Surviving and ICSID Award. Post-Award Remedies in ICSID Arbitration: A Perspective of Contracting State's Interest

Lawyer **Silviu CONSTANTIN**[1]

Abstract

In the general prospect of globalization, investments have always been surrounded by problems that needed to be solved neutrally and impartially. In other words, the global commercial system always required a universally applicable, impartial and neutral judicial system that can be used for settling a dispute arising between nationals of different states or nationals and foreign countries. The following article aims to analyze the unique features of the International Centre for Settlement of Investment Disputes (ICSID) system and its autonomous nature. Specifically, the article will deal with the remedies provided by the international framework to the ICSID awards and the procedural steps that must be undertaken by the parties in order to access a specific remedy with a special emphasis on the most powerful remedy, which is the annulment of an award. Furthermore, the article will focus on the interlink between those remedies and the ones provided by the national law of a Contracting Party or other international non-ICSID law streams. While the vast majority of the international doctrine and case law address the situation of the investor, thus focusing on its interest, this article will mainly focus on the interests of the Contracting State in its capacity as respondent to defend against a claim arising from a Bilateral Investment Treaty (BIT). Given that the legal framework in discussion is a highly specific one, the article will first address the ICSID convention and its final and binding nature. Further on, we will discuss the control mechanism comprising the specific remedies provided by the Convention. We will then proceed to tackle two of the most important post-annulment issues and finally, turn our attention to comparison between ICSID and non-ICSID legal framework.

Keywords: *ICSID Arbitration; post-award remedies; contracting state; interests; annulment; resubmission; delay enforcement; avoid enforcement.*

JEL Classification: K11, K33.

1. Overview of the ICSID Convention

'A domestic lawyer […] might be forgiven for thinking it strange that the international community, apparently so well-equipped with means of judicial settlement, appears to lack what seems to be a natural or inherent feature of national judicial systems, namely a comprehensive system of appeal.'[2]

Going on from that quote, one may ask if the ICSID arbitration system actually has a 'comprehensive system of appeal'[3].

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[1] Silviu Constantin - lawyer in the Bucharest Bar, Romania, specialized in resolving disputes regarding international investments, silviu@constantinlex.com.

[2] Elihu Lauterpacht, *Aspects of the Administration of International Justice*, Cambridge Grotius Publications Limited 99 (1991), in Christian J. Tams, *An Appealing Option? The Debate about an ICSID Appeal Structure,* 57 „Essays in Transnational Economic Law" 2 (2006).

[3] For more details about international bodies involved in resolving investment disputes, see Cristina Elena Popa Tache, *Introduction to International Investment Law,* Adjuris – International Academic Publishing House, Bucharest, 2020, pp. 155-172.

One of the most unique characteristics of the ICSID arbitration system is, of course, its autonomous nature. ICSID arbitration is known as self-contained arbitration because local courts in any particular State have no role in the ICSID proceedings. Instead, the ICSID Convention and Arbitration Rules contain all the necessary provisions required for the arbitration of disputes, including provisions related to jurisdiction, procedure, the award to be rendered by the Tribunal, post award remedies and recognition and enforcement of the award.[4]

Due to the self-contained nature of the system the only means of appeal available against an ICSID award are the remedies explicitly provided in the ICSID Convention (or so it may seem). Therefore, given that the ICSID Convention aimed to ensure that the awards would be binding on the disputing parties, it provided that said awards could not be appealed and were not subject to any remedy except those provided for in the Convention.[5] As a result, unlike other international arbitral awards, ICSID awards supposedly cannot be challenged before national courts. Challenges to ICSID awards must be brought within the framework of the Convention and pursuant to its provisions.

