

**Time for the Appeal Tribunal  
in Investment Arbitration:  
Lessons from WTO and  
Transitioning to the New Era**

**Ahmet Dulger, LL.M.**

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**Time for the Appeal Tribunal in Investment Arbitration:  
Lessons from WTO and Transitioning to the New Era**

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**New York University School of Law**

To my beloved mother and father,  
For their precious and unlimited support

## SUMMARY

This Book is reproduced from my LL.M. thesis written under the supervision of Professor Robert Howse while studying LL.M. at New York University School of Law (2017).

This Book presents a proposal for building an effective, legitimate, and transparent judicial system in the investor-state dispute settlement through an appellate review mechanism for the awards of *ad hoc* arbitral tribunals. Current investment dispute settlement system includes the arbitration facilities provided by institutions such as ICSID and *ad hoc* arbitration tribunals agreed by the disputing parties. This Book argues that this scheme of investment arbitration lacks the mechanisms for correcting the legal errors and securing the consistency between arbitral awards for the similar issues of investment law. As a comparable mechanism, the WTO Dispute Settlement Mechanism is examined to contribute to the establishment of a viable appellate mechanism in the investment arbitration. The WTO Appellate Body is the leading example for a multilateral dispute settlement mechanism. Therefore, lessons from the WTO experience and structure of the WTO Appellate Body are examined to create a transparent appellate mechanism for investment arbitration. Opposed to the EU TTIP Proposal on the establishment of a tribunal of first instance, the investment law must keep its *ad hoc* arbitration system in order to respond the unique needs of each dispute. With the aim of improving the dispute settlement system, the Appeal Tribunal, a standing body charged with deciding appeals of law, is at the center of the proposal. By preserving the flexibility of *ad hoc* tribunals, the Appeal Tribunal would be likely to achieve the goal of harmonizing international investment law.

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## ABBREVIATIONS

**ABA Report:** American Bar Association Report on the European Proposal

**BIT:** Bilateral Investment Treaty

**CETA:** Comprehensive Economic and Trade Agreement

**DSB:** Dispute Settlement Body

**DSU:** Understanding on Rules and Procedures Governing the Settlement of Disputes

**EU:** European Union

**FTA:** Free Trade Agreement

**GATT:** General Agreement on Tariffs and Trade

**IBA:** International Bar Association

**ICC:** International Chamber of Commerce

**ICSID:** International Center for Settlement of Investment Disputes

**ICSID Convention:** Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

**IIA:** International Investment Agreement

**ISDS:** Investor-State Dispute Settlement

**LCIA:** London Court of International Arbitration

**MAI:** Multilateral Agreement on Investment

**Mauritius Convention:** Convention on Transparency in Treaty-based Investor-State Arbitration

**New York Convention:** New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards

**OECD:** Organisation for Economic Co-operation and Development

**SCC:** Stockholm Chamber of Commerce



**TPP:** Trans-Pacific Partnership

**TTIP:** Transatlantic Trade and Investment Partnership

**UNCITRAL:** United Nations Commission on International Trade Law

**U.S.:** The United States

**WTO:** World Trade Organization

**WTO Agreement:** Agreement Establishing the World Trade Organization

## INTRODUCTION

International investment law deals with broad range of legal and economic circumstances. While it resolves the problems of actors in international investment, it faces itself various challenges. The increasing amount of investment disputes created various problems regarding the functionality of international investment law. As of today, it is clear that international investment law is put on the spot to be questioned by its own aims and principles.

The opinions on the practicability and functionality of the current investor-state dispute settlement (ISDS) system differ on how to secure the rights of actors in the system.<sup>1</sup> Some scholars and commentators raise that the ISDS system is broken and it needs to be fixed.<sup>2</sup> On the other hand, others insist on the well-functioning of the system and decline any further change.<sup>3</sup> It is also argued that a multilateral investment agreement, which collapsed before, is now possible due to the fact that home states and host states are much more capable of understanding each other's interests.<sup>4</sup> This is basically because of the more integrated economic era in which the investors make their investments. In such a vibrant economic environment, countries may both act as home state and host state in different investment projects. This may lead the countries to develop more sympathy with the opposing parties' arguments.<sup>5</sup>

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<sup>1</sup> Louis T. Wells, Preface to José E. Alvarez, Karl P. Sauvant eds, *The Evolving International Investment Regime: Expectations, Realities, Options* xv, xvii (2011).

