I. POSSIBILITY OF ESTABLISHING AN APPEAL MECHANISM

The possibility of establishing an appeal mechanism for investment arbitration has been debated for several years now. It seems to me that there has been somewhat of an acknowledgement that it is either not a good idea or that it faces insurmountable problems. I do not agree. It is worth taking a fresh look at the issue.

I do so here from a different angle and a regional perspective, but without losing sight of the broader global view. This risks getting into the old discussion of whether regional agreements are building blocks or stumbling blocks in the global context, but if the discussion is bound to go anywhere, it has already got a head start in the region because several international investment agreements (IIAs), namely those that have been signed with the U.S. since 2003, already contemplate the possibility of an appeal mechanism and call for a discussion to that effect. There is also much greater uniformity among the IIAs in the Americas than elsewhere, and that provides a more suitable setting —although the lack of uniformity is not really an obstacle, as will be seen.

II. IS THERE A NEED FOR AN APPEAL MECHANISM?

The idea of an appellate mechanism for international arbitration is not new. It was discussed as far back as the Peace Conferences that led to the Hague Conventions in 1899 and 1907; it was taken up again several years later during the 1920s within the League of Nations; and it was looked at again in the 1950s when the International Law Commission (ILC) worked on the Rules for Arbitral Procedure. More recently, it was discussed in the Uruguay Round of multilateral negotiations that succeeded in establishing a standing Appellate Body in the World Trade Organization.

However, in the context of investment arbitration, it appears not to have been seriously considered until the turn of this century, but it has now been debated for many years. The unavoidable question, then, is whether there is a need for an appeal mechanism.

Prof. Michael Reisman makes a very interesting analysis. He states: “Arbitration is a certain delegated and restrictive power to make certain types of decisions in certain prescribed ways”. He then explains that any restricted delegation of power must have some system of control to ensure that it works the way it was designed to work, and

adds that, “[i]n social and legal arrangements in which limited power is delegated, control systems are essential” because “without them, the putative restrictions disappear and the limited power may become absolute...”. Thus, “[c]ontrols are necessary not only for efficient operation. Effective controls are the only assurance of limited government...”.

The idea that Prof. Reisman puts forward, therefore, is that control systems are necessary —indeed essential— for arbitration to work the way it was supposed to work. Hence, two questions arise in the context of international investment arbitration: how was investment arbitration supposed to work and are the current control mechanisms adequate to accomplish that? Given the debate that has been going on for more than a decade, it seems far from clear.

**INVESTMENT ARBITRATION AND PRIVATE COMMERCIAL ARBITRATION**

International arbitration between States and private commercial arbitration were born without a system of appeal for quite different reasons. Their respective control mechanisms differ as well.

Modern commercial arbitration can be traced back to the Jay Treaty of 1794, which provided for the settlement of claims of British and U.S. nationals through arbitration before mixed claims commissions. Articles VI and VII of the Treaty provided that awards were final and conclusive in respect of both the justice of the claim and the amount of the sum to be paid to the creditor or the claimant. Over 500 awards were rendered under the Treaty.

The practice of including arbitration clauses in commercial or other treaties became widespread in the 19th Century, and many arbitral agreements were concluded and *ad hoc* arbitration tribunals established to deal with specific cases or to handle a large number of claims. Commissions consisting of members drawn from both disputing parties were often used to settle claims for compensation of injuries to aliens for which justice could not be obtained in the domestic court system. Boundary disputes were also often settled through arbitration².

Arbitration was codified in the Hague Conventions for the Pacific Settlement of Disputes of 1899 and 1907. It was recognized as “the most effective and at the same time the most equitable means of settling disputes” concerning questions of a legal nature, and especially in the interpretation or application of International Conventions which diplomacy has failed to settle (Articles 16 of the 1899 Convention and 38 of the 1907 Convention). Both conventions provided that an award was binding on the parties in dispute (Articles 56 of the 1899 Convention and 84 of the 1907 Convention) and, when “duly pronounced an notified... [it] settles the dispute definitively and without appeal” (Articles 54 of the 1899 Convention and 81 of the 1907 Convention).

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The possibility of including an appeal mechanism was discussed at the ILC in the 1950s, when it addressed the question of arbitral procedure. The ILC began by limiting the scope of arbitration (for the purposes conducting its task on arbitral procedure) to international arbitration between States, in accordance with Article 37 of the 1907 Hague Convention. Therefore, it excluded dispute settlement between governments and private persons acting directly as claimants (and because it involved the peaceful settlement of disputes between States, it did not address private commercial arbitration either).

