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THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTE (ICSID) ANNULMENT REFORM: A LESSON LEARNED FROM THE WORLD TRADE ORGANIZATION APPELLATE BODY STRUGGLE

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Abstract

This article expresses how ICSID can learn from the WTO’s current struggles due to the Appellate Body vacuum. To achieve that, this article consists of three discussions. The first discussions analyze the uncertainties caused by the vagueness of International Investment Law’s (IIL) absolute standards, due to the absence of a multilateral investment treaty. The second discussion expresses the elements of the Multi-Party Interim Arbitration Arrangement (MPIA Arrangement) that shall be taken into account by ICSID. The third discussion provides how the current ICSID annulment mechanism shall be reformed. Those issues are answered through doctrinal research in a prescriptive manner. In the first discussion, the IIL’s absolute standards consisting of Fair and Equitable Treatment (FET) and Full Protection and Security (FPS) have unclear parameters. Such vagueness is caused by the absence of a multilateral investment agreement. The second discussion explains that ICSID shall transpose the MPIA authority to change its member’s national law. This discussion also presents the consistent practice by the WTO Dispute Settlement Body based on the WTO’s substantial rules, as a situation doesn’t exist in IIL. Finally, ICSID needs to expand its annulment scope by ensuring the disputing party’s substantial rights. This article expresses that while it is not the IIL’s duty to unify its material norms due to its dynamic nature, it has to ensure that the disputing parties’ substantial and procedural rights are reasonably taken into account.

Keywords: ICSID, WTO, annulment, substantial rights, procedural rights.

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I. INTRODUCTION

International dispute settlement can be perceived as a toolkit or a device to ensure that international law subjects comply with their international obligations.¹ This statement is based on Chayes’s view that to comply with a treaty regime, international law subjects require a manager (the regime itself) and a process (a set of discourses).² They also express that a treaty

² Naiade el-Khoury, “Managerial Process: Theory and the Effectiveness of International Human
regime shall have an active role in modifying its preferences and generating new options to persuade its members to comply further with the regime and achieve the objectives of that regime. The article herein perceives that this doctrine applies to these two international legal regimes.

Both the World Trade Organization (WTO) Law and the International Investment Law (IIL) are treaty regimes equipped with dispute settlement mechanisms. The WTO Law is a set of rules perceived as an open rule-based trading system based on the principle of non-discrimination, progressive tariff liberalization, and the rule of law. On the other hand, Judge Brandie states that the IIL applies the rule of law principle. These two subjects are parts of international economic law, which is one of the branches of public international law representing a large area of studies. Such similarity can be seen through the legal principles constituting these two subjects. Those principles consist of general principles such as *pacta sunt servanda*, freedom, sovereign equality, reciprocity, and economic sovereignty. Furthermore, both WTO Law and IIL have dispute settlements equipped with instruments that provide legal certainties due to the dissatisfaction of one of the disputing parties.

Regardless of their similarities, WTO law and IIL also have their differences. The existence of the WTO Agreement and its annexes has made this branch of law operate based on the rule-based approach consisting of material and formal law. This is not applicable in the IIL regime, due to the non-existence of a multilateral treaty concerning the promotion and protection of foreign investment. Furthermore, the WTO Law recognized a two-stage dispute settlement mechanism, while the IIL recognized a single-stage dispute

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settlement. In suggesting a solution to such an issue, scholars opined that the International Centre for the Settlement of Investment Dispute (ICSID), as the international organization facilitating the settlement of an investor-state dispute, shall have its appeal mechanism in this case. This article contested such an idea by stating that ICSID shall not apply an appeal mechanism as the WTO.

Early research by Chin Leng Lim shows that the ICSID shall study the struggles currently faced by the WTO. The struggle referred to in this research is the judicial activism conducted by the United States on the appointment of the Appellate Body members, causing this organ unable to operate itself. This action has caused the European Union and 46 other WTO members to adopt the Multi-Party Interim Arbitration (MPIA) Arrangement. The Appellate Body is known as the organ that made the WTO one of the few international dispute settlement mechanisms to provide a review in the form of an appeal mechanism. This organ is constituted under Article 17.1 Dispute Settlement Understanding (DSU), which is established as an appeal from cases examined by the panel.

The disagreement addressed in this article is based on the nature of an ICSID arbitration award, which is final, binding, and not subject to an appeal. Due to the lack of an appeal mechanism in ICSID, the annulment institution has a role in ensuring that procedural justice shall be upheld. Therefore, this mechanism is different from both the Appellate Body and the MPIA, which covers not only procedural justice but also a substantial justice consisting

13 Ibid.
of the contested legal facts. In perceiving these two separate institutions, scholars opined that ICSID shall have its appeal mechanism to ensure legal certainties. Meanwhile, other scholars opined that ICSID shall still uphold the final and binding nature of its arbitration award. In response to these debates, this article suggests that ICSID shall modify its annulment procedures from its standpoint. This position is taken to ensure that ICSID does not only provide procedural justice for its disputing parties but also material or substantial justice.

In expressing the statement above, this article provides three discussions herein. The first discussion discusses the vagueness of absolute standards on the protection of foreign investment and how IIL responds to such uncertainties. The second discussion explains some elements from the MPIA Arrangement that shall be taken into account by ICSID. This discussion also explains the persistent WTO Appellate Body interpretation, due to the presence of the WTO Agreement as something that ICSID does not have. Both the first and the second discussions contain reasoning on why an appeal mechanism is not suitable for ICSID. Finally, the third discussion discusses how the annulment mechanism under the ICSID convention shall be modified. These three discussions are provided based on the research methods explained herein.

This article is written based on the normative research conducted through the implementation of the law in the books on concrete legal issues mentioned and explained in the introduction. The method therein is complemented by the conceptual approach through the implementation of legal doctrines according to WTO law scholars and IIL scholars. Besides the conceptual approach, this article also applies the ratio decidendi, or the finding of international arbitration tribunals examined ISDS cases to provide arguments for solving the three legal issues mentioned above. Last but not least, this article is written by gathering secondary data consisting of primary legal sources in concerto the WTO Agreement, ICSID Convention, ICSID arbitration awards, and WTO case law presented in panel and Appellate Body reports.

