

## ALTERNATIVES TO INVESTOR-STATE ARBITRATION IN A MULTIPOLAR WORLD

This panel was convened at 9:45 am, Thursday, April 4, by its moderator, Jason Yackee of the University of Wisconsin-Madison, who introduced the panelists: Barry Appleton of Appleton & Associates; Andrea K. Bjorklund of the University of California at Davis School of Law; Cliff Manjiao Chi of Xiamen University Law School; and Céline Lévesque of the University of Ottawa.\*

### THE SONG IS OVER: WHY IT'S TIME TO STOP TALKING ABOUT AN INTERNATIONAL INVESTMENT ARBITRATION APPELLATE BODY

*By Barry Appleton<sup>†</sup>*

My goal today is to stimulate scholarly discussion on one of the most contentious issues that has arisen out of investor-state arbitration: the creation of an international treaty arbitration appellate body. This longstanding debate has focused on a perceived lack of consistency within international investment arbitration decisions and a need to have an appellate body (or even some form of appellate investment treaty court) available to discipline “rogue tribunals” which venture outside of the terms of the international economic law treaties. I am suggesting that these types of appellate bodies are unnecessary and in any event, likely a very bad idea. I suggest that it is time to put this discussion to rest and instead to focus on the pernicious underlying symptoms which led us all to consider appellate mechanisms.

When one considers the implementation of an appellate body in the context of nearly three thousand international economic law treaties, the mechanics suggested seem simply unworkable. In my view, there are insurmountable impediments to the creation of an international investment law appellate body. For example, in 2002, the U.S. Trade Promotion Act enabled the creation of an appellate body in future trade agreements.<sup>1</sup> This legislation provided a three-year window to enable the creation of appellate body mechanisms. Despite the legislative capacity, there was no appetite for such a process. During this three-year period, no agreements were negotiated with appellate bodies. So the challenge of discussing the operation of such an appellate body mechanism is simply that no international investment treaty appellate body has been created.

There are solid reasons why no international investment treaty appellate bodies currently exist. To be effective, an appellate body would require a wholesale amendment to the ICSID Convention—an arduous task with a low probability of success within a short period of time. The ICSID ad hoc annulment committee function is quite different from that exercised by an appellate body and incompatible with the functions of an appellate body. The ICSID system is self-contained and is essentially premised on the fact that ICSID panel decisions are controlled through an ad hoc annulment system. Antonio Parra, a former deputy Secretary-General of ICSID, was the author of a thoughtful discussion paper which considered ways

\* Professor Bjorklund did not submit remarks for the *Proceedings*.

<sup>†</sup> Barry Appleton is an international lawyer specializing in international economic law. He is the Managing Partner of Appleton & Associates International Lawyers in Toronto and Washington, D.C. Mr. Appleton thanks ASIL's International Economic Law Interest Group for the opportunity to present these remarks, which do not necessarily reflect the views of his firm or its clients.

<sup>1</sup> Bipartisan Trade Promotion Authority Act of 2002, 19 USC §3802(b)(3)(G)(iv) (2002).

in which ICSID could use its rules to effectively implement an appellate body.<sup>2</sup> Parra's paper concluded that such a process could actually take place in the absence of an amendment to the ICSID Convention through a general *inter se* agreement between state parties to go to an appellate body after the tribunal of first instance.<sup>3</sup> Such an approach has challenges in that it must modify the ad hoc annulment process in ICSID to have it operate as an appellate mechanism. This route does have its challenges.<sup>4</sup>

The World Trade Organization (WTO) has recently permitted the public to sit in on some of its appellate body hearings. I attended such a public hearing of the WTO Appellate Body, which provided an opportunity to observe a previously closely guarded process that the public generally does not have an opportunity to see. I witnessed the hard work done by the WTO Appellate Body to find consistency within the WTO's international economic law decisionmaking. An appellate body is best suited to address questions where there is substantial similarity in investment obligations between the parties. This is the case at the WTO. This could also be the case where there is a series of investment protection agreements based on the same model treaty, or a multilateral agreement such as NAFTA. In these situations, there is a possibility that an appellate body could be structured to make that work. But even in these cases where there is sufficient similarity in the substantive obligations of the treaties, there still are real questions about the practicalities of an appellate body. For example, would an appellate mechanism create two classes of arbitrators, with junior and senior arbitrators much like one finds in municipal appeals courts? This also raises the concern of whether this new process would disrupt the overall effectiveness of international economic law adjudication.

