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Updated Note on a Potential  
*Inter Se* Modification of the ICSID Convention

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## I. INTRODUCTION

1. The UNCITRAL Commission has entrusted its Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement. After identifying and discussing perceived concerns, Working Group III determined that reform was desirable and proceeded to consider concrete elements of investor-State dispute settlement reform. One of these elements is a mechanism to appeal awards before a standing appellate tribunal, potentially including awards rendered under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“**ICSID Convention**”). The International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) attends the sessions of Working Group III as an observer.
2. Since Working Group III was examining the possibility of creating an appellate mechanism that could include ICSID awards, the Centre undertook to explore whether appeal – which is currently precluded under the ICSID Convention, could be made available. The approach under consideration by Working Group III involved a modification of the Convention applicable only among those ICSID States that choose to participate in it, known as an “*inter se* modification”. The objective of this modification would be to permit ICSID awards to be appealed before an external permanent appellate tribunal.
3. In this context, the Centre issued a Note on a Potential *Inter Se* Modification of the ICSID Convention (“**April 2025 Note**”).<sup>1</sup> This Note (“**March 2026 Note**” or “**Note**”) provides an update following revisions made to the Draft Statute that would govern the external permanent appellate tribunal,<sup>2</sup> and considers a different approach for the potential implementation of the *inter se* modification through a dedicated treaty, rather than through the Draft Statute itself.
4. The April 2025 Note and the March 2026 Note seek to assist the ICSID States that may be considering an *inter se* modification and to call attention to certain important considerations.
5. The Centre takes no position on whether such an *inter se* modification would be legally permissible. The April 2025 Note and the March 2026 Note proceed on the basis that the modification would comply with the substantive and procedural requirements of Article 41 of the Vienna Convention on the Law of Treaties (“**VCLT**”), to the extent these or other

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<sup>1</sup> Note on a Potential *Inter Se* Modification of the ICSID Convention - The Possibility of Submitting ICSID Awards for Appeal before the Appeals Tribunal under the Draft Statute of a Standing Mechanism for the Resolution of International Investment Disputes, April 1, 2025, available [here](#).

<sup>2</sup> A key revision consisted in separating the instruments that govern the standing appellate tribunal from the standing first-instance tribunal. As a consequence, appeal is now addressed separately in the Draft statute of a permanent appellate tribunal for international investment disputes ([A/CN.9/WG.III/WP.260](#)) (“**Draft Statute**”).

sources of international law are applicable. States should assess for themselves this important legal question, including: (i) whether the modification would be compatible with the object and purpose of the ICSID Convention, given the prohibition of appeal in Article 53(1) and the self-contained nature of the ICSID Convention; (ii) whether the modification would affect the rights and obligations of the ICSID States that do not participate in it –especially any obligations that may be considered interconnected or owed to all ICSID States; and (iii) the potential consequences of a failure to comply with any applicable requirements.<sup>3</sup>

6. The Centre also does not take a view on whether an *inter se* modification would be advisable, even if it were permissible as a matter of law. This is another question for States to determine for themselves in light of their respective investment policy objectives and a careful assessment of the potential implications for the broader investor-state dispute settlement landscape.
7. Any proposals included in this Note are purely analytical and do not constitute an endorsement of any aspect of the investor-State dispute settlement reform, including the legality or advisability of modifying the ICSID Convention *inter se* to allow for the appeal of ICSID awards before an external permanent appellate tribunal. Comments on this Note may be sent to the ICSID Secretariat, at [ICSIDsecretariat@worldbank.org](mailto:ICSIDsecretariat@worldbank.org). The Centre remains open to exploring other approaches, including approaches that do not involve the *inter se* modification of the ICSID Convention.
8. This Note sets out issues to be considered by States regarding a potential *inter se* modification of the ICSID Convention (II) and proposes a draft Protocol with specific language to modify the ICSID Convention as between participating States (“Protocol”) (III).

