

Draft provision on an Appellate Mechanism

1. Scope of Appeal

Draft provision 1

1. A disputing party may appeal a decision made by a first-tier tribunal on its jurisdiction or on the merits in relation to an international investment dispute.
2. A disputing party may request leave to appeal an interim measure ordered by a first-tier tribunal to preserve a party's rights.
3. The following types of decisions by a first-tier tribunal shall not be subject to appeal:
 - (a) procedural orders;
 - (b) decisions on bifurcation;
 - (c) decisions on challenges of adjudicators;
 - (d) [...].

Comment:

The Working Group has discussed extensively whether an appeal proceeding should be limited to final decisions. The problem with extending the appeal to non-final decisions is the risk of parallel proceedings, which could be expensive and problematic, particularly for developing countries. This being said, there might be some benefits to submitting some partial decisions to the appeal mechanism. In particular, those related to decisions upholding jurisdiction, as it is more likely that the host State is the one that is going to object to the jurisdiction. However, in this case, measures should be taken to avoid parallel proceedings. On the other hand, it might be suitable to extend the scope of the appeal mechanism to decisions upholding liability but leaving the decision on damages for a later stage. Indeed, decisions upholding liability are final with respect to the liability of the host State, although the quantification of damages has not been settled.

Regarding the appeal of an interim measure, there is a risk of systematic appeal each time a measure is adopted by the first-tier tribunal, creating disruption of the proceedings. In our view, the first-tier tribunal should enjoy a greater deference to decide on procedural matters like this. However, if the Working Group decides to extend the appeal to interim measures it should not suspend the proceedings or the measure while the appeal tribunal is examining the interim measure ordered by the first-tier tribunal.

This delegation agrees with listing certain types of decisions that cannot be subject to appeal, such as procedural orders, decisions on bifurcation, and decisions on challenges of adjudicators.

2. Grounds of Appeal

Draft provision 2

1. An appeal should be limited to:

- (a) an [manifest] error in the [application or] interpretation of the law; or
- (b) a manifest error in the appreciation of the facts, including the appreciation of relevant domestic legislation [and the assessment of damages].

2. Notwithstanding paragraph 1, an appeal may be raised on one or more of the following grounds:

- (a) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it;
- (b) the first-tier tribunal was not properly constituted;

- (c) the first-tier tribunal has manifestly exceeded its powers or ruled beyond the claims submitted to it;
- (d) there was corruption on part of a member of the first-tier tribunal;
- (e) there has been a serious departure from a fundamental rule of procedure;
- (f) the first-tier tribunal decision failed to state the reasons on which it is based, unless the parties have agreed otherwise; and
- (g) [the decision by the first-tier tribunal is in conflict with international public policy];
- (h) [new or newly discovered facts;]
- (i) [unsubstantiated award, absence or lack of reasoning; and]
- (j) [grounds for correction and interpretation could be added here].

Comment:

Regarding the grounds of appeals, this delegation is in favour of including a ground on manifest errors in the application and appreciation of the law, as well as the ground on manifest errors in the appreciation of facts. However, we do not think it is necessary to specify that the appreciation of facts may include the appreciation of relevant domestic delegation and/or the assessment of damages. This might create confusion as under certain circumstances, errors in the appreciation of relevant domestic delegation or errors in the assessment of damages could also be considered an error in the appreciation of law.

This delegation is also in favour of listing some of the grounds based on the ICSID Convention and on the New York Convention systems. However, each ground must be carefully analysed. In principle, we considered that there are merits to include the following grounds:

- a) The arbitration agreement is not valid [under the law of the host State] (for cases where the appeal tribunal scope covers investment contracts);
- b) The first-tier tribunal was not properly constituted;
- c) The first-tier tribunal ruled beyond the claims submitted to it;
- d) There has been a serious departure from a fundamental rule of procedure;
- e) The first-tier tribunal failed to state the reasons on which it is based.

The ground on the first-tier tribunal's manifest excess of powers could be difficult to define and distinguish from ruling beyond the claims submitted to it. Besides, in practice, tribunal's manifest excess of powers as been argued in cases of where manifest errors in the application and interpretation of the law are evident. Thus, there can be an overlapping among these grounds.

This delegation does not believe that international public policy should be included as a ground for appeal.

Absence or lack of reasoning could be covered by the ground on the failure to state the reasons.

If new substantive facts are discovered, the parties might need to return to the first-tier tribunal. Likewise, the grounds for correction and interpretation could be covered by recourses other than an appeal.

3. Time frame

Draft provision 3

An appeal shall be raised within [a short period of time to be indicated] from the date of the decision by the first-tier tribunal.

Comment:

Although this delegation is flexible, it would be preferable to opt for the longest period, in other words, 120 days from the date of the decision by the first-tier tribunal, as is the case in the ICSID context.

4. Effect of an appeal

Draft provision 4

When an appeal is raised, the first-tier tribunal may, where appropriate and so requested by a disputing party, suspend the proceedings until a decision is made by the appellate tribunal.

Comment:

We understand the reasons for not imposing an automatic suspension of the proceedings; however, there are cases where automatic suspension might be preferable, such as in the case of decisions upholding jurisdiction in order to avoid parallel proceedings.

5. Relationship with annulment, grounds of appeal and enforcement

Draft provision 5

1. An appeal shall suspend the effect of the decision of the first-tier tribunal and that decision shall not be subject to setting aside, annulment or any other review proceedings before any other fora.
2. Recognition and enforcement proceedings of a decision of the first-tier tribunal shall be stayed until the time period in draft provision 3 has elapsed and if an appeal is raised within that time period, until the appellate tribunal makes a decision or the appellate proceedings are terminated.

