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Defending Investment Treaty Awards: Is There an ICSID Advantage?

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TABLE OF CONTENTS	Page
I. Introduction	318
II. ICSID Versus Non-ICSID – Varying Factors of Uncertainty	319
III. Differing Review of the Absence of Reasons for an Award	321
IV. Limitation of the Review on the Merits	324

I. INTRODUCTION

Common wisdom has it that, in investment matters, the ICSID system has achieved in the last decade an efficiency outshining, to a certain extent, other international arbitration fora. The question here is not so much ICSID's success and expanding caseload since the late 1990s, in particular as a result of the explosion of the number of bilateral investment treaties (BITs) providing for ICSID arbitration and the investors' recourse to those treaties in their disputes with host States around the world. Rather, it is important to focus on the internal reasons for such proclaimed efficiency that can be found in the ICSID Convention itself.

International arbitration was revolutionized in 1958 by the adoption of the New York Convention laying the grounds for the facilitation of the enforcement mechanism and a limitation of the annulment grounds of international arbitral awards.¹ Fifty years later, the success of the New York Convention is undeniable.² In 1965, the ICSID Convention similarly introduced two important innovations in investment matters, by enabling the self-executory nature of arbitral awards and making it an obligation for State parties

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1. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted on 10 June 1958 and, as of this writing, binding on 144 States. See Emmanuel GAILLARD and John SAVAGE, eds., *Fouchard Gaillard Goldman On International Commercial Arbitration* (Kluwer Law International 1999) paras. 247 et seq.; Albert Jan VAN DEN BERG, *The New York Convention of 1958 – Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers 1981).

2. See in particular Robert BRINER and Virginia HAMILTON, "The Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards" in Emmanuel GAILLARD and Domenico DI PIETRO, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice* (Cameron May 2008) p. 3 at pp. 19-21; see also Karl-Heinz BÖCKSTIEGEL, "Future Perspectives" in *ibid.*, p. 865.

under Art. 54 to treat arbitral awards as if they were a final judgment of their own courts, and by establishing in Art. 52 a self-contained annulment system.³

To what extent have the ICSID rules, in hindsight, achieved greater efficiency such that ICSID arbitration is today the investors' preferred option? To the question whether "to ICSID or not to ICSID", the theme of his Report at this Conference, Gaëtan Verhoosel responds that "there is no straight answer" (this volume, pp. 285-317 at p. 317), an observation that, by itself, seems to challenge the notion of ICSID's pre-eminence in investment arbitration today. This conclusion is based on an in-depth analysis of "the two possible hurdles on the road to enforcement – annulment review and enforcement review – and consider[s] how these hurdles compare for ICSID and non-ICSID awards".⁴ My comments will focus on the first aspect of this analysis, namely the comparison between the annulment review of ICSID awards and the setting aside review of non-ICSID awards (often subject to the New York Convention).

II. ICSID VERSUS NON-ICSID: VARYING FACTORS OF UNCERTAINTY

Comparing the respective merits of ICSID and non-ICSID arbitration as regards the review of awards is not as straightforward as it would seem. On the one hand, ICSID establishes a centralized and self-contained review system based on a limited number of specific grounds.⁵ On the other hand, non-ICSID investment treaty awards are reviewed by national courts, often at the seat of the arbitration, in what thus constitutes a decentralized system where the grounds for challenge vary from one jurisdiction to the other.

In his final comments, Mr. Verhoosel observes that:

"While the annulment standards applicable to non-ICSID treaty awards will vary with the seat of the tribunal, that uncertainty is mitigated by the prevailing practice of non-ICSID tribunals to pick a 'usual suspect' as the jurisdiction of the

3. See Christoph SCHREUER, *The ICSID Convention: A Commentary* (Cambridge University Press 2001) pp. 1098 et seq. and pp. 881 et seq. respectively. Rudolf DOLZER and Christoph SCHREUER, *Principles of International Investment Law* (OUP 2008) p. 279. See also W. Michael REISMAN, *Systems of Control in International Adjudication and Arbitration – Breakdown and Repair* (Duke University Press 1992) pp. 46 et seq.