The drafters' intention to ensure the finality of an award can also be seen from the choice of remedies offered by the ICSID Convention. In this respect, the only way to review an award is pursuant to the five specific remedies:

(i) 'Rectification (Article 49) – The Tribunal can rectify any clerical, arithmetical or similar error in its award;

(ii) Supplementary decision (Article 49) – The Tribunal may interpret its award where there is a dispute between the parties as to the meaning or scope of the award rendered;

(iii) Revision (Article 51) – The Tribunal may revise its award on the basis of a newly discovered fact of such a nature as to decisively affect the award;

(iv) Annulment (Article 52) – An ad hoc Committee may fully or partially annul an award on the basis of one or more expressly and restrictively specified ground.'[6]

Due to the fact that the drafters of the ICSID Convention foresaw a system which excludes any judicial recourse, a minimal control mechanism was required in order to ensure the legitimacy of the arbitration process. For this reason, the post-award remedies were included. Whereas the ICSID Convention favors finality of the awards, the annulment being a limited exception to the principle of finality has raised a lot of questions whether finality and correctness of awards should take precedence in investment arbitration.

2. The control mechanism

'An ad hoc Committee is not a court of appeal.'[7]

Being a self-contained regime, ICSID's effectiveness requires a functioning

[4] In accordance with Rule 54 of the ICSID Convention, an award must be recognized by all ICSID Contracting States and pecuniary obligations imposed by an award are enforceable as a final judgment of the courts of a Contracting State.

[5] ICSID Convention, Article 53.

[6] Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, p. 1, paragraph 4.

[7] *Vivendi v. Argentine Republic*, Decision on Annulment issued 3 July 2002, 19 „ICSID Review – Foreign Investment Law Journal", 89 (2004).

internal control mechanism.

The ICSID review system is deemed absolutely fundamental, because it reflects the international feature of its arbitration mechanism and poses a balance to its more extra basic aspects, hence the automatic recognition and enforcement of ICSID awards within the boundaries of the Contracting States and prohibition of any diplomatic protection.[8]

The great feat achieved by the ICSID Convention is that it has managed to provide a balance in the game of states and private parties on the international field. By doing so, private parties are able to sue state sovereign but only within the mutually agreed limits of the Centre's jurisdiction – *ratione personae, ratione materiae* and consent of the parties.

Before looking at the efficiency of the ICSID's control mechanism, we must first look at the aggregated picture of the entire ICSID arbitration system. Briefly put, the arbitration commences with the submission of the request for arbitration. The request for arbitration shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration. It shall be addressed to the Secretary-General who may register or refuse the request.[9] As soon as possible after the registration, the Tribunal of a single arbiter or of uneven number of arbitrators is constituted.[10] Once the tribunal has been formed, the arbitration shall be carried out under the provisions of the ICSID Convention. The award is rendered by the majority of votes and shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based[11].

A general condition for exerting any of the four remedies is that the award must be final. This means that the prospective applicant shall first examine this feature, *i.e.* whether it is an award (since procedural measures and decisions can be awards as well) and if it is, whether this award is final. However, it shall be noted that preliminary decisions cannot be subject to the remedy of annulment, since allowing such measures would seriously delay the whole proceedings[12].

2.1. Rectification

Article 49 of the ICSID Convention prescribes narrow grounds on which a award may be rectified, namely when there is `any clerical, arithmetical or similar error in the award`. The standard for the rectification has been very relevantly assessed by the Tribunal of *Gold Reserve* who found that: *"[t]he purposes of the correction exception to the functus officio principle is to correct obvious omissions or mistakes and avoid a consequence where a party finds itself bound by an award that orders relief which the tribunal did not intent to grant. The purpose is therefore to ensure that the true intentions*

[8] Articles 54 and 27 of the ICSID Convention as quoted in Andrea Giardina, *ICSID: a self-contained, non-national, review system, in Richard B. Lillich, Charles N. Brower, International Arbitration in the 21st Century Towards "Judicialization" and Uniformity? 203 (1993).*

[9] Article 36 of the ICSID Convention.

[10] Article 37 of the ICSID Convention.

[11] Article 48 of the ICSID Convention.