## II. ISSUES TO BE CONSIDERED

9. The ICSID Convention does not permit the appeal of ICSID awards nor any other remedy that is not contained in the ICSID Convention.<sup>4</sup> To make ICSID awards subject to appeal, the ICSID Convention would have to be changed.
10. The ICSID Convention addresses the process of amending the Convention. Article 66(1) establishes that an amendment “shall enter into force 30 days after [...] notification to Contracting States that all Contracting States have ratified, accepted or approved the

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<sup>3</sup> See paragraphs 12-13 below.

<sup>4</sup> Article 53(1) of the ICSID Convention: “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

amendment.” This unanimity requirement for entry into force makes amending the Convention an onerous process.

11. If ICSID States wish to introduce appeal of ICSID awards, a conceivable alternative could be an *inter se* modification, *i.e.*, a modification of the ICSID Convention that applies as between the ICSID States that participate in it.

(1) The Requirements of Article 41 VCLT

12. Article 41 VCLT contains the procedural and substantive requirements of an *inter se* modification.<sup>5</sup> It allows two or more parties to a multilateral treaty to modify the treaty between themselves (*inter se*) without involving all the parties to the treaty. This is only allowed if the treaty provides for it, or if the treaty does not prohibit it. If the treaty does not provide for the possibility of modification but it is not prohibited, Article 41 VCLT further requires that the modification (i) does not affect the enjoyment of rights or the performance of obligations under the treaty by the other parties to the treaty; and (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. Unless the treaty states otherwise, the parties that intend to modify it must also notify the other parties of their intention and of the planned modification.<sup>6</sup>
13. Failure to meet the requirements of Article 41 VCLT would not automatically make a modifying agreement void or invalid, but it could lead to several consequences for the States that participate in the modification. For example, if the modification constitutes a breach of the rights of the other parties, or a failure to abide by an obligation, the modifying States may be internationally responsible for a breach of the original treaty. Or, if the modification is considered a violation of a provision essential to accomplishment of the treaty’s object and

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<sup>5</sup> According to Article 4 of the VCLT, the VCLT only applies to treaties which are concluded after its entry into force, without prejudice to the application of any of its provisions to which treaties would be subject under international law independently of the VCLT. Furthermore, not all parties to the ICSID Convention are parties to the VCLT. For one or potentially both reasons, the requirements in VCLT Article 41 apply to the extent that they constitute customary international law.

<sup>6</sup> Article 41 VCLT is copied *verbatim* below:

“1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.”

purpose, the other parties may suspend the operation of the treaty in whole or in part or terminate it under Article 60 VCLT.

14. Assuming the requirements for an *inter se* modification are met, sections (2) to (8) below address issues that States may wish to consider before finalizing the Draft Statute.

(2) Consent under the *Inter Se* Modified ICSID Convention

15. The Protocol in this Note does not alter how consent to the jurisdiction of the Centre works. Article 2(4) of the Protocol expressly notes that nothing in it shall be construed as dispensing with the requirements in Chapter II of the ICSID Convention, which is the Chapter that addresses the jurisdiction of the Centre (Articles 25 to 27). Article 2(4) of the Protocol was included for clarification purposes, as all the provisions in the Convention that are not modified would remain applicable under the modified version of the Convention.
16. Accordingly, the modified ICSID Convention would also require that the disputing parties consent in writing to submit the dispute to the jurisdiction of the Centre. As such, ICSID States would not be deemed to have consented to the jurisdiction of the Centre by the mere fact of their ratification, acceptance, or approval of the Protocol in this Note. For example, in a treaty-based scenario, the State's consent to the jurisdiction of the Centre would be contained in an investment treaty, and the investor's consent to the jurisdiction of the Centre may be provided with the filing of the request for arbitration. Because consent is obtained through a two-step process, the act of providing the second consent (that of the investor) is commonly referred to as "perfecting consent".
17. If the disputing parties perfect consent to the jurisdiction of the Centre under the modified Convention, the parties would then be able to request appeal before the Permanent Appellate Tribunal of an ICSID award, but only if they have also consented to the jurisdiction of the Permanent Appellate Tribunal. The Permanent Appellate Tribunal's jurisdiction is distinct from that of the Centre, and consent to the jurisdiction of the Permanent Appellate Tribunal is required by Article 14 of the Draft Statute.
18. Consent to both jurisdictions may be provided simultaneously, perfecting it either in the same instrument (a contract) or in a separate instrument (e.g., the filing of a request for arbitration based on an investment treaty that contains consent to both jurisdictions). States wishing to modify the ICSID Convention to allow for appeal are expected to modify their investment treaties (where consent to the jurisdiction of the Centre is already expressed) to add consent to the jurisdiction of the Permanent Appellate Tribunal. Under the contemplated architecture, consent to the jurisdiction of the Permanent Appellate Tribunal could be achieved through the MIIR,<sup>7</sup> which would provide a mechanism enabling States to modify their investment treaties to consent to the jurisdiction of the Permanent Appellate Tribunal by submitting a

