

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

*Potential Investment Treaty Appellate
Bodies: Open Questions*

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I. INTRODUCTION

The goal of this Collection of Articles is to ground and advance the active—and sometimes heated—debate about appellate bodies for investment treaty arbitration. By starting with the foundations of investment treaty arbitration, comparing potential models such as the World Trade Organization (WTO) Appellate Body and noting that there are other examples of appellate bodies in international law, describing the ‘first movers’ in the draft European Union (EU)–Vietnam and Canada–EU Free Trade Agreements (FTAs) and outlining key policy issues throughout, the authors have provided an integrated and coherent study of the current state of play and the challenges going forward.

Two things seem certain. First, a comprehensive multilateral system for the settlement of international investment disputes—if one is deemed desirable—must be seen as a ‘work in progress’ on a long time-frame. Second, because different States necessarily champion different and competing interests, there is little realistic prospect for a single investment court or a single model of appellate body.

That being said, there is much to gain from exploring the broad concepts and specific models of appellate bodies that are on foot. This exploration is helpful not only in attempting to craft workable appellate bodies, but also in addressing the criticisms of the investor-State arbitration system that have led to calls for an appellate avenue.

To conclude this Collection of Articles, and perhaps guide the next stage of debate and exploration, we briefly catalog the central policy and practical questions that emerge from the papers.

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II. WILL AN APPELLATE BODY CONTRIBUTE TO THE PERCEPTION OF MORE LEGITIMACY OR WILL IT UNDERMINE THE EXISTING SYSTEM'S LEGITIMACY?

As emphasized by Elsa Sardinha in her article on the impetus for appellate bodies, the most important question goes to the legitimacy of the existing investor-State arbitration system.³ Unless a new appellate body would enjoy greater legitimacy, and also improve the perceived legitimacy of *ad hoc* tribunals, there is good reason to be sceptical.

Would the approach of EU-led treaties result only in a patchwork of stand-alone bodies or eventually garner sufficient popular support for a multilateral investment dispute settlement system? Multilateral buy-in always requires painstaking consultations with States and other stakeholders such as multinational companies and non-governmental organizations. It is worth remembering that the ICSID and WTO dispute settlement systems were both preceded by extensive consultations among many States representing different regions, legal systems and levels of economic development. The legitimacy of any future investment appellate body, whether regional or multilateral, will hinge on a similar process of global dialogue and consultation.

III. IS CONSISTENCY IN THE INTERPRETATION AND DEVELOPMENT OF INTERNATIONAL INVESTMENT LAW THE IDEAL AIM?

The power of an appellate body to harmonize different interpretations of treaty law is clear. The aim would be to guide first instance tribunals to consistent application of the same legal provisions in one or more treaties.

However, as sagely pointed out in Mark Feldman's article:

For policymakers exploring the appellate mechanism options, analysis should include consideration of the risk of a standing, permanent appellate body developing a consistent, but inaccurate, line of case law on certain issues.⁴

Furthermore, given that relevant treaty provisions are often textually and conceptually different, the question remains whether such consistency should be the aim. As warned in Greg Tereposky's and Mark Huber's article:

Caution must be expressed that the role of a multilateral appellate mechanism would not be to 'standardise' investment treaty law by reading down the subtle (and not too subtle) differences between treaties.⁵

It bears keeping in mind that the multilateral adoption of the substantive provisions of the GATT occurred before the development of its dispute settlement provisions. There is no such pre-existing consensus on substantive protection provisions in investment treaties.

³ Elsa Sardinha, 'The Impetus for the Creation of an Appellate Mechanism' (2017) 32(3) ICSID Rev—FILJ 503.

⁴ Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power', (2017) 32(3) ICSID Rev—FILJ 528.

⁵ Tereposky and Huber, 'The WTO Appellate Body: Viability as a Model for an Investor-State Dispute Settlement Appellate Mechanism' (2017) 32(3) ICSID Rev—FILJ 545.

IV. WILL AN APPELLATE BODY MAKE INVESTOR-STATE DISPUTE RESOLUTION MORE EFFICIENT AND COST-EFFECTIVE?

The impact of an appellate body on efficiency is not reliably predictable. On the one hand, some argue that the availability of an appeal avenue would itself invite delay. One cannot ignore that almost 60 percent of WTO panel reports are appealed, leading to a bottleneck at the WTO Appellate Body.⁶

On the other hand, if an appellate body manages to harmonize foundational legal principles (where appropriate), the resulting coherence should reduce the number of claims pursued. There would be less incentive to litigate already settled issues, and more incentive to resolve disputes by negotiation and mediation.

V. HOW WOULD AN APPELLATE BODY INTERACT WITH EXISTING TREATIES AND ADJUDICATIVE BODIES?

The existing network of thousands of investment treaties is one of the main obstacles to a workable investment appellate body. How would parties get from the former to the latter? An appellate body would have to co-exist not only with existing investment treaties, but also with the ICSID Convention and the New York Convention. As flagged in Jansen Calamita's article, there are questions as to whether an *inter se* modification of the ICSID Convention's provisions, in particular the annulment system, is possible.⁷ Furthermore, how would the decisions of appellate bodies actually be recognized and enforced—as ICSID Convention awards or New York Convention awards, or otherwise?

