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ICSID Annulment Revisited

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1. Introduction

In non-ICSID arbitration, the normal way to challenge an award is through national courts. This is done by the courts of the country in which the tribunal had its seat or by the courts charged with the task of enforcing the award. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, in its Article V, lists a number of grounds on the basis of which recognition and enforcement of a non-national arbitral award may be refused at the request of a party.[1] The UNCITRAL Model Law on International Commercial Arbitration of 1985 foresees a limited number of grounds for setting aside or for non-recognition of an international commercial award by a domestic court, which are closely modeled on Article V of the New York Convention.[2]

By contrast, ICSID awards are not subject to the annulment or any other form of scrutiny by domestic courts. Rather, the ICSID Convention offers its own self-contained system for review. Under this procedure, an *ad hoc* committee, appointed by the Chairman of ICSID's Administrative Council,[3] may annul the award upon the request of a party. The grounds for annulment under the ICSID Convention are listed exhaustively in Article 52(1):

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
   (a) that the Tribunal was not properly constituted;
   (b) that the Tribunal has manifestly exceeded its powers;
   (c) that there was corruption on the part of a member of the Tribunal;
   (d) that there has been a serious departure from a fundamental rule of procedure; or
   (e) that the award has failed to state the reasons on which it is based.

Two potentially conflicting principles are at work in the process of review of a judicial decision: the principle of finality and the principle of correctness. Finality serves the purpose of efficiency in terms of an expeditious and economical settlement of disputes. Correctness is an elusive goal that takes time and effort and may involve several layers of control, a phenomenon that is well known from appeals in domestic court procedure. In interna-

1. 330 UNTS 38 (1959).
2. Articles 34 and 36, 24 ILM 1302, 1311–1313 (1985).
3. The President of the World Bank hold this office, *ex officio*.

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tional arbitration the principle of finality is typically given more weight than the principle of correctness. The desire to see a dispute settled is often regarded as more important than the substantive correctness of the decision.

Annulment is the preferred solution to balance these two objectives. Article 52 of the ICSID Convention offers a review process that is limited to a few serious grounds. Annulment is only concerned with the basic legitimacy of the process of decision but not with its substantive correctness. Annulment under the ICSID Convention is limited to the fundamental standards listed in Article 52(1). Therefore, any request for annulment must be brought under one or several of these grounds.

Annulment is different from an appeal.[4] An appeal may result in the modification of the decision. Annulment results in the legal destruction of the original decision without replacing it. An *ad hoc* committee acting under the ICSID Convention may not amend or replace the award by its own decision on the merits. After annulment, the dispute can be resubmitted to a new tribunal.

Of the five grounds listed in Article 52(1), two grounds have never been raised:[5] improper constitution of the tribunal and corruption of an arbitrator. By contrast, the other three grounds have been invoked in virtually every annulment case.

Between 1984 and 1992, there were requests for annulment in four cases. These led to annulments in three of the cases. The next requests for annulment were not submitted before 2001. These led to two decisions in 2002. One of these declined annulment, the other partially annulled an award.

The 'old' cases have been discussed elsewhere in some detail.[6] Therefore, the following survey will only summarize them briefly. The two recent cases decided in 2002, will be described in more detail.

2. Summary of the 'old' cases

In *Klöckner* v. *Cameroon*,[7] the investor requested annulment invoking three of the grounds listed in Article 52(1): manifest excess of powers, serious departure from a fundamental rule of procedure and failure to state the reasons for the award. The *ad hoc* Committee found that two of these, manifest excess of powers and failure to state reasons, were well-founded and annulled the

4. *See* especially D.D. Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal', 7 *ICSID Review – Foreign Investment Law Journal* 21 (1992).
5. The annulment proceedings in *Philippe Gruslin* v. *Malaysia* were discontinued without a published record. Therefore, they are not included in this survey.
6. C. Schreuer, *The ICSID Convention: A Commentary* (2001), pp. 881–1075 .
7. *Klöckner* v. *Cameroon*, Decision on Annulment, 3 May 1985, 2 *ICSID Reports* 95. Ignaz Seidl-Hohenveldern was a member of the *ad hoc* Committee that rendered this decision.

Award on these grounds. The Tribunal had found that Klöckner's behaviour towards Cameroon had constituted a breach of the principle of confidence, loyalty and openness that it took to be a basic principle of French law and of other national codes.[8] The *ad hoc* Committee held that the Tribunal, by postulating rather than demonstrating the existence of that principle, had failed to apply the proper law, thereby manifestly exceeding its powers. The *ad hoc* Committee also found that the Tribunal had failed in its duty to state reasons by failing to deal with several crucial questions that had been submitted to it.

The dispute was resubmitted to a second Tribunal that rendered an award that has remained unpublished.[9] Both parties requested annulment of the second Award. The Decision of the second *ad hoc* Committee in *Klöckner* rejected the requests for annulment.[10] It also has remained unpublished.[11]

In *Amco* v. *Indonesia*,[12] Indonesia requested the annulment of the Award[13] relying on the same three grounds: excess of powers, serious departure from a fundamental rule of procedure and failure to state reasons for the award. The *ad hoc* Committee annulled the main portion of the Award for excess of powers. It found that the Tribunal had correctly identified the proper law but had failed to apply it by not applying one specific provision of that law.

The case was resubmitted to a new Tribunal that rendered a new Award.[14] Both parties requested annulment of the second Award. The Decision of the second *ad hoc* Committee rejected the requests for annulment.[15] This decision has remained unpublished.

