

An appellate mechanism for investment treaty disputes?

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The design of the ICSID system

The ICSID Convention was developed in the early 1960s

The idea was to create an institution that could administer two types of dispute settlement processes:

- Arbitration
- Conciliation

As events have transpired, ICSID arbitration has been invoked far more frequently than conciliation

The ICSID arbitral system

The drafters of the ICSID Convention:

- opted for *ad hoc* arbitration
- accepted the possibility of inconsistent decisions
- thought that Article 14 of the Convention would give sufficient direction to arbitrators as to their duty to act impartially and independently
- permitted the disputing parties to control who could attend the proceeding and required party consent to publish the award

The ICSID arbitral system (cont.)

The drafters also:

- created a self-contained annulment mechanism (an “*ad hoc* Annulment Committee”)
- limited the scope of review of arbitral awards to preclude review for error of law

This excluded the courts of Contracting States from playing any role in the review or setting aside of ICSID awards [see Article 53(1)]

The Convention turned the courts of Contracting States into enforcement courts for the pecuniary obligations of awards [see Article 54]

BITs began to contemplate non-ICSID arbitration as well

This began to change when States not party to the ICSID Convention also began to enter into investment treaties

If they wished to include investor-State arbitration, they had to provide for some form of arbitration

See, for example, Article VI of the US-Czechoslovakia BIT, 1991, which provided for ICSID, ICSID Additional Facility of the Centre of pursuant to the UNCITRAL Arbitration Rules or pursuant to the arbitration rules of any arbitral institution mutually agreed between the parties to the dispute

There are many non-ICSID treaty arbitrations

Some States that are not parties to the ICSID Convention (*e.g.*, Russian Federation, Laos, Vietnam, Poland) have participated in investment treaty cases

Until Canada acceded to the ICSID Convention, all NAFTA arbitrations were either ICSID Additional Facility or UNCITRAL arbitrations (because only the US was party to the Convention)

Many treaty cases are governed by the UNCITRAL Rules or under the rules of regional arbitration centres such as the Stockholm Chamber

Non-ICSID cases are “localized”

Investment treaty arbitrations taking place outside of ICSID must be sited in a legal system whose courts will have a review power

Thus, there has been judicial review of many treaty awards performed by the courts of Canada, France, the Netherlands, Singapore, Sweden, Switzerland, the United Kingdom, and the United States

This introduces a further element of variability (both as between national laws governing international arbitration and legal systems and as between non-ICSID and ICSID review) when appraising the overall operation of investment treaty arbitration

Attempts to create appellate review address both ICSID and non-ICSID arbitrations

CETA and the EU-Vietnam free trade agreement both contemplate that arbitrations can take place under different arbitral rules

The institutional changes sought to be effected by these new arrangements will modify the operation of the arbitrations irrespective of which rules have been selected by the claimant

The present efforts to create an appellate body thus seek to create a single reviewing body that will apply its own set of treaty review grounds irrespective of whether the arbitral award was rendered pursuant to ICSID or non-ICSID arbitration rules

The policy choices of the ICSID Convention's drafters

Since ICSID still accounts for most treaty arbitrations, this presentation will focus mainly on the design of ICSID arbitration

Much of non-ICSID treaty arbitration resembles the approach taken in the Convention

In retrospect, it is evident that the Convention's drafters:

- did not anticipate the degree of “connectivity” between future cases
- did not foresee how conflicts of interests would emerge
- did not attach importance to legal correctness, and
- did not anticipate the amount of public interest in investment treaty arbitrations

Ad hoc tribunals, not standing tribunals

ICSID's drafters recognized that contradictory decisions could result in cases arising between different parties but based on similar facts

This was "inherent in any ad hoc arbitration system"

The only way to "avoid, or at least limit that danger – or to put it in a positive way, to promote uniformity of decisions – would be to have a standing tribunal"

This was considered to "clearly impractical in the present context"

History of the Negotiations, Vol II-1, at 117

Using the “least desirable method” of constituting a tribunal

The Working Paper on a draft Convention:

The [proposal] adopts what is probably the most usual method for the constitution of an arbitral tribunal. *It can be argued that it is the least desirable method, because of the danger that each party will look upon the arbitrator to be appointed by it as an advocate.* Under this pessimistic assumption, the umpire would be the only true arbitrator. It has been argued for this reason that it would be preferable to have either a sole arbitrator or a tribunal consisting of five members of whom only two would be directly appointed by the parties.

