Panel V: Privatization of the Settlement of International Disputes

Privatization of the Settlement of International Disputes

*Presentation by Francisco Orrego Vicuña**

I am most grateful for the invitation that Rüdiger Wolfrum and the Max Planck Institute have extended to me to participate in this most interesting event. As many of you know, we have had a long standing association with the Max Planck Institute and the University of Heidelberg, particularly in the context of the Master's Program on 'International Law: Trade, Investments and Arbitration' that we have organized in Santiago de Chile and in which a number of you have participated in teaching or research activities. We look indeed forward to a continuing and fruitful cooperation.

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I. The Individual as the Beneficiary of the International Legal System

Armin von Bogdandy has ended his presentation with a question that serves well as my own point of departure, which is that after the many constitutional and other developments in international law one has to ask oneself for whom and in whose name the international legal system works. His conclusion is that ultimately it is the individuals who are the beneficiaries of this legal system. My inquiry is whether it is also the individual who can be regarded as the beneficiary of the dispute settlement system under international law.

While the problem is not new, it has become necessary to solve it in a clear cut manner as we often find initiatives and perceptions moving in different directions, sometimes in a contradictory manner. Some directions are moving in favour of the approach that individuals are the ultimate beneficiaries of the dispute settlement system and enjoy or should enjoy a right of action and access to international courts and tribunals, but other directions move in the contrary sense aiming at the re-establishment of situations and views that we would have thought had been long surpassed.

We all know the many changes that have intervened in this matter along the history of international law. This evolution helps to identify where we are at present and which is the direction we would be reasonably expecting in the years ahead. At an early moment the basic premise was that only States had rights and obligations, but this view was not to last long as all the efforts that characterized the early part of the 20th century were aimed at strengthening a system of international arbitration in spite of States claiming vital interests and other privileges.

A second conceptual step was to follow. While the view held in the *Mavrommatis Palestine Concessions* and other cases was that in exercising diplomatic protection of its citizens the State was acting in its own interest and rights, it came to be later accepted that the State was acting on behalf of the rights of the individual. That conceptual change had many implications, reducing the discretionary role of the State and concluding that it was not the State but the individual the beneficiary of any compensation obtained for the wrong inflicted. All such developments were indicating where the system was moving to.

A third major step, with which we are all very familiar, was related to the claims by nationals in the context of the evolving law of human rights. It was thus the case that individuals could not only claim against

foreign States as it had been the case under the principles of diplomatic protection but could do so against their State of nationality in the context of the specific area of human rights law. While at first it was also thought that individuals could have substantive rights under international law but lack the procedural rights to make them effective by resorting in their own right to international courts and tribunals, what only the State could do on their behalf, this was soon to change, too. It was Lord Denning who clearly warned that if individuals have rights but cannot exercise them it is like having no rights at all. It followed that substantive rights would necessarily be accompanied by procedural rights. Although that distinction appears to have faded in history there are still some remnants of it occasionally pointing to a revitalized role of the State in this context. Both the evolution that has taken place and the discussion surrounding it can be well understood in connection with investment claims and trade disputes, which are the two main areas on which I will concentrate this presentation.

II. Innovation in International Investment Dispute Settlement

In looking first at the area of investment treaty claims it is apparent that the essence of the system is the action of individuals on their own right. Bilateral investment treaties, multilateral arrangements and free trade agreements have all converged on this particular feature. This is the consequence of the major historical evolution that had been taking place and it is today well established in international practice.

Much has been discussed recently about whether this system is right or wrong. Some argue that the system is devised to help out investors against the State, that it is a system that degrades the environment, breaches human rights and ignore social issues. Like with every system of dispute settlement, problems there are. But in my view a number of criticisms are based on prejudice and do not respond at all to realities. Tribunals go to a very great length in the effort to find out who is right or wrong in the disputes brought before them and save very exceptional cases it is hard to find an outcome which deliberately tries to help one party or the other. In my own experience as arbitrator in many cases I must conclude that I have seen such distortion in only one decision, from which I duly dissented.

If you look at the statistics relating to the many decisions and awards rendered you will find that they have gone in one way as much as in the other. States have won as many cases as investors, if not more. But this is not something that will attract the attention of writers who are inclined to revert historical trends so as to curtail the rights of individuals to defend themselves from State acts that might be held in breach of international obligations. What would be utterly wrong in my view would be that States be recognized more privileges, like those they had at the time when the individual had no role to play in the international legal system. It would be to return to the time of allegations of the States' vital interests and their intent not to be submitted to international arbitration or dispute settlement at all. Even in respect of immunities of States and their officials one can see that the trend is to restrict them so as to prevent abuse, and I would regard that to shield the State against claims from individuals would be inconsistent with this evolution.

III. Deficiencies, Corrections and Paradoxes of Investment Dispute Settlement

As mentioned above, it is evidently not possible to ignore that the system has many deficiencies. There have been tribunals saying the wrong things or have said things in unpleasant and discourteous manners, but these exceptional events do not mean that the system is deficient in itself. True enough some international arbitration centres have been more effective than others in handling international dispute proceedings, what has even prompted an increased interest in *ad hoc* arbitration under UNCITRAL, but even those less effective handlings do not mean that the system is wrong. In any event, institutional deficiencies can always be corrected and no doubt they will be in the short term.

One such correction is taking place at present following some recent ICSID annulment decisions as clearly explained in the papers presented to this symposium by Katharina Diel-Gligor and Shotaro Hamamoto. Some such decisions have clearly overstepped the function of annulment in the ICSID system and have openly addressed the merits of the case as an appeals court would do. And even in doing so under some obscure pretext they have wrongly understood the applicable law. Interestingly enough, in all such cases international law matters have been addressed by commissioners who are not experienced in this particular international legal system, what increases the possibility of coming to

the wrong conclusions, as indeed they did. The workings of customary international law and treaties in connection with some matters, particularly state of necessity, are complex enough and not easily understood by persons whose expertise is entirely alien to such system of law. Worse still is that those decisions have come to conclusions inconsistent with the findings of the national courts of the States concerned in the light of their own domestic legal systems.

When things can go this wrong it is inevitable that a crisis will be prompted. Legal uncertainty will be the underlying reason for such crisis as no one can be now certain about the finality of international arbitral awards to the extent that they can be lightly set aside on grounds that have not been envisaged by the annulment mechanisms. Such developments also have institutional implications as counsel will see whenever possible to move their claims to be handled under UNCITRAL rules which provide for any challenge to be submitted to the national courts of the seat of arbitration. Interestingly enough, cases involving the same issues and the same treaties as those that have been handled by the annulment committees under ICSID have been decided with an entirely different outcome by national courts, which have dismissed those challenges.

This is indeed one of the great paradoxes in contemporary international dispute settlement. The system for international annulment was devised so as to escape from the intervention of national courts in international proceedings, but because of having been wrongly handled it has ended up in national courts providing a stricter safeguard of legal certainty and not admitting challenges for reasons that do not relate to their role. Sooner or later a correction will of course take place but in the meanwhile the crisis of the ICSID annulment mechanism is not helping the evolution of the international legal system in its efforts to provide the individual with dispute settlement facilities that might be both reliable and legally safe.

IV. Accessing the International Trade Dispute Resolution System

A second major issue to be examined is whether the same trend towards the privatization of international dispute settlement and the access of the individual to its own right to it might be eventually gathering momentum in a second major subject area, which is that of international

trade and the role of the World Trade Organization. Again here the role of the individual as the beneficiary of the system is gradually appearing. While it is true that States have an interest of their own in trade disputes, mainly concerning the interpretation and application of treaties, it is nonetheless true that also individuals share that interest. It is the exporters and importers who suffer the consequences of any trade dispute, most of whom are private individuals and companies.

The WTO has been moving slowly towards the recognition of the individual's interest, for now in an indirect manner. If some cases like the famous dispute between *Kodak* and *Fuji* are considered, it will be realized that the basic interest underlying the dispute was not that of the United States or Japan but of the specific companies engaged in the dispute. Another important recent example is that of the dispute between *Airbus* and *Boeing*, where the complainant parties are the European Union and the United States but where the main interest lies with the companies implicated in that dispute.

This should not be surprising as every time an individual is affected by some dispute involving trade rules or practices the first thing it will do is to approach his own government for help. The office of the United States Trade Representative or the European Union, like other bodies having a similar role, will examine whether there is ground for a complaint before the WTO. If a positive conclusion is reached then a panel will be requested. At that point it would appear that the dispute becomes wholly inter-governmental. This, however, is not quite so. Like in the earlier period of diplomatic protection, the State had to intervene in the absence of a direct right of action of the individual before an international dispute settlement body. While at first it was considered that the State was protecting its own interest, it would not take long to realize that the ultimate interest was that of the individual himself, with the result that State action came to be considered as one on behalf of the individual. As mentioned above, it would not take long to recognize the individual's right of action in international dispute settlement.

V. A Right of Action before the WTO

This same logic should govern contemporary international trade disputes. If the individual's interest is involved, why to require that the State should be the entity intervening on its behalf before dispute settlement mechanisms and not recognize its own right of action before

the WTO or other bodies? States have indeed an interest and a role but this is not to be understood as detracting from the interest and role of the individual. Some recognition of the individual's interest is found under the TRIPS agreement and the inspection system, but these are still limited examples of what is likely to become a more general trend. Also the interest of producers and the intervention of private counsel have been apparent in some WTO cases, just as briefs and *amicus curiae* are not unknown to such proceedings.

Many problems need to be solved in order to implement a system of the kind proposed. Concern has been expressed as how to avoid an overloading of the system if it is opened to claims by individuals, but the outcome should not really be different from what happened at the time international investment arbitration was opened to the participation of the individual. Institutions have also been able to well adapt to such possibility as it has become evident in the context of the European Court of Human Rights. The growth is manageable and screening systems can always be put into effect. Proposals to enlarge the panel system, to have full-time Appellate Body members and to expand the role of the WTO Secretariat have also been made in this context. The technical contribution and support of the WTO Secretariat to the work of the panels is indeed formidable and this could be always expanded to attend to the needs of an enlarged dispute settlement system.

Similar discussions have been held in the context of the International Court of Justice and other major international dispute settlement mechanisms. To the extent that the individual might be able to bring a claim to the ICJ, for example, there would evidently be an overloading of the system as can be realized from the thousands of letters received today by the Registrar requesting individual complaints to be heard. Screening mechanisms have worked well in domestic contexts. Not every case, for example, will reach the United States Supreme Court but a process of *certiorari* will ensure that only selected issues of importance come to be decided at that level. There is no reason why this should not work equally well in an international context.

VI. Centralization and Decentralization in International Dispute Settlement

There have been a number of suggestions adding new perspectives so as to strengthen international dispute settlement institutions in the light of

the need for an increased participation of individuals. One such thought has been to establish in ICSID a permanent panel of annulment committee members to the effect of minimizing the effects of excessive variations. There have also been suggestions to establish a court of international trade, an international environmental court and some other similar bodies.

The risk with this kind of superstructures is of course that there is always a problem of making them similar to judicial institutions and the accompanying bureaucratic deadweight, which can lead to arbitration losing one of its essential characteristics, which is expediency and flexibility. It is rather preferable to think in terms of functional developments, including new modalities of international arbitration, mediation, negotiations and other such developments that are well known in some domestic system of dispute resolution. In particular there appears to be no need to reshape the WTO system as a whole but it might be enough to develop a special facility for the access of individuals to such system.

Decentralization of the dispute settlement system is indeed better suited to have the individual's role fully recognized as the culmination of the long historical evolution that has been noted. As Armin von Bogdandy concluded his presentation highlighting the individual as the ultimate beneficiary of the international legal system, the same is true of the mechanisms for international dispute settlement. The rights of the individual in this other context should be recognized upfront without the need for a growing number of intermediaries. The privatization of the international dispute settlement system is an outlook that is here to stay as it reflects the realities of the international legal system as a whole.

*Comment by Christoph Schreuer**

I want to make a few remarks about the emancipation of the individual in international litigation, especially from the perspective of investment arbitration. I assume that is why I was invited to come here. First of all, I'll address three questions concerning investment arbitration.

1. The first question: is it necessary? Do we need it?

2. The second question: to whose benefit is it? Is it only to the individuals' benefit or is it also to the States' benefit?

3. Third, I want to make a few remarks about a topic that Francisco Orrego Vicuña did not touch upon today and that's nationality, which is very important in this context.

And then I'll just make a brief remark about annulment.

So the first question: Is investment arbitration necessary? Why do we need access by individuals and corporations to international arbitration? What would be the alternative? The alternative would be twofold: diplomatic protection and/or resort to domestic courts. Those are the only two alternatives that our legal systems offer. Diplomatic protection is not particularly attractive from the perspective of the investor. It is discretionary, the home State can refuse it. It can start exercising it and then give it up. The home State can enter into a settlement at the cost of the investor. And perhaps most importantly, the investor by handing over its case to the State completely loses control of the case. So that is not a particularly attractive situation, even though at first sight it might look nice to have the State taking care of your interest.

Resort to domestic courts is sometimes advocated as the better solution. There are three reasons why domestic courts are not perceived as being particularly attractive by investors. The first one is that, an independent judiciary is only available in relatively few States. That is the sad truth. Only a minority of States nowadays offer truly independent courts. The second point is that even where you have an independent judiciary, this does not mean that the courts are impartial. Investment cases usually deal with large claims against the host States and, after all, domestic courts are organs of that State. So the danger of an identification with the interests of the host State is considerable. I am not pointing my fin-

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ger at any particular type of State. Anyone who wants to know how things can go wrong before domestic courts only needs to read the famous or infamous *Loewen* case.[1] There you see how things can go wrong in Mississippi. For the same reason I would not recommend a foreign investor to bring a claim before an Austrian domestic court against Austria or before any host State's court. The third point about domestic courts is capability. Investment cases involve very difficult technical problems and a domestic court will often be overwhelmed by the technicalities of investment law. So those are the main arguments why investment arbitration fills an important gap.

The second point is: in whose interest is it? Investment arbitration is often depicted as being solely in the interest of foreign investors and as being totally one-sided. Often the charge is levelled that tribunals somehow favour the foreign investors and the State is the loser as Francisco Orrego Vicuña called it. But let's simply look at the facts, let's look at statistics. If you read the cases you will see that a substantial number of investment claims are already dismissed at the stage of jurisdiction and admissibility. That takes care of roughly a third of all cases. The remainder goes to the merits. There the outcome is relatively balanced. Some cases go in favour of the investor, some cases go in favour of the host State. So already under this very simple calculation, considerably more than half of all cases are actually decided in favour of the host State. Even if you just take the cases that are decided in favour of the foreign investor you will see that what tribunals award is usually vastly reduced compared to what the investor has demanded.

So, even if we come to the conclusion that there is no bias in favour of the investors, why do States submit to investment arbitration? Why should it be in their interest? I believe there are three reasons why investor-State arbitration is in the interest of States. The first and most obvious one is that access to investment arbitration, especially on the basis of bilateral investment treaties, creates a climate of legal security. This climate of legal security makes it more comfortable for investors to invest in a particular State. It is widely acknowledged that private investment is the most important driving force for development. In fact, the development dimension is extremely important in international investment law. If you look at the ICSID Convention, the most important document in international investment law, the very first sentence of the Preamble refers to international economic development and the role

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[1] *Loewen Group Inc v. United States of America (Award of 26 June 2003)* ICSID Case No. ARB(AF)/98/3.

of private investment therein. Of course, developing countries know this and this is one of the main reasons why they submit to this particular process. A second reason why it is advantageous to host States is that they get rid of diplomatic protection. Investment arbitration is not particularly pleasant for the respondent States, but it is still much less unpleasant than being leaned upon by the State Department or by the European Commission or even by the Deutsches Auswärtiges Amt (for some reason Germans always laugh when I refer to the potential unpleasantness of the German foreign ministry). So that's another advantage for the host State. A third reason why investment arbitration is in the host State's interest is perhaps less obvious: there is a positive spillover effect for good governance also for the internal arena of a particular State. If a country is exposed to claims for the observance of certain standards through international litigation this will also have its effect on its internal legal structure. Good governance is likely to be demanded by the domestic economic community in that particular State. This is not just fantasy. I recently heard a representative from Costa Rica who had dealt with cases against Costa Rica speak about exactly this topic. He said that the cases that had been initiated against Cost Rica have had a very positive effect on general conditions in Costa Rica even though these litigations were started by foreign investors. It is now the domestic investors, the domestic economic community, that also invokes these standards.

My third point relates to nationality. I hope I will be forgiven for raising this even though it was not discussed in Francisco Orrego Vicuña's primary paper. Nationality is extremely important in international investment law. International investment law is very much dominated by treaties. First and foremost these are bilateral investment treaties, but also regional treaties like NAFTA[2] and the Energy Charter Treaty[3] play an important role. It seems obvious that if an investor wants to benefit from one of these treaties, it must have the nationality of a State party to those treaties. If you want to rely on a BIT, you have to show that you are a national of one of the parties to the BIT. If you want to benefit from NAFTA, you have to be either Canadian or a US citizen or Mexican and so forth. Nationality plays a very important role in investment disputes. In fact, a lot of time and effort is spent on issues of

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[2] North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289.

[3] Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) OJ L380/24.

nationality. I have myself worked on a number of investment cases where half of the case, at least as far as jurisdiction is concerned, was spent on issues of nationality. I do not want to go into technical details, but I can assure you that nationality is still very important.

Once an investor has mastered the hurdle of jurisdiction and has proven that he has the right nationality, a strange thing happens. Once you reach the merits of a case, all of a sudden nationality becomes taboo. Discrimination on the basis of nationality is forbidden. Expropriation, if it is discriminatory on the basis of nationality is illegal. The fair and equitable treatment standard is violated if you discriminate on the basis of nationality. National treatment is an important standard. Most favoured nation treatment is an important standard. Isn't that odd? To get access to the system, you need to show that you have the right nationality. But then all of a sudden, once you are debating the merits, it is exactly the opposite. You must not discriminate on the basis of nationality.

An obvious answer to this strange phenomenon would be: this is a natural consequence of a system based on treaties. Well, is it really? Look at human rights. In human rights, nationality does not play a decisive role for the enjoyment of rights. The system of human rights is open regardless of nationality. Anyone can complain. For instance, anyone can rely on the European Convention on Human Rights. Therefore, the current system in investment arbitration about nationality is not a consequence of the structure of treaty relations. It is rather a consequence of the unwillingness of States to grant rights in the economic sphere except on the basis of reciprocity. It is an application of the old principle of reciprocity. To get away from this nationality hurdle would obviously require a big leap and investment law is still a long distance from taking that leap.

What about nationality planning? Most investors nowadays are not natural persons but juridical persons. You can incorporate juridical persons in an appropriate country with relative ease and that is what is actually done. In the last ten or so years, nationality planning has become very widespread, at least as widespread as tax planning. Astute investors will incorporate in a country that has favourable treaty relations. The Netherlands is very popular because it has a very attractive network of bilateral investment treaties. Is that proper? Isn't that treaty shopping? Isn't treaty shopping something really awful? If you like it you call it 'nationality planning', and if you dislike it you call it 'treaty shopping'. So is it permissible? The case law on this is still at a relatively early stage. But a first conclusion that one can draw from existing decisions is

that if you do nationality planning prospectively, i.e. at an early stage before the dispute arises, it is ok. You can seek a favourable investment climate by structuring your investment appropriately. On the other hand, if you do it retrospectively, i.e. after the dispute has arisen, then it will not work.

Finally, just a brief remark about annulment. I fully agree with Francisco Orrego Vicuña on this particular point even though I'm not personally affected. I believe that the annulment system in ICSID is designed as an emergency measure to come to grips with unusual situations, to preserve the legitimacy of the system. It is not designed to correct 'wrong' decisions. It is not the job of an annulment committee, to impose its better legal view, or its better evaluation of the facts on a particular case. Therefore, *ad hoc* committees should not play the role of appellate courts. That is simply not their task. I believe that the recent activism on annulments is actually very bad for the ICSID system and I hope that it will be reversed. Thank you very much.

*Comment by August Reinisch**

Well, I am in the rather unenviable situation to deal with the 'leftovers' of Christoph Schreuer and as usual, there are no leftovers because he has exhaustively commented on and treated the subject – even in addition to what Francisco Orrego Vicuña has given us for the investment field. So let me try to still single out a few points which I noted and allow me to start with the topic 'Privatization of International Dispute Settlement'. Of course, we heard exactly what I had anticipated, the increasing role of the individual and the individual as the ultimate beneficiary to different degrees in the actual different forms of dispute settlement. And here investment dispute settlement is at the forefront because individual parties have the opportunity to bring claims directly. Then I found very interesting Francisco Orrego Vicuña's treatment of trade disputes, which ultimately equally concern individuals, but where individuals don't have standing and where it is a real challenge how we should deal with that problem in the future. I'd like to come back to that later. But from the phrasing of the topic, 'Privatization of Dispute Settlement', you could also consider or talk about privatizing the dispute settlement process. Of course, when thinking of arbitration, we are talking about a very traditional privatized form of dispute settlement through private arbitrators, private persons who are just appointed *ad hoc* in order to settle disputes. That is not a really new development; it is something very traditional in public international law. And we've seen that before. Now having talked or having listened to the previous panels, there is of course an interesting interplay with the issue of legitimacy: Who are those *ad hoc* judges, those private individuals? How much of a difference is there between them and so-called international courts or standing bodies, which are of course also comprised of private individuals? Even if we talk about the International Court of Justice or other standing judicial bodies that perform public authority, as it was called, but because they are by definition not State organs, they are not subject to any orders or directives from their States, they are meant to be independent. Still we say it's not really private justice, it's something more institutional and it seems to be a wide spectrum, where we'll really have some interesting debate on the legitimacy of the authority that is exercised here. I just wanted to put that as a preliminary thought

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on the topic of privatization of dispute settlement, which could also underlie this notion here.

Let me move quickly to some of the points that have been raised in Francisco Orrego Vicuña's presentation: investment arbitration as the 'evil system', the potential backlash against this system, etc. Many problems have been debated already in the past. But I would fully concur with what has been said if we look at the statistics. My estimate is even more radical in that usually just 25 percent of the investors are actually successful. One reason for that is the, maybe surprising, importance of jurisdictional issues. If we look at the system, it's not just the 'nationality' problem. Of course, this is dominant in the jurisdictional phases, but there is almost an obsession with jurisdictional issues which are irritating from the point of view of giving the individual standing in the system. If we would truly turn to a system where individuals should benefit from international rules, bilateral or multilateral treaty rules protecting investors, then it seems odd that those jurisdictional formalisms are so dominant and that we seldom reach the merits. It may also be that investment arbitration is a system in its infancy, and when we talk about innovations, it could be that at some stage there will be another system – maybe a multilateral one – where nationality will play a less dominant role because by definition, if we have a multiplicity of potential nationalities, that would entitle more investors to bring claims, and there will be more claims that will go to the merits. Looking for the scarce 'leftovers', I feel we haven't really touched the trade law field. The example of *Boeing* versus *Airbus* of course could be complemented by a couple of others. I remember the old GATT case of *Kodak* versus *Fuji*. Now there are private interests which have to be channelled and some WTO members have their internal systems, whether it is the EU's trade barriers regulation or other domestic law mechanisms which trigger an almost obligation to exercise diplomatic protection. It still doesn't lead to satisfactory outcomes in many situations for individuals because as we have heard Georges Abi-Saab, I think, referred to it this morning, the system of WTO dispute settlement is aiming at a recommendation to act in conformity with the rules. It is not providing any remedies for harm, economic harm suffered by the individual exporters, importers, what have you, economic participants. So there seems to be still a very far way that we have to go in looking for compensating 'victims' of WTO violations. The current system of trade retaliation will create additional, I'm tempted to say, 'collateral damage', but not remedies for the actual economic harm that is suffered by firms that have to pay customs duties which are against GATT principles or that are suf-

fering from anti-dumping duties which are then held not to be in conformity with WTO principles. So, that seems to trigger an interesting debate in how far we could uphold the position of the individual and protect individual private interests in a system which, everyone agrees right now, works best by being filtered through States, States having exclusive standing, States being bound, as was equally mentioned earlier today, by a system which provides for an automatic jurisdictional setup, although the term is not used in the DSU. So it probably requires this kind of filter in order not to be overwhelmed, but then there seems to be a long way to go in order to link it, to have the ultimate beneficiary of the system to truly benefit from it. Let me stop here with these few remarks. Thank you.

Discussion

G. Abi-Saab: I have simply a few remarks which were triggered by the remarks of our distinguished panel, which is really distinguished, and I enjoyed hearing them. Hearing Francisco Orrego Vicuña, I was thinking: 'Who is speaking? Is it Francisco Orrego Vicuña or Georges Scelle?'. Because those of you who are old enough or scholarly enough to know Georges Scelle, would remember his *monisme radical*: he said that the individual is the final addressee of all rules of law etc. But his problem was that he forgot the State and assumed that there is an effective federalism in the world, which ended up always with the individual. But unfortunately, such an *effet direct* does not yet exist on a world level (even if it does in European law); and institutional arrangements on the national level are very much with us for some time to come and are hard to die. It's a little bit amazing that after the withering away of real communism, a Marxist theory which is the withering away of the State, is now adopted by the neoliberals, who consider that the State should wither away.