In *MINE* v. *Guinea*,[16] Guinea requested the annulment of the Award.[17] It claimed excess of powers, serious departure from a fundamental rule of procedure and failure to state reasons for the Award. The *ad hoc* Committee annulled only the damages section of the Award for failure to state reasons. In the *ad hoc* Committee's view, the Tribunal had correctly applied the proper law. But it had failed to deal with questions raised by Guinea, the answers to which might have affected the damages awarded. In addition, the Tribunal had contradicted itself in adopting its damages theory.

8. *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 *ICSID Reports* 9.
9. Award, 26 January 1988.
10. Decision of 17 May 1990.
11. A summary of this decision is offered by F. Niggemann, 'Das Washingtoner Weltbank-übereinkommen von 1965 – Das Nichtigkeitsverfahren im Ad-Hoc-Komitee', 4 *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* 97, 112 *et seq.* (1990). *See also* 2 *ICSID Reports* 163.
12. *Amco* v. *Indonesia*, Decision on Annulment, 16 May 1986, 1 *ICSID Reports* 509. Ignaz Seidl-Hohenveldern was President of the *ad hoc* Committee that rendered this decision.
13. *Amco* v. *Indonesia*, Award, 20 November 1984, 1 *ICSID Reports* 413.
14. *Amco* v. *Indonesia*, Resubmitted Case: Award, 5 June 1990, 1 *ICSID Reports* 569.
15. Decision, 17 December 1992.
16. *MINE* v. *Guinea*, Decision on Annulment, 22 December 1989, 4 *ICSID Reports* 79.
17. *MINE* v. *Guinea*, Award, 6 January 1988, 4 *ICSID Reports* 61.

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MINE resubmitted the damages question for decision by a new tribunal. The parties subsequently reached a settlement by agreement and the proceedings were discontinued.[18]

In *SPP* v. *Egypt*, Egypt submitted a request for annulment of the Award[19] on the grounds of excess of powers, serious departure from a fundamental rule of procedure and failure to state reasons. Before the *ad hoc* Committee was able to render a decision, a settlement was reached and the proceeding discontinued at the request of the parties.[20]

The decisions annulling the Awards in *Klöckner* and in *Amco* were the object of severe criticism. It was argued that the two *ad hoc* Committees had exceeded their authority by re-examining the merits of the cases, thereby transgressing the line between annulment and appeal.[21] It was pointed out that in the two cases the Tribunals had not, in fact, failed to apply the proper law but had merely failed to substantiate it sufficiently (*Klöckner*) or had merely misapplied one provision of that law (*Amco*).[22] The extensive interpretation the two ad hoc Committees applied to their review function was said to have affected one of arbitration's primary goals, the finality of awards.[23] Some

18. Secretary-General's Order of 20 November 1990 taking note of the discontinuance pursuant to Arbitration Rule 43(1).
19. *SPP* v. *Egypt*, Award, 20 May 1992, 3 *ICSID Reports* 189.
20. Order of 9 March 1993 taking note of the discontinuance. *See also* 3 *ICSID Reports* 335.
21. T. de Berranger, 'L'article 52 de la Convention de Washington du 18 mars 1965 et les premiers enseignements de sa pratique', *Revue de l'Arbitrage* 93, 107 (1988); C.T. Curtis, '*Amco* v. *Indonesia*', 83 *American Journal of International Law* 106, 110 *et seq.* (1989); G.R. Delaume, *Transnational Contracts, Applicable Law and Settlement of Disputes*, Ch. XV, 70 (1990); E. Gaillard, 'Note', 25 ILM 1439/1440 (1986); E. Gaillard, 'Centre International pour le Règlement des Différends relatifs aux Investissements (CIRDI): Chronique des sentences arbitrales', 114 *Journal du Droit International* 135, 190 (1987); E. Lauterpacht, *Aspects of the Administration of International Justice* 101 *et seq.* (1991); P.T. Muchlinski, 'Dispute Settlement under the Washington Convention on the Settlement of Investment Disputes', in: *Control over Compliance with International Law* 175, 188 (W.E. Butler, ed.) (1991); P. Rambaud, 'De la compétence du tribunal C.I.R.D.I. saisi après une décision d'annulation', 34 *Annuaire Français de Droit International* 209, 215 (1988).
22. F. Niggemann, 'Das Washingtoner Weltbankübereinkommen von 1965 – Das Nichtigkeitsverfahren im Ad-Hoc-Komitee', 4 *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* 97, 1[illegible] (1990); B. Pirrwitz, 'Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States', 23 *Texas International Law Journal* 73, 103, 106, 108 (1988); J. Paulsson, 'ICSID's Achievements and Prospects', 6 *ICSID Review – Foreign Investment Law Journal* 380, 388 *et seq.* (1991); C. Schreuer, *The ICSID Convention: A Commentary* 948–956 (2001).
23. D.J. Branson, 'Annulments of "Final" ICSID Awards Raise Questions about the Process', *National Law Journal* 25 (4 August 1986); W.L. Craig, 'Uses and Abuses of Appeal from Awards', 4 *Arbitration International* 174, 211 *et seq.* (1988); G.R. Delaume, 'The Finality of Arbitration Involving States: Recent Developments', 5 *Arbitration International* 21, 32 (1989); M.B. Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards', 2 *ICSID Review-Foreign Investment Law Journal* pp. 85, 92, 95/96, 101 *et seq.* (1987).

