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Establishing an Appeal Mechanism for Investor-State Dispute Settlement: Challenges, Feasibility, and Options

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ABSTRACT

There is a growing international consensus stating investor-state dispute settlement mechanism (ISDS), with international investment arbitration as the main means of dispute settlement, needs to be reformed, but the reform proposals have not yet been finalised. Among the many options, the option of establishing an appeal mechanism has generated extensive discussion. The permanent, independent and corrective nature of the appeals mechanism helps to address the lack of independence and impartiality of arbitrators under the ISDS mechanism, the inconsistency of arbitral awards, and the lack of control mechanisms. It also has benefit of improving the accuracy of awards. Under the current system of international investment treaties, establishing a multilateral appeal mechanism presents many challenges. However, the Mauritius Convention on Transparency, which uses multilateral instruments to amend bilateral treaties, provides evidence that establishing a multilateral appeal mechanism is feasible.

Keywords: Legitimacy crisis; relief program; Rules on Transparency; Opt-in Convention; Vienna Convention on the Law of Treaties

INTRODUCTION

Under the ISDS mechanism, the international investment arbitration is one of the most commonly chosen means of dispute settlement. In the existing institutional framework of this regime, however, the lack of mechanisms to guarantee the consistency and correctness of arbitral awards has contributed to the unpredictability and uncertainty of international investment law, thus raising concerns about its legitimacy. Therefore, the international community is increasingly calling for the reform of the ISDS mechanism, and the plan to establish an appeal mechanism is attracting attention. China submitted a position paper in July 2019 to Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) on the establishment of an international investment arbitration appeal mechanism. Recent bilateral and multilateral investment treaties have also identified possible options concerning the establishment of appeal mechanisms. Although 'one award is final' is a basic principle in the field of arbitration, there are still instances where arbitral awards are reviewed through the appeal process.[1] For the current system of international investment agreements, although there are difficulties in establishing an appeal mechanism and a well-established judicial system often comes with an appeal process, this initiative is necessary and feasible. Based on the current predicament of the international investment arbitration, this article discusses whether the appeal mechanism can make up for the defects of the ISDS mechanism, and explores whether the experience of the Mauritius Convention on Transparency, as a successful precedent of revising existing bilateral treaties by multilateral conventions, can be used for reference in the establishment of multilateral appeal mechanism.

CHALLENGES OF INTERNATIONAL INVESTMENT ARBITRATION

Since the 1990s, the international investment arbitration has undergone various transformations. Among them are the basis of jurisdiction that has changed from one based on contractual agreements to one based on treaty agreements, the type of dispute that has changed from one based on contractual disputes to one based on treaty disputes, and the substantive norms that have changed from one based on contractual and domestic law and even customary international law to one based on investment treaties.[2] However, these changes bring risks to national sovereignty, public policy formulation, and social development, and also bury hidden dangers for the international investment arbitration.

THE COMMERCIAL ARBITRATION MODEL FOR INVESTMENT DISPUTE SETTLEMENT RAISES QUESTIONS

Commercial arbitration is a system used to settle disputes arising from commercial transactions between private subjects of equal status. Such disputes mainly involve private rights and interests. The arbitral tribunal must consider the legislative, enforcement, and judicial measures of the host country in order to judge the legality of these measures in the context of investment disputes. The arbitral tribunal's decisions may directly or indirectly change the behaviour of countries, thereby affecting the rights and obligations of their citizens.[3] Therefore, the international community has been sceptical about whether commercial arbitration mode is suitable for solving investment disputes involving public law factors. Despite the legitimacy of investment arbitration mechanisms under international law, the right of parties to select arbitrators ad hoc to adjudicate investor-state disputes has not been widely accepted in modern democracies.