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21 Amiruddin and Asikin, Introduction to Legal Research Methods (Pengantar Metode Penelitian Hukum), 165.
The primary legal sources used in this article consist of stipulations under the WTO Agreement, namely the DSU and the Agreement Establishing the World Trade Organization, or the Marrakesh Agreement. Besides the WTO Agreement, the aforementioned legal source also consists of the findings under ICSID tribunals’ awards, a NAFTA tribunal award, a UNCITRAL tribunal award, and WTO case laws under panel and Appellate Body reports. Meanwhile, the secondary sources consist of legal doctrines explaining or related to the primary legal sources mentioned above, which were gathered from books and journal articles. Those legal doctrines consist of the social change theory by Henry Maine, the spirit of nations theory by Von Savigny, and the social phenomena theory by Theodore Geiger. Furthermore, this article also presents doctrines in the form of scholars’ commentaries on the WTO Agreement and the ICSID Convention.

II. VAGUENESS OF IIL’S ABSOLUTE STANDARDS AND ITS RESPONSE

This discussion explores why the appellate mechanism is unsuitable for the IIL regime. It is important to note that the first discussion herein is interrelated with the second discussion since both emphasize why ICSID should not have an appeal mechanism. Such unsuitability is caused by the absence of a multilateral investment agreement that can be used by ICSID tribunals to create a consistent interpretation. These inconsistencies can be seen from the tribunal’s findings on the IIL absolute standards parameter. Those findings are presented in the discussion herein as an expression concerning the reason why an appeal mechanism is not suitable for ICSID.

Yannick Radi states that the IIL regime is undivided from its critique due to the chilling effect on a host state, due to an arbitration award in favor of the foreign investor forcing itself to amend its investment measure. One of the causes of that chilling effect is the vagueness of the absolute standards for the promotion and protection of foreign investors. Those absolute standards consist of Fair and Equitable Treatment (FET) and Full Protection and Security (FPS). Kusnowibowo states that FET is a principle obliging host states to provide fair and equitable treatment to foreign investors. Meanwhile, the FPS shall be viewed as standards that obliging host states have to provide legal protection to foreign investors legal protection to foreign investors to

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prevent injuries.\textsuperscript{25}

The vagueness of the FET Standard can be seen in the tribunal in the case of \textit{Cargill v. Mexico} and \textit{Merill v. Canada}. In the \textit{Cargill v. Mexico} tribunal, it can be understood that FET Standards can only be breached once the minimum standards under the Neer Decision 1926 have been violated. This finding is recognized as an egregious point of view.\textsuperscript{26} Meanwhile, the tribunal on \textit{Merill v. Canada} states that the FET Standards have acquired their status as customary international law and the scope of these standards shall be extended. This reasonableness standard states that the FET Standards consist of the entire protection related to the act of state or an act of a non-state actor violating the fairness and the equity of the foreign investor.\textsuperscript{27}

In the \textit{Cargill v. Mexico} case, the tribunal referred to the NAFTA tribunal’s findings, stating that the poor administration of government programs do not amount to a violation of the minimum standard of treatment under the customary international law.\textsuperscript{28} This tribunal principally stated that the scope of the FET Standards is solely limited to the minimum standard constituted under customary international law. In expressing this statement, the tribunal quoted paragraphs 261 dan 263 of the NAFTA tribunal stating that:

\begin{quote}
“261. \textit{When interpreting and applying the minimum standard...} Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, misjudged the facts, proceeded based on a misguided economic or sociological theory, placed too much emphasis on some social values over others, and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.”\textsuperscript{29}
\end{quote}

\begin{flushright}
\textsuperscript{25} \textit{Ibid.}, 69. \\
\textsuperscript{26} Italaw, Cargill, Incorporated v. United Mexican States, ICSID Case No.ARB (AF)/05/2) (n.d.), paragraph 271. \\
\textsuperscript{27} Italaw, Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1 (n.d.), paragraph 213. \\
\textsuperscript{28} Italaw, Cargill, Incorporated v. United Mexican States, ICSID Case No.ARB (AF)/05/2), paragraph 271. \\
\textsuperscript{29} \textit{Ibid.}, paragraph 261.
\end{flushright}
“263. The tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders....”

The tribunal of *Merill v. Canada* expressed a different point of view. It considered the concept of the minimum standard of treatment of aliens born a few centuries ago. The minimum standard then became paramount, due to the work of the Mexico-United States Claims Commission (also known as the Neer Case). The Commission in the Neer Case stated that the treatment of aliens that amounts to bad faith, willful neglect of duty, or insufficiency of governmental action constitutes a breach of the minimum standard.

Besides considering the Neer Case, this tribunal also took into account several findings mentioned and briefly explained herein. The tribunal took into account the International Court of Justice decision in Elettronica Sicula S.p.A (ELSI) Case (*United States of America v. Italy*), stating that the minimum standard has been set under a high threshold requiring “willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.” The minimum standard defined under the Neer Case has been applied by several tribunals, including the tribunals of Pope & Talbot, Thunderbird, S.D Myres, Waste Management, and Glamis Gold.

However, due to the development of international human rights law, the minimum standard had now been outmoded, and what mattered now was the “fair treatment” to nationals and foreigners alike. The minimum standard defined by the Neer Case had also been left behind due to the work of the International Law Commission on State Responsibility in the late 1950s and early 1960s in codifying the law of state responsibility. The Commission’s work indicated that inconsistent state practices concerning the protection of aliens have caused the Neer Decision finding not to consist of *opinio juris*.

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30 Ibid., paragraph 263.
31 Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, paragraph 195.
32 Ibid.
33 Ibid., 196.
34 Ibid., 197.
35 Ibid., 198.
36 Ibid., 202.
37 Ibid., 203.
38 Ibid., 204.
Last but not least, business, trade, and investment liberalization caused the international community to provide standards including all kinds of property as mentioned in the Iran-United States Claims Tribunal. The liberalization thereby has required aliens to be treated fairly and equitably concerning business, trade, and investment. The finding in this tribunal therefore states that the FET Standards and the minimum standards are separate matters, and the international law development has caused the minimum standards under the Neer Decision or the Neer Case abandoned.

Furthermore, the vagueness of the FPS Standards can be seen in several cases herein. According to the tribunal of *Oxus Gold v. Uzbekistan*, the FPS Standards shall be separated from the FET Standards so it protects foreign investors from non-state actors. Meanwhile, the tribunal of *Biwater v. Tanzania* stated that it would be frivolous if the FPS Standards may only be breached based on the act of non-state actors. Therefore, these standards shall provide both commercial and financial protection to foreign investors from any kind of interference.