4. Gaëtan VERHOOSSEL, "Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID", this volume, pp. 285-317 at pp. 317 and 285-286.

5. These grounds are set forth in Art. 52(1) of the ICSID Convention:

- (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".

seat and the guidance provided by a well-developed body of law in those jurisdictions as compared to the handful of ICSID decisions to date.”⁶

Admittedly, regular recourse to such “usual suspects” would reduce the degree of uncertainty for investors who choose to submit the conduct of their dispute to rules other than ICSID. In practice, however, the factors of uncertainty are not necessarily specific to the choice of non-ICSID arbitration over ICSID arbitration.

The existing body of ICSID decisions shows that the variety of the solutions is not specific to national jurisdictions: the decisions rendered by ad hoc committees also vary greatly. The standard of review, for example, was not the same in *Vivendi* and *Wena* as compared to *Patrick Mitchell* and *CMS*.⁷ Notwithstanding the integrated nature of the ICSID annulment system and certain ad hoc committees’ inspiration to contribute to the “coherence” of international investment law,⁸ the fact remains that today, coherence is not achieved and both the method and the solutions adopted may vary from one committee to another.

Even within jurisdictions appearing as “usual suspects”, there may be different approaches to the challenge of arbitral awards. The situations, here again, may vary greatly.

At one extreme of the range of options, challenges may be brought before the courts of the respondent State (presumably by the State itself in the event it has lost the arbitration on questions of jurisdiction or on the merits).⁹ Considering that, in investment treaty arbitration, the ultimate decision concerns the host State’s international responsibility, this situation raises the issue, from a public international law perspective, of the lack of neutrality and lack of independence of the authority deciding the respondent State’s challenge to the award, which is an organ of that State itself.

Where the seat of the arbitration is fixed in a neutral forum, the solutions will vary depending on the applicability of the New York Convention and, more generally, a given

6. *Ibid.*, p. 317.

7. See *infra*, para. 9. On the “three generations” of ICSID decisions in annulment proceedings, see Christoph SCHREUER, “Three Generations of ICSID Annulment Proceedings” in Emmanuel GAILLARD and Yas BANIFATEMI, eds., *Annulment of ICSID Award, IAI Series on International Arbitration No. 1* (Juris Publishing 2004) p. 17. The article, however, predates the *Patrick Mitchell* and *CMS* decisions; for critical observations on these decisions, see Emmanuel GAILLARD, “Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.) – Chronique des sentences arbitrales”, 134 *Journal du droit international (J.D.I.)* (2007) p. 359 and 135 *J.D.I.* (2008) p. 360.

8. On the notion of “precedent” in international arbitration, see Yas BANIFATEMI, ed., *Precedent in International Arbitration, IAI Series on International Arbitration No. 5* (Juris Publishing 2008); see more specifically Gabrielle KAUFMANN-KOHLER, “Is Consistency a Myth?” in *ibid.*, p. 137 at p. 145 et seq. See also *infra*, p. 323.

9. See, e.g., the setting aside proceeding currently pending before the Czech courts in relation to an UNCITRAL arbitral award whereby the tribunal decided that it had jurisdiction over the dispute between a foreign investor and the Czech Republic: Luke Eric PETERSON, “Czech Republic Continues Efforts to Overturn Confidential Jurisdictional Ruling in BIT Arbitration with German Investor; Prague Court to Hear Arguments as to Incompatibility with EU Law, as Arbitral Proceeding Continues in BIT Dispute”, 1 *Investment Arbitration Reporter* (2008, no. 4) p. 10.

jurisdiction's approach to international arbitration as reflected in the applicable legislation (and whether or not such legislation assumes a modern approach, for example through the adoption of the UNCITRAL Model Law), in the existing body of case law on arbitration, and in the degree of sophistication of the courts in the recognition of the arbitral process. Jurisdictions such as Switzerland and France have, in this respect, adopted the most restrictive standards of review and the highest degree of deference to arbitral awards. The fact that no specific regime exists, in national systems, for investment matters and that the grounds on which an award may be challenged before the courts will be the same in investment arbitration and in commercial arbitration does not alter a given jurisdiction's approach.¹⁰

The choice of the seat in non-ICSID arbitration is therefore crucial. But this choice normally occurs *after* a decision has been made not to choose the ICSID route and after the choice of one of the other options provided under the applicable treaty.