Comment:

We are in agreement with this provision.

6. Conduct of the appeal proceedings

Draft provision 6

1. The appellate tribunal shall ensure that the proceedings are conducted in a fair and expeditious manner and in accordance with [the rules of procedure to be specified].
2. Members of the appellate tribunal shall comply with the Code of Conduct for Arbitrators/Judges in International Investment Dispute Resolution.
3. Joint interpretations by the Contracting Parties shall be binding on the appellate tribunal if this is provided in the applicable treaty.
4. At the request of the other disputing party, the appellate tribunal may order the disputing party raising the appeal to provide security amounting to [a percentage to be specified] of the amount awarded in the decision by the first-tier tribunal.

5. The appellate tribunal may, where appropriate and so requested by a disputing party, suspend the appellate proceedings for a fixed period of time in order to give the first-tier tribunal an opportunity to continue or resume the proceedings or to take such other action as in the appellate tribunal's opinion will eliminate the grounds for appeal.

Comment:

Joint interpretations should be binding to the appellate tribunal even if this is not provided in the applicable treaty.

We propose a minor change in paragraph 1: “The appellate tribunal shall ensure that the proceedings are conducted in a fair and expeditious manner and in accordance with ~~the rules of procedure to be specified~~ the applicable procedural rules”.

In paragraph 4, we are not convinced about the inclusion of a having a security amounting a percentage of the amount awarded, instead of leaving the tribunal with the freedom of determining such amount, depending on the case.

We would like to have more clarity about the phrase “...as in the appellate tribunal’s opinion will eliminate the grounds for appeal” in paragraph 5.

7. Decisions by the appellate tribunal

Draft provision 7

Types of decisions

1. The appellate tribunal may uphold, modify, or reverse the decision of a first-tier tribunal.
2. Where the facts established by the first-tier tribunal are insufficient for the appellate tribunal to render a decision in accordance with paragraph 1, it may remand the dispute to the first-tier tribunal. If the first-tier tribunal is no longer in a position to consider the dispute, or where it would be inappropriate for the first-tier tribunal to consider the dispute, upon the request of either disputing party, a new tribunal shall be constituted in accordance with the same applicable rules.

Form and contents of the decision

3. The decision by the appellate tribunal shall be in writing and state the reasons upon which it is based.
4. When the appellate tribunal modifies or reverses any part of the decision of the first-tier tribunal, it shall indicate as precisely as possible how the relevant findings or conclusions of the first-tier tribunal are modified or reversed. When the appellate tribunal remands a decision to the first-tier tribunal, it may provide, where appropriate, detailed instructions.

Time frames for the decisions and possible extension

5. A decision by the appellate tribunal shall be made within [a period of time to be specified] from the date of the [appeal][constitution of the appellate tribunal].

6. When the appellate tribunal considers that it cannot issue its decision within the time period referred to in paragraph 5, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate period of time within which it will issue its decision, which shall not exceed [a period of time to be specified].

Effect on the decision of the first-tier tribunal

7. A decision of the first-tier tribunal upheld by the appellate tribunal shall be final and binding on the disputing parties.

8. A decision of the first-tier tribunal modified or reversed by the appellate tribunal shall be final and binding on the disputing parties as amended by the appellate tribunal.

Finality of the decision of the appellate tribunal

9. A decision by the appellate tribunal shall be final and binding on the parties and shall not be subject to any appeal or review.

Correction and interpretation

10. Within [30] days of the receipt of the decision by the appellate tribunal, a disputing party, with notice to the other parties, may request the appellate tribunal: (i) to correct any error in computation, any clerical or typographical errors or any errors of similar nature; or (ii) to give an interpretation of its decision.

11. If the appellate tribunal considers that the request is justified, it shall make the correction or give the interpretation within [30] days of the receipt of the request. Such a correction or an interpretation shall form part of the decision.

Comment:

We are in favour of having an appellate tribunal being able to modify the decision of a first-tier tribunal. This could avoid costs by not needing to remand the case to the first-tribunal or to constitute a new tribunal to decide the case, except for those cases where is not possible to render a complete decision.

We also agree with the finality of the decision of the appellate tribunal. Otherwise we risk having the whole process again as it is under the current system where the decision of the new tribunal can also be subject to annulment.

8. Recognition and Enforcement

Draft provision 8

1. Each State Party shall recognize a decision rendered by an appellate tribunal pursuant to [these draft provisions] as binding and enforce the obligations imposed by that decision within its territories as if it were a final judgment of a court in that State. A State Party with a federal constitution may enforce such a decision in or through its federal courts and may provide that such courts shall treat the decision as if it were a final judgment of the courts of a constituent state.
2. A party seeking recognition or enforcement in the territory of a State Party shall furnish a copy of the decision to a court or other authority which such State shall have designated for this purpose.
3. Execution of a decision shall be governed by the laws concerning the execution of judgments in force in the State Party in whose territory such execution is sought.
4. Nothing in [these draft provisions] shall be construed as derogating from the law in force in any State Party relating to immunity of that State Party or of any foreign State from execution.

Comment:

The Working Group may wish to consider including a paragraph regarding the recognition and enforcement of a decision in the territory of a third party, not bound by the instrument establishing the appellate tribunal. It is our understanding that a residual application of the New York Convention may apply; in other words, the country of enforcement may deny in those cases the recognition of the arbitral award under the basis of Article V of the New York Convention.