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Session II: Investor-State Dispute Settlement: Is the system at a crossroads?

Perspective of academia, practitioners and investors

ICSID Annulment Procedure

Shotaro Hamamoto
Professor of International Law
Graduate School of Law
Kyoto University

ICSID Annulment Procedure

requests registered	39
requests withdrawn	5
decisions rendered	24
(partial or entire annulment)	(11)
pending	10

(source: ICSID website, as of 10 December 2010)

Recent *ad hoc* committee decisions exercising *de facto révision au fond*

- Mitchell v. Congo, ARB/99/7, 1 November 2006

- CMS v. Argentina, ARB/01/8, 25 September 2007

- MHS v. Malaysia, ARB/05/10, 16 April 2009

- Sempra v. Argentina, ARB/02/16, 29 June 2010

- Enron v. Argentina, ARB/01/3, 30 July 2010

“Initial Failure”

- Klöckner v. Cameroon, ARB/81/2, 3 May 1985 (first annulment decision)

- Amco v. Indonesia, ARB/81/1, 16 May 1986 (first annulment decision)

- W. Michael Reisman, “The Breakdown of the Control Mechanism in ICSID Arbitration”, *Duke Law Journal*, 1989, p. 739.

- D.A. Redfern, “ICSID - Losing its Appeal?”, *Arbitration International*, vol. 3, 1987, p. 98.

Problem

Limited Power of the *ad hoc* committee:

"[The Committee] is […] mindful of the distinction between the failure to apply the proper law and the *error in judicando* […], and the consequential need to avoid the reopening the merits in proceedings that would turn annulment into appeal."

(Wena v. Egypt, ARB/98/4, annulment, 28 January 2002, para. 22)

What to do with a "wrong" award?

Option 1: *De facto révision au fond* without Annulment

- CMS v. Argentina

Option 2: *De facto révision au fo*nd through Annulment

- Mitchell v. Congo
- MHS v. Malaysia
- Sempra v. Argentina
- Enron v. Argentina

Option 3: No *de facto révision au fond*

CMS v. Argentina, ARB/01/8, Award, 12 May 2005

[para. 308] The Respondent has […] invoked in support of its contention the existence of a state of necessity under both customary international law and the provisions of the Treaty [Argentina-US BIT].

[para. 331] [T]he requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts.

[para. 332] The discussion on necessity and emergency is not confined to customary international law as there are also specific provisions of the Treaty dealing with this matter.

[para. 357] [T]he Tribunal must determine […] whether, as discussed in the context of Article 25 of the [ILC] Articles on State Responsibility, the act in question does not seriously impair an essential interest of the State or States towards which the obligation exists.

[para. 358] [I]t does not appear that an essential interest of the State to which the obligation exists has been impaired, nor have those of the international community as a whole.

CMS v. Argentina, Annulment, 25 September 2007

[para. 130] [T]he requirements under Article XI [of the Argentina-US BIT] are not the same as those under customary international law […]. On that point, the Tribunal made ***a manifest error of law***.

[para. 131] Those two texts having a different operation and content, it was necessary for the Tribunal to take a position on their relationship [...]. The Tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing.

[para. 132] In doing so the Tribunal made ***another error of law***.

[para. 136] 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.

Sempra v. Argentina, ARB/02/16, Annulment, 29 June 2010

[para. 205] So the question arises whether the error in law so identified constitutes an excess of powers.

[para. 208] [T]he Tribunal adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law.

[para. 209] The Committee is therefore driven to the conclusion that the Tribunal has failed to conduct its review on the basis that the applicable legal norm is to be found in Article XI of the BIT, and that ***this failure constitutes an excess of powers*** within the meaning of the ICSID Convention.

Enron v. Argentina, ARB/01/3, Annulment, 30 July 2010

[para. 376] [T]he Tribunal accepted the expert evidence of [an economist] over the conflicting expert evidence of [another economist] to the effect that Argentina had other options available to it for dealing with the economic crisis. From this, without any further analysis, the Tribunal immediately concluded, that the measures adopted by Argentina were not the "only way".

[para. 377] [T]he Tribunal did not in fact apply […] customary international law as reflected in [the ILC Articles] but instead applied an expert opinion on an economic crisis. […] ***[T]his amounts to a failure to apply the applicable law***, as ground of annulment under Article 52(1)(b) of the ICSID Convention.

"Contrairement 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 ho*c ne gagne rien à souligner tous les points sur lesquels, à tout ou à raison, il aurait jugé différemment."

Emmanuel Gaillard, *La jurisprudence du CIRDI*, vol. II, Paris, Pedone, 2010, p. 427.

"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."

Gilbert Guillaume, "Le recours en annulation dans le système CIRDI: De l'insuffisance de motifs dans les sentences du CIRDI", *in* Emmanuel Gaillard ed., *The Review of International Arbitral Awards*, Huntington, Juris, 2010, p. 355.

Shortcomings of the "Creative" Use of Annulment

Option 1: *De facto révision au fond* without Annulment

- CMS v. Argentina

Does this not encourage the respondent State to violate the ICSID Convention?

Option 2: *De facto révision au fond* through Annulment

- Sempra v. Argentina / Enron v. Argentina

Are *ad hoc* committees always right and tribunals always wrong?

Mitchell v. Congo
MHS v. Malaysia

- two *ad hoc* committee decisions arriving at opposite conclusions on the definition of investment under the ICSID Convention.

For a more comprehensive argument:

Shotaro Hamamoto, “New Challenges for the ICSID Annulment System: Another Private-Public Problem in the Investment Dispute Settlement”, *in* Rüdiger Wolfrum ed., *International Dispute Settlement: Room for Innovations* (Max Planck Institute, forthcoming in 2011).