

Draft Working Paper on the Appellate Mechanism and Enforcement issues: Comments by the United Kingdom on the proposed investor state dispute settlement reforms

1. Further to the publication by the UNCITRAL Secretariat of a working paper on a proposed appellate mechanism and enforcement issues, the UK would like to take this opportunity to feedback on the current proposals. The UK would like to express its continued support of the ongoing ISDS reform process at Working Group III and thank the Secretariat for their work on the current working paper.
2. Without prejudice to any future position the UK government takes on the formation of an appellate mechanism, the UK would like to provide comments on the options set out in the working paper. The UK's principal focus is on ensuring efficiency, cost effectiveness and timeliness of the ISDS procedure, as well as delivering robust and transparent outcomes, and our comments reflect our commitment to these principles. The UK believes it is important to highlight where these principles may be advanced or hindered within an appellate mechanism, while recognising that there are different ways an appellate mechanism could be comprised.

Scope

3. In respect to ensuring a limited scope for appeals, the UK believes that it is important to strike a balance between having a robust appeal mechanism which brings consistency to the application of the law by tribunals, while minimising the risk of abuse of the appeals mechanism and avoiding unnecessarily lengthy and more costly proceedings in line with our key aims set out in paragraph two. It is important that the scope for appeals is clearly defined within the rules, including what constitutes an error of law or an error of fact and how the two overlap.
4. As the working paper notes, limiting the scope of appeals will also help to avoid systematic and frivolous appeals by disputing parties by having a clear set criteria and threshold for appeals, helping to reduce the length of proceedings overall.

Selection of Arbitrators

5. The UK has provided separate comments on the working paper on the selection of arbitrators. It could be sensible to apply the same principles which may be adopted for the selection of arbitrators to a first-tier tribunal to any appellate mechanism to ensure consistency between the two. As discussed in these comments, any appellate members should also be independent and impartial, and have the correct expertise and experience, while promoting diversity of arbitrators through a fair and open selection process.

Existing annulment or setting aside procedures

6. An appellate mechanism should offer an alternative to existing annulment proceedings. To ensure no undue delay in the enforcement of awards a decision to appeal should waive the right of the party to pursue annulment proceedings, either in parallel or following the outcome of an appeal. This would avoid the creation of an additional layer of process and a de-facto three-tier system, while providing a more robust and broader option for appeals not currently offered by existing annulment proceedings.

Appealable decisions

7. As the working paper notes, there needs to be a clear definition of what is appealable to ensure efficiency and discourage frivolous claims. The UK notes that there are existing procedures in place or under discussion to allow the challenge of, say, the choice of arbitrator on a tribunal or the dismissal of frivolous claims.

8. If an appellate mechanism were only to consider appeals once a final decision had been made by the original tribunal, this could ensure that arbitrators and tribunals maintain their integrity and authority without parallel appeal proceedings either pausing or interfering with their deliberations. Arbitrators can then be held accountable for their final decisions at the end of the process via an appellate mechanism. The UK thinks it is important for arbitrators to be given the trust and time to complete their tribunal process without appeals undermining that process.
9. To ensure efficiency, cost effectiveness and timely ISDS proceedings, an appellate mechanism should have a process in place to stop abuse of the mechanism. This should include guidelines for the use of the mechanism and possibly a 'deposit' for putting in an appeal.

Effect of appeal

10. With the principles in paragraph two in mind, it is important to note the suggestions made in the working paper as to the initial effect of an appeal on the original tribunal's decision. The working group should consider safeguards to avoid duplicating proceedings and conflicting decisions between the tribunal and a domestic court which could further delay any final award.
11. In a case where an appeal is made in relation to errors of law, there would be no need for a remand procedure. This would enable a final decision to be returned without the need to refer the matter back to the original tribunal. This avoids any practical challenges around reconstituting a previous tribunal and avoids an additional possibly lengthy process. In this instance, any decision reached through this appellate mechanism should be final and binding on all parties, therefore not subject to any further appeals.

Timelines, Costs and Duration

12. The introduction of an appellate mechanism would make the ISDS redress process longer and, consequently, more costly. This would go against the reform objective to reduce the cost and duration of ISDS proceedings and would further favour better resourced, likely multinational, corporations over small and medium sized businesses. This would also increase costs for UNCITRAL. As the paper notes, this potential outcome should be considered and mitigated where possible when considering the formation of an appellate mechanism.

Enforcement

13. In line with the principles in paragraph two, the enforcement of any decisions made by an appellate mechanism could be facilitated under existing mechanisms, for example ICSID or the New York Convention, and appropriate steps should be taken to ensure that any appellate mechanism is compatible with enforcement under these existing mechanisms.