schreuer, Commentary, n9, p1056

dispute could be resubmitted to the new tribunal according to Arbitration Rule 55.[271] In the proceeding of the resubmitted case, the tribunal is not bound by reasoning of the committee.[272] The new tribunal in resubmitted case Amco said that otherwise it would have bestowed upon the committee the role of an appeal court.[273] Notwithstanding, Arbitration Rule 55(3) provides that the new tribunal could not reconsider any portion of the award the committee did not annul. This is because, as tribunal in resubmitted case of Amco pointed out, the issues which the committee expressly did not annul or expressly confirmed despite having been requested by a party constitutes res judicata; additionally the issues decided by the first tribunal but never put forward for annulment forms also res judicata, so are binding for tribunal and parties.[274]

I could say that acceptance of the unannulled parts as res judicata has practical importance. Since the arbitration is preferred its cost effectiveness and efficiencies against the court litigations, the tribunal's decisions not annulled by the committee or not litigated by the parties in annulment should not be re-opened, otherwise arbitration would be transformed everlasting process in which every issues are argued again and could not be solved forever. It causes waste of cost and time. But, the parties could avail the parts not annulled and request these parts to be enforced. Since investments behind the disputes are huge budgeted projects and the damages are massive amounts, importance of res judicata manifest itself.

Additionally, by the reference of Article 49 included in Article 52, for the annulment decisions, the parties could request supplementation; however, they could not request interpretation, revision and further annulment due to lack of reference to Article 50-52 in Article 52. Finally, the reference to Article 53 and Article 54 in Article 52 makes decision on annulment binding for the parties and the each contracting state, so any state could not recognize and enforce an annulled award.[275]

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[271] Caron, Committees, n6, p175

[272] ICSID, n1, p28

[273] Amco, Resubmitted Case: Decision on Jurisdiction, 10 May 1988, 1 ICSID Reports p552, p562

[274] Amco, Resubmitted Case: Decision on Jurisdiction, 10 May 1988, 1 ICSID Reports p552, p563-572

[275] Schreuer, Commentary, n9, p1061

5 ANNULMENT AND APPEAL

The arbitration is preferred by the parties to reach quicker but less costly solution and so the effectiveness of arbitral awards is determined by their finality and ease of enforcement.[276] Additionally, any award is supposed to have two characteristics that are justice and finality.[277] Justice requires the decision to be fair regardless of time and cost of the process, while finality requires the award to be binding and enforceable quickly,[278] and not appealable.[279] The Convention favours the finality of the award[280] and aims at integrity of the arbitral process;[281] so it designed the annulment so as to reach these aims. However, the annulment also aims the procedural justice of the award that means basic norms of fairness in proceeding.[282] To that end, as the Soufraki committee said, the committees are entitled to examine the "*integrity of the tribunal"* in terms of its proper constitution and the absence of corruption and to examine "*the integrity of the procedure"* by looking at the tribunal's compliance with the jurisdiction, the applicable law, submission of the parties and fundamental procedural rules and to examine "*the integrity of the award"* in terms of whether the reasoning reasonably supports the solution.[283] Nevertheless, the Convention does not provide an appeal mechanism which could re-examine the merits of the disputes to ensure the correctness of the decisions.[284]

This approach of the Convention has been echoed by the committees which emphasised the difference between the annulment and appeal mechanism. The committee in MTD said that *"an annulment proceeding is not an appeal, still less a retrial"*[285] and the committee in

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[276] Lucy Reed, Jan Paulsson, Nigel Blackaby, *Guide to ICSID Arbitration* (2.ed, The Netherlands: Kluwer Law International 2010) p179

[277] Gloria Maria Alvarez , "The ICSID Procedure: Mind the Gap" (2011) 10(2) Revista E-mercatoria 163 <http://ssrn.com/abstract=1987236> accessed 11.09.2014, p187

[278] Reisman, Breakdown, n27, p.744-745; Bishop, n17, p20

[279] Nmehielle, n68, p42

[280] Laurens J.E. Timmer, "Manifest Excess of Powers as a Ground for the Annulment of ICSID Awards" (2013) 14 The Journal of World Investment & Trade 775, p782

[281] Soufraki, para.23

[282] Tai-Heng Cheng, n5, p282

[283] Soufraki, para.23

[284] Thomas Walsh, "Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?" (2006) 24(2) Berkeley Journal of International Law 444, p450