INTERNATIONAL INVESTMENT ARBITRATION IS EXPERIENCING A CRISIS OF LEGITIMACY

In recent years, one of the main manifestations of the 'legitimacy crisis' of international investment arbitration is that there are many cases with inconsistent or even contradictory results in arbitration practice. These cases fall into three categories. The first category consists of cases where different awards have been made by arbitral tribunals established under different investment treaties in cases involving the same facts, parties or similar investment rights. Take *Lauder v. Czech* and *CME company v. Czech*[4]as examples, the two cases involving the same facts, almost the same parties, and wording of basic same treaty provisions. But the two arbitral tribunals disagreed on the question of whether the Czech Republic had breached its treaty obligations towards the US investor Lauder and the Dutch company it controlled (CME).[5] In the second category, there are different decisions by arbitral tribunals established by different investment treaties, dealing with cases that having similar commercial situations and similar investment rights. The SGS (Société Générale de Surveillance Holding S.A.) series of cases is typical of this scenario.[6] In such cases, different ICSID arbitral tribunals need to determine whether the 'umbrella clause'[7] translates into a breach of contractual obligations into a breach of international law obligations under the investment treaty. The tribunals in *SGS v. Pakistan* and *SGS v. Philippines* issued opposite rulings based on different interpretations of the umbrella clause. There are also cases in which different arbitral tribunals reach different conclusions using the same investment treaty criteria. For example, there have been many investment arbitrations cases under Chapter 11 of the NAFTA. Among them, the different interpretations made by the arbitral tribunal in the three cases of *S.D. Myers v. Canada*,[8] *Metalclad v. Mexico*,[9] and *Pope & Talbot v. Canada*[10] regarding the 'fair and equitable treatment' in Article 1105 of NAFTA attracted wide attention.

Hence, unpredictable and inconsistent awards put the status of the international investment arbitration awards at risk and, over time, undermine their credibility and legitimacy, which threatens the international legal order and the continuation of investment treaties. Uncertainty over the outcome of the ruling has hurt the reasonable expectations of sovereigns, forcing countries to think twice about legislative or regulatory activities, the so-called 'chilling effect'.[11] In addition, the lack of predictability in the outcome of the ruling could seriously undermine investor confidence.

LACK OF PROPER REVIEW MECHANISM

Under the ICSID Convention, arbitral awards may be set aside in limited circumstances. However, Article 52 does not allow the substance of the dispute to be affected by reconsideration of a decided case to distinguish the setting aside procedure from an appeal. ICSID's primary function when it was established was to settle disputes arising from investment contracts and concession agreements, and approximately 90% of cases originate from such agreements.[12] Accordingly, the ICSID internal review mechanism was not designed to address possible manifest errors in treaty interpretation, thus making it difficult for ICSID to rectify flawed awards issued under existing investment treaties.

Judicial review of awards under non-ICSID conventions is under the jurisdiction of the domestic courts of the place of arbitration or the place where enforcement is sought, and the scope of review of awards is again limited, generally by reference to the 1985 UNCITRAL Model Law on International Commercial Arbitration, which in turn largely follows the conditions for setting aside an

award as enumerated in Article 5 of the New York Convention.[13] Courts have occasionally set aside awards because of concerns about public policy, but they have generally done so only in exceptional circumstances.

Award reviews are designed to remedy significant deficiencies in the arbitration process prior to the enforcing of awards, with a primary focus on the integrity and fairness of the process, rather than the consistency, coherence, and correctness of the award. It is therefore very difficult to correct a legal decision that was made incorrectly by the current system. While the finality is considered an important factor in ensuring the efficiency of arbitration, the correctness of the law cannot be demonstrated if an award that is clearly erroneous cannot be set aside.

FEASIBILITY OF ESTABLISHING AN APPEAL MECHANISM FOR INTERNATIONAL INVESTMENT ARBITRATION: THE ADVANTAGE AND NECESSITY

According to common perception, one major benefit of establishing an appeal mechanism is the improvement of inconsistency in interpretation and application of the law in arbitral awards. Observing the appeal mechanism of a country, it is evident that, whether in civil law or common law country, the appeal system is designed primarily to correct mistakes in the first trial process and to guarantee the integrity of the judgment. The appeal courts need to publish, clarify and harmonize the legal systems they serve and the rules of law they apply.[14] The appeal judge is therefore concerned not only with resolving the dispute on appeal but also with getting the law correctly and uniformly applied and establishing jurisprudence that can guide the decision of future cases.

