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An Appellate Mechanism for CPTPP Investor-State Dispute Settlement

Un Mecanismo de Apelación para el Arreglo de Controversias entre Inversionistas y Estados en el CPTPP

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Abstract

In this text, we will examine whether the establishment of an appellate mechanism benefits the regulation of investments and safeguards its objectives, integrity and ability to resolve disputes.

Keywords: Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Trans-Pacific Partnership Agreement (TPP), Investor-State dispute settlement (ISDS)

Resumen

En este texto, examinaremos si el establecimiento de un mecanismo de apelación beneficia a la regulación de las inversiones y si salvaguarda sus objetivos, integridad y capacidad para resolver disputas.

Palabras clave: Tratado Integral y Progresista de Asociación Transpacífico (CPTPP), Tratado de Asociación Transpacífico (TPP), Controversias entre inversionistas y Estados (ISDS)

1. Introduction

The establishment of an appeals mechanism in investor-State dispute settlement (ISDS) proceedings has been a topic of discussion within the international investment community for some time and could significantly alter the current system. Due to the structure of bilateral treaties, achieving a multilateral solution on this matter has proven challenging. However, the emergence of multilateral investment treaties, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), has revitalized the debate.

Specifically, the CPTPP facilitates the establishment of an appeals mechanism for disputes between investors and States, as outlined in Article 9.23.11 of the Trans-Pacific Partnership (TPP) Agreement, which is incorporated into the CPTPP by reference in accordance with its Article 1. Article 9.23.11 of the TPP states that:

“In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 9.29 (Awards) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 9.24 (Transparency of Arbitral Proceedings)”.

We will examine whether the establishment of an appeals mechanism safeguards the objectives and integrity of investments, and the ability to resolve disputes. Preliminary analyses suggest that the creation of such a mechanism should be approached with caution. It is essential to carefully consider the implications of the chosen appeals mechanism’s structure and scope.

2. An ISDS appellate mechanism for the CPTPP

The TPP promised new opportunities for investors and aimed to create a more predictable and transparent regulatory environment. To achieve this goal, the provisions of the investment chapter (Chapter 9) are designed to facilitate access to investment and protect investors throughout the investment process and beyond. This is accomplished by “granting rights to investors that are directly enforceable by them through the dispute settlement provisions of the chapter” (Kawharu, 2015, p. 5).

Although the objective of Chapter 9 is to provide greater security to investors, we believe that it is not entirely innovative, contrary to the observations made by Kawharu. This is because the TPP establishes dispute settlement mechanisms that have already been incorporated in bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment chapters. However, we agree with Kawharu’s assertion that “the increased visibility and impact on states has prompted calls for reform of the investment arbitration process to better reflect the public nature of the interests involved, improve efficiency, and improve the quality of decision-making” (Kawharu, 2015, p. 18). In this context, the establishment of an appellate mechanism or body becomes relevant.

In general, scholars recognize the necessity for the ISDS system outlined in the CPTPP to include an appellate body or mechanism. In light of the widespread absence of an appellate mechanism in ISDS, Álvarez highlights five general complaints against treaties like the CPTPP and against ISDS:

“ISDS violates the rule of law. Ad hoc arbitral tribunals from which there is no full scale appeal to correct errors of law, are said to produce inconsistent, ill-reasoned, and sometimes incoherent arbitral awards that fail to provide the certainty demanded by either investors or states” (Álvarez, 2016, p. 12).

Álvarez, in his text, focuses on the absence of an appellate mechanism in ad hoc arbitrations, which directly results in a lack of certainty for both States and investors. Although the author discusses ad hoc arbitration, this concern undoubtedly extends to arbitrations administered by the International Centre for Settlement of Investment Disputes (ICSID), as it also lacks an appellate mechanism. For many Europeans, the TPP proposal is outdated, with the appropriate standard being the one proposed by the Transatlantic Trade and Investment Partnership (TTIP), which proposed an appellate process (Álvarez, 2016, p. 10). Álvarez criticizes the absence of an appellate mechanism in the CPTPP and its consequent lack of certainty for both States and investors. However, he does not provide or propose an original model; instead, he concentrates on analyzing existing systems (Álvarez, 2016, p. 41).

In line with Álvarez, Tung points out that

“various stakeholders have criticized certain aspects of the investor-state dispute settlement (ISDS) provisions embedded in the TPP and in other international investment agreements (IIA). Critics often focus on the arbitration cases brought under these ISDS provisions, particularly attacking the [...] absence of appeal [...]” (Tung, 2016, p. 55).

Tung also addresses the criticism regarding the absence of an appellate mechanism or body in the CPTPP ISDS system. He specifies that the lack of an appeal process would lead to inconsistency in the awards (Tung, 2016, p. 57). Without addressing an original solution, Tung states that the European Union–Canada Comprehensive Economic and Trade Agreement (CETA) “and the EU draft of TTIP establish a standing appellate tribunal to address this criticism” (2016, p. 57).

Howse highlights a letter sent to the United States Congress by approximately 200 law and economics scholars, making the following critique, among others, regarding ISDS in the TPP:

“In addition to these fundamental flaws that arise from a parallel and privileged set of legal rights and recourse for foreign economic actors, there are various flaws in the way ISDS proceedings are meant to be conducted in the TPP. In short, ISDS lacks many of the basic protections and procedures of the justice system normally available in a court of law. There are no mechanisms for domestic citizens or entities affected by ISDS cases to intervene in or meaningfully participate in the disputes; there is no appeals process and therefore no way of addressing errors of law or fact made in arbitral decisions” (Howse, 2019, p. 2).