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<sup>7</sup> Draft multilateral instrument on ISDS reform ([A/CN.9/WG.III/WP.246](#)) ("MIIR").

list of those treaties. If this listing leads to the modification of an investment treaty to include consent to the jurisdiction of the Permanent Appellate Tribunal, an investor that submits a request for arbitration under the modified ICSID Convention and the modified investment treaty would be perfecting consent to both jurisdictions simultaneously.

19. Conversely, consent to each jurisdiction may be given separately.<sup>8</sup> Consent to the jurisdiction of the Centre may also be given without consent to the jurisdiction of the Permanent Appellate Tribunal. For example, it is possible that some investment treaties that include consent to the jurisdiction of the Centre are not modified to add consent to the Permanent Appellate Tribunal, including because the MIIR's list mechanism does not result in a match (because a State chooses not to list a treaty, fails to list a treaty or includes a specification that does not match the notification provided by the other party or parties to the treaty). An investor that files a request for arbitration under such a treaty pursuant to the modified ICSID Convention would be perfecting consent to the jurisdiction of the Centre under the modified ICSID Convention without consenting to the jurisdiction of the Permanent Appellate Tribunal.
20. For this reason, the Protocol in this Note has been designed to allow a party to submit a request for appeal of an ICSID award rendered under the modified Convention only if the disputing parties have consented to the jurisdiction of the Permanent Appellate Tribunal. If the disputing parties have not consented to the jurisdiction of the Permanent Appellate Tribunal, the modified Convention would allow them access to annulment. The relationship between annulment and appeal is discussed in section (4) below.
21. Consequently, to be able to appeal an ICSID award before the Permanent Appellate Tribunal once the ICSID Convention has been modified *inter se*, the disputing parties would need to: (i) consent to the jurisdiction of the Centre, for the dispute to be submitted to an ICSID tribunal; and (ii) consent to the jurisdiction of the Permanent Appellate Tribunal, for the resulting ICSID award to be appealed to the Permanent Appellate Tribunal. Failure to consent to the jurisdiction of the Permanent Appellate Tribunal would enable access to annulment instead of appeal.<sup>9</sup>

### (3) The Effects of the *Inter Se* Modification

22. An *inter se* modification would displace the original provisions of the ICSID Convention with their modified versions as between modifying States, leaving the remaining provisions intact. In practical terms, this would create two versions of the ICSID Convention – the original and the modified version. Technically, however, there would be only one ICSID

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<sup>8</sup> Article 14 of the Draft Statute provides that the disputing parties may consent to the jurisdiction of the Permanent Appellate Tribunal “at any time”.

<sup>9</sup> See section (4) below.

Convention. The modified provisions would be contained in a separate treaty and would apply in place of the original version of said provisions depending on which ICSID States are involved, *i.e.*, the modified provisions would apply only as between modifying States. The reason why an *inter se* modification does not create a second ICSID Convention is that the mechanism to modify a treaty *inter se* is legally distinct from the mechanism to conclude a successive treaty relating to the same subject matter but involving only some of its parties.<sup>10</sup>