International experience shows that decisions made by the Appellate Body can have a great impact even if the previous decision is not strictly binding in law. For example, although the WTO Appellate Body is currently suspended, it is undeniable that it has made great contributions to increasing the reliability and predictability of the WTO dispute settlement mechanism, and is therefore known as 'the most dazzling pearl in the crown of WTO'.[15] It should be noted, however, that the fragmentation of legal sources of international investment law limits the ability of investment arbitration to learn from the successful experience of the WTO Appellate Body. Even so, the appeal mechanism could make a difference in unifying the interpretation of investment treaties. In fact, international investment treaties are not isolated from each other. Most of them contain similar clauses of rights and obligations, such as most-favoured-nation principle, national treatment and minimum treatment standards, fair and equitable treatment, comprehensive protection and security treatment, and rules of expropriation and requisition. Most of the investment contracts signed by foreign investors and the host country also invoke these rights and obligations clauses.[16] Even though different investment treaties use different expressions, there are usually only limited possible interpretations.[17]

Further, the consistency of the arbitral results means that they are fairly predictable, which is very important to the host country because when signing an investment contract with foreign investors, the host country will rely on the precedent of the arbitral award in order to predict adverse factors and potential risks after the case have gone to arbitration.[18] Nowadays, host countries are unable to rely solely on arbitration precedents to establish reasonable expectations, which is causing host countries to be more cautious in determining the dispute resolution clauses included in investment contracts with foreign investors, and some host countries have excluded the application of ISDS arbitration from such contracts.[19] Therefore, it is necessary to establish an appeal mechanism in order to reduce the adverse impact of unpredictability on the development of ISDS arbitration and to enhance the confidence of the host country in ISDS arbitration. Even if the second decision provided by the appellate body does not guarantee the accuracy of the first decision, it is evident that the appeal mechanism helps to improve the quality of the decision, this view is even echoed by scholars who oppose the establishment of an appeal mechanism in investment arbitration.[20]

Another advantage of establishing an appeal mechanism is that it can be used to correct obvious graphical errors, thus ensuring the quality of the final determination. In general, appellate judges have more experience, have less constraint time, and can focus on issues that divide the parties through collegiality, thus making them less likely to err as compared to trial courts.[21] Although it is felt that consistency does not necessarily guarantee the correctness of an award, there is still a close correlation between the consistency of an award and its correctness. A consistent decision indicates that it is closer to consensus and more likely to be correct

than a situation where the decision is inconsistent.[22] In the case of international investment agreements, reopening the substantive issues in dispute through an appeal process improves the award more than revoking it. The existence of an appeal mechanism may create an incentive for an arbitral tribunal to interpret the law correctly, while at the same time, it would provide an important opportunity for flawed rulings to be corrected before they become final. In a defective arbitral award, national sovereignty and public policy may indeed be undermined. However, with an appeal mechanism, a defective award can be corrected before being implemented, which will maintain public confidence in investment arbitration and resolve the legitimacy issue.

The establishment of an appeal mechanism has attracted most attention among the reform proposals because it preserves the essential features of international investment agreements that have proven their worth, as a way to help establish clear and consistent case law, correct legal errors in specific cases and thereby restore confidence in the mechanism. While it is true that the establishment of an appeal mechanism is not the only way to solve the problems of the current international investment agreements regime that has its own inherent flaws, it needs to be stressed that the aim of the reform is not to transform a dispute settlement mechanism to perfection, but rather to minimise the misuse and ambiguity of the law in a way that enhances legitimacy. In the context of the current difficulties in finding a better solution, if an appeal mechanism can go some way to alleviating the crisis of legitimacy in investment arbitration, then it is worth considering its inclusion in the current system in an appropriate manner.[23]