The sharp separation between the FET dan the FPS in the tribunal of *Oxus Gold v. Uzbekistan* can be explained as such. This tribunal refers to the finding in the *El Paso v. Argentina* tribunal, stating that the FPS standard is no more than the traditional obligation to protect aliens under international customary law. This obligation is not directly attributed to the government as it is attributed to third parties. The FPS standard shall thereby be perceived as a complementary standard to the FET standard or as obligations not covered under the FET standard. It is important to note that the FPS standard solely consists of the obligation of means or an obligation to do something.

Meanwhile, the tribunal of *Biwater v. Tanzania* interpreted the phrase “full security” by expressing that this standard does not only limit a state’s failure to prevent actions by third parties, but it also extends to actions by state organs and state representatives. By adhering to the state organs and state representatives as subjects to this standard, the word “full” shall thereby

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41 Italaw, Oxus Gold v. the Republic of Uzbekistan (n.d.), paragraph 353.
42 Italaw, Biwater Gauff (Tanzania) Ltd. v. the United Republic of Tanzania, ICSID Case No. ARB/05/22 (n.d.), 216.
43 Italaw, Oxus Gold v. the Republic of Uzbekistan., 165.
47 *Biwater Gauff* (Tanzania) Ltd. v. the United Republic of Tanzania, ICSID Case No. ARB/05/22, paragraph 730.
reflected and the purpose of the BIT will be achieved.48

The IIL has viewed coherence as the only method to overcome the vagueness of those absolute standards. The idea of coherence itself has been spread in several findings of ICSID arbitration awards. The excerpt of the *Burlington v. Ecuador* award explains Brigitte Stern’s point of view on coherence by stating that:

“The majority believes that subject to compelling contrary grounds, it has to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has to seek to contribute to the harmonious development of investment law, and thereby meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator’s role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.”49

Meanwhile, the tribunal of the Government of the *Province of East Kalimantan v. PT Kaltim Prima Coal* referred to Article 4 of the Swiss Rules on International Arbitration, stating that a tribunal is not bound by the past arbitration awards.50 Regardless of the major viewpoint explained above, this tribunal also took the coherence concept into account. Such finding can be seen in the passage herein:

“In support of their positions, the Parties have relied on previous decisions or awards. The Tribunal considers that it is not bound by previous decisions. At the same time, it believes that it must pay due consideration to earlier decisions of international tribunals. It believes that subject to compelling contrary grounds, it has to duly consider and possibly adopt solutions established in a series of consistent cases. It also believes that subject to the specifics of a given treaty and of the circumstances of the actual case, it has to seek to contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards the certainty of the rule of

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48 Ibid.
49 International Centre for Settlement of Investment Disputes: Burlington Resources Inc. v. Republic of Ecuador (n.d.).
50 International Centre for Settlement of Investment Disputes: Government of the Province of East Kalimantan v. PT Kaltim Prima Coal (n.d.).
It is important to understand that the concepts of harmonization and unification are different matters. These concepts are generally recognized within the Private International Law (PIL) regime. Meanwhile, the IIL itself consists of norms constituted not only under public international law, but also according to the PIL having the ambition to conduct harmonization. Harmonization can be understood as a means to bring different matters suitable for each other. In certain cases, international arbitration tribunals, including ICSID arbitrators, have always tried their best to harmonize the foreign element of the case while having an obligation to examine the case according to the choice of law of the parties according to state contracts, the national law of the host state, or the public international law according to ICSID Convention.

The statement explained above is in line with Wirjono Projodikoro’s opinion, stating that the objective of PIL is to fulfill the sense of justice to the involved parties of a case. This legal regime is also meant to achieve equality in the legal system. Due to the existence of PIL as an element within the IIL, it is not the task of IIL to ensure that the elements of the FET and FPS standards, and other IIL standards are uniform. However, it has always been IIL’s duty to ensure that both foreign investors and their host states’ material and procedural rights are taken into account by the arbitration tribunals. This is because the application of IIL shall be viewed as a legal regime undivided with the concept of law as a social adaptation due to the pluralism that existed across the world according to Henry Maine’s theory.

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51 Ibid.
56 Ibid., 19.
Henry Maine stated that the economy has always been the trigger of a social change that occurs in societies that exist in every state. Such social change has caused humans to adapt and change their legal norms and it also caused humans to interact based on his or her obligation instead of based on his or her social status. Henry Maine named this phenomenon as the movement of status to contract. From this theory, this article would like to express that the dynamic nature of the economy has caused the application of the unification concept to lag behind the realities.

The rationale of Maine’s theory herein applies to understanding how the dynamic nature of foreign investment triggers the ICSID tribunal to create inconsistent findings concerning IIL standards. This is because each host state has its distinctive economic situation, which becomes the main basis for adopting its investment measures. Therefore, each tribunal is forced to take into account the domestic law of that host state in expressing its findings on a case-by-case basis and some even deny their calling to create arbitration awards based on consistent findings. This article would like to reemphasize that the cases and doctrines presented above are reflections on the causal relation between the non-existence of multilateral investment and ICSID’s incompatibility to adopt an appeal mechanism.

Such an issue does not exist in the practice of the WTO Law due to the existence of the WTO Agreement as the main achievement of the Uruguay Round Negotiations. This multilateral trade agreement has provided substantial norms for the WTO Dispute Settlement Body, especially the Appellate Body to create consistent findings in providing certainties to their disputing members. The consistent practice conducted by the WTO herein is explained in the second discussion. The discussion below also provides further reasoning on why the appeal mechanism does not suit ICSID. Such reasoning is supported by the Appellate Body issue presented below.

59 Tanya, Simanjuntak, and Hage, Law Theory of Human Ordered Strategy across Space and Generation, 104.
60 Ibid., 101.
III. THE ELEMENTS OF THE MPIA TAKEN INTO ACCOUNT BY THE ICSID AND THE CONSISTENT PRACTICE BY THE WTO DSB

The Appellate Body is an organ that functions to ensure the coherence of the WTO dispute settlement practice. That function is conducted by providing considerations on the legal aspects of a panel report and by interpreting the panel’s point of view. The Appellate Body’s authority has caused the Dispute Settlement Mechanism to be perceived as the WTO’s shining crown jewel. This crown jewel lasted for at least two decades until the United States protested this system by conducting actions in the form of judicial activism. This action was conducted to show the United States’ disagreement with the Appellate Body’s recommendation under their report.