This being said, I agree with August Reinisch that of course arbitration has always been, since the Greek polis, a private affair. But it's always a private affair under the authority of the public power. In internal law, it is always under the authority of the State. It is not freewheeling. So would it be freewheeling in international law? That is the question we have to grapple with.

Now, Francisco Orrego Vicuña said that ICSID is running into trouble and we are going to other alternatives. But the other alternatives are not equal alternatives because whether it's UNCITRAL or the International Chamber of Commerce (ICC), it is embedded in a national system, there is a control by a national judge. It is never just freewheeling. While the advantage of ICSID is that you run away from a control of a national judge and you have judgments which are executory, which are not subject to immunity etc. So that was the great advantage of ICSID. And this is why ICSID was a little bit more acceptable also to the weaker partners in international economic relations, because it was perceived basically as an arbitration under international law, which means that public interest is taken into consideration to a greater extent. Whether the decisions (that I don't consider as amounting to jurisprudence), that came out of it, go this way is a controversial question. I see

that there is a unanimity here that ICSID has been very objective, but it is not perceived so in large sectors of the world. And this is a real problem. I am not taking position, but it is real.

Finally, about the criticisms of the annulment committees because they go into substance. I just happened by a freak of circumstance to sit on several ICSID panels in a short period, and it is amazing. If you have two international lawyers and one commercial lawyer, you get a very different animal than when you sit as an international lawyer with two commercial lawyers. And the result is you get a very heterogeneous outcome in spite of the great efforts of great minds like Christoph Schreuer who try to synthesize the law, but still you have great differences. And this is why I perhaps agree with you that the annulment system, which was made not as a kind of appeal, except for *ultra vires*, should be strengthened and encouraged to go further in the direction of a real appeal system, rather than receding from it completely or limiting its progress in that direction. There should be a kind of an appellate body for ICSID at least for the law to stabilize because as it is functioning now through the different heterogeneous panels, it is not stabilized. Thank you very much.

H. Hestermeyer: Thank you for the inspiring thoughts about international investment law. I particularly enjoyed the comparison with world trade law, but come to a slightly different conclusion on that issue. Of course, I agree about the role of individuals in WTO law. In the end, it is always the individual who benefits. But in dispute settlement it is not Chiquita Bananas that can make a complaint about banana trade. It must be a country. It is not Anheuser-Busch that can complain about geographical indications, it must be a country. Countries insisted on the recourse to diplomatic protection within the field of trade law and they did not feel comfortable with the idea of individuals complaining directly. Now, domestic procedures leading to diplomatic protection and a WTO case exist, but they exist in very few countries and the executive generally retains discretion at the end. As to remedies in WTO law, people thought about granting damages, but in the end they said: 'No, we can't do this. This would be too much. We don't want that system'. And why did they not want it? Sovereignty. I am astonished that we spent some minutes talking about sovereignty in the trade panel rather than in the investment one, given that investment law submits the treatment of a broadly defined category of investments (including intellectual property and probably mere applications for trade marks) to standards that could not be vaguer in their formulation, namely fair and

equitable treatment. The system is binding, there is no requirement of diplomatic protection, it grants damages and there is generally no requirement of exhaustion of domestic remedies. Within the WTO context suggestions to grant provisional measures were rejected. In investment law it seems that you can stop a criminal proceeding by way of provisional measures. So I was wondering why the sovereignty debate is so much stronger in WTO law, when it seems so much less relevant than in investment law. One of the few reasons I can come up with is that the basic idea of investment law was to replace the court system of countries whose systems we perceived as deficient. And we did not think that in the end in some cases this also meant replacing our own court systems.

F. Morrison: First, I want to make a comment about where the jurisdictional law comes from. I think it comes in this area from the succession to the diplomatic protection notion and because diplomatic protection was always asserted on the basis of the nationality of the individual. When ICSID and other things were created, they were created on the foundation of that older law. Secondly, I was going to make sort of the opposite of the point that Holger Hestermeyer made. If you've ever dealt with a diplomatic protection case, they are awful. They are awful because if you are representing the government, you have to both take a position one way with regard to the foreign government and the other way with regard to the investor. And the investor is usually a company, not an individual. And if you decide against the company or individual, at least in a country like mine, or if you start to indicate any doubts about the company or individual, you get a number of senators calling you and it becomes a very difficult internal domestic issue. So I think the answer to your question is in part the foreign officers didn't want to do it any more. They didn't want to do it any more because the domestic political complications of representing a local company in its unreasonable claim against a foreign government were simply too great. 'You go and do that yourself!' was a much easier answer and for the domestic companies, it was a much more satisfying answer because they did not feel they were insulated from the actual decision process.

I also want to second the comment that Georges Abi-Saab said with regard to the Appellate Body. The collective judgment of all of the appellate panel members is essential, if you expect to create a common standard for future cases. Creating that standard is important to provide guidance to the participating States and to the trial panels about the State of the applicable law. If different appellate panels give different

decisions on the same point of law, then the whole appellate review process becomes simply a lottery. Thank you.

M. Ioannidis: Thank you very much Francisco Orrego Vicuña for this enlightening presentation and the members of the panel for their comments. My question has also to do with the second part of the presentation and the enforcement of WTO law in particular.

Panels and the Appellate Body have declared on many occasions that individuals are among the ultimate recipients of trade rules. This is something which, as Holger Hestermeyer said before, makes absolute sense. As individuals are the actors basically making trade-relevant decisions, it is their conduct that is ultimately regulated. The issue is that, although individuals are the ultimate recipients of rights and obligations derived by WTO law, sometimes they do not have access to mechanisms effectively enforcing the respective rules.

You sketched one strategy to cope with this deficiency. That would be, if I understood you correctly, through some kind of direct access of individuals to the WTO dispute settlement mechanism – maybe after some stage of scrutiny of the relevant applications.

I was wondering, if one could see the development of another strategy to achieve an equivalent result. That could be to allow individuals to claim WTO-based rights before national courts. The key word here is 'direct effect'. Of course, this question has two limbs: do domestic courts accept that WTO rules have direct effect? Mostly, they do not. The European Court of Justice, for example, generally denies that. The other part of the equation has to do with how the WTO adjudicating bodies address themselves the same question. As it is well known, it has been declared that, so far, and I stress here the use of the phrase 'so far', WTO law has not been interpreted as constituting a legal order producing direct effect. Do you think that the question of protecting the interests of individuals through the recognition of direct effect of WTO rules might be a point for the Appellate Body in this context, even in some distant point of the development of its case law?

A. Reinisch: Let me quickly pick a few of the points. The first issue that was raised by Georges Abi-Saab concerning arbitration as a private form of dispute settlement but still under State control. I fully agree that ICSID was meant to be less under State control, more independent, truly international arbitration. But I think in Francisco Orrego Vicuña's presentation already, and Christoph Schreuer reinforced that, the inter-

esting development is that today it seems that an investment award under UNCITRAL rules stands firmer because States are more reluctant to question them and are fairly strictly applying the New York Convention and not interfering with such an award as opposed to annulment. Now, of course, you may say it still remains within the system and an annulled award will lead to the 'go back to the start' phenomenon and you could have the whole thing again, but that's exactly the damage to the system if you have an initial award being set aside and then the whole procedure being re-litigated. So in that sense, I think we are witnessing a rather unintended development currently. I agree with the interesting phenomenon that Holger Hestermeyer described that in the trade debate, the whole Uruguay Round has been 'obsessed', I could almost say, with 'sovereignty', how to be protected and how much sovereignty is lost by agreeing to dispute settlement and reinforcing it as opposed to the old GATT system. The 'sovereignty' problem apparently was not that much of a concern in investment arbitration. But the sovereignty argument is back in the current backlash debate. And the sovereignty card in a way is played quite clearly by a number of States, just demonstrating that the outcome is something which is harmful to their sovereignty. But I guess, and here we sometimes see very interesting developments, a kind of decoupling of the debate you find in UNCTAD and other development organizations which start to become very critical of the system and talk about attacks on sovereignty as a result of investment arbitration. If you look, however, at the simultaneous debate within the World Bank or other organizations, where good governance is very important, you sometimes feel that you could link investment arbitration to good governance as Christoph Schreuer has said. There is a good governance spill-over that could be the result of investment arbitration, which is in the short run costly because it leads to awards that have to be satisfied, but if it also leads to an internal legal reform, then it is beneficial – although any kind of legal reform that comes from outside may be questioned from the point of sovereignty.

I agree with Fred Morrison on nationality deriving from the diplomatic protection paradigm. But if I understood Francisco Orrego Vicuña's presentation correctly, he was pointing out that diplomatic protection was kind of the first step showing that certain individuals, certain foreigners, enjoyed rights and then human rights was the next step broadening this notion and holding that individuals enjoyed rights regardless of their nationality. So when we talk about innovation, potential innovation of dispute settlement in the field, I think the real exciting ques-

tion is whether there will ever be such an additional step where nationality becomes less important, where also economic rights are protected on a broader basis. That again has been alluded to. And the last question from Michael Ioannidis about alternatives through direct effect, of course, this has been a very long debate, particularly the US/EU debate about the direct effect of WTO law. We may be able to learn from our Swiss colleagues because I am told that Switzerland has quite a different view and allows far more broadly the direct application of WTO law. We just focus on the EU's main political argument against direct effect of WTO law, i.e. that it takes away sovereign freedom to act, including the freedom to violate WTO law rules, etc. That's fine, but what's puzzling to me is that this argument is upheld even when it comes to compensate the individuals that have suffered. I could perfectly well envisage a situation where we deny direct effect for the reasons given, in order to have the political freedom to either comply or not to comply with WTO rules, but then I don't quite see why this should be on the back of individual economic actors that have to pay for it. So, in other words, why does the European Court of Justice not allow actions in damages of those individual actors at least to compensate them for the political gain that is apparently there for the EU?

C. Schreuer: Georges Abi-Saab has championed the idea of an appellate body in ICSID. There is a technical problem to this. The ICSID Convention has an Art. 53, which says: 'The award […] shall not be subject to any appeal or to any other remedy except those provided for in this Convention'. This is a very technical answer. So why not amend the ICSID Convention? The problem is you need unanimity for that and that is almost impossible to get. I think there is an alternative, to an appellate body. I believe an appeal is not the best solution. What are we trying to achieve? The biggest problem we are confronting on this front at the moment is the inconsistency of decisions. An appellate body might deal with that, but I think the better method might be to introduce a system of preliminary rulings like before the European Court of Justice. Perhaps the biggest obstacle to that is that American lawyers are not familiar with that procedure. This is a very European thing and it would probably take some time to convince our American friends that there is some value to that. The idea would be to create a permanent body that can dispense justice without being competent for particular cases. Problems of investment law could be submitted to that body as they arise before a particular tribunal. In other words, you don't get to the stage where you have a wrong decision to have it overturned, but

you do this pre-emptively by asking for preliminary rulings. We are still very far away from that, but it is technically possible and it could be done without an amendment of the ICSID Convention.

Holger Hestermeyer's observation that there is much sovereignty debate in WTO but none in the investment arbitration system is an interesting one. My answer is twofold. First, there is a sort of sovereignty debate in investment arbitration but the debate looks different. It is about regulatory space and legitimate police powers and how far States may go in dealing with investors without infringing investors' rights. So it's a different debate, but it is also a sovereignty debate. The other aspect is that in investment arbitration, the outcome of the procedure has been 'monetarized'. In other words, monetary damages are paid. In the vast majority of cases, there is no requirement of specific performance but a sum of money is awarded and the State is usually not required to change its law or do anything of the kind. It just pays damages to the investor and that's the end of the matter. So it can buy itself off. Specific performance is not impossible in investment arbitration. There are a few cases where this is discussed and States are typically outraged when the idea comes up that there might be an obligation of specific performance, that they might have to withdraw legislation. Tribunals have said it is possible, but it is hardly ever done.

Fred Morrison, you are of course right when you say that nationality was somehow inherited from diplomatic protection. But there is an interesting phenomenon: when it comes to nationality cases and to technical details, tribunals have repeatedly said they do not feel bound or even guided by old cases dealing with diplomatic protection because those involved different issues. They address nationality more as a matter of treaty interpretation because in the BITs, you usually have some, if somewhat vague, definitions of nationality. And they tend to distance themselves from the old diplomatic protection cases.

F. Orrego Vicuña: This has been a rather fascinating debate and I must notice at the outset that although we have different views about specific issues the overall objective of recognizing the full participation of individuals in international dispute settlement appears to be well shared by all.

I fully agree with the comments made by Christoph Schreuer and August Reinisch noting in particular that remedies are a rather crucial element of international dispute settlement as the individual will seek compensation or other remedies for the eventual damage suffered.

Occasional Difficulties and Success of the System

Georges Abi-Saab is quite right in mentioning that while international arbitration raised important expectations at the beginning, this was not exempt from doubts as it is well evidenced by the history of the ICSID Convention. The important point is of course that such decisive step was given. The difficulties experienced in the working of the system have created indeed perceptions that are not always favourable, but this does not mean in my understanding that the system of investment dispute settlement as such is failing, particularly in view that its deficiencies can always be corrected.

It is interesting to note in this respect that while a few countries in Latin America have either denounced the ICSID Convention or restricted their consent to arbitration, or have undertaken some other policies as an expression of criticism to that system in particular, at the same time a number of critics have entered into Free Trade Agreements and other similar arrangements with the United States, the European Union and more recently Japan and China, to mention just a few such developments. Many such agreements also contain investment dispute settlement arrangements thus evidencing that it is not the development of the law that is questioned but only some of the institutional experiences had in the working of the system.

Another point of particular interest raised in the discussion is that concerning the annulment proceedings in respect of international arbitration. As mentioned above, to the extent that an autonomous international annulment proceeding will not be available or will not work well under customary legal standards governing the challenge of awards, the alternative that will emerge will be a renewed role for the control by national courts. On many occasions that experienced domestic courts of the seat of arbitration have intervened in this matter, their decisions have been fully consistent with the applicable legal requirements for annulment, which at this point are truly universal. Paris, London, Geneva, Madrid or New York, to mention just a few, offer good examples of serious annulment proceedings.

NAFTA also offers an interesting case study in respect of the question of international panel review of national decisions in certain areas, as evidenced in particular by the Chapter 19 mechanisms concerning subsidies, countervailing duties and other free trade issues. While an interesting mechanism of limited international review was devised to this effect, the fact is that governments are many times trying to get way from it because of alleged sovereignty issues, just as it happened with the original resistance to international arbitration. A similar experience be-

came evident with the 2001 Free Trade Commission interpretation of what was to be understood by fair and equitable treatment and its role in the light of customary international law. Governments were adopting in that respect a restrictive policy which would better protect their sovereign interests as opposed to the developments of international law in this matter.

Customary international law has turned to be a far more complex matter when applied in the silence of investment or other treaties. Recent annulment committees have in fact considered that it is wrong to rely on customary law when a treaty is silent on a given point of international law, but such conclusion evidently fails to understand that international law is a system of law and that its various sources do have a supplementary role when there is a need to identify the meaning and requirements of a particular legal issue or principle.

Functional Solutions and Paralyzing Institutional Superstructures

Fred Morrison has also raised an important consideration in respect of consistency, which is very much needed in international investment arbitration. Yet consistency should not become synonymous with paralyzing superstructures that have been proposed to supposedly ensure that end, such as appeal mechanisms of all sorts inspired in the experience of domestic supreme courts or high courts of justice. While there is a natural degree of inconsistency of arbitral awards one should not consider it to be generally detrimental to the overall trends of international law. There are in practice many ways to deal with inconsistencies that do not entail any such superstructures, an interesting example of it being the role of the WTO Secretariat in bringing to the attention of panels how some issues have been approached in other cases so as to avoid departures that might not be entirely justified.

Functional solutions are to be much preferred over institutional superstructures, a matter on which I am greatly honoured by the comparison made by Georges Abi-Saab between my thinking and that of George Scelle, whom I have greatly admired. States, however, often take a different view and very much favour the building of institutions that will help their own cause. Communism was supposed to abolish the State in the name of the people, but ended up building the most powerful States ever known. Neoliberalism also advocates diminishing the role of the State, but that is true as far as no major crises intervene, at which point everyone turns to the State seeking support and protection and the injection of trillions of dollars into the economy.

The functional approach to be desired is entirely different. The State has an important role, including in the workings of international law, and this should not be done away with. Yet, we ought not to forget that the State is just a public service, the concept of service public in the French legal tradition, whose role is to help the individual to achieve its economic and social well-being. The fact that the individual is the ultimate beneficiary of the international legal system evidences a development that the State can very much help to attend and achieve instead of its role being one of interference with the rights of the individual, as we have seen too many examples in the history of mankind and international law.

Systemic Deficiencies of ICSID Investment Arbitration? An Inspection of the Annulment Mechanism

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I. Introduction to the Development of Investment Arbitration at ICSID

1. Success Story of ICSID

In consequence of the dramatic growth of Foreign Direct Investment (FDI)[1] and the increasing number of BITs and MITs[2] throughout the past decades, conflict settlement mechanisms in the field of investment arbitration have gained significant importance. Since the 1990s, at large, there has been a considerable increase in the number of cases filed in the International Center for Settlement of Investment Disputes (ICSID). As a result, about two thirds of the overall amount involved in investment arbitration proceedings are now going through the Washington

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[1] The rather hostile attitude of various States towards international investment predominating in the 1970s was overcome during the 1980s and 1990s by the increasing awareness of its importance as an instrument for furthering economic development. In the context of advancing ideas of an open market economy, the tendency towards privatization, and the globalization of business, FDI reached two trillion USD in the world in total in 2007, and has only been slowed down by the current financial crisis. Cf. M. Dimsey *The Resolution of International Investment Disputes* (Eleventh International Publishing Utrecht 2008) 1; M. Besch *Schutz von Auslandsinvestitionen: Risikovorsorge durch Investitionsverträge* (Recht und Wirtschaft Frankfurt/Main 2008) 70; UNCTAD *World Investment Report, Transnational Corporations, Agricultural Production and Development* (2009) <http://www.unctad.org/en/docs/wir2009_en.pdf> (7 June 2011).

[2] Bilateral and Multilateral Investment Treaties; Cf. Z. Elkins, A. Guzman and B. Simmons 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000' in M. Waibel et al. (eds) *The Backlash against Investment Arbitration* (Kluwer Alphen 2010) 369.

The question of whether international investment treaties may have a stimulating effect on FDI is disputed and various ecometric studies were undertaken in this regard. While early works from 1998 to 2004 came to differing conclusions, ranging from findings of no or merely a weak relationship to outcomes claiming a considerable impact of BITs on FDI flows, subsequent studies from 2005 to 2008, using improved analysis techniques and enlarged data bases, came to more consistent conclusions. They show that BITs do encourage and stimulate FDI to a certain extent. For an overview, summary and evaluation, see UNCTAD *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (2009) <http://www.unctad.org/en/docs/diaeia20095_en.pdf> (11 June 2011).

Center.[3] This continuous trend clearly indicates that international arbitration is no longer an exceptional phenomenon, but an integral part of the investment landscape.[4] The causes of its success can be traced to the significant strengths of the ICSID system, such as its administrative infrastructure, its time and cost efficiency, the expertise of its pool of arbitrators, and the direct enforceability of its awards.

2. Backlash against ICSID?

Despite the ongoing high demand for the World Bank's institutional arbitration forum, there has recently been a slight downwards trend in its use – in absolute and relative numbers – as evidenced by caseload statistics. These show that the annual number of ICSID filings in relation to the annual number of investment arbitration cases in total noticeably dropped: While in 2007, still 75% of the known treaty-based cases were filed at the ICSID (or the ICSID Additional Facility), this percentage decreased to roughly 60% in 2008 and 2009.[5] Also, the absolute number of newly initiated ICSID cases in general – based on investment contracts, treaties, or laws – sank from 37 in 2007 to 21 in 2008 and slightly rebounded to 25 in 2009.[6] In 2010, signs of recovery could be perceived.[7]

To give a complete picture, of course it is vital to stress that ICSID cases are only the most ascertainable part of investment arbitration. Many cases are also being processed by other institutions such as the International Chamber of Commerce (ICC) Court of International Arbitration, the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), and, as ICSID's main commercial

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3 UNCTAD 'Latest Developments in Investor-State-Dispute-Settlement' 1 (2008) IIA Monitor 1 (2 et seq.) <http://www.unctad.org/en/docs/iteiia20083_en.pdf> (7 June 2011).

4 UNCTAD 'Latest Developments in Investor-State-Dispute-Settlement' 1 (2009) IIA Monitor 1 (1) <http://www.unctad.org> (11 June 2011).

5 UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases <http://www.unctad.org/iia-dbcases/cases.aspx> (7 June 2011).

6 ICSID Secretariat 'The ICSID Caseload Statistics, Issue 2011-1' (2011) <http://icsid.worldbank.org> (7 June 2011).

7 Cf. UNCTAD and ICSID statistics (notes 5, 6); (status as of June 2011).

competitor,[8] under UNCITRAL[9] *ad hoc* arbitration. Even if the officially known number of treaty-based investor-State dispute settlement cases handled under the *ad hoc* UNCITRAL framework remained relatively constant in recent years,[10] one has to bear in mind that a non-trivial percentage of investor-State arbitrations processed under non-ICSID mechanisms is never disclosed to the public at all due to the lack of a central registry.[11] Hence, the number of unreported non-ICSID cases may be significantly higher.

The decision to bring an investment dispute either before ICSID or to use an alternative arbitral system is generally based on the parties' agreement. In the majority of cases, the State party's consent to the mechanism for the settlement of investment conflicts is already expressed through the underlying BITs,[12] which most commonly either specify solely ICSID procedure for arbitration or provide for a choice to the aggrieved private investor between ICSID and *ad hoc* arbitration under the UNCITRAL Arbitration Rules.[13]

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[8] UNCTAD 'Latest Developments in Investor-State-Dispute Settlement (2011), 1 IIA Issues Note, 2: Besides almost two-thirds of the total number of known treaty-based investment arbitrations filed with ICSID (or the ICSID Additional Facility), the second most common type is *ad hoc* arbitration pursuant to the UNCITRAL Arbitration Rules with more than one fourth of the cases. Institutional commercial arbitration has only a lesser significance, with e.g. 5% of the cases at the SCC and about 1,5% of the cases handled by the ICC.

[9] United Nations Commission for International Trade Law.

[10] Cf. UNCTAD 'Latest Developments in Investor-State-Dispute-Settlement' (2009) 1 IIA Monitor/ (2008) 1 IIA Monitor/ (2006) 4 IAA Monitor <http://www.unctad.org> (7 June 2011).

[11] G. Born and E. Shenkman 'Confidentiality in International Arbitration' in C. Rogers and R. Alford (eds) *The Future of Investment Arbitration* (OUP New York 2009) 5 (28).

[12] C. Schreuer et al. *The ICSID Convention: A Commentary* (2nd edn. CUP Cambridge 2009) 190 et seq.

[13] Cf. OECD 'Documentation of Negotiating Group on the Multilateral Agreement on Investment (MAI) DAFFE/MAI(95)9' (21 November 1995) <http://www.oecd.org/daf/mai/pdf/ng/ng951e.pdf> (7 June 2011): 'Possible variants include, inter alia, the applicable rules under ICSID, UNCITRAL, the ICC and the Stockholm Arbitration Institute. European BIT's tend to specify ICSID procedures for arbitration whereas the U.S. and Canada provide a choice as between ICSID and UNCITRAL rules. The NAFTA provides a choice between ICSID or UNCITRAL rules and the ECT provides a choice

Thus, the indicated slight trend away from ICSID arbitration in the past years could imply that some investors tend to prefer other fora, namely commercial arbitral tribunals or even national domestic courts. It can be interpreted as a signal that they find alternative avenues for the settlement of investor-State dispute more attractive. Of course, the reasons for this so far still minor tendency are complex and manifold. Yet, part of them are seemingly attributable to procedural advantages inherent to the respective other sets of arbitral rules, mirroring the corresponding disadvantages incidental to ICSID.

The focus of this article will be on these ICSID weaknesses, which will provide a point of departure for an analysis of the above-described development. It will first give a brief overview of the currently discussed shortcomings of the ICSID regime (II). In a further step, the ICSID annulment system and jurisprudence will particularly be singled out and explained, as it is presently one of the most controversial features of investment arbitration procedure (III). Given the fact that the annulment mechanism in ICSID Convention Art. 52 (1)[14] is the only way to escape the enforcement of a defective award, it has received argus-eyed attention of the investment community throughout its past and current development. While in the recent past, the trend in ICSID practice was towards curtailing the scope of annulment review, the latest annulment decisions have departed from this established approach and thereby have reignited debate over the limited function of annulment committees and their role in balancing the competing desire for both the finality and correctness of arbitral awards. In response to this development, which has lead to increased legal uncertainty thus presumably adding to a potential backlash tendency against the ICSID regime, reform proposals intending to tackle these deficiencies in the annulment process will be presented in brief (IV). The improvement of the ICSID regime is of particular importance as it was especially created for investment arbitration. It is often deemed to be the most suitable arbitral system for settling disputes of semi-public nature. For this reason, reforming

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between ICSID, UNCITRAL or the Arbitration Institute of the Stockholm Chamber of Commerce. Where a choice of forums is provided, it is the investor making the claim who makes the choice as to the applicable regime.'; cf. also ICSID *Investment Treaties, Loose Leaf Collection* (ICSID Washington D.C. 2001), containing the texts of investment promotion and protection treaties concluded by over 165 countries during the period from 1959 to 2007.