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authors even spoke of a breakdown of ICSID's control system, which posed a grave risk to the institution's future effectiveness.[24]

Another group of commentators have defended the approach adopted in these early annulment cases.[25] They have described any transgressions by the two *ad hoc* Committees as minor or have actually welcomed the activist role taken by them.

3. The 'new' cases: *Wena* and *Vivendi*

3.1. Wena Hotels *v.* Egypt

In *Wena Hotels Ltd.* v. *Arab Republic of Egypt*,[26] the investor, a British national, had entered into agreements with EHC, an Egyptian public sector company, for the lease, development and management of two hotels in Luxor and Cairo. Disputes arose between EHC and Wena concerning their respective obligations. Wena instituted arbitration proceedings against EHC in Egypt leading to an award in which Wena was partially successful.

In April 1991, violent attacks led to a forcible takeover of the hotels. EHC participated in these attacks and took control of the hotels. The illegality of the attacks and takeover was recognized by the Egyptian authorities and, after some time, the hotels were returned to the investor.

24. W.M. Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration', *Duke Law Journal* pp. 739, 766 *et seq.* (1989); F. Niggemann, 'Die dritte Annullierung eines ICSID-Schiedsspruches – Die Entscheidung in Sachen *Mine* v. *Guinea*', 11 *Praxis des Internationalen Privat- und Verfahrensrechts* 77, 83 *et seq.* (1991); W. Peter, *Arbitration and Renegotiation of International Investment Agreements* 306 *et seq.* (1995); D.A. Redfern, 'ICSID-Losing its Appeal?', 3 *Arbitration International* 98,106 *et seq.* (1987); P. Rambaud, 'L'annulation des sentences *Klöckner* et *Amco*', 32 *Annuaire Français de Droit International* 259 (1986); P. Rambaud, 'L'annulation des sentences *Klöckner* et *Amco*', 32 *Annuaire Français de Droit International* 259, 274 (1986).

25. A. Broches, 'Observations on the Finality of ICSID Awards', 6 *ICSID Review – Foreign Investment Law Journal* 321 (1991); D.D. Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal', 7 *ICSID Review – Foreign Investment Law Journal* 21 (1992); A.S. El-Kosheri, 'ICSID Arbitration and Developing Countries', 8 *ICSID Review – Foreign Investment Law Journal* 104, 113/114 (1993); A.S. El Kosheri, 'The *Klöckner* Case and the Finality of ICSID Arbitral Awards', in: *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* 103 (1998); F. Lattanzi, 'Convenzione di Washington sulle controversie relative ad investimenti e invalidità delle sentenze arbitrali', 70 *Rivista di Diritto Internazionale* 521, 535 (1987); P. Schlechtriem, 'Zur Überprüfbarkeit von ICSID-Schiedssprüchen: Die Aufhebungsentscheidung im Falle *Klöckner/Kamerun*', 6 *Praxis des Internationalen Privat- und Verfahrensrechts* 69, 72/73 (1986); I. Seidl-Hohenveldern, 'Die Aufhebung von ICSID Schiedssprüchen', 2 *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* 100 (1989).

26. For a detailed account of the facts *see Wena Hotels Ltd.* v. *Arab Republic of Egypt*, Award, 8 December 2000, 41 ILM 896, 900–910 (2002).

Wena initiated two further domestic arbitrations against EHC in respect of the two hotels. In one of the arbitrations, it received damages for the forcible takeover but the award also required Wena to surrender the hotel to EHC's control. Eventually Wena was evicted from the hotel.

In the other domestic arbitration, Wena also received damages, but the award was subsequently nullified by the Cairo Appeal Court. Eventually, Wena was also evicted from the second hotel.

Wena initiated ICSID arbitration on the basis of the bilateral investment treaty between Egypt and the United Kingdom ('the BIT'). The Tribunal found that Egypt had violated its obligations to provide 'fair and equitable treatment', 'full protection and security' and had failed to provide Wena with 'prompt, adequate and effective compensation' following the expropriation of the investment. It awarded a substantial amount of damages including interest at the rate of 9 per cent compounded quarterly.[27]

Egypt's request for annulment invoked three grounds: manifest excess of powers, serious departure from a fundamental rule of procedure and failure to state the reasons on which the Award was based.

Under Article 52(2) of the ICSID Convention an application for annulment must be made within 120 days of the award. Before the *ad hoc* Committee, Wena argued that several grounds for annulment, invoked by Egypt in its Memorial requesting annulment, were time-barred, because they had not been argued in the initial Request. The *ad hoc* Committee rejected this contention:

> '. . . the ICSID Convention does not state any requirement of completeness of the Application, except to the extent that the Application must invoke one or more of the grounds listed in Article 52(1) on which it is based. The ICSID Convention thus does not preclude raising new arguments which are related to a ground of annulment invoked within the time limit fixed in the Convention.'[28]

The *ad hoc* Committee examined the grounds for annulment put forward by Egypt but rejected all of them.

3.3.1. Manifest excess of powers

Egypt argued that the Tribunal had manifestly exceeded its powers by failing to apply Egyptian law contrary to Article 42(1) of the ICSID Convention[29]

27. Award, 41 ILM 918–920 (2002).
28. Decision on Annulment, 28 January, 2002, 41 ILM 933, 938 (2002) at § 19.
29. Article 42(1):

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

and by allowing Wena to assert claims on behalf of investors that were not covered by the BIT.