The United States protests started in 2011 when the Obama administration decided not to re-appoint Professor Jennifer Hillman and Professor Seung Wha Chang, who were supposed to fill the chairs from 2012 to 2016. This judicial activism continued during the Trump administration, causing the multilateral trade system to break on 10 December 2019. Such damage was caused by the systematic blockade of the Appellate Body potential candidate, causing the absence of the new adjudicators replacing the old ones.

Since then, this Appellate Body, as part of the crown jewel, has been temporarily replaced by the MPIA, which was established not based on Article IX of the WTO Agreement concerning the WTO decision-making mechanism in the present day. By understanding the fact that this organ is not legitimated by majorities of the WTO members, the existence of the MPIA Arrangement is thereby questioned. Such a question can be thrown by asking whether this mechanism may settle a dispute effectively, or shall only be viewed as a political declaration conducted by several WTO members adopting this mechanism.

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63 Ibid., 4.
64 Ibid.
67 Olga Starshinova, “Is the MPIA a Solution to the WTO Appellate Body Crisis?,” Journal of World Trade 05, no. 05 (2021): 788.
68 Starshinova. “Is the MPIA a Solution to the WTO Appellate Body Crisis?,” Journal of World
Although it is formally imperfect according to Article IX WTO Agreement, the MPIA is a mechanism adopted by WTO members. According to Article 25 DSU,69 Article 25.1. DSU states that an arbitration procedure can be applied as an alternative dispute resolution between members in facilitating a solution to certain issues determined by the contesting parties.70 Paragraph 2 of this article states that a resort to an arbitration may prevail based on the mutual agreement of the disputing parties and this shall be notified to the whole WTO members.71 The MPIA Framework consists of three parts. There is the institutional arrangement, where procedural law is applied once an appeal is conducted according to this mechanism (see. Annex 1 MPIA), and a system is applied in choosing the arbitrators (see. Annex 2 MPIA).72

Elisa Baroncini states that the MPIA mechanism may be viewed as an interim and flexible mechanism since the entire WTO members may easily enter or exit this arrangement. This mechanism can be applied as a bridge between the blockade on the WTO tribunal to the multilateral renovation on the WTO appellate review.73 Furthermore, this mechanism may be viewed as a method for ensuring coherence within the WTO procedural law and case law.74 Kristen Hopewell views the MPIA Arrangement as a means to ensure that global trade governance does not rely on the United States leadership.75 The MPIA Arrangement thereby may be perceived as the Appellate Body, excluding the United States.76

Trade 05, no. 05 (2021): 789.


76 Ibid.
The scholars disagreeing with the MPIA Arrangement existence are explained herein. Henry Gao states that the MPIA Arrangement position is unclear, whether it is inside or outside the WTO system. Furthermore, he also explained that this mechanism does not represent the United States’ disagreement with the Appellate Body’s weaknesses. Gao, as a scholar in favor of the United States’ legal need before the WTO, expressed that the MPIA Arrangement shall be perceived as the antithesis of the conceptualization of the United States notion, stating that the WTO dispute settlement mechanism has a final and binding nature. From such disagreement, this article may express that the MPIA still reflects the two-stage dispute settlement concept that has been applied by the WTO until now.

Furthermore, Mariana Andrade states that the MPIA Arrangement may not be viewed as a mechanism that is able to cover the weakness of the Appellate Body. The procedural weaknesses can be found in the unclear 90-day period constituted under Article 17 of the DSU. Furthermore, the award ruled by this organ exceeds its authority, since the MPIA arbitrators have advised the WTO members to change their national law. In line with those weaknesses, Jan Yves Remy questioned whether this mechanism may actualize the concept of coherence, which was conducted by the Appellate Body. Like the ICSID arbitration award, the MPIA award also has the authority to order a state in this case a WTO member to change its national law.

From the Appellate Body issue presented herein, this article suggests that ICSID does not adopt a similar mechanism as the WTO has. The United States protest on the Appellate Body has shown the fact that an appeal mechanism can be perceived as a controversial method in settling disputes if a precedent is unintentionally created to nullify or impair one of its regime members. To avoid facing the same issue in the future, this article therefore does not suggest ICSID to have an appeal mechanism as recommended by the previous research in the background.

78 Ibid., 545.
79 Ibid.
81 Ibid., 148.
82 Ibid.
Furthermore, ICSID shall not adopt the appeal mechanism as implemented by the WTO since its tribunals rule based on vague substantial rules. This discussion reemphasized the fact that the IIL regime is not regulated by a multilateral treaty as international trade. An appeal mechanism will be difficult to operate if such a tribunal has no written basis for interpreting the law implementation in the first stage. This statement is supported by the findings from the WTO cases explained in the discussion herein. However, the judicial activism of the United States and the absence of substantial rules on the other hand, shall not be perceived as a pessimistic basis not to achieve certainties and consistencies related to the dispute settlement system under the international economic law regime.

Although this matter is perceived as controversial in the realm of WTO Law, the MPIA’s arbitrator authority to recommend the disputing party to change its national law shall be viewed as a lesson learned for ICSID. This is because, unlike the WTO, the ICSID arbitration issues an arbitration award and not a recommendation as issued by the Dispute Settlement Body. The distinction between these two legal products is presented herein. An arbitration award is an individual and concrete norm having a final and binding nature to the disputing parties. Meanwhile, a recommendation by a WTO panel or Appellate Body does not have a similar nature, since the Dispute Settlement Body is a quasi-judicial organ. This notion is also supported by Radi’s view,

84 David Palmeter, Petros C. Mavroidis, and Niall Meagher, *Dispute Settlement in the World Trade Organization* (Cambridge University Press, 2022), yet complex, systems of international arbitration. In this extensively revised new edition of Palmeter, Mavroidis, and Meagher’s authoritative book on WTO dispute settlement, the authors provide a comprehensive overview of each step of the WTO dispute settlement process, examining both the history of the system, the governing legal rules, and the more informal procedural aspects of the process in detail. This edition takes into account the jurisprudence of panels and the Appellate Body up to the end of 2020 and includes an analysis of the current crisis in the WTO Appellate Body. This volume is an essential tool for practitioners, diplomats, government lawyers, and students of WTO law and should equally be of interest to students of other forms of international arbitration.”, https://github.com/citation-style-language/schema/raw/master/csl-citation.json”, 190.

