The Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime

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The EU’s Investment Tribunals: Jurisdiction & Procedure

Claim may be submitted to the Tribunal under one of the following “sets of rules on dispute settlement”:

- “the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID);
- the ICSID Convention in accordance with the Rules on the Additional Facility. . . .where the conditions for proceedings pursuant to paragraph (a) do not apply;
- the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or,
- any other rules on agreement of the disputing parties.”
The EU’s Investment Tribunals: Appellate Jurisdiction

- Appeals available as of right from first instance awards.
- Grounds:
  - “(a) that the Tribunal has erred in the interpretation or application of the applicable law;
  - (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,
  - (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).”
The EU’s Investment Tribunals: Enforcement of Awards

“1. Final awards issued pursuant to this Section:

(a) shall be binding between the disputing parties and in respect of that particular case; and

(b) shall not be subject to appeal, review, set aside, annulment or any other remedy.

2. Each Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.”
"7. For the purposes of Article 1 of the New York Convention, final awards issued pursuant to this Section shall be deemed to be arbitral awards and to relate to claims arising out of a commercial relationship or transaction.

8. For greater certainty, where a claim has been submitted to dispute settlement pursuant to Article 6(2)(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the [ICSID Convention]."
Summary of the New EU Model

- A “radical revision” of ISDS in international investment treaties.
- Replaces *ad hoc* arbitral structures with standing tribunals established specifically to decide claims and hear appeals under each of the EU’s new treaties.
- State party control of over members of the tribunals and appellate bodies is heightened, establishing new requirements for nationality, qualifications, and ethical obligations.
- Recourse to the EU’s new system is made exclusive – even though the treaties do continue to allow investors some choice as to the procedural rules which will be used.
Summary of the New EU Model

- Clear concern about what happens to EU treaty final awards.
- Provisions designed to foreclose challenges to the applicability of the ICSID Convention and the New York Convention to EU model awards.
- Aimed to ensure that 3rd states will carry out obligations under ICSID Convention (Art. 54), when presented with EU model awards, and will feel constrained in their review of such awards under Article V of the New York Convention.
(In)compatibility with the ICSID Convention

- “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.” (Art. 26)

- “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.” (Art. 53)
The Impermissibility of *Inter Se* Modification

Article 41

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

   (a) the possibility of such a modification is provided for by the treaty; or

   (b) the modification in question is not prohibited by the treaty and:

   (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

   (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
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Applicability of the New York Convention

- Prospective waiver of Art. V review?
- EU-Vietnam FTA, Art. 30(1): Final awards “shall not be subject to appeal, review, set aside, annulment or any other remedy.”
- EU’s treaties cannot bind 3rd states with respect to their obligations under the NY Convention (or the application of their national law).
- State practice is very variable on the effectiveness of waivers, especially of Art. V(2) grounds.
A Multilateral Option for Existing IIAs?

- An opt-in multilateral facility for appellate review of investor-state awards.
  - Along the lines mooted by ICSID Secretariat (2004).
  - Similar to Mauritius Convention approach.
- A “bolt-on” mechanism; not total rethink of ISDS.
  - Inclusive of provisions for appellate review; finality of review; and recognition and enforcement among parties.
  - Would not be able to overcome the incompatibility of appellate review with ICSID Convention arbitration.
Thank you

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