



Columbia Center  
on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL  
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

## Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 147 May 11, 2015

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Adrian P. Torres (adrian.p.torres@gmail.com)

### **An appellate body for international investment disputes: How appealing is it?**

by

Joachim Karl\*

The debate about a reform of the international investment agreement (IIA) regime is gaining momentum.<sup>1</sup> One suggestion currently being discussed is the establishment of an appellate body for investor-state dispute settlement (ISDS) cases, as a means to review first instance awards, thereby enhancing the coherence and predictability of jurisprudence and contributing to legal security.<sup>2</sup> However, more discussion is needed on how such a body could be set up, and to what extent it could achieve its purpose.

One option is to establish a standing appellate body as exists for trade disputes under World Trade Organization (WTO) rules.<sup>3</sup> The second is an ad hoc appellate body, following the example of the International Centre for Settlement of Investment Dispute (ICSID) regarding the annulment of arbitral awards. Either type of appellate body would not only have the right to annul awards, but also to amend them.

The first option implies the establishment of a new multilateral institution or the opening up of the WTO dispute-settlement system to ISDS; both ideas lack political support and are therefore unrealistic; however, a permanent court could be an option at the bilateral or regional level.

The second option means that an appellate body would convene only as need arises in relation to a specific dispute. Contrary to a standing appellate body, members of an ad hoc appellate body would vary from case-to-case.<sup>4</sup> While a hierarchical structure would be missing, the supremacy of the appellate body could be secured through other means.<sup>5</sup>

Such a body could be set up multilaterally, e.g., by an amendment to the existing ICSID Convention<sup>6</sup> or the UNCITRAL Arbitration Rules, as suggested in a recent *Perspective*,<sup>7</sup> or in bilateral or regional investment agreements. While amending existing multilateral conventions would be extremely difficult, the second alternative would be easier to realize, especially with regard to future IIAs.

Matters look different with regard to the more than 3,200 existing IIAs. At the all-time peak of IIA-making in the mid-1990s, approximately 200 treaties were negotiated per year. At that rate, it would take at least 16 years to incorporate an appellate body into all these treaties, but this may still be an optimistic scenario given

the high complexity of today's IIA negotiations. In the end, an amendment to the ICSID Convention or the UNCITRAL Arbitration Rules - if successful - may be more efficient. Without embarking on one of these two reform paths, the introduction of an appellate body in new IIAs would remain piecemeal.

Certainly, a serious shortcoming of an ad hoc appellate body - independent of whether it is based on a bilateral, regional or multilateral treaty - is its limited ability to promote coherence in treaty interpretation.<sup>8</sup> Since none of these tribunals would have supremacy over the others, there would be a considerable risk that different ad hoc appellate bodies would decide the same legal issue differently, thus perpetuating a common drawback in current arbitration practice. This risk would exist both with regard to a consistent interpretation of one and the same IIA, and in respect of similar IIA provisions deriving from different treaties.

In conclusion, it appears that inclusion into future IIAs would be the fastest way toward an appellate body in ISDS.<sup>9</sup> An ad hoc tribunal could review decisions of the first instance and thereby address a major concern of critics of the existing arbitration system. However, for promoting the equally important objective of coherence and predictability in international arbitration practice, it would need a permanent appellate body with broad jurisdiction over the existing IIA regime.

---

\* Joachim Karl (joachim.karl@unctad.org) is Chief of the Policy Research Section in UNCTAD's Division on Investment and Enterprise, Geneva. The author is grateful to Ucheora Onwuamaegbu, Antonio Parra and August Reinisch for their helpful peer reviews. **The views expressed by the author of this *Perspective* are his personal opinion and do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

<sup>1</sup> UNCTAD, *World Investment Report 2014* (Geneva: UNCTAD, 2014), p. 126.

<sup>2</sup> See, e.g., Christoph Schreuer, "Revising the system of review for investment awards", available at [http://www.univie.ac.at/intlaw/wordpress/pdf/99\\_rev\\_invest\\_awards.pdf](http://www.univie.ac.at/intlaw/wordpress/pdf/99_rev_invest_awards.pdf); see also Karl P. Sauvant, ed., *Appeals Mechanism in International Investment Disputes* (Oxford: OUP, 2008).

<sup>3</sup> The WTO Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel; Appellate Body Reports, once adopted by the Dispute Settlement Body, must be accepted by the parties to a dispute.

<sup>4</sup> However, the establishment of a roster of arbitrators can reduce the number of potential arbitrators.

<sup>5</sup> Such as a higher number of arbitrators compared to the first instance or particularly stringent qualification requirements.

<sup>6</sup> See ICSID, "Possible improvement of the framework for ICSID arbitration", Discussion Paper, Oct. 22, 2004, available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14\\_1.pdf](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf).

<sup>7</sup> Anna Joubin-Bret, "Why we need a global appellate mechanism for international investment law", *Columbia FDI Perspectives*, No. 146, April 27, 2015.

<sup>8</sup> Irene M. Ten, "International arbitration and the ends of appellate review", *NYU Journal of International Law and Politics*, vol. 44 (2012), pp. 1109-1204.

<sup>9</sup> Alternatively, it has been suggested to provide for preliminary rulings in pending investment arbitration cases. See, e.g. Christoph Schreuer, "Preliminary rulings in investment arbitration", *Transnational Dispute Management Journal*, vol. 3 (2008).

*The material in this Perspective may be reprinted if accompanied by the following acknowledgment: "Joachim Karl, 'An appellate body for international investment disputes: How appealing is it?,' Columbia FDI Perspectives, No. 147, May 11, 2015. Reprinted with permission from the Columbia Center on Sustainable Investment (www.ccsi.columbia.edu)." A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.*

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Adrian Torres, [adrian.p.torres@gmail.com](mailto:adrian.p.torres@gmail.com) or [adrian.torres@law.columbia.edu](mailto:adrian.torres@law.columbia.edu).

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at [www.ccsi.columbia.edu](http://www.ccsi.columbia.edu).

### **Most recent Columbia FDI Perspectives**

- No. 146, Anna Joubin-Bret, “Why we need a global appellate mechanism for international investment law,” April 27, 2015.
- No. 145, Charles-Emmanuel Côté, “Toward arbitration between subnational units and foreign investors?,” April 13, 2015.
- No. 144, Herfried Wöss, “Legitimacy in WTO law and investment arbitration: the role of the contracting parties,” March 30, 2015.
- No. 143, Alvaro Cuervo-Cazurra and Ravi Ramamurti, “The escape motivation of emerging market multinational enterprises,” March 16, 2015.
- No. 142, Louis Brennan, “The challenges for Chinese FDI in Europe,” March 2, 2015.

All previous *FDI Perspectives* are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.