On the issue of failure to apply the proper law, the *ad hoc* Committee found that the parties to the dispute before it had not made a choice of law. While the agreements between Wena and EHC were clearly subject to Egyptian law, the relationship between Wena and Egypt was of a different nature. Therefore, the second sentence of Article 42(1), directing the tribunal to apply the host State's law and applicable rules of international law, governed the issue. In this regard the *ad hoc* Committee found that both legal orders have a role but that, in case of an incompatibility, international law would prevail. The BIT and the ICSID Convention were in accord with and part of Egyptian law. Therefore, the Tribunal, in relying on the BIT as the primary source of law, did not exceed its powers.[30]

Egypt's application for annulment had relied on excess of powers for failure to apply the proper law in three specific contexts:

1. Egypt had argued that under Egyptian law the leases for the two hotels in question were null and void because of an incident of corruption. In not so holding, the Award is alleged to have failed to apply Egyptian law. The *ad hoc* Committee responded by saying that while corruption could invalidate the agreements under Egyptian law, or for that matter international law, such unlawful act would have to be proved. The Tribunal had found that there was not sufficient evidence before it to prove such an allegation. Therefore the question was not one of applicable law but of evidence.[31]
2. Egypt also contended that the Tribunal should have considered the extent and nature of the rights under the leases as governed by Egyptian law. It also criticised the fact that the ICSID Tribunal had failed to take proper account of one of the domestic arbitral awards in proceedings between Wena and EHC. This, alleged the Memorial, amounted to a failure to apply the proper law and a manifest excess of powers.

The *ad hoc* Committee, in rejecting this argument, emphasized the distinction between the relationship between Wena and EHC on one hand and Wena and Egypt on the other. The dispute submitted to the domestic arbitration under the lease agreements was not the dispute brought to arbitration under the ICSID Convention and the BIT. The *ad hoc* Committee said:

> '49. It is here where the relationship between one dispute and the other becomes relevant. The ultimate purpose of the relief sought by Wena is to have its losses compensated. To the extent this relief was partially obtained in the domestic arbitration, the Tribunal in awarding

30. Decision on Annulment, 41 ILM 939–942.
31. At p. 942.

> damages under the IPPA [i.e. the BIT] did take into account such partial indemnification so as to prevent a kind of double dipping in favor of the investor. The two disputes are still separate but the ultimate result is the compensation of the investor for the wrongdoings that have affected its business.'[32]

3. The potentially most important area of applicable law concerned the calculation of interest. Egypt argued that that the Tribunal, by awarding interest at the rate of 9 per cent, compounded quarterly, had failed to apply the proper law. Egypt contended that such a calculation of interest was contrary to Egyptian law, specifically Article 226 of the Egyptian Civil Code, which provides for various limits to the determination of interest.

The *ad hoc* Committee rejected this argument. It found that under the BIT compensation had to be 'prompt, adequate and effective' and 'compensation shall amount to the market value of the investment expropriated immediately before the expropriation itself'. Although not referring to interest, these provisions had to be read as including a determination of interest that was compatible with those two principles. The *ad hoc* Committee said:

> '53. The option the Tribunal took was in the view of this Committee within the Tribunal's power. International law and ICSID practice, unlike the Egyptian Civil Code, offer a variety of alternatives that are compatible with those objectives. These alternatives include the compounding of interest in some cases. Whether among the many alternatives available under such practice the Tribunal chose the most appropriate in the circumstances of the case is not for this Committee to say as such matter belongs to the merits of the decision. Moreover, this is a discretionary decision of the Tribunal. Even if it were established that the Tribunal did not rely on the appropriate criteria this in itself would not amount to a manifest excess of power leading to annulment.'[33]

Apart from failure to apply the proper law, Egypt also argued that the Tribunal had exceeded its powers by permitting Wena to pursue claims for the losses of its affiliates who did not qualify under the BIT. The *ad hoc* Committee's response to this argument was terse: the origin of the sums invested and the ultimate beneficiary of the sums awarded was a matter of fact and evidence. The Committee added that 'ICSID practice has also been quite flexible on claims that include the interests of subsidiaries and affiliates.'[34]

32. *Loc. cit.*
33. At p. 943. Footnote omitted.
34. *Loc. cit.*

For these reasons, the *ad hoc* Committee dismissed excess of powers as a ground for annulment.

3.1.2. Serious departure from a fundamental rule of procedure

Egypt advanced several arguments under the rubric of serious departure from a fundamental rule of procedure, all of which were dismissed.

Egypt argued that by rejecting Applicant's argument that the leases were procured by illegitimate payments, the Award violated a fundamental rule of procedure in the way it applied the burden of proof. The *ad hoc* Committee pointed out that Egypt had not identified the rule of burden of proof upon which it was relying. The question concerned a factual issue that was irrelevant as a matter of minimal standard of procedure.[35]

Egypt also argued that by accepting Wena's calculation of its investment, the Tribunal had not required Wena to discharge its burden of proving its damages. This, Egypt claimed, constituted a departure from a fundamental rule of procedure. Again, the *ad hoc* Committee pointed out that the application had not identified the fundamental rule of procedure in question. The question involved was not one of procedure but of the probative value of the evidence submitted by the parties. This was a matter for the Tribunal's discretion.[36]

