The ICSID Procedure: Mind the gap

By Gloria M. Alvarez[1]

International investments between developing countries and foreign investors are an essential activity for the growth of any economy. Investment transactions contribute immensely to utilize resources in a more efficient way by achieving benefits for the government hosting the investment. Economical, environmental, political, legal and even cultural facts interact in all international investments; thus disputes between the host state and the investor have always existed and are a latent possibility.

In accordance with the World Bank proposals and in response to the absence of an institution specialised on the administration of investment disputes in 1966 the International Centre for Settlement of Investment Disputes (ICSID) was founded. The creation of the Centre by the World Bank has been an incentive for the investment community, especially because it provides a set of accurate provisions carefully drafted, 'so as to blend the procedures of the common law with those of the civil law'. ICSID has improved the atmosphere of settlement of investment disputes. This can be seen through, the increasing amount of Bilateral Investment Treaties (BITs) where consent to arbitrate under ICSID can be found. So far, more than 2,400 BITs contains ICSID arbitration as a forum choice among other arbitral institutions[2].

Unlike awards recognized and enforced under the New York Convention, ICSID is described as a *'self-contained system'* that excludes awards for any other revision that is not within the remedies available in the Washington Convention. Investment experts have recently considered that ICSID, has achieved it's propose without overcoming high expectations regarding the finality principle. In contrast, there is the opinion that ICSID should be recognized for all the innovations brought to this special arbitration regime and unsuccessful experiences should be considered positively as teaching lessons for the future.

In the Summer of 2010, four ICSID awards were annulled, due this, practitioners have named it as a "hot summer for annulments" while others describe it as a "wake up call" for the investment community. The ambiguity on the finality principle can be found in the internal mechanism that reviews and annuls an award. The mechanism basically offers to the parties the possibility to apply for the annulment of the award through an internal procedure.

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The author wishes to thanks Professor Loukas Mistelis (Director of School of International Arbitration) for his contribution on this research and Ms. Carolina Castellanos (General Secretary of Centro de Arbitraje de Mexico-CAM) for her constant interest on the academic developments made by Queen Mary, University of London.

[2] See as an example ECT article 26 (4), Jordan- Russian Federation BIT, Germany- Oman BIT, Qatar- Turkey BIT, Finland- Ethiopia BIT, Thailand-Argentine BIT, US-Estonia BIT, Netherlands- Venezuela BIT, Spain-Venezuela BIT, UK-Egypt BIT, US- Argentina BIT and France-Argentina BIT, *et al*.

The application for the annulment is heard by a group of experts called *Ad hoc committee. Here* is where lack of effectiveness appears, because every time an award is rendered it can be subject of annulment and as consequence the dispute can be restarted.

AMCO v Indonesia II and Vivendi v Argentina among other cases are examples of annulment and resubmission of the dispute. One of the most popular causes according to the investment experts of the overactive annulment activity is the lack of consistent criteria over the ICSID annulment generations.

The aim of this article is to shed light on the elements involved in the procedural loopholes impacting ICSID annulment activity in order to find solutions easy to be implemented. The working hypothesis of this paper is to demonstrate that these elements are distinctive features affecting the annulment activity with the aim of finding a procedural solution capable of solve the procedural inconsistencies presented on ICSID.

Article 52 of the Washington Convention describes the annulment procedure; were the parties have 120 days after the award has been rendered to request the annulment of the award and must state all arguments to uphold their request. The annulment proceeding can produce 3 different outcomes: to refuse it, grant it partially or totally. It is important to bear in mind that *a decision to annul does not replace the award with a new decision,* moreover the consequence is the legal destruction of the award in order to allow the parties to restart the same dispute unlimitedly.

The first advantage of the annulment procedure is that it encourages the arbitral tribunal to render an award exhaustively reasoned and grounded. Secondly, the revision made by the *Ad hoc committee* constitutes an important opportunity of having a new and clearer opinion towards the decision stated in the award. Third, the grounds to annul an award are not at the discretion of the *Ad hoc committee*, these criteria are clearly stated and they were created to avoid any abuse on exceeding its jurisdictional powers[3].