85 Constantin, “Surviving and ICSID Award. Post-Award Remedies in ICSID Arbitration.”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 International Investment Law Journal 1, No. 1 (2021): 75.


stating that ICSID arbitration awards have persistently consisted which forces the host states to change their national law and pay an amount of compensation to the foreign investor.\footnote{Radi, \textit{International Investment Law Textbook Part I}, 15-16.}

With concern to the issue regarding the WTO Law’s consistent nature, the reason why the scope of the WTO’s substantial or material norms can be perceived in a uniform matter is due to the existence of the WTO Agreement and its annexed agreements.\footnote{Bossche and Zdouc, \textit{The Law and Policy of the World Trade Organization: Text, Cases, and Materials} (Cambridge: Cambridge University Press, 2022), 114.} The WTO Agreement is equipped with an article that obliges its members to act consistently with this set of rules.\footnote{Ming Du and Qingjiang Kong, “Explaining the Limits of the WTO in Shaping the Rule of Law in China,” \textit{Journal of International Economic Law} 23, no. 4 (December 1, 2020): 886, https://doi.org/10.1093/jiel/jgaa027.} The ICSID Convention does not consist of any norms that oblige its members to promote and protect their foreign investors. Such absence has caused this article to not suggest ICSID to fully upgrade its procedural rules by having an appeal mechanism but offers ICSID a simple modification instead, by upgrading its annulment mechanism. Before discussing this further, the authors will explain the article under the WTO Agreement referred to in this paragraph.

The obligation referred to in the paragraph above is Article XVI.4 of the agreement.\footnote{Marrakesh Agreement - Agreement Establishing World Trade Organization, opened for signature 15 April 1994, UNTS 1867 (entered into force 1 January 1995).} This stipulation obliges that every WTO member ensure the conformity of its laws, regulations, and administrative procedures with its obligation as provided in the annexed Agreements.\footnote{Ibid.} The absence of a multilateral investment agreement as explained above has shown that the IIL has no similar stipulation. To understand how Article XVI.4 of the agreement works in practice, the discussions below presented findings in WTO cases related to that article.

The implementation of Article XVI: 4 GATT can be further understood according to the findings in the United States - Hot Rolled Steel Case, the United States – Section 301 Case, and the European Community – IT Products. In the US – Hot Rolled Steel case, the Appellate Body stated that WTO members have conducted a consequential violation of Article XVI: 4 GATT since their law, regulation, or administrative procedure was opted and implemented inconsistently with the obligations under the WTO’s covered
agreements. Meanwhile, in the United States – Section 301 Case, the panel interpreted the words “laws, regulations, and administrative procedures” as measures generally applicable within that member, and not measures specifically applicable in a dispute. Last but not least, from the panel report in the European Community – IT Products Case, it can be understood that each of the members’ measures shall not only be compatible with the WTO-covered agreements, but it must also be compatible with their schedule of concessions. The heavy obligations of the WTO members to bring their measures into conformity with the agreement can be explained further herein.

In the United States - Hot Rolled Steel case, the Appellate Body report recorded the fact that this procedure was requested by Japan to ensure that the United States acts consistent with Article XVI: 4 WTO Agreement, in this case, to act consistent with the Anti-Dumping Agreement (ADA). This was because the United States invoked anti-dumping measures on hot-rolled steel from Japan inconsistent with Articles 2.1, 2.2, 2.3, 2.4, 3.1, 3.2, 3.4, 3.5, 3.6, 4.1, 6.1, 6.6, 6.8, 6.13, 9.3, 9.4, 10.1, 10.6, and 10.7 of the ADA and Article X: 3 GATT. The Appellate Body examined this case by taking into account the panel reports among others stating that Section 735(c)(5)(A) of the Tariff Act 1930 mandated the US DOC to only exclude margins entirely based on the facts available in determining an all others rate. This action thereby violated stipulations under Article 9.4 ADA, stating the authorities are prohibited from applying their anti-dumping duties to the requirements under this article

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98 Ibid.
99 Ibid.
if they have limited their examination according to the second sentence of Article 6.10 ADA.\textsuperscript{100} The sentence therein stated that the importing members’ authorities are allowed to limit their examination either to a reasonable number of interested parties or products by using statistically valid samples based on the information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.\textsuperscript{101} Such violation thereby caused the United States to also violate the stipulations under Article 18.4 ADA obliging WTO members to bring their anti-dumping measures in conformity with the ADA.\textsuperscript{102}

In responding to the appeal brought by the United States, the Appellate Body provided an excerpt stating that:

“As section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, requires the inclusion of margins established, in part, based on facts available, in the calculation of the “all others” rate, and to the extent that this results in an “all others” rate over the maximum allowable rate under Article 9.4, we uphold the Panel’s finding that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is inconsistent with Article 9.4 of the Anti-Dumping Agreement. We also uphold the Panel’s consequent findings that the United States acted inconsistently with Article 18.4 of that Agreement and with Article XVI:4 of the WTO Agreement. We further uphold the Panel’s finding that the United States’ application of the method outlined in section 735(c)(5)(A) of the Tariff Act of 1930, as amended, to determine the “all others” rate, in this case, was inconsistent with United States’ obligations under the Anti-Dumping Agreement because it was based on a method that included, in the calculation of the “all others” rate, margins established, in part, using facts available.”\textsuperscript{103}

This article will not examine the technical aspects of the ADA since this is out of the scope of the article’s discussions. However, this finding is presented to show the fact that measures related to the implementation of the WTO


\textsuperscript{101} Ibid.


\textsuperscript{103} World Trade Organization, “WTO | Dispute Settlement - the Disputes - DS184 - United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan.”, 47.
Agreement shall be implemented according to the agreement’s validity. This feature however is not available in the case of IIL. Another example can be seen in the United States – Section 301 Case presented below.

In the following dispute, China claimed that the United States violated stipulations under Articles I: 1 and II: 1 GATT. Those violations were caused by the additional duties from 10% to 25% implemented under Section 301 of the Trade Act 1947. The United States justified its action by stating that the products exported by China violated the United States measures concerning technology, intellectual property, and commercial secrets under Article XX(a) GATT regarding the public moral general exception. The panel adopted the report of this dispute by stating that the United States trade law violated Articles I: 1 and II: 1 GATT.

