Kluwer Arbitration Blog

Appellate Structure and Need for Legal Certainty in Investment Arbitration

Deepu Jojo Sushama (Association for International Arbitration) · Thursday, May 1st, 2014

Stare decisis is Latin for “to stand by things decided”. This is also a doctrine which is frequently used by courts which decides to abide by a point of law which was previously held by a court of equal or superior judicial hierarchy. The system of *stare decisis* purports to promote *stability, certainty, reliability, uniformity, convenience and expediency* (Jeffery Commission, *Precedent in Investment Treaty Arbitration: A citation Analysis of a Developing Jurisprudence*, 24 J. Intl. Arb 132 (2007)).

Some public international law rights have been articulated for the first time in investment treaties – such as the right to “fair and equitable treatment” and a sovereign’s obligation to “observe its commitments.” Tribunals have applied these standards differently and made divergent findings on liability. Rather than creating certainty for foreign investors and states, the process of resolving investment disputes through arbitration is creating uncertainty about the meaning of those rights and public international law.

When it comes to investment arbitration different tribunals put emphasis on different criteria. Further inconsistency is caused since the elements which one tribunal finds to be important may be of absolutely no relevance to another tribunal. The *Lauder* (*Ronald S Lauder v. Czech Republic*, UNCITRAL Final award) arbitrations provide a perfect example of how different tribunals can take different views even though the facts remain the same. In the *Lauder* arbitrations two tribunals arrived at different decisions in essentially the same dispute. As this case was considering expropriation, the inconsistent judgments show the difficulties which are faced by tribunals when it comes to deciding issues of expropriation. Unpredictability and uncertainty is prevailing as a result of judgments such as these.

People have the tendency to trust in a legal mechanism when it offers predictability. Investment arbitration which offers no consistency would not be held in high regard by the parties. Many countries have their income and development improving as a result of the investments. Investors want certainty to ensure that their investment is safe. They want to know what would happen if their investment is expropriated.

According to Article 52 of the ICSID Convention an annulment function is present. However this does not offer a solution to the problem of inconsistent awards rendered in investment arbitration cases. The current state of the annulment mechanism is illustrated in *CMS Gas Transmission Co. v. Argentine Republic*. In this case the *ad hoc* committee held the following:

> Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee. However the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist. As stated already (paragraph 136 above), in these circumstances the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal. (para. 158)

In such circumstances the annulment committee often wants to correct at least a part of the award, but it is unable to do so. Under these conditions, the importance of an Appellate body is particularly highlighted.

The idea of an Appellate structure in investment disputes has been ensuing for several years now. In 2002, the Congress of the United States enacted the Bipartisan Trade Promotion Authority Act. The Act identified for US free trade agreements a negotiating objective of providing for an Appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in trade agreements (Barton Legum, *Options to Establish an Appellate mechanism for Investment Disputes*, in ***Appeals Mechanism in International Investment Disputes***, Karl P. Sauvant ed., (2008) Oxford U. Press, Page 232). The ICSID mentioned the idea of the ICSID Appeals facility in its working paper of 2002 (ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* 14-16 (22 Oct. 2004)). Following a series of meetings in 2005 they concluded that it would be premature to establish an ICSID appellate mechanism.

There are definite advantages if an Appellate system is present in investment disputes. An Appellate system would ensure that more control is being exercised over the decisions of the tribunals. Such an Appellate system would be critical for the development of the whole investment arbitration scenario as it can use potential precedential value to improve investment arbitration awards. The Appellate body can indicate its position on matters brought before it by determining whether an award was a correct one or not. Awards that are designated as correct would create precedent and would show the stance taken by the Appellate body. By using the system of precedents effectively, the Appellate body would be able to remove the existing inconsistencies.[1)] By using reasonableness along with the precedents, the Appellate body can be extremely effective. It has been argued by James Fry that there should be a shift of focus from what is a pure precedential approach to decision making based by examining the reasonableness of prior decisions. He states that a reason based approach "*would add a large measure of consistency to the regime, regardless of whether different lines of precedent develop over time.*" (James D. Fry, *Regularity Through Reason: A Foundation of Virtue for International Arbitration*, 4 CONTEMP. ASIA ARB. J. 57, 82 (2011)).

The success of the WTO Dispute Settlement system shows that there is a high chance of success for the ICSID Appellate system as well. The WTO Appellate system has also been praised for bringing in more predictability into dispute settlement in world trade law.[2)] In the words of the Appellate Body, the GATT and WTO panel reports — and equally adopted Appellate Body reports (Appellate Body Report, US — Shrimp (Article 21.5 — Malaysia), para. 109)— "*create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are*

relevant to any dispute" (Appellate Body Report, Japan — Alcoholic Beverages II DSR 1996:I, 97 at p 107-108).

The WTO system can be considered as a model system as it is different from the other international mechanisms available for resolving international disputes. The WTO dispute settlement system is the first international dispute settlement mechanism which embraced the idea of appeal against the decisions which was rendered by a dispute settlement panel. The WTO dispute settlement system is a mixture of diplomacy, mediation, arbitraton, negotiation and adjudication. In the WTO dispute settlement system there are two stages: the first stage is modeled on arbitration and the second stage is modeled on a judicial mechanism, with some exceptions. The decision which is rendered by the Appellate body has a character of recommendation rather than a judgement. Through the present system the WTO has managed to provide the investors with legal certainty that is lacking in the ICSID system.

The success of the WTO Appellate body should also encourage the ICSID, in the context of a review of potential improvements in the process of arbitration, to raise the idea of an appeals facility for its the body of case law which has been generated by it. It can be found that the body of case law which has been generated by the WTO Appellate body is highly impressive in terms of both quality and quantity. The Appellate body has issued twice as twice as many decisions as the International Court of Justice did during the period from 1996 to 2004.

Such an Appellate body if created would ensure that contradictory awards are not rendered. In present day arbitration there are questions such as what is the level of importance which arbitrator should give to decisions which were previously made by other tribunals. In such a scenario, an Appellate body would have a vital role to play by developing international investment law through case law.

References

?1 Compare *SGS Societe General de Surveillance S.A. v. Republic of Philippines*, ICSID Case No. ARB/02/6 (Jan. 29, 2004) (holding umbrella clause elevated contractual obligations to international law obligations) with *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, 42 I.L.M. 1290 (Aug. 6, 2003) (holding umbrella clause did not elevate contractual obligations to international law obligations).

?2 According to Article 3:2 of the DSU, the WTO dispute settlement "serves to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law".

This entry was posted on Thursday, May 1st, 2014 at 7:00 am and is filed under Appellate Body, ICSID Convention, Precedent
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.