[285] MTD, para.31

Amco II emphasised that "*[t]he authority given to the ad hoc Committee is clearly that of nullity and not of substantive revision*".[286] In this context, annulment is a limited remedy with main differences from appeal as follows.[287] Firstly, annulment could wholly or partially invalidate the award or leave it valid as is; but it could not revise or modify it[288] so as to correct any error of law and fact in the original award.[289] That is because, as stated by the committee in MINE, the annulment is not a legal remedy against incorrect decisions,[290] so, the committee could not substitute its own judgments for that of the tribunals[291] and it could not create a new res judicata instead despite it could void a present one.[292] The committee has also no authority to interpret the award if not annulled,[293] or even if it annuls the award, it could not decide on the merits of the dispute.[294] That is why, it only concerns about the legitimacy and integrity of the decision process[295] to ensure that the tribunal carried out its functions in a way that met the basic requirements of fair settlement and the requirements of the Convention and so the award has been arrived at fairly, under due process and with transparency.[296]

However, appeal is a proceeding that is conducted by a higher authority[297] in terms of legitimacy of the decision process and substantive correctness of the decision, so the initial

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[286] Amco, Resubmitted Case: Decision on Jurisdiction, 10 May 1988, 1 ICSID Reports p552, p562

[287] Cate, n145, p1172

[288] Reed, n276, p162

[289] Hans Houtte, "Article 52 of the Washington Convention - A Brief Introduction" in Emmanuel Gaillard, Yas Banifatemi (eds) *Annulment of ICSID Awards* (New York: Juris Publishing 2004) p.11-16, p12

[290] MINE 4.04

[291] Caron, Reputation, n227, p26

[292] MTD, para.54

[293] Schreuer, Commentary, n9, p1040

[294] ICSID, n1, p15

[295] Dohyun Kim,"The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move away from an Annulment-Based System" (2011) 86 New York University Law Review 242, p255

[296] CDC, paras.34-36; Lucchetti para.97; Schreuer, Commentary, n9, p903; Caron, Reputation, n227, p23; Houtte, n289, p12

[297] Alvarez, n277, p185

decision could be re-examined in all its aspects and confirmed or modified[298] as well as reversed and corrected.[299]

In case law, annulment decisions have been categorized according to the committees' approach toward this issue.[300] Klöckner I and Amco I constitute first generation which reviewed of the substance of the dispute, which brought about so many criticisms for behaving like an appeal court.[301] MINE, Klöckner II, and Amco II have been classified as second generation which alleviated the worries after the first cases.[302] The decisions of the third generation cases, Wena and Vivendi l, provided more balanced approach and thus restored the confidence in the annulment system.[303] However, some recent committees in Mitchell, CMS, Sempra, and Enron[304] expressed activism in reviewing ICSID awards with an extensive interpretation of the grounds and their functions.[305] For instance, despite the annulment could not provide the parties for opportunity to submit new claims or evidences as if appeal mechanism,[306] in Sempra, the committee admitted new arguments of Argentina on the ground that they were a permissible development of Argentina's arguments on the first issue identified,[307] and in Enron, the committee annulled the award on the argument that applicant never raised as a ground for annulment.[308]

In my personal view, the review of the merits of the disputes extends the duration and costs of the proceeding, thereby undermine the main motives behind selection of the arbitration and makes the annulment indifference from the underlying arbitration proceeding. The adoption of such a priority in the Convention implies its intention of establishing an alternative private

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[298] Caron, Reputation, n227, p23-24

[299] Soufraki, para.24

[300] Schreuer, Generations, n36, p17

[301] Schreuer, Generations, n36, p17

[302] Schreuer, Generations, n36, p18

[303] Piero Bernardini, "ICSID Versus Non-ICSID Investment Treaty Arbitration" in M. Fernindez Ballesteros, D. Arias (eds) *Liber Amicorum Bernardo Cremades* (Madrid: La Ley 2010), p36 <http://www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf> accessed 11.09.2014

[304] Bishop, n17, p29

[305] Schreuer, Appeal, n141, p213

[306] MINE, para.6.42

[307] Sempra, para.184

[308] Bishop, n17, p199

dispute resolution system to the national courts by excluding the methods of the national jurisdictional system. If the parties wish the exactly correct decision, they have always opportunity to resort to national jurisdiction having appeal mechanism by including such a clause in their agreements or by avoiding consenting to the arbitration.