23. Having agreed to use the modified provisions in place of the original ones, it would appear that modifying States cannot apply the provisions they have agreed to displace in their relations with other modifying States. Therefore, the modified version of the ICSID Convention would apply as between the modifying States, even if there is no consent to the jurisdiction of the Permanent Appellate Tribunal. This would be the case where two States have modified the ICSID Convention *inter se*, but they have not modified an investment treaty providing for ICSID jurisdiction to which they are both parties to include consent to the jurisdiction of the Permanent Appellate Tribunal.
24. Given that the modified ICSID Convention would appear to be the only version applicable between modifying States regardless of consent to the Permanent Appellate Tribunal, Article 2(3) of the Protocol in this Note adjusts investment treaty provisions that already contain consent to the jurisdiction of the Centre, so that such consent is understood to refer to the modified ICSID Convention. Specifically, where an investment treaty includes consent to the jurisdiction of the Centre, that consent shall be deemed to refer to the Centre's jurisdiction under the modified Convention, provided that the *inter se* modification has entered into force for both: (i) the State party to the investment treaty that is a party to the dispute; and (ii) the State party to the investment treaty whose national is a party to the dispute. This applies regardless of whether the investment treaty has also been modified to include consent to the jurisdiction of the Permanent Appellate Tribunal.
25. Given that it is possible for the parties to consent to the jurisdiction of the Centre under the modified Convention without (or prior to) consenting to the jurisdiction of the Permanent Appellate Tribunal, the relationship between annulment and appeal under the modified Convention needs to be carefully considered to avoid a scenario where the parties do not have access to either remedy or a scenario where the parties have access to both.

(4) The Exclusion of Annulment upon Consent to the Jurisdiction of the Permanent Appellate Tribunal

26. Parties to the ICSID Convention would need to modify Article 53(1), which prohibits appeal, to allow appeal of ICSID awards. Once appeal is enabled, the relationship between appeal and annulment needs to be addressed.

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<sup>10</sup> These distinct mechanisms are governed by Article 41 VCLT and Article 30 VCLT respectively.

27. Assuming that all grounds for annulment are included as grounds for appeal in Article 20 of the Draft Statute,<sup>11</sup> preserving both remedies could lead to parallel or sequential annulment and appeal proceedings.<sup>12</sup>
28. The draft statute on which the April 2025 Note was based proposed to address the relationship between annulment and appeal by requiring that the party requesting appeal waive annulment and by excluding annulment upon the registration of the request for appeal.<sup>13</sup> This solution would not prevent the filing of an annulment application by the other party until the appeal request is registered. Accordingly, the April 2025 Note considered that the replacement of annulment with appeal would be a preferable solution.<sup>14</sup>
29. The current Draft Statute proposes two alternatives to address the relationship between annulment and appeal: (a) the same waiver option, now included in Article 19(A) of the Draft Statute; and (b) the exclusion of annulment upon consent to the jurisdiction of the Permanent Appellate Tribunal, included in Article 19(B) of the Draft Statute.<sup>15</sup>
30. Each option presents its own challenges:
  - a. The waiver option would require that the requesting party waives annulment as a condition to request appeal, but it would not prevent the other party from requesting annulment (at least not until an appeal request is registered).<sup>16</sup> This could lead to parallel annulment and appeal proceedings.

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<sup>11</sup> The Centre understands that Working Group III considers that the grounds for appeal currently contained in Article 20 of the Draft Statute substantively cover all grounds for annulment, even if not all grounds for annulment are reproduced *verbatim*. See Submission from the Government of Switzerland, [A/CN.9/WG.III/WP.241](#), para. 9 *ad* Article 29(a) and (b) which were then adopted in Article 20(a) and (b) of the Draft Statute (regarding the grounds for “error” and the relationship with the ground for “manifest excess of powers” in the ICSID context); Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fifty-first session, second part (New York, 7–11 April 2025), [A/CN.9/1196/Add.1](#), para. 30 (“In response to a question whether corruption on the part of a member of a first-tier tribunal was covered by subparagraph (b), it was said that such corruption would be covered by subparagraph (c)”).

<sup>12</sup> Submission from the Government of Switzerland, [A/CN.9/WG.III/WP.241](#), paras. 15-18.

<sup>13</sup> Draft statute of a standing mechanism for the resolution of international investment disputes ([A/CN.9/WG.III/WP.239](#)), Articles 28(1) and 31(1).

<sup>14</sup> See April 25 Note, paras. 8-11. See also Submission from the Government of Switzerland, [A/CN.9/WG.III/WP.241](#), paras. 15-18.