<sup>2</sup> M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in Appeals Mechanism in International Investment Disputes 39 (Karl P. Sauvant ed, 2008).

<sup>3</sup> Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *Fordham L. Rev.* 1521, 1521 (2005); Charles H. II Brower, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 *Vand. J. Transnat'l L.* 37, 37-94 (2003); See also Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 *Geo. Int'l Envtl. L. Rev.* 51, 88 (2004).

<sup>4</sup> Wells, 2011, *supra* note 1, p. xvii.

<sup>5</sup> *Id.*

Therefore, it is possible for a search on global effort to unify the rules governing international investment law and have more systematic dispute settlement system. I am relatively optimistic about a comprehensive global approach in order to improve the current ISDS mechanism. However, this global approach would not be the multinational investment agreement. Considering the current political atmosphere, neither the United States (U.S.) nor other globally active actors are able to lead a successful initiation for a global investment treaty.

In this Book, I will question these concerns and conclude that the system needs to be immediately fixed. In Section I, the aim of international investment law and relevant risks that needed to be dealt with will be explained. Section II provides an overview of the International Center for Settlement of Investment Disputes (ICSID) investment dispute settlement mechanism. The structural and practical problems of ICSID dispute settlement will be examined. Section III gives an understanding of World Trade Organization (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and relevant aspects of its decision-making process. The WTO DSU will be evaluated to highlight its features that are compatible with the proposed system of appellate review in the ISDS. Section IV concludes with an overall analysis of current ISDS and proposed changes to introduce appellate review mechanism. The advantages of appellate review and transitioning to such mechanism will be presented through the analysis of case law and the current proposals for a change in ISDS.

## SECTION I

### 1.1 General Framework of International Investment Law

International investment law has been designed to protect the secure flow of capital and relatedly to ensure the sustainability of investment projects.<sup>6</sup> Such definition of investment projects includes both portfolio investment and foreign direct investment.<sup>7</sup> These projects could only be protected by safeguarding the interests of actors who make these transactions. A large variety of actors in international investment has contradicting interests. All these interests have significance in the general scheme of international investment law. However, international investment law aims essentially to ensure the protection of foreign investors from the decisions and executions of host states.<sup>8</sup> “Disciplining states”<sup>9</sup> and providing protection to investors from unfair regulations of host states can also be counted as the main motivation of investment law.

#### *Conflict of Interests*

International investment law produced mechanisms to serve and protect the interests of the actors in international investment. There are three main actors in international investment which are the following: foreign investor,<sup>10</sup> host state, and home state. By the term ‘investor’, it is to be meant that the foreign national either legal or natural who makes the investment in the host state. While host state is the country where the investor makes his investment, home state is the country where investor incorporated or has its place of business.

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<sup>6</sup> M. Sornarajah, *The International Law on Foreign Investment* (3<sup>rd</sup> edition), Cambridge University Press New York, p. 174 (2010).

<sup>7</sup> *Id.* p. 8.

<sup>8</sup> *Id.* p. 175.

<sup>9</sup> Alex Mills, *The Public-Private Dualities of International Investment Law and Arbitration, in Evolution in Investment Treaty Law and Arbitration* 97, 108 (Chester Brown, Kate Miles eds, 2011).

<sup>10</sup> Hereinafter ‘investor’.

The actors in international investment have different interests while dealing with the investment. The interests are controversial with regard to the inherent competence with each other. While investor based his interests on the ownership of property to get profit, host state has various interests including economic and social development based on sovereign rights.<sup>11</sup> Moreover, home state has an interest in protecting the economic and legal rights of its subjects abroad. Since making an investment reveals various interests of different actors, the conflict of interests is inevitable. This will raise the question of how to deal with such complex relations and disputes involved in these relations.

## **1.2 Risks of International Investment**

Making investment requires having long term projections. Contrary to commercial transactions which are mostly accepted as involving relatively short term deals and transactions, making investment in a foreign country requires investors to know the legal and economic structure of host state very closely. Throughout such a long term relationship, numbers of problems may arise and have any effect on the sustainability of investment. These problems can only be predicted by looking at the risks that an investment may face.

International investment law is developed in order to eliminate the risks that are inherently involved in international investment projects. Such risks arise from the relationship and the conflict of interests between the actors of an actual investment. The actors may encounter the difficulties

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<sup>11</sup> Sornarajah, 2010, *supra* note 6, p. 59.

that arise from economic, legal, political, and infrastructure risks. Thus, it is important to review the situations which pose such risks.