6 COMPARISION WITH THE UNCITRAL MODEL LAW

6.1 Judicial Review

Some disputes between the states and investors do not meet the jurisdictional requirements of the Convention, so some investment arbitrations take place outside ICSID system.[309] The awards of the arbitrations not conducted under the Convention can be challenged under the commercial arbitration framework envisaged by national law.[310] In this context, the annulment mechanism of the Convention will be compared with the setting aside method of the UNCITRAL Model Law (the Model Law) which aims at harmonizing national laws on arbitration and providing uniform model for countries and has formed the basis for national arbitration laws of so many countries.[311]

Under the Model Law, domestic law of seat of arbitration determines the rules governing the arbitration proceeding and outcomes such as those regulating the issues from the procedural issues to the post-award remedies.[312] Similar to the Convention, the Model Law does not include any mechanism so as to re-examine substance of the disputes namely the errors of law and facts.[313] However, some national laws, having adopted the Model Law as modified, permits substantial review of the arbitral award on the law or on the facts.[314]

According to the Model Law Article 1(2), the exclusive jurisdiction to set aside the arbitral awards belongs to the local courts of the state where the arbitration took place.[315] However,

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[309] Rubins, n156, p360

[310] Yannaca-Small, n4, p6

[311] Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (The Netherlands: Kluwer Law International 2002), p30; Edward Baldwin, Mark Kantor, Michael Nolan, "Limits to Enforcement of ICSID Awards" (2006) 23(1) Journal of International Arbitration 1, p4

[312] Albert Jan van den Berg, "Should the Setting Aside of the Arbitral Award be Abolished?" (2014) 29(2) ICSID Review 263, p21

[313] Gharavi, n311, p31

[314] Petrova, n42, p291

[315] Gharavi, n311, p12

the review of national courts is limited to six grounds stated in Article 34.[316] Similar to the Convention, the Model Law requires the application of parties to initiate the annulment and excludes a third party action for annulment.[317] Contrary to 120 days of application period in the Convention, Article 34(3) of the Model Law requires an application to be made within three months from the date on which the party had received that award.

In the Convention, all procedural rules of the arbitration proceeding apply in the same manner to the annulment proceedings; however the underlying arbitration and judicial review under the Model Law are governed by different procedural rules such as those concerning the language of the process, the representation of the parties, oral and written hearing and marshalling of the evidence.[318]

In terms of selecting the members of the committee to hear the dispute, the Convention provides a different modality from that of the arbitrators of the tribunals. The authority in selecting the number and name of arbitrators is left to the parties while the committee's members are designated by Chairman directly among the panel members and the number of the members is strictly three. These panel members have not to be judge but they may have different occupations such as being academician or engineer as the case may be.[319] However, the application for annulment will be dealt with the judges of local courts, who are generally assigned by and work for the government and most probably are not expert on international arbitration.[320]

6.2 Grounds

The setting aside by the local courts is a review in terms of the grounds stated in Article 34. There are some differences between the grounds of the Convention and those in the Model Law. Since the Convention seeks to only remedy procedural defects, it does not include public policy and non-arbitrability grounds contrary to the Model Law.[321] Additionally, there is no specific ground for annulment in case of failure to state the reason in Model Law. However if the parties have agreed that the tribunal shall give reasoning in the award, failing

[316] David Gantz, "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges" (2006) 39 Vand. J. Transnat'l L. 39, p52

[317] Gharavi, n311, p30; Berg, n312, p6

[318] Fernández-Armesto, n215, p134

[319] Fernández-Armesto, n215, p136

[320] Fernández-Armesto, n215, p136

[321] Petrova, n42, p298

to do so will cause the annulment due to noncompliance with the agreement according to Article 34(2)(a)(iv).[322] Similarly, the Model Law does not include any specific ground for corruption contrary to the Convention, but in this event public policy grounds or rules on procedural irregularities could be invoked.[323]

In this context, the grounds under the Model Law could be summarised as follows:[324]

- Excess of power and adjudicability of the dispute (concerning validity of arbitration agreement, tribunal's excess of authority, arbitrability in terms of ratione materiae and ratione personae.)
- Procedural grounds (concerning irregular constitution of the arbitral tribunal; lack of impartiality and independence of the arbitrator, irregular procedure, violation of due process such as equal treatment and the ability of a party to present its case.)
- Substantive grounds (related to issues of public policy.)