In the 1980's, the First Generation of ICSID annulments started with two cases: *Klockner* and *AMCO* where both awards were set aside on the ground that the arbitral tribunals went beyond their faculties by failing to state accepted reasons. This criteria was applied in both cases, creating a wave of critics and concerns. This was because when the *Ad hoc committees* decided regarding the lack of reasoning of the Arbitral Tribunal, automatically they looked into the merits of the dispute, confusing the differences between an appeal and annulment. Moreover, by annulling an award under the grounds of "exceeding powers", it was catalogued as very low criteria to upheld an annulment. Thus, the performance of the Committees was criticized for two main reasons: (i) the unclear difference between and appeal and an annulment body and (ii) the concept of finality was distorted.

In 1989 the *Ad Hoc Committees* tried to hit back the first critics, when they refused the applications for the annulment of *AMCO II* and *Klockner II*. Although, the Second Generation can be clearly illustrated by *MINE v Guinea;* in this case the *Ad hoc committee* by a better scrutinising

[3] Washington Convention Art 52 (1) and Arbitration Rules of ICSID R 50

of the final award and by not exceeding its faculties as an annulment court dismissed the request of Guinea on the part claiming a breach of contract. However, it granted the request were the Arbitral Tribunal did not an accurate study of the merits of the case at the *quantum of damages* stage; therefore only damages determination was annulled. On a superficial review, it seems that during the Second Generation the *Ad hoc committees* acted more vigilantly by treating the procedure annulment not as an extension of ICSID procedure but as "High-Court of Annulment". Nevertheless, this was the beginning of uncertainty in Investment Arbitration precedents, this change of criteria between the first and the second generation must have been considered as a "yellow light" for the ICSID drafters about the necessity of having precedents.

A questions arises from these two generations, is it necessary to have precedents that help to draw the scope of the *Ad hoc committee*?, is ICSID contributing to a coherent legal criteria in the international investment law?.

The Third Generation started in 2002, more than be illustrated by cases, a country stands out: Argentina. Two procedures play the main role, in the first one the claimant is the company Vivendi Universal followed by a procedure started by a gas company named CMS Gas Transmission. In both decisions, the *Ad hoc committees* gave a most balanced approach about their duties as annulment committee, which means that they will not automatically annul an award under very ambiguous criteria, unlike in the previous generations. The *Ad hoc committees* reached the conclusion that even if they found errors on the Arbitral Tribunals' final decision the annulment should only be granted if an award contains serious substantive defects.

A second reflection arises from the behaviour of the Third Generation Committees: Is there a gap on ICSID procedure? If the *Ad hoc Committee* considers there are some legal mistakes on the awards, that they cannot amend because they are only an extreme mechanism, is that an indicator that there should be a procedure between the final award and the annulment?

In 2010 a set of cases raised the question of the threshold of annulment proceedings which embraces *Sempra v Argentina, Enron v Argentina, Helnan v Egypt and Vivendi v Argentina II.* The main critic at that time is the contrasting annulment decisions in *Sempra* and *Enron* focused on the blurred limits on the *Committees'* faculties. This is because there is no faculty granted in the Washington Convention, neither on the ICSID rules that allows the *Committees* to annul an award because of an error on the applied law – *as it occurred in both cases.*

Why the lack of precedents is so important regarding the annulment activity? How the existence of consistent and predictable judgments will solve the procedural gaps on ICSID? Stability and predictability are essential elements on any mechanism aiming to provide benefits for an economy. International Investment arbitration is a new area in law than needs to properly evolve over a period of time. There is a concern that inconsistency will provide the best excuse for the host state of the investment to refuse the enforcement of the award arguing that 'is politically unacceptable to enforce inconsistent decisions'. As mentioned before, inconsistency and lack of coherency among the awards is not *per se* a problem, the concern is addressed when similar standards are been revised, and the outcomes are the different. Umbrella clause, fair and equitable treatment and necessity; are concepts expected to be understood with similarity in the framework of International Investment Law. Nevertheless, practitioners prefer to remain positive towards

inconsistency rather to give solutions to the lack of precedents. This is not surprising at all, considering they are the ones participating in the tribunals and committees that render all the different decisions catalogued as inconsistent, to try to make consensus among them is a hard task.