[12] For instance, in *SPP v. Egypt,* Egypt applied for annulment of the Tribunal's decision which upheld the jurisdiction that the Secretary-General refused stating that kind of decisions are not awards in the sense provided for by Article 52, but rather an interlocutory decision unable to trigger the annulment process.

of the tribunal are given effect in the award, but not to alter those intentions, amend the legal analysis, modify reasoning or alter findings. An authoritative commentary confirms that the correction facility found in most arbitral rules is to be used to correct miscalculation or unintended errors of expression and that "that remedy cannot be used to alter the reasoning of the decision." Any purported correction that goes beyond the scope of the Tribunal's limited mandate in this regard is likely to be subject to challenge[13]."

The rectification standard itself does not pose difficulties but it falls on the tribunals to decide whether a matter can be subject to rectification or not. For example, many share the view of the *Enron*[14] tribunal that rectification is solely a remedy for inadvertent omissions and minor technical errors in an award and that it does not allow for a substantive review or reconsideration of the Tribunal's decisions. However, even though this may seem sound reasoning, which we do not oppose, it raises the questions of what should be decided if the 'minor technical error' would consist of omitting a digit on a compensation decision. This would modify the amount by one order of magnitude.

It thus remains for each tribunal to stand by its reasoning and rectify any part of the award which it betrays its intentions.

2.2. Revision and interpretation

The basis for interpretation of the ICSID awards is Article 50 of the ICSID Convention.[15] Normally, the interpretation of an award is a matter of forma procedure offered by the original adjudicatory body covered by the rules of procedure.[16] The principle has always been the same – to provide the parties with a clear explanation over the scope and the meaning of the award. The essential prerequisite for the application for interpretation is the existence of a dispute over the scope and meaning of the award with some practical significance o the award's execution. A sheer argument concerning theoretical suggestions about the clarity of the award would not suffice for a successful application.[17] The interpretation of the award must have no impact on the finality, since new matters would obviously not be allowed as long as this procedure is intended to also be employed in situations when the original tribunal has ceased its function.

Unlike applications for other post-award remedies, the request for interpretation

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[13] *Gold Reserve v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) (*Gold Reserve*), Decision Regarding the Claimant's and the Respondent's Request for corrections, 15 Decembrer 2014, paragraph 38. Whilst this was a Decision under Article 56 of the Additional Facility (Arbitration Rules), the provision is similar to that under the ICSID Convention.

[14] *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Claimants' Request for Rectification and/or Supplementary decision of the Award, 25 October 2007, when the tribunal rejected the request for rectification of the calculation of interest stating that „[e]ven if the Claimants' could establish that there was an error, which they have not, such error, as the Respondent has noted, would by no means be a minor technical error of the kind envisaged by Article 49(2) of the ICSID Convention.

[15] Article 50 of the ICSID Convention shall be distinguished from the Article 64 which deals with the disputes concerning the interpretation of the whole ICSID Convention. These disputes are referred to the International Court of Justice according to the Vienna Convention and the Law of Treaties.

[16] See for example Article 33 of the UNCITRAL Model Law.

[17] See Christoph H. Schreuer, *ICSID Annulment Revisited,* in „Legal Issues of Economic Integration" 30/2, (2003), pp.103 – 122.

from one of the arbitration parties that is addressed to the Secretary-General of the ICSID is not times-limited with regard to the long-lasting investor-host state relation. It seems reasonable to submit the application for the interpretation to the very same tribunal that has rendered the original award (Article 50(2)). However, the precondition for the interpretation is the express willingness of the members of the tribunal to take part in the procedure, since the reconstitution of the same tribunal is bot costly and time consuming, and a majority of them will cease to exist before this moment. Since the interpretation is not subject to a time limit, the accessibility of the original tribunal becomes more complicated with the lapse of time. Therefore, Arbitration Rule 51(2) provides for the constitution of a new Tribunal.

The contingency of revision is always dependent on the newly discovered element of law or fact which has objectively existed at the time of signing and dispatching of the award.