<sup>15</sup> Article 19(B) of the Draft Statute provides as follows: “Where an award or decision of the first-tier tribunal is subject to appeal in accordance with article 14, it shall not be subject to any remedy (including annulment, set aside or other review before any forums) other than those set out in this Protocol.” For an award to be “subject to appeal in accordance with article 14”, the parties would have to have consented to the jurisdiction of the Permanent Appellate Tribunal.

<sup>16</sup> See Articles 19(A) and 23(1) of the Draft Statute.

- b. The option to exclude annulment upon consent to the jurisdiction of the Permanent Appellate Tribunal would minimize the opportunity for parallel annulment and appeal proceedings, but only if consent to the jurisdiction of the Permanent Appellate Tribunal is provided before the award is rendered.<sup>17</sup> States may wish to bear in mind that the possibility exists that consent to the jurisdiction of the Permanent Appellate Tribunal could be provided after the award is rendered, as well as the possibility that the parties may disagree over whether they have consented to the jurisdiction of the Permanent Appellate Tribunal.<sup>18</sup>
  - c. The replacement of annulment with appeal would completely foreclose the possibility of parallel annulment and appeal proceedings because annulment would be removed and replaced with appeal. But if the parties fail to consent to the jurisdiction of the Permanent Appellate Tribunal, it would lead to a scenario where there would not be access to either annulment or appeal.
31. This Note proposes to adopt option (b) above, *i.e.*, the exclusion of annulment upon consent to the jurisdiction of the Permanent Appellate Tribunal. As noted in paragraph 27 above, this proposal assumes that all grounds for annulment would be preserved as grounds for appeal.
  32. This option is already contemplated in Article 19(B) of the Draft Statute. The reference to consent to the jurisdiction of the Permanent Appellate Tribunal is implied in Article 19(B) of the Draft Statute, which provides for the exclusion of annulment when the award “is subject to appeal in accordance with article 14”. For an award to be “subject to appeal in accordance with article 14”, the parties would have to have consented to the jurisdiction of the Permanent Appellate Tribunal.
  33. The benefits of this option are that it minimizes the potential for parallel annulment and appeal proceedings while retaining the availability of annulment if the parties do not consent to the jurisdiction of the Permanent Appellate Tribunal. This could happen, for example, if an investor files a request for arbitration under the modified Convention on the basis of an investment treaty that does not include consent to the jurisdiction of the Permanent Appellate Tribunal – for example, because the MIIR list mechanism does not result in a match (because a State chooses not to list a treaty, fails to list a treaty or includes a specification that does not match the notification provided by the other party or parties to the treaty). In this scenario, the modified Convention would preserve annulment as a remedy in the absence of consent to the jurisdiction of the Permanent Appellate Tribunal. If the award is not annulled, it would be enforceable under the modified Convention in modifying States.<sup>19</sup>

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<sup>17</sup> Article 14(2) of the Draft Statute does not impose a time restriction on consent to the jurisdiction of the Permanent Appellate Tribunal.

<sup>18</sup> For an elaboration on these two consent-related issues, see the commentary to Article 3(4) in the Protocol to this Note.

<sup>19</sup> For enforcement-related issues, see section (7) below.

34. The main challenge facing this option is that it does not completely eliminate the possibility of parallel annulment and appeal proceeding, though this possibility appears to be limited to the following two scenarios: delayed consent (or the possibility that the parties may consent to the Permanent Appellate Tribunal after an annulment has already been filed) and disputed consent (or the possibility that the parties may disagree over whether they have consented to the jurisdiction of the Permanent Appellate Tribunal). These scenarios are discussed in the commentary to Article 3(4) in the Protocol to this Note.

