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Research Report

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Why we need a global appellate mechanism for international investment law

by
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The European Union's (EU) proposal to include an appellate mechanism in its international investment agreements (IIAs) is a response to concerns about the inconsistency of awards rendered by investment-treaty arbitration tribunals and to criticism about the legitimacy of investor-state arbitration.

The proposal is not new. It had already been included in the IIAs concluded by the United States (US) since 2004, to respond to similar concerns, and had been discussed in 2006 as part of the revision process of the rules of the International Centre for Settlement of Investment Disputes (ICSID).[1] While it can be argued that provisions regarding the establishment of an appellate mechanism have remained open-ended, and that contracting parties have not shown a strong appetite for their implementation, there was always the excuse that a future multilateral regime, to which the contracting parties to any IIA could adhere, was preferable to an appellate mechanism set up treaty-by-treaty.

As an appellate mechanism for investment treaty arbitration gains renewed momentum, its discussion should not be carried out solely by the EU and Canada in the context of their Comprehensive Economic and Trade Agreement (CETA), or with the US in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations with the EU, or with a focus on each individual treaty. The discussion needs to address the impact an appellate mechanism can have on the body of international investment law as it applies to thousands of treaties.

Accordingly, it is important that a global debate takes place, facilitated and supported by international organizations, such as ICSID (the forum that would be impacted first by an appellate facility), drawing on broad membership to evaluate the impact and the costs and benefits for all investment treaties – not only a selected few – be they of first, second or third generation.

It could build on the experience of the international trading system, specifically the WTO Appellate Body, which for the past two decades has generally received positive feedback from the states using it. Criticisms about the increase in costs and duration of the proceedings and the process of appointment of members of the Appellate Body have gradually subsided as workable jurisprudence has emerged in interpreting and

applying WTO treaties. Even though investment law is not based on a single treaty, but rather upon thousands, useful lessons for institutional arrangements and procedural mechanisms can be learned from the WTO experience.

The discussion should also focus on establishing a facility that could work for all treaties and parties, which would not require a major reopening of existing treaties and conventions. This could be achieved by an initiative along the lines of the ICSID Additional Facility Rules, or by a specific convention such as the one adopted in July 2014 by UNCITRAL on transparency,[2] to which treaty parties can then decide to opt in or out. This was suggested by ICSID in a 2004 paper that proposed an Appeals Facility for cases under ICSID, UNCITRAL and other rules.[3] Such an approach offers the best hope for enhancing consistency and coherence. Technical features, such as strict time limits, a precise scope for appeals, the selection of appellate tribunals – whether standing or selected for each case from the roster of chairpersons, as contemplated by the draft EU-CETA text – are all good starting points. Although the challenges (not only technical but also political) are formidable, there are feasible means to draft a functional appellate system for the international investment regime.

The parties to CETA and TTIP clearly benefit from significant experience in investment arbitration and can be considered like-minded, or at least as having a common interest in high standards of investment protection, while preserving the right and the duty of states to regulate for public purposes. However, the design of a bilateral appellate mechanism in these mega-treaties should not come at the expense of improvements to the system of international arbitration agreements as a whole, and should not operate in isolation of investment-treaty arbitration across treaties. The risk of further fragmentation of international investment law and of deepening the divide between older generation BITs and modern free trade agreements is high.

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[1] Barton Legum, "Options to establish an appellate mechanism for investment disputes", in Karl P. Sau-vant and Michael Chiswick Patterson, eds., *Appeals Mechanism in International Investment Disputes* (New York: OUP, 2008), pp. 231- 240; *see also* Barton Legum, "Appellate mechanisms for investment arbitration: Worth a second look for the trans-pacific partnership and the proposed EU-US FTA?", *Transnational Dispute Management*, vol. 11 (2014); Gabriel Bottini, "Reform of the investor state arbitration regime: the appeal proposal", *Transnational Dispute Management*, vol. 11 (2014; Jaemin Lee, "Introduction of an appellate review mechanism for international investment disputes expe-cted benefits and remaining tasks", *Transnational Dispute Management*, vol. 11 (2014); Kristina Andelic, "Why ICSID doesn't need an appellate procedure, and what to do instead", *Transnational Dispute Management*, vol. 11 (2014); Eun Young Park, "Appellate review in investor-state arbitration", *Transnational Dispute Management*, vol. 11 (2014).

[2] UNCITRAL, "Draft Convention on Transparency in Treaty-Based Investor-State Arbitration", adopted July 9, 2014, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V14/014/50/PDF/V1401450.pdf?OpenElement.

[3] ICSID, "Possible improvements of the framework for ICSID arbitration", ICSID Discussion Paper, October 22, 2004, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf.

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