ICSID Arbitration and Developing Countries

*Ahmed Sadek El-Kosheri**

I. INTRODUCTION

ICSID REPRESENTS A SPECIAL CASE among the various institutions in charge of administering arbitration in implementation of a given set of rules for the conduct of conciliation and arbitration proceedings.

The specificity of ICSID stems from the fact that it is a truly international institution created by a multilateral convention concluded between States, establishing a system which functions exclusively in the particular field of investment disputes between the governmental authorities of the host country and the foreign investor who is from a State which is also a party to the ICSID Convention. In more concrete terms, the ICSID system operates outside the scope of domestic law control in matters necessarily involving a public law entity in its relationship with an investment project involving a national of a member State.

In most cases, the member State hosting the foreign investment is a developing country, since the real need to provide an international forum for the settlement of investment disputes with local public authorities, not subject to any possible intervention from national courts, was envisaged primarily as an incentive to western private investors to look more favorably towards developing countries. Clearly, the drafters of the ICSID Convention did not have it in mind, in the early sixties, to encourage investments in industrialized countries

* Professor of Law and Vice-President, International University for African Development at Alexandria (Université Senghor); Member of the Institut de Droit International; Partner, Kosheri, Rashed & Riad, Cairo. This paper was presented at a session on "Arbitration and Developing Countries" of the eighth in the series of colloquia on international arbitration co-sponsored by ICSID, the American Arbitration Association and the ICC International Court of Arbitration held at Washington, D.C. on November 11, 1991.

which had reached stability both in economic and political terms. Instead the drafters aimed at securing some protection against the "non-commercial risks" associated with poorer countries—mainly exporters of raw materials—which were at that point striving to gain control over their political destiny and over the economic resources which were critical to harmonious accelerated development.

Therefore, in order to evaluate the degree of success of the ICSID system, reference should be made to the number of developing countries that have become parties to the 1965 Convention. According to the current published list, out of the 123 States which have signed the ICSID Convention, no more than 21 States belong to the industrialized group of countries of Western Europe, the U.S., Japan, Australia and New Zealand. The remaining 102 States, even if not all of them qualify as developing countries, virtually all fall within the category of States that may need to grant special guarantees to attract foreign investment. Apart from several formerly socialist Eastern European States, and the special case of China (which ratified the Convention in January 1993), the other 86 States fall within this category of developing countries.

The second point which reflects the role that developing countries have played within the ICSID system derives from an analysis of the 29 disputes submitted to ICSID until now. Only two of the disputes involved governments of industrialized countries: *Swiss Aluminium Limited and Icelandic Aluminium Company Limited* v. *Government of Iceland*[1] and *Mobil Oil Corporation, Mobil Petroleum Company, Inc. and Mobil Oil New Zealand Limited* v. *New Zealand Government.*[2] Almost all of the other 27 disputes (including the two conciliation cases which were settled amicably) related to disputes in which the government of a developing country or an agency thereof was the defendant. There has been only one case in which the government of a developing country was the claimant (*Government of Gabon* v. *Société Serete S.A.*).[3]

A study of those 25 disputes submitted to ICSID arbitral tribunals that involved governments of developing countries shows the extent to which these governments followed usual patterns in their conduct of the arbitration proceedings, or conversely, acted in a manner that differs from what institutions like the ICC and the AAA are familiar with when handling transnational arbitrations that are ultimately subject to the control of domestic courts, whether directly in annulment recourses or indirectly within the enforcement proceedings. The results can be summarized under the following two main headings.

[1] ICSID Case No. ARB/83/1.

[2] ICSID Case No. ARB/87/2.

[3] ICSID Case No. ARB/76/1.

II. THE TRANSFORMATION OF THE ROLE TRADITIONALLY ENJOYED BY THE ARBITRATION AGREEMENT AS BASIS FOR JURISDICTION

In non-ICSID arbitrations, the presence of a special agreement concluded after the emergence of the dispute (*compromis*), or an arbitration clause (*clause compromissoire*), contained in the initial contract providing for a given type of arbitration to solve eventual disputes that may occur in relation to the contract, are the usual bases on which arbitration can be envisaged.

During the first two decades in the life of ICSID, the existence of an arbitration clause in the "investment contract" was also the pattern for ICSID arbitrations. However, in recent years new techniques have emerged which are theoretically conceivable under the ICSID Convention, but quite unlikely in the context of transnational business arbitration.