This is not to say that creating an appellate body within the constraints of current international investment treaties is impossible, but that it is difficult. There are ways to integrate an appellate system into some existing regional international investment treaty agreements. For example, NAFTA could permit the creation of an appellate body in the event that the treaty was amended. Regional investment treaties could also permit the creation of appellate mechanisms. But in every set of existing treaties, there are practical and political difficulties in modifying the treaty that hardly makes the creation of an appellate body worth the cost.

This review of the objectives that could be remedied by an appellate body necessitates a more fundamental consideration of the question about whether there really is a problem that needs to be addressed by an appellate body. My answer to this question is no.

Much of the current debate about an appellate body has actually been misplaced by having a focus on whether a particular tribunal or a particular arbitrator has had "pro-investor" or "pro-state" leanings. This simplistic two-sided view of international economic law is inadequate to explain how an appellate body might actually operate. At its most basic, this bipolar

<sup>2</sup> Antonio R. Parra, *Possible Improvements of the Framework for ICSID Arbitration*, ICSID Secretariat Discussion Paper, Oct. 22, 2004.

<sup>3</sup> See the discussion on this topic in *id.*, annex.

<sup>4</sup> I am indebted to comments on these remarks from Professor Robert Howse from the Faculty of Law at New York University who points out that the state parties involved in an ICSID dispute (that is, the respondent state and state of the investor) could enter into a specific agreement to permit an appellate body to operate in the ICSID dispute without the need for an amendment to the ICSID Convention. In such a circumstance, the rules of international law require a demonstration that the ICSID Convention does not contain a *lex specialis* that would otherwise preclude recourse to Article 41 of the Vienna Convention. Article 41 addresses *inter se* amendments to multilateral treaties. Any modification to permit an appellate body process would have to ensure that the change was not to the detriment of other state parties. All modifications would need to be notified in advance to all treaty parties, and the modification could not otherwise be incompatible with the fundamental purpose of treaty. Such a process has not been followed by a party, and thus the response from an affected claimant has also not been considered in this approach.

view is fundamentally the wrong dialectic lens to consider this area of the law. Such a view creates a series of questions and approaches that are irrelevant to the fundamental issue to be addressed. This is where the problems do arise.

#### IMPROPER APPLICATION OF RULES OF INTERNATIONAL LAW

States have negotiated treaties. These same states expect tribunals to give effect to the words of the treaty when they are interpreted as these words were carefully negotiated. But often tribunals ignore the wording in the treaty. A failure properly to interpret the words of a treaty can easily result in inconsistent decisions between tribunals considering the same substantive treaty provision. It can also result in an excess of jurisdiction or an error of law.

Many of the problems arise fundamentally from the lack of proper application of international law. Fundamental and basic concepts such as those contained in the Vienna Convention on the Law of Treaties and the ILC Draft Articles on State Responsibility are often not followed in the interpretation of international economic law treaties. When the proper rules of international law have not been applied, or are applied inconsistently or improperly, there is going to be a problem. By the time an appellate body is in place, the damage by the tribunal has been done. Appellate mechanisms were to address this type of fundamental problem where the rule of law is ignored because customary rules of international law have not been applied. In essence, this is a system where carelessness and lawlessness, rather than the application of the rule of law, applies.

The fundamental concern that needs to be addressed is to ensure that high standards of professionalism and competence are maintained by these international economic law tribunals. The issue is not really about the need for an appellate body. Instead, the need is to ameliorate the tribunal process. An improved process starts with having tribunals comprising the best possible arbitrators, who are ready to address the issues in a dispute based on the application of rules of international law to the terms of the particular treaty at issue.

There are lessons that can be learned from domestic arbitration procedures. A number of these domestic procedures require mandatory certification before an arbitrator can be appointed to a tribunal. Such an approach is followed in arbitrations before the International Center for Dispute Resolution or by the Chartered Institute of Arbitrators. In matters before these arbitration institutions, one cannot be named as an arbitrator until there is a demonstrated certification of competency. For international economic law arbitration, a potential arbitrator should be able to demonstrate knowledge of the rules of international law and international arbitration procedure that is sufficient to establish the issuance of a proper decision. Simple mechanisms could be put into place for an arbitrator to demonstrate the achievement of these basic standards, and disputing parties appointing arbitrators could look for this certification before making appointments.

