

Three Generations of ICSID Annulment Proceedings

Christoph Schreuer *

I. ANNULMENT IN THE ICSID SYSTEM

In the framework of ICSID arbitration, annulment was designed as an extraordinary remedy for unusual and important cases. It is not a routine step to be taken by a party that has lost a case. Successive *ad hoc* committees have emphasized that annulment is different from appeal.¹ But their approach towards their task has not been uniform and has been subject to some change over time.

The history of annulment under the ICSID Convention can be described in terms of three generations. The first two ICSID annulment cases, *Klöckner I*² and *Amco I*³ aroused much concern.

* Professor, University of Vienna.

¹ Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, Decision annulling the award, May 3, 1985, 2 ICSID REP. 95, 126, 138, 139, 161 (1994); Amco Asia Corporation and others v. Republic of Indonesia, Decision annulling the award, May 16, 1986, 1 ICSID REP. 509, 539 (1993); Maritime International Nominees Establishment v. Republic of Guinea, Decision partially annulling the award, Dec. 22, 1989, 4 ICSID REP. 79, 98 (1997); Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, Decision on application for annulment, July 3, 2002, 41 I.L.M. 1135, ¶ 64 (2002) (the text of this decision is reproduced in this volume as Annex 4). See also David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV. – FOREIGN INV. L.J. 21 (1992).

² Klöckner v. Cameroon, *supra* note 1.

³ Amco v. Indonesia, Decision annulling the award, *supra* note 1.

They were criticized for reexamining the merits of the two cases and for improperly crossing the line between annulment and appeal.⁴

These concerns were alleviated by the second generation of decisions in *MINE*⁵ as well as in *Klöckner II* and *Amco II*. Unfortunately the decisions in *Klöckner II* and *Amco II* have remained unpublished.

The third generation of ICSID annulment cases consist of the two decisions on annulment rendered in 2002 in *Wena*⁶ and in *Vivendi*.⁷ They demonstrate that the ICSID annulment process has found its proper balance. In particular, the two decisions of 2002

⁴ George R. Delaume, *The Finality of Arbitration Involving States: Recent Developments*, 5 ARB. INT'L 21, 32 (1989); Mark B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REV. – FOREIGN INV. L.J. 85 (1987); Emmanuel Gaillard, *Note*, 25 I.L.M. 1439–40 (1986); Emmanuel Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.) – Chronique des sentences arbitrales*, 114 JOURNAL DU DROIT INTERNATIONAL [J.D.I.] 135, 184 *et seq.* (1987); ELIHU LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 101 *et seq.* (1991); Peter T. Muchlinski, *Dispute Settlement under the Washington Convention on the Settlement of Investment Disputes*, in CONTROL OVER COMPLIANCE WITH INTERNATIONAL LAW 175, 188 (William E. Butler ed., 1991); Jan Paulsson, *ICSID's Achievements and Prospects*, 6 ICSID REV. – FOREIGN INV. L.J. 380, 388 *et seq.*; W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739.

⁵ *MINE v. Guinea*, *supra* note 1.

⁶ *Wena Hotels Limited v. Arab Republic of Egypt*, Decision on application for annulment, Feb. 5, 2002, 41 I.L.M. 933 (2002) (the text of this decision is reproduced in this volume as Annex 2). For a commentary, see Emmanuel Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.) – Chronique des sentences arbitrales*, 130 [J.D.I.] 130, 191 *et seq.* (2003).

⁷ *Vivendi v. Argentina*, *supra* note 1.

show that *ad hoc* committees will only intervene in serious and important cases.

A good example for the movement towards this more balanced approach is the position taken by *ad hoc* Committees on their obligation or discretion to annul once they have found a ground for annulment. In *Klöckner I*, the *ad hoc* Committee had still held that a finding that there existed a ground for annulment would have to automatically lead to the annulment of the award.⁸ Subsequent *ad hoc* committees have rejected this “hair trigger” standard in favor of a “material violation” approach.⁹

Wena and *Vivendi* contain further confirmation of this cautious attitude. In *Wena*, the *ad hoc* Committee stated, both in the context of an alleged serious departure from a fundamental rule of procedure and an alleged failure to state reasons, that in order to lead to annulment such a violation would have to be capable of taking the Tribunal to a result different from the one it had reached.¹⁰

In *Vivendi*, the *ad hoc* Committee stated that it “must guard against the annulment of awards for trivial cause.”¹¹ The *Vivendi* Committee also found it to be established that it had “a certain measure of discretion as to whether to annul an award, even if an annulable error is found.” Among other things, it found it necessary “to consider the significance of the error relative to the legal rights of the parties.”¹² Specifically, with respect to excess of

⁸ *Klöckner v. Cameroon*, *supra* note 1, at 162.