In two ICSID cases brought against the Government of Egypt (*Southern Pacific Properties (Middle East) Limited* v. *Arab Republic of Egypt*[4] and *Manufacturers Hanover Trust Company* v. *Arab Republic of Egypt and General Authority for Investment and Free Zones*[5]), there was no ICSID arbitration clause in the "investment contract" invoked by the claimant as the basis for the jurisdiction of the ICSID arbitral tribunal. Instead, the request for arbitration in the former case was exclusively and directly based on a legislative text (Article 8 of Law No. 43 of 1974 on Foreign Investments and Free Zones) which was alleged to offer potential foreign investors an incentive in the form of possible recourse to the ICSID Convention, whenever applicable, for the settlement thereunder of disputes related to foreign investments. In the latter case, the request for arbitration is said to have had a similar basis.

Interestingly, in both cases the ICSID arbitral tribunal declared itself competent to adjudicate the dispute submitted thereto, in spite of the objections raised by counsel for the Egyptian Government who maintained that in the Arabic official text the wording envisages that a subsequent arbitration agreement, in proper form, was required to implement the framework authorization provided for in the legislative act.[6] In the *SPP* case, the Government of Egypt tried to attack the jurisdictional decision by requesting annulment of that ruling under Article 52 of the ICSID Convention. That request however was denied by the acting Secretary-General on the grounds that only after the issuance of a final award on the merits could the annulment procedure be invoked, and

[4] ICSID Case No. ARB/84/3.

[5] ICSID Case No. ARB/89/1.

[6] In the *SPP* case, excerpts of the Decisions on Jurisdiction of Nov. 27, 1985 and Apr. 14, 1988 are published in 16 Y.B. Com. Arb. 19 (1991).

partial awards rendered on preliminary issues could not be separately challenged.[7]

At any rate, it is important to emphasize that the ICSID arbitral tribunal which issued this ruling on jurisdiction opened new prospects for future expansion of ICSID arbitration to cover cases where no formal arbitration agreement exists in the classic sense, and where the foreign investor instead treats the domestic legislative text as an open offer which he accepts merely by filing his arbitration request or notifying the host State of his intention to do so.

The other new technique which opens unlimited opportunities for ICSID arbitration to become the "natural judge" (*juge de droit commun*) in adjudicating investment disputes with the governmental authorities of a host State, was first practiced in *Asian Agricultural Products Limited* v. *Democratic Socialist Republic of Sri Lanka*.[8] In the absence of an arbitration agreement concluded in due written form, the claimant company (incorporated in this case in Hong Kong), based its request for arbitration exclusively on the text of the bilateral investment treaty (BIT) between the United Kingdom and Sri Lanka which referred to ICSID arbitration as the proper forum for the settlement of disputes related to investments by nationals of the other Contracting Party (Hong Kong being among the territories covered by the treaty).

The Government of Sri Lanka did not raise jurisdictional objections similar to those raised by Egypt in the above-mentioned two cases. The case thus set the first precedent for submission to ICSID jurisdiction directly and exclusively on the basis of a treaty text under which the private investor became the beneficiary capable of invoking the treaty without any need to negotiate even an investment contract with the competent authorities of the host State.

Taking into consideration that many BITs exist today containing similar references to the ICSID system, it seems that recourse to BIT provisions might in the future become the main channel through which ICSID could be seized. This in turn might lead to rapid growth in the number of cases submitted to arbitral tribunals established under the system.

III. THE EMERGENCE OF CERTAIN PATTERNS CHARACTERIZING THE CONDUCT OF THE PROCEEDINGS BEFORE ICSID ARBITRAL TRIBUNALS

The first clear tendency that may be observed in an evaluation of the ICSID experience is the high percentage of proceedings that have been

---

[7] *See* 6 News from ICSID, No. 1, at 2 (1989).

[8] ICSID Case No. ARB/87/3.

discontinued (over 50% of the cases) due to the fact that parties arrived at settlements on agreed terms.

More precisely, once objections related to lack of jurisdiction were rejected by the various ICSID arbitral tribunals, the "deterrent" role of the system came effectively into motion and the two parties would then attempt to settle their dispute amicably.

