

Argumentaire on a two-tier system for the settlement of investment disputes

The question has arisen as to whether it is better to create an appeal mechanism or a two-tier court, with a first instance tribunal and an appeal mechanism. In general, leaving the ad hoc arbitration system in place at the first instance will not address satisfactorily the concerns that have been identified thus far whilst a two-tier mechanism would do. There are a number of arguments in favour of a two-tier system:

1. **Greater consistency and legal certainty.** Not every case will go on appeal. A single court will more effectively ensure consistency. In the same institution there will be a greater degree of deference towards an appeal mechanism as compared to that likely to be displayed by ad hoc tribunals. This will also ensure that the outcome of cases is more predictable, which in turn will make the decision-making more efficient, and hence more cost-effective, and possibly reduce the amount of cases overall. Consistent jurisprudence both at the first and second instance will promote a greater level of understanding and reduce "adventurous" claims by investors (which are likely to be unsuccessful before the Court).
2. **Remand** (i.e. sending a case back after an appeal where there are insufficient facts to complete the case). This is probably impossible with ad hoc first instance tribunals given they will already be disbanded when they have delivered their award and the appeal will be rendered some time after that.
3. **Preventing parallel claims.** The more treaties are subject to the court the more cases can be more effectively handled. For example, this may happen through joinder of cases, consolidation, stay of proceedings or even dismissal of cases. This may also lead to a more satisfactory handling of some complicated legal issues (e.g. corporate personality, shareholder claims etc.).
4. **Costs and expeditious handling of cases.** A court will be better able to keep costs down because it will be better able to control the length of hearings, pleadings etc. With an appeal mechanism in place, States and investors will still have to bear the significant costs of ad hoc arbitration at the first instance, whereas a two-tier Court would reduce the economic burden overall – especially as membership widens (the more countries join, the lower will be the cost for everybody). It would be unnecessary to adopt procedural orders etc for each case. In addition time would not be spent in the appointment of arbitrators and the associated costs would be avoided.
5. **Independence and impartiality.** Full time adjudicators at first instance will be better able to ensure independence and impartiality. This will be through both avoiding double-hatting (acting as counsel and arbitrator) but also through the removal of incentives flowing from the desire to be reappointed linked, for example, to the need to maintain good relations with counsel who are the gate-keepers to appointment. An appeal mechanism only cannot provide such independence and impartiality.

6. Geographical and gender representativeness. A two-tier system provides more opportunities for the appointment of adjudicators from underrepresented regions and to seek gender balance. An appeal mechanism by itself will offer such possibility on a more limited basis.