(5) The Interaction of Appeal with ICSID Post-Awards Remedies Other than Annulment

35. It is unclear whether the Draft Statute considers the interaction between appeal and ICSID post-award remedies other than annulment, *i.e.*, rectification and supplementation (Article 49(2)), interpretation (Article 50), and revision (Article 51).<sup>20</sup>
36. Each ICSID remedy is available within its respective time limit,<sup>21</sup> except that rectification and supplementation defer the time periods to request revision and annulment.<sup>22</sup> If one post-award remedy is initiated while another one is pending, the interaction between these proceedings may be addressed by suspending a proceeding until the other has concluded.
37. Articles 14(3),<sup>23</sup> 19(B),<sup>24</sup> or 23(1)<sup>25</sup> of the Draft Statute provide for various circumstances under which certain “remedies” would be excluded. It is not clear whether rectification,

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<sup>20</sup> See, for example, a reference to revision in the context of discussions on the grounds for appeal: “It was further suggested that subparagraph (h) be deleted as new or newly discovered facts could be addressed by the first-tier tribunal through revision or an additional award. In that context, it was suggested that it might be necessary to address the relationship between such proceedings and an appeal (including when a new fact arose after an appeal was raised).” Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fifty-first session, second part (New York, 7–11 April 2025) (A/CN.9/1196/Add.1), para. 29.

<sup>21</sup> The time limits of ICSID post-award remedies are as follows: rectification and supplementation (45 days from the award); interpretation (no time limit); revision (90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered); annulment (120 days after the date on which the award was rendered, except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered).

<sup>22</sup> Article 49(2) of the ICSID Convention: “... The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.”

<sup>23</sup> Article 14(3) of the Draft Statute, with emphasis added: “The Permanent Appellate Tribunal shall have exclusive jurisdiction over appeals of an award or a decision of a first-tier tribunal with regard to an international investment dispute, when both or all relevant Contracting Parties have consented in writing to the exclusion of any other remedy [, including through the mechanism provided in the MIIR].”

<sup>24</sup> Article 19(B) of the Draft Statute, with emphasis added: “Where an award or decision of the first-tier tribunal is subject to appeal in accordance with article 14, it shall not be subject to any remedy (including annulment, set aside or other review before any forums) other than those set out in this Protocol.”

<sup>25</sup> Article 23(1) of the Draft Statute, with emphasis added: “When the request for appeal is registered in accordance with article 15, paragraph 4, the award or decision of the first-tier tribunal subject of appeal shall

supplementation, interpretation or revision would qualify as “remedies” in the sense of these provisions. The Working Group has not yet fully discussed these provisions or their interaction with ICSID post-award remedies other than annulment.<sup>26</sup> The determination regarding the relationship between these post-award processes and appeal may be impacted by the Working Group’s decisions with respect to the grounds for appeal in the Draft Statute, and whether and to what extent the Permanent Appellate Tribunal is expected to review factual determinations of the first-instance tribunal, since factual determinations could also be addressed in proceedings under Articles 49-51 of the ICSID Convention.

38. Pending a decision on the above, States may wish to consider addressing interpretation and revision through a change to the Draft Statute rather than through a modification of ICSID Articles 50 and 51. The proposed change would be to add two sentences to Article 23(2) of the Draft Statute to enable or require the Permanent Appellate Tribunal to suspend the appeal proceeding until a decision has been made by the interpretation or revision tribunal: “[...] *The Chamber [shall/may] stay the appeal proceeding until a decision is made by a tribunal considering interpretation or revision of the award. Once a decision has been made by the Tribunal, the Chamber shall consider the request for appeal of the award as interpreted or revised by the tribunal.*”
39. The reason for this is that an ICSID interpretation or revision tribunal would not have jurisdiction to interpret or revise an appeal decision, so interpretation and revision would only work if (i) no appeal is requested or (ii) if appeal is requested, before the Permanent Appellate Tribunal issues its decision. Suspending the appeal proceeding would allow the Permanent Appellate Tribunal to consider the appeal of the award as interpreted or revised by the ICSID tribunal, without prejudice to the possibility to seek interpretation (and correction or supplementation) of the appeal decision itself before the Permanent Appellate Tribunal pursuant to Article 25(14) of the Draft Statute.<sup>27</sup> While this may introduce delays, a revision or interpretation of the award may obviate the need for appeal.
40. As for rectification and supplementation, this Note proposes that they are not considered “remedies” for the purpose of Articles 14(3), 19, and 23(1) of the Draft Statute given that

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not be final and binding and shall not be subject to annulment, set aside, recognition, enforcement or any other remedy.”