⁹ For a detailed discussion of the earlier cases on this point, see CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1019–23 (2001).

¹⁰ *Wena v. Egypt*, *supra* note 6, ¶¶ 58, at 105.

¹¹ *Vivendi v. Argentina*, *supra* note 1, ¶ 63.

¹² *Id.* ¶ 66. See also ¶ 50.

powers it said that “only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power.”¹³

An overall reading of the two decisions on annulment rendered in 2002 confirms this careful approach. Both *ad hoc* Committees rejected a whole series of technical reasons for annulment. The only reason that prevailed, in *Vivendi*, is of fundamental importance. The relationship between an ICSID clause in a BIT and a domestic forum selection clause in a contract was pivotal not only in that case but is a central question in a number of other cases that are currently pending. The *Vivendi* Tribunal’s decision not to decide had a devastating effect on the protection of the investor in this case. If left unannulled, this effect would probably have spilled over to a large number of similar cases.

II. THE GROUNDS FOR ANNULMENT

A. *The Relationship of the Grounds for Annulment*

Article 52(1) of the ICSID Convention contains an exhaustive list of grounds for the annulment of an award:¹⁴

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;

¹³ *Id.* ¶ 86.

¹⁴ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 4 I.L.M. 524 (1966).

- (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.

A request for annulment must allege the existence of one or more of the grounds listed in that provision. Typically, several grounds are used cumulatively.

The success of the invocation of these grounds varies greatly. Practice indicates that some seem to carry a reasonable chance of success whereas others are less promising. Some have never been tried.

The following table presents the decisions on annulment by ICSID *ad hoc* committees broken down by grounds for annulment. Practice shows typical situations in which these grounds are invoked. These are presented as subcategories to the Convention's grounds.

Three Generations of ICSID Annulment Proceedings

Symbols:

invoked and accepted: √
invoked but not decided: ○

invoked and rejected: X
relevant paragraphs: ¶

	Klöckner I	Klöckner II	Amco I	Amco II	MINE	Wena	Vivendi
Art. 52(1)(a): Improper constitution of tribunal							
Art. 52(1)(b): manifest excess of powers:							
lack or excess of jurisdiction	X					X ¶54	X ¶72-80
non exercise of jurisdiction							X ¶89-92 √ ¶86-88, 93-115
failure to apply the proper law	√		√		X	X ¶26-53	○
Art. 52(1)(c): Corruption							
Art. 52(1)(d): serious departure from a fundamental rule of procedure:							
Impartiality	X		X				
right to be heard	X			√	○	X ¶66-70	X ¶82-85
Deliberation	X	X					
evidence and proof		X	X			X ¶59-65, 71-73	
Art. 52(1)(e): failure to state reasons:							
absence of reasons	√		X		X	X ¶84-86	X ¶50,116
insufficient and inadequate reasons	√	X	○		X	X ¶87-99	
contradictory reasons	X		√		√		○ ¶65,72
failure to deal with questions	√				√	X ¶102-110	

The decisions in *Klöckner II* and in *Amco II* are unpublished. The information on these two cases is incomplete.

In *SPP v. Egypt*, annulment proceedings were initiated but the parties reached an agreed settlement and the proceedings were discontinued at their request before the *ad hoc* Committee issued a decision.

In *Philippe Gruslin v. Malaysia*, annulment proceedings were initiated but discontinued for lack of payment of advances before the *ad hoc* Committee issued a decision.

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The picture presented by this table is painted with a rather broad brushstroke. The categories cannot always be separated easily. Not infrequently, the party seeking annulment attacks one and the same perceived shortcoming in an award in terms of several grounds for annulment.¹⁵ In other words, the grounds have turned out to be to some extent interchangeable.

For instance, in *Amco I*, Indonesia argued that the Tribunal, by finding that Amco's investment shortfall was not material and did not justify the revocation of the investment license, had manifestly exceeded its powers, had seriously departed from a fundamental rule of procedure and had failed to state the reasons on which it based the Award.¹⁶ The *ad hoc* Committee found that the Tribunal in calculating Amco's investment had manifestly exceeded its power in failing to apply fundamental provisions of Indonesian law and had failed to state reasons for its calculation.¹⁷

Similarly, in *Wena* the Applicant argued that the Tribunal's method of calculating interest on the amount it had awarded constituted a manifest excess of powers, a serious departure from a fundamental rule of procedure and a failure to state reasons. The *ad hoc* Committee rejected all three charges.¹⁸

The Applicant in *Vivendi* followed the same strategy in classifying various alleged shortcomings of the Award in terms of several of the grounds for annulment.