With this background in mind, it is of particular interest to briefly consider the difference in approach between ICSID and non-ICSID mechanisms as regards two chief grounds for review, namely the failure to state reasons (a ground specific to ICSID arbitration) and the violation of the requirements of public policy (a non-ICSID ground found in the New York Convention and in most arbitration laws).

III. DIFFERING REVIEW OF THE ABSENCE OF REASONS FOR AN AWARD

Although the failure to state reasons is specific to the ICSID Convention under Art. 52(1)(e), this ground for challenge is not necessarily absent in non-ICSID arbitration. A number of arbitration rules provide for the requirement of a reasoned award. For example, Art. 32(3) of the UNCITRAL Rules provides that "[t]he arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given". Under Art. 36(1) of the Arbitration Institute of the Stockholm Chamber of Commerce, "[t]he Arbitral Tribunal shall make its award in writing, and, unless otherwise agreed by the parties, shall state the reasons upon which the award is based". Art. 25(2) of the ICC Rules in turn provides that "[t]he Award shall state the reasons upon which it is based". The losing party in an investment arbitration conducted under any of these arbitration rules may therefore attempt to challenge the award for failure to state reasons based on the tribunal's non-compliance with such rules.

10. For an example of a challenge to an investment treaty award in the United Kingdom, see *Occidental Exploration and Production Company v. Republic of Ecuador*, Court of Appeal, [2005] 2 Lloyd's Rep. 707, upholding the decision of the High Court, Queen's Bench Division, [2005] 2 Lloyd's Rep. 240. For an example in France, see Paris CA, 25 September 2008, *Czech Republic v. Pren Nreka*, partially reproduced in Alexis MOURRE and Priscille PEDONE, "Sommaires de jurisprudence des cours et tribunaux", in *Les Cahiers de l'arbitrage* (2008, no. 3) p. 36 (Gazette du Palais, 15-16 October 2008). For an example in Switzerland, see Federal Tribunal, 7 September 2006, *Czech Republic v. Saluka Investments BV*, 25 Bull. ASA (2007, no. 1) p. 123. For an example in Sweden, see Svea CA, 15 June 2005, *Russia v. Sedelmayer*, 2 Transnational Dispute Management (Nov. 2005, issue 5).

Under the ordinary rules of international arbitration, the approach taken by domestic courts is often a restrictive one.¹¹ In France, for example, the approach is very restrictive. The French *Cour de Cassation* has decided that the failure to state reasons is not “in itself contrary to the French understanding of international public policy”.¹² Only where the law applicable to the procedure or the arbitration rules stipulate that reasons must be given is non-compliance with such requirement reviewed. The courts then limit their review to the sole *existence* of reasons. No control is exercised on the *correctness* of the reasons.¹³

By contrast, in the ICSID context, the position is not always as clear. There is no consistent case law on the limits assigned to ad hoc committees’ review. Practice shows that the degree of review varies from one ad hoc committee to the other. There are in reality three levels of review in ICSID practice.

A number of ad hoc committees have limited their review to the *existence* of reasons for the award. This was notably the approach adopted by the *Vivendi* and the *Wena* committees.¹⁴ In the words of the *Vivendi* committee, the standard of review under Art. 52 is “a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons”, adding that “... [the] correctness [of the reasons] is beside the point”.¹⁵

Other ad hoc committees have extended their review of the award to the *consistency* of its reasoning. In the ICSID context, contradictory reasons amount to a failure to state reasons.¹⁶ Although this standard is not as clear-cut as the verification of the existence of reasons, it has been accepted in practice given that ad hoc committees may restrict their review to the consistency of the reasons without engaging in a review of the correctness of the reasoning.