History of the Negotiations, Vol II-1, at 40

ICSID generally restricts nationals from sitting in cases involving their own state

Article 39:

“The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute;”

However, there is an exception to this rule:

“provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.”

Some investment treaties employ this exception

Partisanship, nationality, and conflicts of interest

The only concern expressed about partisanship stemmed from the link of nationality between an arbitrator and his/her State of nationality

As ISDS has developed, other concerns have emerged such as:

- “Double-hatting”
- Repeat appointments of arbitrators by law firms or parties
- Other relationships between counsel and arbitrators
- The economic incentives said to be associated with the emergence of a class of professional arbitrators

Arbitrator's duty

Article 14(1):

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

This is the basis for arbitrator challenges under the Convention.

Article 57 permits a disputing party to challenge an arbitrator on the grounds of her/his “manifest lack of the qualities required by paragraph (1) of Article 14”.

Should there be appeal?

The drafters repeatedly discussed whether appeal for error of law should be permitted

They decided that there should be no appeal for error of law

The records of the negotiations note the following comments by the Bank's General Counsel, Aron Broches:

“...the draft Convention did not provide for an appeal against the award and in his opinion *a mistake in the application of the law would not be a valid ground for annulment of the award.*”

The reason? “A mistake of law as well as a mistake of fact *constituted an inherent risk* in judicial or arbitral decision for which appeal was not provided.”

ICSID Convention, Article 52

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

Scope of review

The grounds for annulment of awards focus on the integrity of the arbitral process rather than the correctness of the tribunal's findings of law or fact

Was the tribunal properly constituted?

Did the tribunal act within the grant of its jurisdiction?

Did it treat the parties with equality and adhere to fundamental rules of procedure?

Did the award state the reasons on which it was based?

So long as the tribunal applies the applicable law rather than some other law, under the ICSID Convention (and almost all other existing regimes), the tribunal is entitled to be wrong in its application of the law

ICSID Convention, Article 53

The limited scope of review is buttressed by Article 53

The award benefits from a unique enforcement regime created by the Convention

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

ICSID Convention, Article 54

Article 54

(1) *Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state...*

Predicting the future

One expert identified the risk underlying a system that did not insist on legal correctness. In discussing the annulment system and Article 54's enforcement regime, he stated:

...that the Section should be accepted regardless of the fact that on paper it appeared a strange innovation. *The final result would depend on the quality of the awards given; if the awards were good, they would justify the acceptance of the system.*

History of the Convention, Vol II-1, at 427

What was left unsaid was what could or would be done if the awards were not good

The answer

Under the ICSID regime, there is no power to correct for legal error short of some other error that does give rise to annulment

A legal error that amounted to the tribunal's acting in manifest excess of powers or its seriously departing from a fundamental rule of procedure could give rise to annulment

But error of law by a tribunal that renders an award that is otherwise not challengeable under Article 52 of the Convention cannot be corrected

AES v. Hungary

With respect to Articles 52 and 53 the drafters have taken great care to use terms which clearly express that annulment is an exhaustive, exceptional and narrowly circumscribed remedy and not an appeal. *The interpretation of the terms must take this object and purpose into consideration and avoid an approach which would result in the qualification of a tribunal's reasoning as deficient, superficial, sub-standard, wrong, bad or otherwise faulty, in other words, a re-assessment of the merits which is typical for an appeal...*