This pattern was established in the first ICSID case (*Holiday Inns S.A., Occidental Petroleum Corporation et al.* v. *Government of Morocco*),[9] and was followed in the three bauxite mining cases against the Government of Jamaica.[10] More recently it appears to have been followed in *Manufacturers Hanover Trust Company* v. *Arab Republic of Egypt and General Authority for Investment and Free Zones*.[11]

This brings us to the second feature of the ICSID experience which is the tendency among the defendant developing governments to seek to evade the jurisdiction of the ICSID system by invoking whatever arguments available and, if not by trying to frustrate the proceedings, by refusing to appear initially, or by boycotting meetings and withdrawing from the proceedings.

The classical jurisdictional objection was that successfully raised by Morocco in the *Holiday Inns* case with regard to the absence of an agreement by the host State to treat local subsidiaries as being under "foreign control" for the purposes of Article 25(2)(b) of the ICSID Convention.[12] The same type of objection was raised in the *Amco Asia* v. *Indonesia* case,[13] but failed this time since the first ICSID arbitral tribunal in that case held, in light of the information available to it, that it was "crystal clear" that the Indonesian authorities had agreed to treat the local company as a national of another Contracting State (namely the United States) for the purposes of the Convention.[14] Within a

---

[9] ICSID Case No. ARB/72/1.

[10] Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica (ICSID Case No. ARB/74/2); Kaiser Bauxite Company v. Government of Jamaica (ICSID Case No. ARB/74/3); Reynolds Jamaica Mines Limited and Reynolds Metals Company v. Government of Jamaica (ICSID Case No. ARB/74/4).

[11] *See supra* note 5.

[12] *See* P. Lalive, The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Problems, 51 Brit. Y.B. Int'l L. 123, 137 (1980).

[13] The Amco Decision is reproduced in 23 ILM 351 (1984) and 10 Y.B. Com. Arb. 61 (1985).

[14] *See* Lamm, Jurisdiction of the International Centre for Settlement of Investment Disputes, 6 ICSID Rev.—FILJ 462, 471 (1991).

different context, the same type of objection was again raised and rejected in *Société Ouest Africaine des Bétons Industriels* v. *State of Senegal.*[15]

The more radical challenge to jurisdiction under the ICSID system—coupled with certain measures of non-cooperation with it—came as a result of the Jamaican bauxite mining disputes and the way they were handled.

That was one of the first occasions on which the Chairman of the ICSID Administrative Council used the powers granted to him by virtue of Article 38 of the Convention[16] and under Article 4 of the Arbitration Rules,[17] to appoint the second arbitrator, since the Government of Jamaica refused to exercise that prerogative. At the same time, the Government of Jamaica tried to abrogate its prior consent to ICSID arbitration of disputes arising out of the agreements with the three claimant companies. Unanimously, the arbitral tribunal decided that once consent had been given to a foreign investor, it could not be unilaterally withdrawn.[18]

A similar negative approach of not appointing the second arbitrator was subsequently followed by the Government of the Republic of the Congo which was the respondent in the case submitted by AGIP S.p.A..[19] It was proven ineffective since the Chairman of the Administrative Council appointed

---

[15] ICSID Case No. ARB/82/1. The Award of Feb. 25, 1988 in this case and its attachments are published in 6 ICSID Rev.—FILJ 125 (1991). For comments on the jurisdictional issues in this case, see Gaillard, Chronique des sentences arbitrales, 117 Journal du droit international 192 (1990); Ziadé, Introductory Note, 6 ICSID Rev.—FILJ 119 (1991).

[16] Article 38 of the ICSID Convention provides:

> If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

[17] ICSID Arbitration Rule 4(1) provides:

> If the Tribunal is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the arbitrator or arbitrators not yet appointed and to designate an arbitrator to be the President of the Tribunal.

ICSID Arbitration Rule 4(4) provides:

> The Chairman shall, with due regard to Articles 38 and 40(1) of the Convention, and after consulting both parties as far as possible, comply with that request within 30 days after its receipt.

[18] Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica, Decision on Jurisdiction and Competence of July 6, 1975, 4 Y.B. Com. Arb. 206 (1979).