This uncertainty about the categorization of grounds also leads to certain logistical problems. Should a memorial be

¹⁵ SCHREUER, *supra* note 9, at 925–28, 1001–02, 1032–34.

¹⁶ *Amco v. Indonesia*, Decision annulling the award, *supra* note 1, at 512, 531.

¹⁷ *Id.* at 536.

¹⁸ *Wena v. Egypt*, *supra* note 6, ¶¶ 50–53, 66–70, 94–99.

organized by grounds for annulment as listed in Article 52(1) or by sets of facts which are the basis for the request for annulment?

The *ad hoc* Committees have adopted different strategies to organize their decisions. In *Klöckner I* and in *Wena* they follow the system of Article 52(1), that is, they proceed according to the grounds listed there. This method means that they had to look at the various alleged shortcomings in the Awards separately under the different headings of Article 52(1).

In *Amco I*, the *ad hoc* Committee adopted a different method. The decision's structure does not follow the list of grounds as presented by Article 52(1). Rather, the *ad hoc* Committee dealt with the various claims of nullity raised by Indonesia following the general sequence of the findings and conclusions of the Award.¹⁹ This meant that the *ad hoc* Committee had to address the different grounds for annulment in a variety of contexts.

The decision on annulment in *Vivendi* seems to follow a mixed method. It deals separately with the Tribunal's findings on jurisdiction and the Tribunal's findings on the merits. In its discussion of the findings on the merits it follows the grounds for annulment invoked in the application.

Two more caveats must be added to the above table: it shows which grounds for annulment were accepted (✓) by the *ad hoc* Committees and which were rejected (✗). Sometimes one and the same ground for annulment was accepted in one context and rejected in another context in the same decision. For instance, in *Vivendi* manifest excess of powers for failure to decide was rejected with respect to the "federal claims" but accepted with respect to the "Tucumán claims."

¹⁹ *Amco v. Indonesia*, Decision annulling the award, *supra* note 1, at 514.

Two of the seven decisions on annulment, those in *Klöckner II* and in *Amco II*, have remained unpublished and the information available on them is from secondary sources and incomplete. Therefore, the corresponding columns in the table should be treated with caution. In particular, the single entry under *Amco II* only relates to the Second Tribunal's decision on rectification.²⁰

A look at the practice of *ad hoc* Committees in terms of the five grounds for annulment listed in Article 52(1) shows that two have never been invoked. These are improper constitution of the tribunals and corruption of an arbitrator.²¹ Consequently, these will not be discussed in this contribution.

The other three grounds have been invoked in all published cases often in multiple contexts. It is a standard feature of requests for annulment to allege manifest excess of powers as well as serious departure from a fundamental rule of procedure and failure to state reasons.

B. Manifest Excess of Powers

1. Lack or Excess of Jurisdiction

The most obvious instance of an excess of powers would be a decision where there is no jurisdiction or a decision that goes beyond an existing jurisdiction. Any of the requirements for jurisdiction contained in the Convention's Article 25 could form

²⁰ *Amco Asia Corporation and others v. Republic of Indonesia*, Decision on supplemental decisions and rectification of the award, Oct. 17, 1990, 1 ICSID REP. 638 (1993). See SCHREUER, *supra* note 9, at 972, 976–78.

²¹ See SCHREUER, *supra* note 9, at 928–31, 966–68.

the basis for a complaint of lack of jurisdiction. This would be the case, for instance, if the claimant did not fulfill the Convention's nationality requirements.²² It would also be the case if there was no legal dispute arising directly out of an investment or if consent was lacking.

The unsuccessful invocation of this ground in *Klöckner I* concerned the reach of a general submission to ICSID in the face of a clause in a contract referring one aspect of the dispute (management) to ICC arbitration.²³ In *Wena*, the request contended unsuccessfully that the Claimant had asserted claims on behalf of other investors.²⁴ In *Vivendi*, the *ad hoc* Committee rejected Argentina's contention that the Tribunal had lacked jurisdiction and had committed a manifest excess of powers by assuming jurisdiction under the BIT and by proceeding to the merits.²⁵

2. Non Exercise of Jurisdiction

The central issue in *Vivendi* was manifest excess of powers through a failure to decide. The *ad hoc* Committee made a general statement on this variant of excess of powers in the following terms:

86. It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant

²² In *MINE v. Guinea*, *supra* note 1, there were doubts as to the Claimant's nationality but the issue was raised neither before the Tribunal nor in the request for Annulment. See SCHREUER, *supra* note 9, at 282–83.