Decision of the *ad hoc* Annulment Committee, para. 17

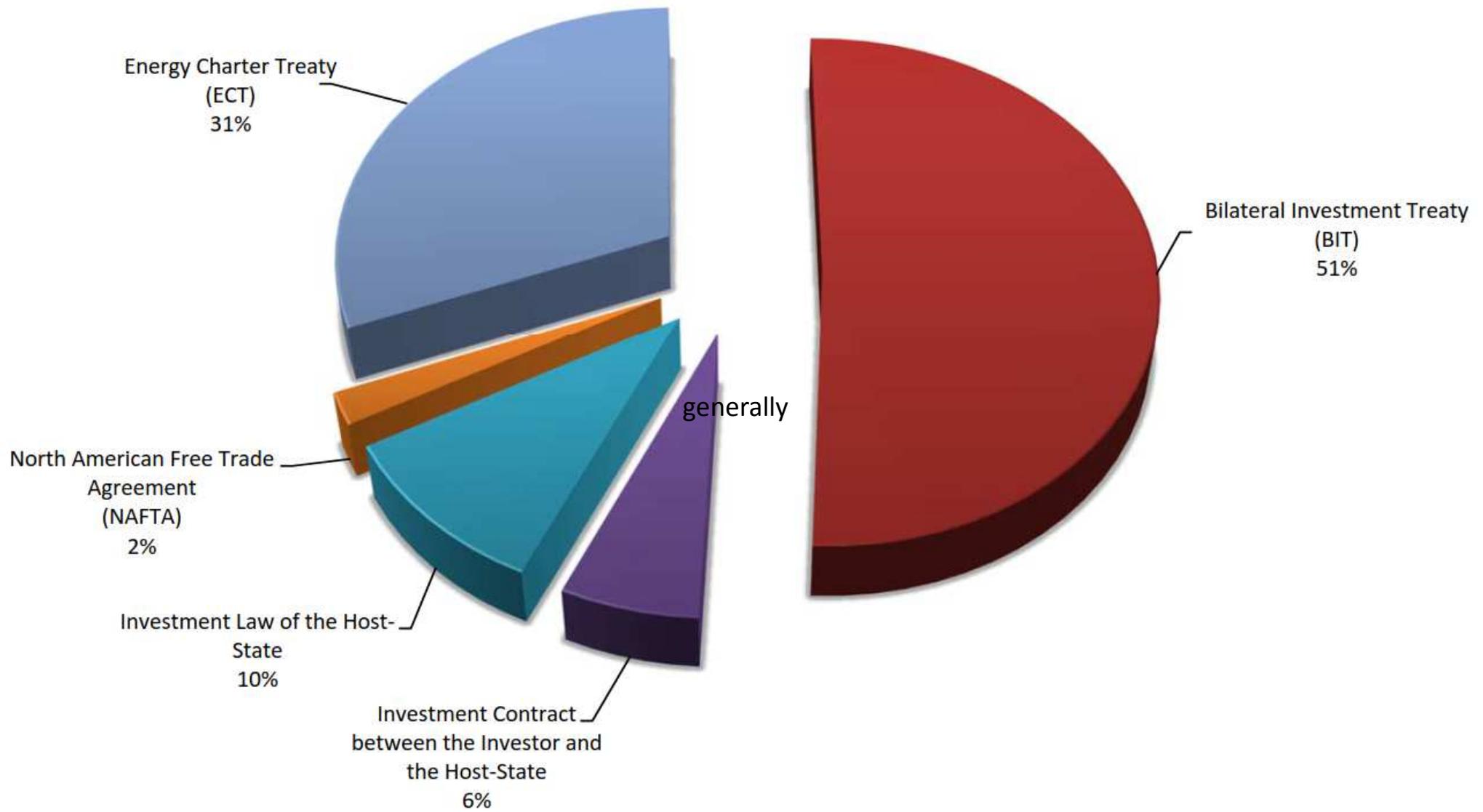
A key assumption: the future caseload expected to be contractual disputes

Record of Aron Broches' comments to the Bangkok regional legal experts' meeting:

If the Convention were limited to disputes arising out of investment agreements with governments, perhaps 95% of possible disputes would be covered. The reason why the draft [Convention] went beyond the case of investment agreements, in a permissive sense, was to take account of different situations prevailing in different parts of the world, and specifically, to permit ad hoc submission of disputes, which he thought was very important.

