Appellate Review in Investor-State Arbitration

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1 Introduction

Investor-State arbitral tribunals are created on an ad hoc basis for the purpose of resolving a single dispute regarding a specific investment treaty. As a result, these tribunals may reach divergent decisions on issues that at the outset appear similar. While in some cases these diverging results are attributable to meaningful factual differences or differing treaty provisions, in a growing number of cases separate tribunals have reached contradictory results that cannot be explained by factual or legal differences in the claims.

This phenomenon can be seen clearly in the series of investor-State arbitrations against Argentina, in which Argentina raised the defense of necessity arising from Argentina’s financial crisis. The tribunals in these arbitrations reached significantly different interpretations on the application of the necessity defense despite facing virtually identical factual circumstances. Further, several of these awards were upheld in annulment proceedings despite irreconcilable differences in their interpretation of the necessity defense.

Such inconsistencies have caused a loss of confidence in the investment arbitration system and have contributed to calls for the establishment of a centralized appellate review process for investment arbitration awards. Accordingly, this chapter will illustrate that lack of consistency with a review of selected inconsistent awards that have been rendered under the current system, and examine the necessity of an appellate review process and proposed features for such a system.

Most international systems settling disputes to which a nation is a party are devised with a primary focus on the finality of decisions. This is because a predominant concern in these forms of dispute is avoiding exacerbation of the disputes and safeguarding enforcement of the decision.1

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In line with such concerns, the drafters of the ICSID Convention “fully recognized that only limited recourse had been provided” and that “the binding character of the award went beyond what was normally expected in respect of an arbitral tribunal.”\(^2\) Thus, the drafters of the ICSID Convention did not intend to provide for appeal of awards, and the annulment procedure was devised as an exceptional procedure on limited grounds that could be used to protect the aggrieved parties in case there had been a “violation of the fundamental principles of law governing the Tribunal’s proceedings.”\(^3\)

Such emphasis on securing the finality of the award has contributed to timely and efficient enforcement of awards. However, in combination with the absence of *stare decisis* in the ICSID system, this has had the unforeseen effect of giving rise to inconsistent interpretation among ICSID cases with respect to some of the fundamental issues in international investment law.

2 Inconsistencies in Argentina-Related Disputes

In a growing number of cases, separate tribunals have reached contradictory results that cannot be explained by factual or legal differences in the claims. This is evident in the series of Argentina-related cases in which Argentina raised the defense of necessity.

2.1 Argentine Financial Crisis

In the early 1980s and 1990s, the Argentine government implemented a series of policies to attract foreign investment, including policies to promote privatization of several public service sectors—such as water, electricity and gas distribution—and to provide licenses to foreign investors allowing them, among other things, to utilize a tariff regime denominated in US dollars. Next, in 1991 the government enacted the Convertibility Law, which fixed the Argentine peso to the US dollar at a one-to-one exchange rate. In response to these policies, foreign investors, including CMS, Sempra, LG&E and Enron, invested in Argentine public service sectors.

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\(^2\) Inconsistencies in Argentina-Related Disputes


\(^3\) Id. at p. 6.