OPTIONS OF ESTABLISHING AN APPEAL MECHANISM FOR IIA

ACHIEVINGTHE OBJECTIVES OF THE APPEAL MECHANISM

1. Positioning of the appeal mechanism

To begin with, it is important to clearly understand the relationship between the appeal mechanism and the existing procedures for relief. It is apparent that the nature of the arbitration procedure will not change with the second instance procedure agreed upon by the parties, according to the experience in arbitration practice. The appeal, however, would preclude any further review, including any set aside (either through the ICSID mechanisms for setting aside or through proceedings in domestic courts), as the grounds for appeal override those for setting aside. In the event of the retention of revocation procedure, the dispute settlement process would become too delayed and cumbersome due to the three-tiered dispute settlement system. Therefore, countries should adopt appropriate forms to ensure that the decisions of appellate bodies are final.

When each investment treaty defines its own arbitration appeals procedure, these separate mechanisms would be 'each for themselves', achieving consistency within a particular treaty, but not necessarily globally. Theoretically, only a multilateral single appeal mechanism to hear all international investment arbitration awards would realistically address the consistency problems of the current international investment arbitration regime and contribute to the development of general principles with legal authority.

2. Composition and construction

The experience of the WTO Appellate Body, the International Court of Justice, and the International Tribunal for the Law of the Sea all show that a long tenure ensures a degree of personal consistency. Consistency in the interpretation and application of the law can only be ensured if the membership of the appellate body is relatively limited and stable. In order to achieve consistency in the interpretation and application of the law, the appellate mechanism should follow the model of a permanent body with fixed-term members. For example, permanent members are nominated by States and elected, meaning that each country that agrees to the establishment of an appeal mechanism has the right to propose candidates. To keep the system apolitical and given that ICSID undertakes the majority of investment arbitration cases that currently heard, countries could be encouraged to nominate from ICSID's existing list of mediators and arbitrators, rather than having countries to make recommendations directly. Each case shall be heard by three members of the appellate body, but decisions shall be made by all its members.

Members of the appellate body shall be rotated, with one-fifth of the members selected at regular intervals to take specific responsibility for the case. In selecting the members of the appellate body, the following rules should also be followed: First, the selection of arbitrators should be based on a higher

standard of professional quality than that of the arbitral tribunal of the first instance, thus providing a safeguard for the correctness and consistency of the award results. Secondly, the appellate body's decisions are more influential than those made by the first instance arbitral body, and its members are more likely to encounter 'issue conflicts' than in other arbitration proceedings,[24] so members of the appellate body are prohibited from participating in any pending ICSID or non-ICSID arbitrations (whether as lawyers or arbitrators) during their term of office. Finally, possible nationality restrictions on members of the appellate body should be considered, where one of the parties to the dispute is a country or a national from the same nation.

HOW TO ESTABLISH AN APPEAL MECHANISM UNDER THE CURRENT INVESTMENT

The Mauritius Convention on Transparency was created to apply the UNCITRAL Rules on Transparency in Investor-State Arbitration (hereinafter referred to as the Rules on Transparency) to over 3,000 treaties concluded before the rules were adopted,[25] and to 'extend' the Rules on Transparency to existing treaties through the interaction between Article 1 (scope of application) and Article 2 (application of the Rules on Transparency) and Article 3 (acceptable saving clauses) of the Mauritius Convention on Transparency. This approach may be referred to as the 'Mauritius Convention Approach'. The new framework, which combines the provisions of the Rules on Transparency and the Mauritius Convention on Transparency, will apply to the following: a. any cases under the UNCITRAL Rules for investment arbitration commenced after 1st1 April 2014, unless the Parties to the investment treaty agree in otherwise;[26] b. investment arbitration initiated under a treaty concluded before 1st1 April 2014, provided that the parties to that treaty agree to apply it;[27] and c. any investment arbitration commenced under a treaty concluded before 1st1 April 2014, provided that the parties to the dispute agree to apply it.[28]

The Mauritius Convention on Transparency borrows the special form of consent used to reach consent to arbitration under investment treaties. Upon making an 'offer' to apply the rules unilaterally, a Contracting State would be offering it to all investors, and not just to those who have the nationality of a Contracting State. Moreover, even if only one party (the respondent country) investment treaty to join the Mauritius Convention on Transparency, the Rules on Transparency will infiltrate into the investment treaty, because on the other side, the investor home country can refer according to the Mauritius Convention on Transparency of Article 2 (2) mechanism to accept the offer for the Rules on Transparency.

