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An appellate body for international investment disputes: How appealing is it?

by
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The debate about a reform of the international investment agreement (IIA) regime is gaining momentum.[1] One suggestion currently being discussed is the establishment of an appellate body for investor-state dispute settlement (ISDS) cases, as a means to review first instance awards, thereby enhancing the coherence and predictability of jurisprudence and contributing to legal security.[2] However, more discussion is needed on how such a body could be set up, and to what extent it could achieve its purpose.

One option is to establish a standing appellate body as exists for trade disputes under World Trade Organization (WTO) rules.[3] The second is an ad hoc appellate body, following the example of the International Centre for Settlement of Investment Dispute (ICSID) regarding the annulment of arbitral awards. Either type of appellate body would not only have the right to annul awards, but also to amend them.

The first option implies the establishment of a new multilateral institution or the opening up of the WTO dispute-settlement system to ISDS; both ideas lack political support and are therefore unrealistic; however, a permanent court could be an option at the bilateral or regional level.

The second option means that an appellate body would convene only as need arises in relation to a specific dispute. Contrary to a standing appellate body, members of an ad hoc appellate body would vary from case-to-case.[4] While a hierarchical structure would be missing, the supremacy of the appellate body could be secured through other means.[5]

Such a body could be set up multilaterally, e.g., by an amendment to the existing ICSID Convention[6] or the UNCITRAL Arbitration Rules, as suggested in a recent *Perspective*,[7] or in bilateral or regional investment agreements. While amending existing multilateral conventions would be extremely difficult, the second alternative would be easier to realize, especially with regard to future IIAs.

Matters look different with regard to the more than 3,200 existing IIAs. At the all-time peak of IIA-making in the mid-1990s, approximately 200 treaties were negotiated per year. At that rate, it would take at least 16 years to incorporate an appellate body into all these treaties, but this may still be an optimistic scenario given

the high complexity of today's IIA negotiations. In the end, an amendment to the ICSID Convention or the UNCITRAL Arbitration Rules - if successful - may be more efficient. Without embarking on one of these two reform paths, the introduction of an appellate body in new IIAs would remain piecemeal.

Certainly, a serious shortcoming of an ad hoc appellate body - independent of whether it is based on a bilateral, regional or multilateral treaty - is its limited ability to promote coherence in treaty interpretation.[8] Since none of these tribunals would have supremacy over the others, there would be a considerable risk that different ad hoc appellate bodies would decide the same legal issue differently, thus perpetuating a common drawback in current arbitration practice. This risk would exist both with regard to a consistent interpretation of one and the same IIA, and in respect of similar IIA provisions deriving from different treaties.

In conclusion, it appears that inclusion into future IIAs would be the fastest way toward an appellate body in ISDS.[9] An ad hoc tribunal could review decisions of the first instance and thereby address a major concern of critics of the existing arbitration system. However, for promoting the equally important objective of coherence and predictability in international arbitration practice, it would need a permanent appellate body with broad jurisdiction over the existing IIA regime.

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[1] UNCTAD, *World Investment Report 2014* (Geneva: UNCTAD, 2014), p. 126.

[2] *See*, e.g., Christoph Schreuer, "Revising the system of review for investment awards", available at http://www.univie.ac.at/intlaw/wordpress/pdf/99_rev_invest_awards.pdf; *see also* Karl P. Sauvant, ed., *Appeals Mechanism in International Investment Disputes* (Oxford: OUP, 2008).

[3] The WTO Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel; Appellate Body Reports, once adopted by the Dispute Settlement Body, must be accepted by the parties to a dispute.

[4] However, the establishment of a roster of arbitrators can reduce the number of potential arbitrators.

[5] Such as a higher number of arbitrators compared to the first instance or particularly stringent qualification requirements.

[6] *See* ICSID, "Possible improvement of the framework for ICSID arbitration", Discussion Paper, Oct. 22, 2004, available at http://icsid.world bank.org/ICSID/FrontServlet?reques-Type=ICSIDPublicationsRH&action Val=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf.

[7] Anna Joubin-Bret, "Why we need a global appellate mechanism for international investment law", *Columbia FDI Perspectives*, No. 146, April 27, 2015.

[8] Irene M. Ten, "International arbitration and the ends of appellate review", *NYU Journal of International Law and Politics*, vol. 44 (2012), pp. 1109-1204.

[9] Alternatively, it has been suggested to provide for preliminary rulings in pending investment arbitration cases. *See, e.g.* Christoph Schreuer, "Preliminary rulings in investment arbitration", *Transnational Dispute Management Journal*, vol. 3 (2008).

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