

Revising the System of Review for Investment Awards

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1. Introduction

The last few years have seen an increasing number of annulment proceedings. Relatively little use has been made of other post award remedies such as supplementation & rectification, revision and interpretation. These remedies are not nearly as spectacular as annulment. They are granted, if possible, by the tribunal that rendered the original award.

A further increase in the number of annulment proceedings is likely. In part this is a consequence of the increase in the number of awards. In addition, Argentina's policy appears to be to challenge every award rendered against it.

Recently there have also been problems with compliance. There is an increasingly hostile and defiant attitude towards investment arbitration in Latin America especially in Argentina.

Inconsistent decisions by investment tribunals on a number of issues have also raised some concern. This phenomenon has led to a number of suggestions.¹

Many of the alternatives to the current system of review for investment arbitration would require changes to existing treaties, notably of the ICSID Convention. This may be unrealistic, at any rate in the short run.² But a discussion that goes beyond the Convention as it stands at present is of course legitimate.

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¹ For a survey see August Reinisch, *The Future of Investment Arbitration*, in: *International Investment Law for the 21st Century* (Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich eds. 2009) 894, 905 *et seq.*

² See Article 66 of the ICSID Convention requiring approval by all Contracting States of any amendment.

2. Changing the Scope of Review

a) Widening the Scope for Review

There has been some discussion about widening the possibility of review of awards beyond the narrow grounds for annulment listed in Article 52 of ICSID Convention. In particular, there are plans for a full appeals mechanism.³ Plans for an ICSID appeals facility are currently shelved as “premature”.

An appeals mechanism would have two potential objectives:

- a) To ensure the correctness of a particular decision;
- b) To ensure the consistency of decisions, *i.e.* the overall coherence of the system.

The correctness of decisions is an elusive goal that may take much time and effort as is evidenced by domestic systems of appeal. In arbitration finality is typically given precedence over correctness in the interest of economy and an expeditious settlement. A basic policy choice must be made in this respect. An added endeavour for correctness will inevitably affect finality.

An appeals system that serves the goal of correctness also presupposes a higher degree of wisdom (or at least experience) in the appellate body. An appeals mechanism that is based simply on a review by another panel of three arbitrators is unlikely to carry the authority and legitimacy for such a far-reaching review.

On the basis of the Convention, it is extremely difficult to introduce an appeals mechanism into the ICSID system. Article 53 specifically provides that: “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”

An *inter se* modification of the Convention by some Parties is possible, in principle, under Article 41 of the Vienna Convention on the Law of Treaties (VCLT). But the VCLT requires that the modification “does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.” (Art. 41(1)(b)(ii) VCLT). It is at least arguable that the explicit exclusion of any appeal or other additional remedy in Article 53 of the ICSID Convention is closely related to the effective execution of the Convention’s object and purpose.

³ For detailed discussion see Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (2008).

b) Narrowing the Scope for Review

The creation of new remedies and procedures is not the only way to revise the existing system of review. It is also legitimate to ask the opposite question: Would it make sense to narrow the basis for review as compared to the current system? As pointed out before, an amendment of the ICSID Convention's text, specifically its Article 52, is not realistic. Therefore, any change would have to take place through the practice of *ad hoc* committees. Successive *ad hoc* committees have stressed that their function is a narrow one and that they are not appellate bodies. For instance, a mere error of law is not a ground for annulment whereas a failure to apply the proper law may amount to an excess of powers and may lead to annulment. Yet, some *ad hoc* Committees have assumed the posture of a court of higher instance and have not hesitated to reprimand tribunals for perceived mistakes in the application of the law. This is not part of their function and it is questionable whether this approach is helpful.⁴

Upon closer scrutiny, some mistakes in the application of the law are relevant in annulment proceedings. This is so whenever the mistake has an impact upon jurisdiction. For instance, a “wrong” application of an umbrella clause⁵ or the misapplication of the concept of “investment”⁶ may cause an excess of powers leading to annulment. Also, the distinction between a non-application of the proper law and its merely erroneous application has turned out to be a fine one. There are more possible examples. The point is that there is room for a narrower interpretation of the grounds for annulment than some *ad hoc* committees have adopted.

One way to contain the potential activism of *ad hoc* committees may be to stress their discretion and to insist on a “material violation standard”. In other words, annulment would be available not upon the mere presence of one of the grounds for annulment listed

⁴ For detailed discussion see *The ICSID Convention: A Commentary* 2d ed., Christoph Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, Article 52, paras. 210-232 (2009).

⁵ *CMS v. Argentina*, Decision on Annulment, 25 September 2007, paras. 86-100.