Under the Model Law, the issues concerning the arbitrability of the subject matter and violation of domestic public policy must be raised by a national court on its own initiative[325] or by the tribunal *ex officio;* while the others need to be raised by the parties.[326] However, under the Convention, the grounds must be invoked by the parties. Nevertheless, by reference to Arbitration Rule 41(2), it is being argued that in cases that the committee doubts about whether the dispute is within the jurisdiction of the Centre, it may raise *ex officio* this ground even if the applicant did not do so.[327]

Besides, similar to the Convention, by saying that an arbitral award may be set aside by the court in Article 34(2), the Model Law grants the local courts power of discretion to set the

[322] Fernández-Armesto, n215, p141

[323] Fernández-Armesto, n215, p138

[324] Berg, n312, p6; Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, *Redfern & Hunter on International Arbitration* (5thed. Oxford: Oxford University Press 2009), p596

[325] Petrova, n42, p295

[326] Gharavi, n311, p31

[327] Bernardini, n303, p29

award aside, thereby the courts could prefer not to annul the award even if it found any of the grounds.[328]

6.2.1 Excess of Power and Adjudicability of the Dispute

National law determines arbitrability of a dispute,[329] but the consent of the parties and the content of the submission to tribunal determine the scope of the authority and jurisdiction of the tribunal.[330] Therefore, in the cases of invalidity of the arbitration agreement, or the issues that were decided by the tribunal but not within the tribunal's jurisdiction or capable of being solved by arbitration, the Model Law envisages the award to be annulled.[331] Additionally, tribunal's failing choose or apply the proper law also constitutes the contradiction with the parties' agreement,[332] therefore non-compliance with this agreement on applicable law could lead to nullity due to excess of powers or authority.[333]

Despite the context of the provisions are effectively similar, the difference between the Convention and the Model Law is that the latter does not require the excess of power to be manifest.[334] The other difference is that while the parties could not submit the award affirming the jurisdiction to annulment committee immediately under the Convention, Article 16(3) of the Model Law provides that in such a case any party may resort to the court against this decision.[335]

6.2.2 Substantive Grounds

The ICSID Convention aims at establishing the international and autonomous mechanism for dispute solution so it does not envisage such a ground concerning public policy.[336] Nevertheless, the Model Law envisages an arbitral award in conflict with the public policy of

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[328] Gaëtan Verhoosel, "Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID?" in Albert Jan van den Berg (ed) *50 years of the New York Convention: ICCA International Arbitration Conference* (The Netherland: Kluwer Law International 2009) p.285-317, p295

[329] Petrova, n42, p314

[330] Rubins, n156, p363, Christoph Schreuer, "Failure to Apply the Governing Law in International Investment Arbitration" (2002) 7Austrian Review of International and European Law 147, p163

[331] Fernández-Armesto, n215, p139

[332] Fernández-Armesto, n215, p139,140

[333] Schreuer, Failure, n330, p163

[334] Friedland, n8, p738

[335] Verhoosel, n328, p290

[336] Fernández-Armesto, n215, p141

the place of arbitration to be set aside by the national court of this State. According to the Swiss Federal Supreme Court, public policy represents fundamental legal principles violation of which would be against the fundamental national legal and economic system.[337] US Court of Appeals for the Second Circuit in Parsons defined public policy as *"the forum state's most basic notions of morality and justice."* [338] In this sense, public policy could be interpreted to include substantive and procedural fundamental principles of justice and covers such instances as fraud, bribery and corruption.[339] Some national laws refers to international public policy, which focuses on general principles on basic notions of morality and justice accepted by developed countries,[340] to establish objective and generally accepted base for this ground.[341]

In a nutshell, the public policy is of hybrid and ambiguous nature that includes both procedural and substantive aspects, therefore it has a potential of causing the review of the merits of the disputes like an appeal mechanism.[342] I could argue that no doubt any country should not be expected to welcome any activities which are against its fundamental legal and moral principles. However, the one that is expected from a country is that it should establish the coherence its domestic system. Like other business activities, predictability is of essence in terms of investments since decision on investing in a country is made taking local legal, economic and administrative order of a country into account. In this sense, if the country provides the investors for some investment facilities such as arbitration, it should not attempt to undermine these by some complex and unreasonable regulations. Especially, such a term as public policy which does not special definition and scope has a potential which could damage the transparency, coherency and efficiency of problem solutions system.