The concepts of Court of Appeal and Court of Annulment are usually mentioned when the reasoning of the *Ad hoc Committee* is been revised. Before getting into these critics, it is important to understand the meaning of annulment and appeal. It can be said that the consequences of an annulment decision are concerning the procedural legitimacy, whereas an appeal decision is not only the review of the procedural legitimacy but also its substantive accuracy. One of the problematic consequences of the legal reasoning of the *Ad hoc committees* is the blurred line of acting as Court of Annulment or Court of Appeal. *Ad hoc committees* often emphasises that their task is only regarding the annulment of an award although decisions have not been coherent with it. Unfortunately, annulment tribunals have not always complied with the text and sprit of Article 52. This is because decisions rendered by the *Ad hoc Committees* seems to go out of the scope of Article 52 by having a broader conception of annulment.

The current problematic in implementing solutions on the ICSID framework has leaded to find new possibilities within the investment infrastructure. In 2002, after some threats to the U.S. sovereignty and NAFTA experiences, the American Congress with the aim of improving fair trade standards and investment stability, signed the U.S. Trade Act, which promotes the implementation of an appeal mechanism in subsequent trade agreements signed by the USA. Therefore, the government has started to negotiate Free Trade Agreements with Jordan, Morocco, Peru, Australia, Chile, Singapore, Central America and the Caribbean. The aim of this appeal mechanism is to have coherence in all U.S. investment treaties; nowadays CAFTA is the best example of implementation of a Court of Appeal into an Investment Treaty converting the previous theoretical discussions into a new dynamic.

ICSID has contributed to implement solutions that does not affect the structure of the Washington Convention, as an example are the set of Argentinian water concession cases, where a similar arbitral tribunal was constituted and a single procedural hearing was fixed for all the cases. This consolidation of cases in ICSID was well accepted among practitioners. Nevertheless, consolidation is a partial solution and does not solve substantially the problem of annulments, merely because an award consequence of joinder proceedings can also be annulled.

If we are allowed to make consensus, it can be said that the proposals to fill the gap in ICSID procedure can be summarized as:

a) A Court of Appeal,
b) Guidelines for the *Ad hoc committee,*
c) Case law in form of precedents,
d) Prima facie analysis of the annulment request by ICSID Secretariat.

The implementation of any of these proposals has to be done through:

(1) An amendment on the Washington Convention, as well as ICSID Rules,
(2) A Protocol signed by all the Member Countries,

(3) Creation of Appeal Facility Rules – but it will clash with Art 53 Washington Convention
(4) Inserting an Appeal mechanism on the Investment Treaties

Two solutions, outside ICSID procedure, have been offered for the investment community although have not been strongly discuss. The essential characteristic of these silent solutions is that they do not contradict the provision of Art 53 of the Convention.

The chaos of implementation of all the possible solutions to fill the gaps on ICSID procedure has lead experts to seek alternatives outside the investment scope. The Washington Convention in Art 6 gives the first solution, where Sates members can request the assistance of The International Court of Justice (ICJ) when a dispute arises from the interpretation or application of the Washington Convention. The International Court of Justice is seeing as the "highest international tribunal", therefore its hierarchy and reputation can assist ICSID proceedings. This suggestion is strengthen by the *CMS v Argentina case* where the Arbitral Tribunal did frequent references to the case *Gabcikovo Nagymaros,* It should not being understood that ICJ, substitutes an appeal court, but it can review disputes arisen from the violations made on errors of interpretation of a investment treaty. This interpretation conflict should be a Sate – State dispute, therefore the challenge is for the Claimant State are in arguing which kind of violations suffered.

A more regional solution, difficult to apply to all ICSID members, is the preliminary mechanism offered by the European Court of Justice, which can operate as interim measure in ICSID proceedings. If a Tribunal has a conflict interpreting previous ICSID decisions or concerning the interpretation of a treaty, the ECJ can clarify the interpretation while the ICSID Tribunal remain in pause, until the clarification is been rendered. The contribution of the ECJ would directly benefit ICISD awards with less inconsistencies and law fragmentation. Some administrative issues should be discussed, such as if this clarification can been requested as an *Amice Curie* or if the ECJ decision will have a binding effect.

These last two solutions, should be exhaustively discussed, specially the option offered by the International Court of Justice, the claims made by the State- representing the investor should contain more than creativity, because the State has to prove a violation was made to the country, in contrast the European Court of Justice solution is a tool that it will only generate consistency in EU-ICSID precedents.

When ICSID was designed, it had the best intentions to contribute to the investment field and provide for a balance to the investors and developing countries. The aim should not be forgotten: the annulment history remains pending, and the creativity of the investment community should answer the wakeup call.