<sup>26</sup> For example, Working Group III agreed to postpone the discussion on Article 23 and to further consider Article 19 of the Draft Statute (previously Articles 28 and 31). See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fifty-first session, second part (New York, 7–11 April 2025) (A/CN.9/1196/Add.1), paras. 25, 42.

<sup>27</sup> See Article 25(14) of the Draft Statute: “Within [a period of time to be specified] days of the communication of the decision by the Chamber, a disputing party may make a request the Registrar 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 Registrar shall notify the other disputing party and if the request is justified, the Chamber shall make an interpretation, correction or additional decision within [a period of time to be specified] days, which shall form part of the decision of the Chamber.”

they are typically brief proceedings that serve an important purpose and they do not appear to be included as grounds for appeal. This would be consistent with the fact that the ICSID Convention considers rectification and supplementation decisions part of the award and that the deadline to request appeal in the Draft Statute runs from the date of the award.<sup>28</sup> This Note proposes that clarification be provided (either in the *inter se* modification<sup>29</sup> or, preferably, in the Draft Statute<sup>30</sup>) specifying that the deadline to request appeal runs from the date of the award or, where applicable, from the date of any rectification or supplementary decision.

#### (6) Appeal of Decisions vs Appeal of Awards

41. Under the ICSID Convention, only the final award is subject to post-award remedies, and that award incorporates all prior decisions in which the tribunal disposed of questions before it. Allowing such decisions to be appealed before the final award is rendered<sup>31</sup> would increase the possibilities of appeal, risk impairing the efficiency of the Permanent Appellate Tribunal, and increase costs.<sup>32</sup> It is therefore recommended to limit appeals to the final award or, alternatively, to include an ICSID-specific carve-out in light of the Convention’s particular features.<sup>33</sup>

#### (7) Enforcement Issues

42. The Draft Statute contains its own enforcement provision in Article 28 regarding “a decision by the Permanent Appellate Tribunal”, which largely mirrors ICSID Article 54 regarding “an award rendered pursuant to this Convention”. It thus appears that Article 28 of the Draft Statute governs the enforcement of *appeal decisions*, and that Article 54 of the ICSID Convention governs the enforcement of *awards* rendered pursuant to the modified Convention (for modifying ICSID States) or pursuant to the unmodified Convention (for non-modifying ICSID States).<sup>34</sup>

- (i) *Enforcement under the ICSID Convention or the modified ICSID Convention:* ICSID Convention Article 54 limits the enforcement obligations of ICSID States to

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<sup>28</sup> See Article 49(2) of the ICSID Convention and Article 15(3) of the Draft Statute.

<sup>29</sup> See Article 3(4) of the Protocol to this Note containing the proposed addition of Article 52 Bis.

<sup>30</sup> See the commentary to Article 3(4) of the Protocol to this Note proposing to add a sentence to Article 15(3) of the Draft Statute.

<sup>31</sup> See Article 18 of the Draft Statute.

<sup>32</sup> See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fifty-first session, second part (New York, 7–11 April 2025) (A/CN.9/1196/Add.1), paras. 14-15.

<sup>33</sup> See April 2025 Note, paragraphs 17-22.

<sup>34</sup> This Note refers to the modified and the unmodified/non-modified/original versions of the Convention for simplicity. In technical terms, there would only be one ICSID Convention, which modified provisions would be contained in a separate treaty and would apply in place of the original version of said provisions as between modifying States. See paragraph 22 above.

awards “rendered pursuant to this Convention.” The phrase “this Convention” is likely to be interpreted to refer to the unmodified Convention<sup>35</sup> by ICSID States that are not parties to the *inter se* modification. Consequently, awards rendered under the modified Convention would appear to be enforceable only in the ICSID States that participate in the modification, irrespective of whether the award has been appealed.<sup>36</sup> This is without prejudice to their enforceability under other instruments in non-modifying ICSID States, such as the New York Convention.

