International Investment Law: ICSID Arbitration and Annulment Mechanisms

International investment law has been designed to protect the secure flow of capital and relatedly to ensure the sustainability of investment projects. Such definition of investment projects includes both portfolio investment and foreign direct investment. These projects could only be protected by safeguarding the interests of actors who make these transactions. International investment law aims essentially to ensure the protection of foreign investors from the decisions and executions of host states. “Disciplining states” and providing protection to investors from unfair regulations of host states can also be counted as the main motivation of investment law. In this paper, I will explain the general features of International Center for Settlement of Investment Disputes (ICSID) arbitration mechanism with an eye on its annulment procedure.

ICSID Convention Arbitration

Actors of international investment engaged in ways to mitigate the inherent risks of foreign investment in the host states. With that regard, Investor-State Dispute Settlement (ISDS) provisions have been included by the most International Investment Agreements (IIAs) over the last three decades. 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. However, United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules or International Chamber of Commerce (ICC) Rules of Arbitration are also selected by a significant number of IIAs.

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. 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.

The number of investor-state arbitration under ICSID Convention has grown extensively in recent years. While in 2016 the total number of cases registered under the ICSID Convention and Additional Facility Rules was 48, 53 cases were registered in 2017. The total number of newly registered ICSID cases was 56 in 2018. As of December 31, 2018, ICSID had registered 706 cases under the ICSID Convention and Additional Facility Rules. Besides these, there are a number of non-ICSID cases administered by the ICSID Secretariat.

ICSID provides facilities for the settlement of international investment disputes in investor-state and state-state cases. These cases may be referred to conciliation or arbitration under the ICSID Convention. 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.[13]

**ICSID Convention 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.”[14] 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.

A successful annulment process would only result in “invalidation of the original award.”[15] 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.[16]

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, 2018, parties requested annulment under the ICSID Convention in 60 out of 170 cases.[17] Only 5 of these awards were annulled in part or in full.[18]

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.[19] 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 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. The fact that parties can only request for annulment on these grounds cause an obstacle to prevent the enforcement of arbitral awards.
An Ad Hoc Committee of three persons will be established for maintaining the annulment process. 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. 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. In that case, the dispute can be resubmitted to a new tribunal to make a new decision.

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. Even though the Committee finds a ground which is listed under Article 52(1), it may find it non-material to the position of one party. The Ad Hoc Committee in Vivendi concluded 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. It is necessary for an ad hoc committee to consider the significance of the error relative to the legal rights of the parties.

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.

Conclusion

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. After getting the decision from ICSID tribunal, winner party will be able to enforce directly the award under ICSID Convention rules. Lack of an appellate review and a very limited process for annulment reflects the idea of preserving such efficiency in terms of finality.

[3] Id. p. 175.
For the purpose of this thesis, only the arbitration provisions of the ICSID Convention will be examined.

ICSID Convention Article 36 and Article 37.

ICSID Convention Article 54.

Guiguo, 2014, supra note 28, p. 31.2007, 4, p. 02. Available at


Article 52(3).


Id. p. 302.

Article 52(6).


Id.

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.