This article examined this case by focusing on the United States’ obligation to impose duty according to their schedule of concession under Article II: 1 GATT. Understanding the fact that the panel expressed that duties shall not be imposed above the schedules, this finding can be systematically interpreted with Article XVI: 4 WTO Agreement. Therefore, this case emphasized the fact that the formulation of Article XVI: 4 WTO Agreement also covers each of the members’ schedules stipulated under Article II: 1 GATT, thereby making the readers perceive this instrument as inseparable from the WTO Agreement as a whole. Besides these tariff obligations, a minor finding in the form of the panel perception on viewing measures in the form of “laws, regulations, and administrative procedures” as measures generally applicable within that member, and not measures specifically applicable in a dispute, can also be found.

The obligation of WTO members to implement their measures according to each of their schedules can also be found in the European Community – IT Products Case. This dispute involved the United States as the complainant of the tariff measures applied both by the European Communities and its member states on certain flat panel display devices (FDP), set-top boxes that have communication functions (STBC), and multifunctional machines.

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105 Ibid.
106 Ibid.
107 Ibid.
108 Ibid.
109 “WTO Dispute Settlement - the Disputes - DS375 - European Communities and Its Member
It is important to note that the scope of this dispute covered the Ministerial Declaration on Trade in Information Technology Products (ITA). The ITA obliges its participants to achieve duty-free on electronic products mentioned under the ITA Annex.

The European Communities justified its action in this case by stating that it has exclusive competence concerning all tariff matters since 1968, based on Article 133 of the Treaty establishing the European Communities (TFEC). The complainant argued that this action is contrary to Article II GATT and the ITA. Based on the panel’s finding, the European Communities was proven to violate the stipulation under Articles II: 1, Article X: 1, and X: 2 GATT, and the European Communities thereby nullified and impaired the United States’s benefit. As the US – Section 301 Case, this case expresses that in a matter of schedule of concessions, Article XVI: 4 WTO Agreement shall be systematically read together with Article II GATT in conjunction with the member’s schedule.

The WTO case laws explained above have described how the WTO law has powers to ensure that all members adopt and implement their measures consistent with the agreement. Article XVI: 4 WTO was able to ensure that the whole members have identical domestic concerning international trade. This presence has caused the diversity of the legal system across the globe to not be a major issue for WTO law. A different case exists in IIL, where the ICSID arbitration tribunal shall always take into account the legal system of the host states as an important consideration as explained in the first discussion.

In expressing the notion above, this article does consider doctrines discussing the two major legal systems spread across the world, the civil law legal system and the common law legal system. Regardless of the influence of these two legal systems, each state across the world has its distinctive features in its legal system. This variety has indeed caused greater challenges for IIL to ensure that its substantive law is unified. Therefore, the two cousins are not fully identical, even though they are constituted under the same spirits as it is explained in the introduction of this article. This notion is in line with the legal theory explained below.


110 Ibid.
111 Ibid.
112 Ibid.
113 Ibid.
114 Ibid.
Besides being perceived as a social adaptation, IIL may also be viewed as a phenomenon reflecting the spirit of nations (also known as *volkgeist*). Von Savigny expressed this doctrine in responding to the universal spirit expressed by George Hegel.\(^\text{115}\) Von Savigny states that law in the form of a statute may only acquire its significant nature if it declares the living law that exists in that nation.\(^\text{116}\) He further states that law has an organic relation with the nature or the character of its nations.\(^\text{117}\) Therefore, to understand the law of a host state involved in a dispute with its foreign investor, in-depth research shall be conducted on the spirit that lies within that host state as a nation and from where such spirit has become the basis of that host state’s legal structure.\(^\text{118}\)

From the application of this theory, this article re-emphasizes the fact that the absence of a multilateral investment treaty has caused a sharp distinction between the WTO law and the IIL despite their similarities. Therefore, the similarities existing between these legal regimes do not mean that the stipulation constituted under the WTO law is transposable mutatis mutandis to the IIL procedural law. Due to this situation, ICSID arbitrators are pushed to examine and award their cases by studying the national spirit that exists in the host state and the related rules of international law at the same time. The “national spirit” referred to herein is the national law existing in the host state which attributes authorities to its government to determine its investment measure or its measures related to investment.

It is also important to emphasize the fact that the absence of the multilateral investment treaty has caused the IIL to have no stipulations as Article XVI.4 WTO Agreement as explained above. The following absence and the various national spirits existing across the world have caused tribunals to be unable to interpret issues in a homogenous manner. Therefore, the appeal mechanism is not a suitable mechanism to be adopted by ICSID, as the only possible approach is the case-by-case basis approach. This article suggests that ICSID shall reform its annulment mechanism by allowing the disputing parties to trigger this mechanism to ensure both their substantial and formal rights are secured.


\(^{118}\) *Ibid.*
The extension of ICSID’s scope of annulment is necessary since this tribunal has no substantial or material legal basis to settle disputes between foreign investors and their host states. Through this modification, ICSID may have greater authority to provide certainty to both states and foreign investors using its arbitration. The next discussion expresses how ICSID shall reform its annulment by allowing this institution to examine the substantial matter of an award, as what the MPIA conducts. The discussion therein is supported by ICSID cases showing that the annulment committees through times have accepted an annulment application under reasons concerning substantial justice-related issues.

IV. MODIFICATION OF THE ANNULMENT MECHANISM CURRENTLY APPLIED BY ICSID

The introduction of this article has shown that previous research suggests that ICSID has an appeal mechanism and that this article disagrees with those suggestions. Those suggestions were triggered by the increasing trust from foreign investors in the dispute settlement mechanism of ICSID to overcome the uncertainties caused by the fragmentation of ICSID jurisprudence.¹¹⁹ The first discussion emphasizes that the absence of a multilateral investment agreement has caused the ICSID tribunal to provide certainties on its absolute standards, therefore is unsuitable to have an appeal mechanism. Meanwhile, the second discussion showed that the existence of the WTO Agreement has indeed can be perceived as a parameter for the panel and Appellate Body to provide consistent findings and recommendations, which therefore makes an appeal mechanism suit the WTO dispute settlement practice.

Furthermore, by taking into account the impact of such scrutiny, ICSID shall not conduct a massive reform by adopting an appeal. Unlike an appeal mechanism, the annulment causes the creation of a new tribunal instead of bringing a case to a higher tribunal.¹²⁰ This is because the previous award is no longer enforceable, therefore the disputing parties are not bound by the award ruled by the previous tribunal. Many scholars are suggesting that ICSID shall adopt an appeal mechanism and their opinions are explained below.