[19] AGIP S.p.A. v. Government of the People's Republic of the Congo (ICSID Case No. ARB/77/1).

the same second and third arbitrators who participated in the Jamaican cases (Mr. Jørgen Trolle of Denmark, and Mr. Fuad Rouhani of Iran). Together with Professor Dupuy, appointed by the Italian claimant, the three arbitrators rendered a unanimous award which became definitively binding on the defending Government,[20] thus proving the unproductive effect of non-cooperation. A sudden change of attitude took place in the next case brought a few months later against the same Government of the Republic of the Congo by another Italian company (S.A.R.L. Benvenuti & Bonfant).[21] In this case the Government agreed to cooperate by appointing Mr. Edilbert Razafindralambo (Malagasy) to become the second arbitrator. However, the Government did not go sufficiently far in its cooperation with the ICSID arbitral tribunal, since it filed an objection to jurisdiction based on the existence of a suit pending before the Revolutionary Court of Brazzaville. It also failed to attend the hearings, to submit its counter-memorial and reply to the claimant's observations on the objection to jurisdiction. In a unanimous final award,[22] the ICSID tribunal started by rejecting the objection to jurisdiction raised by the Government, essentially for the reason that the Republic of the Congo had not required the prior exhaustion of local remedies as a mandatory step before recourse to ICSID.

The lessons that should have been learned from the failure of the above-mentioned occurrences of non-cooperation to achieve a beneficial result for the defending State were unfortunately not taken into account in some of the subsequent cases, mainly in *Liberian Eastern Timber Corporation* v. *Government of the Republic of Liberia*.[23] In spite of the fact that the Government of Liberia appointed Mr. Alan Redfern of the United Kingdom as second arbitrator and was represented at the start of the proceedings by Mr. Jan Paulsson (then of the Paris office of Coudert Brothers), a telex of December 30, 1983 indicated that Coudert Brothers would no longer represent Liberia and the Government not only failed to appoint a new representative but also failed to attend the hearings or to present its case.

In the other two ICSID cases previously referred to which involved the Egyptian Government, although counsel acting for the Government attended and fully participated in the proceedings, the same dismissive attitude towards the ICSID system can be easily traced.

---

[20] Award of Nov. 20, 1979, 64 Riv. dir. int'l 863 (1981); 71 Revue critique de droit international privé 92 (1982). English translations of French original in 21 ILM 726 (1982); 8 Y.B. Com. Arb. 133 (1983); 67 I.L.R. 318 (1984).

[21] ICSID Case No. ARB/77/2.

[22] Award of Aug. 8, 1980. English translation of French original in 21 ILM 740 (1982); 8 Y.B. Com. Arb. 144 (1983); 67 I.L.R. 345 (1984).

[23] ICSID Case No. ARB/83/2.

In the first of the two cases (the *SPP* case), I personally think that it would have been more useful to Egypt, instead of raising objections to jurisdiction, regardless of whether they were justified or not, to welcome ICSID arbitration as consistent with the declared governmental public policy of providing foreign investors with effective legal guarantees that should normally prevent any type of "denial of justice" including any delay in rendering justice. (It should be recalled in this respect that since the cancellation of the Pyramids Plateau touristic project by the late President Sadat in 1978, valuable time was wasted in pursuit of an ICC arbitral award[24] which had been annulled by the Paris Court of Appeal in 1984,[25] and the case was then before ICSID from August 1984 to March 1993).

In the other arbitration case, the performance of the defendant's local governmental counsel leads this writer to emphasize the importance within the ICSID system of having not only arbitral tribunals composed of qualified persons capable of working collectively in a harmonious manner, but also adequate representation of the two parties by competent counsel, well experienced in the field of international arbitration. The manner in which the various ICSID tribunals were constituted and worked indicates clearly that these essential requirements were met in most cases.

Special attention should be given in this respect to the fact that the respondent developing countries generally accepted the appointment of qualified arbitrators regardless of their nationality. On eight occasions the developing countries agreed to have ICSID arbitral tribunals composed exclusively of western arbitrators, including those they appointed themselves. In fact, Morocco appointed Paul Reuter of France in the first ICSID case;[26] Gabon appointed Victor-Gaston Martiny of Belgium in its dispute with Société Serete S.A.;[27] and Nigeria appointed Elihu Lauterpacht of the United Kingdom in its dispute with Guadalupe Gas Products Corporation.[28] In the *Amco Asia* v. *Indonesia* case, Indonesia appointed a Danish citizen to both the first and the second tribunal (Professor Isi Foighel in Amco I, and Mr. Per Magid in Amco II).[29] In three of these cases, the three members of the arbitral tribunal were of the same nationality. Thus, the arbitral tribunal in *Adriano Gardella S.p.A.* v.

---

[24] Award of Mar. 11, 1983, 22 ILM 752 (1983); 9 Y.B. Com. Arb. 111 (1984); 1986 Revue de l'arbitrage 105.