The current situation is ripe for bad decisionmaking. It facilitates inconsistency rather than enhancing stability and predictability from a consistent meaning and application of international investment treaty norms. This is the most practical and immediate area where reform could be implemented by institutions that engage in a good deal of appointments, such as the Permanent Court of Arbitration or ICSID. These practical measures should be considered by international lawyers engaged in this area of law as well.

Reviewing investor-state arbitration decisions demonstrates just how helpful recourse to the rules of international law would be to the determination of issues raised. Many questions could be resolved by a simple reference to the rules contained in the ILC Draft Articles on State Responsibility. These rules provide a trier of fact with a great deal of information. For

example, the ILC Draft Articles provide a codified (and sensible) international economic law approach to approach essential questions on the attribution of state responsibility that frequently need to be considered within international economic law claims.

A lack of demonstrated competency in international economic law and procedure is also a problem for WTO dispute settlement panels. The failures of these panels to appreciate the required legal tests, and thus to adduce the proper evidence, have made effective appellate review impossible by the WTO Appellate Body, which has no power to obtain new evidence or make its own findings of fact de novo. Again, there is no requirement for competency-based certification to be a panelist at the WTO.<sup>5</sup> So the same problems manifest themselves at the WTO and at the investor-state level.<sup>6</sup>

In conclusion, the likelihood of an appellate mechanism being created within the contours of the current network of international economic law treaties remains very low. Substantive reforms to enable the creation of an appellate body within key international investment treaty institutions such as ICSID are nonstarters. The simplest and most productive way to enhance the effectiveness and consistency of international economic law tribunals is to ensure that the persons with demonstrated knowledge about the rules of international law are appointed to international economic law tribunals.

This is the time finally to address the underlying problem that arises when there is a lack of rigor in tribunal decisionmaking. I suggest, given the difficulties in creating an appellate body, that it is time to stop focusing simply on appellate mechanisms and instead take up the real challenge to ensure consistent recourse to rules of international law in the interpretation of international treaties. The song about appellate mechanisms is finished, and it is now time to be singing a different tune.

### **PRIVILEGING DOMESTIC REMEDIES IN INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT**

*By Manjiao Chi\**

There are various methods to settle international investment disputes between states and foreign investors at the international and national levels. Typical methods include investor-state negotiation, consultation, mediation or/and arbitration, local remedies in the host states, state-state arbitration, or diplomatic protection. These methods have their respective merits and disadvantages and are not necessarily mutually exclusive. Many international investment agreements (IIAs), bilateral investment treaties (BITs), and regional trade agreements (RTAs)

<sup>5</sup> The WTO's Dispute Settlement Understanding does specify that WTO panelists need to be qualified. But this requirement has not been spelled out in a meaningful way that could provide guidelines for appointments. The resource constraints and tight timeframes for the WTO Appellate Body effectively make it impossible for the WTO Appellate Body to compensate for errors of competency and professionalism which occur at the panel level.

<sup>6</sup> It is important to make clear that there are many qualified and experienced international economic law arbitrators who sit on investor-state arbitration tribunals, but a requirement for demonstrated knowledge of the rules of international law is simply not a prerequisite for appointment to a tribunal. This results in circumstances where there can be international investment treaty arbitration panels without any member having demonstrated knowledge of international economic law. This is a practical and identifiable way to be able to deal with the public policy concerns which have resulted in a call for an appellate body solution. My proposal is that scholars, arbitrators, arbitration institutions, and international economic law lawyers all have a vested interest in enhancing international economic law—and that ensuring professionalism and competency as a fundamental requirement of the system is a practical way to be able to address the issues of potential inconsistency and incorrectness in tribunal decisions.

\* Associate Professor of Law, Law School, Xiamen University, China; Deputy Secretary-General, the Administrative Council, Xiamen Academy of International Law; Research Fellow, Collaborative Innovation Center for Global Governance and Rule of Law, Xiamen University.