The new piece of information, however, must be decisive and must be of such importance to substantively modify the award. The right for application is time-limited, the parties being barred by both a subjective and an objective term of performance:

(i) The applicant shall make his request for revision within 90 days after the finding of the decisive fact; but

(ii) No later than three years after the date the award was dispatched to the parties.[18]

If the application for revision is successful, the automatic stay of enforcement of the award is granted, however this automatic stay expires 30 days after the Tribunal's constitution. The stay of enforcement can be renewed at a later moment.

2.3. Annulment

2.3.1. Policy, principles and procedures

According to Article 53 of the ICSID Convention, the annulment process is not an appeal.[19] It entails no review of the merits, whether facts or law, and is limited to the

[18] Under Article 49(1) of the ICSID Convention, the award shall be deemed rendered on the date of its dispatch to the parties.

[19] On the annulment of awards under the ICSID Convention, see primarily Christoph H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge 2001 pp. 881 ff.; see also Andrea Giardina, *ICSID: A Self-Contained Non-National Review System*, in R. B. Lillich/Ch. Brower [Eds], *International Arbitration in the 21st Century : Towards "Judicialization" and Uniformity*, 1994 ; Philippe Pinsolle, *The Annulment of ICSID Arbitral Awards*, „Journal of World Investment" 199[..] p. 243; Ibrahim F.I. Shihata/Antonio Parra, *The Experience of the International Centre for the Settlement of Investment Disputes*, 14 „ICSID Review – Foreign Investment Law Journal" (1999) 299, 338-341. For comments on the earlier annulment decisions, Alan Redfern, *ICSID – Losing its Appeal?* 3 „Arbitration International" 98 (1987); W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, „Duke Law Journal" 739 (1989) (referred to as "Breakdown"); Aron Broches, *Observations on the Finality of ICSID Awards*, 6 „ICSID Review – Foreign Investment Law Journal" 321 (1991); David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 „ICSID Review – Foreign Investment Law Journal" 21 (1992); W. Michael Reisman, *Repairing ICSID's Control System: Some Comments on Aron Boches' "Observations on the Finality of ICSID Awards",* 7 „ICSID Review – Foreign Investment Law Journal" (1992) 196 (referred to as "Repairing"); Jan Paulsson, *ICSID's Achievements and Prospects*, 6 „ICSID Review – Foreign Investment Law Journal" 380, 386-394 (1991). For comments on all annulment decisions, see Emmanuel Gaillard's yearly chronicle in Journal du droit

ground listed in Article 52(1) of the ICSID Convention. It is also well established that the interpretation of the annulment grounds should be neither extensive, nor restrictive.[20]

Following *MINE,* which was a contract arbitration, on the one hand, and *Wena* and *Vivendi*, which were treaty arbitration, on the other, it is clear that the *ad hoc* committee has a level of discretion when deciding whether or not to annul an award.[21] An annulment should only be ordered in case of a material violation.

Annulment is the most radical, drastic, however limited post-award remedy out of those provided by the Convention, and the only one able to completely destruct the award. Seeing the provisions of Article 53, which excludes any form of appeal except those mentioned by the ICSID Convention, the annulment constitutes a very limited exception to the principle of finality, *thus adding legitimacy to balance the substantive suitability of and ICSID award.*

The annulment procedure is covered by Article 52 and Arbitration Rules 50, 52-55. To initiate the annulment procedure, any or both parties (separately or jointly) must file an application with the ICSID Secretary-General. This means that the commencement of annulment is subject to procedural autonomy and is not an *ex officio* matter.

Usually, the losing party will wish to apply all the possible procedural remedies in order to avoid political responsibility) as is the case of Contracting State parties) or serious economical detriment. Thus, the right to request the annulment is discretionary, which means that a party may waiver this right after the award is rendered. However, this must be done explicitly.[22]

As show, either disputing may initiate an annulment proceeding by filing an application for annulment with the ICSID Secretary-General. The application must:

(i) Identify the award to which it relates;

(ii) Indicate the date of the application;

(iii) State in detail the grounds on which it is based pursuant to Article 52(1) of the ICSID Convention; and

(iv) Be accompanied by the payment of a fee for lodging the application.