[25] Arab Republic of Egypt v. Southern Pacific properties, Ltd. (SPP) and Southern Pacific Properties (Middle East), Cour d'appel, Paris Judgment of July 12, 1984, 23 ILM 1048 (1984).

[26] *See supra* note 9.

[27] *See supra* note 3.

[28] ICSID Case No. ARB/78/1.

[29] ICSID Case No. ARB/81/1.

Government of Côte d'Ivoire[30] was composed of three Swiss citizens; three American citizens formed the arbitral tribunal which adjudicated the case of *Maritime International Nominees Establishment* v. *Government of the Republic of Guinea*[31] and in the dispute between *Occidental of Pakistan, Inc.* and *Islamic Republic of Pakistan*[32] the arbitrators were three British nationals. Moreover, in four ICSID cases, two out of the three arbitrators were of the same nationality (in the *Gabon* v. *Serete* case two were Swiss citizens; two nationals of the Netherlands served on the tribunal in *Société Ouest Africaine des Bétons Industriels (SOABI)* v. *State of Senegal* as well as in *Atlantic Triton Company Limited* v. *Republic of Guinea*; and two Australians served in *Mobil Oil Corporation* v. *New Zealand Government*).

However, in order to complete the picture, it has to be noted that within the ICSID system the role played by persons from developing countries is gradually expanding. The *ad hoc* Committee in charge of the second annulment proceeding in the *Klöckner* v. *Cameroon* case, as well as the *ad hoc* Committee in charge of the annulment proceeding in the *MINE* v. *Guinea* case comprised two developing country jurists (Professor Sompong Sucharitkul of Thailand as President in both instances and Judge Kéba Mbaye of Senegal as member also in both). Furthermore, in the *Asian Agricultural Products* case against Sri Lanka, two out of the three members of the arbitral tribunal were from Africa (an Egyptian appointed as President, and a Ghanaian chosen as arbitrator by Sri Lanka).

Another new trend appears to favor the appointment by the defendant developing country of one of its own citizens as member of the ICSID arbitral Tribunal (*SPP* v. *Egypt*; *SOABI* v. *Senegal*; and *Société d'Etudes de Travaux et de Gestion SETIMEG S.A.* v. *Republic of Gabon*[33]). It remains to be seen how effective the role can be of an arbitrator who tries to maintain his neutrality vis-à-vis his own country, detaching himself psychologically from all surrounding circumstances.

Finally, a few concluding remarks have to be made regarding the most controversial issue, namely the finality of ICSID awards and whether the system has been weakened or on the contrary strengthened by the three annulments rendered until now. The starting point in any serious discussion of the subject has to focus on the need to find a balanced solution which permits the substitution of the control normally exercised by national courts on transna-

[30] ICSID Case No. ARB/74/1.

[31] ICSID Case No. ARB/84/4.

[32] ICSID Case No. ARB/87/4.

[33] ICSID Case No. ARB/87/1.

tional arbitral awards by another type of adequate control exclusively placed at the international law level.

The drafters of the ICSID Convention were certainly right in establishing the control system envisaged in Article 52 which was intended to avoid the possibility of being faced one day with arbitrary awards manifestly *ultra vires*. Thus, the principle of control itself which can in certain circumstances lead to the annulment of an ICSID award seems hardly questionable. The experience of the last few years has demonstrated effectively that the presence of such control has been beneficial to developing countries as well as to foreign investors. In two out of the three published annulment decisions rendered, Indonesia and Guinea succeeded in their respective recourses, and in the third instance (which was chronologically the first), it was the foreign investor who benefitted from the decision.

It should be recalled that it was the decision rendered by the first *ad hoc* Committee in the *Klöckner* v. *Cameroon* case which triggered considerable differences of opinion.[34] A number of commentators severely criticized the lengthy elaborations contained in that unanimous decision, without taking sufficiently into consideration that this difficult task was undertaken in an effort to find a way out of the dilemma in which the members of the Committee found themselves: on one hand, a firm commitment to the presumption of validity (*in favorem validitatis sententiae*); and on the other hand, a deep conviction that a certain degree of control is required to sanction any "excès de pouvoir." Otherwise an ICSID arbitrator would be transformed into a new Roman *praetor* or a decision-maker with virtually an absolute discretion to impose his own concepts as a substitute for the law he was supposed to apply.

Certain authors have tried to portray the situation as if the so-called "hair-trigger mechanism," adopted by the first *Klöckner ad hoc* Committee which unreasonably expanded the grounds for nullification, was subsequently reversed by the first *Amco ad hoc* Committee[35] in what was termed its "effort to repair the ICSID control function" through the adoption of a "material violation approach" to replace *Klöckner*'s "technical discrepancy approach."