Two theses were confronted at the ILC: that of justice, illustrated by the adage “nothing is settled until it is settled right”, and that of finality, incorporated in Article 81 of the 1907 Hague Convention: “The Award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal”. To use Prof. Reisman’s words, there was “a tension between two control system policies: justice and finality”\(^3\).

The Special Rapporteur, Mr. Georges Scelle, was sympathetic to the idea of providing for an appeal mechanism. In his first report he stated:

> Now, there are cases where the award that has been issued is unacceptable and, consequently, where criticism is legitimate. In such cases, even if the award is executed, the dispute will not really be terminated and an international uneasiness will remain; or there will be such opposition, not only of the country against which the award was rendered, but also of the international public opinion, that execution may be delayed indefinitely or even refused. And yet, that is also unacceptable… \(^4\)

He thus concluded:

> A dispute is not terminated just by any award: a judgment surrounded by all legal and social guarantees is required. Given the frequent shortcomings of arbitral tribunals, the composition of which risks being the result of a compromise, the need of a second instance must substitute the ancient conception according to which the arbitral judgment is final and without appeal. \(^5\)

The Second Draft on Arbitral Procedure produced by the ILC in 1951 provided for a means of appeal by establishing that “Every challenge to the validity of the award, whatever the vices alleged, must be submitted to a new jurisdictional instance by the Party alleging the invalidity…” (Article 42)\(^6\). The method was to appeal to a new ad hoc tribunal constituted following the same rules that applied to the constitution of the original tribunal.

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3. REISMAN, op. cit., p. 966.
5. *Id.*, p. 146.
Judge Schwebel has noted that, while the Draft “produced under the leadership of its eminent Special Rapporteur, Professor Georges Scelle... was superb in its technical craftsmanship...[its] paramount deficiency... was that States were not generally prepared to accept it... [because] many of them, too many, liked loopholes...”. Indeed, he notes that the Netherlands bluntly maintained that a “special characteristic of arbitration” is that “it is rather easy for an unwilling party to find an excuse for shirking its engagements” and that if such loopholes were to be closed then arbitration might lose its attractiveness for States”. Mr. Scelle had indeed earlier pointed out that the most powerful among the arguments against instituting a new instance in arbitration was that “the current international community is not in a state of political integration or psychological preparation to register an evolution of this sort”\(^8\). The ILC thus ruled out “appeals on the ground of misapplication of the law” and decided to follow “the traditional practice that an arbitral award should be final, subject, however, to the possibility of its revision or annulment”\(^9\). Nevertheless, two things should be noted:

- First, although some means of control through correction, interpretation and revision of the award was accepted, the ultimate system of control in international arbitration between States lies in their ability to unilaterally oppose an award that they legitimately or otherwise consider to be in error, thus becoming, in words of Georges Scelle: “juge de ses juges...”\(^10\).
- Second, the underlying reason in favor of an appeal mechanism was clearly pointed out and can be summarized in a view that justice should prevail over finality.

Why, then, has finality traditionally prevailed over justice in international arbitration between States?

Both, international arbitration between States, and private commercial arbitration are alternative means of dispute resolution, but they are so for very different reasons. It is often explained that a major incentive for international arbitration is “its promise of simplicity, economy, supranational neutrality, and speed”\(^11\). Redfern and Hunter would add to the list “privacy... and, above all, finality”\(^12\). Prof. Reisman explains that

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11. REISMAN, op cit., pp. 968-969.

"[t]he fact that the parties can shape the tribunal and, if they so decide, individually appoint one of the arbitrators with the expectation that he or she will be sympathetic to their view certainly makes arbitration attractive..."13. Redfern and Hunter add that "[b]y choosing arbitration, the parties choose a system of dispute resolution that results in a decision that is, in principle, final and binding"14. However, these are broad generalizations that may hold true for private commercial arbitration, but not necessarily so for the other types of arbitration.

Private commercial arbitration is an alternative to the judicial settlement of disputes in domestic courts. Therefore, the incentives that Prof. Reisman, Redfern and Hunter refer to are clear advantages for persons engaged in international trade that voluntarily want to escape the complexities, delays and other nuances of domestic judicial systems, especially of one that, in all likelihood, they are not familiar with. Accordingly, the possibility of choosing the arbitrators and adopting simple procedural rules is, indeed, attractive, and it is ultimately a question of choice—a choice that the disputing parties consent to.