History of the Negotiations, Vol II-1, at 494

This has not turned out to be the case



Degree of connectivity between different types of proceedings

ICSID contractual arbitrations, governed generally by host State law, have little in common except for the ICSID Convention and perhaps general principles of arbitral law and practice

Investment treaty cases are more connected in the sense of tribunals applying not only the Convention but also:

- The VCLT
- The Articles on State Responsibility
- General rules and principles of international law

Disputing parties and tribunals cite prior decisions and awards for their persuasive value (a kind of *de facto stare decisis* in a system that lacks a formal *stare decisis* rule)

Connectivity is illustrated by *Waste Management v. Mexico*

98...Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

Waste Management Inc. v. United Mexican States [II], ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004

This paragraph(s)/footnote(s) of this report, award or decision is referred to in:

SORT JURISPRUDENCE:

In Reverse Chronological Order

By Dispute Name

- Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016 
- Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion, 8 July 2016 
- Murphy Exploration and Production Company International v. Republic of Ecuador [II], PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016 
- MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016 
- Mesa Power Group LLC v. Government of Canada, PCA Case No. 2012-17, Award, 24 March 2016 
- Mesa Power Group LLC v. Government of Canada, PCA Case No. 2012-17, Concurring and Dissenting Opinion of Judge Charles N. Brower, 24 March 2016 
- Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, 27 October 2015 
- Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award, 16 September 2015 
- Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015 
- William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc. v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 
- William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc. v. Government of Canada, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, 17 March 2015 
- HOCHTIEF Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014 
- British Caribbean Bank Ltd. v. Government of Belize, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014 
- Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica, ICSID Case No. ARB/13/2, Decision on Jurisdiction, 15 December 2014 [Spanish] 
- Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Partial Dissent of Profesor Raúl Emilio Vinuesa, 18 November 2014 [Spanish] 
- Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 
- Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability, 12 September 2014 
- Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 
- David Minnotte and Robert Lewis v. Republic of Poland, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014 
- TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Award, 19 December 2013 
- Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013 

Parties and tribunals refer frequently to prior decisions

- An award is binding only upon the parties to the dispute and only in respect of that dispute
- But parties and tribunals routinely employ prior awards
- Some refer to them as “authorities” even though they are not binding on subsequent tribunals
- One leading arbitrator routinely speaks of a duty to apply a consistent trend in the cases and to contribute to the harmonious development of investment law

Burlington Resources v. Ecuador

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. The majority believes that, subject to compelling contrary grounds, *it has a duty to adopt solutions established in a series of consistent cases*. It also believes that, *subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law*, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law...

Decision on Jurisdiction, para. 100

But not all agree...

Burlington Resources (cont.)

...Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.

The current regime

The system is “flat” in that tribunals are all on the same plane and there is no review for error of law akin to that performed by national courts of appeal and supreme courts

No formal *stare decisis* rule; each tribunal is “sovereign”

AES v Argentine Republic Decision on Jurisdiction, para 30:

Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.

Does this make sense in present circumstances?

Greater connectivity between cases

Treaty claims involve:

- issues of treaty interpretation;
- Application of general rules and principles of international law (i.e. the Articles on State Responsibility)
- The application of (more or less) similarly worded obligations such as fair and equitable treatment

Strong connectivity between cases arising under the same treaty

Some treaties – NAFTA, CAFTA-DR, the Energy Charter Treaty, *etc.* have been invoked many times

Other treaties have never been invoked at all and many have been invoked only once

The EU-Canada FTA (CETA): A radical change

Rejects the use of party-appointed *ad hoc* arbitral tribunals

Establishes a standing tribunal (of first instance) and an appellate tribunal

Elaborates detailed ethical standards for tribunal members (e.g., no “double-hatting”)

Subjects both phases to tight timeframes

Varies the grounds for review of awards

The Appellate Tribunal can modify or reverse an award based on:

- (a) errors in application or interpretation of the applicable law;
- (b) manifest errors in appreciation of the facts, including the appreciation of relevant domestic law;
- (c) the grounds set out in Article 52(1)(a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).”

[CETA Article 8.28(2)]

Could appellate review provide benefits? Would it create new problems?

Confer legitimacy?

Improve the reasoning of tribunals?

Create greater consistency and predictability?

Will this come at a cost?

More appeals? (the WTO experience might be telling)

Re-arguing of cases? (the grounds for challenging awards are broad)

The end