[14] Article citations without further specification refer to those of the ICSID Convention.

the ICSID will help to maintain and refine an appropriate mechanism for the resolution of investment disputes in the future.

II. Overview of Deficiencies

There are multiple areas of concern in the ICSID regime which are considered to threaten the Center's current status as the most popular system for the settlement of investment disputes.[15]

1. Timing of Proceedings

One of these aspects is the timing of proceedings, in particular the average amount of time needed from registration of an arbitral request until constitution of an ICSID tribunal as well as time passing from closure of an ICSID proceeding until the award is rendered.

Regarding the first timeframe, the ICSID process is vulnerable to delaying tactics. The generous procedural time limits set out in the ICSID Convention and Arbitration Rules [16], which eventually culminate in the default method of appointment, leave considerable room for counterproductive manipulation by one or both of the parties.[17] Nevertheless, the ICSID Secretariat meanwhile managed to bring down the time for the tribunals' constitution to six weeks on average.[18]

The main challenge now lies in reducing the second time period, as such delays stand in stark contrast to time efficiency – the characteristic for which arbitration is famous for.

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[15] UNCTAD (note 8) 2.

[16] If the parties cannot agree on the number of the arbitrators and the method of their appointment, Rule 2 foresees a period of 60 days after the registration of a request until the default method in Art. 37 (2) applies. In addition, if the parties cannot agree upon the constitution of the tribunal within 90 days, Art. 38 and Rule 4 provide that either party may request the ICSID Chairman to appoint the arbitrator(s) not yet appointed.

[17] S. Jagusch and J. Sullivan 'A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern' in Waibel (note 2) 79 (81).

[18] Cf. M. Kinnear, ICSID Secretary General, in her Keynote Speech at the 5th Juris Annual Investment Treaty Arbitration Conference (Washington D.C. 2011).

2. Jurisdiction

In ICSID arbitration, consent of the parties – by way of a bilateral or multilateral investment treaties, contracts, or laws – constitutes only one element of its double jurisdictional requirement. The second element marking the outer limits of jurisdiction of the Center is contained in Art. 25.[19] Due to its permissive language, the latter provision leaves open the definition of the crucial term 'investment'. In addition, it fails to specify the scope of the term 'nationality'. Thus, objections to jurisdiction *ratione materiae* or *ratione personae* often result in a bifurcation of the arbitral proceedings into a jurisdictional phase and a phase on the merits, leading to time and cost consequences as well as to increased legal uncertainty.[20]

3. Provisional Measures

The power of an ICSID arbitral tribunal to grant provisional measures is contained in Art. 47. However, the legal authority of such measures is quite unsettled because the relevant norm provides only that a tribunal 'may […] recommend' that certain provisional measures be taken, giving rise to doubt as to whether these can be binding on the parties.[21] To date, the express wording of Art. 47[22] and the practice of tribunals[23] are

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[19] D. Krishan and A. Sinclair 'Are the ICSID Rules Governing Nationality & Investment Working? – Panel Discussion' in T. Weiler (ed.) *Investment Treaty Arbitration and International Law* (Juris Huntington 2008) 120.

[20] Jagusch and Sullivan (note 17) 88; See also D. Krishan 'A Notion of ICSID Investment in Investment Treaty Arbitration and International Law' in Weiler (note 19) 61–84; A. Sinclair 'ICSID's Nationality Requirements' in Weiler (note 19) 85–118.

[21] Schreuer (note 12) 764–65.

[22] Notwithstanding the fact that the word 'recommend' was eventually inserted into Art. 47, the legal effect of provisional measures had already been debated during the drafting history of the Convention. Cf. C.N. Brower and R. Goodman 'Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings' (1990) 6 ICSID Rev/FILJ 431 (440–43).

[23] Cf. e.g. *Emilio Agustín Maffezini v. Kingdom of Spain (Procedural Order of 28 October 1999)* ICSID Case No. ARB/97/7 para. 9; *Víctor Pey Casado v.*

drifting apart, so that the uncertainty surrounding this question has not yet been overcome.

4. Procedural Transparency vs. Confidentiality

While on the one hand, the increase in procedural transparency heralded by the 2006 amendments to the ICSID Convention[24] was welcomed in view of the semi-public nature of investment disputes, on the other hand, the ongoing want for a certain degree of confidentiality remains critical.[25] In the course of promoting a transparent arbitral process, it was recognized that public scrutiny and control can also result in a re-politicization of proceedings and thus in an aggravation of the dispute.[26] Hence, there is a continuing need to evaluate and reflect the ICSID legal standard on transparency and to discuss possible further reform measures.[27] Only in this way, a proper balance of transparency and confidentiality of ICSID arbitration will be achieved.

Republic of Chile (Decision on Provisional Measures of 25 September 2001) ICSID Case No. ARB/98/2 paras 17–26.

[Unless stated otherwise, all arbitral decisions and awards are available online on the ICSID webpage at <http://www.worldbank.org/icsid> (11 June 2011), on the Investment Treaty Arbitration webpage at <http://ita.law.uvic.ca> (11 June 2011), or on the Investment Claims webpage at <http://www.investmentclaims.com> (11 June 2011)].

[24] The amendments of the ICSID Arbitration Rules in 2006 modified the provisions in Rule 32 (2) (public attendance at oral hearings), Rule 37 (2) (*amicus curiae* submissions by third parties), and Rule 48 (4) (automatic publication of excerpts of every award).

[25] N. Rubins 'Opening the Investment Arbitration Process: At What Cost, for What Benefit?' in R. Hoffmann and C. Tams (eds) *The International Convention on the Settlement of Investment Disputes (ICSID) - Taking Stock after 40 Years* (Nomos Baden-Baden 2007) 179 (217–22).

[26] Ibid.

[27] One reform proposal addresses the apportionment of transparency in the different stages of the arbitral process. It suggests a higher degree of confidentiality while proceedings are pending, in order to maintain their integrity, and enhanced transparency in the post-award stage to enable the development of a more consistent jurisprudence. Cf. Born and Shenkman (note 11).

5. Consistency of Awards

Finally, a more general point of criticism as to the inconsistency of ICSID arbitral awards largely relates back to the rather incoherent interpretation of investment treaties and the protective standards contained therein, of the relationship between such treaty obligations and other international law obligations in the sense of Art. 42 (1) sentence 2,[28] and of the ICSID Convention itself. In view of the latter regulatory framework, the diverging interpretation of, *inter alia*, the jurisdictional requirements and the legal authority of provisional measures has been heavily criticized. Another significant subject of this debate is the incoherent annulment jurisprudence under Art. 52 (1),[29] which will be addressed below in greater detail. All these aspects create legal uncertainty and risk to undermine the legitimacy of the system.

III. Focus on Illegitimate Annulment Decisions

1. Functioning and Basic Principles of the ICSID Annulment Mechanism

As the ICSID machinery is designed to preserve the finality of its awards,[30] Art. 53 (1) provides for their binding effect upon parties and prohibits submitting them 'to any appeal or to any other remedy except those provided for in this Convention'. This implies that the parties, nonetheless, are not unprotected against defective or arbitrary awards. The remedies to ensure the correctness of a decision are foreseen within the self-contained review system of the ICSID Convention, namely interpretation, revision, and annulment, which is the most drastic

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[28] A. Leeks 'The Relationship between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach' (2007) 65 University of Toronto Faculty of Law Review 1.

[29] W. Burke-White and A. Von Staden 'Private Litigation in a Public Sphere: The Standards of Review in Investor-State Arbitration' (2010) 35 YaleLJ 283 (299).

[30] G. Delaume 'The Finality of Arbitration Involving States: Recent Developments' (1989) 5 Arbitration International 21 (29–30).

means.[31] According to Art. 52 (1), a request for annulment may be filed to an *ad hoc* committee of three persons appointed by the Chairman of the Administrative Council on specific and limited grounds.[32] If a violation of one or more of these grounds is found, the panel is authorized to annul the award.

Thus, there are two basic principles, finality and correctness, which stand in opposition to each other and which need to be balanced by the annulment system. Its task is to provide relief in emergency situations involving severe violations of fundamental policies and, at the same time, to preserve the finality of a ruling in all possible respects.[33]

As to the nature of annulment, it is important to bear in mind that it is distinct from appeal in two ways: The first difference lies in the result of the process. While an appeals body may modify the decision under review and hence is able to replace deficient rulings by its own views on the merits, annulment only allows invalidation in whole or in part, requiring the dispute to be resubmitted to a new tribunal.[34] The second difference relates to aspects of the award under review. Appeal can be concerned with the substantive correctness of a legal decision, but annulment, in contrast, merely considers the legitimacy of the process of decisions, regardless of legal or factual errors.[35]

Despite this principally narrow conception of the ICSID annulment mechanism, the use of this review tool has become a serious cause for concern. The problems which have arisen within this provisional framework will be developed in the following section.

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[31] Art. 50 (Interpretation), Art. 51 (Revision), Art. 52 (Annulment); For further details see L. Reed, J. Paulsson and N. Blackaby *Guide to ICSID Arbitration* (Kluwer The Hague 2004) 97–105.

[32] Art. 52 (1) contains 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.

[33] Schreuer (note 12) 903.

[34] D. Caron 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal' (1992) 7 ICSID Rev/FILJ 21 (23–27).

[35] Ibid.

2. Continued Shortcomings in Annulment Case Law: *Klöckner I*'s and *Amco I*'s Comeback in *Sempra* and *Enron*?

Until the very early years of this millennium, the history of annulment proceedings under the ICSID Convention used to be classified into three groups: the first generation in 1985/ 1986 comprising *Klöckner I*[36] and *Amco I*[37], two decisions heavily criticized for their undue extension of the scope of annulment review, the second generation represented by the more cautious *Klöckner II*[38], *MINE*[39], and *Amco II*[40] from 1989–1992, and the third generation with *Wena*[41] and *Vivendi*[42] in 2002, which were lauded for their balanced approach between the opposing principles of finality and correctness. Since then, all the annulment decisions rendered in the aftermath were designated as modern law of annulment, including the polarizing rulings in *Mitchell*[43] (2006) and *MHS*[44] (2009), as well as the *CMS*[45] decision (2007).[46]

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[36] *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon (Decision on Annulment of 3 May 1985)* [hereinafter *Klöckner I*].

[37] *Amco Asia Corp. v. Republic of Indonesia (Decision on Annulment* of *16 May 1986)* ICSID Case No. ARB/81/1 [hereinafter *Amco I*].

[38] *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon and Société Camerounaise des Engrais (Decision on Annulment of 17 May 1990)* ICSID Case No. ARB/81/2 [unpublished; hereinafter *Klöckner II*].

[39] *Maritime International Nominees Establishment (MINE) v. Republic of Guinea (Decision on Annulment of 22 December 1989)* ICSID Case No. ARB/84/4 [hereinafter *MINE*].

[40] *Amco Asia Corp. v. Republic of Indonesia (Decision on Annulment of 17 December 1992)* ICSID Case No. ARB/81/1 [hereinafter *Amco II*].

[41] *Wena Hotels Limited v. Arab Republic of Egypt (Decision on Annulment of 5 February 2002)* ICSID Case No. ARB/98/4 [hereinafter *Wena*].

[42] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Decision on Annulment of 3 July 2002)* ICSID Case No. ARB/97/3 [hereinafter *Vivendi I*].

[43] *Patrick Mitchell v. Democratic Republic of the Congo (Decision on Annulment of* 1 November 2006) ICSID Case No. ARB/99/7 [hereinafter *Mitchell*].

[44] *Malaysian Historical Salvors, SDN, BHD v. Malaysia (Decision on Annulment of* 16 April 2009) ICSID Case No. ARB/05/10 [hereinafter *MHS*].

[45] *CMS Gas Transmission Company v. the Argentine Republic (Decision on Annulment of 25 September 2007)* ICSID Case No. ARB/01/8 [hereinafter *CMS*].

The dyad of annulment decisions rendered in the summer of 2010, *Sempra*[47] and *Enron*[48] seem to veer out of these emerging structures. They backslide to old habits of expanding the scope of review, thereby causing considerable legal uncertainty and dismay in expert circles. In reference to this re-abandonment of the tried and tested higher annulment threshold in these most recent decisions, some commentators already refer to these cases as the 'fourth generation' of ICSID annulment awards.[49]

The varying approaches adopted in the so far rendered decisions are of enormous significance for the general functioning of the annulment mechanism. They reflect the way the appointed *ad hoc* committees see themselves and are hence of importance for the perception and reputation of ICSID in the investment community. Therefore, it is useful to shed further light on the interpretation and application of the different grounds for annulment in the most prominent cases of ICSID annulment jurisprudence.

a. A Difficult Start – The First Generation

The first two annulment decisions in the ICSID history, *Klöckner I* and *Amco I*, caused mainly negative reactions and led some commentators to call into question the effectiveness of ICSID arbitration as a whole.[50] They were criticized for having undertaken a substantial review on the merits, thereby crossing the line between annulment and appeal and undermining one of the superior goals of arbitration – the finality of awards.[51] Some commentators even spoke of a 'breakdown of the con-

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[46] Terminology according to C. Schreuer 'Three Generations of ICSID Annulment Proceeding' in E. Gaillard and Y. Banifatemi (eds) *Annulment of ICSID Awards* (CUP New York 2004); Schreuer (note 12) 913.

[47] *Sempra Energy International v. Argentine Republic (Decision on Annulment of 29 June 2010)* ICSID Case No. ARB/02/16 [hereinafter *Sempra*].

[48] *Enron Creditors Recovery Corp. (formerly Enron Corp.) v. Argentine Republic (Decision on Annulment of 30 July 2010)* ICSID Case No. ARB/01/3 [hereinafter *Enron*].

[49] P. Nair and C. Ludwig 'ICSID Annulment Awards–The Forth Generation?' (11 October 2010) <http://www.globalarbitrationreview.com> (11 June 2011).

[50] E. Gaillard 'Introduction' in Gaillard and Banifatemi (note 46) 5 (6).

[51] Schreuer (note 12) 912, with further references.

trol mechanism in ICSID arbitration'[52] or of 'ICSID losing its appeal'.[53] Only a few voices were raised in support of these rulings.[54]

The *Klöckner I ad hoc* committee, it will be recalled, annulled the award on two of the three invoked grounds. It held that the Tribunal had failed to apply the proper law by postulating basic legal principles without reference to the applicable national law as is required by Art. 42. Consequently, it manifestly exceeded its powers in the sense intended by Art. 52 (1) (b).[55] Furthermore, the panel found that the award had failed to state reasons pursuant to Art. 52 (1) (e) because it neglected to provide answers to every question which had been submitted to it.[56]

As to the first ground, critics pointed out that the Tribunal had not failed to apply the proper law, but had only failed to substantiate it in an adequate way.[57] Regarding the second ground, concerns were raised that this approach would allow nullification when there was only an insufficient statement of reasons, leading to the possibility to nullify whenever the panel actually disagrees with the tribunal's material reasoning.[58] More generally, criticism centered on the extremely broad interpretation of the grounds for annulment[59] and on the committee's

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[52] W.M. Reisman 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) 4 Duke Law Journal 739.

[53] D.A. Redfern 'ICSID—Losing its Appeal?' (1987) 3 Arbitration International 98.

[54] Schreuer (note 12) 912–13, with further references.

[55] *Klöckner I* (note 36) paras 67–79.

[56] Ibid. para. 79.

[57] J. Paulsson 'ICSID's Achievements and Prospects' (1991) 6 ICSID Rev/FILJ 380 (388–89); B. Pirrwitz 'Annulment of Arbitral Awards under Art. 52 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1988) 23 TexasILJ 73 (103–07); Schreuer (note 12) 966–67.

[58] W.L. Craig 'Uses and Abuses of Appeal from Awards' (1988) 4 Arbitration International 210. In addition, it was pointed out that the Convention provides its own, different remedy for correcting such kind of failure in Art. 49 (2); cf. Delaume (note 30) 31.

[59] *Klöckner I* (note 36) paras 58–59. The *ad hoc* committee read Art. 52 (1) as a type of *renvoi* to the rest of the Convention and thus interpreted this provision as authorizing it to examine a challenged award with all the standards contained in the Convention.

'hair trigger' approach[60], which appeared to support automatic nullification once any defect were established.

In *Amco I*, the *ad hoc* committee annulled the award on the same basis. In respect to the excess-of-powers ground, it held that the tribunal, despite properly identifying the applicable national law, had failed to apply some of its fundamental provisions when making calculations relevant to the dispute,[61] amounting to both an error of fact and of law. In addition, a failure to state reasons was seen in the tribunal's omission to provide reasons for its calculations.[62] Again, this decision was criticized by numerous commentators for the above reasons. Concretely, it was pointed out that the tribunal had not, in fact, failed to apply the proper law, but had only misapplied one provision of that law,[63] so that an annulment for excess of powers would not be justified. Despite all these reprehensions very similar to the *Klöckner I* challenges, the *Amco I* panel distinguished itself from its predecessor in one of its constitutive rulings. In contrast to the 'hair trigger' mechanism requiring nullification *per se* in case of any technical discrepancy, it applied a 'material violation' standard,[64] which required an inquiry into whether a formal mistake in fact caused injury to the party alleging it or distorted the award.

In total, the critics of both annulment decisions stressed that the ramifications were drastic. They effectively turned what was intended to be an emergency supervision tool to vindicate a party's basic rights in case of outrageously irregular awards into an appellate-type of mechanism. Because this first generation of annulments were considered likely to be foundational to later proceedings, it was feared that *Klöckner I* and *Amco I* would counteract the finality of awards – one of arbitration's

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[60] *Klöckner I* (note 36) para. 179. According to the *ad hoc* committee, no qualitative aspects of a defect like significance or gravity were to be taken into account. Cf. also Reisman (note 52) 762.

[61] *Amco I* (note 37) paras 95–98.

[62] Ibid. paras 97–98.

[63] Paulsson (note 57) 388; Pirrwitz (note 57) 108–09; Schreuer (note 12) 942–43, 960.

[64] *Amco I* (note 37) paras 75, 78, 79. Cf. also Reisman (note 52) 775–78.

primary goals[65] –, and thereby throw doubt upon the ICSID system as a whole.[66]

b. A Seemingly Balanced System

The criticisms of the first generation of ICSID annulment jurisprudence having been unequivocal, subsequent *ad hoc* committees acted with significantly more moderation and thereby established a seemingly balanced system. A leading commentator[67] subdivided this process into a further two phases, the second and the third generation of annulment awards, followed by the so far not further classified 'modern law of annulment'.

aa. The Second and Third Generation

The *MINE* decision, as part of the second generation, demonstrated a much more cautious approach. It helped to clarify the annulment function by reflecting on the question of how narrow or how broad the interpretation of the annulment grounds in Art. 52 (1) should be. The panel held that 'Art. 52 (1) should be interpreted in accordance with its object and purpose, which excludes on the one hand […] extending its application to the review of an award on the merits, and, on the other, an unwarranted refusal to give full effect to it […]'.[68] It hence addressed the concerns raised by the interpretive breadth that had been suggested in the earlier decisions. This shift away from the old interventionist approach was also reflected by the refusal to annul in *Klöckner II* and *Amco II*.

Ten years passed until *Wena* and *Vivendi I*, the decisions representing the third generation, resumed this more moderate way of dealing with applications for annulment. The *ad hoc* committees carefully stayed

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65 Schreuer (note 12), 912, with further references.

66 Redfern (note 53) 117. ICSID itself acknowledged this when Secretary General Ibrahim Shihata, at the 1986 Annual Meeting of the Administrative Counsel, referred to *Klöckner I* and *Amco I* and warned of the danger that 'parties, dissatisfied with an award, make it a practice to seek annulment' and that this might put the ICSID's effectiveness into question, deterring both investors and States.

67 Schreuer (note 46); Ibid. (note 12) 913.

68 *MINE* (note 39) para. 4.05.

within the limits prescribed by Art. 52 (1) and rejected an overly strict approach.[69] They demonstrated that an ICSID annulment committee will generally intervene on a party's request, but only in a limited way, to correct fundamental, non-trivial errors[70] and without reviewing the substantive correctness of an award.[71] Thereby, both panels aimed to balance the tension between the competing goals of complete fairness and absolute finality.[72] All in all, these two cases show that the ICSID control system had – at least temporarily – found its proper *modus operandi.* In consequence, annulment was no longer seen as unpredictable device but as a useful remedy.[73]

bb. Modern Law of Annulment

Since 2002, the bulk of the annulment decisions classified as the modern law of annulment have adhered to the more sensitive method. Accord-

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[69] In both decisions, the applications for annulment were rejected for the most part. Only in *Vivendi I*, there was one area in which annulment had occurred. The annulment committee took a decision which was considered to be of high relevance for future arbitrations, as it clarified the difference between treaty disputes and contractual disputes. In particular, the panel stated that a contractual Domestic Forum Selection Clause does not preclude advancing claims for breach of a BIT in international arbitration, because coexisting contract claims and treaty claims are governed by different legal standards. Cf. S.A. Alexandrov 'The Vivendi Annulment Decision and the Lessons for Future ICSID Arbitrations – The Applicant's perspective' in Gaillard and Banifatemi (note 46) 97 (114). Nevertheless, *Vivendi I* has been criticized for having undertaken 'a kind of analysis that clearly goes beyond the line that separates what is correct from what is illegitimate'. Cf. C.I. Suarez Anzorena 'Vivendi v. Argentina: on the Admissibility of Requests for Partial Annulment and the Ground of a Manifest Excess of Powers' in Gaillard and Banifatemi (note 46) 123 (174).

[70] Both tribunals rejected the 'hair trigger' approach, which referred to formal discrepancies, in favour of the 'material violation' approach, which accords discretion to the annulment committee and which was first introduced in *Amco I*. Cf. *Wena* (note 41) para. 58 and *Vivendi I* (note 42) para. 63.

[71] Schreuer (note 12) 913.

[72] Cf. H. van Houtte 'Article 52 of the Washington Convention – A Brief Introduction' in Gaillard and Banifatemi (note 46) 11 (15), who described the handling of these opposing concepts as navigating between 'the Scylla of complete fairness and the Charybdis of absolute finality'.

[73] C. Schreuer 'ICSID Annulment Revisited' (2003) 30 Legal Issues of Economic Integration 121.

ingly, the 'ICSID experiment seem[ed] back on track'.[74] A whole range of annulment committees, for instance those in *CDC*[75], *Repsol*[76], *MTD*[77], *Soufraki*[78], *Lucchetti*[79], *Azurix*[80], or *MCI*[81], adopted this balanced, rather restrained approach and entirely rejected the annulment applications. Their argumentation constantly reflected their consciousness of the limited and narrow mandate conferred by Art. 52.

A further modern annulment decision, *CMS*[82], has caused some concern. The panel was criticized[83] for having entered into the discussion of how to interpret and apply the defense of 'necessity' with regard to the underlying relationship of treaties and customary international law.[84]

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[74] M. Reisman 'Control Mechanisms in International Dispute Resolution' (1994) 2 U.S.-Mexican Law Journal 129 (133).

[75] *CDC Group plc v. Republic of Seychelles (Decision on Annulment of 29 June 2005)* ICSID Case No. ARB/02/14 [hereinafter *CDC*].

[76] *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador) (Decision on Annulment of 8 January 2007)* ICSID Case No. ARB/01/10 [hereinafter *Repsol*].

[77] *MTD Equity Sdn. Bhd. v. Republic of Chile (Decision on Annulment of 21 March 2007)* ICSID Case No. ARB/01/7 [hereinafter *MTD*].

[78] *Hussein Nuaman Soufraki v. United Arab Emirates (Decision on Annulment of 5 June 2007)* ICSID Case No. ARB/02/7 [hereinafter *Soufraki*].

[79] *Industria Nacional de Alimentos S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru (Decision on Annulment of 5 September 2007)* ICSID Case No. ARB/03/4 [hereinafter *Luchetti*].

[80] *Azurix Corp. v. Argentine Republic (Decision on Annulment of 1 September 2009)* ICSID Case No. ARB/01/12 [hereinafter *Azurix*].

[81] *M.C.I. Power Group L.C. v. Republic of Ecuador (Decision on Annulment of 19 October 2009)* ICSID Case No. ARB/03/6 [hereinafter *MCI*].

[82] *CMS* (note 45).

[83] M. Reisman commented *CMS* as 'very strong move towards a more substantial appraisal of whether an award was correct'; R.D. Bishop criticized the *CMS* committee members for 'making gratuitous statements that they didn't have to make' and for having 'effectively de-legitimised the award', both quoted in: S. Perry 'Annulment Committees and Nosferatu Awards' (24 May 2010) <http://www.globalarbitration review.com> (31 October 2010).

