



A Proposal to modernize ICSID Dispute Settlement Rules:

An ICSID Appeals Facility: An Arbitration-based Mechanism

An ICSID award is not subject to any appeal according to Article 53 of the Convention. It might be annulled on the very strict grounds established by Article 52. However, severe errors of fact or law could not be challenged using the annulment mechanism established at Article 52. Would be beneficial to introduce a mechanism allowing the parties to challenge the awards on grounds of severe errors of fact or law?

The existence of such mechanism could become an incentive to improve the quality of awards. Gary Born has discussed on the convenience of substantive review of awards in some of his works on international arbitration.¹ It could add legitimacy and coherence to the system. Legitimacy could be at risk when some ICSID awards are said not to follow strict facts and law. These assertions could be contended if a mechanism for reviewing such claims is developed.

Could an ICSID Appeals Facility that allows the parties to challenge the final award on these grounds be an answer to these assertions? Could this add legitimacy to the whole system?

The ICSID Secretariat Discussion paper drafted in 2004 considered that possibility.² It was based on the Appellate Body structure existing at the WTO. It started a discussion

¹ Gary B. Born, *Annulment and Revision of International Arbitral Awards*, International Arbitration: Cases and Materials (Gary B. Born ed.), Kluwer Law International, (2009)

² POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION – Discussion Paper October 22, 2004 ICSID Secretariat - International Centre for Settlement of Investment Disputes. Accessed at: <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>

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that has become more relevant the previous years. Given the fact that the ICSID Convention was drafted more than 50 years ago, time has come to review certain standards.

More than 20 different dispute investment treaties in the previous years have developed appeals mechanisms. Many of them have granted ICSID a role in their investment proceedings. Therefore, the appeals mechanism is indeed being considered as a solution that is gaining acceptance in multiple negotiations and final texts agreed by different States.

The way this appeal mechanism should be constructed is based on a permanent tribunal with fixed terms in most treaties. The ICSID discussion paper outlines the WTO appellate body as a possible framework to model such an appeals facility.³

The view that I present here advocates for an Appeals Facility based on International Arbitration.

The present ICSID Dispute Settlement mechanism is efficient due its flexibility and the strict standards that international arbitration develops. Efficiency to resolve investment disputes is necessary to guarantee due process to foreign investors.

An ICSID Appeals Facility mechanism could be inspired on the ad hoc Committee used for Annulment described at Article 52 of the ICSID Convention. The appointment of

³ This type of construction could generate difficulties as the ones faced at the WTO Appellate Body that might not be able to keep running due to the reluctance of a member state to accept the nomination of any new members and the imminent expiration of the terms of the current ones. See Jennifer Hillman: Three Approaches to Fixing the Appellate Body.

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such body could be different: The parties concerned could have the right to appoint an Ad Hoc Arbitration Appeals Panel given certain strict requirements to challenge the award as serious errors of fact or law. There could be a special roster for these panels. The proceeding should also have strict time limits to avoid delays that would undermine the efficiency of the ICSID Dispute Settlement system.

An appeals mechanism based on arbitration could enhance coherence and consistency. It could grant more legitimacy to a system threatened when decisions reflect severe errors of facts or law applicable to a particular case.

This mechanism would require to amend article 53 of the ICSID Convention allowing appeals in the exceptional circumstances mentioned. This amendment would require the votes of all Contracting States.

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