⁶ *Mitchell v. DR Congo*, Decision on Annulment, 1 November 2006; *Malaysian Historical Salvors v. Malaysia*, Decision on Annulment, 16 April 2009.

in the Convention but would require additionally its material impact upon the parties in terms of the outcome of the case.⁷

3. Achieving Consistency of Decisions through Preliminary Rulings

Coherence and consistency of the case-law of investment tribunals has become a matter of concern. A system that operates with a large number of differently composed tribunals is vulnerable to discrepancies. Even well meaning and competent arbitrators are unlikely to agree on all points all the time. Courts with a permanent composition are more likely to produce a consistent case law. But a permanent court for investment disputes is an unlikely goal, at least for the time being.

The most effective way to achieve judicial coherence and consistency is not necessarily to submit decisions to review and reversal. Appeal presupposes a decision that has been made already, that will be attacked for a perceived flaw and that may be revised and repaired.

Rather than remedy the damage after it has occurred, it is more sensible to address the problem of inconsistency through preventive action. A method to secure the coherence of case law that has been remarkably successful is to allow for preliminary rulings while the original proceedings are still pending.⁸ Under such a system a tribunal would suspend proceedings and request a ruling on a question of law from a body established for that purpose.

Preliminary rulings would be in conformity with Article 53 of the ICSID Convention. A mechanism of this kind would not provide an appeal or other remedy and would not affect the principle of finality.

⁷ For details see: *The ICSID Convention: A Commentary* 2d ed., Christoph Schreuer *et al.*, Article 52, paras. 466-485 (2009).

⁸ The idea has been put forward before: see *G. Kaufmann-Kohler*, Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?, in *E. Gaillard/Y. Banifatemi* (eds.), *Annulment of ICSID Awards* 289 (2004). See also *G. Kaufmann-Kohler*, In search of Transparency and Consistency: ICSID Reform Proposal, *TDM*, vol. 2, No. 5, p.8 (2005).

This procedure has been applied with a large measure of success in the framework of European Community law.⁹ It is provided for in Article 234 (formerly Article 177) of the Treaty establishing the European Community (TEC). This mechanism effectively secures the uniform application of European law by domestic courts in all member States through preliminary rulings of the Court of Justice of the European Communities (European Court).

Under this system, any national court or tribunal of a Member State may decide to refer a question with regard to the interpretation (or validity) of European Community Law to the European Court, when a decision on that question is necessary to enable the national court to give a judgment. Where such a question is raised before a court of last instance, the court is under an obligation to request a preliminary ruling from the European Court.

Article 234 TEC ensures that questions regarding the interpretation of community law are referred to the European Court before the judgment is rendered. Article 234 TEC assures the uniform interpretation of community law by national courts. Preliminary rulings help to avoid divergent interpretations and further the efficient application of community law *ex ante*. They are preferable to the frequently cumbersome appellate mechanisms which are engaged *ex post*.

Adapted to investment arbitration this method could provide for an interim procedure whenever a tribunal is faced with an important question of international investment law. Such an important question may tentatively be described as a fundamental issue of investment treaty application, a situation where the tribunal wants to depart from a “precedent” or where there are conflicting previous decisions. In such a situation, the tribunal might suspend proceedings and request a ruling. Once that ruling has been forthcoming, the original tribunal would resume its proceedings and reach an award on the basis of the guidance it has received through the preliminary ruling. This method could become a successful means to ward off inconsistency and fragmentation.

⁹ See especially: P. Craig and G. De Búrca, *EU Law. Text, Cases and Materials*, 3d ed., (2003) pp. 432-481; M. Andenas (ed.), *Article 177 References to the European Court – Policy and Practice* (1994); D. Anderson, *Preliminary Rulings* (1995); A. Dashwood and A. Johnston (eds.), *The Future of the Judicial System of the European Union* (2001); G. De Búrca and J.H.H. Weiler (eds.), *The European Court of Justice* (2001); H. Schermers, C. Timmermans, A. Kellerman and J. Stewart Watson, *Article 177 EEC: Experiences and Problems* (1987).

A mechanism of this kind would require the establishment of a central and permanent body that would be authorised to give preliminary rulings. A permanent body of this kind would be less ambitious than a permanent court for the adjudication of investment disputes. It would not do away with the basic structure of current investment arbitration consisting of a multitude of individual tribunals. But, if successfully used, it could guarantee a large measure of harmonization while leaving the tribunals their basic competence to adjudicate the cases submitted to them.