[84] In contrast to the tribunal's ruling, the panel found the necessity exception contained in Art. XI of the BIT and the concept of necessity under customary international law contained in Art. 25 of the ILC Articles on State Re-

Nevertheless, the committee only annulled part of the award[85] and upheld the original tribunal's award of damages, stating that even in case that an 'award contained manifest errors of law […] [a] Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal', except if in accordance with in the annulment grounds of Art. 52 (1).[86] It thereby emphasized the continuing practice in annulment proceedings 'to distinguish between failure to apply the law and error in its application'.[87] In view of this consistent adherence to the established annulment jurisprudence, the *CMS* decision can eventually be considered as joining the consensus on the strict limits of the ICSID annulment function by highlighting the difference between annulment and appeal.[88]

However, two outliers clouded this so far homogenous picture of the modern law of annulment: In *Mitchell*[89], the *ad hoc* committee also expressed its disagreement with the tribunal's reasoning, namely the approach used to determine whether an 'investment' for purposes of Art. 25 (1) had occurred. Though, in contrast to the subsequent and more cautious *CMS* ruling, it annulled the award on the ground that the tribunal mistakenly had accepted that an investment existed.[90] Given the fact that the definition of the term 'investment' was explicitly left open by the drafters of the Convention and is still unsettled in ICSID case law,[91] the investment community received this decision as an attempt to

sponsibility to be 'substantially different' and consequently held that the tribunal had committed a 'manifest error of law'. Cf. *CMS* (note 45) para. 130.

85 The application for annulment was rejected on all grounds but with regard to the tribunal's ruling that the host State had breached the 'umbrella clause' in the applicable BIT. As the committee pointed out, this partial annulment left the award as a whole unaffected. Cf. *CMS* (note 45) para. 99.

86 *CMS* (note 45) para. 158.

87 Ibid. para. 50.

88 Schreuer (note 12) 915.

Nevertheless, despite its formal conformity with the ICSID Convention, one should be aware of the ambiguity the committee creates by leaving intact an arbitral award it previously declared as suffering from grave deficiencies.

89 *Mitchell* (note 43).

90 Ibid. para. 41. The committee arrived at this conclusion as it found one of the 'four characteristics' of an investment in the sense of Art. 25 (1) to be missing, namely the substantial contribution to the economic development of the host State.

91 Schreuer (note 12) 114.

impose the committee's own views on the merits.[92] Similar criticism can be voiced in reaction to the *MHS*[93] annulment award. The panel of the latter decision turned on exactly the same issue, but assumed that an investment had occurred and hence based its ruling on an opposite conclusion as to the *ratione materiae* issue. By referring to the appropriateness and coherence of the tribunals' reasoning, as commentators admonished,[94] both panels engaged in a substantive review of the award at hand. In this way, they adopted a role which was otherwise inconsistent with the general trend in annulment jurisprudence.[95]

At that time, these two deviations from the trend might still have been seen as inevitable and scattered malfunctioning of an evolving dispute settlement mechanism, most notably with regard to the predominantly balanced approaches in modern annulment awards before and after. Nevertheless, commentators have also considered the above annulment decisions, all dealing with the tribunal's interpretation of the corresponding investment treaties, as indicative of a trend[96] to 'something similar to an appellate review in international investment law'.[97]

c. A Return to Old Habits – The Fourth Generation?

The two ICSID annulment awards rendered very recently throughout the summer of 2010, *Sempra*[98] and *Enron*[99], have raised a further storm of criticism with regard to the scope of review adopted by the panels. They were perceived as undermining the well established limited character of the emergency review mechanism rooted in Art. 52 (1)[100] by

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92 W.B. Hamida 'Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control' (2007) 24 Journal of International Investment Arbitration 303.

93 *MHS* (note 44).

94 E. Gaillard 'A Black Year for ICSID' (2007) 4/5 Transnational Dispute Management 4, comment on *Mitchell*.

95 Schreuer (note 12) 915, comment on *Mitchell*.

96 Gaillard (note 94) 4, in his comment on *Mitchell.*

97 Michael Reisman's comment on *CMS* and *MHS*, quoted in Perry (note 83).

98 *Sempra* (note 47).

99 *Enron* (note 48).

100 S. Smith and K. Rubino 'Investors Beware: Enron and Sempra Annulment Decisions Bolster the State Necessity Defense While Showing New Un-

converting it into *de facto* appellate proceedings.[101] Some commentators have already asked whether there is an emerging 'fourth generation' of ICSID annulment jurisprudence and whether this new wave of annulment awards will necessitate reform.[102] Others, by contrast, consider these decisions as a result of the increasingly complex contentious issues to be addressed by ICSID tribunals and as still proportionate to the growing volume of arbitral requests. [103] In their opinion, the annulments should not be overestimated.

Both cases were based on similar circumstances and facts. They arose out of Argentina's unauthorized modifications and breaches of license contracts carried out by the government to deal with an unprecedented economic crisis in 2001. As a reaction, *Sempra* and *Enron* initiated ICSID arbitrations alleging that Argentina had violated its obligations under the US-Argentina BIT.[104] In defense, Argentina justified its emergency measures by pleading defenses under domestic law, international law, and under the treaty. Among other matters, it referred to Art. XI of the BIT, which provides that the treaty 'shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the Protection of its own essential security interests'. A further similarity is that the arbitral tribunals concerned with these two cases both rejected Argentina's plea of a state of necessity and rendered unanimous awards in favor of the claimant-investors. The tribunals considered the standards under Art. 25 of the ILC Articles[105] as relevant in determining the customary international law requirements as well as the conditions set out in Art. XI of the BIT, and they ended up finding these were not met.

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certainty Regarding the Finality of ICSID Arbitral Awards' (11 August 2010) <http://www.mondaq.com/unitedstates/article.asp?articleid=107480> (7 June 2011).

[101] Nair and Ludwig (note 49).

[102] Ibid.

[103] Cf. Kinnear (note 18).

[104] Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (signed 14 November 1991; entered into force 20 October 1994) <http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf> (7 June 2011).

[105] UNGA Res. 56/83 'Responsibility of States for Internationally Wrongful Acts' (12 December 2001) GAOR 56th Session Supp 49 vol 1, 499.

Interestingly, even if the committees dealt with similar facts and reviewed almost identical underlying awards[106] and even if both panels examined the necessity defense advanced by the host State, they followed entirely different paths in reaching their annulment decisions based on the excess-of-powers ground in Art. 52 (1) (d).

The *Sempra* committee, which is comparable to *CMS* in this respect, expressed its view on the content and relationship of the relevant BIT and the ILC Articles referring to customary international law principles of necessity.[107] It held that the tribunal had erred when it interpreted the BIT Art. XI on 'necessity' as being governed by ILC Art. 25[108] and consequently did not consider the applicability of the BIT provision.[109] The committee then continued to characterize this failure of the tribunal to 'conduct its review on the basis that the applicable legal norm is to be found in Article XI of the BIT' [110] as complete failure to apply the applicable law and thus as manifest excess of its powers in the sense of Art. 52 (1) (b).

This conclusion stands in contradiction to the statement in the original award, which was actually quoted by the *ad hoc* committee. The concerned finding of the tribunal expounded that

> '[…] Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under

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[106] *Enron Creditors Recovery Corp. (formerly Enron Corp.) v. Argentine Republic (Award of 22 May 2007)* ICSID Case No. ARB/01/3; *Sempra Energy International v. Argentine Republic (Award of 28 September 2007)* ICSID Case No. ARB/02/16.

[107] *Sempra* (note 47) paras 192–204. In the panel's opinion, the tribunal wrongly conflated the relationship between necessity under a treaty and under customary international law. Following *CMS*, the *ad hoc* committee applied the Primary-Secondary-Rule distinction, which identifies the BIT Art. XI as self-judging and thus as the primary applicable legal norm when examining the necessity defense.

[108] *Sempra* (note 47) para. 201.

[109] Ibid. para. 196.

[110] Ibid. para. 209.

> Article XI given that this Article does not set out conditions different from customary law in such regard'.[111]

In view of this passage, it seems not clear at all that the *Sempra* tribunal in fact did apply customary international law to the exclusion of the BIT.[112] It rather appears that it proceeded on the assumption that the two regimes were equivalent.[113] An impartial and unbiased reader, who would be able to perceive this statement in a fair and reasonable manner, is indeed very likely to understand that the original tribunal actually did apply Art. IX of the BIT and that it noticed a similar outcome to the one inferred from ILC Art. 25. Hence, the impression given is that the *ad hoc* panel just tried to find a convenient excuse for annulling the tribunal's adverse conclusion. This way of interfering with the original tribunal's decision strongly conflicts with the strictly limited annulment review permitted by Art. 52.

The *Enron* panel took a different route. It had an opposite attitude regarding the competences assigned by Art. 52 (1) as it held that '[t]he role of an annulment committee is not to reach its own conclusions on these issues'. Therefore, the panel was of the opinion that the tribunal was permitted to apply its own interpretation of the legal relationship between the BIT and the ILC Articles.[114] Nevertheless and irrespective of how the relation of these two legal texts was viewed, it found that the tribunal had failed to apply properly the various elements contained in ILC Art. 25, which are essential in determining the necessity of a State's actions under customary international law.[115] The committee held, *inter alia*, that instead of relying on expert evidence[116] the tribunal should have engaged in the legal analysis of what 'the only way' requirement or the expression 'contributed to the situation of necessity' in that provi-

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111 *Sempra* (note 106) para. 388.

112 Nair and Ludwig (note 49).

113 Ibid.

114 *Enron* (note 48) para. 405.

115 Ibid. para. 355.

116 Ibid. paras 361–67 and 392. Regarding the question of whether the emergency measures adopted by the host State to deal with the financial crisis were 'the only way' to safeguard an essential security interest and whether Argentina 'contributed to the situation of necessity' or not, the panel noted that the tribunal dealt with this issue in a cursory manner by uncritically relying on the opinion of an economic expert.

sion meant.[117] According to the *ad hoc* panel, this amounted to a failure to apply the applicable law, which constitutes an annullable error pursuant to Art. 52 (1) (b).[118]

As to both elements, the committee effectively disregarded the tribunal's decision on evidence and replaced it with its own, differing determination of its probative value.[119] Furthermore, in order to clarify what it considered as the 'proper construction of ILC Art. 25',[120] it introduced new inquiries and theories as to what the 'correct interpretation'[121] should have involved. The *ad hoc* panel did not criticize the tribunal for failing to apply settled law, because there was not any settled law at that time.[122] It rather decided to annul the award for the tribunal's failure to observe its retroactively formulated schemes of legal analysis,[123] which again stands in strong contrast to the limited annulment function as provided for in Art. 52.

In addition to the individual criticism of each of these two recent annulment decisions, there are also several common aspects of arbitral failure to be addressed.

One concern was caused by the fact that the committees at least partially[124] overturned the tribunal's awards for a mere erroneous interpretation or non-application of a single rule of law, which – no matter how

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[117] *Enron* (note 48) paras 369–72 and 393. In these paragraphs, the committee set forth the details of the inquiry and reasoning the tribunal should have followed.

[118] Ibid. paras 377, 393, 395. In addition, the committee also annulled the finding that the BIT Art. XI was inapplicable in this case, because this ruling was based on the committee's prior finding that the requirements of ILC Art. 25 were not satisfied. Cf. ibid. para. 405.

[119] This decision of the *ad hoc* committee clearly violates ICSID Arbitration Rule 34 (1), which states that '[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value'.

[120] *Enron* (note 48) para. 377.

[121] Ibid. paras 369, 386.

[122] R.D. Bishop 'The Fundamental Role of Fundamental Rules of Procedure, Recent Developments in Investment Arbitration Procedure, Keynote Address, BIICL, 15th Investment Treaty Forum Public Conference' (10 September 2010) 9–10 <http://www.biicl.org/Fifteenth_ITF_Public_Conference> (11 June 2011).

[123] Ibid.

[124] While the *Sempra* committee entirely annulled the award, the *Enron* panel only rendered a partial annulment.

serious – normally could not be a basis of annulment.[125] Yet, these errors of law were considered as a failure to apply the proper law and hence as having triggered the manifest excess-of-powers ground in Art. 52 (1) (b).[126] Moreover, on the occasion of these findings, the arbitrators sitting on the *ad hoc* panels thus put forward their own understanding of the law. This sharply contradicts the meaningful *CMS* decision, which held in support of the limited annulment jurisdiction that '[a] Committee cannot simply substitute its own view of the law […] for those of the Tribunal'.[127] In consequence, the *Sempra* and *Enron* committees committed the cardinal error of blurring the distinction between an exhaustive error-of-law review and the narrow jurisdictional review under the ICSID regime.[128]

Another concern relates to the long-standing principle that new issues or arguments, in the sense that they had not been advanced before the tribunal by a party, can under no circumstances be admitted by annulment committees.[129] This derives from the fundamental procedural right to be heard, which is not only a basic rule of fairness, but also puts limits on what an annulment committee can examine.[130] Despite this established principle, the *ad hoc* panels in both *Sempra* and *Enron* did the exact opposite by allowing the applicant to raise new arguments or even by creating their own arguments in support of the applicants and as a basis for their annulment decisions.[131]

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[125] Nair and Ludwig (note 49); Schreuer (note 12) 959, 964.

[126] Nair and Ludwig (note 49).

[127] *CMS* (note 45) para. 136.

[128] Nair and Ludwig (note 49).

[129] Cf. the statements in *MTD* (note 77) paras 52–54: '[…] an annulment proceeding […] is a form of review on specified and limited grounds which take as their premise the record before the tribunal.'; *Soufraki* (note 78) para. 37: 'the structure within which an ICSID tribunal has to remain is defined by three elements: the imperative jurisdictional requirements, the rules on applicable law and the issues submitted to the arbitral tribunal'; *CDC* (note 75) para. 40: 'Common examples for such excesses [of powers] are a Tribunal deciding questions not submitted to it […]'. Cf. also Bishop (note 122) 10–11.

[130] Bishop (note 122) 9–10.

[131] Ibid. 11. Cf. also *Sempra* (note 47) para. 184: In reply to respondent's claim that several of the arguments raised by applicant were new and therefore inadmissible, the committee found that 'in so far as the arguments of Argentina can be said to be "new", they are a permissible development of Argentina's arguments […] and therefore admissible'; *Enron* (note 48) paras 353, 393, 395:

Moreover and finally, the fact that the *Sempra* and *Enron* committees found a 'manifest excess of powers' invites a critique based on the already existing, substantiated and well-established ICSID annulment jurisprudence in comparable scenarios, according to which the term 'manifest' in Art. 52 (1) (b) does not indicate the seriousness of an excess of powers, but rather relates to its ease of perception.[132] This means that the excess must be self-evident and readily identifiable. Conducting a detailed and extensive analysis of the issues in question is and should not be necessary to detect such an excess within the meaning of Art. 52 (1) (b). Yet, this was done by the present committees and it is hence not justifiable to speak of a 'manifest' excess. Therefore, the reasoning undertaken by the *Sempra* and *Enron* panels casts doubt on the integrity and legitimacy of their annulment decisions.[133]

Altogether, the above decisions suggest that the scope of annulment review may be more expansive than previously understood.[134] They mark the latest in a row of fluctuating positions on the scope of permissible review, which exacerbate the much-criticized problem of inconsistencies in ICSID jurisprudence and inevitably amount to increased legal uncertainty[135] with respect to the outcome of ICSID proceedings. Moreover, they counteract the supposed finality of ICSID arbitral awards.

During the proceedings, the applicant never argued that the tribunal had failed to apply ILC Art. 25 as ground for annulment, and yet, this was the principal ground cited by the committee for its annulment pursuant to Art. 52 (1) (b).

[132] Schreuer (note 12) 938–43, on the manifest nature of excess of powers.

[133] So far, the *Enron* committee is the only one to see a 'manifest excess of powers' in the fact that the original tribunal examined ILC Art. 25 with reference to the evidence and arguments brought before it. In addition, the *Sempra* committee stands alone in considering a tribunal's discussion of BIT Art. XI as non-application of the latter.

[134] Smith and Rubino (note 100).

[135] In particular to the extent that the recent annulments demonstrated a greater receptivity to the host State's arguments in favor of its right to regulate via 'emergency', 'this casts doubt on the original expectation that resort to investor-State dispute settlement would "depoliticize" such disputes – and the ensuing law'; cf. J.E. Alvarez 'More on the Transparency of the International Investment Regime' (27 September 2010) <http://opiniojuris.org/2010/09/27/my-summer-vacation-part-ii-more-on-the-transparency-of-the-international-investment-regime/> (7 June 2011).

Reforms approaching this particular weakness are therefore a worthwhile undertaking in order to achieve enhanced consistency of the ICSID case law and to strengthen the regime as a whole in the competition of systems.

IV. Overview of Reform Proposals

The proper and coherent functioning of the Art. 52 (1) annulment device is a crucial factor in forthcoming decisions of whether to choose ICSID or UNCITRAL as the arbitration mechanism for investment disputes. Accordingly, the overzealous activities of the latest annulment committees are likely to impair the ICSID regime's attractiveness. They significantly lengthen proceedings and stand in tension with the demand to preserve finality as one of the virtues of ICSID investment arbitration, which is known for not going through the jurisdictional levels of comparable domestic litigation. In total, they risk undermining the general confidence in the supposed efficiency and reliability of the Washington Center. Aiming to counteract the *ad hoc* committees' second-guessing of the tribunals' interpretation of facts and of law and to support consistency of annulment awards, repeated calls for reform[136] of the ICSID annulment regime have become louder.

1. Reform Approaches requiring Amendment of the ICSID Convention

One remedy to control the problems created by *Klöcker I* and *Amco I*, which have now recurred in *Sempra* and *Enron*, is the creation of a standing body of jurists – in opposition to *ad hoc* panels – as a permanent review institution.[137] Such a facility could eliminate the volatile and

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[136] The following only provides an overview of the mostly discussed reform proposals. Various further approaches have been developed in specialist literature, as e.g. a party consultation as informal procedure before appointing an annulment committee in order to keep up the characteristic of a party-appointed arbitration system, or the option to submit ICSID disputes to the International Court of Justice in order to seek for an advisory opinion. Cf. Reisman (note 52) paras 787–807.

[137] Schreuer (note 12) 1034, with further references; cf. also A. Bjorklund 'The Continuing Appeal of Annulment, Lessons from Amco Asia and CME' in

discontinuous character of the current annulment committees, which are, by definition, composed for each single request for annulment. They are therefore not capable of exercising a kind of control that develops and applies precisely defined standards with the objective to establish predictable, coherent and conclusive investment treaty jurisprudence.[138] Hence, apart from various problems related to its implementation,[139] a permanent annulment body could provide for 'consistent case law through consistent committees'.[140]

Another way to attain the objective of mitigating the deficiencies of annulment jurisprudence would be to express the exclusivity of the annulment grounds by inserting the term 'only' in Art. 52 (1) and by specifying in Art. 53 (3) that an annulment of an award is only permitted in case of 'a material violation and not in case of a technical discrepancy'.[141] As a consequence, the annulment remedy would be unavailable for an inclusive interpretation by reference to other parts of the Convention.[142] Moreover, it would no longer be available upon the mere ostensible applicability of one of the specified grounds for annulment, but, in addition, would require its substantial impact upon the parties

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T. Grierson-Weiler (ed.) *International Investment Law and Arbitration* (Cameron May London 2005) 512; Reisman (note 52) 804–05; T. Wälde 'Improving the Mechanisms for Treaty Negotiation and Investment Disputes' in K. Sauvant (ed.) *Yearbook of International Law & Policy 2008–2009* (OUP New York 2008/09) 549.

138 E. Gaillard 'CIDRI Chronique des Sentences Arbitrales' (1987) 114 Journal du Droit International 135 (190–91).

139 The downside of this proposal is its practical implementation: Besides the need of an amendment of the ICSID Convention (see below, section IV. 2., note 154) and the determination of the number of permanent review panels as well as their quantitative composition, there is also the question of whether arbitrators sitting on such panel should be excluded from acting as 'first instance' arbitrators. Cf. G. Kaufmann-Kohler 'In Search of Transparency and Consistency: ICSID Reform Proposal' (2005) 2 Transnational Dispute Management 1 (5–6).

140 A. Broches 'Observations on the Finality of ICSID Awards' (1991) 6 ICSID Rev/FILJ 321 (373).

141 J. Clapham 'Finality of Investor State Arbitral Awards: Has the Tide turned and is there Need for Reform?' (2009) 26 JIntlArb 459.

142 Cf. Reisman (note 52) 788–92, 806, who contrasts the exclusivity of annulment grounds in Art. 52 (1) with the *Klöckner I* committees ruling, which opted for such inclusive interpretation.

with respect to the outcome of the case.[143] In spite of the problems connected to the practical implementation of this reform proposal,[144] it could be an effective way to prevent *ad hoc* panels from acting like higher courts, which use to reprimand tribunals for perceived legal errors.[145]

The most prominent in this category of reform proposals to mitigate the deficiencies of the Washington Center's annulment jurisprudence pleads for a widening of the scope of review beyond the narrow annulment grounds listed in Art. 52.[146] Hence, it implies a fundamental modification of the current review system. The concrete idea behind this rather abstract objective is the creation of an appellate body under the auspices of the ICSID, whose main functions are to ensure the correctness of a particular decision and the consistency of the decisions in the context of the overall system.[147] As to this approach, the ICSID itself has released a discussion paper[148] in 2004. Its proposal of an appeals mechanism, to which the disputing parties could agree to refer any post-award challenge, caused heated debates[149] with respect to the

[143] C. Schreuer 'Revising the System of Review of Investment Awards' (2009) <http://www.univie.ac.at/intlaw/wordpress/pdf/99_rev_invest_awards.pdf> (12 February 2011) 3–4.

[144] See below, Section IV. 2., note 154.

[145] Schreuer (note 143) 3.

[146] Ibid. 2.

[147] Ibid.

[148] ICSID Discussion Paper 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement 14> (12 February 2011).

[149] Schreuer (note 12) 1034, with further references, *inter alia* Bjorklund (note 137) 510; C. Tams 'Is There a Need for an ICSID Appellate Structure' in Hofmann and Tams (note 25) 223; T. Walsh 'Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?' (2006) 24 BerkeleyJIL 444 (454–60).

For reasoned opinions, cf. B. Legum and J. Paulsson in opposition, and S.D. Franck and G. Van Harten in support of an appellate body: B. Legum 'Options to Establish an Appellate Mechanism for Investment Disputes' in K. Sauvant (ed.) *Appeals Mechanism in International Investment Disputes* (OUP New York 2008) 231; J. Paulsson 'Avoiding Unintended Consequences' in Sauvant (ed.) ibid. 241; S.D. Franck 'ICSID Institutional Reform: The Evolution of Dispute Resolution and the Role of Structural Safeguards' in A. Fijalkowski

pros[150] and cons[151] of such permanent review institution. Albeit being temporarily off the agenda,[152] these discussions are still ongoing.[153]

When it comes to their implementation *in concreto*, all of the above reform models would, sooner or later, require amendments to the Washington Convention, which is known to be extremely difficult to achieve.[154] They are hence not very promising.[155]

2. Reform Approaches based on the *Status Quo* of the ICSID Convention

An alternative approach to promote finality of ICSID awards without such obligatory modifications of the Convention involves the issuing of

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(ed.) *International Institutional Reform: Proceedings of the Hague Joint Conference on Contemporary Issues in International Law* (TMC Asser Press The Hague 2007) 268; G. van Harten 'Private Authority and Transnational Governance: The Contours of the International System of Investor Protection' (2005) 12 Review of International Political Economy 600.

[150] Pro-arguments refer to e.g. the improvement of consistency and correctness of ICSID jurisprudence, or the enhancement of authority and legitimacy of investment awards. Cf. Tams (note 149) 231–46.

[151] Contra-arguments encompass e.g. the already existing, narrowly limited review option in Art. 52 (1) and the exclusion of any other form of review remedy in Art. 53 (1), or the increase of the amount of time lapsed and cost generated in a two-tiered system. Cf. Tams (note 149) 224–31.

[152] The result of the ICSID Secretariat's consultation process with member States, private investors, NGOs, scholars and others to gather their views on such appeals mechanism was that 'it would be premature to attempt to establish such an ICSID mechanism at this stage', cf. ICSID Secretariat 'Suggested Changes to the ICSID Rules and Regulations' (12 May 2005) 3 <http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf> (31 October 2010).

[153] Cf. Tams (note 149) 224, who stresses that 'the debate about an ICSID appellate system is not over', but also admits that 'much more time is needed properly to evaluate the pros and cons of an appellate structure'.

[154] Pursuant to Arts 65 and 66, an amendment of the Convention requires the acceptance of a two-thirds majority of the membership of the Council. If this majority is given, the proposed amendment will be circulated for ratification, acceptance or approval by all 147 current contracting States (status as of June 2011).