Yet another complaint with respect to procedure concerned the Tribunal's assessment of interest. Egypt contended that it was not offered the opportunity to address the issue of the appropriate rule of interest before the Tribunal and thus was deprived of its right to be heard. The *ad hoc* Committee found as a matter of fact that Wena had requested interest and that Egypt had every opportunity to respond to Wena's claims. Although neither party had raised the topic of compound interest, there was discussion of international cases in which compound interest had been awarded. Therefore, the parties must have been aware of the possibility that the Tribunal might award it.[37]

Finally, Egypt contended that the Tribunal breached a fundamental rule of procedure when not requesting further evidence concerning the issue of corruption, especially in not calling an essential witness whom neither party had offered in evidence. The *ad hoc* Committee pointed out that it was primarily incumbent upon the parties to produce the evidence they wished to present. The tribunal's power to call upon the parties to produce further evidence, as embodied in Article 43 of the ICSID Convention and in Arbitration Rule 34(2), is discretionary. Therefore, there was no fundamental rule of procedure that would have put the Tribunal under an obligation to call for further evidence.[38]

35. At p. 944.
36. At p. 945.
37. *Loc. cit.*
38. At pp. 945–946.

It followed that there was no ground for annulment relating to a serious departure of the Tribunal from a fundamental rule of procedure.[39]

3.1.3. Failure to state reasons

It is beyond doubt that an ICSID tribunal is under an obligation to state the reasons upon which an award is based. Article 48(3) of the Convention is unequivocal in this respect. What is less clear is how detailed and thorough a statement of reasons must be. Of all the grounds for annulment, an evaluation of the tribunal's reasoning carries the biggest danger of blending into an examination of the award's substantive correctness and hence to cross the border between annulment and appeal.[40] The standard for an acceptable explanation is highly subjective. This problem is exacerbated by the fact that different legal cultures have different conceptions about what constitutes adequate reasons for a judicial ruling. In addition, the need to find a compromise formula in a divided tribunal sometimes leads to the adoption of language that may not appear entirely coherent and logical to an outside reader.

The reasons will primarily consist of the legal arguments that have induced the tribunal to adopt its decision. In addition, a statement of the facts that the tribunal has accepted as proven will be an element of the reasons. The purpose of a statement of reasons is to explain to the reader of the award, especially to the parties, how and why the tribunal reached its decision. Since the parties are the award's primary addressees, the reasons need not go into the same detail that would be necessary to explain the award to an outsider. The parties can be expected to be familiar with the main issues before the tribunal, with the evidence that was before it and with the main legal arguments presented to it.

39. At p. 946.

40. *See also* D.D. Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal', 7 *ICSID Review – Foreign Investment Law Journal* 21 at 38, 44/45 (1992); I. Seidl-Hohenveldern, 'Die Aufhebung von ICSID Schiedssprüchen', 2 *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* 100 at 103 *et seq.* (1989); M. Sturzenegger, 'ICSID Arbitration and Annulment for Failure to State Reasons', 9 *Journal of International Arbitration* 173 at 188 (1992); T. de Berranger, 'L'article 52 de la Convention de Washington du 18 mars 1965 et les premiers enseignements de sa pratique', *Revue de l'Arbitrage* 93 at 110/111, 114/115 (1988); A. Broches, 'Observations on the Finality of ICSID Awards', 6 *ICSID Review-Foreign Investment Law Journal* 321 at 377 (1991); M.B. Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards', 2 *ICSID Review – Foreign Investment Law Journal* 85 at 109 (1987); E. Gaillard, 'Centre International pour le Règlement des Différends relatifs aux Investissements (CIRDI): Chronique des sentences arbitrales', 114 *Journal du Droit International* 135 at 190 (1987); A. Giardina, 'ICSID: A Self-Contained, Non-National Review System', in: *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?* (R.B. Lillich/C.N. Brower, eds.) 199 at 212/213 (1994); W.M. Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration', *Duke Law Journal* 739 at 791/792 (1989).

The ability to explain to the parties the motives that have induced the tribunal to adopt its decision should be distinguished from the ability to convince the losing party that the decision was the right one. A party that has not prevailed in litigation is inclined to regard the decision as incomprehensible and to feel that the decision-maker has not explained adequately why it rejected the arguments of which the losing party is convinced. But the task of the tribunal in drawing up its reasons is merely to explain the way by which it reached its result and not to supply reasoning that offers incontrovertible grounds on every argument put forward by the parties.

The *ad hoc* Committee in *Wena* made several preliminary remarks concerning a failure to state reasons. These included the following:

> '81. Neither Article 48(3)[41] nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the parties will be able to understand the Tribunal's reasoning. This goal does not require that each reason be stated expressly. The Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.
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> . . .
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> 83. It is in the nature of this ground of annulment that in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of Article 52(1)(e), the remedy need not be the annulment of the award. The purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision. If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be re submitted to a new Tribunal. If the *ad hoc* Committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions can be explained by the *ad hoc* Committee itself.'[42]

Egypt offered three arguments why Award had failed to state reasons. In addition it contended that the Tribunal did not deal with some questions submitted to it.

