

Draft statute of a standing mechanism for the resolution of international investment disputes

Section F. The Appeals Tribunal Procedure (comparison)

Text in the draft statute (A/CN.9/WG.III/WP.239)	Text proposed by Switzerland (A/CN.9/WG.III/WP.241)
<p>Article 27 – Scope of appeal</p> <p>1. When requesting an appeal in accordance with article 19, a party may appeal an award or decision of the first-tier tribunal on its jurisdiction or on its merits, including:</p> <p style="padding-left: 20px;">An interim measure ordered by the first-tier tribunal to preserve a party’s rights.</p> <p>2. The following types of an award or decision shall not be subject to appeal:</p> <p style="padding-left: 20px;">(a) Procedural orders;</p> <p style="padding-left: 20px;">(b) Decisions on bifurcation;</p> <p style="padding-left: 20px;">(c) Decisions on challenges of arbitrators or adjudicators;</p> <p style="padding-left: 20px;">(d) [...].</p>	<p>Article 27 – Decision or awards subject to appeal</p> <p>1. Either party may appeal from a final decision or a final award rendered by the first-tier tribunal within [<i>a period of time to be specified</i>] days from the date of that decision or award.¹</p> <p>2. A final decision or a final award rendered by the first-tier tribunal which has not been appealed within the time limit indicated in the previous paragraph shall be final and binding on the disputing parties.</p>
<p>Article 28 – Conditions for appeal</p> <p>1. An appeal may be requested in accordance with article 19 only if the party expressly waives its rights to initiate annulment, set aside, recognition or enforcement proceedings with regard to the award or decision of the first-tier tribunal [during the appeal proceedings].</p> <p>2. A request for appeal in article 19 shall be made within [<i>a period of time to be specified</i>] days from the date of the award or decision.²</p>	<p><i>Delete (see article 31)</i></p>
<p>Article 29 – Grounds of appeal</p> <p>1. An appeal should be limited to:</p> <p style="padding-left: 20px;">(a) An [manifest] error in the application or interpretation of the law; or</p> <p style="padding-left: 20px;">(b) A manifest error in the appreciation of the facts, [including the appreciation of relevant domestic legislation] [and the assessment of damages].</p>	<p>Article 29 – Grounds of appeal</p> <p>A party may appeal an award or decision referred to in article 27 on the ground that:</p> <p style="padding-left: 20px;">(a) The first-tier tribunal made an error in the application or interpretation of the law[, in respect of jurisdiction, admissibility, liability or quantification of damages];</p>

¹ See A/CN.9/1195, para. 113.

² Moved to article 19, see A/CN.9/1195, para. 113.

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<p>2. Notwithstanding paragraph 1, an appeal may be raised on one or more of the following grounds:</p> <p>(a) A party to the agreement to initiate the first-tier proceeding was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it;</p> <p>(b) The first-tier tribunal was not properly constituted;</p> <p>(c) The first-tier tribunal has manifestly exceeded its powers or ruled beyond the claim/dispute submitted to it;</p> <p>(d) There was corruption on part of a member of the first-tier tribunal;</p> <p>(e) There has been a serious departure from a fundamental rule of procedure by the first-tier tribunal;</p> <p>(f) The award or decision of the first-tier tribunal decision failed to state the reasons on which it is based, unless the parties have agreed otherwise; and</p> <p>(g) [The decision by the first-tier tribunal is in conflict with international public policy];</p> <p>(h) [New or newly discovered facts;]</p> <p>(i) [Unsubstantiated award, absence or lack of reasoning; and]</p> <p>(j) [].</p>	<p>(b) The first-tier tribunal made a manifest error in the assessment of the facts, including domestic law[, in respect of jurisdiction, admissibility, liability or quantification of damages];</p> <p>(c) Any of the first-tier tribunal members lacked impartiality or independence or the first-tier tribunal was improperly appointed or constituted;</p> <p>(d) The first-tier tribunal ruled beyond the claims submitted to it;</p> <p>(e) There has been a serious departure from a fundamental rule of procedure.</p>
<p>Article 30 – Effect of an appeal on ongoing first-tier tribunal proceeding</p> <p>When the request for appeal is registered and upon the request by a party, the first-tier tribunal may suspend its proceedings until a decision is made by the Appeals Tribunal, including a decision to terminate the appeal proceedings.</p>	<p><i>Not addressed in A/CN.9/WG.III/WP.241</i></p>
<p>Article 31 – Effect of an appeal on proceedings for annulment, set aside, recognition and enforcement of the award or decision subject of appeal</p> <p>1. When the request for appeal is registered, the award or decision of the first-tier tribunal shall no longer be the subject of annulment, set aside, recognition, enforcement or any other review proceedings before any forums.</p>	<p>Article 31 – Exclusion of other remedies</p> <p>1. Where a decision or award is subject to appeal in accordance with article 18, it shall not be subject to any other remedy, including annulment, set aside or any other review before any forums other than those set out in this Statute.</p>