[155] Schreuer (note 12) 1034.

an interpretive note[156] by the Administrative Council, which would refer to Art. 52 (1). This comprehensive paper, based upon the history of and the case law so far generated under the Convention,[157] should confirm the general principles of annulment proceedings established to date[158] and also set out an interpretation of each of the annulment grounds listed.[159] What would be problematic in this regard is the unlikeliness that an interpretive note would be treated as having binding effect on *ad hoc* committees, given that the ICSID Convention does not assign any binding effect to such notes[160] and given that the Vienna Convention will hardly require an *ad hoc* committee to follow an interpretation of this nature.[161] Yet, it can be expected that *ad hoc* committees would pay a certain degree of deference to such note when applying Art. 52.[162]

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156 Clapham (note 141) 464; Delaume (note 30) 32.

157 The interpretive approach could also be of law comparative nature, taking into account the interpretation of comparable grounds for setting aside an award in the UNCITRAL Model Law as well as in most modern domestic legislations.

158 These basic principles could encompass that (i) awards should only be annulled for fundamental jurisdictional error, (ii) Art. 52 (1) lists exclusive annulment grounds, (iii) Art. 52 (1) does not allow a review on the merits, (iv) *ad hoc* committees have discretion of whether to annul an award where an annulment ground has been established, (v) in case of partial awards, subsequent tribunals shall not reconsider any finding of law or fact that has not been nullified. Cf. Clapham (note 141) 464; Reisman (note 52) 806.

159 For instance, with respect to the manifest-excess-of-powers ground in Art. 52 (1) (b), the note could provide that the two main categories of this annulment ground concern the tribunals jurisdiction and the failure to apply the proper law and then could proceed to explain further details. In addition, it could point out that the term 'manifest' does not necessarily indicate the gravity of an excess of powers, but that it rather relates to the ease of its perception. Cf. Schreuer (note 12) 937–77.

160 In contrast, the NAFTA foresees a binding effect for an interpretive note issued by the Free Trade Commission. Cf. Clapham (note 141) 464.

161 The Vienna Convention on the Law of Treaties in Art. 31 (3) (a) provides that 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' shall be taken into account when interpreting the treaty. Nevertheless, it is improbable that the members of the ICSID Administrative Council would be regarded as being able to make such kind of agreement on behalf of a State party. Cf. Clapham (note 141) 464.

162 Clapham (note 141) 465.

Another reform proposal without need to amend the Convention suggests a waiver of Art. 52 (1) procedures to be adopted by the parties to an investment agreement even before an award has been rendered, except for issues of public order like fraud or corruption, which are not at the parties' disposal.[163] However, it is doubtful whether advance waivers, be it in total or to a specific extent, are permissible at all in the light of a literal, systematic, and teleological interpretation of the Convention.[164] In any case, by doing so, the parties would accept to lose the minimum of safeguards provided by the ICSID regime, which excludes any recourse to external review. As it is impossible to predict to whose benefit such waivers – if effective – will operate, a party might ultimately pay a high price in order to preserve the finality of an arbitral award.[165]

Finally, a recently discussed method envisages avoiding inconsistent arbitral awards even before they are rendered through preventive action, thereby obviating a potential need of review. The *ex-ante* approach of a preliminary rulings structure has been developed along the lines of European Community law.[166] It proposes to create a right vested in the parties to request the arbitral tribunal to suspend its proceedings and to submit fundamental legal questions[167] in dispute to an authoritative body established for that purpose. That body would then issue an opinion on that question of law, which could be of binding or merely recommendatory character.[168] Such reference system would not subject ICSID awards 'to any appeal' and would thus not conflict with Art. 53. For that reason, it could also be created without amendments to the

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163 Reisman (note 52) 805. Cf. also Broches (note 140) 374; G. Delaume 'Reflections on the Effectiveness of International Arbitral Awards' (1995) 12 JIntlArb 5; ibid. (note 30) 33–34.

164 Schreuer (note 12) 920.

165 Reed, Paulsson and Blackaby (note 31) 104.

166 Cf. Art. 267 of the Treaty on the Functioning of the European Union (TFEU, Consolidated Version, OJ C 083/164, 3 March 2010), which is the ex Art. 234 of the Treaty Establishing the European Community (TEC, Consolidated Version, OJ C 321E/147, 29 December 2006).

167 Such kind of question should be concerned with a fundamental issue of international investment law, e.g. with issues that have been ruled on by previous tribunals with differing outcomes or that induce the competent tribunal to depart from a 'precedent'. Cf. Schreuer (note 143) 5.

168 C. Schreuer 'Preliminary Rulings in Investment Arbitration' in Sauvant (note 149) 212.

Convention.[169] Despite the considerable advantages of this idea,[170] there are still plenty of problems tied to its legal repercussions and its practical implementation, which need to be resolved.[171]

In summary, there is not yet a perfect solution with which to tackle the deficiencies of the ICSID annulment mechanism. Most of the reform approaches should be analyzed with caution, as 'the cure could be worse than the disease'.[172] Whatever tool of repair will be chosen, the basic policies of the ICSID control system should be considered thoroughly[173] during the process of shaping and implementation. It should always be kept in mind that the main purpose of control is to maintain the vitality and integrity of the arbitral proceedings and to ensure that awards are fair and consistent.[174] Only if supervision is understood as a functional one at a minimum level to guard against an outrageous miscarriage of justice, so to speak as a *garde-fou*,[175] ICSID investment arbitration will preserve the characteristics it is famous for, namely an efficient, proficient and fair dispute resolution mechanism, which provides justice to the parties and fosters economic prosperity.[176] In addition, a proper functioning of the ICSID review system could slow down the recent minor trend of defections to alternative forms of arbitration.[177]

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169 A preliminary rulings mechanism could be established through a decision of the ICSID Administrative Council pursuant to Art. 6, or through an additional protocol to the ICSID Convention. Cf. Schreuer (note 143) 6.

170 Pro-arguments refer to e.g. the furtherance of finality of arbitral awards, the avoidance of costly and time consuming review proceedings, or the harmonization of annulment jurisprudence without depriving the tribunals of their basic competence to adjudicate submitted cases. Cf. Schreuer (note 168) 211–12.

171 Contra-arguments encompass e.g. the difficulties in determining the types of question to be submitted, the composition of the competent institution, the scope of its analysis, or the effect of its rulings. Cf. Schreuer (note 168) 212; Tams (note 149) 249.

172 Legum (note 149) 231.

173 Reisman (note 52) 787.

174 Ibid.

175 Craig (note 58) 208.

176 Reisman (note 52) 788.

177 D. Caron's comment on *Sempra* in: T. Toulson 'ICSID Committee annuls Argentina Award' (2 July 2010) <http://globalarbitrationreview.com> (7 June 2011).

V. Conclusion

Even if it is disputed whether one can speak of a systemic crisis of the Washington Center,[178] there is little doubt that the ICSID regime as a whole and its annulment mechanism in particular[179] face remarkable challenges. The controversies and criticism surrounding the system stress both procedural and substantive weak points[180] and indicate that ICSID investment arbitration, as currently practiced, no longer lives up to the expectations of the international community.[181] Hence, there is a strong need to explore possible solutions for improvement. Effective reforms curing the present deficiencies are of enormous importance in preserving ICSID's attractiveness in comparison to alternative forms of investment arbitration. Of course, this is not to say that these competing regimes are free of considerable shortfalls.[182] In fact, they are similarly demanding of improvement.[183]

However, if ICSID wants to maintain its place as the leading jurisdiction of international investment dispute settlement,[184] it needs to be ahead of its competition. Such ongoing success of the ICSID regime is of special interest because it has been tailor-made for the settlement of investor-State disputes and their semi-pubic nature.[185] Its body of rules

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178 M. Waibel et al. 'The Backlash against Investment Arbitration, Perceptions and Reality' in M. Waibel (note 2) x1viii, with further elaboration on the points of criticism in detail.

179 A. Parra 'ICSID and the Rise of BITs: Will ICISD be the Leading Arbitration Institution in the Early 21st Century?' (2000) 94 ASIL Proceedings 41.

180 Waibel et al. (note 178) xxxix.

181 Ibid. x1viii.

182 One frequently discussed aspect within the system of commercial arbitration is the scope and possible interpretation of the 'public policy' ground for setting aside an award during review by a domestic court. This ground is contained in the UNCITRAL Model Law on International Commercial Arbitration (1985), Art. 34 II (b) (ii), and in the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Art. V II (b). Cf. J.-P. Beraudo 'Egregious Error of Law as Grounds for Setting Aside an Arbitral Award' (2006) 23 JIntlArb 351.

183 For instance, the release of the new UNCITRAL Arbitration Rules in 2010 reflects that this set of rules previously contained a range of deficiencies and that, in all likeliness, it still has not reached a state of perfection.

184 Parra (note 179) 42.

185 ICSID Convention, Preamble.

is structured to meet most closely the interests of all parties involved. In addition it has set out as one of its primary goals the need to foster a beneficial climate for private international investment,[186] – a cornerstone for global economic development.

[186] Ibid.

New Challenges for the ICSID Annulment System: Another Private-Public Problem in the International Investment Dispute Settlement

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I. Introduction

Under the ICSID annulment system, 43 requests for annulment have been registered as of 15 February 2011. Among these, 6 proceedings were discontinued, 26 decisions were rendered by *ad hoc* committees and 11 cases are pending.[1] *Ad hoc* committees, established under Art. 52 of the ICSID Convention[2] to examine requests for annulment, are quite 'active' in the sense that in 12 cases out of 26 cases decided so far, the original awards were annulled either entirely or partially.[3]

Not only active, the ICSID annulment system seems now embarking also on a new phase, following Christoph Schreuer's celebrated 'three generations'.[4] In particular, *Mitchell v. Congo* (2006), *CMS v. Argentina* (2007), *MHS v. Malaysia* (2009), *Sempra v. Argentina* (2010) and *Enron v. Argentina* (2010) raise a new problem – or revive an old problem which was believed to have been solved for good – with which *ad hoc*

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[1] Information available on the ICSID's website <http://icsid.worldbank.org/> (20 April 2011).

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

[3] Three out of 26 annulment decisions have not been made publicly available yet: *Consortium R.F.C.C. v. Kingdom of Morocco (Decision of 18 January 2006)* ICSID Case No. ARB/00/6 [hereafter *RFCC v. Morocco*]; *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic (Decision of 11 May 2010)* ICSID Case No. ARB/04/5 [hereafter *CECFT v. Gabon*]; *Fraport v. Philippines (Decision of 23 December 2010)* ICSID Case No. ARB/03/25. It is however reported that the *ad hoc* committees rejected the request for annulment in the first two cases, while it annulled the original award in the last case. See D. Vis-Dunbar 'ICSID Committee Rejects Request for Annulment in R.F.C.C. v. Morocco' (29 March 2006) Investment Treaty News <http://www.iisd.org/pdf/2006/itn_mar29_2006.pdf> (10 June 2011); J. Hepburn 'In an Unpublished ICSID Annulment Decision Upholding Railway Consortium Victory over Republic of Gabon, Committee Discusses Complex Issues of Nationality and Control' (4 November 2010) Investment Arbitration Reporter Vol. 3 No. 17 <http://www.iareporter.com/categories/20100326_2> (10 June 2011); N.R. Melican and A.M.G. Roa 'Gov't to Look at German Firm's Proposal' (5 January 2011) Business World (on *Fraport v. Philippines*) [available on Lexis/Nexis].

[4] C. Schreuer 'Three Generations of ICSID Annulment Proceedings' in E. Gaillard and Y. Banifatemi (eds) *Annulment of ICSID Awards* (Juris Publishing Huntington 2004) 17.

committees are more and more often faced: how to deal with the original award whose interpretation of the applicable treaty is, to the committee's eyes, patently wrong.

It is well known that the ICSID annulment system experienced some initial failure. The decisions of *ad hoc* committees in *Klöckner I* (1985) and *Amco I* (1986) were sharply criticized for practically undertaking a *révision au fond* and thus overstepping the limit inherent to the annulment procedure, which is not an appeal. This initial failure was however rapidly redressed and subsequent *ad hoc* committees scrupulously respected the distinction between a non-application and misapplication of the applicable law by the original arbitral tribunal: the former would entail the annulment of the award for an *excès de pouvoir*, while the latter would not.

The recent resurgence of *ad hoc* committee decisions exercising *de facto révision au fond* needs to be understood in light of this past experience. We will thus begin with a brief account of the original design and the past experience of the ICSID annulment system (II.) before entering into an analysis of the recent evolution (III.).

II. An Inherently Imperfect System

The ICSID annulment system was designed not to be an appellate procedure (1.). Although the recent evolution of international investment law stirred up considerable interest in the creation of such a procedure, no court of appeals will be established in the foreseeable future (2.).

1. The Original Design

a. Why révision au fond *Was Rejected: Finality of Awards*

Since the *travaux préparatoires* of the ICSID Convention have been already extensively examined by a number of authors,[5] a brief account is sufficient for the purpose of the present study.

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[5] See e.g. C. Schreuer et al. *The ICSID Convention: A Commentary* (2nd edn. CUP Cambridge 2009) 890–1095 ('Art. 52') especially 937–38 paras 130–33.

The Preliminary Draft, submitted by the staff of the World Bank to the Consultative Meeting of Legal Experts in 1963, provided in its Art. IV, Section 13, as follows:

> 'Section 13. (1) The validity of an award may be challenged by either party on one or more of the following grounds:
>
> (a) that the Tribunal has exceeded its powers […]'.[6]

A member of the Consultative Meeting suggested that the clause 'the tribunal exceeded its powers' could be improved if the words 'including failure to apply the proper law' were added. According to the member, '[A]s the parties were entitled to agree on the applicable law, failure of the tribunal to apply that law would frustrate that agreement'.[7] The Chairman replied that in such a case 'the award could be properly challenged on the ground that the arbitrators had gone against the terms of the compromis'.[8] Since no further argument was made in this regard, it seems that there was a consensus in the meeting that the failure to apply the proper law could constitute an *excès de pouvoir* as provided in the Preliminary Draft.

On the other hand, it was made clear during the debate in the meeting that a mistake in the interpretation or application of the applicable law would not constitute an *excès de pouvoir*. When the Legal Committee examined the Draft Convention,[9] whose Art. 55 (1) basically corresponds to Art. 52 (1) of the ICSID Convention,[10] a member suggested to add a provision making annulment possible on the grounds of an error in the application of the proper law by the Tribunal. This sugges-

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[6] 'Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States' Doc. No. COM/AF/WH/EU/AS/1 (15 October 1963) in ICSID *Documents Concerning the Origin and the Formulation of the Convention* Vol. II Part. 1 (ICSID Washington 1968) 184, 217 [hereafter *Documents*].

[7] Mr. Tsai (China) *Documents* Vol. II Part. 1, 517.

[8] The Chairman (A. Broches) ibid. 518. *See also* Mr. Ghanem (Lebanon) ibid.

[9] 'Draft Convention on the Settlement of Investment Disputes between States and Nationals of Other States' Doc. No. Z 12 (11 September 1964) *Documents* Vol. II Part 1, 610.

[10] Art. 55 (1) (e) of the Draft Convention was drafted in a language slightly different from that of today's Art. 55 (1) (e). *Documents* Vol. II Part 1, 635. The difference is, however, not material to the present study.

tion, criticized by several members for endangering the finality of arbitral awards,[11] was rejected by a majority.[12]

Despite this clear record in the *travaux préparatoires* of the Convention, the ICSID annulment system experienced some initial failure. We do not need to go into details of the *ad hoc* committees' decisions belonging to Schreuer's 'first generation'[13]: it is sufficient here to recall that these *ad hoc* committees, which were almost unanimously[14] criticized for exercising a *révision au fond*,[15] nevertheless recognized, at least in theory, that '[i]l est clair que l'*error in judicando*' [l'application erronée du droit] ne saurait être admise comme une cause de nullité, sous peine de réintroduire indirectement l'appel contre les sentences arbitrales'.[16] There thus existed, from the very beginning of the ICSID's activities, a solid consensus that an erroneous application of the applicable

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[11] Mr. Burrows (United Kingdom): '[I]t would be unfortunate to open endless possibilities for one party to frustrate or delay the proceedings' *Documents* Vol. II Part 2, 852. *See also* Mr. van Santen (Netherlands) ibid.; Mr. Tsai (China) *Documents* Vol. II Part 1, 518.

[12] *Documents* Vol. II Part 2, 853–54.

[13] Schreuer (note 4) 17.

[14] The *ad hoc* committee decisions in *Klöckner I* and *Amco I* however found a defence, though isolated, in a no less prominent authority than Aron Broches, who had chaired the drafting process of the ICSID Convention. A. Broches 'Observation on the Finality of ICSID Awards' (1991) 6 ICSID Rev./FILJ 321 (360–69); A. Broches 'On the Finality of Awards: A Reply to Michael Reisman' (1993) 8 ICSID Rev./FILJ 92.

[15] This criticism applies particularly to the annulment decision in *Amco v. Indonesia (Decision on Annulment of 16 May 1986)* ICSID Case No. ARB/81/1. Among many others, E. Gaillard *La jurisprudence du CIRDI* (Pedone Paris 2004) 195–96; M.B. Feldman 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards' (1987) 2 ICSID Rev./FILJ 85 (102); T. de Berranger 'L'article 52 de la Convention de Washington du 18 mars 1965 et les premiers enseignements de sa pratique' (1988) Revue de l'arbitrage 93 (112) ; G.R. Delaume 'The Finality of Arbitration Involving States: Recent Developments' (1989) 5 Arbitration International 21 (31–32); W.M. Reisman 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) DukeLJ 739 (785–87); J. Paulsson 'ICSID's Achievements and Prospects' (1991) 6 ICSID Rev./FILJ 380 (389–90).

[16] *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon (Decision on Annulment of 3 May 1985)* ICSID Case No. ARB/81/2 [hereafter *Klöckner I*] in E. Gaillard (see note 15) 166 para. 61; *Amco v. Indonesia* (note 15) para. 23.

law by the tribunal would not constitute an *excès de pouvoir* of the tribunal and therefore would not result in an annulment of the award.

b. Why the Finality of the Award Prevails over the Correct Application of Law: An Essentially Private 'Depoliticized' System

One may however be tempted to say that no arbitral tribunal is vested with the power to wrongly apply relevant rules and that a wrong application necessarily constitutes an *excès de pouvoir*: 'no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction'.[17] Why, then, an overwhelming majority of opinions consider that a wrong application of the applicable law does not constitute an *excès de pouvoir*?

It is in fact not a literal interpretation of Art. 52 (1) (b) of the ICSID Convention that leads most of the authors to this conclusion. It is generally considered that, in addition to the aforementioned *travaux préparatoires* of the ICSID Convention, a balancing of interests between the finality of awards and the correct application of law is decisive: if an erroneous application of legal rules is to be considered to amount to an *excès de pouvoir*, 'then possible annulments of ICSID awards will be unlimited'.[18]

The question to be asked is, therefore, why the finality of the award prevails over the correct application of law. In this respect, it is interesting to find that those who consider that an erroneous application of the applicable law does not constitute an *excès de pouvoir* frequently refer to the doctrine and domestic jurisprudence dealing with the annulment of awards in international commercial arbitration.[19] As regards this branch of arbitration, it is often stated that '[l]'exclusion de l'appel proprement dit, qui permettrait à la cour d'appel de connaître du fond du

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[17] *Pearlman v. Harrow School (C.A.)* [1979] 1 QB 56, 70 [Lord Denning]. Note that no question of international investment law was dealt with in this case.

[18] 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' (1988) 23 TexasJIL 73 (109).

[19] Ibid. 103–07. See also de Berranger (note 15) 113–14.

litige, allait de soi en matière [d'arbitrage commercial international]'.[20] The choice of arbitration by the parties to the dispute will indeed become meaningless if domestic courts, i.e. judges not selected by the parties, have the power to review the arbitral award.[21] Another reason to deny the *révision au fond* by domestic courts is the difficult conceivability of 'wrong' award in international commercial arbitration due to the broad leeway that arbitrators enjoy in interpreting and applying the applicable law: 'What seems rational for the international arbitrators who are familiar with the underlying economic interest of a particular highly specialized branch of trade or international commerce might seem irrational for the judge'.[22]

However, if the principle is well established, there are exceptions as always. In England, a party may appeal an arbitral award on a point of law under the conditions set forth by Section 69 of the Arbitration Act of 1996.[23] The appeal cannot be brought unless the court grants leave to appeal, which the court should grant if 'the question is one of general public importance and the decision of the tribunal is at least open to serious doubt'.[24] In Switzerland, although the Swiss *Loi fédérale sur le droit international privé* of 1987 does not have similar provisions, the Federal Tribunal recognizes the possibility that 'une erreur de droit manifeste' signifies 'une incompatibilité avec l'ordre public' which leads the Tribunal to review the original award under Art. 190 of the *Loi*.[25]

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[20] P. Fouchard et al. *Traité de l'arbitrage commercial international* (Litec Paris 1996) 930.

[21] 'La reconnaissance de l'efficacité de la convention d'arbitrage n'aurait en effet aucun sens si le litige devait nécessairement trouver son épilogue devant les juridictions étatiques', ibid.

[22] K.P. Berger *International Economic Arbitration* (Kluwer Deventer 1993) 679–80. *See also* domestic judgments refusing to set aside an arbitral award for errors of law, quoted by Berger, ibid. 678 n. 187.

[23] Available at <http://www.legislation.gov.uk/ukpga/1996/23/contents> (20 April 2011).

[24] Section 69 (3) (c) (ii). Therefore, the English court does not have any power to grant leave appeal if no question of the law of England arises out of the challenged arbitral award. *Reliance Industries Ltd v. Enron Oil and Gas India Ltd* [2002] 1 All ER (Comm) 59 para. 33.

[25] *Rhône-Poulenc Rorer Pharmaceuticals c. Roche Diagnostic Corporation (17 février 2000)* Tribunal fédéral, I[ère] Cour civile (2002) 12 RSDIE 584–85. Art. 190 (2) (e) provides that the arbitral award may be challenged 'lorsque la sentence est incompatible avec l'ordre public'.

The rationale for the possible review by domestic courts recognized by the English Act and the Swiss Federal Tribunal[26] is clear enough: they try 'to strike a balance between the need for finality in the arbitral process and the wider public interest in some measure of judicial control, if only to ensure consistency of decisions and predictability of the operation of the law'.[27]

This suggests that the original design of the ICSID annulment system, in which the *ad hoc* committee has no power of *révision au fond*, presupposes the essentially private character of the investor-State dispute settlement before ICSID tribunals. When ICSID was established in 1965, it was supposed to settle disputes between an investor and a host State arising from contracts concluded between them.[28] Each arbitral award dealing with a contract or a set of contracts particular to the dispute, issues 'of general public importance' or relating to 'l'ordre public' seldom arise and there was no need to ensure consistency of decisions. As is well known, this situation would be drastically modified when treaty-based arbitration became the norm in the late 1990s.

2. Improbable Restructuring

a. Necessary Appeal: Legitimacy Debate and Unsuited Annulment System

The generalization of treaty-based arbitration radically altered the landscape of international investment law. An investor is now qualified to institute an arbitration against the host State without an arbitration clause included in a contract that he/she concluded with the host State,

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[26] Some US court decisions consider that a 'manifest disregard of the law' by the arbitral tribunal may form the basis of a challenge to the award. See *Stolt-Nielsen v. AnimalFeeds International Corp* (2nd Cir. 2008) 548 F. 3d 85. However, it is not clear whether 'manifest disregard' still is a ground for set aside under US law. See *Hall Street Associates LLC v. Mattel Inc.* (2008) 552 U.S. 576. See also T. Várady et al. *International Commercial Arbitration: A Transnational Perspective* (West St. Paul 2009) 821.

[27] N. Blackaby and C. Partasides *Redfern and Hunter on International Arbitration* (5th edn. OUP Oxford 2009) 607.

[28] I. Fadlallah 'La distinction treaty claims – contract claims et la compétence de l'arbitre CIRDI' in C. Leben (ed.) *Le contentieux arbitral transnational relatif à l'investissement* (LGDJ Paris 2006) 205 (211).

provided that his/her mother State and the host State have concluded a treaty stipulating such a possibility.[29] It resulted in a large number of arbitration cases brought by an investor against the host State. While, according to publicly available information, less than five cases were brought to arbitration every year until 1995, more than 30 arbitrations are instituted every year since 2002.[30] The increase in the number of arbitrations, together with a lack of co-ordination mechanism among mutually independent arbitral tribunals, resulted in various inconsistent arbitral findings. The most conspicuous examples, among others, are the definition of investment[31], the scope of the obligations observance ('umbrella') clause,[32] the applicability of the most-favoured-nation treatment to the dispute settlement clause,[33] the conditions of the state of necessity under customary international law[34] and the relationship between the national security clause contained in investment treaties and the state of necessity under customary international law.[35]

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[29] For early studies indicating potential impacts of treaty-based investment arbitration, see G. Burdeau 'Nouvelle perspectives pour l'arbitrage dans le contentieux économique intéressant les Etats' (1995) Revue de l'arbitrage 3 (13–14); J. Paulsson 'Arbitration without Privity' (1995) 10 ICSID Rev./FILJ 232 (236–41).