However, international arbitration between States is different in many respects. To name a few:

- It is an alternative to diplomatic means of dispute resolution and, in its origins, to the use of force. Indeed, the Jay Treaty was regarded as a success because it averted—some would say, delayed—war between the US and the British Empire. Similarly, the Hague Conventions on the Pacific Settlement of International Disputes emanated from the Peace Conferences convened in The Hague in 1899 and 1907 "with the object of seeking the most effective means of ensuring to all peoples the benefits of a real and lasting peace...". It was not in its origins, and it is not now, an alternative to judicial settlement of disputes.
- Disputes were initially submitted to arbitration conducted by mixed claims commissions or tribunals (such was the case of the Jay Treaty, the Convention Between the United States and Mexico for the Adjustment of Claims of 1868, or the Treaty of Washington of 1871 to settle the Alabama claims). This had at least the following implications that are relevant to the absence of an appeal mechanism:
  - Even though, there was no standing international court (the first having been the Permanent Court of International Justice established in 1922), claims commissions or tribunals, while ad hoc in the sense that its members were chosen by the States in question, had a certain permanence since they were individual entities established to resolve a large number of claims.
  - The disputes generally involved claims that could not be submitted to the domestic courts for adjudication, so there was no other available remedy.

13. REISMAN, loc. cit.
14. REDFERN, loc. cit.
• The balance ultimately rested in the system of control: Each country retained its ability to comply with the award, which was balanced with submission to the system in order to prevent the use of armed force.

In these circumstances, it is not surprising that a stratified adjudicative process was not contemplated.

Investment arbitration in its current form lies somewhere in the middle of the spectrum and, while it shares commonalities with the other two types of arbitration — private commercial arbitration and arbitration between States —, there are also important differences (I will leave aside for purposes of this article arbitration consented to in State contracts or by means of an arbitral clause).

As with arbitration between States, investor–State arbitration it is not an alternative to adjudication by the domestic courts. National treatment, the most favored nation treatment and the minimum standard of treatment (including fair and equitable treatment), among other provisions, are conventional obligations between States embodied in international agreements. Claims for breach of such provisions — that is claims of State responsibility for internationally wrongful acts — are not ones that can readily be submitted to domestic courts. The nature of the claims differs. Thus, what are deemed advantages in private commercial arbitration might not be so in investment arbitration. For example:

- In private commercial arbitration speed and economy are comparators of the time and cost of arbitral proceedings in contrast to litigating before domestic courts. However, because investment arbitration is not an alternative to the domestic court system, there is no similar comparator.

- Privacy takes on quite a different meaning where the dispute concerns a contract negotiated between two parties, as opposed to a claim that involves the public interest: a law passed by Congress, the application of a tax or the nationalization of an industry, and where liability may result in disbursement of public funds.

- Even consent is of a very different type: consent to investment arbitration in the majority of the cases does not usually involve simultaneous consent by two parties to submit a particular dispute to arbitration. More often than not, it involves an ex ante offer by the State to submit undetermined disputes to arbitration.

Thus, finality should be looked at in a different light. It would appear that finality of investment awards is more the result of inertia, than a conscious decision that it should prevail over justice.

Redfern and Hunter have said that “[i]t is not easy to strike a balance between the need for privacy, speed and, above all, finality in the arbitral process and the wider public interest in some measure of judicial control, if only to ensure consistency of decisions and predictability of the operation of the law”. They add that “[i]nternationally, however, the balance has come down strongly in favour of finality,
and against judicial review, except in very limited circumstances”15. While this may be true of private commercial arbitration, it is changing in the case of international arbitration between States, as shown by the institution of a standing Appellate Body in the World Trade Organization. Undoubtedly, the public interest in investment arbitration has greater weight than Redfern and Hunter concede for private commercial arbitration. Redfern and Hunter suggest the answer where they state: “

The principal justification for allowing an appeal from the award of an arbitral tribunal on questions of law is that it is in the public interest —and especially in the interest of commercial men— that the law should be certain and that, in particular, there should not be different findings by different tribunals as to the meaning and effect of the same words in different contracts. There can be no such general interest in the findings of fact of a particular tribunal in a particular case. They may be wrong, even badly wrong, but that is likely to be of interest only to the parties. Accordingly, most states with developed laws of arbitration refuse to allow appeals from arbitral tribunals on issues of fact. 16

However, international investment arbitration is quite different: the public interest—which is not that of commercial men, but rather of the government as a regulator, its constituency, including the taxpayers whose contributions may result affected, the civil society at large, and certainly foreign investors as well— calls for the law to be certain. There is indeed a general interest in the findings of fact and law of investment arbitration tribunals and, thus, an appeal mechanism seems to be well justified.