By using the 'Mauritius Convention Approach' to evaluate the idea of a multilateral appeal mechanism, countries would no longer be required to undergo the lengthy and complex process of amending their treaties. The new multilateral instrument will enable countries that accept reform to apply the new dispute settlement mechanism directly to existing treaties. Furthermore, a single appeal mechanism may be established quickly to review investment arbitration awards based on different treaties, by avoiding the need to amend the huge stock of treaties on a case-by-case basis. Next, this reform initiative focuses on a separate component of international investment treaties, namely investor-state dispute settlement, avoiding arguments over substantive treaty obligations. Fourth, reform of the multilateral appellate mechanism using the 'Mauritius Convention Approach' would be initiated as a multilateral project with other countries joining as they see fit, which would also increase the chances of success.

If the reform is to be implemented under the 'Mauritius Convention Approach', it will require the development of the Rules of the Appeal Mechanism, which will cover the nature, structure, and organisation of the appeal mechanism. Next would be the drafting of an Opt-in Convention that would extend the Rules of the Appeal Mechanism to existing investment treaties. These initiatives will bring about significant changes to the international investment arbitration regime. This article, therefore, considers the necessity to focus on the relationship between two pairs of treaties, namely the Opt-in Convention and existing international investment treaties, as well as the Opt-in Convention and the ICSID Convention.

As a multilateral convention, the Opt-in Convention's ultimate goal is to change the existing international investment treaties regarding dispute settlement, so it will ultimately co-exist with them. When considering the Opt-in Convention as a continuing treaty and applying the rules of customary international law in Article 30 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the Vienna Convention), the following cases should be distinguished: One case is when all the parties to a previously concluded

international investment treaty are also parties to the Opt-in Convention pursuant to Article 30(3) of the Vienna Convention and the rules apply to the same matter, the later treaty will prevail (the later law prevails over the former law).[29] Thus, if both the host country and investor's home country are parties to an international investment arbitration and the Opt-in Convention, the latter will amend the previous international investment arbitration between the two countries and the investor may pursue the dispute directly under the new appeal procedures that made available under this modification.

In another case, Article 30(4)(b) of the Vienna Convention provides the parties to the later treaty do not include all the parties to the earlier treaty and the rights and obligations of a country that is a party to both treaties, and a country that is a party to only one of the treaties are governed by the article in which both countries are parties'. Therefore, the dispute settlement framework under the original international investment treaty will continue to apply between a State Party that chooses to apply between a State Party to the Opt-in Convention and another country that is not a party to the Convention. At this point, the question of whether the Opt-in Convention can extend the appeal mechanism to pre-existing international investment treaties has to be discussed in three distinct situations.

First, the host country, which is the respondent party, is a Contracting State to the Opt-in Convention, but the investor's home country is not. Article 2 (2) of the Mauritius Convention on Transparency makes use of an 'ex parte offer' (consent of the investor who is the applicant) to implement the Rules of Transparency in this context. Whether such an approach could be directly transplanted into the Opt-in Convention, however, should be reconsidered. In accordance with the general principle that non-States Parties are not bound, States Parties shall not be affected by amends to which they have not agreed. Thus, the Opt-in Convention does not apply to countries not a party to it. Those countries are not invited to participate in the new dispute settlement mechanism without their consent, and investors have the right to assert claims under the original investment treaty provisions.