Egypt argued that the Tribunal failed to state reasons by not dealing with the issue of Wena's alleged default under the leases and the termination of one of the hotel leases by the domestic arbitral tribunal. The *ad hoc* Committee responded by pointing out that the Tribunal had stated that its decision was

41. Article 48(3) of the ICSID Convention: The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based. [Footnote added.]
42. At p. 947.

based on the BIT and that the contractual relationship with EHC was irrelevant in this respect. This was a sufficient explanation.[43]

Egypt also complained that the Award did not explain the amount of damages awarded to Wena. The *ad hoc* Committee pointed out that the Award had referred to the BIT's relevant provisions. With regard to the quantum of damages, the Tribunal, in the *ad hoc* Committee's view, enjoyed a certain margin of discretion. But the reasons given in this regard were sufficient. Part of the reasoning was implicit in the Award's reference to documentation submitted to the Tribunal.[44]

Egypt also argued that the Tribunal failed to state reasons for its calculation of interest. Specifically, it complained that no reason was given for the rate of interest of 9 per cent and for the date or dates from which interest has been calculated. The *ad hoc* Committee pointed out that the Award had specified that the rate of interest was 1 per cent below that for long-term government bonds in Egypt. Moreover, international tribunals had a large margin of discretion when fixing interest. This was particularly so when the parties, as in the present case, had not addressed the issue in any detail. The date from which interest was awarded was ascertainable through a mathematical calculation on the basis of the amount awarded.[45]

Finally, Egypt argued that the Award failed to deal with every question submitted to it and that the Tribunal thereby failed to state the reasons on which the Award was based. The ad hoc Committee found that these allegations related in part to issues of fact and evidence that the Tribunal had dealt with explicitly or by implication. In part these allegations related to the relationship between Wena and EHC that was not relevant to determine the relationship between Wena and Egypt under the BIT.[46]

Therefore, the *ad hoc* Committee concluded that the complaints based on the alleged failure to state reasons were not founded and had to be rejected. Therefore, the application for annulment of the Award was rejected in its entirety.

3.2. Vivendi

In *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux* v. *Argentine Republic* (the *Vivendi* case) the French investor (CGE, subsequently renamed Vivendi) had entered into a Concession Contract with the Argentinean province of Tucumán pursuant to which CGE assumed responsibility for the operation of the Province's water and sewage system. Disputes arose soon thereafter between CGE and the Tucumán authorities. CGE

43. At pp. 947–948.
44. At pp. 948–949.
45. At p. 949.
46. At pp. 950–951.

contended that the provincial authorities illegally interfered with the performance of the Contract. Argentina contended that CGE's performance of the Contract was deficient. Attempts at renegotiating the Contract failed. Eventually both CGE and Tucumán separately purported to terminate the Contract. CGE instituted ICSID arbitration pursuant to the BIT between Argentina and France. CGE alleged that the Argentine Republic had failed to prevent the Province of Tucumán from taking the incriminated action and had failed to cause the Province to take certain action it should have taken (the 'federal claims'). In addition, CGE argued that under international law Argentina was responsible for the actions of its Province (the 'Tucumán claims').

Argentina challenged ICSID's jurisdiction by relying on a forum selection clause in the Concession Contract. That clause, in Article 16.4 of the Concession Contract, provides as follows:

> 'For purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Courts of Tucumán.'[47]

CGE never challenged the actions of Tucumán in these courts.

The Tribunal joined the jurisdictional question to the merits. The Award[48] first dealt with jurisdiction. The decisive passage in that part of the Tribunal's Award is as follows:

> '53. . . . the Tribunal holds that Article 16.4 of the Concession Contract does not divest this Tribunal of jurisdiction to hear this case because that provision did not and could not constitute a waiver by CGE of its rights under Article 8 of the BIT to file the pending claims against the Argentine Republic . . . In this case the claims filed by CGE against Respondent are based on violation by the Argentine Republic of the BIT through acts or omissions of that government and acts of the Tucumán authorities that Claimants assert should be attributed to the central government. As formulated, these claims against the Argentine Republic are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT.
>
> 54. Thus, Article 16.4 of the Concession Contract cannot be deemed to prevent the investor from proceeding under the ICSID Convention

47. Award, para. 27.
48. *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux* v. *Argentine Republic*, Award, 21 November 2000, 40 ILM 426 (2001), 16 *ICSID Review* 643 (2001), 5 *ICSID Reports* 296.

> against the Argentine Republic on a claim charging the Argentine Republic with a violation of the Argentine-French BIT.'[49]

The Tribunal summarized its own finding on jurisdiction in the following terms:

> 'For the reasons set forth in this Award, the Tribunal holds that it has jurisdiction to hear the claims of CGE against the Argentine Republic for violation of the obligations of the Argentine Republic under the BIT. Neither the forum-selection provision of the Concession Contract nor the provisions of the ICSID Convention and the BIT on which the Argentine Republic relies preclude CGE's recourse to this Tribunal on the facts presented.'[50]

In the merits part of the Award, the Tribunal found that the actions by Argentina itself did not amount to a violation of the BIT. With respect to the acts of the Province of Tucumán, for which CGE held Argentina responsible, the Tribunal held that these claims were closely linked to the performance of the Concession Contract. The Tribunal said:

> '[T]he Tribunal holds that, because of the crucial connection in this case between the terms of the Concession Contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the Concession Contract requires, asserted their rights in proceedings before the contentious administrative courts of Tucumán and have been denied their rights, either procedurally or substantively.[51]
>
> . . .
>
> In this case, however, the obligation to resort to the local courts is compelled by the express terms of Article 16.4 of the [Concession Contract] and the impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts.'[52]

For this reason the Tribunal dismissed the claims.