In reality, there has been a remarkable continuity in the constructive efforts undertaken by the *ad hoc* Committees which rendered the first two annulment decisions. Nothing of relevance is proven to exist, in the sense that the differences in approach or in the concepts formulated could have affected

---

[34] *See, e.g.*, Feldman, The Annulment Proceedings and the Finality of ICSID Arbitral Awards, 2 ICSID Rev.—FILJ 85 (1987). The first *ad hoc* Committee decision in the Klöckner v. Cameroon case is published in English translation at 1 ICSID Rev.—FILJ 89 (1986).

[35] *See* Reisman, The Breakdown of the Control Mechanism in ICSID Arbitration, 1989 Duke L.J., No. 4, at 739. The first *ad hoc* Committee decision in the Amco case is published in 25 ILM 1435 (1986).

the final outcome of the recourse. This would have been unlikely due to the fact that one member of the first *Klöckner ad hoc* Committee became the President of the first *Amco ad hoc* Committee. Moreover it can easily be observed that on more than one occasion express reliance was placed by the *Amco* Committee on certain passages of the *Klöckner* Decision.

In essence, an objective analysis of the differences between the two cases suggests that failure to apply any rules of law and to state reasons in support of findings pertaining to the crucial inseparable issues in the *Klöckner* case left the *ad hoc* Committee with no other choice than to annul the award in its entirety, while in the *Amco* case, failure to apply fundamental provisions of Indonesian law and to state reasons affected only certain issues that could be easily separated, a situation which logically led to a partial annulment. In no way did the *Amco ad hoc* Committee become involved in a material evaluation of the substantive requirements for adequacy of reasons, a dangerous path which necessarily leads to sliding into appeal.

With regard to the third annulment decision rendered subsequently in the *MINE* v. *Guinea* case,[36] it seems important to emphasize that the reasoning followed by the *ad hoc* Committee, presided over by Professor Sucharitkul, would not have led to a different result had it been applied in the first *Klöckner* annulment proceeding. This is in spite of the different approach that could be detected in the Committee's declaration to the effect that:

> The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.[37]

It should be recalled that the Committee immediately thereafter qualified that statement by adding:

> the minimum requirement (to state reasons) is in particular not satisfied by either contradictory or frivolous reasons.[38]

Furthermore, the Committee declared that:

> failure to deal with a question may render the award unintelligible and thus subject to annulment for failure to state reasons.[39]

---

[36] The *ad hoc* Committee decision in the MINE v. Guinea case is published in 5 ICSID Rev.—FILJ 95 (1990).

[37] *Id.* at 105.

[38] *Id.*

[39] *Id.* at 106.

Taking the above-stated conclusions into account, it would be unacceptable to claim that the ICSID "control system has spun out of control," or that ICSID arbitration has been transformed "into a sequence of two-phased proceedings." [40]

The undisputed reality is that whenever the arbitral tribunal has done its job properly there can be no room for recourse under Article 52 of the ICSID Convention, and consequently no possible annulment.

The award rendered in the *Asian Agricultural Products* case against Sri Lanka[41] provides an illustration of that reality since no recourse for annulment was filed against it by either party in spite of the fact that the majority decision was accompanied by a strongly worded dissenting opinion of one of the arbitrators which qualified the product of his two colleagues as being "bad law."

In conclusion, it seems appropriate to recall what Dr. Shihata declared at the twenty-second annual meeting of the Administrative Council of ICSID held in Berlin:

> It may be expected that use of the annulment procedure would be a rare event because of the seriousness of the shortcomings against which it is meant to be a safeguard. This still seems to be the case, since the annulment procedure has only been invoked in three disputes before the Centre. However, if parties dissatisfied with awards regularly seek annulment such a practice may put in doubt the features which make ICSID arbitration an attractive means of settling investment disputes—namely its speed, comparatively low cost, and its effectiveness. It is also wrong to confuse the annulment proceeding with an appeals process which is not possible in respect of awards issued by ICSID's tribunals.[42]

[40] Reisman, *supra* note 35, at 787.

[41] See *supra* note 8. The award is reprinted in 6 ICSID Rev.—FILJ 526 (1991).

[42] Twenty-second Annual Meeting, Report of the Secretary-General to the Administrative Council, at 3 (1988).