The next question that arises is whether, in addition to the options available, do an investor has a right to appeal an ex parte offer made by the host country under the Opt-in Convention? The answer is yes. Since the dispute settlement provisions of existing international investment treaties provide for the settlement of disputes in accordance with 'any other rules agreed by the disputing parties', provisions such as this could certainly encompass a new dispute settlement mechanism. For example, among the options for dispute settlement, the German Model BIT 2009 includes 'any other means of dispute settlement agreed upon by the disputing parties'.[30] Of course, many international investment treaties limit dispute settlement to arbitration under pre-existing rules (e.g. ICSID Rules, ICSID Additional Facility Rules UNCITRAL Arbitration Rules, etc.).[31] Even then, the investor may choose to accept the offer made by the host country in the Opt-in Convention. This is as subjected to any international investment treaty, at which the substantive obligations of the host country set out in an international investment treaty are in fact enforceable rights that directly attributable to the qualified investor, whereby the investor may enforce those substantive rights in any international tribunal recognised by the requested country. In the case of good faith performance of a treaty, the investor's home country has no good reason to object to its nationals enforcing their rights under an international investment treaty in other tribunals if its treaty partners have agreed to do so. In accordance with the fundamental principle that non-parties are not bound, this new dispute settlement mechanism would not place any additional burden on the home country, while at the same time giving its nationals more procedural options. Thus, the new dispute settlement mechanism could be extended to this context through the offer of 'unilateral application of the appellate mechanism' proposed by the Opt-in Convention.

The second situation is where the investor's home country is a Contracting State to the Opt-in Convention, but the host country, as the respondent party, is not. For the appeal mechanism to apply in this situation, the investor must obtain the consent of the host country. In the case of ad-hoc consents, there seem to be no limits to the use of the appeal mechanism. In fact, for this case, the host country has only provisionally agreed to apply the new dispute settlement mechanism to a particular dispute, and the Opt-in Convention does not change the existing international investment treaties between the two countries for all other investors that falling within the scope of that international investment treaties.

The third situation is where neither the host country, which is the respondent party nor the home country of the investor, is a party to the Opt-in Convention. In such a case, if the applicant country

provisionally agrees to subject the dispute to the existing appeal mechanism, the result would be similar to the first case above, that is, the investor could accept the offer made unilaterally by the applicant country and the investor's home country would not be affected by such action.

There is a need for a discussion on how the Opt-in Convention and the ICSID Convention are related. The ICSID Convention excludes remedies other than those provided for in the Convention and, in particular, excludes appeals in Article 53. To amend the ICSID Convention, the Contracting States must have unanimous approval. Initiating the process would therefore be impractical. If the new rules on Appeal Mechanisms can be applied without distinction to arbitrations conducted under any arbitration rules, it is worthwhile to analyse in-depth whether the application of the rules would conflict with ICSID Convention arbitrations.

For those States Parties that willing to accept this reform of the appeal mechanism, the Convention on Choice of Application would be a mutual agreement between them to modify the ICSID Convention, and a possibility is already contemplated by Article 41 of the Vienna Convention, which allows States Parties to multilateral treaties to create a separate treaty to set up an applicable special regime for their bilateral relations under certain conditions.[32]Article 41 of the Vienna Convention provides that, such reciprocal amendments are permissible if the following two concurrent substantive conditions are met. First, 'related amendments.....must not interfere with the exercise or performance of the rights or obligations of other parties to the treaty'; second, one must ensure that 'relevant amendments should not include provisions (such as derogation) that are incompatible with the objective and purpose of effective implementation of the treaty as a whole'. In order to assess whether a modification meets these two conditions, a distinction is often made between treaties imposing reciprocal obligations and those imposing absolute obligations. In reciprocal treaties, the interaction of the parties takes the form of a 'quasi-bilateral'; 'absolute obligations' treaties bind countries in an interdependent manner and their validity depends on compliance with all their provisions. The obligations of States Parties under the ICSID Convention can be broken down into a number of separate bilateral rights and obligations, as the ICSID Convention is not a treaty that imposes absolute obligations.