With regard to the economic risks, economic performance and standing of the host state is the main factor that may affect the foreign investment adversely. By the principle of state sovereignty, states can decide to change their economic policies to follow.<sup>12</sup> The economic measures and schemes may be re-shaped before and after the investor commenced its investment project. Indeed, these decisions of states to change its economic policies pose threat to foreign investment.<sup>13</sup> Further, the economic instabilities or unexpected changes on the state economy can be listed as economic risk. High inflation rate or unpredictable fluctuations create a dangerous environment for the profitability of foreign investment.

The legal conditions in host state have also significant impact on the success of foreign investment. Vague legal environment, lack of enforcement, and problems concerning dispute resolution mechanism can be stated as legal risks. In a forum where foreign investor can not predict what challenges its investment will face and how the host state will treat the investor and investment, there would not be a legal certainty for the future of investment. Inefficient legal protection for intellectual property rights and the uncertainty regarding the applicable law are other legal risks.

Furthermore, host state's arbitrary and discriminatory practices would raise the concerns over political risks. Unlawful expropriation could be deemed as the most severe intervention of

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<sup>12</sup> *Id.* p. 70.

<sup>13</sup> *Id.*

property rights. In case of preclusion of currency transfer, investor's whole effort to get profit and transfer to his own country would be meaningless. Kohler and Stahler clearly states that:

Almost all investment implies exposure to political risk: Once upfront cost is sunk the sovereign may change the legal environment, say through regulatory standards, such that the *ex ante* incentives for the investment is put into question *ex post* (...) Due to anticipation by foreign investors, regulatory risk may thus lead to beneficial investments not being carried out at all, or not carried out to the socially optimal amount.<sup>14</sup>

Finally, as a big scale commercial enterprise, foreign investment requires providing the investor necessary infrastructure. Incomplete and inferior transportation and communication network would cause substantial harm to the investment project.

### **1.3 Dispute Settlement Mechanisms in International Investment Law**

The above-mentioned factors lead the actors of international investment to find ways to mitigate the inherent risks of investment. With that regard, ISDS provisions have been included by the most International Investment Agreements (IIAs) over the last three decades.<sup>15</sup> IIAs which contain ISDS mechanisms allow investors to bring their claims directly before an arbitral tribunal. To resolve the disputes through ISDS, parties mostly designate ICSID procedures to be applicable to their disputes.<sup>16</sup> However, United Nations Commission on International Trade Law

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<sup>14</sup> Wilhelm Kohler, Frank Stahler, *The Economics of Investor Protection: ISDS versus National Treatment*, Center for Economic Studies and Ifo Institute 5766, p. 1 (2016).

<sup>15</sup> Roberto Echandi, *What Do Developing Countries Expect from the International Investment Regime?*, in *The Evolving International Investment Regime: Expectations, Realities, Options* 3, 11 (José E. Alvarez, Karl P. Sauvant eds, 2011).

<sup>16</sup> Rainer Geiger, *Multilateral Approaches to Investment: The Way Forward*, in *The Evolving International Investment Regime: Expectations, Realities, Options* 153, 164 (José E. Alvarez, Karl P. Sauvant eds, 2011).

(UNCITRAL) Arbitration Rules or International Chamber of Commerce (ICC) Rules of Arbitration are also selected by a significant number of IIAs.<sup>17</sup> To present the current structure of ISDS, ICSID which is most commonly used by investors to bring claim against host states will be examined in the following Section.

International investment law contains different dispute settlement mechanisms. Each dispute settlement mechanism has its own features to deal with the disputes. While some provide sets of rules to bring claims in hearings, others may facilitate for parties to negotiate. However, all these different mechanisms should have the necessary common feature: The means for bringing a claim must have necessary components of impartiality and effectiveness to fulfill the investor protection.

In the absence of other arrangements, domestic courts of the host state would have jurisdiction to settle the disputes between foreign investor and host state. It should be mentioned that domestic courts may not offer the sufficient guarantees to foreign investors. Even though it can be argued that it is practical to bring actions before these courts, there are serious concerns about the impartiality and lack of expertise. Courts of host state may act in a way favoring the host state against investor. Domestic courts of other states might also be selected as the forum for dispute settlement. Besides the claims on sovereign rights of host states, lack of territorial jurisdiction would make most cases impossible. For instance, the doctrine of *forum non-conveniens* may well be argued to dismiss the case. Further, host state can claim state immunity before the courts of other states.