The application must be filed within 120 days after the date on which the award (or any subsequent decision or correction) was rendered. In the case of corruption on the part of a Tribunal member, the application may be filed within 120 days after discovery of the corruption, and in any event within three years after the date on which the award

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international, entitled *Centre international pour le règlement des différends relatifs aux investissements, Chronique des sentences arbitrales*. On the annulment of awards based on investment treaties, see in particular David Williams, International Commercial Arbitration and Globalization – Review and Recourse against Awards Rendered under Investment Treaties, Journal of World Investment 2003 p. 251; Emmanuel Gaillard, *L'arbitrage sur le fondement des traités de protection des investissements*, „Revue de l'Arbitrage" 2003 no. 3, p. 855.

[20] In particular, decision on annulment, 22 December 1989, Maritime International Nominees Establishment v. Guinea, 4 ICSID Reports 61, # 4.05 (referred to as MINE); Decision on annulment, 28 January 2002, Wena Hotels Ltd. v. Arab Republic of Egypt, 41 ILM 933 (2002), # 18 (referred to as Wena); Decision on annulment, 3 July 2002, Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, 41 ILM 1135 (2002), # 62 (referred to as Vivendi).

[21] MINE, #4.09 – 4.10; Vivendi # 66 *("[…] it appears established that an ad hoc committee has a certain measure of discretion as to whether to annul an award, even if an annullable error is found.");* Wena # 58 (with respect to departure from a rule of procedure), # 83 (with respect to failure to state reasons).

[22] AMCO v. Indonesia, Decision on Annulment, 16 May 1986, 1 ICSID Reports 523/4.

was rendered. The Secretary-General must refuse registration of an application for the annulment that is not filed within the prescribed time limits.

The application for annulment must concern an ICSID award, which is the final decision concluding a case. This must be taken very seriously since there can be only on award in a case disputed under the ICSID system. The parties must wait until the award is rendered before filing for annulment. An application for annulment concerning a decision issued prior to the award (*e.g.* a decision on a challenge, a provisional measure, or a decision upholding jurisdiction) cannot be challenged before it becomes part of the eventual award, even if it raises issues that may constitute the basis for an annulment application.

Finding a balance between the award's finality and its legitimacy, along with the entire arbitral process, must be a subjective exercise.[23] On one hand, there is the need for the efficient settlement of disputes and of legal security, and on the other hand, we must consider the importance of correctness and fairness of this dispute resolution mechanism. In our opinion, the different weight given one must give to the two principles must be assessed bearing in mind the nature and the scope of said arbitration proceedings. In other words, one must look whether or not the proceedings relate to commercial arbitration or to investment arbitration.

It goes without saying that both types of proceedings must show both integrity and fairness as well as finality. However, one can argue that it may be that in commercial arbitration finality may overweight legitimacy, whereas in investment arbitration, where one of the parties may be subject to paying a monetary award out of public funds, legitimacy must always prevail.

On the matter of legitimacy, we argue that if a decision goes to affect more than just two private parties, by finally impacting the public at large, the content of the decision and the unfolding of the procedure which led to said decision, must be subject to a higher level of scrutiny.

2.3.2. Non-ICSID annulment

Despite it being a 'fully autonomous procedure where arbitration is independent from any national legal system', in their attempts to by-pass the 'final and binding' nature of an ICSID award, losing parties turn to a secondary annulment mechanism. Under the non-ICSID system an arbitral award may be set aside according to the grounds provided by a court and under the laws of the state where it was rendered.