Albert Jan van den Berg agreed with the adoption of an appeal mechanism based on the fact that there are more than 3,300 investment agreements in the form of bilateral investment treaties or regional investment agreements enforced and only less than 2% of those numbers adhere to an appeal mechanism.\textsuperscript{121} Due to the nonexistence of a legal basis concerning the two stages appeal mechanism may achieve legal certainty in the application of international investment agreements.\textsuperscript{122} Furthermore, Piero Bernardini states that an appeal mechanism needs to be adopted by ICISD to fairly balance the conflicting interests of the host states and their foreign investors.\textsuperscript{123} Last but not least, Chester Brown opined that ICISD needs to adopt an appeal mechanism having authority as a supervisor and controller as what is owned by the Permanent Court of Arbitration (PCA) and the International Court of Justice (ICJ).\textsuperscript{124}

The point of view presented above is rebutted in the discussion herein. This article disagrees with those scholars under the legal basis in Article 53 paragraph (1) ICSID Convention stating that the arbitration award of ICISID is final, binding, and is not subject to appeal.\textsuperscript{125} This disagreement is based on the fact that the IIL regime operates itself through a dispute settlement mechanism that involves a heavy weight of domestic laws, which varies based on the spirit of those nations and based on the economic situation faced by the host states. Furthermore, the article specifically criticizes Chester’s opinion, referring to Article 51 of Hague Rules 1899 by stating that the PCA does not provide an appeal mechanism.\textsuperscript{126} Meanwhile, Article 61 of the ICJ Statute also states that the legal remedies provided by the ICJ only consist of corrections on judgment, if a new determining fact not known by the court during the dispute period is found by one of the former disputing parties.\textsuperscript{127} Therefore, the arrangement in those two tribunals is not a proper example of how ICISID shall reform its dispute settlement mechanism.

\textsuperscript{122} \textit{Ibid.}
\textsuperscript{126} Centre for International Law, “1899 Convention for the Pacific Settlement of International Disputes” (University of Singapore, 2022), 9.
\textsuperscript{127} Statute of the Court Of Justice | International Court of Justice, opened for signature 24 October 1945, UNTS 993 (entered into force 24 October 1945).
This article disagrees with Gabriel Bottini’s view stating the establishment of two stages of dispute settlement such as the appeal mechanism may increase the courtesy of states and foreign investors on arbitration awards issued by ICSID and the procedural law provided by this center.\(^{128}\) Such an opinion has its flaws if it is perceived from the issue currently faced by the WTO. Knowing the United States disagreed with the Appellate Body’s decisions triggering them to conduct judicial activism, this article expresses the fact that the existence of an Appellate Body in ICSID may only cause a state reluctant to export its foreign investors to another state.

The article’s standing position concerning its affirmation of ICSID annulment reform is supported by the previous research herein. Rosenberg agrees with the ICSID annulment reform by expressing that ICSID shall learn a lesson from the WTO Appellate Body reform issue. Unlike previous research by Rosenberg, this article does not propose the ICSID annulment reform by suggesting that it has an independent organ to review the annulment appointment conducted by the ICSID Administrative Council.\(^{129}\) The empirical research conducted by Koepp, Kryvoi, and Biggs stated that the number of annulment procedure applicants would likely increase in the future. Such an increase is consistent with the aim of the ICSID Convention drafter which had the intention to turn this mechanism into an appeal mechanism.\(^{130}\) Last but not least, the suggestion proposed in this article is in line with Popov’s opinion, stating that the ICSID annulment committee shall have a proper right to interfere with the content of its arbitration award to ensure that the annulment procedure will be operated effectively.\(^{131}\)

In discussing how the annulment mechanism shall be reformed, this article provides explanations concerning this procedure prima facie. Annulment is constituted under Article 52 paragraph (1) ICSID Convention stating that:


“Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.”

Based on the stipulation therein, the ICSID arbitration award may only be annulled if there is a plausible procedural reason for doing so. The annulment is provided by the ICSID to ensure procedural justice concerning the integrity, appropriation, and justice of the arbitration procedure. Therefore, by referring to the annulment committee’s view on the tribunal’s award in the TECO v. Guatemala case, an annulment has never been meant to review the substantial truth of an award. However, the practice of annulment committees has shown that committees are accepting an annulment pleading due to the denial of substantial justices.

In explaining the phrase “the tribunal has manifestly exceeded its powers”, the annulment committee of SAUR v. Argentina states that this annulment basis may only be valid if several matters such as the rights to be equally treated, the rights to be heard, the rights to examine before the objective and impartial tribunal, and the rights to equally treat evidence and burden of evidence has been violated during the settlement process. Meanwhile, the committee for Adem Dogan v. Turkmenistan states that an annulment based on fundamental rules may only be granted based on a factual judgment. Those findings have indicated that there is a fragmentation in perceiving the scope of an annulment.

Such fragmentation can also be found in the debate concerning the scope of a tribunal failure in stating the reasons on which it is based. The annulment committee on the Tidewater v. Venezuela case stated that the legitimation of due process depends on how the tribunal’s finding may be understood and the transparency in ruling an award. It can be understood that the annulment

135 SAUR International SA v. the Republic of Argentina, ICSID Case No. ARB/04/4 (n.d.),
136 Adem Dogan v. Turkmenistan, ICSID Case No. ARB/09/9 (n.d.).
mechanism has a nexus with the material law related to the dispute settlement process. Meanwhile, the committee for the case of MINE v. Guinea stated that annulment based on the failure in reasoning an award may only be granted once a tribunal fails to state its syllogism related to the award, even though the tribunal has made a factual error and a material legal error (stating how “a” can be connected to “b”).

Yannick Radi expressed that although the ICISD Convention does not explain in detail the tribunal’s failure to state its reasons, five situations may determine the relevancy of such a basis. The five reasons consist of the existence of conflicting reasons, frivolous reasons, inadequate reasons, implicit reasons, and non-understandable reasons. This doctrine is in line with the finding by the committee on Continental Casualty v. Argentina stating annulment based on the failure of a tribunal to state its reason is the existence of a set of reasons which cannot stand together as an award readable in a reasonable manner.