²³ *Klöckner v. Cameroon*, *supra* note 1, at 97–117.

²⁴ *Wena v. Egypt*, *supra* note 6, ¶ 54.

²⁵ *Vivendi v. Argentina*, *supra* note 1, ¶¶ 72–80.

agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments [T]he failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52(1)(b).²⁶

The *ad hoc* Committee dismissed the contention that the Tribunal had failed to decide with respect to the so-called federal claims, that is the allegations that federal authorities through their acts and omissions had violated the BIT. The Committee reached the conclusion that the Tribunal had carefully considered the federal claims on the facts and had rejected them.²⁷

With respect to the so-called Tucumán claims the Committee reached a different result. Any breaches of the BIT by the authorities of the Province of Tucumán were attributable to Argentina under the rules of State responsibility. With respect to the selection of a domestic forum in the concession contract between the investor and the Province, the *ad hoc* Committee said:

102. In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties.

²⁶ *Id.* ¶ 86 (footnote omitted).

²⁷ *Id.* ¶¶ 89-92.

The *ad hoc* Committee concluded that “the Tribunal, in dismissing the Tucumán claims as it did, actually failed to decide whether or not the conduct in question amounted to a breach of the BIT.”²⁸ The Committee’s conclusion was as follows:

115. For all of these reasons, the Committee concludes that the Tribunal exceeded its powers in the sense of Article 52 (1) (b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims. Given the clear and serious implications of that decision for Claimants in terms of Article 8 (2) of the BIT, and the surrounding circumstances, the Committee can only conclude that that excess of powers was manifest. It accordingly annuls the decision of the Tribunal so far as concerns the entirety of the Tucumán claims.

3. Failure to Apply the Proper Law²⁹

In *Klöckner I* and in *Amco I*, this ground for annulment was applied under circumstances that led to severe criticism.³⁰ In *MINE*, the *ad hoc* Committee refused to accept a technical and inconsequential error in the identification of the proper law as a ground for annulment.³¹ In *Wena*, failure to apply the proper law was put forward in a number of contexts but rejected on the specific facts of the case.³² In *Vivendi*, failure to apply the proper

²⁸ *Vivendi v. Argentina*, *supra* note 1, ¶ 111.

²⁹ Failure to apply the proper law is an accepted variant of excess of powers. This question is addressed in the contribution by Emmanuel Gaillard in this volume (*The Extent of Review of the Applicable Law in Investment Treaty Arbitration, infra*, at 223). Therefore, a brief summary is sufficient here.

³⁰ For details and references, see SCHREUER, *supra* note 9, at 947–62

³¹ *MINE v. Guinea*, *supra* note 1, at 94–96.

³² *Wena v. Egypt*, *supra* note 6, ¶¶ 26–53.

law was raised by the Applicant but not addressed by the *ad hoc* Committee.

C. *Serious Departure from a Fundamental Rule of Procedure*

A look at the practice concerning the ground for annulment of serious departure from a fundamental rule of procedure shows that it has often been invoked but rarely succeeded.

1. Impartiality

Lack of impartiality was alleged in *Klöckner I* on the basis of the Award's style and general structure.³³ In *Amco I*, this complaint was based primarily on the way the Tribunal had dealt with the evidence before it.³⁴ Both allegations were rejected by the respective *ad hoc* Committees.

2. Right to be Heard

The only successful allegation of a serious departure from a fundamental rule of procedure concerned a decision of the second *Amco* Tribunal to rectify its Award.³⁵ The Rectification was annulled since the Tribunal had rendered it on the request of one

³³ *Klöckner v. Cameroon*, *supra* note 1, at 129–36.

³⁴ *Amco v. Indonesia*, Decision annulling the award, *supra* note 1, at 517–19, 532–33, 541.

³⁵ *Amco v. Indonesia*, Decision on supplemental decisions and rectification of the award, *supra* note 20, 638 (1993).

party without giving the other party the opportunity to file its observations.³⁶

Several of the cases involving the charge of a violation of the right to be heard involved the same type of situation: a complaint that the award was based on a theory that had not been discussed by the parties before the tribunal. The *ad hoc* committees have uniformly rejected the idea that the tribunals in drafting their awards are restricted to the arguments presented to them by the parties. In *Klöckner I*, the *ad hoc* Committee stated that a tribunal is neither under an obligation to hear the parties on the reasons it is going to rely on in its decision, nor bound to choose among the arguments put forward by the parties.³⁷ In *MINE*, the same argument was put forward by the Applicant but was never reached by the *ad hoc* Committee.³⁸