The Claimants' request for annulment related not to the part of the Award dealing with jurisdiction but only to the merits portion of the Award. The request relied on three grounds: serious departure from a fundamental rule

49. 40 ILM 438–439.
50. 40 ILM 428.
51. 40 ILM 443.
52. 40 ILM 444.

of procedure, manifest excess of powers and failure to state reasons. Argentina, in addition to resisting each of these contentions, argued that if any of them were to be upheld, the Award should be annulled as a whole, including its finding on jurisdiction. The Claimants, in turn, objected arguing that the 'counterclaim' for the annulment of the whole Award was inadmissible in that it was made outside the time limit of 120 days as set out in Article 52(2).

The *ad hoc* Committee rejected this objection. It said:

> '68. The Committee agrees with Claimants that a counterclaim for annulment, that is, a claim which is not raised by the party concerned as a separate request in accordance with Article 52(1) of the Convention, is inadmissible. But it does not follow that a party, such as Respondent in the present case, may not present its own arguments on questions of annulment, provided that those arguments concern specific matters pleaded by the party requesting annulment, in this case the Claimants. In the opinion of the Committee, a party to annulment proceedings which successfully pleads and sustains a ground for annulment set out in Article 52(1) of the ICSID Convention cannot limit the extent to which an *ad hoc* committee may decide to annul the impugned award as a consequence.
> 69. Thus where a ground for annulment is established, it is for the *ad hoc* committee, and not the requesting party, to determine the extent of the annulment. In making this determination, the committee is not bound by the applicant's characterisation of its request, whether in the original application or otherwise, as requiring either complete or partial annulment of the award.'[53]

The *ad hoc* Committee also commented on its discretion to annul:[54]

> '66. Finally, it appears to be established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annullable error is found. Article 52(3) provides that a committee "shall have the authority to annul the award or any part thereof", and this has been interpreted as giving committees some flexibility in determining whether annulment is appropriate in the circumstances. Among other things, it is necessary for an *ad hoc* committee to consider the significance of the error relative to the legal rights of the parties.'[55]

53. Decision on Annulment, 3 July 2002, 41 ILM 1135, 1150 (2002).
54. For the previous discussion of the 'hair-trigger approach' versus the 'material violation' approach *see* C. Schreuer, *The ICSID Convention: A Commentary* 1018–1023 (2001).
55. 41 ILM 1149. Footnote omitted.

With respect to the Tribunal's jurisdictional finding, the *ad hoc* Committee had no difficulty finding that it suffered neither from an excess of powers nor from a failure to state reasons. Therefore, the part of the Award dealing with jurisdiction was upheld.[56] With respect to the Tribunal's finding on the merits, the *ad hoc* Committee took a more deliberate approach.

3.2.1. Serious departure from a fundamental rule of procedure

The Claimants argued that the Tribunal had departed from a fundamental rule of procedure in that the dismissal of the claims, based on Article 16.4 of the Concession Contract had not been adequately addressed in argument.

The *ad hoc* Committee was unable to find any violation of a rule of procedure in the records of the arbitration. It stated:

> '85. From the record, it is evident that the parties had a full and fair opportunity to be heard at every stage of the proceedings. They had ample opportunity to consider and present written and oral submissions on the issues, and the oral hearing itself was meticulously conducted to enable each party to present its point of view. The Tribunal's analysis of issues was clearly based on the materials presented by the parties and was in no sense *ultra petita*. For these reasons, the Committee finds no departure at all from any fundamental rule of procedure, let alone a serious departure.'[57]

3.2.2. Manifest excess of powers

The Claimant argued that the Tribunal had manifestly exceeded its powers by failing to decide matters that were clearly within its jurisdiction. The *ad hoc* Committee prefaced its analysis by saying that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have but also if it fails to exercise a jurisdiction which it possesses.[58]

With respect to the 'federal claims', the *ad hoc* Committee came to the conclusion that the Tribunal had carefully considered these on the facts and had rejected them. Therefore, there was no manifest excess of powers with respect to these claims.[59]

With respect to the Tucumán claims, the Claimants submitted that the Tribunal had not dismissed these but had declined to address them. The *ad hoc* Committee found that the Tribunal had manifestly exceeded its powers by not examining the merits of the claims for acts of the Tucumán authorities under the BIT. Therefore, it annulled the Award with regard to those claims. The *ad hoc* Committee summarized the issue as follows:

56. At pp. 1150–1152.
57. At p. 1152.
58. *Loc. cit.*
59. At p. 1153.

> '41. The Tribunal's stated rationale for rejecting Claimants' position is "the impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts". The Tribunal appears to have considered that, because Claimants' contract and treaty claims could not be separated, a distinct claim "based on the BIT" was impossible in the circumstances of the case, at least prior to submission of the dispute to the provincial courts.'[60]

The *ad hoc* Committee found it 'evident that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards and questions of contract'.[61] This did not impair the jurisdiction of the ICSID Tribunal:

> 'This being so, the fact that the Concession Contract referred contractual disputes to the contentious administrative courts of Tucumán did not affect the jurisdiction of the Tribunal with respect to a claim based on the provisions of the BIT. Article 16(4) of the Concession Contract did not in terms purport to exclude the jurisdiction of an international tribunal arising under Article 8(2) of the BIT; at the very least, a clear indication of an intention to exclude that jurisdiction would be required.'[62]

On the relation between breach of contract and breach of treaty, the *ad hoc* Committee pointed out that these related to independent standards. 'A state may breach a treaty without breaching a contract, and *vice versa*.' Therefore, 'whether there has been a breach of the BIT and whether there has been a breach of contract are different questions.'[63] This led the *ad hoc* Committee to the following conclusions:

> '. . . where "the fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.[64] . . . A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful

60. At p. 1135.
61. Para. 60 at p. 1148.
62. Para. 76 at p. 1151.
63. Paras. 95, 96 at p. 1154.
64. Para. 101 at p. 1156. Footnote omitted.

