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Magdalena Bulit Goñi

"Should an International Court in charge of the review of arbitral awards be created?"

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The issue of the review of arbitral awards is not new. Many proposals have been made along the years and as early as in the 1920s, when it was even suggested that the Permanent Court of International Justice had the competence to review interstate arbitral awards. The most advanced attempt at a review system is the New York Convention on the recognition and enforcement of foreign arbitral awards of 1958 ("New York Convention").

In order to properly answer this question it is first necessary to determine what a review entails and what would be its benefits, and to do that it is necessary to distinguish international commercial arbitration from investment arbitration since, to put it shortly, they are two different systems and they present different difficulties.

Review can be understood as a type of control in order to ensure that the system works in the way it was designed to work. In this sense, establishing an international court in charge of the review of arbitral awards could imply multiple benefits as consistency and uniformity of criteria. However, the key question is to determine whether it is possible to put a separate review system into practice, one for international commercial arbitration and another for international investment arbitration, without creating an unnecessarily cumbersome and duplicative regime and without sacrificing the flexibility that characterizes arbitration.

This essay seeks to demarcate and analyze the justifications for and against the implementation of an international court in charge of reviewing arbitral awards.

I. A different review for each different type of arbitration

The divergent nature and objectives pursued in international commercial arbitration and in international investment arbitration explain the different functions that awards review plays in

each one. Indeed, the general commercial arbitration cases result from contract claims streaming out of business transactions between private parties whereas investment arbitrations always involve state parties and most of the times deal with their interference with investments made by foreign investors through public policies.

Consequently the review in each type of arbitration focuses on different aspects: in international commercial arbitration the review aims mainly at the correction of procedural errors in order to shield the integrity of adjudication while in investment arbitration the review tends to lawmaking with the purpose of developing and harmonizing norms.

Following another line of reasoning, it must also be borne in mind that review of arbitral awards, whether commercial or investment ones, should not amount to an appeal; that is to say, it should not extend to the merits of the dispute. To allow another tribunal to exercise an extensive control over the award would imply to transfer the power to make the decision to the second tribunal, thus the review would turn into an appeal. This shift would be nonsensical if we keep in mind that, in most of the cases, parties can agree to an appeal based on their autonomy of will.

II. Review of international commercial awards by an international court

When drafting the New York Convention the main concern was to avoid national courts with the conviction that they would always be more favorable towards their nationals than to foreigners. Despite this, the national courts were unavoidable and what was achieved was assigning national courts a restricted review competence.

To implement an international court in charge of reviewing international commercial arbitral awards would not only import a major improvement in legal security and predictability but it would also imply a great step forward towards the creation of an international arbitral legal order.

Regarding its implementation, it would be possible to adopt a protocol to the New York Convention creating this international court. This would entail an "opt-in" possibility allowing States to agree to its terms, whichever they might be, and, at the same time, maintain the legal order already established by the New York Convention.

However the questions to answer here, then, are: Can we do better than the New York Convention? Is it possible to improve the review system without turning it into an appeal?

I believe that the answer is no: the problem is not in the New York Convention in itself but it is in the interpretation that some domestic tribunals make regarding, mainly, the public policy exception. And even though the logical solution to a problem of dissimilar interpretations is to unify this interpretation -mainly through a common tribunal-, this would entail the States giving up the core defense of their own juridical systems and, in the current situation, the different national legal orders are, (with the exception of the European Union in spite of the Brexit vote), quite far from merging among themselves. States would not resign in favor of an international court their last juridical control before the definitive incorporation of a legal decision into their juridical order. Furthermore, and in the alternative that States should accede to a public policy control made by the international court, it is contradictory to envisage an international court being the "guardian" of any national legal order.

There are two possible alternatives but both lead to the same answer. The first one would be to derogate the public policy exception from the New York Convention which, again, States would not accept. The other alternative is to implement an international court in charge of the general

review with the States reserving for themselves the possibility to analyze whether the award implies an infringement of its public policy.