It is the *correctness* of the reasoning that is the most problematic. Under this standard, the reviewing authority will always engage in an assessment of the adequacy of the reasoning. This was the approach taken in *Klöckner* and *Amco*, the well-known and often

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11. For examples, see Gaëtan VERHOUSEL, “Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID”, *supra* fn. 4, at pp. 301-302.
 12. French *Cour de Cassation*, 1e civ., 22 November 1966, *Gerstlé v. Merry Hull*, *Juris-Classeur Périodique* [JCP], Ed. G., Pt. II, No. 15,318 (1968), and observations by Henri MOTULSKY; 94 J.D.I. (1967) p. 631, and Berthold GOLDMAN’s note; 1967 *Revue critique de droit international privé* p. 72, and Phocion FRANCESEKAKIS’ note.
 13. The Paris Court of Appeal, for example, decided in 1999 that a challenge based on contradictory reasons would in fact amount to a challenge of the award on its merits, something that is not within the powers of a reviewing court: Paris CA, 26 October 1999, *Patou v. Edipar*, *Rev. arb.* (1999) p. 811, and Emmanuel GAILLARD’s note.
 14. See *Vivendi v. Argentina* (ICSID Case No. ARB/97/3), Decision of the Ad hoc Committee on Annulment (3 July 2002) 6 ICSID Rep. (2004) 340; *Wena v. Egypt* (ICSID Case No. ARB/98/4) Decision of the Ad hoc Committee on Application for Annulment (5 February 2002) 6 ICSID Rep. (2004) 129.
 15. See *Vivendi v. Argentina*, *supra* fn. 14, para. 64.
 16. See *Klöckner v. Cameroon* (ICSID Case No. ARB/81/2), Decision of the Ad hoc Committee on Annulment (3 May 1985) para. 116, 2 ICSID Rep. (1994) 95; *Amco v. Indonesia* (ICSID Case No. ARB/81/1), Decision of the Ad hoc Committee on Annulment (16 May 1986) 1 ICSID Rep. (1993) 509.

cited test being that the reasons must be “sufficiently relevant” or “reasonably sustainable and capable of providing a basis for the decision”.¹⁷ More recently, this was also the approach adopted by the committees in *Patrick Mitchell*¹⁸ and in *CMS*.¹⁹

To focus only on one of the most recent annulment decisions in *CMS*, it is noteworthy that it was criticized by a number of commentators for *what it does*, namely partially annulling the award for failure to state reasons on the interpretation of an umbrella clause in the applicable BIT giving standing to the claimant as shareholder (whereas, in the committee’s view, the License under consideration contained obligations “with regard to investments” enforceable by the company only, not the company’s shareholder). The criticism is justified if one considers that the *CMS* committee engaged in an appreciation of the *adequacy* of the tribunal’s reasoning with respect to the issue at hand.²⁰

The *CMS* decision is even more problematic for *what it does not do* when assessing the adequacy of the tribunal’s reasoning. It does not determine the existence of reasons for the award in light of the positions actually taken by the parties before the tribunal. Rather, it reconstructs the reasoning which should have been adopted by the tribunal in light of what the committee deems to be the ideal logic. This clearly flows from a simple sequential reading of the annulment decision:

- (1) *what CMS (the claimant) did not say to the tribunal*: para. 91 (“During the hearings, CMS referred to the possibility that an investor might acquire an international law right to compliance with undertakings with regard to investments. But it finally accepted that this was *not the basis of its claim before the Tribunal or of the Tribunal’s own reasoning*” (Emphasis added));
- (2) *what CMS should have said to the tribunal*: para. 92 (“In the end, CMS relied on a literal interpretation of Art. II(2)(c) ... Although CMS was not entitled as a minority shareholder to invoke those obligations ... the effect of Art. II(2)(c) was to give it standing to invoke them under the BIT”);
- (3) *what the tribunal said*: para. 93;
- (4) *what the tribunal could have said had it had the benefit of CMS’s position before the committee*: para. 94 (“It is implicit in this reasoning that the *Tribunal may have accepted the interpretation* of Art. II(2)(c) referred to in para. 92 above ...” (Emphasis added));
- (5) *what should have been the reasoning of the tribunal*: para. 95, based on a six-point sequence addressing the “major difficulties” of the tribunal’s broad interpretation;

17. *Klöckner*, supra fn. 16, para. 120.