> under a treaty.[65] . . . it is one thing to exercise contractual jurisdiction (arguably exclusively vested in the administrative tribunals of Tucumán by virtue of the Concession Contract) and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in Article 3 of the BIT.'[66]

It followed that the Tribunal had manifestly exceeded its powers in that it had failed to decide the claims under the BIT:

> '. . . the Committee can only conclude that the Tribunal, in dismissing the Tucumán claims as it did, actually failed to decide whether or not the conduct in question amounted to a breach of the BIT. In particular, the Tribunal repeatedly referred to allegations and issues which, it held, it could not decide given the terms of Article 16(4) of the Concession Contract, even though these were adduced by Claimants specifically in support of their BIT claim.[67] . . . It was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT. In the Committee's view, the Tribunal, faced with such a claim and having validly held that it had jurisdiction, was obliged to consider and to decide it.'[68]

For these reasons the *ad hoc* Committee concluded that the Tribunal exceeded its powers in that it failed to decide those claims although it had jurisdiction. Therefore it annulled the decision of the Tribunal with respect to the Tucumán claims.[69]

3.2.3. Failure to state reasons

The *ad hoc* Committee made some generally prefatory remarks on failure to state reasons as a ground for annulment:

> '64. A greater source of concern is perhaps the ground of "failure to state reasons", which is not qualified by any such phrase as "manifestly" or "serious". However, it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an *ad hoc* committee is

65. Para. 103 at p. 1156.
66. Para. 105 at p. 1156.
67. Para. 111 at p. 1157.
68. Para. 112 at p. 1157.
69. At p. 1158.

> not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.
>
> 65. In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.'

But in the end, the *ad hoc* Committee found it unnecessary to consider the allegation of a failure to state reasons as a ground for annulment in view of its previous conclusions on excess of powers.[70]

4. Conclusions

The two applications for annulment that were lodged in 2001 were received with calmness. In the meantime, ICSID has more than proved its viability and its central importance in investor/State dispute settlement. Annulment is no longer seen as a threat to ICSID arbitration but as a useful supplement. The number of cases has soared and tribunals have often taken a generous attitude of their competence. Therefore, annulment is seen as a wholesome check to the assertiveness of tribunals.

Ironically, the one instance in the two recent cases in which an application for annulment was successful did not concern an unduly expansive assertion of powers by the tribunal. On the contrary, in *Vivendi* the Award was partially annulled because the Tribunal failed to exercise a jurisdiction that, in the eyes of the *ad hoc* Committee, it should have exercised.

The two *ad hoc* Committees were careful to stay within the limits prescribed by Article 52(1) of the ICSID Convention. This is well demonstrated by their interpretation of the ground for serious departure from a fundamental rule of procedure. Both *ad hoc* Committees came to the conclusion that a failure

70. *Loc. cit.*

by the parties sufficiently to address a particular point because they did not anticipate a particular outcome could not be interpreted as a serious departure from a fundamental rule of procedure on the part of the Tribunals. It is not the duty of the tribunal to seek the opinion of the parties on specific points that are within the general ambit of the arguments made.

With regard to failure to state reasons, the two *ad hoc* Committees also rejected an overly strict approach. The primary addressees of awards are the parties who are familiar with the case and with the various arguments made before the tribunal. Therefore, they may need only limited explanation. Reasons may also be stated implicitly. Even where the reasons are deficient, annulment is not automatic and the *ad hoc* Committee enjoys a certain degree of discretion. It may even reconstruct the reasons. Annulment for failure to state reasons should only occur in a clear case. This would only be the case where the rationale on a vital point in the tribunal's decision is essentially lacking.

On excess of powers, the Committees refused to find that there had been a failure to apply the proper law. Although the principle that failure to apply the proper law may constitute a manifest excess of powers was not cast into doubt, the overly strict approach of the *Klöckner* and *Amco* cases seems to have been abandoned. If there is a conflict between domestic law and international law, the tribunal may rely on the latter. In the ascertainment of the appropriate rule of international law, the tribunal enjoys a certain degree of discretion. Even if it makes a mistake in its search for the appropriate rule this will not automatically lead to annulment.

The one area in which an annulment did occur involved a case where the Tribunal, despite its finding that it had jurisdiction, declined to make a decision on the merits. The annulment in *Vivendi* is of high practical relevance. Most BITs, of which there are presently over 2000, offer consent to ICSID jurisdiction to investors of the other country party to the BIT. Most cases currently brought to ICSID involve such clauses in BITs. At the same time, concession agreements between host States and foreign investors often contain domestic forum selection clauses. To allow these contractual forum selection clauses to detract from the consent to ICSID arbitration as contained in BITs would have seriously undermined ICSID's jurisdiction. A number of cases involving this issue are currently pending before ICSID tribunals and it may be expected that they will follow the decision of the *ad hoc* Committee in *Vivendi*.

The recent cases can be seen to have served exactly the purpose that ICSID annulment was created for: to provide emergency relief in rare cases of fundamental importance but to uphold the finality of awards in the face of alleged relatively minor substantive or procedural flaws.