In consequence the implementation of an international court in charge of the review of commercial arbitral awards would simply entail the institution of a new stage of proceedings, increasing their length and costs, making it lose some of its appreciated flexibility without the possibility of disregarding the last and necessary stop of every single case at domestic courts, when requesting the recognition and enforcement or arguing the nullity based on the infringement of public policy of that order.

It is even possible to consider that the implementation of such an international court would detract from one of the "charms" of arbitration: the possibility of having different jurisdictions for enforcing the award.

In short, the predictable resistance of States to resign the public policy control, in any of the proposed alternatives, and the need to resort to domestic tribunals would make unfeasible the creation of an international court in charge of the review of commercial arbitral awards.

III. Review of investment awards by an international court

The different nature of investment arbitration with respect to international commercial arbitration is also evident in the divergence of the deficiencies they may have and could justify a different answer in relation to the question raised by this essay.

Indeed, many criticisms have been raised during the last years regarding substantive standards of procedural aspects, primarily: the arbitrator's lack of impartiality and independence, the absence

of a proper control mechanism, the excessive length and costs of the procedures, the lack of transparency and consistency.

These criticisms have led to several proposals calling for the institution of a permanent body in order to centralize lawmaking. Moreover, recently there have been major improvements in this direction with the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and the European Union-Vietnam Free Trade Agreement, which both include a permanent investment court system instead of the traditional investor-State arbitration system.

The implementation of a court with review competence would contribute to improving consistency, predictability and legal correctness of investment awards, that is to say, it would improve investment lawmaking, thus enhancing the regime's legitimacy.

But these improvements would not be without certain drawbacks, such as the already criticized length and costs of the procedures (that would certainly increase). Moreover, remedies should avoid sacrificing the benefits of investor-state arbitration like the distance of the arbitrators from politics and business interests and the finality and enforceability of the award saving time and costs.

As to the implementation of this international court, it would be possible to replicate the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, adopted by the U.N. General Assembly on 10 December 2014 ("Mauritius Convention"). Indeed the Mauritius Convention allows the States to make the provisions of the Convention applicable to their investment agreements currently in force. Hence, if the mechanism were to be replicated, the States could opt-in without having to modify all the international investment agreements.

This possibility would give place to the establishment of a true multilateral permanent investment court able to consistently develop investment lawmaking thus putting an end to most of the difficulties that investment arbitration has at present.

Nevertheless it must be stated that part of the investment awards will still be subject to the New York Convention examination since only the International Centre for Settlement of Investment Disputes (ICSID) system provides an execution mechanism that does not need the recognition and enforcement within the terms of the said convention. Hence, as it has happened in some cases before, some of these awards may be set aside in relation to the public policy exception of the New York Convention.

Even though it is not a frequent case and if, as stated, the investment review process would have a different focus than the international commercial arbitration awards review, the possibility of being set aside because of the New York Convention requires the restriction of the above mentioned benefits to the ICSID system and makes the conclusions mentioned regarding the review of commercial arbitration awards by an international court extensible to these other investment awards.

At the same time this would impact the possibility of establishing a multilateral permanent investment court especially since the ICSID cases are the majority of investment cases according to the statistics given by the United Nations Conference on Trade and Development

IV. Conclusions

Despite the differences in the review regime of each kind of arbitration, international commercial and investment arbitration, it is possible to identify some common features that can be affected if an international court is established for the review of arbitral awards.

Undoubtedly another procedure stage would be introduced and with it the risk of parties abusing it with the sole purpose of deferring the conclusion of the arbitral process. This would cause the unfair increase of costs and length of procedures. Moreover the implementation of a new procedural stage may even affect the flexibility of the arbitration process.

For these reasons, and bearing in mind the exception of the autonomous ICSID system, it is that, for both types of arbitration and despite the divergent nature of the review, the answer is the same: an international court in charge of the review of arbitral awards should not be created.