18. See *Patrick Mitchell v. Congo* (ICSID Case No. ARB/99/7), Decision of the Ad hoc Committee on the Application for Annulment of the Award (1 November 2006) referring to reasons that “are so inadequate that the coherence of the reasoning is seriously affected”, at para. 21, 21 Int’l Arb. Rep. B1 (Nov. 2006).

19. See *CMS v. Argentina* (ICSID Case No. ARB/01/18), Decision of the Ad hoc Committee for Annulment (25 September 2007) 46 ILM (2007) 1136.

20. On this aspect, see *contra* Gaëtan VERHOESEL, “Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID”, supra fn. 4 at p. 303, indicating that the committee remained within the boundaries of the standard set.

(6) *that not being the tribunal's reasoning, whereas "one would have expected a discussion of the issues of interpretation referred to above", there is a significant lacuna in the Award: paragraphs 96-97;*

(7) *the award must be partially annulled for failure to state reasons.*

This sequence shows that the adequacy of the tribunal's reasoning – presuming that is something that can be reviewed – is not even reviewed against the positions taken by the parties before the tribunal. In other words, the comparison is not between the parties' claims and arguments and the tribunal's decision on that basis. It is an *ex post facto* comparison – in isolation from the parties' positions – between the committee's ideal reasoning and the tribunal's actual reasoning.²¹ This method can be contrasted with that of the *Lucchetti* committee which emphasized that:

“it is not part of the Committee's function ... to purport to substitute its own view for that arrived at by the Tribunal.... The Committee is not charged with the task of determining whether one interpretation is 'better' than another, or indeed which among several interpretations might be considered the 'best' one. The Committee is concerned solely with the process by which the Tribunal moved from its premise to its conclusion.”²²

Understandably, the *CMS* committee wanted to create a precedent in light of the issues discussed and the “implications [of its decision] for the many similar cases against Argentina” (namely on the effect of umbrella clauses, and the tribunal's so-called manifest errors of law in making a confusion between measures necessary for the maintenance of public order or the Contracting Parties' essential security interests, and state of necessity under customary international law).²³ The temptation to create a precedent can, however, in no way be a justification for jeopardizing the integrity of the process wanted by the drafters of the ICSID Convention.

IV. LIMITATION OF THE REVIEW ON THE MERITS

By contrast to Art. 52(1)(e), the ground of a manifest excess of powers under Art. 52(1)(b) allows, to a certain degree, a review of the merits of the award on questions such as the exercise of jurisdiction or the application of the proper law by the tribunal. Art. 52, however, limits such review to the situations where such excess of

21. See also Emmanuel GAILLARD, “*Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.) – Chronique des sentences arbitrages*”, 135 J.D.I. (2008) p. 360 at p. 362.

22. *Lucchetti v. Peru* (ICSID Case No. ARB/03/4), Decision of the Ad hoc Committee on the Application for Annulment of the Award (5 September 2007) para. 112, 22 Int'l Arb. Rep. C1 (Sept. 2007); for a commentary, see Emmanuel GAILLARD, “*Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.) – Chronique des sentences arbitrages*”, 135 J.D.I. (2008) p. 349.

23. Gaëtan VERHOOSSEL, “Annulment and Enforcement Review of Treaty Awards: To ICSID or not to ICSID”, *supra* fn. 4, at pp. 306-307, referring to *CMS v. Argentina*, *supra* fn. 19, at para. 45.

powers is *manifest* and ICSID committees have exercised a degree of restraint in this respect.²⁴

Under the ordinary rules of international arbitration and outside the ICSID system, an assessment of the award on its merits, which can be exercised on the basis of the public policy ground, can be even more exceptional in some jurisdictions, in particular in the continental tradition.