On the other hand, similar to the Convention, the Model law does not include any provision for challenging an award on the basis of mistake of fact or law.[343] However, to my mind, the existence of such a review could pose more risk of annulment in the local courts

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[337] Redfern, n324, p614

[338] Christopher Dugan, Don Wallace, Noah Rubins, Borzu Sabahi, *Investor-State Arbitration* (2nded Oxford: Oxford University Press, 2011), p640

[339] Petrova, n42, p310

[340] Petrova, n42, p313

[341] Michael Mcilwrath, John Savage, *International Arbitration and Mediation: A Practical Guide* (The Netherlands: Kluwer Law International, 2010), p338

[342] Klaw Peter Berger, "The Modern Trend Towards Exclusion of Recourse against Transnational Arbitral Awards: A European Perspective" (1989) 12 Fordham International Law Journal 605, p640

[343] Redfern, n324, p609

than that in the Convention. That is because, the local judges are generally not expert on the international arbitration and even on international trade, however to comprehend and solve the international investment disputes requires more talents than knowledge of local legal system and interpretation of the law. Therefore, because of the volume, specifity and complexity of the investment disputes, the review of the merits by the local courts would be open generally to incomprehension or misapprehension of the case. Moreover, considering that one of the parties to disputes is the State, the review of the merits by the local court might not be independent and impartial. Finally, review on the substance of the disputes requires re-starting all proceeding, evaluating of evidences and witnesses, hearing the arguments and even collecting new facts. Considering the density of the works in local courts and their rapidity, these take lots of time and cause lots of money. Therefore, review of merits of the disputes by the local courts might deprive the parties of the benefits of the arbitration.

6.2.3 Procedural Grounds

Article 34(2)(a)(ii)-(iv) provides that if the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or with law of the State as may be the case, this could constitute a reason for annulment. Despite each uses different terminology from that of the Convention, these procedural standards aim at ensuring that the tribunal is properly constituted, the arbitral procedure is in accordance with the agreement of the parties, the parties are given proper notice of the proceedings, hearings, and awards so that the parties are treated with equality and are given a fair hearing, with a full and proper opportunity to present their respective cases.[344]

In this context, in Petro-Canada and PanCanadian Gas Products Ltd., the arbitral award was set aside on the ground that violation of Article34(2)(a)(ii); because the tribunal based its conclusions on matters that were not argued before it and thus the applicant could not to argue the issues and participate in the evidentiary process.[345] However, in the US case of Generia v Pharmaceutical Basic, against the claim that the denial of cross examination violated fundamental due process, the Court decided that the tribunal could decide freely how to conduct the arbitration, besides that, already the outcome of the arbitration was unlikely to be affected by this action.[346]

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[344] Redfern, n324, p600

[345] Petrova, n42, p307

[346] Dugan, n338, p643

Likewise the Convention, in the Model Law, there is no specific ground to set an award aside in cases that an arbitral tribunal fails to consider some issues submitted to it; so despite such an award may be incomplete but not annullable solely because of this.[347] That is because tribunal sometimes could prefer not to address some issues that it considers as insignificant and immaterial, and this should be regarded as within its discretion.[348] However, as for me, in this context, importance of the issue should be taken into account and if this issue could have had such an effect as to amend even reverse the decision, the award could be challenged on the ground of excess of power.

6.2.4 Rights of Parties on Grounds

The Model law does not include any provision for the parties to narrow the grounds for annulment as well as to waive the right to annulment. Nevertheless, similar to Arbitration Rule 27, Article 4 of the Model Law says that a party who knew any defect but did not object shall be deemed to have waived his right to object. On the other hand, some national laws such as Switzerland, Belgium, Malaysia, Sweden and Tunisia allow the parties to waive the right to judicial review entering into exclusion agreement.[349]