Further, with respect to the first condition, the problem will not arise if the parties to the different treaties can apply the modified treaty separately and independently. According to the proposed changes to the ICSID Convention,[33]Contracting Parties that accept an appeal mechanism will use international investment agreement with an appeal mechanism as a dispute settlement mechanism between them (and their nationals); the ICSID revocation regime will apply to investment disputes with non-parties to the Opt-in Convention. As for the second condition above, specifically, we must take into consideration whether derogating from the prohibition on appeal under the ICSID regime are incompatible with the act of achieving the objective and purpose of the treaty in its entirety. According to Article 1(2) of the ICSID Convention, the Centre is established to facilitate the conciliation and arbitration of investment disputes involving parties to the Convention and their nationals of other parties to the Convention. The wording of ICSID Convention states that it promotes private international investment, fosters economic development, and works to strengthen relationships between member countries. Clearly, an appeal in lieu of revoking an award is not inconsistent with any such purpose.

As noted earlier, the grounds for appeal usually include grounds for revoking an award, which only expanding the scope of review of the award. Thus, derogation from the effect of Article 53 of the ICSID Convention does not affect the objective in Article 1(2) or in the preamble, nor does it pose a threat to the effective implementation of the overall objective and purpose of the Convention. In this way, the Opt-in Convention, as a mutual agreement between some parties to the ICSID Convention, can have the intended effect after meeting two substantive requirements set out in Article 41 of the Vienna Convention and upon notifying other parties of the intent to amend the ICSID Convention. According to the current international law framework, the Opt-in Convention could become a multilateral legal instrument that changes the existing dispute settlement mechanism for international investment treaties if the reform initiative to create an appeal mechanism is implemented effectively.

CONCLUSION

The addition of an appeal mechanism to international investment arbitration would not only preserve its essential character but would

also meet the international community's demand for greater consistency and legal correctness in international investment arbitration awards. As a response to the fragmented system of investment treaties, establishing a single multilateral standing appeal mechanism as the appeals tribunal for all international investment arbitration awards might help in resolving current concerns regarding consistency. The successful practice of using the 'Mauritius Convention Approach' to modify bilateral treaties by multilateral instruments gives hope for the establishment of a multilateral appeal mechanism. The Opt-in Convention primarily aims to address dispute settlement mechanisms under existing international investment treaties. However, countries may still invoke new dispute settlement methods in future investment treaties as long as they deem them appropriate. Using careful convention drafting, a multilateral appeal mechanism could be set up in a way that addresses by every investment arbitration dispute under bilateral and multilateral investment treaties.

NOTES

[1] For example, American Arbitration Association's Optional Appellate Arbitration Rules (2013); JAMSOptional Arbitration Appeals Procedure (2003); International Institute for Conflict Prevention & Resolution's (CPR) Appellate Arbitration Procedure (2015); and Article 28 of the Arbitration Rules of the European Court of Arbitration (2015).

[2] Yanzhi Wang, 'Legalization of International Investment Dispute Settlement: Achievements and Challenges', (2011) 3 *Contemporary Law Review* 16.

[3] A. Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 7 *American Journal of International Law* 45-6.

[4] CME Czech Republic B.V. v. the Czech Republic, Partial Award of 13 September 2001 and Final Award of 14 March 2003 (the 'Stockholm Award'); Lauder v. the Czech Republic, Final Award of 3 September 2001 (the 'London Award'), https://oxia.ouplaw.com/search?q=CME+Czech+Republic+B.V.+v.+Czech+Republic&prd=IC&searchBtn=Search[6 August 2021].

[5] The arbitral tribunal of the Arbitration Chamber of the Stockholm Chamber of Commerce found that the Czech Media Council's deprivation of CME's franchise in the television industry constituted discrimination against foreign investors and thus constituted a collection under Article 5 of the Czech-Netherlands BIT. Whereas the US-Czech BIT essentially applies the same standard of collection, the LCIA tribunal held that the Czech measure did not constitute a collection because the Czech government did not directly infringe on Lauder's property rights, and the Czech government did not benefit from the measure.

[6] SGS (Société Générale de Surveillance Holding S.A.) is an international body for inspection, testing, quality assurance and certification. Société Générale de Surveillance S.A. v. Pakistan, Decision on Jurisdiction of 6 August 2003 ('SGS-Pakistan'); Société Générale de Surveillance S.A. v. the Philippines, Decision on Jurisdiction of 29 January 2004 ('SGS-Philippines'), https://oxia.ouplaw.com/search?q=SGS+Soci%C3%A9t%C3%A9+G%C3%A9n%C3%A9rale+de+Surveillance+S.A.+v.+Pakistan&prd=IC&searchBtn=Search[6 August 2021].

