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# **The Case for an Appellate Panel and its Scope of Review**

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May 7, 2004  
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# The Free Trade Agreements (“FTA”) and the Proposed US Model BIT

“Within 3 years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a **bilateral appellate body** or similar mechanism to review awards rendered ... in arbitrations commenced after they establish the appellate body or similar mechanism”

(Annex 10-H US-Chile FTA, Annex D New draft US Model BIT, also agreed by side letters between Singapore and the US)

## The Free Trade Agreements (“FTA”) and the Proposed US Model BIT

“If a separate **multilateral agreement** enters into force ... that establishes an **appellate body** for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment agreements **to hear investment disputes**, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered ... in arbitrations commenced after the appellate body’s establishment.” (Art. 10.19.6 US-Chile FTA, Art. 15.19.10 US-Singapore FTA, Art. 28.10 New draft US Model BIT)

# The Central American FTA

(Annex 10-F)

“Within 3 months of entry into force of the Agreement, **the FTC shall establish a Negotiating Group to develop an appellate body** or similar mechanism **to review awards rendered by tribunals under the Investment Chapter of the Agreement** [Chapter XX]. Such **appellate body** or similar mechanism **shall be designed to provide coherence to the interpretation of investment provisions** in the Agreement.”

# The Central American FTA

## (Annex 10-F)

“The FTC shall direct the Negotiating Group to take into account the following issues, among others:

- (i) the nature and composition of an **appellate body** or similar mechanism;
- (ii) the applicable scope and standard of review;**
- (iii) transparency of proceedings of an **appellate body** or similar mechanism;
- (iv) the effect of decisions by an **appellate body** or similar mechanism;
- (v) the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected** under Articles XX.17 [submission of a claim to arbitration] and XX.26 [consolidation]; and
- (vi) the relationship of review by an **appellate body** or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.”

# The Current System Is Not Broken

- Despite criticism from some Governments and NGO's, the current system is working fine
- This is a new field of international law — Investment treaties had not been tested until the past 5 years
- There is no precedential effect for arbitral awards
- So it is not shocking or surprising that there is some amount of inconsistency among awards
- What we are seeing are normal growing pains for a new area of law

# The Current System Is Not Broken

- Some level of inconsistency is salutary in a new area of law because it permits the law to evolve and develop
- But Tribunals are carefully reviewing previous decisions, avoiding previous mistakes, refining the law, and seeking to harmonize their decisions
- The Appellate Body should not be viewed as a reaction to cure the current system, but as a new phase in the evolution towards a more sophisticated system (diplomatic protection, FCNs, BITs, FTAs)

# So why an Appellate Body?

“The case for an integrated system of administering international justice is a strong one, not least in terms of the consistent development of the law. It is strongly arguable that cases are better decided by judges of experience than by arbitrators selected *ad hoc* for the purpose of a single case. **Arbitration** is, however, an important component of the international system and cannot be done away with. **We should contemplate the possibility that its value may be enhanced if it is linked to a system of appeal.**” (Elihu Lauterpacht, *Aspects of the Administration of International Justice*, 1991 at p. 111)

# So why an Appellate Body?

- A single Appellate Body to review all decisions will provide the **perception** of:
  - **Consistency**
  - **Predictability**
  - **Objectivity**
  - **Sensitivity** to legitimate governmental concerns
- It will reduce the risk of inconsistent decisions
- It will help **legitimize** and **institutionalize** the process of Investor-State dispute settlement
- It will aid in making the system **sustainable**

# Issues that need to be addressed

- Incompatibility with the existing ICSID Convention Annulment Procedure
- How will it be implemented?
  - Bilateral Treaties?
  - Revision of the ICSID Convention? Protocol?
  - New Multilateral Convention?
  - Regional Conventions? (CAFTA)
- Will it apply to non-ICSID cases only?

## ICSID's Annulment Committees

- *Ad hoc* Committees consisting of 3 individuals appointed by the Secretary-General
- The grounds for annulment under Art. 52 are:
  - (a) the Tribunal was not properly constituted;
  - (b) the Tribunal has manifestly exceeded its powers;
  - (c) there was corruption on the part of a member of the Tribunal;
  - (d) there has been a serious departure from a fundamental rule of procedure; or
  - (e) the award has failed to state the reasons on which it is based.

## The Experience of the WTO

- The Appellate Body is a **standing organ** consisting of 7 individuals appointed for a 4 year term, 3 of whom shall serve on any one case
- Appeals are limited to **issues of law and legal interpretations** (Art. 17.6 DSU)
- The Appellate Body **may uphold, modify or reverse the legal findings and conclusions** of the panel (Art. 17.13 DSU)
- The normal duration of proceedings is only 60 - 90 days from notice of the intent to appeal

G. Sacerdoti, *Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review*, 1997

<b>Review Jurisdiction</b>	<b>ICJ</b>	<b>ECHR</b>	<b>ECJ</b>	<b>ICSID <i>ad hoc</i> Committees</b>	<b>NAFTA Chapter XIX Panel</b>	<b>Domestic Courts</b>	<b>WTO Appellate Body</b>
(A) Limited review  (B) Appeal as to the law	A	B	B*	A	A	A	B
Review jurisdiction may:  (A) Annul and remand the case (B) Decide the case	A	B	A, B	A	A	A	B

\*No review or appeal but re-examination of the law

# Issues that need to be addressed

## What should be its scope of review?

- Limited review for fundamental due process issues
  - » New York Convention
  - » ICSID Convention
- Review for errors of law
  - » WTO
  - » ICJ (UNAT)
  - » ECJ
- Review of Jurisdiction and Merits
  - » PCIJ (Mixed Arbitral Tribunals after WWI)
  - » ICJ (ICAO's Council)

# Proper Scope of Appellate Review

- Jurisdiction and admissibility
- Fundamental error in procedure
- Due process issues encompassed in ICSID and New York Convention reviews
- Errors of law
- Application of facts to the law
- But no review of fact findings
- Ability to replace Tribunal's decision with its own

# Issues that need to be addressed

- Who will appoint its members?
  - The States, the PCA, or ICSID?
  - Will Investors have any voice? How? Who? (Perception of legitimacy)
  - Ad hoc judges appointed by the parties?
- Will it be a full-time or part-time Tribunal?

# Issues that need to be addressed

- Should the Appellate Body have the power to replace the award with its decision? or just to annul and remand it? Should it remand to a new tribunal?
- How will a decision of the Appellate Body be enforced? (ICSID or New York Convention)

# Feasibility of an Appellate Body?

“The choices before us are simple. One alternative is that we have no appeals at all—in the sense of review of the merits. International society appears to be ready to go one stage beyond that. Another is that we have the present unregulated and haphazard system—which is developing empirically without any real planning and may not be entirely satisfactory. **The third is that we go the whole way and try to establish a proper appeals arrangement. But if we are to do that, how is it to be structured? The solution to this last question is so fraught with difficulties that we may find that, despite its idealistic appeal, it is not a practical alternative.**” (Elihu Lauterpacht, *Aspects of the Administration of International Justice*, 1991 at p. 111)

# The Central American FTA

(Annex 10-F)

“The FRC shall direct the Negotiating Group to provide to the FTC, **within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body** or similar mechanism. Upon approval of the draft amendment by the Parties, in accordance with Article XX.\_\_\_ (Amendments), the Agreement shall be so amended.”