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<sup>17</sup> *Id.*



Another way to settle the disputes can be through the diplomatic protection. Home state can espouse and pursue the claim against host state. International courts or arbitral tribunals may be the forum for negotiation or litigation between states. However, certain reasons make the diplomatic protection less preferable for foreign investors. There must be previous stages to be fulfilled in order to take an action through diplomatic protection doctrine. For instance, investor must have exhausted all local remedies in host state. Yet, the discretionary right of home state to bring a claim before host state makes the legal protection even more limited.

Because of these reasons, contracting parties to IIAs implemented ISDS mechanisms which contain investment arbitration in order to secure a more efficient system of investment dispute settlement.<sup>18</sup> Through investment arbitration, it became possible to directly claim the rights under IIAs before the arbitral tribunals without requiring the investors to depend on the diplomatic protection of home states.<sup>19</sup>

With regard to the topic of this Book, alternative dispute resolution mechanisms constitute the most significant way for the settlement of investment disputes. Mediation, conciliation, and arbitration are the main means for that purpose. Flexibility in terms of the party autonomy is the biggest advantage that is provided to parties of the dispute. The enforceability of arbitral awards is another aspect of investment arbitration to be preferred. Since the Book is about the investment

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<sup>18</sup> See Yusuf Caliskan, *Dispute Settlement in International Investment Law, in Implementing International Economic Law: Through Dispute Settlement Mechanisms* 123, 146-52 (Yusuf Aksar ed, 2011).

<sup>19</sup> Echandi, 2011, *supra* note 15, p. 11.

arbitration, the following sections will only focus on the structure and problems of investment arbitration.

## SECTION II

### 2.1 ICSID Convention Arbitration

ICSID is established by the World Bank in 1966 as a means for promoting foreign investment. While it is aimed to provide a proper mechanism for dispute settlement, it is also sought to encourage the flow of international investment worldwide.<sup>20</sup> It should be noted that ICSID has a significant role in removing the obstacles to the flow of international investment and the development objectives for countries through its widely accepted competence in ISDS.<sup>21</sup>

As of today, 161 countries are signatory and contracting states to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).<sup>22</sup> The number of investor-state arbitration has grown extensively in recent years. While in 2014 the total number of cases registered under the ICSID Convention and Additional Facility Rules was 38, in 2015 this number was 52. As of 31 December 2016, the total number of newly registered ICSID cases was 48.<sup>23</sup> Currently, ICSID had registered 597 cases under the ICSID Convention and Additional Facility Rules. Besides these, there are a number of non-ICSID cases administered by the ICSID Secretariat.

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<sup>20</sup> Nassib G. Ziadé, *Challenges and Prospects Facing the International Centre for Settlement of Investment Disputes*, in *The Evolving International Investment Regime: Expectations, Realities, Options* 120, 121 (José E. Alvarez, Karl P. Sauvant eds, 2011).

<sup>21</sup> *Id.*

<sup>22</sup> Database of ICSID Member States. Available at <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (Last visited April 7, 2017).

<sup>23</sup> The ICSID Caseload – Statistics (Issue 2017-1), p. 7. Available at [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf) (Last visited April 7, 2017).

ICSID provides facilities for the settlement of international investment disputes in investor-state and state-state cases.<sup>24</sup> These cases may be referred to conciliation or arbitration under the ICSID Convention.<sup>25</sup> With regard to the arbitration proceedings, the Center handles both cases which referred to the ICSID Convention and other rules such as UNCITRAL Arbitration Rules. Either investor or contracting state can request the establishment of an arbitration tribunal which composes of a sole or any uneven number of arbitrators.<sup>26</sup>

## **2.2 ICSID Annulment Mechanism**

Pursuant to Article 53 of the ICSID Convention, “the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.” The binding character and finality of an ICSID award are the most significant aspects of ICSID arbitration. Thus, the award is directly enforceable within the territories of contracting states “as if it were a final judgment of a court in that State.”<sup>27</sup> The ICSID Convention does not provide any mechanism for appeal. However, the disputing parties can ask for the annulment of the decision of the tribunal under Article 52. It should also be noted that even the annulment mechanism is conceived to be used in extraordinary circumstances.<sup>28</sup> In this part, the present annulment mechanism under the ICSID Convention will be examined.