As it was stated in the Commentary on the ICSID Convention this 'function of review may be exercised by the courts of the country in which the tribunal had its seat or by the courts charged with the task of enforcing the award'.[24]

The annulment of arbitral awards is provided in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention). Article V (1) e) of the convention states: *"recognition and enforcement of*

[23] Schreuer refers to two 'potentially conflicting principles…the principle of finality and the principle of correctness.' See Christoph H. Schreuer, *ICSID Annulment Revisited,* in Legal Issues of Economic Integration 30/2, (2003), pp.103 – 122.

[24] See Schreuer, C., Malintoppi, L., Reinisch, A., & Sinclair, A., *The ICSID Convention: A Commentary* (2nd ed.). Cambridge: Cambridge University, (2009), p. 900.

the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the award has been set aside by a competent authority of the country in which, or under the law of which, that award was made."

Under the European Convention on International Commercial Arbitration of 1961 (Geneva Convention) the setting aside of an award constitutes a refusal of its enforcement in another contracting state. Article IX of the Geneva Convention defines four conditions for setting aside of an award:

(a) The parties to the arbitration agreement were under the law applicable to them, under some incapacity of the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of submission, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted that part of the award which contains decision on matters submitted to arbitration need not be set aside; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this convention.

According to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985, setting aside is an 'exclusive recourse against arbitral awards.' An arbitral award may be set aside by a national court of a state where an arbitral award was rendered. UNCITRAL Model Law set up the following ground for annulment of arbitral awards:

a) The party making the application furnishes proof that:

(i) A party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or; failing any indication thereon, under the law of this State; or

(ii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only the part of the award which contains decision on matters not submitted to arbitration may be set aside; or

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

b) The court finds that:

(i) The subject-matter of the dispute is not capable of settlement by arbitration

under the law of this State; or

(ii) The award is in conflict with the public policy of this State.

Notwithstanding these international non-ICISD annulment grounds, most countries national legal systems provide few remedies to challenge an arbitral award. As noted in a famous comparative treaty on international arbitration: *"There are few ground on which the party can seek to avoid an award. If dissatisfied with an award and unwilling to voluntarily accept its effect, an unsuccessful party has three options. It can (i) appeal against the award, if this is permitted under the applicable law or the arbitration rules; (ii) challenge the award in the courts of the place where the award was made; or (iii) wait until the successful party initiates the enforcement proceedings before a court at which stage it can seek to resist enforcement."*[25]

Seeing it has some options to challenge an award otherwise final and binding, a Contracting State would feel compelled to access any and all means it may have available in order to avoid the political responsibility which follows an unfavorable award.

2.3.3. Beyond annulment

The introduction of new remedies with respect to the awards rendered in international investment arbitration has been discussed for a long time.[26] However, the legal doctrine shares inconsistent views towards this idea. The advantages of a new appeal mechanism could prove to silence some of the criticism generally levelled against investment arbitration and with the appropriate design, it could 'be faster, more transparent, less costly than the current annulment remedy and, in the long run, it could prove to strengthen the finality of awards.'[27]

References to some kind of a new appellate review mechanism continue to occur in State practice, especially in the recent mega-regional treaties and agreements. AS an example, Article 8/28 of the Comprehensive Economic and Trade Agreement (CETA) signed between Canada and the European Union, provides for the establishment of an appellate tribunal.[28]

The discussion regarding the current debate about a possible new appeal mechanism can be synthesized into two main issues – a judicial aspect and a political one.

The political matter shall not be completely tackled here, but we will state that we share the view that whenever influential actors in the system express their discontent about certain annulment decisions, ICSID should intervene to put the annulment process back on track. No less than that, one must not forget that the ICSID Conventional

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[25] See Julian David Mathew Lew QC, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration*, Wolters Kluwer Publishing House, The Hague Kluwer (2003), p. 663.

[26] See David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges,* „Vanderbilt Journal of Transnational Law" 39 (2006), pp. 45-49; *(*discussing references to the establishment of an appellate body in the practice of the USA since the Trade Act of 2002).