In addition to the above, what Howse points out is significant, as he indicates that uncertainty about outcomes is crucial for understanding the various economic effects of treaty-based investor protection. This uncertainty can be attributed significantly to the choice of dispute settlement mechanism, such as ad hoc arbitration, which lacks precedent and appeal (Howse, 2019, p. 46). Finally, Howse suggests answers to what would be the appropriate mechanism to choose, including options such as arbitrations with or without appeal or precedent, based on the externalities that the same author explains (2019, p. 54).

The authors cited above shed light on the need for an appellate body or mechanism to be incorporated into the TPP ISDS, drawing examples from other treaties such as CETA and the EU draft of TTIP. Chaisse and Renouf go a step further in explaining why an appellate mechanism or procedure in ISDS is necessary. In particular, they argue that

“Interest in an appellate mechanism arose out of the lack of consistency in awards produced by an increasing number of arbitral tribunals, and from the need to avoid “wrong” decisions by some “rogue tribunal” (...). Both views point, however, at the same issue: a need for harmonisation in “jurisprudence”. Proponents

of the appellate stage argue that an appeals mechanism would avoid contradictory awards and might result in a more coherent investment legal system” (Chaisse & Renouf, 2018, p. 300).

However, they also highlight that the proposal put forth by the European Commission in the context of the TTIP negotiations shares many characteristics with that of the WTO: among them, the possibility of appealing issues of law before an Appellate Body (Chaisse & Renouf, 2018, p. 283).

In this sense, and in accordance with what has been stated by the previous authors, Toro-Fernández and Tijmes-Ihl support the creation of an appellate body to provide greater legal certainty. In this regard, they state that they “strongly support the establishment of an appellate body to enhance coherence among arbitral awards, thereby providing greater legal certainty for host States and investors” (Toro-Fernández & Tijmes-Ihl, 2020, p. 168). They argue that the existence of an appellate body or mechanism in the CPTPP dispute settlement system would provide greater security and legal certainty both for States and investors. This is because it should enhance coherence among awards. However, the text is descriptive in nature and does not provide further insights into how the appellate mechanism in the CPTPP dispute settlement system should be structured.

While it does not directly address investor-State disputes, but rather differences between States, Gallardo-Salazar and Tijmes-Ihl offer certain insights into the need for an appellate body in the dispute settlement system of the CPTPP. For instance, they argue that:

Chapter 17 of the Additional Protocol to the PA Agreement and chapter 28 of the TPP Agreement, as incorporated into the CPTPP, include state-to-state dispute settlement systems. Neither considers an appeal stage. They allow the complaining party to bring

the dispute to its preferred forum, be it another international trade agreement or the WTO (article 17.4.2 PA Additional Protocol and article 28.4.2 TPP Agreement, as incorporated into the CPTPP) (Gallardo-Salazar & Tijmes-Ihl, 2021, p. 641).

The relevance of this statement lies in the fact that the absence of an appellate mechanism could become a disincentive to using the dispute settlement mechanism provided for in the treaty. Particularly noteworthy is that the majority of mechanisms outlined in BITs do not include an appellate mechanism, although certain cases allow for annulment of the award. The establishment of an appellate mechanism in accordance with the provisions of the TPP undoubtedly represents a progression in investor-State dispute settlement mechanisms.

Finally, it is important to pose the question, as Tams does, if an appellate system could remedy the problem. Particularly, the author points out that:

Comparative experience, both at the national and international level, suggests that indeed, hierarchically-structured systems of judicial dispute settlement can succeed in producing a consistent line of jurisprudence, and thus reduce uncertainty. For example, the WTO Appellate Body is widely credited for having rendered dispute settlement in world trade law more reliable and predictable (Tams, 2006, p. 23).

While Tams does not specifically discuss the ISDS mechanism established in the CPTPP, he provides insights that indicate that this is not a problem unique to this regional system. It should be mentioned that the ICSID system, the mechanism enshrined in Article 9.19 paragraph 4 of the TPP, does not include an appellate mechanism, even though it stands as one of the primary mechanisms for ISDS. Unlike the other authors who favor the CETA or TTIP model, Tams proposes the example of the WTO Appellate Body due to its predictability, among other attributes. Thus,

it would provide greater certainty and legal security to both States and investors, avoiding contradictory or inconsistency awards.

3. Conclusions

The existence of an appellate mechanism in the CPTPP ISDS system is necessary. Among the arguments in favor of introducing an appellate mechanism, the benefits it would bring compared to the current process stand out. The main reason for supporting its establishment is the assertion that an appellate mechanism would enhance the coherence of international investment law. Simultaneously, an improvement in the coherence of awards would provide greater certainty and legal security for both investors and States. In fact, one of the problems identified in the dispute settlement system is the existence of inconsistent awards that contribute to a confusing body of international investment law.

The potential positive effects of an appellate mechanism include an enhanced authority or legitimacy of investment awards and the rectification of decisions perceived as biased towards the investor, thereby bolstering the position of States. Some authors suggest the model established in CETA and in the EU draft of TTIP, which establishes a standing appellate tribunal. Furthermore, for example, a permanent institution for investment appeals, possibly following the model of the WTO Appellate Body, could gain institutional prestige that enhances the authority of its decisions, even though the WTO dispute settlement system is in crisis due to reasons unrelated to the functioning of the body itself in resolving disputes.

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