[7] Umbrella clauses are also known as mirror clauses, parallel clauses, observance of commitment clause or pacta sunt servanda clause. The clause appears in large numbers in countries' bilateral investment agreements. Its origins lie in the "umbrella clause mechanism" envisaged by Lauterpacht in the 1950s. See Anthony C. Sindair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection', (2004) 20(4) *Arbitration International* 429.

[8] Myers, Inc. v. Canada, UNCITRAL, First Partial Award of 13 December 2000, https://oxia.ouplaw.com/search?q=Myers%2C+Inc.+v.+Canada&prd=IC&searchBtn=Search[4 August 2021].

[9] Metalclad Corporation v. Mexico, ICSID Case No.ARB(AF)19711, Award of 30 August 2000 (ICSID), https://oxia.ouplaw.com/search?q=Metalclad+Corporation+v.+Mexico&prd=IC&searchBtn=Search [10 August 2021].

[10] Pope & Talbot Inc. v. Canada, UNCITRAL-Award of 10 April 2001, https://oxia.ouplaw.com/search?q=Pope+%26+Talbot+Inc.+v.+Canada&prd=IC&searchBtn=Search [10 August 2021].

[11] The 'chilling effect' is a legal term used to mean that people discussing freedom of speech or assembly are deterred from speaking out for fear of being punished by the state or having to face high compensation, just as cicadas are silenced in cold weather. One of the phrases cited here is to describe how the uncertainty caused by inconsistent arbitration results undermines the reasonable expectations of sovereign countries, the countries have difficulty judging how they must act in order to comply with their legal obligations, and countries are forced to look back when undertaking legislative or regulatory activities.

[12] Early cases referred to the ICSID were based on the arbitration clauses contained in investment contracts, and it was not until 1990, in AAPL v. Sri Lanka, that the ICSID Tribunal first recognized that an investor could accept a unilateral "offer" from a host country to initiate arbitration on a treaty basis.

[13] That is, 1. arbitration agreements were void or the parties lacked the capacity to arbitrate; 2. the parties were not properly notified or failed to state their reasons; 3. the arbitral tribunal dealt with a problem outside of the scope of the parties' arbitration agreement; 4. neither the composition of the arbitral tribunal or the arbitral procedure complied with the law; 5. the arbitral award contained non-arbitrable matters, and 6. it was contrary to the public policy of this country.

[14] Irene M. Ten Cate, 'International Arbitration and the Ends of Appellate Review', (2011) 44 *New York University Journal of International Law & Politics* 1109.

[15] Cosette D. Creamer, 'From the WTO's Crown Jewel to Its Crown of Thorns', (2019) (113) *American Journal of International Law* 53.

[16] Gabriel Bottini, 'Reform of the Investor-State Arbitration Regime: The Appeal Proposal', (2014) 11 *Transnational Dispute Management* 468.

[17] K. P. Sauvant & M. Chiswick-Patterson, *Appeals Mechanism in Investment Disputes*, Oxford University Press, 2008, pp.137-138.

[18] David A. Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-state Disputes: Prospects and Challenges', (2006) 39 *Vanderbilt Journal of Transnational Law* 57.

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[22] Jun Xiao, 'Feasibility Study on the Establishment of an International Investment Arbitration Appeals Mechanism—From the Negotiation of Bilateral Investment Treaties between China and the United States'(2015) 2(2), *Legal and Business Studies* 168.

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[27] See Article 1(2) (b) of the Rules on Transparency and Article 2(1) of the Mauritius Convention on Transparency.

[28] See Article 1 (2) (a) of the Rules on Transparency and Article 2(2) of the Mauritius Convention on Transparency.

[29] See Article 30(3) of the Vienna Convention on the Law of Treaties.

[30] See Germany Model BIT 2009-Article 10(2) &10(5).

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