The introduction of this mechanism would not require an amendment to the ICSID Convention. It could be created through a decision of ICSID's Administrative Council rather like the Additional Facility. Alternatively, it might be established through an additional protocol to the ICSID Convention. Use of such a facility need not be restricted to ICSID proceedings but may be extended to other forms of investment arbitration *e.g. ad hoc* arbitration under the UNCITRAL Rules.

The delay caused by a request for a preliminary ruling would be much more limited than an appeals procedure that sets in only after the original proceedings have resulted in an award. Whereas an appeals procedure might reach a measure of consistency through a costly and time consuming repair mechanism, preliminary rulings could help to prevent the development of inconsistencies in the first place.

Interestingly, the possibility of preliminary rulings was discussed during the ICSID Convention's drafting. The idea was that a tribunal would suspend proceedings and seek a ruling from the International Court of Justice (ICJ) on a matter concerning the Convention's interpretation in order to attain uniformity in the Convention's application. The idea was dropped, not least for technical reasons. It was unclear in what way the matter would be brought before the ICJ in accordance with its Statute.¹⁰ From today's perspective it seems clear that the ICJ would not be the appropriate body to assume this task.

If a system of preliminary rulings were to be introduced, a number of details would have to be worked out. One is under what circumstances a tribunal would request a preliminary ruling and whether it would be under an obligation to do so. Another question would be whether these rulings would bind the tribunal or would merely constitute

¹⁰ See The ICSID Convention: A Commentary 2d ed., Christoph Schreuer *et al.*, Article 64, paras. 7-10.

recommendations. Perhaps most importantly, the composition of a body charged with giving preliminary rulings would require detailed discussion.

4. Compliance and Enforcement

The growing trend to challenge awards in annulment proceedings goes hand in hand with a tendency to resist compliance even after the obligation under the award has been confirmed. A looming prospect for ICSID Awards is their review by domestic courts. Argentina has recently developed a new theory that would subordinate compliance with a final ICSID award to prior enforcement by its own domestic courts. From the perspective of the investor who has prevailed in the arbitration proceedings, this would mean that he has to go through the domestic court system of the host State before receiving payment under the award. It would follow from this theory that Argentina is not in default under the award unless and until the investor has run the course of Argentina's court system to enforce the award and has prevailed there.

This theory confuses Articles 53 and 54 of the ICSID Convention.¹¹ Article 53 contains an obligation to abide by and comply with an award. This is the obligation incumbent upon the award debtor.

By contrast, Article 54 on enforcement comes into play only after a default has occurred. Article 54 applies in situations in which a party to ICSID arbitration has failed in its obligation to abide by and comply with the award. It is designed for worldwide enforcement against a defaulting award debtor.

The obligation to comply under Article 53 is incumbent upon the award debtor and arises at the time the award is rendered (unless the award contains a period of grace). The obligation to enforce under Article 54 is incumbent upon all Parties to the Convention. It is designed to ensure that even after non-compliance with an award, and hence a breach of the Convention, there will be a mechanism that ensures payment under the award.

Put differently, the primary obligation is to abide and comply under Article 53. If there is non-compliance, there is a breach of the Convention. Remedies against this breach are:

a) enforcement under Art. 54 in the courts of all States parties to the Convention;

¹¹ For a more thorough analysis see Stanimir A. Alexandrov, *Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention*, in: *International Investment Law for the 21st Century* (Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich eds. 2009) 322.

b) the revival of the right to diplomatic protection under Article 27.

Therefore, any attempt to condition compliance with an award upon its prior enforcement through the award debtor's courts is contrary to the Convention.

An important step to secure the effectiveness of awards would be to require the posting of a security or of a performance bond by the award debtor seeking annulment as a condition for a stay of the award's enforcement. This can take place in the form of a bank guarantee or a similar arrangement. If the challenge to the award is successful, the security would be returned. If the award survives the annulment proceedings, the award creditor may draw upon the security.

The practice of *ad hoc* committees on this point is divided. They seem to be generally agreed that they have the power to require the posting of a bond. Some *ad hoc* committees have actually required the posting of a bond, others have not. The pros and cons were debated in a number of cases (notably in *Azurix*).

As mentioned before, Argentina seems to pursue a policy of challenging adverse awards as a matter of routine, combined with a practice to resist compliance. I believe that the appropriate response to this dual policy should be requiring a bond for the award's performance should it be confirmed.

A practice that would make a stay of enforcement conditional upon the posting of a security for the award's eventual performance would serve a dual purpose. It would facilitate enforcement. But it may also serve as a possible deterrent to requests for annulment that are motivated primarily by a desire to delay and, possibly, to avoid compliance.