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<p>2. A party may request the stay of the annulment, set aside, recognition, enforcement or any other review proceedings until a decision is made by the Appeals Tribunal, including a decision to terminate the appeal proceedings.</p>	<p>2. For the avoidance of doubt, by initiating a proceeding before the first-tier tribunal, the investor is deemed to have consented to the exclusion of any such other remedies.</p> <p>3. <i>[In a two-tier system in which the first-tier tribunal is an ICSID arbitral tribunal]</i> In arbitrations governed by the ICSID Convention and which are subject to the jurisdiction of the Appeals Tribunal pursuant to article 18, Article 52 of the ICSID Convention shall not apply.</p> <p>4. <i>[In a two-tier system in which the first-tier tribunal is a non-ICSID arbitral tribunal]</i> In arbitrations that are not governed by the ICSID Convention and which are subject to the jurisdiction of the Appeals Tribunal pursuant to article 18, the seat of the arbitration shall be fixed in one of the Contracting Parties to this Statute and there shall be no recourse to any remedies against decisions or awards that would have otherwise been available under national law. The Contracting Parties undertake to enact legislation to ensure that investor-State arbitrations seated in their jurisdictions and which are subject to the jurisdiction of the Appeals Tribunals pursuant to article 18 shall not be subject to any post-award remedy under their national laws.</p>
<p>Article 32 – Conduct of the Chamber proceedings</p> <p>1. The Chamber shall conduct the proceedings in accordance with this Protocol and the rules of procedure adopted by the Conference.</p> <p>2. Article 22 shall apply mutatis mutandis to the Chamber proceedings.</p> <p>3. The Chamber may, where appropriate and so requested by a party, suspend the appeals proceedings for a fixed period of time to give the first-tier tribunal an opportunity to continue or resume the proceedings or to take such other action as in the Chamber’s opinion will eliminate the grounds for appeal.</p>	<p><i>Not addressed in A/CN.9/WG.III/WP.241</i></p>
<p>Article 33 – Decision by the Chamber</p> <p>1. Any decision of the Chamber shall be made by a majority of the members.</p> <p>2. Questions of procedure may be decided by the presiding member of the Chamber in consultation with the President of the Appeals Tribunal.</p>	<p>Article 33 Decisions by the Chamber</p> <p>1. (...)</p> <p>2. (...)</p>

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<p>3. The Chamber may uphold, modify or reverse the award or decision of the first-tier tribunal, including its findings.</p> <p>4. Where the facts established by the first-tier tribunal are insufficient for the Chamber to make a decision in accordance with paragraph 3, it may remand the dispute to the first-tier tribunal. If the first-tier tribunal is not able to consider the dispute, or where it would be inappropriate to do so, a new tribunal shall be constituted upon the request of either disputing party in accordance with the rules that were applied to the first-tier tribunal.</p> <p>5. When the Chamber modifies or reverses any part of the award or 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 Chamber remands the dispute to the first-tier tribunal, it may provide detailed instructions where appropriate.</p> <p>6. The Chamber shall make a decision within [<i>a period of time to be specified</i>] days from the date the request for appeal is registered in accordance with article 19, paragraph 3. When the Chamber is not in position to make the decision within that period of time, it shall inform the parties in writing of the reasons for the delay together indicating a fixed period of time within which it will make its decision, which shall not exceed [<i>a period of time to be specified</i>] days.</p> <p>7. The decision of the Chamber shall be in writing and shall be signed by the members of the Chamber.</p> <p>8. The decision of the Chamber shall state the reasons upon which it is based.</p> <p>9. Within [<i>a period of time to be specified</i>] days of the communication of the decision by the Chamber, a party may make a request to the Executive Director that the Chamber: (i) give an interpretation of the decision; (ii) correct any error in computation, any clerical or typographical errors or any error or omission of a similar nature; or (iii) make an additional decision as to issues presented in the proceedings but not decided by the Chamber. The Executive Director shall notify the other party and if the request is justified, the Chamber shall make an interpretation, correction or additional decision within [<i>a period of time to be specified</i>] days, which shall form part of the decision of the Chamber.</p>	<p>3. The Chamber may uphold, modify, or reverse the award or decision of the first-tier tribunal in whole or in part.</p> <p><i>Modification without remand</i></p> <p>4. If the Chamber does not uphold the award or decision, it shall in principle modify the award or decision on the basis of the facts established by the first-tier tribunal or, if the Chamber deems this useful and appropriate, through its own fact-finding.</p> <p><i>Reversal with remand to first-instance tribunal</i></p> <p>5. If the Chamber does not uphold the award or decision and is unable to modify it in accordance with paragraph 4, it shall reverse it and remand the dispute to the first-tier tribunal with instructions.</p> <p>6. In that case, the dispute shall, if possible, be remanded to the first-instance tribunal which rendered the decision or award. If one or more members of the original first-tier tribunal are no longer willing, available, or otherwise able to serve, any such member shall be replaced by a new member appointed in accordance with the rules applicable to the constitution of the first-tier tribunal.</p> <p><i>Reversal with resubmission to new tribunal</i></p> <p>7. If the Chamber determines that a remand pursuant to paragraph 5 of this article would be inappropriate, the dispute shall be resubmitted, at the request of either party, to a new first-instance tribunal constituted in accordance with the rules applicable to the constitution of the first-tier tribunal.</p> <p>8. If the Chamber reverses the award or decision on the basis of article 29, paragraph (c), the dispute shall in any event be resubmitted, at the request of either party, to a new first-instance tribunal constituted in accordance with the rules applicable to the constitution of the first-tier tribunal.</p> <p>9. (...)</p>