In France, for example, the *Cour de Cassation* has recently restricted even further the standard of review based on the requirements of international public policy under Arts. 1502.5° and 1504 of the New Code of Civil Procedure,²⁵ which may concern the arbitral procedure or the merits of the dispute and which has traditionally been exercised very sparingly. This was achieved by a decision rendered recently in the matter of *SNF v. Cytec Industries BV*.²⁶ The case concerned the question of whether the arbitral tribunal had correctly applied EC law in deciding that the agreement in dispute was null and void as contrary to Art. 81 of the Treaty Establishing the European Community and whether the recognition and enforcement of the award would result in the violation of international public policy. The *Cour de Cassation* decided that any violation of international public policy must be *manifest*:

“... as regards the violation of international public policy, the recognition and enforcement of the award is reviewed by the annulment court in light of the conformity of its solution with such public policy, a review that is limited to the flagrant, actual and concrete character of the alleged violation”.²⁷

The control by the French courts of the requirements of international public policy is thus even more restricted today, as it will not go beyond a manifest violation (in this instance, the Court declining to review the correct application of EC law by the arbitral tribunal). Here again, in non-ICSID matters, this shows the importance of the choice of the seat as regards the safeguard of the integrity of the arbitral process.

The brief examination of these two key grounds and the exercise by national courts of a higher degree of self-restraint and deference to arbitral awards²⁸ provides an

24. See Gaëtan VERHOOSSEL, “Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID”, this volume, p. 300. Such self-restraint in relation to the manifest excess of powers (Art. 52(1)(b) does not mean, however, that ad hoc committees always avoid engaging in a review of the merits of the award and exercise the same degree of restraint in relation to other grounds, in particular Art. 52(1)(e): see supra, p. 323 and fn. 18 in relation to the *Patrick Mitchell* annulment decision.

25. Under these provisions, an appeal (Art. 1502.5°) or an action to set aside on the same grounds (Art. 1504) may be sought “where the recognition or enforcement is contrary to international public policy”.

26. Cass. 1e civ., 4 June 2008, *SNF v. Cytec Industries BV*, Rev. arb. (2008) p. 473, and Ibrahim FADLALLAH’s note.

27. Unofficial translation from the French original. For the complete English version of the decision, see ICCA *Yearbook on Commercial Arbitration* XXXIII (2008) p. 489 at p. 493.

28. Gaëtan VERHOOSSEL, “Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID”, supra fn. 4, at p. 317.

illustration of the reasons why ICSID's appeal as one of the options available to the parties is increasingly questioned today. If one considers the annulment procedure under Art. 52, the incentive in favor of ICSID arbitration may appear not as strong, given the multiplication of annulment proceedings in recent years, the relatively high proportion of annulled awards²⁹ and the discrepancy in the standards of review adopted by the ad hoc committees. Yet, the question whether or not ICSID remains the preferred option in investment arbitration no longer primarily depends on the challenge and enforcement mechanisms. Today, the advantages and disadvantages of settling one's dispute within the tried and tested framework of ICSID are almost as significant if one considers the *front end* of the arbitral process (for example, possible questions of jurisdiction, in particular as regards specific requirements under the ICSID Convention)³⁰ and the *back end* of the arbitral process (namely the challenge and enforcement of the award).

29. By the end of 2007, forty percent of the applications for annulment had been successful in the ICSID system, a figure that can be compared with the six-percent percentage provided by Mr. Verhoosel as regards setting aside proceedings before national courts, this volume, at p. 287.

30. On limitations on jurisdiction in the ICSID system, see, e.g., Yas BANIFATEMI, "Unresolved Issues in Investment Arbitration" in *Modern Law for Global Commerce – Proceedings of the UNCITRAL Congress, 9-12 July 2007, Vienna* (forthcoming in 2009).