In *Wena*, the Tribunal had awarded compound interest on the damages awarded. In the annulment proceedings, the Applicant complained that it was not offered the opportunity to address the issue of interest. *Wena* had requested appropriate interest but neither party had discussed the issue of compound interest. The *ad hoc* Committee stated that the parties must have been aware of the possibility that compound interest would be awarded. It concluded:

³⁶ Amco Asia Corporation and others v. Republic of Indonesia, Decision rejecting the parties' applications for annulment of the Award and annulling the Decision on supplemental decisions and rectification, Dec. 17, 1992 (unpublished). See Aron Broches, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application*, XVIII Y.B. COM. ARB. 627, 693-94 (1993); SCHREUER, *supra* note 9, at 972, 976-77.

³⁷ *Klöckner v. Cameroon*, *supra* note 1, at 128-29.

³⁸ *MINE v. Guinea*, *supra* note 1, at 82, 106, 109.

70. In the light of this, the Committee cannot accept the complaint that the Tribunal fixed interest by reference to a method not included in Wena's claim and on which the Applicant would have had no opportunity to express its views.

In *Vivendi* too, the Claimants argued that the Tribunal's dismissal of the Tucumán claims was based on a point not adequately canvassed in argument. They complained that the Tribunal's decision came unannounced and that they had no opportunity to present their arguments on that decisive point.³⁹ The *ad hoc* Committee found that the approach adopted by the Tribunal may well have come as a surprise to the parties. But this did not mean that there had been a serious departure from a fundamental rule of procedure. The Committee said:

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

These decisions contain an important lesson for counsel in ICSID proceedings. A failure to anticipate an argument that appears convincing to the tribunal and the resulting failure to address it does not find a remedy in annulment.

³⁹ *Vivendi v. Argentina*, *supra* note 1, ¶¶ 82-85.

3. Deliberation

Absence of deliberation in the Tribunal played a role in *Klöckner*.⁴⁰ The requirement of a deliberation is indeed a fundamental rule of procedure. A total absence of deliberation is unlikely. In view of its secrecy, it will be difficult for an *ad hoc* committee to judge the seriousness of the deliberation.

4. Evidence and Proof

In several instances, applicants complained about the way that tribunals had dealt with evidence and proof, especially with the allocation of the burden of proof.⁴¹ In *Wena*, in particular, this complaint was put forward in several contexts as a ground for annulment. In response to complaints that the Tribunal had committed an erroneous reversal of the burden of proof, the *ad hoc* Committee found that the Applicant had not identified the rule on burden of proof it was purporting to rely on. Moreover, the complaint concerned factual and substantive rather than procedural issues. In addition, the *ad hoc* Committee found that the tribunal is the judge of the probative value of the evidence before it.⁴²

In response to a complaint that the Tribunal had not requested to hear a decisive witness, the *Wena* Committee stated that it was incumbent upon the parties to produce evidence and that

⁴⁰ *Klöckner v. Cameroon*, *supra* note 1, at 126–27.

⁴¹ *Amco v. Indonesia*, Decision annulling the award, *supra* note 1, at 533. For the decision in *Klöckner II*, see SCHREUER, *supra* note 9, at 982.

⁴² *Wena v. Egypt*, *supra* note 6, ¶¶ 59–61.

the tribunal's power to call upon the parties to produce further evidence was discretionary.⁴³ The *ad hoc* Committee said:

The Applicant fails to demonstrate the existence of a fundamental rule of procedure which would have put the Tribunal under an obligation to call for further evidence concerning Mr. Kandil.⁴⁴

D. Failure to State Reasons

Failure to state reasons is the most difficult ground for annulment to apply and to analyze. A total absence of reasons is extremely unlikely in view of the clear obligation to state reasons contained in Article 48(3) of the Convention. But applications for annulment have repeatedly alleged an absence of reasons on particular points or other grave defects in the tribunals' reasoning. The outcome of these complaints, at least as far as the "old cases" are concerned, shows that this is dangerous territory for a tribunal.

1. Absence of Reasons

The absence of reasons on particular points contained in the award has been alleged in virtually every application for annulment. In *Klöckner I*, the *ad hoc* Committee found that the Tribunal had imposed an "obligation of result" upon the Claimant without ever explaining the reasons for doing so. It followed that

⁴³ Article 43 of the ICSID Convention provides that: "Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence . . ."

⁴⁴ *Wena v. Egypt*, *supra* note 6, ¶ 73.

the complaint was well founded.⁴⁵ By contrast, the *ad hoc* Committees in *Amco I*⁴⁶ and in *MINE*⁴⁷ proceeded to reconstruct reasons missing from the Awards and declined to annul on this ground.