[27] Gabriel Bottini, *Reform of the Investor-State Arbitration Regime: The Appeal Proposal,* in Jean E. Kalicki, Anna Joubin-Bret (eds.), *Reshaping the Investor – State Dispute Settlement System: Journeys for the* 21st Century, Brill Publishers, 2015, pp. 472-473.

[28] European Commission – Canada, Comprehensive Economic and Trade Agreement (CETA), Chapter 8, Section F, Article 8.28.

repeatedly states that neither the Secretary-General not the President of the World Bank would have any influence on the substance of the proceedings before the Centre.[29]

The judicial matter stems from the difference between annulment and appeal. First of all, it is undisputed that an *ad hoc* committee has the discretionary power to annul an award, but it may not modify it in any way.[30]

The *ad hoc* committee in the *Occidental Petroleum* v. *Ecuador* case endorsed this principle[31] and, after partially annulling the award, it pointed out that the committee was required not to amend the award but rather to 'substitute the Tribunal's figure of damages with the correct one.'[32] Furthermore, the respective committee found that *ad hoc* committees 'should be entitles to do so' provided the substitution could be 'performed without further submissions from the Parties and without additional marshalling of evidence. The *ad hoc* committee cites '[b]*asic reasons of procedural economy'* to justify the solution. Finally, it reduced the amounts granted in the award by over US$ 700 million (approx. 40%). Knowing this, the question of whether this decision can be qualified as a modification of the Award and, whether, consequently, the *ad hoc* committee has the power to 'substitute the Tribunal's figure of damages' is still pending. On the other hand, the *ad hoc* committee put forth the argument of 'procedural economy'. To avoid having the parties 'incur the additional cost and delay of going through a second investment arbitration, when the correct number [could] be inserted by the annulment committee, after performing a simple arithmetic calculation and without further input from the parties.' It thus remains open for each and every reader to decide for themselves what would be best in the finality versus legitimacy debates.

3. Conclusions

Despite all the criticism against investment arbitration, ICSID is an effective international institution making an important contribution to the international community through the resolution of a considerable number of investment disputes. It also remains the most popular institution in investment arbitration among both investors and States and, more importantly, also the most transparent.

Yet the voices of discontent and the calls for change should not be ignored, not least by those who generally support investment arbitration. This means, on the one hand, that there is a need for the investment arbitration community to meaningfully contribute to the discussions about the reform of international investment law[33] and

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[29] Although the ICSID Convention's *travaux preparatoires* reflect that there were proposals to 'indicate that the cause for annulment would be exceptional', ICSID, *Hystory of the ICSID Convention: Documents Concerning the Origins and the Formation of the Conventions on the Settlement of Investment Disputes between States and Nationals of Other States,* Vol. II-a, (ICSID Publication 1968) p. 108.

[30] Ee Caron (n. 7) 23-4; Honlet, Legum and Crevon (n. 2) 1435: *Tulip Real Estate and Development Netherlands BV v. Republic of Tukey,* ICSID Case No. ARB/11/28, Decision on Annulment (30 December 2015) pp. 42; MTD (n. 13) pp. 54; Updated Background Paper (n. 2) pp 62; *Iberdrola* (n. 25) p. 74.

[31] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Annulment of the Award (2 November 2015) pp. 47, 299.

[32] *Ibid, pp 299.*

[33] See Cristina-Elena Popa (Tache), *Individualization and development of international investment law as the third millennium law field*, „Juridical Tribune - Tribuna Juridica" vol. 9, Issue 3, December 2019, pp. 584-587; also see Cristina Elena Popa (Tache), *Administrative Review and Reform Movements from the*

institutions. The adoption of some of the proposals that are out there, including the establishment of some kind of permanent appeal mechanism or tribunal, may not be impossible anymore. On the other hand, the benefits for the system's legitimacy of interpretive criteria seeking to impose a restrictive reading of annulment grounds should be revisited, Rather, *ad hoc* committees should be allowed to exercise their judgment in applying the annulment remedy within the confines of the ICSID rule and in light of the Convention's important scope and purpose.

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