Reasons and Reasoning in ICSID Annnulment Decisions: Are We Going in the Right Direction?

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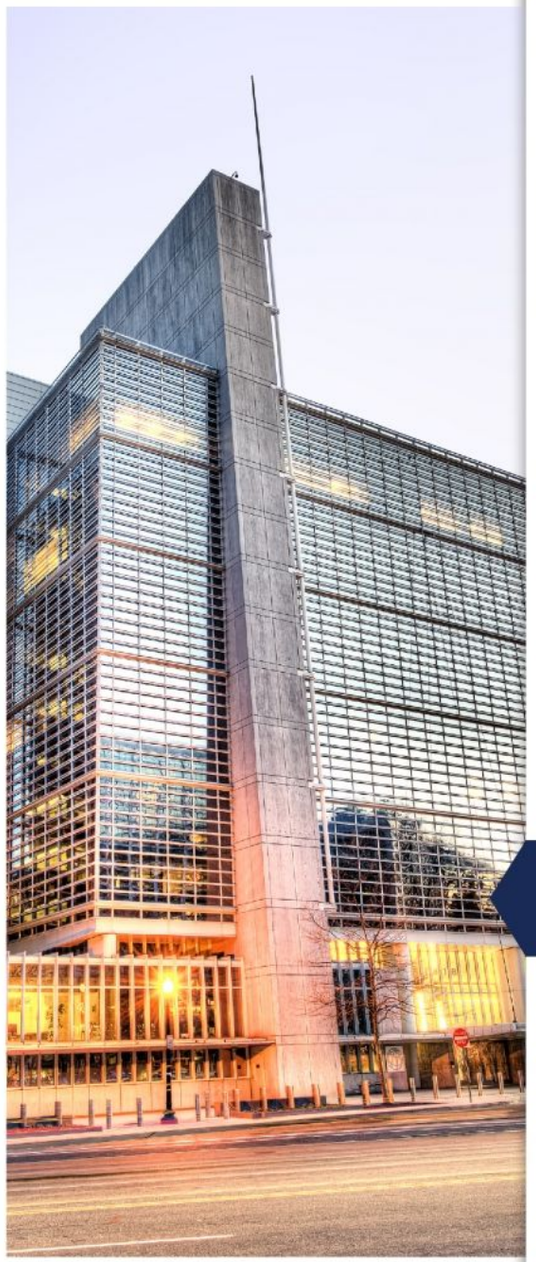
In the past decade, ICSID arbitration has encountered fervent opponents. Three Latin American states denounced the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the 'Convention') and, more recently, strong criticisms were voiced against investment arbitration generally in the context of the negotiations of the so-called mega-regional treaties.

The criticisms are varied in nature and have long been debated. The ICSID Secretariat and the arbitration community as a whole have been striving to try to explain the benefits of ICSID arbitration to the public. Notwithstanding several reports and statistics published by the ICSID Secretariat, however, one of the concerns expressed appears difficult to eradicate: the alleged perceived bias of the mechanism as a whole in favour of investors and/or developed countries. In this context, the awards themselves, which are the end result of the arbitration procedure and often the only document available to the public, are subject to increased scrutiny.

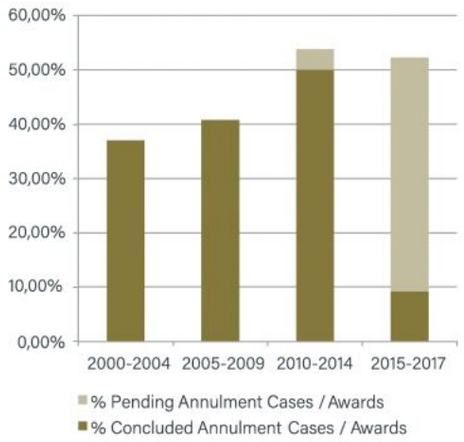
The drafters of the Convention had already anticipated the importance of the content of the award. As such, the requirement that the award be reasoned appears twice in the Convention, first in Article 48(3) of the Convention, as an arbitrator's duty (which entails the parties' corresponding right to receive a reasoned award) and, second, in Article 52(1)(e) of the Convention, as a ground for annulment due to the failure to give reasons. However, the Convention provides no further guidance as to the manner in which a tribunal should reason its award or as to when an award can be deemed to lack reasons and thus warrant annulment.