In *Wena*, the Applicant complained that the Tribunal had failed to explain the reasons for not taking into account the investor's lease dispute with its local business partner (EHC).⁴⁸ The *ad hoc* Committee said that the Award had clearly stated that it was based on the BIT and concerned a dispute between the investor and Egypt. It followed that the rights and duties under the lease dispute were irrelevant. The Committee concluded:

The explanation thus given for not determining the respective obligations of Wena and EHC under the leases is sufficient to understand the premises on which the Tribunal's decision is based in this respect.⁴⁹

In *Vivendi*, the *ad hoc* Committee found that the Tribunal had given full reasons for the dismissal of the federal claims. With regard to the Tucumán claims, the Tribunal had also given very full reasons for their dismissal. Since that part of the Award had been annulled for a different reason, nothing more needed to be said on this ground for annulment.⁵⁰

⁴⁵ Klöckner v. Cameroon, *supra* note 1, at 148–49.

⁴⁶ Amco v. Indonesia, Decision annulling the award, *supra* note 1, at 524–25.

⁴⁷ MINE v. Guinea, *supra* note 1, at 107–08.

⁴⁸ Wena v. Egypt, *supra* note 6, ¶¶ 84–85.

⁴⁹ *Id.* ¶ 86.

⁵⁰ Vivendi v. Argentina, *supra* note 1, ¶ 116. Elsewhere, the *ad hoc* Committee in Vivendi v. Argentina found that it was arguable that the Tribunal had failed to state any reasons for its finding that “CAA should be considered a

2. Insufficient and Inadequate Reasons

The insufficiency and inadequacy of reasons has also been invoked frequently. It is evident that this is a particularly subjective criterion and the earlier *ad hoc* Committees have grappled with the problem of finding a standard for this elusive concept.⁵¹ In *Klöckner I*, the charge of insufficient reasons was accepted by the *ad hoc* Committee under circumstances that seemed to look at their quality and correctness and hence appeared to blend into appeal.⁵² Subsequent *ad hoc* committees found the reasons of the tribunals sufficient.⁵³

In *Wena*, the Applicant complained about insufficient reasons for the Tribunal's determination of the amount awarded as well as for the calculation of interest on that amount.⁵⁴ The *ad hoc* Committee found that the Tribunal's reasons were sufficient although it had to make some inferences. With respect to the amount of damages, the *ad hoc* Committee pointed out that the relevant information was contained in *Wena's* documentation that was before the Tribunal. The Tribunal's reasons were stated implicitly by reference to that documentation.⁵⁵ With respect to the rate of interest, the *ad hoc* Committee primarily pointed to the Tribunal's discretion which meant that only limited reasons had to be given.⁵⁶ With respect to the *dies a quo* for interest, the *ad hoc* Committee pointed out that the date might be calculated based on

French investor from the effective date of the Concession Contract." But it concluded that this finding was inconsequential in that it played no part in the Tribunal's subsequent reasoning (*see Vivendi v. Argentina, supra* note 1, ¶ 50).

⁵¹ For details, see SCHREUER, *supra* note 9, at 990-94.

⁵² *Klöckner v. Cameroon, supra* note 1, at 136-43, 159-61.

⁵³ *MINE v. Guinea, supra* note 1, at 96-98.

⁵⁴ *Wena v. Egypt, supra* note 6, ¶¶ 87-99.

⁵⁵ *Id.* ¶ 93.

⁵⁶ *Id.* ¶¶ 94-97.

the total amount awarded.⁵⁷ In other words, the *ad hoc* Committee reconstructed the Tribunal's reasoning.

Although the *Wena* Award remained unannulled, this episode is an apt reminder to tribunals to be careful in substantiating the damages portions of their awards. There is a tendency of arbitrators to be summary when it comes to numbers. It is by no means clear that *ad hoc* committees will always be as tolerant as the *Wena* Committee when it comes to examining the calculation of damages in awards.

3. Contradictory Reasons

There is agreement that contradictory reasons amount to a failure to state reasons.⁵⁸ The charge was rejected in *Klöckner I* on the specific facts.⁵⁹ In *Amco I*, contradictory reasons were found to exist with respect to the calculation of the amount of the investment.⁶⁰ In *MINE*, the *ad hoc* Committee found contradictions in the Award's calculation of lost profits.⁶¹

In *Vivendi*, the *ad hoc* Committee confirmed that contradictory reasons might cancel each other out.⁶² Argentina argued that there was a contradiction between the Tribunal's jurisdictional finding and the Tribunal's reasons given concerning the merits. But then Argentina also argued that there was no jurisdiction in any event which would have resolved the

⁵⁷ *Id.* ¶ 98.