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<sup>24</sup> ICSID and the World Bank Group. Available at <https://icsid.worldbank.org/en/Pages/about/ICSID%20And%20The%20World%20Bank%20Group.aspx> (Last visited April 7, 2017).

<sup>25</sup> For the purpose of this Book, only the arbitration provisions of the ICSID Convention will be examined.

<sup>26</sup> ICSID Convention Article 36 and Article 37.

<sup>27</sup> ICSID Convention Article 54.

<sup>28</sup> Wang Guiguo, *The ICSID Annulment Mechanism: Practice, Problems and Alternatives*, 2 China Legal Sci. 29, 31 (2014).

### **a) The Distinction Between Appeal and Annulment**

First of all, the line between appeal and annulment should be observed. The distinguishing features of the two mechanisms lie on the grounds to review. In the appeal process, parties to a dispute can bring claims both for substantive correctness and the legitimacy of the process.<sup>29</sup> Appeal mechanism can be seen as the safety valve of any kind of dispute settlement. Any type of legal errors in the first instance could be corrected by appeal review. On the other hand, annulment serves a different purpose.<sup>30</sup> Annulment deals only with the legitimacy of the process of the decision.<sup>31</sup> Through annulment process, only the errors occurred regarding the operation of dispute settlement is examined.

Since the aim of appeal is to correct the errors, the appellate body may decide to replace the initial award by a new decision.<sup>32</sup> The decision of appellate body will replace the first decision. It should also be noted that appellate review does not deal with the fact findings of the first instance, but rather merely evaluate the legal norms. On the other hand, annulment removes the original decision but does not replace it. In case the annulment body reaches a conclusion that the award contains substantial errors pursuant to the relevant law, the original decision will be invalidated. Therefore, there can not be any enforcement process by the original decision.

### **b) Features of ICSID Annulment Process**

The ICSID Convention does not provide any mechanism for appeal. Rather, Article 52 introduces a facility to annul the decisions of arbitral tribunals. Thus, a successful annulment

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<sup>29</sup> Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2<sup>nd</sup> Ed.). Oxford University Press, p. 302 (2012).

<sup>30</sup> *Id.* See also David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID Foreign Inv. L. J. 21 (1992).

<sup>31</sup> Dolzer & Schreuer, 2012, *supra* note 29, p. 302.

<sup>32</sup> *Id.*

process would only result in “invalidation of the original award.”<sup>33</sup> It means that it is not possible for an annulment committee to amend or substitute the award of the arbitral tribunal. The *Ad Hoc* Committee does not have power to remand the dispute back to the original arbitral tribunal.<sup>34</sup> It will only annul the award partially or in its entirety under its revision of annulment.

Another aspect of the ICSID annulment process is that it is an exceptional way to review the arbitral awards. Because of that, the number of annulled decisions is very limited. For instance, since 2011 until December 31, 2016, parties requested annulment under the ICSID Convention in 46 out of 170 cases.<sup>35</sup> Only four of these awards were annulled in part or in full.<sup>36</sup>

Furthermore, the mechanism created for the revision of awards allows bringing annulment claims only on five grounds. These grounds are established to provide very limited reasons for annulment regarding the fundamental standards of mostly procedural nature.<sup>37</sup> The grounds for annulment under Article 52(1) of the ICSID Convention are the following:

- (a) the Tribunal was not properly constituted;
- (b) the Tribunal has manifestly exceeded its powers;
- (c) there was corruption on the part of a member of the Tribunal;
- (d) there has been a serious departure from a fundamental

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<sup>33</sup> Guiguo, 2014, *supra* note 28, p. 31.

<sup>34</sup> Joost Pauwelyn, *Appeal Without Remand: A Design Flaw in WTO Dispute Settlement and How to Fix It*. ICTSD Dispute Settlement and Legal Aspects of International Trade, p. 44 (2007).

<sup>35</sup> The ICSID Caseload – Statistics (Issue 2017-1), p. 18. Available at [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf) (Last visited April 7, 2017).

<sup>36</sup> *Id.*

<sup>37</sup> Dolzer & Schreuer, 2012, *supra* note 29, p. 302.

rule of procedure; or

(e) the award has failed to state the reasons on which it is based.

This limited nature of grounds for annulment serves the most notable feature of ICSID arbitration that is the finality and directly enforceability of awards. Consequently, the fact that parties can only request for annulment on these grounds cause an obstacle to prevent the enforcement of arbitral awards.