[30] UNCTAD 'Investor-State Dispute Settlement and Impact on Investment Rulemaking' (2007) UN Doc. UNCTAD/ITE/IIA/2007/3, 7; UNCTAD 'Latest Developments in Investor-State Dispute Settlement' (2010) 1 IIA Issues Note, UN Doc. UNCTAD/WEB/DIAE/IA/2010/3, 3.

[31] See W. Ben Hamida 'La notion d'investissement: le chaos s'amplifie devant le CIRDI' (2009) Gazette du Palais (Doctrine 3615–21).

[32] See S.W. Schill 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' (2008) 9 IILJ Working Paper 1.

[33] See S.W. Schill *The Multilateralization of International Investment Law* (CUP Cambridge 2009) 151–96.

[34] See M. Raux 'Les circonstances excluant l'illicéité dans le cadre du contentieux investisseurs-Etats' 14 au 16 décembre 2008 Gazette du Palais 41 (41–47).

[35] See W.W. Burke White and A. von Staden 'Non-precluded Measures Provisions, the State of Necessity, and the State Liability for Investor Harms in Exceptional Circumstances' in M.H. Mourra and T.E. Carbonneau *Latin American Investment Treaty Arbitration* (Kluwer Alphen aan den Rijn 2008) 105–62.

Some of these inconsistencies may be explained by the co-existence of literally thousands of international investment agreements (IIAs).[36] A same measure taken by the host State may well constitute an indirect expropriation under an IIA without falling into such a category according to another IIA.[37] However, inconsistent arbitral 'jurisprudence' produces serious problems when it relates to an identical rule. For example, certain tribunals and *ad hoc* committees consider that 'investment' under Art. 25 (1) of the ICSID Convention covers only those which contribute to the economic development of the host State,[38] while others find that no such condition exists for the definition of investment under the same article.[39] In addition, many IIAs contain similar, if not identical, norms. Arbitral tribunals, when asked to interpret an article of the applicable IIA, are more than inclined to take into account awards rendered by other tribunals on the basis of a similar article stipulated in a different IIA. The evolution of the arbitral jurisprudence on the fair and equitable treatment[40] is the best evidence for this.[41]

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[36] According to UNCTAD, the total number of bilateral investment treaties rises to 2,679 at the end of 2008. UNCTAD 'Recent Developments in International Investment Agreements (2008-June 2009)' (2009) 3 IIA Monitor, UN Doc. UNCTAD/WEB/DIAE/IA/2009/8, 1.

[37] The diametrically opposite conclusions arrived at by *CME* and *Lauder* tribunals concerning disputes arising from the same facts (*Lauder v. Czech Republic [Award of 3 September 2001]* [2006] 9 ICSID Rep. 66; *CME v. Czech Republic [Partial Award of 13 September 2001]* [2006] 9 ICSID Rep. 121; *CME v. Czech Republic [Final Award of 14 March 2003]* [2006] 9 ICSID Rep. 264) may be explained by different wordings adopted by relevant BITs. S. Manciaux *Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats* (Litec Paris 2004) 465.

[38] *Patrick Mitchell v. Democratic Republic of Congo (Decision on the Application for Annulment of the Award of 1 November 2006)* ICSID Case No. ARB/99/7 para. 27 [Antonias Dimolitsa (president), Robert S.M. Dossou, Andrea Giardina].

[39] *Malaysian Historical Salvors v. Malaysia (Decision on the Application for Annulment of 16 April 2009)* ICSID Case No. ARB/05/10 para. 80 [Stephen M. Schwebel (president), Mohamed Shahabuddeen (dissenting), Peter Tomka].

[40] See generally I. Tudor *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP Oxford 2008).

[41] In theory, even when there are two IIAs which respectively contain an identically-worded provision, the two 'same' provisions may well be differently interpreted as they are necessarily placed in different contexts. However, arbitral tribunals tend to dispense with a verification whether any difference of con-

If, therefore, inconsistent arbitral jurisprudence persists with regard to identical or similar rules provided in various IIAs, legal certainty and predictability will be heavily compromised and the legitimacy of treaty-based arbitrations will be put into question.[42] The treaty-based system of investment arbitration thus has to find a way to ensure the consistency of arbitral jurisprudence at least to a certain degree.

The legitimacy of treaty-based investment arbitration is also being challenged from another angle. An arbitral tribunal may be requested to examine the conformity with an IIA of a measure taken by the host State in perfect accordance with its domestic law enacted to attain highly public purposes such as environmental protection.[43] Why should three arbitrators, who are selected *ad hoc* by the parties to the dispute but have no constitutional status in the host State, be vested with the power to examine the legality of legislative and/or administrative measures taken for public purposes?[44] This question is apparently more political than legal, since the status of the arbitrators is firmly based on the IIA to which the host State consented. However, unless the arbitral tribunal renders an award 'good' and convincing enough, the legitimacy of the treaty-based investment arbitration will be, here again, put into doubt. A certain system of quality control is thus needed.

In sum, treaty-based investor-State arbitrations take on a public character, while contract-based investor-State arbitrations are relatively private in nature.[45] The experience of international commercial arbitration suggests, as mentioned above, that a certain type of mechanism to pro-

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texts leads to different results. See e.g. *AES Summit Generation Ltd v. Hungary (Award of 23 September 2010)* ICSID Case No. ARB/07/22 paras 9.3.8–9.3.12, referring to several arbitral awards dealing with the fair and equitable clause [Claus Werner von Wobeser (president), Brigitte Stern, J. William Rowley].

42 See S.D. Franck 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham LRev 1521 (1545–46).

43 See generally S. Robert-Cuendet *Droits de l'investisseur étranger et protection de l'environnement* (Nijhoff Leiden 2010).

44 This criticism is often delivered by NGOs which consider that the investor-State arbitration is hardly compatible with democracy. See e.g. Public Citizen 'NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy' (September 2001) especially a section entitled 'NAFTA Corporate Dispute Resolution: Private Enforcement of a Public Treaty' at 6.

45 See G. van Harten 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 ICLQ 371 (374).

ceed to the *révision au fond* of an arbitral award will be needed if the arbitration deals with issues affecting public interests. The ICSID annulment system is, however, regrettably far from sufficient to assume such a role because, as we have seen above, it is supposed not to proceed to a *révision au fond* of the original award. An *ad hoc* committee has no power to annul the original award for the reason that the latter either is not in conformity with the *jurisprudence constante* or wrongly applied the rules of applicable law. It is thus understandable that some States started to advocate an idea for the creation of appeal mechanism in investment arbitration.

b. Unfeasible Appeal: Practical and Institutional Problems

It is in this context that the United States Congress in 2002 passed a law granting the President the power to negotiate a treaty with investment provisions 'providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements'.[46] The 2004 version of the United States model BIT include an annex according to which the parties to the BIT shall consider whether to establish a bilateral appellate body.[47] Several IIAs to which the US is a party in fact include a provision to that effect.[48]

In response to this US initiative, the ICSID Secretariat prepared a discussion paper that proposed an 'ICSID Appeals Facility' in 2004.[49] As

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[46] Section 2102 (b)(3)(G)(iv) of the US Trade Act of 2002, Public Law No. 107–210, 116 Statutes at Large 933 (2002), <http://www.govtrack.us/congress/billtext.xpd?bill=h107-3009> (18 April 2011).

[47] Annex D of the 2004 Model BIT <http://ustraderep.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html> (18 April 2011).

[48] Art. 28 (10) of the US-Uruguay BIT (signed 4 November 2005; entered into force 1 November 2006) <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/Uruguay_BIT.asp> (18 April 2011); Art. 28 (10) of the US-Rwanda BIT <http://ustraderep.gov/Trade_Agreements/BIT/Rwa/Section_Index.html> (18 April 2011). See also Art. 15.19 (10) of the US-Singapore Free Trade Agreement (signed 6 May 2003, entered into force 1 January 2004) <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_007049.asp> (18 April 2011); Art. 10.19 (10) of the US-Chile FTA (signed 6 June 2003, entered into force 1 January 2004) <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000984.asp> (18 April 2011).

[49] ICSID Secretariat 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004).

soon as in 2005, however, the Secretariat decided not to proceed towards the establishment of an ICSID appeal mechanism, in face of opinions considering it premature to establish such a mechanism 'in view of the difficult technical and policy issues raised in the Discussion Paper'.[50] Among various considerations militating against the establishment of an appeal mechanism,[51] the most important seems to be that of the cost. Since arbitral tribunals interpret and apply not only IIAs but also the ICSID Convention and customary international law rules, the appeal mechanism would have to be permanent and accepted all States which are party to IIAs equipped with investor-State arbitration in order to secure consistency of arbitral jurisprudence. It is however unlikely that many States would be interested in such a system which would require a considerable amount of maintenance cost for a permanent court of appeals as well as accumulated legal fees for the appellate procedure.[52] Although heatedly debated for a moment following the ICSID Secretariat's proposal in 2004, the possibility of the establishment of an appeal mechanism is no longer a hot issue,[53] though not totally abandoned.

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[50] ICSID Secretariat 'Suggested Changes to the ICSID Rules and Regulations' (12 May 2005) para. 4.

[51] See K. Yannaca-Small 'Improving the System of Investor-State Dispute Settlement' (2006) 1 OECD Working Papers on International Investment (February 2006) <http://www.oecd.org/dataoecd/3/59/36052284.pdf> (18 April 2011) paras 46–56. For various pros and cons of a possible appeals mechanism, see K.P. Sauvant (ed.) *Appeals Mechanism in International Investment Disputes* (OUP New York 2008).

[52] It is often indicated that claims by smaller investors and defences by developing countries will become financially difficult. See T. Wälde 'Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?' in F. Ortino et al. (eds) *Investment Treaty Law: Current Issues* (British Institute of International and Comparative Law London 2006) vol. 1 135 (140). See also A.H. Qureshi 'An Appellate System in International Investment Arbitration?' in P. Muchlinski et al. (eds) *The Oxford Handbook of International Investment Law* (OUP Oxford 2008) 1154 (1156).

[53] Even an ardent advocate for an Additional Annulment Facility acknowledges that it would take time such a project to gain momentum. J. Clapham 'Finality of Investor-State Arbitral Awards: Has the Tide Turned and Is There a Need for Reform?' (2009) 26 JIntlArb 437 (463).

III. How to Make Most of the Inherently Imperfect System

The unfeasibility of the establishment of an appeal mechanism means that we have to continue to live with the inherently imperfect ICSID annulment system. We need a coherent arbitral jurisprudence of high quality, which the current ICSID annulment system cannot ensure. On the other hand, an appellate mechanism which would ensure coherence and quality is far from feasible and will not be realized in a foreseeable future. It is then only natural that some *ad hoc* tribunals endeavour to adopt 'creative' approaches to cope with the problem within their limited powers (1.). The success of these 'creative' approaches, however, is anything but guaranteed (2.).

1. Treaty Arbitration and Quest for a 'Right' Decision

a. De facto révision au fond *without Annulment*

CMS v. Argentina is one of the long series of arbitrations instituted by investors frustrated by several measures that Argentina adopted to cope with the economic crisis that had erupted towards the end of the 1990s. The claimant complained particularly of the termination of the right granted to it as a licensee of public utilities to adjust tariffs calculated in USD according to the US-PPI.[54] The arbitral tribunal held that Argentina had violated several provisions of the Argentina-US BIT[55] and rejected the respondent State's argument that those violations should be justified by Art. 11 of the BIT (security exception)[56] as well as the state

[54] *CMS* invested in gas transportation industry in Argentina. Argentinean laws and decrees stipulated that tariffs were to be calculated in dollars, conversion to pesos to be effected at the time of billing and tariffs adjusted every six months in accordance with the United States Producer Price Index (US-PPI). *CMS v. Argentina (Award of 12 May 2005)* ICSID Case No. ARB/01/8 (2005) para. 57 [Francisco Orrego Vicuña (president), Marc Lalonde, Francisco Rezek].

[55] Argentina-US Bilateral Investment Treaty (signed 14 November 1991, entered into force 20 October 1994) <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000897.asp> (18 April 2011).

[56] 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests'.

of necessity under customary international law. The tribunal first examined customary international law as reflected in Art. 25[57] of the Articles on State Responsibility[58] and held that requirements to invoke necessity were not met.[59] It then turned to Art. 11 of the BIT.[60] Although the respondent's argument based on this article was not explicitly rejected, it seems that the tribunal, considering that Art. 11 set the same conditions as the state of necessity under customary international law,[61] did reject it because it finally found violations by the respondent of various provisions of the BIT.

The *ad hoc* committee thoroughly reviewed the original award which it considered patently wrong. It first found that the tribunal made 'a manifest error of law' in assimilating the conditions necessary for the implementation of Art. 11 of the BIT to those concerning the existence of the state of necessity under customary international law.[62] It further

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[57] '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity'.

[58] UNGA Res. 56/83 'Responsibility of States for Internationally Wrongful Acts' (12 December 2001) GAOR 56th Session Supp 49 vol. 1, 499.

[59] *CMS v. Argentina* (note 54) para. 331.

[60] The *ad hoc* committee points out that the respondent State's presentation dealt with the defense based on customary law before dealing with the defense drawn from Art. 11 of the BIT. *CMS v. Argentina (Decision on Annulment of 25 September 2007)* ICSID Case No. ARB/01/8 para. 128 [Gilbert Guillaume (president), Nabil Elaraby, James R. Crawford].

[61] Ibid. para. 357.

[62] Ibid. para. 130. For the *ad hoc* committee, Art. 11 of the BIT and the state of necessity under customary international law have a different operation and content. 'Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 [of the Articles

pointed out that the tribunal made 'another error of law' in applying both Art. 11 of the BIT and the state of necessity under customary international law without entering into an analysis of their relationship.[63] 'These two errors made by the Tribunal could have had a decisive impact on the operative part of the Award'.[64] Nevertheless, the *ad hoc* committee declared:

> 'The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. In the circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal. Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers'.[65]

It thus refused to annul the original award on the basis of Art. 52 (1) (b) of the ICSID Convention.[66]

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on State Responsibility] is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations. Furthermore Article XI and Article 25 are substantively different. The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions. […] In other terms the requirements under Article XI are not the same as those under customary international law as codified by Article 25', ibid. paras 129–30.

63 Ibid. para. 132. According to the *ad hoc* committee, 'if state of necessity means that there has not been even a *prima facie* breach of the BIT, it would be, to use the terminology of the ILC, a primary rule of international law. But this is also the case with Article XI. […] Article XI and Article 25 thus construed would cover the same field and the Tribunal should have applied Article as the *lex specialis* governing the matter and not Article 25. If, on the contrary, state of necessity in customary international law goes to the issue of responsibility, it would be a secondary rule of international law […]. In this case, the Tribunal would have been under an obligation to consider first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI'. Ibid. paras 133–34 [footnotes omitted].

64 Ibid. para. 135.

65 Ibid. para. 136.

66 The *ad hoc* committee annulled the tribunal's finding on Art. 2 (2) (c) of the BIT (the 'umbrella' clause) for failure to state reasons (Art. 52 (1) (e) of the ICSID Convention). Ibid. para. 97. This question is out of the scope of the present study.

b. De facto révision au fond *through Annulment*

Enron v. Argentina[67] and *Sempra v. Argentina*[68] arose from essentially the same facts and were brought to arbitration on the basis of the same BIT and for the same grounds as in *CMS v. Argentina*. The *Enron* and *Sempra* tribunals followed basically the identical line of argument to arrive at the same conclusion as did the *CMS* tribunal.[69] When considering the plea of emergency advanced by the respondent State, the *Enron* and *Sempra* tribunal thus first examined whether the requirements of the state of necessity under customary international law were fulfilled and arrived at a negative conclusion.[70] They then proceeded to deal with the plea of emergency under Art. 11 of the Argentina-US BIT.[71] Here, in response to the claimant's arguments criticizing the *CMS* award, the two tribunals entered into an examination of the relationship between the state of necessity under customary international law and Art. 11 of the BIT, and explicitly confirmed what the *CMS* tribunal implied, i.e. the identity of requirements to invoke the two exceptions.[72] Since the requirements of the state of necessity under customary international law had already been held to be unfulfilled, the two tribunals declared that there was no need to undertake a further review under Art. 11 of the BIT.[73]

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67 *Enron v. Argentina (Award of 22 May 2007)* ICSID Case No. ARB/01/3 [Francisco Orrego Vicuña (president), Albert Jan van den Berg, Pierre-Yves Tschanz].

68 *Sempra v. Argentina (Award of 28 September 2007)* ICSID Case No. ARB/02/16 [Francisco Orrego Vicuña (president), Marc Lalonde, Sandra Morelli Rico].

69 It is to be noted that both *Enron* and *Sempra* awards had been rendered before the *CMS ad hoc* committee handed down its decision.

70 *Enron v. Argentina* (note 67) paras 303–13; *Sempra v. Argentina* (note 68) paras 344–55.

71 In *Sempra v. Argentina*, the respondent State again argued the plea of necessity under customary international law before proceeding to the matter of preclusion under Art. 11 of the BIT. *Sempra v. Argentina* (note 68) para. 176. (note 60).

72 *Enron v. Argentina* (note 67) paras 333–34; *Sempra v. Argentina* (note 68) paras 376, 378, 388.

73 *Enron v. Argentina* (note 67) paras 334, 341; *Sempra v. Argentina* (note 68) para. 388.

Both cases were brought to *ad hoc* committees by Argentina. The *Sempra* committee, as did the *CMS* committee, criticized the original award for confusing the conditions for the operation of Art. 11 of the BIT with those of the state of necessity under customary international law.[74] It also criticized, again as did the *CMS* committee, the award for not understanding that these two rules dealt with quite different situations: the state of necessity is invoked as a ground for precluding the wrongfulness of an act, while where Art. 11 of the BIT applies, the taking of measures envisaged there is not wrongful.[75] It then proceeded, here again as did the *CMS* committee, to consider whether 'the error in law' constituted an *excès de pouvoir*. At this point, however, the *Sempra* committee parted company with the *CMS* committee. The former held that the *Sempra* tribunal had made a fundamental error in identifying and applying the applicable law by adopting the state of necessity under customary international law as the primary law to be applied, rather than Art. 11 of the BIT.[76] This failure to apply Art. 11 of the BIT was considered by the *Sempra* committee to constitute an *excès de pouvoir* and the award was thus annulled.[77]

The *Enron ad hoc* committee also annulled the original award but on quite different grounds. The *Enron* tribunal relied on the views expressed by an economist when it considered the questions whether the measures taken by Argentina were 'the only way for the State to safeguard an essential interest against a grave and imminent peril' (Art. 25 (1) (a) of the ILC Articles)[78] and whether Argentina had 'contributed to the situation of necessity' (Art. 25 (2) (b) of the ILC Articles).[79] This means for the *Enron* committee that the tribunal did not in fact apply Art. 25 (1) (a)/(2) (b) of the ILC Articles but instead applied an expert

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74 Ibid. paras 197–99.

75 Ibid. para. 200.

76 Ibid. para. 208.

77 Ibid. para. 209. See also para. 219.

78 *Enron v. Argentina* (note 67) paras 300, 308–09.

79 Ibid. paras 300, 311–12.

opinion on an economic issue.[80] The award was thus annulled for an *excès de pouvoir.*[81]

2. In Search of the Least Evil

a. Advantages and Drawbacks of the Approaches Adopted

aa) *De facto révision au fond* without Annulment

The *CMS ad hoc* committee thoroughly reviewed and severely criticized the original award. It also proceeded to indicate solutions that the tribunal should have adopted. Taking into account the original design of the ICSID annulment system, one could not but agree with Emmanuel Gaillard who argues cogently that:

> '[c]ontrairement à une instance d'appel, un comité *ad hoc* est chargé de s'assurer qu'aucun dysfonctionnement n'a affecté la conduite de la procédure et que la sentence n'est entachée d'aucun vice grave. Il ne doit, par définition, pas se préoccuper du reste: un raisonnement peut être juste ou faux, une constatation de fait erronée ou non, l'articulation d'un raisonnement convaincante ou pas. Dans un tel système de contrôle, le comité *ad hoc* ne gagne rien à souligner tous les points sur lesquels, à tout ou à raison, il aurait jugé différemment'.[82]

It is however difficult to imagine that the *CMS ad hoc* committee did not anticipate this sort of criticism. It is submitted that the *ad hoc* committee decided to make most of its powers within the limits set forth by the ICSID Convention, i.e. without annulling the original award for errors of law, to rectify it because the tribunal's findings on Art. 11 of the Argentine-US BIT and the state of necessity under customary international law were so wrong, to the committee's eyes, that they would cause serious damages to the legitimacy of the treaty-based

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[80] *Enron v. Argentina (Decision on the Application for Annulment of 30 July 2010)* ICSID Case No. ARB/01/3 paras 376–77, 392–93 [Gavan Griffith (president), Patrick L. Robinson, Per Tresselt].

[81] The committee also found a failure to state reasons (para. 384) but the *dispositif* of the decision refers only to Art. 52 (1) (b) of the ICSID Convention.

[82] E. Gaillard *La jurisprudence du CIRDI* vol. II (Pedone Paris 2010) 427.

arbitration system.[83] Gilbert Guillaume, president of the *CMS* committee, later stated that:

> 'Annuler la sentence litigieuse en censurant cette erreur eut été agir en un domaine dans lequel le Comité n'avait pas compétence. Mais ne pas relever la confusion opérée eut été encourager les quelques quarante tribunaux arbitraux constitués dans les affaires concernant l'Argentine à poursuivre dans une voie manifestement erronée. La solution de l'*obiter dictum* était la seule qui permettait d'orienter la jurisprudence future sur le fond tout en respectant la jurisprudence passée sur la compétence'.[84]

This option adopted by the *CMS ad hoc* committee[85] is in conformity with the original design of the ICSID annulment system to the extent that the *ad hoc* committee avoids annulling the arbitral award for errors of law and thus assuming the role of a court of appeals. From a practical standpoint, however, it will lead to a desperate situation. Since the original award is not annulled, the respondent State is now under the obligation to enforce the award in accordance with Art. 54 of the ICSID Convention. However, is it politically possible or realistic for the respondent State to enforce the award of an ICSID tribunal which was later declared to be grievously deficient by an ICSID *ad hoc* committee?[86] Even when the government of the respondent State is ready,

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[83] 'In view of the lack of an appeals procedure, the need for clarification of ambiguities or even misinterpretations could be regarded as an additional role of the ICSID annulment process'. I. Marboe 'ICSID Annulment Decisions: Three Generations Revisited' in C. Binder et al. (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP Oxford 2009) 200 (217).

[84] G. Guillaume 'Le recours en annulation dans le système CIRDI: De l'insuffisance de motifs dans les sentences du CIRDI' in E. Gaillard (ed.) *The Review of International Arbitral Awards* (Juris Huntington 2010) 349 (355).

[85] *See also* the *Vivendi II ad hoc* committee's decision, which explicitly put into question the independence of a member of the original tribunal but refused to annul the original award on the ground of Art. 52 (1) (d) of the ICSID Convention ('a serious departure from a fundamental rule of procedure'), considering, among others, 'the extraordinary length of the present case'. *CAA & Vivendi v. Argentina (Decision on the Argentine Republic's Request for Annulment of 10 August 2010)* ICSID Case No. ARB/97/3 paras 232, 238–42 [Ahmed S. El Kosheri (president), Jan Hendrik Dalhuisen, Andreas J. Jacovides].

[86] A. Crivellaro 'Actualité du contrôle des sentences arbitrales CIRDI' in C. Leben (ed.) *La procédure arbitrale relative aux investissements internationaux* (Anthemis Paris 2010) 221 (242).

which is not necessarily always the case, to fulfil its obligations under the ICSID Convention, how can it convince opposition parties and the general public that their State should accept an award held by an impartial organ to be utterly defective?[87]

bb) *De facto révision au fond* through Annulment

It goes without saying that the approach adopted by the *Sempra* and *Enron ad hoc* committees is hardly in conformity with the original design of the ICSID annulment system. One may of course disagree with the *Sempra* tribunal regarding the relationship between the state of necessity under customary international law and Art. 11 of the Argentina-US BIT. It is nonetheless extremely difficult to consider that the Sempra tribunal failed to apply the applicable law, i.e. Art. 11 of the BIT. It explicitly mentioned and interpreted the Article as setting forth the same conditions for operation as the state of necessity under customary international law. One may also criticize the Enron tribunal for arriving at the conclusions with only cursory examinations. However, it reached the conclusions explicitly on the basis of Art. 25 (1) (a)/(2) (b) of the ILC Articles as well as of the opinions of economic experts. These are arguably 'wrong' awards but the tribunals arrived at 'wrong' conclusions through an application of the applicable law.[88]

That said, it would be naïve to believe that the *Sempra* and *Enron ad hoc* committees were ignorant of this kind of criticism. We have to admit that their approach carries obvious advantages. It annuls defective arbitral awards so that the respondent State will not be required to enforce awards declared to be 'wrong'. Furthermore, it may enhance the 'quality' of awards and ensure a greater coherence of arbitral jurisprudence in a far more efficient manner than the *CMS ad hoc* committee's approach. The fact that several recent *ad hoc* committees, in addition to

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[87] As for *CMS v. Argentina*, Blue Ridge Investments, which is the purchaser and assignee of the award rendered in favor of CMS, asked a US court to enforce the original award. *Blue Ridge Investments v. Argentina (Petition for an Order Confirming Foreign Arbitral Award and Entering Judgment Thereon)* U.S.Dist.Ct.S.D.N.Y. (8 January 2009). Following a settlement reached by the parties, the court dismissed the request. *Blue Ridge Investments v. Argentina (Order)* U.S.Dist.Ct.S.D.N.Y. (31 August 2009). Relevant documents, but not the content of the settlement, are available at <http://ita.law.uvic.ca/> (9 June 2011).