⁵⁸ *See generally* Klöckner v. Cameroon, *supra* note 1, at 137.

⁵⁹ Klöckner v. Cameroon, *supra* note 1, at 141.

⁶⁰ Amco v. Indonesia, Decision annulling the award, *supra* note 1, at 535–36.

⁶¹ MINE v. Guinea, *supra* note 1, at 108.

⁶² Vivendi v. Argentina, *supra* note 1, ¶ 65.

contradiction.⁶³ As it turned out, the contradiction was removed through the annulment for excess of powers of most of the Award's part dealing with the merits.

4. Failure to Deal with Every Question

Failure to deal with every question is not listed as a separate ground for annulment and its place in the system of the Convention is somewhat unclear. While the *ad hoc* committees were agreed that a failure to deal with every question could lead to annulment they were less clear as to whether the appropriate ground would always be a failure to state reasons. Other possibilities would be excess of powers and serious departure from a fundamental rule of procedure. But the preponderant view is that failure to deal with every question should be treated as a variant of failure to state reasons.⁶⁴ The *ad hoc* Committee in *Wena* confirmed this. After dealing with supplementation under Article 49(2) it said:

The ground for annulment under Article 52(1)(e) includes therefore the case where the Tribunal omitted to decide upon a question submitted to it to the extent such supplemental decision may affect the reasoning supporting the Award.⁶⁵

The *Klöckner I ad hoc* Committee found several instances of failure to deal with essential legal questions in the Award and refused to accept that there had been indirect or implicit treatment.⁶⁶ In *MINE*, Guinea complained that the Tribunal had

⁶³ *Id.* ¶ 72.

⁶⁴ For a summary of the discussion, see SCHREUER, *supra* note 9, at 997-1002.

⁶⁵ *Wena v. Egypt*, *supra* note 6, ¶ 101.

⁶⁶ *Klöckner v. Cameroon*, *supra* note 1, 149-56.

failed to deal with “questions” or arguments that, had they been accepted, would have required the Tribunal to reconsider the Award.⁶⁷ The *ad hoc* Committee concluded that several of the alleged violations of the obligation to deal with every question appeared singly to justify and collectively to compel annulment of the damages portion of the Award.⁶⁸

In *Wena*, the charge of failure to deal with questions was made in a variety of contexts.⁶⁹ The *ad hoc* Committee offered differentiated responses to these complaints but rejected them all. On one point it found that the issue was not a failure to state reasons but a disagreement with the result reached by the Tribunal.⁷⁰ In other contexts the question concerned was found to be irrelevant.⁷¹ On other points it found that the Tribunal had answered the question implicitly⁷² or had given ample explanation for its conclusion.⁷³

III. TIME LIMITS

The parties are subject to severe restraints as to the timing of their complaints. Already in the proceedings before the tribunal a party that is aware of a defect that may constitute a ground for annulment must raise this point. Under Arbitration Rule 27 a failure to raise a violation of pertinent rules constitutes a waiver of

⁶⁷ MINE v. Guinea, *supra* note 1, at 89, 97, 104, 105.

⁶⁸ *Id.* at 107.

⁶⁹ Wena v. Egypt, *supra* note 6, ¶¶ 102–10.

⁷⁰ *Id.* ¶ 103.

⁷¹ *Id.* ¶¶ 105, 107, 108.

⁷² *Id.* ¶ 106.

⁷³ *Id.* ¶ 110.

the right to object.⁷⁴ For instance, a party that knows that a jurisdictional requirement has not been met and which fails to state its objections thereto promptly before the tribunal, shall be deemed to have waived its right to raise this point as an excess of powers. It is not an option for a party first to await the outcome of the proceedings on the merits without making an objection to jurisdiction and then, if the award turns out to be unfavorable, to request annulment on the ground of an excess of powers.⁷⁵

Similarly, in the annulment proceedings, a party may not present new arguments on fact and law that it failed to put forward in the original arbitral proceeding. The *ad hoc* Committees in *Klöckner I* and in *MINE* pointed out that an application for annulment was not an occasion for a party to present, complete and develop an argument which it could and should have made in the arbitral proceeding.⁷⁶

The *ad hoc* Committee in *Wena* confirmed this point:

82. The Tribunal's duty to state the reasons supporting its conclusions has as its basis the statements on facts and law, together with all the evidence adduced, that were before the Tribunal at the latest at the time it declared the proceeding closed pursuant to Arbitration Rule 38. The award cannot be challenged under Article 52(1)(e) for a lack of reasons in respect of allegations and arguments, or parts thereof, that

⁷⁴ Rule 27 Waiver reads: "A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object."

