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NUS CENTRE FOR INTERNATIONAL LAW COLLECTION OF ARTICLES ON AN APPELLATE BODY IN ISDS

Introduction to the Collection

Meg Kinnear[1] and Christine Sim[2]

The question of whether investment awards should be reviewable by an appellate body has been debated several times in the last 15 years. In 2004, the United States began to include 'socket clauses' in their investment treaties that contemplated the potential for appellate review of investment awards. In the same year, the International Centre for Settlement of Investment Disputes (ICSID) proposed the creation of an ICSID Appellate Facility that would review awards rendered under ICSID, the ICSID Additional Facility and the Arbitration Rules of the United Nations Commission on International Trade Law United States. More recently, the European Union (EU) and Canada have concluded a free trade agreement with an investment chapter establishing both an appellate and standing first level tribunal.[3] A similar proposal is found in the Vietnam–EU Free Trade Agreement chapter on investment.[4] The EU and Canada have also initiated exploratory discussions on a potential multilateral investment court, comprised of a first instance and appeal body.

Considering this renewed interest, this series of articles initiated by the National University of Singapore's Centre for International Law is very timely. The impetus for these articles was the increasingly prominent discussion on establishing some form of multilateral appellate review for investment treaty arbitral awards. The issue begins with a comprehensive analysis by J. Christopher Thomas and Harpreet Dhillon reviewing the foundations of investment arbitration. It examines the history of the ICSID Convention, noting that the ICSID drafters also wrestled with whether party appointment would lead to perceptions of partisanship and whether a standard of review allowing for *de novo* review would best serve the needs of the system.[5] The authors characterize the existing system as one that places a high premium on the finality and enforceability of awards instead of on their legal correctness. This analysis of the foundations of investment arbitration is

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[3] European Union–Canada Comprehensive Economic and Trade Agreement (final draft of 29 February 2016).
[4] Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (final draft of 1 February 2016).
[5] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966).

followed by an article by Elsa Sardinha identifying the issues that led to the renewed debate about appellate review. In particular, she relates how concerns about inadequate consistency and coherence among awards and about potential arbitrator bias motivate the current debate.

The articles then turn to several examples of appellate review in international legal systems that might inform current discussions in the investment context. Mark Huber and Greg Tereposky review the World Trade Organization (WTO) appellate mechanism and suggest lessons from the WTO that should be incorporated into the design of an appellate mechanism for investment disputes. Next, Chester Brown's article examines the historical supervisory jurisdiction of the Permanent Court of International Justice and International Court of Justice. It adds important historical detail to the discussion by considering early attempts to create appellate mechanisms in international law. This is followed by an article by Elsa Sardinha reviewing the Canada–EU and Vietnam–EU models for investment treaty appellate bodies.

Taking a big picture view of the discussion on appellate bodies for investment arbitration, Mark Feldman discusses the competing policy arguments for and against an appellate mechanism. He addresses the policy issue of balancing consistency with accuracy, and considers some of the other control mechanisms available to States. Examining the system overall, N. Jansen Calamita considers the enforcement issues raised by the Vietnam and Canada–EU treaties and some of the challenges in ensuring enforceability among the treaty partners as well as with respect to third States, as is uniquely provided by the current ICSID Convention.

As a proposal for the future, Colin Brown's preliminary sketches of a multilateral mechanism for the settlement of investment disputes expands on the EU approach. He proposes a multilateral investment dispute mechanism and briefly raises several issues that would have to be addressed in designing such a system. Lucy Reed and Christine Sim conclude by setting out some of the most pertinent issues raised in this series as a roadmap for future discussion and development.

The *ICSID Review* is pleased to bring this series of articles to its readers and to add to the discussion about future directions for dispute settlement in international investment treaties. Given that the ICSID Convention effectively invented this form of dispute settlement and has administered more than 70 percent of all known cases, it is especially apt for the *ICSID Review* to contribute to discussions on reform. We hope these articles contribute to a full and informed discussion, and the *ICSID Review* will continue to provide diverse views on relevant discussion in upcoming issues.