[88] See the quotation from the *CMS ad hoc* committee's decision (note 65).

the *Sempra* and *Enron* committees, do not hesitate to annul original awards that they consider to be 'wrong' for an *excès de pouvoir*[89] or for a failure to state reasons[90] indicates that this 'creative use of the ICSID annulment procedure'[91] enjoys certain support.[92] It is therefore submitted that the *Sempra* and *Enron ad hoc* committees were perfectly aware and considered it justified that they would overstep the limit of the original design of the ICSID annulment system.

b. Embracing Imperfectness: Annulment, Not révision au fond

We consider that the *CMS ad hoc* committee's approach shall be avoided for the reasons indicated above. It will gravely hinder the settlement of the dispute by making it politically impossible for the government of the respondent State to comply with the arbitral award that has been severely criticized but stays valid.

It is also difficult to follow the *Sempra* and *Enron ad hoc* committees. Besides its dubious conformity with the original design of the ICSID annulment system mentioned above, their approach will hardly achieve their objectives, i.e. to maintain quality and coherence of arbitral jurisprudence. As a perspicacious expert stated as early as in 1987:

> 'le mode de désignation d'un Comité *ad hoc* […], malgré les précautions prises, ne naît pas du consensus des parties, ne représente pas

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[89] *Patrick Mitchell v. Democratic Republic of Congo* (note 38) paras 46–48; *Malaysian Historical Salvors v. Malaysia* (note 39) para. 80; *Helnan v. Egypt (Decision of the* ad hoc *Committee of 14 June 2010)* ICSID Case No. ARB/05/19 paras 46–57 [Stephen M. Schwebel (president), Bola Ajibola, Campbell McLachlan].

[90] *Patrick Mitchell v. Democratic Republic of Congo* (note 38) paras 38–41.

[91] See K. Yannaca-Small 'Annulment of ICSID Awards' in K. Yannaca-Small (ed.) *Arbitration under International Investment Agreements* (OUP Oxford 2010) 603 (622–23).

[92] Though not annulling original awards, several *ad hoc* committees stated that misinterpretation or misapplication of the applicable law would in certain situations amount to failure to apply the applicable law. See *Soufraki v. United Arab Emirates (Decision of 5 June 2007)* ICSID Case No. ARB/02/7 paras 86, 98–102 [Florentino P. Feliciano (president), Omar Nabulsi, Brigitte Stern]; *MCI v. Ecuador (Decision of 19 October 2009)* ICSID Case No. ARB/03/6 paras 43, 51–57. See also *MTD Equity Sdn. Bhd. v. Republic of Chile (Decision of 21 March 2007)* ICSID Case No. ARB/01/7 paras 67–71 [Gilbert Guillaume (president), James Crawford, Ordóñez Noriega].

> vraiment la communauté des Etats parties à la Convention de Washington comme le sont les juges à la Cour internationale de Justice; le caractère temporaire (une affaire) de cette désignation […] fragilise la jurisprudence qui pourrait s'établir'.[93]

To put it bluntly, '[w]hy should we think that a second panel of three arbitrators will yield a better decision than the first panel of three arbitrators?'.[94] The fact that the *Mitchell* and *MHS ad hoc* committees arrived at precisely opposite conclusions as regards the notion of 'investment' stipulated in Art. 25 of the ICSID Convention[95] clearly illustrates the inherent limit of the 'creative' approach proposed by various *ad hoc* committees mentioned in the previous section. Contrary to a court of appeals, the *ad hoc* committee does not enjoy a hierarchically higher status and is vested, neither *de jure* nor *de facto*, with the power 'to impose their own views'[96] upon the arbitral tribunal.[97]

It is therefore submitted that the *ad hoc* committee should stick to the original design of the ICSID annulment system. It is certainly full of shortcomings, but any 'creative' approach is most likely to cause more harms than good. If quality and coherence need to be pursued, we should be content with far less dramatic methods, such as the publication of award that ensures a critical legal debate.[98]

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[93] P. Kahn 'Le contrôle des sentences arbitrales rendues par un tribunal CIRDI' in Société française pour le droit international *La juridiction internationale permanente* (1st edn. Pedone Paris 1987) 363 (377).

[94] D.D. Caron 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal' (1992) 7 ICSID Rev./FILJ 21 (54).

[95] *Patrick Mitchell v. Democratic Republic of Congo* (note 38) paras 27–31; *Malaysian Historical Salvors v. Malaysia* (note 39) para. 80.

[96] W.B. Hamida 'Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control' (2007) 24 JIntlArb 287 (303).

[97] 'The Chairman of the arbitral tribunal in *Klöckner I* was a public international lawyer. The Chairman of the annulment committee in *Klöckner I* was a private international lawyer. So one might be tempted to say that every single sic was a message from the private international [lawyer] to the public international lawyer. You do not know what you are doing. Stay off my turf. This couldn't possibly be right'. J. Paulsson 'comment' in Ortino et al. (note 52) 69.

[98] I. Kalnina and D. Di Pietro 'The Scope of ICSID Review: Remarks on Selected Problematic Issues of ICSID Decisions' in Binder (note 83) 221 (241).

IV. Conclusion

The appearance and generalization of treaty-based investor-State arbitration made us understand the essentially public character of this mode of dispute settlement. It is apparent that the ICSID annulment system, designed originally for contract-based arbitrations, is today lagging behind this rapid evolution of treaty-based investor-State arbitration as it can satisfactorily ensure neither quality nor coherence of arbitral jurisprudence. However, the creation of an investment court of appeals has to overcome a number of political and institutional problems and is thus not expected to be realized in a foreseeable future.

Against this background, it is certainly understandable that several *ad hoc* committees endeavour to make most of their power for the purpose of maintaining the quality and coherence of arbitral jurisprudence. These attempts are however destined to fail, since *ad hoc* committees are not equipped with qualifications necessary to accomplish such a purpose. It is therefore submitted that *ad hoc* committees go back to the original design of the ICSID annulment system as clearly enounced by the *INA (Luccetti) ad hoc* committee:

> 'It is no part of the Committee's function […] to purport to substitute its own view for that arrived at by the Tribunal. The interpretation […] adopted by the Tribunal is clearly a tenable one. Clearly also there are other tenable interpretations. The Committee is not charged with the task of determining whether one interpretation is "better" than another'.[99]

Such an attitude may seem excessively modest for those advocating more 'creative' use of the ICSID annulment system, but we quite often have to be content with the least evil in a world full of imperfectness.

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[99] *Industria Nacional de Alimentos v. Peru (Decision on Annulment of 5 September 2007)* ICSID Case No. ARB/03/4 para. 112 [Hans Danelius (president), Franklin Berman, Andrea Giardina].

The Diversity of Applicable Law before International Tribunals as a Source of Forum Shopping and Fragmentation of International Law: An Assessment

*Paper submitted by Mathias Forteau**

Since the 1990s, problems arising from the so-called 'proliferation of international tribunals' have been dealt with extensively by international legal study.[1] They have been generally analysed within a systematic and

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[1] The ILC decided not to preempt the debate when it began to work on the topic, for wise reasons: see UN ILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc. A/CN.4/L.682 para. 13: 'The previous paragraph raises both institutional and substantive problems. The former have to do with the competence of various institutions applying international legal rules and their hierarchical relations *inter se*. The Commission decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves. The Commission has instead wished to focus on the sub-

holitistic approach (whether the international settlement *system* is threatened by the multiplication of tribunals). Under this heading many authors have assessed whether this proliferation entails some fragmentation of international law (and whether, as a result, it has to be deplored for such a reason) and what could be done to reach some coordination between international tribunals in contemporary international society.

The purpose of the present paper is not to explore yet again these ontological questionings – albeit crucial for the unity of the law of international society. Our intent is rather to try to turn the question on its head by starting from the more practical question of the applicable law before international tribunals[2] to see, first, whether there is nowadays a diversity of applicable laws before international tribunals and, second, whether this diversity could give rise to some forum shopping (or some 'functional approach' of judicial settlement of disputes) in the public international sphere in the sense that litigants would base their choice of an international tribunal, when more than one is available, on the specific nature of 'the international law' applicable before it. It may be the case indeed that making an application before the European Court of Human Rights rather than before an ICSID Tribunal or the ICJ entails legal consequences on the outcome of a given dispute due to the diverse nature of applicable laws before these courts and tribunals.

At first sight, this approach would perhaps seem rather surprising to international lawyers. Within the classical approach of international law, there was little room for forum shopping since there were too few international tribunals (at best, litigants could choose between *ad hoc* arbitration or the ICJ) and since international tribunals applied nearly the same rules, i.e. general international law and special international law applicable to the parties to the dispute. Applicable law did not change therefore depending on the tribunal used for settling the dispute. Variations of applicable law depended exclusively on the nature of the parties and of their bilateral obligations, not on the nature of the tribunal to which they decided to resort to.

In recent years, many changes have occurred however, especially when the situation is compared with the one existing at the time of the 1907

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stantive question – the splitting up of the law into highly specialised "boxes" that claim relative autonomy from each other and from the general law'.

[2] The definition of applicable law is a practical question which has to be resolved in each dispute through a concrete examination conducted according to the rules of judicial process.

Hague Conference.[3] Three evolutions have to be noticed in particular which could give rise to the development of some kind of forum shopping in the international sphere: (i) the specialisation of several tribunals; (ii) the 'fragmentation of international law' into distinct and autonomous fields (trade, investment, human rights, environment, etc.); and (iii) the opportunity sometimes open to resort to domestic or international courts (and then to domestic or international law) to settle international disputes, without any hierarchy between these fora, but only, at best, the obligation to make a definitive choice between them (see, in the context of investment arbitration, the well-known *fork in the road* provision[4]).

Due to these evolutions, we think it necessary to complete the traditional normative (the theory of sources of international law) and institutional (the law of international institutions and their powers) analysis of international law by some 'litigation approach' which seems more appropriate to understand the functioning of a legal society and a legal order which are today much more judicial-oriented than they have ever been.

If such a method is followed, two conclusions can be reached: applicable law before international tribunals proves to be relative in essence (I.) but in practice minor divergences appear between applicable laws before international tribunals (II.). It seems therefore that forum shopping and fragmentation are a fear rather than an actual risk in contemporary international society, at least when applicable law is at stake. We will try to demonstrate the validity of these two assertions in the present paper.

I. Applicable Law is Something Relative in Essence before International Tribunals

The main difference between public international law and private international law has been generally defined as follows:

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[3] See J. Crawford and N. Schrijver 'The Institution of Permanent Adjudicatory Bodies and Recourse to *Ad Hoc* Tribunals' in Y. Daudet (ed.) *Topicality of the 1907 Hague Conference, The Second Peace Conference* (Nijhoff Leiden 2008) 153–75.

[4] On which see for instance C. Santulli *Droit du contentieux international* (Montchrestien Paris 2005) 87–89; M. Sornarajah *The International Law on Foreign Investment* (3rd edn. CUP Cambridge 2010) 320–22.

> 'Whereas [public international law] governs the relations of States and other subjects of international law amongst themselves, [private international law] consists of the rules developed by States as part of their domestic law to resolve the problems which, in cases between private persons which involve a foreign element, arise over whether the court has jurisdiction and over the choice of the applicable law'.[5]

There would be then within international law only one applicable law (international law would be precisely the applicable law of international society and of its tribunals) while within private international law, there would be applicable laws between which a choice would have to be made using the rules of private international law (which would constitute therefore a kind of 'secondary' set of rules whose function would be to select primary rules applicable to the merits of the case). If this were true, then every international tribunal would apply the same rules ('the' international law) while domestic courts would apply (when facing an international legal question) various applicable laws, depending on the nature of each case. For the reasons set out below, this distinction however does not prove totally accurate. Applicable law *is not* necessarily the same before international tribunals.[6]

Admittedly, every student (at least in France) who attends his/her first lectures on international law is generally informed that there is something like 'the' international law and that Art. 38 of the ICJ Statute is like the 'open sesame' to it.[7] But Art. 38 of the Statute of the principal judicial organ of the United Nations cannot be considered as a universal, mandatory 'constitutional' provision defining once and for all the sources of international law as our poor junior student might think.

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[5] Sir R. Jennings and Sir A. Watts (eds) *Oppenheim's International Law*, vol. 1, *Peace* (9th edn. Longman London 1996) 5–6. See also M. Virally *La pensée juridique* (LGDJ Paris 1960) 201–02.

[6] Beyond the fact that when two States try to settle their dispute by peaceful means, the applicable law to the negotiations as defined by the Parties is not necessarily the same as the applicable law by an international tribunal (see on that point *Maritime Delimitation in the Black Sea [Romania v. Ukraine]* [2009] ICJ Rep. 78 para. 41).

[7] 'Scholars usually describe Art. 38, para. 1, as listing the "sources" of international law'; 'as has been noted, "[w]hen discussing the problem of the 'sources' of international law, most [international lawyers] begin their argument by referring to Article 38 of the ICJ's Statute"', A. Pellet 'Article 38' in A. Zimmermann et al. (eds) *The Statute of the International Court of Justice. A Commentary* (OUP Oxford 2006) 677 para. 74 (quoting Onuma).

Quite to the contrary, Art. 38's objective is mainly functional; it is oriented toward the question of applicable law *before the Court* and not the sources of international law in the abstract. Pierre-Marie Dupuy and Yann Kerbrat are perfectly right when they write on that point that:

> 'L'article 38 du Statut de la Cour internationale de Justice [...] est généralement cité […] pour présenter la typologie des sources du droit international. La constance avec laquelle l'article 38 est ainsi invoqué en relation avec les sources du droit international oblige à quelques rappels élémentaires.
>
> a) En premier lieu, on ne doit pas perdre de vue la nature éminemment *contractuelle*, c'est-à-dire *relative* de cette disposition, annexée à la Charte des Nations Unies. […]
>
> b) En second lieu, cette disposition présente en elle-même un caractère étroitement fonctionnel, ou, si l'on préfère, *opératoire*. Il s'agissait avant tout pour ses rédacteurs d'indiquer comment le juge international doit procéder pour déterminer les règles de droit applicables à un litige déterminé'.[8]

Applicable law under Art. 38 of the ICJ Statute is indeed in two ways relative: first, it can be different in each case, depending especially on the treaties entered into by the parties to the dispute; second and more importantly, the methodology set forth in Art. 38 to define the applicable law before the Court only applies to the Court. Nothing prevents States from establishing other tribunals for which Statute would provide another concept of applicable law. To take only one example, States could decide that a new Tribunal would have to apply jurisprudence as an autonomous source of law and not only as a subsidiary means for the determination of rules of law as is the case according to Art. 38.

This interpretation is fully corroborated by the Model Rules on Arbitral Procedure adopted in 1958 by the International Law Commission in which it incorporated the substance of Art. 38 subject to a fundamental limit which was expressed very clearly at the beginning of Art. 10 of the Model Rules: '1. *In the absence of any agreement between the parties concerning the law to be applied*, the tribunal shall be guided' [and then Art. 10 was a copy and paste of Art. 38 of the ICJ Statute][9];

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[8] P.-M. Dupuy and Y. Kerbrat *Droit international public* (Dalloz Paris 2010) 293–94.

[9] UN ILC 'Arbitral Procedure' [1958] vol II ILC Yearbook 1 para. 16.

then States can always adopt another system of applicable law than the system contemplated *for the Court* in Art. 38.

Art. 38 of the ICJ Statute is also relative in a third sense. Before the ICJ itself States can limit or expand applicable law within or beyond Art. 38 of the ICJ Statute.

(i) They can limit it by making some reservations to their acceptance of the jurisdiction of the Court, like the United States in the *Nicaragua* case as far as multilateral treaties were concerned. As the Court put it in 1986, the effect of the American reservation was 'to barring the applicability of the United Nations Charter and Organization of American States Charter as multilateral treaty law', even if this exclusion had 'no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply' – i.e. the Court could apply customary international law instead of multilateral treaty law.[10]

(ii) States can also extend applicable law before the ICJ beyond Art. 38 if the Parties to the dispute adopt an agreement to that purpose. It can be done by defining which particular international rules have to be applied beyond the general formula of Art. 38 of the ICJ Statute – in that case, it is in fact doing nothing more than describing one of the special rules applicable on the grounds of customary or treaty law as already contemplated by Art. 38 of the ICJ Statute.[11] Defining applicable law can also be done by adding to the sources of Art. 38 something that apparently it had not included such as *soft law*. In the *Case Concerning the Continental Shelf (Tunisia/Libya)*, the Court made the following argument to justify such an extension of applicable law:

'Under Article 1 of the Special Agreement, the Court is required first to state "the principles and rules of international law [which]

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[10] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Rep. 14 para. 56.

[11] See for instance Art. 6 of the Special Agreement in the *Frontier Dispute (Burkina Faso/Niger)* case: 'Les règles et principes du droit international qui s'appliquent au différend sont ceux énumérés au paragraphe 1er de l'article 38 du Statut de la Cour internationale de Justice, y compris le principe de l'intangibilité des frontières héritées de la colonisation et l'Accord du 28 mars 1987', *Frontier Dispute (Burkina Faso/Niger) (Special Agreement of 21 July 2010)* <http://www.icj-cij.org/docket/files/149/15986.pdf> (14 April 2011).

> may be applied for the delimitation of the area of the continental shelf" appertaining to each of the two countries respectively. The Court is specifically called upon, in rendering its decision, to take into account of the following three factors, expressly mentioned in the Special Agreement: *(a)* equitable principles; *(b)* the relevant circumstances which characterize the area; and *(c)* the new accepted trends in the Third United Nations Conference on the Law of the Sea. *While the Court is, of course, bound to have regard to all the legal sources specified in Article 38, paragraph 1, of the Statute of the Court in determining the relevant principles and rules applicable to the delimitation, it is also bound, in accordance with paragraph 1 (a), of that Article, to apply the provisions of the Special Agreement.* [...] The Court is thus authorized by the Special Agreement to take into account "new accepted trends"' which can be considered, as the term "trends" suggests, as having reached an advanced stage of the process of elaboration'".[12]

For the reasons set above, it proves to be correct then to state that in essence, international tribunals are never the judges of 'the' international law; they are only the judges of 'an' international law, the one applicable to the dispute as defined according to the particular concept of applicable law encapsulated in the statute of each tribunal and by the parties.

The relative nature of applicable law explains why within international judicial settlement of disputes, as within private international law, the question of 'applicable law' is a crucial phase of the judicial process (which could give rise before some tribunals to an annulment proceeding if the Tribunal has not applied the relevant applicable law[13]). As applicable law is (potentially) never the same, it has to be established on a case-by-case basis.[14] This is also the reason why, frequently, and (it has

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[12] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep. 18 paras 23–24 (italics added).

[13] See for instance ICSID *ad hoc* Committee *Sempra Energy International v. Argentine Republic (Decision on Annulment of 29 June 2010)* ICSID Case No. ARB/02/16 paras 160–65 and paras 173 et seq.; or ICSID *ad hoc* Committee *Azurix Corp. v. Argentine Republic (Decision on the Application for Annulment of 1 September 2009)* ICSID Case No. ARB/01/12 paras 45–48.

[14] See G. Ripert 'Les règles du droit civil applicables aux rapports internationaux' (1933) 44 RdC 565 (648): 'Devant les juridictions internes, le demandeur n'a pas à établir les règles de droit applicables. Le juge doit connaître la loi, et s'il est bon en fait de lui en rappeler l'existence, ou même de la lui expliquer, il

to be underscored) more and more often, even before a 'general' court such as the ICJ, the stage devoted to the identification of applicable law is formalised in the judgment as an autonomous and preliminary step. This formalisation is *quasi* systematic in investment arbitration, for obvious reasons, or before the ECtHR. It can also occur before the ICJ (see the *Genocide* case in 2007, point IV of the Judgment, entitled 'The Applicable Law'[15], or the *Romania v. Ukraine* case in 2009, point 3.3. of the Judgment, entitled 'Applicable Law'[16]).

The fact that applicable law never exists as such, '*en soi*', is ultimately confirmed by the inclusion of provisions (which are drafted frequently differently) in the Statutes of many international tribunals defining the particular international law applicable before those tribunals.

International practice is very diversified as regards the formulation and the content of these provisions. It is neither feasible nor useful to present exhaustively all the provisions in force today on that matter, but some global overview can easily be done which shows how diverse judicial practice is.

To begin with, before international tribunals provisions defining applicable law do not always confine themselves to refer to *international* rules or sources. Domestic law can also be a part of or the only applicable law before international tribunals. Four scenarios can be isolated in contemporary practice:

(i) the 'alternative' scenario, within which the provision bestows a choice on the parties between the application of any (potentially domestic) law chosen by themselves or, if no such choice has been made, the application of international law[17];

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n'y a pas sur ce point d'exigence légale. Devant le juge international, la question est plus complexe. Il n'y a pas, en effet, de règle de droit fixée par l'autorité supérieure dont le juge dépende. Il faudra donc établir l'existence de règles qui donnent compétence au juge et de règles que le juge doit appliquer'.

[15] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)* [2007] ICJ Rep. 43, point IV, paras 142–201.

[16] *Maritime Delimitation in the Black Sea (Judgment)* [2009] ICJ Rep. 61 paras 31–42, point 3.3. See also in the case *Ahmadou Siado Diallo (Republic of Guinea v. Democratic Republic of Congo) (Judgment of 30 November 2010)* ICJ Doc. 2010 General List No. 103 paras 63 et seq., point II.B.2 'Consideration of the facts in the light of the applicable international law'.

[17] See Art. 33 (1) of the PCA Optional Rules for Arbitrating Disputes between Two States (effective of 20 October 1992) <http://www.pca-

(ii) the 'accumulation' scenario, within which national and international law jointly form part of applicable law and therefore have to be applied together, by the same tribunal,[18] subject possibly to some strict conditions.[19] In other cases, some transnational law is designated as applicable law together with domestic law[20] or together with domestic and international law[21];

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cpa.org/upload/files/2STATENG.pdf> (16 April 2011) or PCA Optional Rules for Arbitration Involving International Organizations and States (effective of 1 July 1996) <http://www.pca-cpa.org/upload/files/IGO2ENG.pdf> (16 April 2011).

[18] See the well-known Art. 42 (1), second sentence, of the ICSID Convention.

[19] See Art. 21 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90: the Court may apply 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards'.

[20] See Art. 14.1 of the Procedural Rules on Conciliation and Arbitration of Contracts Financed by the European Development Fund (adopted by Decision No. 3/90 of the ACP-EC Council of Ministers [29 March 1990] OJ L 382): 'The tribunal shall apply the law of the State of the contracting authority to the matters in dispute, unless otherwise specified in the contract, in which case the tribunal shall apply the law so specified. In all cases, the tribunal shall decide in accordance with the terms of the contract, and may take into account the usages of the trade applicable to the transaction'.

[21] See Art. 33 (1) of the Iran-US Claims Tribunal's Rules of Procedure ([3 May 1983] 2 Iran-US CTR 405), which states that applicable law is made of 'such choice of law rules and principles of commercial and international law [...] taking into account relevant usages of the trade, contract provisions and changed circumstances', or the Art. 33 of the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (effective 6 July 1993) <http://www.pca-cpa.org/upload/files/1STATENG.pdf> (16 April 2011) or PCA Optional Rules for Arbitration between International Organizations and Private Parties (effective of 1 July 1996) <http://www.pca-cpa.org/upload/files/IGO1ENG.pdf> (16 April 2011).

(iii) the 'distribution' scenario, within which applicable law depends on the nature of the cause of action submitted to the international tribunal[22];

(iv) finally, the 'uncertainty' scenario, within which, though the inclusion of a specific provision on applicable law has been foreseen, the enigmatic nature of the tribunal and of the dispute – are they international or domestic? – and the ambiguous wording of the provision hinders the tribunal and the parties from easily determining if domestic or international law has to be applied. In such a case, the tribunal has to settle the question on the basis of objective clues such as the skills of the members of the tribunal and of the counsels or the nature of the dispute – is it domestic or international in essence?. This was the very interesting (and unorthodox) approach followed by the Arbitral Tribunal recently in the *Abyei Arbitration*.[23]

Even when applicable law is only constituted by international law, the relevant provisions can be construed differently. The provision can be more or less precise, the sources to which it is referred to can be different in nature, or some normative hierarchy between the elements of applicable law can be established. There are many differences for instance, at least at first sight[24] between (to take only those examples) Art. 38 of the ICJ Statute, Art. 293 of UNCLOS, Art. 21 of the Rome Statute of the ICC, Art. 20 of the Protocol of the Court of Justice of the African

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[22] See Art. 340 of the Treaty on the Functioning of the European Union, which distinguishes two causes of action in matters of EU's liability and two different sets of applicable laws: 'The contractual liability of the Union shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'.