⁷⁵ See SCHREUER, *supra* note 9, at 930–31, 939, 983–84, 1037.

⁷⁶ *Klöckner v. Cameroon*, *supra* note 1, at 126; *MINE v. Guinea*, *supra* note 1, at 96.

have not been presented during the proceeding before the Tribunal.

The time limit for applications for annulment is contained in Article 52(2) of the Convention. It says that an application must be made within 120 days from the date of the award (subject to a variation in case corruption is alleged). A recurrent theme in the annulment cases was the extent to which pleas could be advanced by the parties after that date.

In *Amco I*, Amco contended that a number of pleas advanced by Indonesia for the annulment of the Award were time-barred since they were raised not in the Application for Annulment but only in its Memorial and therefore outside the time limit of 120 days. The *ad hoc* Committee agreed that it would be insufficient for an application for annulment merely to recite grounds for annulment as contained in Article 52(1), together with a prospect for further submissions at a later stage. But statements made in the application could be taken together with their development and amplification in a later memorial. The *ad hoc* Committee examined in detail whether the claims for annulment, as contained in Indonesia's Memorial, could reasonably be considered as covered by the statements made in its Application for Annulment. In the end, it reached an affirmative result.

The same issue arose in *Wena*. The *ad hoc* Committee seems to have adopted a rather generous attitude towards the subsequent amplification and development of grounds contained in the Application for Annulment. It said:

[T]he ICSID Convention does not state any requirement of completeness of the Application, except to the extent that the Application must invoke one or more of the grounds listed in Article 52(1) on which it is based. The ICSID Convention thus does not preclude raising new arguments

which are related to a ground of annulment invoked within the time limit fixed in the Convention.⁷⁷

In *Vivendi*, the issue arose differently. The Applicant, Vivendi, had only requested the partial annulment of the Award's portion that related to the merits. Argentina not only resisted that request but also argued in the alternative that if Vivendi's request were to be upheld the Award should be annulled as a whole. The grounds offered by Argentina were that the Tribunal had no jurisdiction at all and that there was a fundamental contradiction between the Award's parts on jurisdiction and on the merits. Vivendi resisted Argentina's request arguing that it was time-barred and that Article 52 made no provision for counterclaims.⁷⁸

The *ad hoc* Committee found Argentina's argument admissible but rejected it on its merits. It found that a Respondent in annulment proceedings may present its own arguments provided these concern specific matters pleaded by the party requesting annulment.⁷⁹ It was for the *ad hoc* Committee and not for the requesting party to determine the extent of the annulment.⁸⁰ The *ad hoc* Committee said:

70. In seeking in the alternative the annulment of the jurisdictional portion of the Award, the Respondent was not making a late annulment application by way of a counterclaim – a procedure which, as Claimants correctly asserted, is not contemplated by Article 52 of the ICSID Convention. Rather it was arguing that if Claimants' position on the merits were to be upheld, either under Article 52 (1) (b) or 52 (1) (e), the effect must necessarily be to bring down the whole Award. That position was entirely

⁷⁷ *Wena v. Egypt*, *supra* note 6, ¶ 19.

⁷⁸ *Vivendi v. Argentina*, *supra* note 1, ¶ 67.

⁷⁹ *Id.* ¶ 68.

⁸⁰ *Id.* ¶ 69.

open to the Respondent. It in no way entailed what would have been an inadmissible counterclaim for annulment on new grounds.⁸¹

IV. CONCLUSION

The two decisions in *Wena* and *Vivendi* rendered in 2002 demonstrate that ICSID's review mechanism has found its proper place. It has abandoned the early activism of the *Klöckner* case and now presents itself as what it was designed for: an unusual remedy for unusual situations. The recent cases have helped to dispel the fears about frequent attacks on awards for trivial reasons leading to protracted and expensive litigations.

In the meantime, ICSID has also established itself as a successful and extremely busy forum for investor/State dispute settlement. The early fears of ICSID losing its appeal and being abandoned by the investment community are no longer a realistic threat. ICSID's problem is rather how to deal with an overabundance of cases. In this situation the watchful eye of *ad hoc* committees performs an entirely wholesome function.

The practice of *ad hoc* Committees has also generated a valuable body of case law. This case law is significant not only for future annulment cases. It also offers guidance to tribunals in that it constitutes an early warning system on a number of issues that keep coming up in their practice.

⁸¹ *Id.* ¶ 70.