The last weakness of the annulment mechanism can be found in the committee of AMCO v. Indonesia. During this dispute, Indonesia as the host state proposed an annulment for the first and third awards two times and both AMCO and Indonesia proposed an annulment for the second award one time. The committee granted those three annulment proposals. The first annulment was requested on 20 November 1984 and it was granted on 16 May 1986. Meanwhile, the second annulment was requested by AMCO on 12 May 1987, and by Indonesia on 12 June 1987. The request therein caused the adoption of a new tribunal on 20 October 1987. The third and last annulment was requested by Indonesia on 5 June 1990 and was granted on 2 March 1991.

139 Radi, International Investment Law Textbook Part II (Louvain: UC Louvain, 2021), 33.
140 Ibid.
141 Continental Casualty Company v. The Argentine Republic, ICSID Case No.ARB/03/9 (n.d.).
142 Amco Asia Corporation and others v. the Republic of Indonesia, ICSID Case No. ARB/81/1 (n.d.), paragraph 17-18
143 Italaw, Amco Asia Corporation and others v. the Republic of Indonesia, ICSID Case No. ARB/81/1 (n.d.), paragraph 1.
145 Ibid., paragraph 2.20.
146 Ibid., paragraph 2.21.
Indonesia quoted three annulment grounds under Article 52 paragraph (1) of the ICSID Convention in requesting the first annulment. Those grounds are the tribunal has manifestly exceeded its power, there has been a serious departure from a fundamental rule of procedure and the award has failed to state the reasons on which it is based.147 Meanwhile, the second annulment was requested based on the finding that Indonesia was liable under the new theory of denial of justice on a generally tainted background surrounding the revocation of AMCO’s license, the finding that the substantive validity of the revocation need not be decided to determine AMCO’s entitlement to damages, and the findings that AMCO entitled to award damages of its full contractual expectation based on a denial of justice.148 Finally, the third annulment was requested due to the tribunal’s failure to state reasons and to consider under Indonesian Law: Indonesia’s tax fraud counterclaim, Indonesia’s tax concessions counterclaim, and Indonesia’s customs concessions counterclaim.149

Based on the grounds of the second annulment and the grounds of the third annulment, it can be understood that the annulment committees granted the request according to grounds related to material law. Furthermore, the fact that ICSID granted the three annulments requested by Indonesia has shown that the current stipulation applied by ICSID is less effective. Concerning Article 53 ICSID Convention stating that an award is final, binding, and not subject to appeal, this article opined that ICSID needs to extend its annulment scope. Therefore, the notion stating that ICSID shall learn from WTO may not be swallowed due to the particular differences between these two legal regimes.

In providing a concise recommendation, this article provides the draft for the amendment of Article 52 ICSID Convention as presented below. This draft is presented based on the wording in the AMCO v. Indonesia case explained above:

147 Ibid., paragraph 4.02.1.
148 Ibid., paragraph 4.02.1.
149 Ibid., paragraph 1.05.
“Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; (e) that the award has failed to state the reasons on which it is based; or (f) denial of justice surrounded on a generally tainted background surrounding the disputing parties.”

From letter (f) of the presented draft above, one or both of the parties of the dispute settlement may request an annulment based on a substantial reason. It is important to note that an annulment mechanism and an appeal mechanism have their distinctive nature. An appeal mechanism is a legal remedy that allows one or both of the parties to continue the dispute into the next stage, with a different procedural law from the previous stages. Meanwhile, an annulment mechanism is a legal remedy that allows the party to annul an award causing the disputing parties to repeat the same procedure. Therefore, the idea of this article suggesting ICSID extend its scope of annulment does not conflict with this article’s point of view not to recommend this international organization not to adopt an appeal mechanism.

This proposal is addressed based on Theodore Geiger’s view presented. He perceives the law as a social fact instead of a juridical fact by stating that certainties will always exist once people comply with the existing legal norm. By understanding that act of compliance, the concept of nihilism or a situation with no legal norm will never exist. The social phenomena theory also perceives legal norms as part of a dynamic society since societies are dynamic, and the legal norms shall be perceived as a dynamic social reality. From doctrine, this article would like to address that a massive change is unnecessary to ensure compliance with a legal norm.


151 Ibid.


Since the object of ICSID arbitration is a state measure invoked by a host state without the existence of a multilateral treaty as the host state’s manual in adopting and implementing their investment measure, arbitration tribunals are forced to perceive the legal norm of a host state as a dynamic social reality. To ensure that the rights of both the foreign investor and the host state are protected in a balanced manner before the ICSID arbitration tribunal, substantial justice shall also be taken into account by a tribunal. This article states that the annulment institution reform is meant not to unify the various parameters of IIL standards, but to ensure that the substantial rights and the formal rights of the disputing parties are taken into account by the arbitration tribunals in a reasonable manner. This is because the IIL has no obligation to determine the uniformity of each dispute finding. Furthermore, tribunals have no obligation to conduct an action similar to legislators since it is pushed to take into account the dynamic economic situations within the host state jurisdiction occurring in every dispute.

V. CONCLUSION

To wrap up this article, it is important to express that the appeal mechanism is not a suitable concept for the ICSID tribunal. This opinion is expressed based on the interrelated reasoning within the first and the second discussions. The absence of a multilateral investment agreement has caused ICSID tribunals to create a consistent interpretation of the scope and the applicability of IIL substantial norms. By referring to the second discussion of this article, the presence of multilateral trade agreements has caused WTO Law to have the capacity to ensure that their members apply their substantial norms persistently, which is something that the ICSID does not have. The second discussion also explained that ICSID shall not adopt an appeal mechanism to avoid the same complaints faced by the WTO, yet it shall keep following the MPIA arbitrators’ stance to recommend the disputing party to change its national law.

According to Chayeses’s doctrine explained in the background, this article expresses that ICSID as a treaty regime shall modify itself, to ensure further compliance by its members. ICSID should therefore expand its annulment scope by adhering to substantial justice as the reason for an annulment. Such expansion can be conducted by amending Article 52 of the ICSID Convention based on the wording proposed in this article. This recommendation is addressed since ICSID arbitrators on the one hand are not legislators who must ensure that both the scope of the FET and FPS standards are understood by the entire IIL regime precisely. On the other hand, they have a procedural duty
to provide certainties to the disputing host states and their foreign investors through the implementation of those standards. In closing this article, it is important to note that IIL’s main duty is to provide certainties for the disputing parties so that both their substantial and procedural rights are taken into account.
ICSID Annulment Reform

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