Under the ICSID Convention, the *Ad Hoc* Committee of three persons will be established for maintaining the annulment process.<sup>38</sup> Most of the claims for annulment includes the reference to three of the grounds: excess of powers, serious departure from a fundamental rule of procedure, and failure to state reasons.<sup>39</sup> Parties can request annulment by claiming the presence of one or more of the grounds which are listed in Article 52. In case the Committee decides to annul the original decision in part or in full, it can not render its own decision on the merits.<sup>40</sup> In that case, the dispute can be resubmitted to a new tribunal to make a new decision.<sup>41</sup>

Article 52(3) reveals that the *Ad Hoc* Committee has the authority to annul the award on these grounds. Therefore, the Committee has the discretion to decide whether the error is significant enough to annul.<sup>42</sup> Even though the Committee finds a ground which is listed under

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<sup>38</sup> Article 52(3).

<sup>39</sup> Dolzer & Schreuer, 2012, *supra* note 29, p. 303.

<sup>40</sup> *Id.* p. 302.

<sup>41</sup> Article 52(6).

<sup>42</sup> Dolzer & Schreuer, 2012, *supra* note 29, p. 303.

Article 52(1), it may find it non-material to the position of one party.<sup>43</sup> The *Ad Hoc* Committee in *Vivendi* concluded that:

It appears to be established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annulable error is found. Article 52(3) provides that a committee ‘shall have the authority to annul the award or any part thereof,’ and this has been interpreted as giving committees some flexibility in determining whether annulment is appropriate in the circumstances. Among other things, it is necessary for an *ad hoc* committee to consider the significance of the error relative to the legal rights of the parties.<sup>44</sup>

Consequently, the committee will decide on whether the alleged error has a material effect on the case and award. Such discretion shows that the drafters of the Convention do not desire to open the possibility for annulment on non-material errors.

It is also argued that this choice of only having an annulment mechanism, rather than an appeal procedure, aims to “uphold and strengthen the integrity of the ICSID process.”<sup>45</sup> Professor Wang Guiguo argues that there has not been even much concern about the lack of appeal procedure until recently when the number of applying parties for the annulment of decision increased dramatically.<sup>46</sup> However, the increasing number of contradictory interpretation of similar provisions of the Bilateral Investment Treaties (BITs) raise the concerns over the lack of such

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<sup>43</sup> *Id.*

<sup>44</sup> *Compania De Aguas Del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No.02 ARB/97/3, Decision On Annulment (July 3, 2002) para 66.

<sup>45</sup> *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic’s Request for Annulment of the Award rendered on 20 August 2007 (August 10, 2010) para 247.

<sup>46</sup> Guiguo, 2014, *supra* note 28, p. 31



control mechanism. The *Ad Hoc* Committee in *CDC v. Seychelles* defined the function of annulment in ICSID arbitration in the following terms:

This mechanism protecting against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions) arises from the ICSID Convention's drafters' desire that Awards be final and binding, which is an expression of 'customary law based on the concepts of *pacta sunt servanda* and *res judicata*',<sup>47</sup> and is in keeping with the object and purpose of the Convention.<sup>48</sup>

In sum, it is clear that parties prefer ICSID arbitration in order to have a more efficient dispute settlement process than is in national courts or other mechanisms. Lack of an appellate review and a very limited process for annulment reflects the idea of preserving such efficiency in terms of finality.

### **2.3 Concerns About the Current System**

International investment law deals with distinctive factors and elements of various financial, political, and infrastructural problems.<sup>49</sup> The comprehensive nature of investment law has a significant role in resolving the disputes in an optimal way. With that regard, ISDS mechanism should be designed to allow creating more predictable and safe environment for the flow of international investment. It is correct that investment tribunals are 'multifunctional actors' of investment law.<sup>50</sup> Their only mission is not to settle the disputes among parties. Rather, investment tribunals take an active role in securing the development and predictability of law

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<sup>47</sup> Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID Review 321, 321-324 (1991).

<sup>48</sup> *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision on the Application for Annulment of the Republic of Seychelles (June 29, 2005) para 36.

<sup>49</sup> Robert Howse; Efraim Chalamish, *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz*, 20 Eur. J. Int'l L. 1087, 1088 (2010).

<sup>50</sup> Ingo Venzke, *Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication*, 17 J. World Investment & Trade 374, 376 (2016).