The role that providing reasons plays in ICSID awards has often been discussed. The reasoning shows the parties (and particularly the losing party) why the tribunal has reached a particular decision. It also guarantees that the decision was not the consequence of an arbitrary procedure and allows the parties to ascertain whether or to what extent the tribunal's findings were based on the law and the facts of the case. This is common to any type of arbitration. In investment arbitration, however, providing reasons plays an important additional role: it allows public scrutiny of the decision reached, a decision which may have a major political impact and consequences affecting the public interest. In other words, providing the reasons upon which an award is based is especially important in investment arbitration because it affects the very legitimacy of this form of dispute resolution.



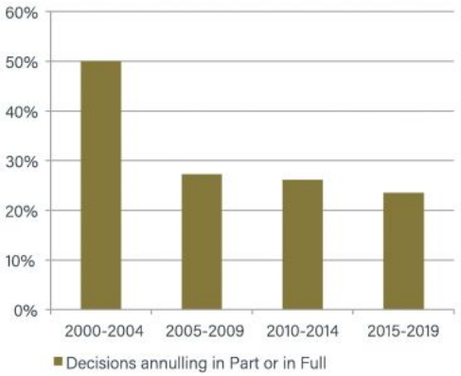
In ICSID arbitration, the annulment procedure is a self-contained mechanism which reserves the task of deciding on any annulment application to a body of three members directly appointed by the Chairman of ICSID's Administrative Council for each case.

A parallel can be drawn between the criticisms levelled against investment arbitration and the number of annulments sought in the past decade. While applications for annulment of ICSID awards were relatively contained at the beginning of the millennium (annulment was sought for around 30% of ICSID awards), one can easily see how this rate has been rapidly growing, alongside the outburst of criticisms towards ICSID arbitration generally. In the past decade, around 50% of ICSID awards have been subject to annulment proceedings. In 2017, annulment has been sought for more than 80% of the awards rendered before September.



In most ICSID annulment proceedings, Article 52(1)(e) (i.e., that the award failed to state the reasons on which it was based) has been invoked.

However, the trend regarding the number of cases that are actually being annulled is the opposite. While in the early 2000s around 50% of the annulment proceedings initiated resulted in partial or full annulment, this percentage has dropped to less than 25% since 2015. In the past three years, only one award was annulled per year.



The perception exists that this trend has been partly influenced by the ICSID's position in favour of the finality of its arbitration awards. Whether or not this perception is accurate, the real question is whether the approach of using *ad hoc* committees to scrutinise the awards' reasoning is actually leading to a minimum standard of reasoning which ultimately allows users of ICSID arbitration to acknowledge the legitimacy of ICSID arbitration and accept the outcome of the arbitration procedure.

When faced with applications for annulment under Article 52(1)(e), the interpretation by *ad hoc* committees of this ground has developed two different thresholds: on the one hand, the interpretation cannot lead to a disguised appeal of the arbitration award by entering into the correctness of the reasons given; on the other hand, the review should be more than a formal assessment of the mere existence of reasons and ensure that the award meets the minimum requirements to allow the reader to understand the decision taken.

Over the past two decades, *ad hoc* committees have identified several requirements that the reasoning of an award must meet in order not to warrant annulment:

- the award must contain reasons with respect to all pivotal or outcome-determinative points;
- the reasoning must enable the reader to follow the reasoning of the tribunal on points of fact and law or how it proceeded from point A to point B to eventually arrive at its conclusion, even if it made an error of fact or law;
- the reasoning cannot contain genuinely contradictory or frivolous reasons; and
- reasons cannot be so inadequate so as to seriously affect the coherence of the reasoning.

These requirements are, on paper, uncontroversial. The differences lie in how *ad hoc* committees have interpreted and applied them: in other words, what they considered to be '*contradictory*' '*frivolous*' or '*inadequate*' reasons. Three ICSID annulment decisions rendered in 2017 considered these requirements.