VI. WHAT LEGAL AND PROCEDURAL CHALLENGES WOULD AN APPELLATE BODY FACE?

First, unlike ICSID annulment committees, an appellate body with the power to review awards for errors of law would effectively have the prerogative to reverse the first instance tribunal's award for failure to apply the applicable law. In so doing, what law should the appellate body apply? If both the first instance and appellate tribunals are created under the same treaty, that treaty could specify the same substantive law to be the applicable law for both tribunals. However, if an opt-in convention along the lines of the Mauritius Convention⁸ is created, it could specify the applicable law only for appeals. This might be a different substantive law from the law applied by the first instance tribunal. Would State parties to such a multilateral appellate body be able to agree on this difficult and often outcome-determinative issue?

⁶ Tereposky and Huber, 'The WTO Appellate Body: Viability as a Model for an Investor-State Dispute Settlement Appellate Mechanism' (2017) 32(3) ICSID Rev—FILJ 545.

⁷ Calamita, 'The Challenge of Establishing a Multilateral Investment Tribunal at ICSID' (2017) 32(3) ICSID Rev—FILJ 611.

⁸ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017); UNGA, 'United Nations Convention on Transparency in Treaty-based Investor-State Arbitration' (18 December 2014), 69th session (2014) Res A/69/116.

Second, an appellate body would have to define its role both *vis à vis* the first instance tribunal and the States' joint committees. How should an appellate body manage its relationship with these bodies?

What level of deference should an appellate body give to the findings of the first instance tribunal below? As Christopher Thomas and Harpreet Dhillon explore in their article, the level of deference that an appellate body would owe to the factual findings of the first instance tribunal would depend on the scope and standard of review.⁹ For instance, if language such as 'manifest error' is used, the standard of review is to be limited. However, as raised by Chester Brown in his article on the experience of the Permanent Court of International Justice and International Court of Justice, the question would remain how, in practice, the standard would be interpreted and applied by an appellate body.¹⁰ A highly independent and interventionist 'bench' could decide that any error of fact affecting the outcome of an award is *per se* 'manifest'.

States may also wish to create joint committees with the power to issue binding interpretations to guide tribunals to consistent treaty interpretations meeting the States' views. How should an appellate body treat such statements? The interaction between a joint States parties' interpretive statement and an appellate body could prove problematic. Would an appellate body be bound to follow the States' joint interpretation, even if it clashed with the appellate body's own developing and consistent interpretation? What if the States offered their interpretation during the time between the decision of the first instance tribunal and the appeal?

VI. WHAT PRACTICAL STEPS MUST PRECEDE CREATION OF AN APPELLATE BODY?

First, establishing the processes and standards for the appointment, challenge and removal of appellate body members would require great creativity and diplomacy. There is a diversity of views on the ethical duties of any tribunal member, including on issues such as 'double-hatting'. Some views are deeply rooted in different legal traditions and cultures. An agreed code of ethics—more easily achieved on a bilateral than a multilateral basis—would be a bare necessity. And who should decide on a challenge of an appellate body member? Should it be the President of the International Court of Justice, the other tribunal members or the arbitral institution?

Second, what working procedures should an appellate body follow? How much detail is necessary, for example, going to seat, language, and hierarchy of members? Which rules should be cast in stone—and by whom—and which would be better saved for evolution?

Last, but certainly not least, are questions concerning funding and secretarial support for an appellate body, some of which are discussed in Colin Brown's

⁹ Careful consideration needs to be given to the scope of appellate review. If, as the EU model currently holds, an appellate body can review awards not only for legal error but also for manifest error of fact, this might give dissatisfied parties an additional incentive to re-litigate the dispute. See JC Thomas and HK Dhillon, 'The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards' (2017) 32(3) ICSID Rev—FILJ 459.

¹⁰ See Chester Brown, 'Supervision, Control, And Appellate Jurisdiction: The Experience Of The International Court' (2017) 32(3) ICSID Rev—FILJ 595.

article.¹¹ The robust support provided by the WTO Appellate Body Secretariat is credited for much of the success of the WTO appellate system. Should that be replicated for an investment treaty appellate body, and if so how? Certainly, there would have to be a steady pledge of funds for an initial period of time. One approach, as contemplated by the EU–Vietnam FTA, is to share the costs of the appellate body amongst the States party to the relevant convention, taking into account their respective levels of economic development; another is to have the actual users pay as they go; and what about geography? Even the choice of a physical location for the appellate body would prove complex.

The questions above merely open the early dialogue on the potential creation of investment dispute appellate bodies, whether stand-alone or multilateral. There is a panoply of relevant questions, ranging from overarching policy considerations to procedural minutiae, to be explored. Regardless of the result, this explorative process should advance and improve the regime of investor-State arbitration.

¹¹ See Colin Brown, 'A multilateral mechanism for the settlement of investment disputes. Some preliminary sketches' (2017) 32(3) *ICSID Rev—FILJ* 673–90.