6.3 Post-Annulment Procedure

Any arbitral award annulled by the committee or the court loses its enforceability.[350] However, differently from the Convention, the Model Law Article 34(4) enables the court to suspend the setting aside proceedings in order to give the original arbitral tribunal an opportunity to resume the arbitral proceedings or to eliminate the grounds for setting aside.[351] The other difference is that while the committee's decision on annulment is final and not subject to any further annulment or appeal, the decision of the judge could be submitted to a higher court to appeal.[352]

Under the ICSID system, any jurisprudence is not established or envisaged so neither tribunal's nor committee's decisions are binding for the subsequent committees or tribunals.[353] However, even if their value of precedent may vary according to legal system,

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[347] Lew, n153, p676

[348] Lew, n153, p676

[349] Verhoosel, n328, p289

[350] Fernández-Armesto, n215, p142

[351] Fernández-Armesto, n215, p142

[352] Fernández-Armesto, n215, p142

[353] Bernardini, n303, p35

since decision on annulment by national courts are the parts of the national jurisprudence, previous decisions could have such an effect to some extent over the other courts.[354]

7 CONCLUSION

The Convention constituted a self-sufficient and closed arbitration system which aims at providing mainly final and efficient resolutions for the investment disputes. Accordingly, it based also its annulment mechanism on the priority of finality of the award and integrity of the system and does not provide any mechanism to check the substantial correctness of the award.

In this context, the annulment system is a special-purpose remedy which is restricted to particular grounds in order to ensure only procedural fairness of the awards, so it should be held within the limits envisaged by the Convention and not be compelled to transform into appeal mechanism to review the merits of the disputes. That is because; there is a trade-off between the exact fairness of the award and the finality, binding nature and quick enforceability of the awards. The first could be ensured in ordinary courts system by exhausting all juridical levels until being persuaded. This is a long way which is unpredictable and sometimes costs much more than time and money than desired. Also the parties cannot intervene in any stage of this procedure in selection of neither judges nor procedural and applicable rules. Moreover, considering the investors are of the different nationality from the host state, it is very hard for the investors to comprehend strange legal order and follow its case properly. Also, in some countries it may be possible for the local courts to be exposed to the pressure of the government, which is the party to dispute. Additionally, it is very unclear for the investors how the local courts could interpret and apply the law especially against the public policy ground, which is highly subjective matter. Furthermore, the judges who will hear the case are generally not expert in the international investment dispute, so even there is no intentional biased treatment; it could make the solution harder in terms of the investors.

However, the Convention system aims at finality, binding nature and quick enforceability of the awards. The parties could reach a solution for their special problems and they could find the opportunities to have the awards which they see as defective checked in self-contained system. The Convention grants enough flexibility to the parties in conducting the proceeding from selecting the arbitrators to selection of procedural and applicable law. On the other hand, arbitration and annulments are close to the pressure of the state party, so proceeding will be carried out between two equal parties.

These are two alternatives methods which could be selected by the parties. If they consent to the arbitration under the Convention, it means that they prioritize the finality of the awards;

[354] Bernardini, n303, p38

however if they concern about the fairness of the award, they could prefer to go to the local courts. It is a matter of selection. Considering the fact that when the parties consent to the ICSID arbitration, they have accepted the priorities and objectives of ICSID system knowingly and wilfully; annulment mechanism should be hold within these limits and immune from the review of the merits of the disputes and not be allowed to be transformed into appeal mechanism.

Nevertheless, the annulment mechanism is not immune from some defects. One of them is that the decisions of the committees are being criticised for being inconsistent with each other. As mentioned before, this is also the problem of the national courts systems and to overcome this problem in ICSID system which has self-contained nature is easier than in the national judicial system which is very complex. For instance a stable committee could be assigned to the annulment cases, but it is not so simple in national court even if the specific courts are authorised for annulment of arbitral awards. On the other hand, as the annulment system deals with more cases and produces more awards and the critics and comments increase in this field, it is possible for interpretations and implications of the provisions to gain stability.

On the other hand, as proposed before, it may be brought about some changes to the system so as to include the opportunity for the application for the annulment by the third parties on the conditions stated before. This would contribute to the transparency and thereby legitimacy of the system but it must be designed so as not to damage the purpose of the annulment mechanism. Additionally, the parties could be granted an opportunity to submit the decisions affirming the jurisdiction to the annulment without waiting the final awards, since it fits the purpose of providing efficient and quick solution. Finally, by the same token, it could be discussed to shorten the application period for annulment.

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