"Appeal versus Annulment: is the ICSID Annulment Process Working or is it Now Time for an Appellate Mechanism?"

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The Proposition

“*The decisions of recent ICSID ad hoc Annulment Committees, such as in Sempra v. Argentina, have revived questions concerning the exact scope of the standard of review exercised by those Committees. If the standard of review is moving to one closer to an appeal standard, should ICSID itself not revive its efforts to an open appeal mechanism?*”

I will be arguing that the time has come for an appeal mechanism to be introduced at ICSID.
What do we mean by appeal versus annulment?

- Annulment: only the procedural legitimacy of the tribunal’s decision is considered.

- Appeal: both the substantive correctness of the decision and its procedural legitimacy are considered.

- Key difference: an appeal body would be able to consider whether the tribunal simply got it wrong.
What does the ICSID Convention permit?

“Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

a) that the Tribunal was not properly constituted;
b) that the Tribunal has manifestly exceeded its powers;
c) that there was corruption on the part of a member of the Tribunal;
d) that there has been a serious departure from a fundamental rule of procedure; or
e) that the award has failed to state the reasons on which it is based.”

(Article 52(1) of the ICSID Convention)
What do annulment committees say?

“[T]he law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention. The ad hoc Committee has approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.”

(Amco v. Indonesia, ICSID Case No. ARB/81/1, First Annulment Decision, para. 23, emphasis added)
What do annulment committees say? Cont...

“[T]he task of the Ad hoc Committee is to consider whether the manner in which the Tribunal approached and accomplished that task opened its Award to annulment under the Convention [...] or adequately met the requirements of the Convention [...]. The word ‘manner’ is specifically used here in order to emphasise that it is no part of the Committee’s functions to review the decision itself which the Tribunal arrived at, still less to substitute its own views for those of the Tribunal but merely to pass judgment on whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention.”

(Lucchetti v Peru, ICSID Case No. ARB/03/4, para. 97, emphasis added)
How are the annulment criteria applied in practice?

» First Generation: widely condemned for reviewing decisions in a manner approaching appeal

» Second Generation: generally considered to have “got it right”

» Third Generation: a mixed bag:
  – Some considered to have got it right;
  – Some recent decisions condemned for edging back towards applying an appeal standard; and
  – Some where the correct standard seems to have been applied but where the committees have acted like a “Supreme Court” by giving “obiter” remarks on the findings of the tribunal whilst allowing its decision to stand.
THE TIME HAS COME FOR REFORM OF THE SYSTEM:
THE ARGUMENTS IN FAVOUR OF AN APPEAL MECHANISM
1. Consistency

» There is a great deal of inconsistency in the annulment jurisprudence.

» An appeal mechanism would increase consistency.
  – ICSID agrees: the Secretariat’s Discussion Paper of 2004 stated “the appeal mechanism would be intended to foster coherence and consistency in the case law”.

» Lack of uniformity in how the law is applied increases risk for investors, contrary to the ICSID Convention’s goal of creating “an atmosphere of mutual confidence [thereby] stimulating a larger flow of private international capital into those countries which wish to attract it.”
  (Report of the Executive Directors on the Convention, para. 9)

» Fairness: similar cases should be dealt with in similar ways.

» Legitimacy of ICSID arbitration: detailed scrutiny of decisions highlights any inconsistency and usually brings condemnation from commentators.

» Hierarchical judicial systems usually produce consistent bodies of case law, even without a system of binding precedent in place.

» The current uncertainty over how the annulment grounds will be applied could encourage parties to bring unmeritorious claims or annulment proceedings in the hope that the grounds are applied in their favour.
2. Correct Decisions

» Important for the parties to the dispute that “justice is done.”

» Incorrect decisions can influence non-parties in similar legal positions.

» Incorrect decisions left to stand could have a negative impact on the reputation of ICSID arbitration.

» Under the annulment system, incorrect decisions can be left to stand.
  – “[A]n arbitrator can cloak profoundly unfair or wrongful conduct in the guise of meticulous procedural formalities, and only the possibility of some substantive review on the merits can effectively check such conduct.”

» “The more generous the scope for challenging decisions by appeal or review, the greater the chance of eliminating error”

» Why should a second panel lead to more correct decisions?
  – it can focus on the one or two points alleged to have been wrongly determined rather than the raft of issues before the first panel;
  – appellate bodies are generally composed of the best qualified and most experienced lawyers in the field;
RESPONDING TO ARGUMENTS AGAINST THE INTRODUCTION OF AN APPELLATE MECHANISM
1. Finality

» ICSID awards are not currently final when they are issued anyway because of the possibility of annulment.

» Awards emanating from ICSID would still be as final (after going through the appellate process, where applicable instead of an annulment process).

» Is finality worth the cost to the parties and others of living with a “wrong” decision?
  – not commercial disputes between commercial parties who have agreed an arbitration clause so that their disputes can be resolved one way or the other by the tribunal and they can get on with business;
  – high-value disputes, often of significant importance to more than the parties (e.g. outcomes could influence other potential investors).
2. Time

- Parties are understandably anxious to have disputes resolved within a reasonable time period.
- An appellate mechanism need not prolong the resolution of disputes.
- WTO appellate mechanism has strict time limits and has on average delayed the final decision by 129 days.
- The current annulment mechanism can lead to long delays, particularly when a dispute is submitted to a second tribunal following annulment (and then in a small number of cases, to a second annulment panel!).
Respect for ICSID and the authority of awards

» Suggestion is that an appellate mechanism could undermine the authority of “first round” awards.

» Already have an annulment mechanism in place – changing the grounds of review to include the substantive correctness of the decision should not change how these awards are viewed.

» An appellate mechanism could actually increase respect for “first round” decisions as an appellate body would not be able to criticise an award but allow it to stand.
  – See, for example, CMS v. Argentina, ICSID Case No. ARB/01/8.

» Perceived increased “correctness” of ICSID awards should increase respect for the institution
CONCLUSION

The time has come for an appellate mechanism to be introduced at ICSID.

It is unfair on parties who have a huge amount at stake and spend a huge amount on proceedings to be forced to live with decisions that are wrong, and that in some cases are acknowledged to be wrong by annulment panels.

Consistency in the resolution of disputes would provide more stability for investors, thereby encouraging investment, in line with the goals of the ICSID Convention.

The arguments against an appeals mechanism do not hold water, particularly where some form of second level review – the annulment procedure – is in place.

The fly in the ointment – how to achieve change?