III. CONSISTENCY AND COHERENCE OF ARBITRAL DECISIONS

The recent call for a possible introduction of a system of appeals in international investment arbitration was made by the United States in 2002 when the US Congress, in the Trade Promotion Authority provisions of the Trade Act of 2002, made “providing for an appellate body or similar mechanism to provide coherence to the interpretations of trade agreements” one of the “principal negotiating objectives of the United States regarding foreign investment”. The rationale, as expressed by the US Senate, was that:

As the United States enters into more investment agreements and the number of investor-state disputes grows, the need for consistency of interpretation of common terms—such as expropriation and fair and equitable treatment—will grow. Absent such consistency, key terms may be given different meanings depending on which arbitrators are appointed to interpret them. This will detract from the predictability of rights conferred under investment agreements. A single appellate mechanism to review the decisions of arbitral panels under various investment agreements should help to address this issue and minimize the risk of aberrant interpretations.

Thus, Congress instructed US negotiators to “seek to establish a single appellate body to review decisions in investor-state disputes.”

15. REDFERN, op. cit., p. 434
The US Congress, in all certainty, was only referring to agreements entered into by the United States, based on its Model Bilateral Investment Treaty (BIT); but several commentators seem to have mistakenly identified an apparently insurmountable problem. Barton Legum, for instance, has emphatically stated that “there are no options” to establish an appellate mechanism for investment disputes. He explains:

The current environment of international investment law is ill-suited to appeals...[because] international investment law is defined by some 2,500 bilateral investment treaties (BITs) negotiated over a half-century by hundreds of different combinations of countries. As might be expected, the provisions of these treaties are different from each other in important respects, although their text is also similar-sometimes deceptively similar-in many respects.

...While international investment agreements may have similar or identical texts, because they were negotiated at widely varying times between diverse States with varying intentions, different content will be, and should be, given to that text by tribunals applying established principles of treaty interpretation. The goal of achieving consistency and coherence across the full body of international investment law today, therefore, is chimerical. The diversity of texts and contexts across the 2,500 treaties is such that a truly consistent and coherent interpretation of them is neither possible nor permissible under accepted rules of treaty interpretation... [A] single multilateral agreement with a single set of provisions to be consistently construed is fundamental...17

Similarly, Geiger Rainer warns: “In the absence of a single multilateral text of reference, an appeals procedure that has to examine awards based on diverging treaty texts may not in itself be sufficient to increase coherence and to create the value of precedent18.

This is not quite right, and it really is a non-issue. It would be helpful to have a single multilateral text, but it is not necessary. A simple example serves to illustrate the point: Mexico has 33 Civil Codes. Each of its 32 states (including the Federal District) has enacted its own and there is a Federal Code as well. They are largely similar, because they were modeled on the 1928 Federal Civil Code19. Yet, they are not identical. In some cases certain matters were purposely regulated differently; in others, different people at different times drafted provisions concerning the same matter differently, but perhaps no substantive variation was intended. The domestic system of appeal is in no way intended to bring consistency across the whole of

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Mexico's 33 Civil Codes. Courts cannot do the legislator's job. But this in no way undermines the nature and function of appellate mechanisms.

It is no different with the large number of IIAs in existence. Having said this, to the extent that IIAs are worded similarly, perhaps they should be interpreted consistently. This is the case of many IIAs in the Americas.

The U.S. and several Latin American countries have taken an important step that should trigger a serious dialogue about the possibility of establishing a system of appeal for investor–State arbitration, because several IIAs already contemplate that possibility and actually call for an analysis and discussion to that effect. It should also be discussed in the context of regional integration because of the risk of fragmentation on one end and of isolation on the other end. And, the region is a good place to start because, as noted, several agreements already provide for the possibility of establishing a system of appeal; there is a high degree of consistency among many IIAs, and the U.S. is a common denominator, and that provides certain stability.

But it is also relevant beyond the Americas. The U.S. has signed international investment agreements with other countries that include similar provisions. It is also the subject of discussion in broader trade and investment negotiations, such as within the Trans-Pacific Partnership.

In any event, a serious discussion will allow countries to make an informed decision.