In *Gambrinus, Corp. v. the Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/31), the *ad hoc* committee emphasized that its role was to ascertain how the tribunal had proceeded from point A to point B in arriving at its decision, even if it made an error of fact or law. The *ad hoc committee* was not empowered to reconsider whether the reasons were appropriate or convincing. Applying these principles to the case at hand, the *ad hoc* committee found no grounds for annulment since, in its view, the award contained reasoning that could be followed even if it did not address a particular point that the applicant considered relevant for the decision. To assess whether a particular point needed to be addressed by the tribunal, the *ad hoc* committee relied on a list of issues that the parties had submitted to the tribunal.

In *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. the Argentine Republic* (ICSID Case No. ARB/03/19), the *ad hoc* committee held that it could not assess whether evidence was well or ill-considered, or indeed whether it was not considered

Providing the reasons upon which an award is based is especially important in investment arbitration

at all by the tribunal. This was because the assessment of the evidence and interpretation of the applicable law could only be performed by the tribunal. It further stated that as long as the reader could follow the reasoning in the award, the fact that it did not deal with every piece of evidence was immaterial. Finally, it held that only a total failure to address '*highly relevant*' evidence, the consideration of which could have had a significant impact on the award, amounted to a failure to provide reasons under Article 52(1)(e) and that this was not the case in the award under scrutiny.

Finally, in *Venezuela Holdings B.V. and others v. the Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), when dealing with aspects relating to compensation raised by the applicant, the *ad hoc* committee found that the reasoning of the award was lacking as to the relevance of specific contractual/national law provisions in determining compensation under the applicable bilateral investment treaty ('BIT'). Furthermore, the award failed to address an argument by the respondent on the impact of those provisions and to explain what was the quantum for compensation imposed by international law (which was apparently different from that stemming from the provisions of the BIT). The conclusion of the committee is worth reproducing: '*In other words, in its anxiety to dismiss any thought that national law can be invoked as a defence to the breach of an international obligation, the Tribunal ended up falling into an another version of exactly the same type of proposition, i.e. that some alternative source of international obligation can be invoked to displace particular rights and obligations established by treaty. Had the Tribunal set out to articulate the proposition directly, and to reason it through, it would immediately have realized that this proposition was as unsustainable, at the level of general principle, as the proposition which the Tribunal was setting out to reject.*'

These three decisions show that, to date, *ad hoc* committees apply similar criteria but with differing degrees of intensity to the awards under scrutiny. The question therefore remains: in the context of a growing number of dissatisfied users and annulment applications, is the reasoning of the awards and the incentives given by *ad hoc* committees in annulment proceedings going in the right direction?

Award in *Fábrica de Vidrios Los Andes, C.A. & Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*

On 13 November 2017, an ICSID tribunal (ICSID Case ARB/12/21) declined jurisdiction over a dispute between Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois of Venezuela, C.A. (the 'Claimants') and the Bolivarian Republic of Venezuela ('Venezuela') under the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela (the 'BIT'). The Claimants were Venezuelan companies controlled by a Dutch group. The Claimants alleged that Venezuela had breached its obligations under the BIT by expropriating their glass container production and distribution business via a government decree, and claimed damages of over USD 1 billion.

The Claimants stated they had consented to ICSID arbitration at the time the request for arbitration was submitted to the Centre on 20 July 2012, despite Venezuela having denounced the ICSID Convention (the 'Convention') on 24 January 2012. For the Claimants, denunciation of the Convention by Venezuela would only become effective after the six-month period provided for in Article 71. Venezuela objected to the jurisdiction *ratione voluntatis* of the arbitral tribunal arguing that, after a Contracting State denounces the Convention, Article 72 establishes a right to ICSID arbitration only where consent to ICSID jurisdiction has been perfected, in this case through the investor's acceptance of the state's offer to arbitrate in the BIT, before the date of denunciation of the Convention.