[23] *The Government of Sudan v. The Sudan People's Liberation Movement/Army (Abyei Arbitration) (Final Award)* PCA (22 July 2009) paras 425–35. See also in the same vein the award in the *Norwegian Shipowners' Claims (Norway v. United States of America)* (1922) 1 RIAA 307 (330–33).

[24] For a less fragmented approach to these provisions see below p. 429 et seq.

Union[25] or Art. 21 of the Protocol on the Southern African Development Community (SADC) Tribunal.[26]

Art. 38 (1) of the ICJ Statute reads as follows:

> 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

Art. 293 (1) of UNCLOS states more briefly but also more selectively that '[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention'.

According to the more elaborate Art. 21 of the Rome Statute:

> '1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

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[25] Protocol of the Court of Justice of the African Union (adopted 11 July 2003, entered into force 10 February 2008) (2005) 13 African Journal of International and Comparative Law 115.

[26] Protocol on the SADC Tribunal and the Rules of Procedure Thereof <http://www.sadc.int/index/browse/page/163#rulesofprocedure> (16 April 2011).

> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.

For its part, Art. 20 (1) of the Protocol of the Court of Justice of the African Union mixes the general model of Art. 38 of the ICJ Statute with the peculiarities of regional law:

> 'The Court, whose function is to decide in accordance with international law such disputes, as are submitted to it, shall have regard to:
>
> (a) The Act;
>
> (b) International treaties whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (c) International custom, as evidence of a general practice accepted as law;
>
> (d) The general principles of law recognized universally or by African States;
>
> (e) Subject to Article 37 of this Protocol, judicial decisions and the writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the Union as subsidiary means for the determination of the rules of law'.

Finally, and as a last example of the diversity of contemporary practice, Art. 21 of the Protocol on the Southern African Development Community (SADC) Tribunal asks it to:

> 'a) apply the Treaty, this Protocol and other Protocols that form part of the Treaty, all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols; and
>
> b) develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States'.

The essential relative nature of applicable law before international tribunals is confirmed by these varied wordings. But are these varied formulas really significant in practice?

II. There are Only a Few Divergences in Practice between Applicable Laws before International Tribunals

The fact that applicable law provisions differ from each other in wording does not necessarily imply that in substance they require different rules to be applied to different disputes depending on the Tribunal to which the Parties have submitted their dispute (1.). This last assertion admittedly apparently contradicts the fact that nowadays, international tribunals are frequently specialized and that, therefore, they are the judge of 'their' convention rather international law judges. The ECtHR is above all the judge of the European Convention on Human Rights, the Dispute Settlement Body the judge of the WTO Agreements and ICSID Tribunals the judges of investment treaties. But it does not mean that the conventions which specialized tribunals have to assess are the sole area of applicable law before them. It is of the uppermost importance to make a distinction on that point between the competence of international tribunals, which is indeed more and more specialized, and applicable law before them, which is for its part never restricted to specialized rules (2.).

1. In Substance, Applicable Law Provisions Seldom if Ever Depart from Each Other

The fact that applicable law provisions are worded differently, as it is clear from the examples quoted above[27], does not mean that they embody radically different concepts of international law which would result in its fragmentation when applied before international tribunals. In substance, applicable law provisions generally do not depart from the general framework set up in Art. 38 of the PCIJ Statute in 1920 which became Art. 38 of the ICJ Statute in 1945. This is true at least in three respects.

To begin with, despite their different wording, it appears that provisions of applicable law generally have recourse to the same type of sources. Even when one of them is not expressly mentioned in the provision, it does not imply that it is not applicable and that therefore there would be a discrepancy between provisions expressly resorting to that source and another one which does not expressly mention it. Substan-

[27] See p. 419 et seq.

tive applicable law is something more subtle than its mere textual definition in applicable law provisions.

It would be a mistake to consider on the basis of an *a contrario* argument that Art. 38 of the ICJ Statute for instance does not encompass decisions of international organizations for the sole reason that it does not mention it contrary to Art. 21 of the Protocol on the SADC Tribunal which includes unilateral acts of the SADC in applicable law.[28] As the case-law of the Court very clearly shows, decisions of international organizations are part of applicable law before it.[29] In reality, it is always possible to consider, even if the argument is somehow artificial, that 'resolutions of organs of international organizations are rooted in the constituent instrument of the organization from which they draw their binding force'.[30] This way of reasoning is in line with the one followed by the Court in 1982 as regards the inclusion of *soft law* in applicable law on the basis of the agreed decision of the parties.[31]

The same can be said as far as regional rules are concerned. Again, Art. 38 of the ICJ Statute does not refer to regional treaties, nor to regional custom or general principles of law. By contrast, Art. 20 (1) of the Protocol of the Court of Justice of the African Union includes in applicable law '[t]he general principles of law recognized universally *or by African States*'. But again, the non-inclusion of this last category as a source of international law in the ICJ Statute did not prevent it from recognizing and applying regional sources of law, first of all in the *Asylum Case* where the ICJ had recourse to the concept of 'regional or local custom'.[32] As far as regional law can be assimilated to special law, it matches the definition of applicable law set forth in Art. 38 of the Statute.

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[28] See also Art. 34 of the Olivos Protocol for the Settlement of Disputes in MERCOSUR (signed 18 February 2002, entered into force 1 January 2004) (2003) 42 ILM 2, defining the applicable law before the Mercosur Tribunal.

[29] See A. Pellet 'Article 38' in A. Zimmermann et al. (eds) *The Statute of the International Court of Justice. A Commentary* (OUP Oxford 2006) 677 paras 96–101.

[30] Ibid. para. 96.

[31] See above p. 419 et seq.

[32] A*sylum Case (Colombia/Peru) (Judgement)* [1950] ICJ Rep. 266 (276); see also *Rights of Nationals of the United States of America in Morocco (France v. United States of America)* [1952] ICJ Rep. 176 (200).

The status of jurisprudence is a last example of the strong convergence of applicable law provisions despite their different wording. Two main classes of applicable law provisions can be opposed in that regard: on the one hand, provisions which make no specific reference to judicial decisions (Art. 293 (1) of UNCLOS or Art. 42 of the ICSID Convention) or which only treat them as 'subsidiary means for the determination of rules of law' (Art. 38 of the ICJ Statute); on the other hand, provisions which give some higher (albeit not precisely defined) legal status to judicial decisions as Art. 21 (2) of the Rome Statute ('The Court may apply principles and rules of law as interpreted in its previous decisions'), Art. 21 of the Protocol on the SADC Tribunal (the Tribunal shall 'develop its own Community jurisprudence') or Art. 20 (3) of the 2002 Statute of the Special Court for Sierra Leone ('The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone'[33]).

But these various formulas do not involve substantive differences, for two reasons.

First, international tribunals before which judicial decisions are not considered as autonomous sources of applicable law have not refrained from setting them on a nearly equal footing with 'classical' sources of international law – at least to give them more importance than the one they would deserve on the sole basis of the text of applicable law provisions. This obviously emerges nowadays from ICSID awards or from WTO Dispute Settlement Body case-law.[34] This has also been recognized by the Arbitral Award in the *Barbados/Trinidad Arbitration* where the Tribunal pointed out that the 'apparently simple and imprecise formula' of Art. 293 of UNCLOS

> 'allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have

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[33] Statute of the Special Court for Sierra Leone (16 January 2002) annexed to the Agreement on the Establishment of a Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137.

[34] See P Daillier, M. Forteau and A. Pellet *Droit international public* (LGDJ Paris 2009) 438–39.

made to the understanding and interpretation of this body of legal rules'.[35]

Second, and conversely, international tribunals which have received the power to take into account judicial decisions as an autonomous source of law have considered it wiser not to give them too much importance and therefore to minimize the reference made to them in their applicable law provision. In the *Norman* case especially, the Special Court for Sierra Leone decided that the wording of Art. 20 (3) of its Statute (the Court 'shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda') does not imply that it would be legally bound by the decisions of ICTY and ICTR.[36]

The legal effect of variations in the wording of applicable law provisions must not be overestimated either as regards the mandatory hierarchy established between sources of international law in some applicable law provisions. It has been recalled previously that, contrary to Art. 38 of the ICJ Statute which set on an equal footing all the sources listed, according to Art. 293 of UNCLOS or Art. 21 of the Rome Statute some rules take precedence over others in cases of conflict. But this kind of provision does not convey any distinctive concept of applicable law since *in any case*, even if the applicable provision does not include any rule of conflict, the general (and even 'structural') rule of international law *lex specialis derogat generali* applies, even if it has not been expressly foreseen – the ICJ recently even allocated (from our point of view, excessively) to this principle a very large and absolute effect in the *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*.[37]

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[35] *Barbados and the Republic of Trinidad and Tobago (Award)* PCA (11 April 2006) (2006) 45 ILM 800 para. 222.

[36] *Prosecutor v. Norman (Decision on Interlocutory Appeals against Trail Chamber Decision Refusing to Subpoena the President of Sierra Leone)* SCSL-2004-14-T (11 September 2006) paras 12–13.

[37] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (Judgment of 19 July 2009)* ICJ Doc. 2009 General List No. 133 paras 35–36: 'Indeed, even if categorization as an "international river" would be legally relevant in respect of navigation, in that it would entail the application of rules of customary international law to that question, such rules could only be operative, at the very most, in the absence of any treaty provisions that had the effect of excluding them, in particular because those provisions were intended to define completely the régime applicable to navigation, by the riparian States

Moreover, and as will be explained later, it cannot be avoided to give precedence to the rules on which the international tribunal has jurisdiction as opposed to the rules which only form part of the applicable law. The difference between the two sets of rules explains the solution mentioned in Art. 293 of UNCLOS as well as the supremacy granted by the Court of Justice of the European Union to its constituent treaties over any other rule of law.[38]

The last element supporting the relative function of applicable law provisions follows from the fact that in many cases, there is no such provision in the rules governing the task of the tribunal and that this *lacuna* has never proved problematic. International tribunals can always reform applicable law using general directives provided by secondary rules of international law (especially the law of treaties) which are in essence always (or automatically) applicable before any international tribunal.[39] The ICJ notably pointed out in the *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* that '[e]ven if there had been no reference [in the provision on applicable law] to the "rules and principles of international law", the Court would in any event have been entitled to apply the general rules of international treaty interpretation for the purposes of interpreting the 1890 Treaty'.[40]

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on a specific river or a section of it. That is precisely the case in this instance. The 1858 Treaty of Limits completely defines the rules applicable to the section of the San Juan river that is in dispute in respect of navigation. Interpreted in the light of the other treaty provisions in force between the Parties, and in accordance with the arbitral or judicial decisions rendered on it, that Treaty is sufficient to settle the question of the extent of Costa Rica's right of free navigation which is now before the Court. Consequently, the Court has no need to consider whether, if these provisions did not exist, Costa Rica could nevertheless have relied for this purpose on rules derived from international, universal or regional custom'.

[38] For instance the UN Charter: see the *Kadi* cases, especially the Judgment of the European Court of 28 September 2008: Joined Cases C–402/05 P and C–415/05 P *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351. See below p. 435 et seq.

[39] C. Santulli *Droit du contentieux international* (Montchrestien Paris 2005) 332–33; C. Amerasinghe *Jurisdiction of International Tribunals* (Kluwer The Hague 2003) Chapter 10.

[40] *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep. 1045 para. 93. See also, as far as the secondary rules of State responsibility are concerned, Stockholm Chamber of Commerce, *Renta 4 S.V.S.A. v. Russian Federation*

International tribunals could resort in particular to two major guidelines: the principle[41] according to which international tribunals apply international law; and the general rule codified in Art. 31(3)(c) of the Vienna Convention on the Law of Treaties which states that any treaty – but this is equally true for any rule of international law – has to be interpreted taking into account 'any relevant rules of international law applicable in the relations between the parties'. This standard is currently applied by the ECtHR whose Statute and Rules of Procedure contain no provision on applicable law and it constitute a kind of applicable law provision by default.[42]

To conclude, it appears that despite the differences in the wording of applicable law provisions (when they exist), these differences do not entail major discrepancies in substance. Since international tribunals can always open the spectrum of applicable law by basing some sources on others (decisions of international organizations on constituent treaties,

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(Award on Preliminary Objections) SCC Case No. 24/2007 (20 March 2009) paras 19–67.

41 Which is only a principle, which could therefore be ruled out (see on the possibility for an international tribunal to apply domestic law M. Forteau 'Le juge CIRDI envisagé du point de vue de son office: juge interne, juge international, ou l'un et l'autre *à la fois*?' in *Le procès international: Liber amicorum Jean-Pierre Cot* (Bruylant Bruxelles 2009) 95–129.

42 See for instance ECtHR *Behrami v. France (Decision as to the Admissibility of Application)* App. No. 71412/01 (2 May 2007) para. 122: the Court 'recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969; *Al-Adsani v. the United Kingdom* [GC] No. 35763/97, § 55, ECHR 2001-XI; and the above-cited decision of *Banković and Others*, at § 57)'. See also Art. 3 (2) of the Rules and Procedures Governing the Settlement of Disputes annexed to WTO Agreements which could be analysed as an applicable provision which limits itself to a *renvoi* to Art. 31 of the Vienna Convention on the Law of Treaties ('The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law [...]').

for instance) and by using the general rules of interpretation, especially the principle of systemic interpretation, the wording of applicable law provisions could hardly be a real source of fragmentation of applicable international law. And even if the intent of its authors were to lock the tribunal into a limited concept of applicable law, it could be predicted that 'the judges will interpret the text, at least partially, so as to recover the powers inherent in all courts, of which the drafters of the Statute clearly wanted to deprive them'.[43]

2. Before International Tribunals, only Competence, not Applicable Law, is Fragmented

How to conciliate however the idea according to which applicable law would be nearly the same before any international tribunal with the indisputable fact that international tribunals are more and more often specialized in contemporary international society? Could unity coexist with fragmentation? The answer is 'no' provided that applicable law and competence (jurisdiction) are clearly distinguished.

First of all, it has to be noticed that the alleged fragmentation of international law ('the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other and from the general law'[44]) is not really a normative but rather an institutional phenomenon. It affects the domain within which international tribunals exercise their judicial powers, rather than the rules governing the relationship between subjects of law. There could be no such a thing as an *autonomous* international law of human rights (or law of the European Union) without the existence of a specific judge totally devoted to the enforcement of that law. To say it differently, in the pure normative sphere, it makes no sense to consider that a set of rules is autonomous. It is only through enforcement that it can result in such an effect.

To understand that first idea, a second, decisive element has to be introduced. To summarize the nature of fragmentation of international law, it is generally said that specialized tribunals 'apply' specialized rules: the ECtHR 'applies' the European Convention on Human Rights, while

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[43] A. Pellet 'Applicable Law' in A. Cassese et al. (eds) *The Rome Statute of the International Criminal Court: A Commentary* (OUP Oxford 2002) 1051 (1053).

[44] See above (note 1).

the Court of Justice of the European Union 'applies' the law of the EU, the international criminal tribunals the international criminal law, the Dispute Settlement Body international trade law or ICSID Tribunals the law of foreign investments. Each of these tribunals would therefore exacerbate the fragmentation of international law by focusing on specific rules and by adopting different or at the very worst contradictory answers to the same situations due to the 'application' of different (specialized) rules.

However this is not an accurate description of the legal situation. The problem here derives from the ambivalence of the word 'application' or 'apply', which can mean two different things.

In the general meaning of the word, two different set of rules are 'applicable' before international tribunals depending on the nature of *who* applies them:

– the rules that the applicant and/or the defendant have to apply (i.e. their obligations): as regards these rules, any international tribunal does not have to apply them in the strict meaning of the word but it has 'only' to check the correct application of these rules *by the parties involved*; these rules form part therefore, not of the 'applicable law', but of the jurisdiction *ratione materiae* of the international tribunal (it has been given the competence to settle any dispute on the application of these rules);
– the second category of rules, which only corresponds to the notion of 'applicable law', includes all the rules that the Tribunal itself can use ('apply') to settle the dispute over which it has jurisdiction.[45]

Of course, the first rules are included in the second ones. But the opposite is not true. If the ECtHR, whose competence is limited to the European Convention on Human Rights, can apply any rule of international law, including (of course) the Convention itself, to decide if the Convention has been violated by the defendant, the opposite is not

[45] In some cases, due to the unorthodox wording of the relevant provisions, the distinction can be more elaborate and of a triple nature. In the *Eurotunnel* case, the Tribunal pedagogically made a distinction between the 'jurisdiction of the Tribunal', the 'source of the Parties' rights and obligations' and the 'Applicable law' (see *Eurotunnel [The Channel Tunnel Group Ltd. et al v. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland et al] [Partial Award]* PCA [30 January 2007] paras 97–99). See also UN ILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (note 1) para. 45.

true: it cannot extend its jurisdiction beyond the Convention by invoking the applicable law. If it could do that, any international tribunal could extend its jurisdiction over the entire international law on the basis of Art. 31(3)(c) of the Vienna Convention[46] which would be heresy.

Unfortunately, the confusion between the two set of rules and the two legal questions sometimes occurred. In the *Guyana/Suriname* Arbitration the Arbitral Tribunal decided that it had jurisdiction not only on the UNCLOS, but also on the 'alleged violations of the UN Charter and general international law' on the basis of Art. 293 of UNCLOS defining the applicable law.[47] This was a misconception of the jurisdiction of the Tribunal which was limited to the UNCLOS by Art. 286 of that Convention. This was moreover an absurd decision: since Art. 293 covers international law as a whole, its interpretation as a provision on jurisdiction, not on applicable law, would mean that every Annex VII Tribunal, or the ICJ, or the ITLOS, would be by the sole effect of Art. 293 of UNCLOS 'all-competent' international tribunals, which they are clearly not.

On the contrary, the Inter-American Court of Human Rights rightly refused in the *Las Palmeras* case in 2000 to admit its jurisdiction on the 1949 Geneva Conventions (contrary to what the Commission requested it to do on the basis of the combined applicability in cases of armed conflict of the law of human rights and the law applicable to armed conflicts) by pointing out that the American Convention 'has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions'.[48]

The distinction between applicable law and jurisdiction does not prohibit, of course, the use of rules of applicable law in order to define the extent of the jurisdiction of the tribunal. To assess for instance whether 'the Treaty' establishing the Southern African Development Community deals with human rights and whether therefore human rights claims are included in the jurisdiction of the SADC Tribunal, the sources of law defined in the applicable law provision (Art. 21) can be

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[46] See above p. 429 et seq.

[47] *Guyana v. Suriname (Award)* PCA (17 September 2007) paras 402–06.

[48] *Case of Las Palmeras v. Colombia (Preliminary Objections)* IACtHR Series C No. 67 (4 February 2000) para. 33.

resorted to to interpret the meaning of Art. 14 ('Basis of Jurisdiction').[49] But the applicable law provision cannot be used *instead* of the jurisdictional provision.[50]

The fact that the rules on which the Tribunal has jurisdiction are not the same as the rules forming part of the applicable law by the Tribunal entails legal consequences.

First, it gives to the first set of rules a specific status which explains why they always supersede any other applicable rules. When Art. 293 of UNCLOS states that '[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law *not incompatible with this Convention*' or when the CJEU gives Community Law the precedence over international law and even the UN Charter and the decisions of the UN Security Council, the reason is not to be found primarily in the *lex specialis* principle or the dualist doctrine, but in the legal impossibility for the relevant international courts not to give priority to the rules on which they have jurisdiction, i.e. the rules which they have to decide if they have been correctly en-

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[49] See *Mike Campbell (Pvt) Ltd. et al. v. the Republic of Zimbabwe (Judgment of 28 November 2008)* SADC Tribunal Case No. 2/2007 point IV. See also the approach followed by the Inter-American Court of Human Rights in the case *González et al. ("Cotton Field") v. Mexico* (Judgment) IACtHR Series C No. 205 (16 November 2009) paras 31–81.

[50] See the telling example of the *Oil Platforms* case before the ICJ: the Court decided in 1996 that it had not jurisdiction over the question of the use of force in this case since the bilateral treaty forming the basis of its jurisdiction was only a commercial treaty and since its Article 1 could not be interpreted as prohibiting the use of force (see *Oil Platforms [Islamic Republic of Iran v. United States of America] [Preliminary Objections]* [1996] ICJ Rep. 803 paras 24–31). But it decided in 2003 that to assess, on the merits, if the commercial obligations of the treaty have been violated, it could interpret them taking into account, 'under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, [...] "any relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty' (*Oil Platforms [Islamic Republic of Iran v. United States of America]* [2003] ICJ Rep. 161 para. 41).

forced. This is not a question here of normative hierarchy, it is the product of the gap existing between the content of the jurisdiction (the UNCLOS, Community Law, *only*) and the content of the applicable law (which is always larger than the rules on which the tribunal has jurisdiction but which cannot by itself extend the Tribunal's competence *ratione materiae*[51]).

Second, and as a result, there is another fundamental difference between the rules pertaining to applicable law and the rules pertaining to jurisdiction. Since the former rules are the only ones which could be judicially enforced (i.e. their violation could be sanctioned by the tribunal) and since, by contrast, the rules of applicable law are only used to incidental ends (essentially to interpret the rules on which the Tribunal has jurisdiction), then the content of applicable law can be fixed very liberally. If international tribunals only have jurisdiction over 'hard rules' (that is to say, obligations in force), there is nothing which precludes them to include in the applicable law more soft laws according to an open-minded concept of applicable law and of the relevant 'context' used to interpret the commitments of the parties.

Actually it seems that nowadays, the potential divergence between applicable laws before international tribunals does not result from the *specialisation* of international law (since in any case, it is always possible to include in applicable law the international law as a whole[52]) but rather from the degree of *openness* of the applicable law between the parties that international tribunals are ready to accept. The core of the question on this point is mainly to determine what Art. 31(3)(c) of the VCLT means when it refers to 'any relevant rules of international law applicable in the relations between the parties'. The two following examples

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[51] Such a gap can result in difficult issues: see for instance the case before an ICSID Tribunal where the defendant (the State) invokes as a circumstance precluding the wrongfulness of its act within the law of foreign investment the adoption of a legitimate countermeasure adopted under *GATT Law* against the *State of nationality* of the applicant before ICSID. In such a case, the Tribunal does not have jurisdiction to assess whether such a countermeasure could be validly invoked and then it left the dispute submitted to it partially unresolved (see ICSID [NAFTA] *Archer Daniels Midland Co. v. United Mexican States [Award of 21 November 2007]* ICSID Case No. ARB(AF)/04/05 paras 128–33; *contra* ICSID [NAFTA] *Corn Products v. United Mexican States [Decision on Responsibility of 15 January 2008]* ICSID Case No. ARB (AF)/04/1 paras 180–92).

[52] See above p. 429 et seq.

clearly show the nature of the legal difficulty and the varied possible interpretations which can be delivered from Art. 31(3)(c) of the VCLT.

According to the WTO Dispute Settlement Body, only the obligations entered into by, at least all the parties to the dispute, perhaps also all the members of the WTO, could be included in applicable law under this provision:

> '[...] Article 31(3)(c) indicates that it is only those rules of international law which are "applicable in the relations between the parties" that are to be taken into account in interpreting a treaty. This limitation gives rise to the question of what is meant by the term 'the parties'. [...] This understanding of the term "the parties" leads logically to the view that the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members. [...]
>
> Before applying our interpretation of Article 31(3)(c) to the present case, it is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account'.[53]

According to the ECtHR on the other hand, Art. 31(3)(c) of the VCLT would justify including in applicable law *soft law* as well as international obligations which the defendant State *has not* entered into. In the *Demir* case especially the ECtHR went on to say, when recounting its practice of interpreting Convention provisions in the light of other international texts and instruments, that:

> 'In a number of judgments the Court has used, for the purpose of interpreting the Convention, intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly [...]. These methods of interpretation have also led the Court to support its reasoning by reference to norms emanating

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[53] See WTO *EC – Approval and Marketing of Biotech Products (Panel Report of 29 September 2006)* WT/DS291/R paras 7.68, 7.70 and 7.72 for the quotations and broadly paras 7.49–7.96.

> from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies'

and that:

> 'when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty. [...] The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State'.[54]

This is surely fragmentation since these two international tribunals do not share the same concept of 'applicable law'. But it is surely not the 'classical' fragmentation of international law (the one described in the International Law Commission's Report on the topic and discussed intensively since the 1990s). This 'new fragmentation' is too subtle to encourage litigants to avail of forum shopping, it does not really affect the unity of international law and it has nothing to do with the debate on the specialisation of international law. This 'fragmentation' rather gives birth to new questionings concerning above all the limits of contemporary international *law* and of the normative powers of international tribunals.

These new questionings remain to be fully explored. This is another good reason to substitute the classical approaches of fragmentation of international law with a more 'judicial-and-pragmatic-oriented' one. The present paper was intended to show how fruitful this approach could be.

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[54] *Demir v. Turkey* (ECtHR) Reports 1998-VI 2640 paras 74–75 and paras 76 and 78.