



Fourth round of break-out sessions: Reform of investment dispute settlement Appeals facility¹

Chair: Ms. Aurélia Antonietti

International Centre for Settlement of Investment Disputes (ICSID)

Chair: Mr. Colin Brown

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Kick-off speaker: Ms. Aurélia Antonietti

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The debates about the establishment of an appeals facility concerned one of the most complex issues in international investment law reform at present, and accordingly, generated a rich and fruitful debate that spanned a wide range of legal, and practical, policy-related issues. The experts conveyed a host of different ideas and positions on the topic. The discussion concerned both the question whether having an appeals facility in the first place was necessary or desirable and how the implementation of such a facility could look like in practice. The prospects depend on whether the system will remain a predominantly bilateral or whether its growing multilateral ambitions will materialize. The other relevant factor is whether the system will remain investor-State oriented or will shift towards State-State dispute settlement.

While the chairs asked the experts to speak particularly on the question of the practicalities of how to set-up an appeals and what features such a facility should have, the experts also addressed the considerations as to the need to have an appeals facility in the first place. What proved helpful in the discussion was to distinguish two functions that an appeals facility would have: 1) an 'individual justice'-function is ensuring the correctness of arbitral awards and 2) a 'legislative' function in further developing international investment law.

The experts mentioned that having a right to appeal is a due-process guarantee that disputing parties should normally be able to have (and which they do have in other international litigation mechanisms such as human rights courts or the international criminal court). This right was important from an individual justice perspective. An aspect that was mentioned by some as an asset of an appeals facility was that this could ensure, and contribute to further developing, a coherent jurisprudence on international investment law. Other experts argued that the creation of coherence was out of line with the bilateral nature of investment treaties, which – because of their nature as bilateral treaties – were opposed to ideas of coherence. In light of differences in the language of investment treaties an appeals facility would therefore unlikely fully solve issues of consistency and predictability. Furthermore, issues with the length and costs of an additional instance in the proceedings were mentioned as a concern for both investors and host States.

¹ The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

The experts then mainly focused on how an appeals mechanism could look like in practice. First, it was discussed whether appeals facilities should be set up on a bilateral, treaty-by-treaty basis, whether they should be regional instruments, or be created on the multilateral level. In this context, the argument was made that a single appeals mechanism is to be preferred to multiple *ad hoc* ones as it would better tackle the current problems (lack of legal consistency and predictability in arbitral decisions). At the same time, some experts expressed doubts as to whether this would not override the interest of parties in bilateral solutions. Second, mention was made that the grounds for review needed to be established, whether this would include review for procedural violations, misapplication of applicable law, and errors of facts. Third, it was pointed out that mechanisms should be introduced in order to ensure that decisions by a future appeals facility would be complied with in light of the additional time and cost such a proceeding would entail.

Fourth, much discussion turned as to whether there were certain models of appeals mechanisms that one should look at in particular. In this context, many experts referred to the World Trade Organization (WTO) as a good and well-functioning model to follow; other experts were critical of this analogy given that the WTO Appellate Body oversees a set of multilateral treaties (WTO agreements) as opposed to a “spaghetti bowl” of differently worded IIAs. The alternative to use the International Centre for Settlement of Investment Disputes (ICSID) as a forum was also considered, although this approach would leave unaddressed arbitration under the United Nations Commission on International Trade Law (UNCITRAL) (and other) arbitration rules, which are frequently used and sometimes the only ones available under an IIA (e.g. if a country is not member of ICSID). Finally, many experts pointed out that the composition of a possible appeals facility was crucial if such an organ was to have authority and legitimacy in the eyes of States and investors.

Ultimately, most experts agreed that the creation of an appellate mechanism is difficult to pursue separately from the substantive IIA reform, including because amendments to existing treaties might be required and because there is not sufficient agreement as to how broad standards in existing agreements, such as fair and equitable treatment or the concept of indirect expropriation should be interpreted under existing agreements. Furthermore, the experts agreed that comparison with the WTO should be further explored, not in the sense of copying that mechanism one-to-one to investment law, but in order to learn from the experiences the WTO appellate mechanism has made.

Although quick short-term solutions are difficult, an incremental bottom-up approach, including with opt-in models similar to the UNCITRAL Transparency Convention, could be undertaken. Some experts called for further, more detailed studies of the various ways that an appeals facility could be established, the potential scope of appellate review and other specific issues that need to be thought through in this connection.