The tribunal sided with Venezuela. In accordance with the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties ('VCLT'), the tribunal initially examined the ordinary meaning of the terms of Article 72 in their context, to conclude that '*it is only where consent* [...] *is perfected, such that it generates rights and obligations under the ICSID Convention, that those rights and obligations persist following the receipt of a notice of denunciation by a Contracting State pursuant to Article 71*.' The tribunal then refuted the Claimants' allegation that their interpretation, focused on the object and purpose of the Convention, should prevail over an interpretation focused on the ordinary meaning of the terms of Article 72 in their context. According to the Claimants, the object and purpose of the Convention —to promote foreign investment by creating a mechanism for the binding third party adjudication of investment disputes— was inconsistent with Article 72's ordinary meaning and, in the Claimants' view, the Convention's object and purpose '*favours an interpretation that will serve to protect and preserve the jurisdiction of ICSID tribunals as far as possible in the face of the denunciation*

of the ICSID Convention by a Contracting State'. Again, the tribunal disagreed, stating that '*it would be very unusual for an appeal to the object and purpose of a treaty to lead to an interpretation that is fundamentally at odds with the ordinary meaning of terms in the context*'.

The tribunal found that Article 71 laid down the right of Contracting States to denounce the Convention and the consequences of denunciation for the state in its position as a party to the Convention. It also found that Article 72 governs the consequences of such denunciation for the state in its position as a party to an ICSID arbitration. Consequently, to analyze whether the denunciation of the Convention by Venezuela had any effect on the arbitration at hand, the tribunal had to focus on Article 72.

According to Article 72, the consent given to the Centre's jurisdiction by a denouncing state prior to the denunciation is still preserved after denunciation becomes effective (i.e., after the lapse of the six-month period). However, the parties' main divergence related to whether the word '*consent*' in the phrase 'consent to the jurisdiction of the Centre' of Article 72 related to the '*unilateral consent*' of the state in the BIT (as argued by the Claimants), or to the 'perfected consent' after a given investor accepts the state's offer to arbitrate (as argued by Venezuela).

With regard to the analysis of the ordinary meaning of the terms of Article 72, first, the tribunal applied the *effet utile* principle, which requires giving effect to all the terms of Article 72. In so doing, the tribunal found that the use of the phrase '*any national of that State*' referred to in Article 72 did not fit in with the 'unilateral consent' theory, since a national cannot give its unilateral consent in legislation or a BIT. The tribunal added that, when a national of a Contracting State consents to the jurisdiction of the Centre, it will always be perfected consent, so it is only '*perfected*' consent to which Article 72 refers.

The drafting history of the Convention provides support to the tribunal's interpretation of Articles 71 and 72 of the Convention

Second, the tribunal found that the reference in Article 72 to '*consent to the jurisdiction of the Centre*' giving rise to '*rights and obligations*' under the Convention in relation to acting as a potential party in ICSID arbitration proceedings, may only relate to perfected consent. Consent, if not perfected, may not give rise to rights or obligations under the Convention. Thus, the tribunal explained, '[t]*he Contracting State's unilateral consent in an investment treaty cannot fall within the scope of Article 72 because Article 72 only concerns "*consent*" [...] that has given rise to "*rights and obligations under *[the ICSID]* Convention*"*'*.

The tribunal also found support for its interpretation of consent under Article 72 as meaning '*perfected consent*' by reference to Article 25(1), the core provision governing jurisdiction under the Convention. As noted by the tribunal, '*nowhere in Article 25* [...] *or indeed in the rest of the ICSID Convention*' was the word consent used as meaning '*unilateral consent*'. Similarly, Article 66(2), which regulates the effects of amendments to the Convention on the rights and obligations of all parties to ICSID arbitration agreements, also supported the interpretation of Article 72.

Despite refusing to resort to supplementary means of interpretation under the terms of Article 32 of the VCLT because it did not deem it '*justified or necessary*, the tribunal observed that the drafting history of the Convention provided support to the tribunal's interpretation of Articles 71 and 72 of the Convention.

This decision departs from the line of reasoning taken by other tribunals dealing with the same issue that came to the opposite conclusion, including, as noted by the decision itself, the tribunals in *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela* (ICSID Case ARB/12/22) and *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case ARB/12/20).