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<p>10. The decision of a Chamber shall be considered a decision of the Appeals Tribunal.</p> <p>11. The Executive Director shall communicate the certified copies of the decision to the parties and shall also make it available to the public.</p>	
<p>Article 34 – Effect of the decision</p> <p>1. An award or decision of the first-tier tribunal upheld by the Chamber shall be final and binding on the disputing parties.</p> <p>2. An award or decision of the first-tier tribunal modified or reversed by the Chamber shall be final and binding on the disputing parties as amended by the Chamber.</p> <p>3. An award or decision of the first-tier tribunal which was remanded by the Chamber shall have no effect. A subsequent award or decision made by the first-tier tribunal or a new tribunal in accordance with article 33, paragraphs 4 and 5 shall not be subject to appeal.</p> <p>4. After the lapse of time in article 33, paragraph 9, the decision shall be binding on the parties and final, upon which each party shall comply with the terms of the first-tier decision as upheld or amended by the Chamber without delay.</p>	<p>Article 34 – Effect of the decision</p> <p>1. An award or decision of the first-tier tribunal upheld by the Chamber shall be final and binding on the disputing parties.</p> <p>2. An award or decision of the first-tier tribunal modified by the Chamber shall be final and binding on the disputing parties as modified.</p> <p>3. An award or decision of the first-tier tribunal which was reversed in full with remand by the Chamber shall have no effect.</p> <p>4. An award or decision of the first-tier tribunal which was reversed in part with remand by the Chamber shall have no effect with respect to the part that was reversed.</p> <p>5. An award or decision made by the first-tier tribunal upon remand shall be subject to appeal on the ground that the first-tier tribunal on remand did not comply with the instructions of the Chamber and, for any new findings that were not subject to the first appeal, on all grounds under article 29.</p> <p>6. An award or decision reversed in accordance with article 33, paragraphs 7 and 8 shall have no effect. The final decision or final award rendered in the resubmission proceeding shall be subject to appeal pursuant to article 29.</p>
<p>Article 35 – Recourse against the decision</p> <p>A decision by the Appeals Tribunal shall not be subject to appeal or any other review proceedings before any forums.</p>	<p><i>Not addressed in A/CN.9/WG.III/WP.241</i></p>
<p>Article 36 – Recognition and enforcement</p> <p>1. Each Contracting Party shall recognize a decision by the Appeals Tribunal pursuant to this Protocol 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</p>	<p><i>Not addressed in A/CN.9/WG.III/WP.241</i></p>

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<p>Contracting Party. A Contracting Party with a federal constitution may choose to 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.</p> <p>2. A party seeking recognition or enforcement in the territory of a Contracting Party shall supply to a competent court or other authority, which that Contracting Party shall have designated for this purpose, a copy of the decision certified by the Executive Director in accordance with article 33, paragraph 10.</p> <p>3. For the avoidance of doubt and for the purposes of recognition and enforcement in the territory of a non-Contracting Party, a decision made by the Appeals Tribunal shall be treated as an “arbitral award” as defined in article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.</p> <p>4. Execution of a decision shall be governed by the laws concerning the execution in the Contracting Party in whose territory such execution is sought.</p>	