- (ii) *ICSID awards that are appealed*: Pursuant to Article 25(3) of the Draft Statute, the Permanent Appellate Tribunal can uphold, modify or reverse the award of the first-tier tribunal in whole or in part.
  - a. An award that is upheld or modified will be considered “as rendered by the Permanent Appellate Tribunal” and it would be enforceable through the Draft Statute.<sup>37</sup>
  - b. An award, or a portion of an award, that is reversed will have no effect.<sup>38</sup> If an award is reversed only in part, the part that is not reversed will be enforceable

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<sup>35</sup> Technically, the ICSID Convention without modified provisions – see paragraph 22 above.

<sup>36</sup> A second view holds that ICSID States that do not participate in the *inter se* modification would nonetheless remain under an obligation to enforce awards rendered under the modified ICSID Convention, especially in circumstances where (i) the award is not appealed, (ii) the award is upheld on appeal without modification, or (iii) a new award is issued on remand or resubmission and is neither appealed nor modified on appeal. Proponents argue there is no principled basis to treat awards subject to appeal differently than awards subject to annulment, especially when the content of the award is identical to what it would have been had the award been subject to annulment instead of appeal. This approach prioritizes the characteristics and content of an award over the instrument under which it is rendered. For an article that favors this view while presenting both positions, see Michele Potestà, *An Appellate Mechanism for ICSID Awards and Modification of the ICSID Convention under Article 41 of the VCLT in The Vienna Convention on the Law of Treaties: in International Arbitration: History, Evolution, and Future* (Esmé Shirlow and Kiran Nasir Gore (eds), Kluwer, 2022), pages 15-18.

<sup>37</sup> See Article 28(1) and (2)(a) and (b) of the Draft Statute, with emphasis added:

“1. Each Contracting Party shall recognize a decision by the Permanent Appellate Tribunal 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 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.

2. For the purposes of paragraph 1:

(a) An award or decision of the first-tier tribunal upheld by the Permanent Appellate Tribunal shall be considered as rendered by the Permanent Appellate Tribunal;

(b) An award or decision of the first-tier tribunal modified by the Permanent Appellate Tribunal shall be considered as rendered by the Permanent Appellate Tribunal as modified;”

<sup>38</sup> See Article 26(3) to (5) of the Draft Statute:

“[...]

via the Draft Statute once the remand or resubmission tribunal has decided on the remanded or resubmitted portion (which itself would not be enforceable under the Draft Statute).<sup>39</sup>

- (iii) *ICSID awards that are not appealed*: An award rendered under the modified ICSID Convention that is not appealed would be enforceable under the modified ICSID Convention in the ICSID States that participate in the modification.
- (iv) *ICSID awards that are appealed but where the appeal proceeding is discontinued*: This situation is not contemplated in the Draft Statute. These awards could be enforceable under the modified ICSID Convention in the ICSID States that participate in the modification as a discontinued appeal will not have resulted in an appeal decision that is enforceable under the Draft Statute.
- (v) *ICSID awards rendered by an ICSID tribunal on remand or resubmission*: These awards are considered equivalent to awards rendered for the first time by an ICSID tribunal under the modified ICSID Convention. If they are not appealed, they would be enforceable under the modified ICSID Convention in the ICSID States that participate in the modification (*see* subparagraph iii). If they are appealed, subparagraphs (ii) and (iv) would apply.

#### (8) Implementation of the *Inter Se* Modification

43. As noted in the April 2025 Note, an *inter se* modification could be implemented in a dedicated treaty or in the Draft Statute itself. This Note proposes a dedicated treaty. The treaty could take the form of a protocol to the MIIR, alongside the Draft Statute and other

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3. An award or decision of the first-tier tribunal which was reversed in whole with remand by the Permanent Appellate Tribunal in accordance with article 25, paragraphs 5, shall have no effect.

4. Any part of an award or decision of the first-tier tribunal which was reversed with remand by the Permanent Appellate Tribunal in accordance with article 25, paragraphs 5, shall have no effect. The remaining part of the award or decision [which was not reversed] shall be binding on the disputing parties.

[...]

5. An award or decision of the first-tier tribunal reversed by the Permanent Appellate Tribunal in accordance with article 25, paragraphs 7 and 8, shall have no effect.”

<sup>39</sup> See Article 28(1) and (2)(c) of the Draft Statute, with emphasis added:

“1. Each Contracting Party shall recognize a decision by the Permanent Appellate Tribunal 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 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.

2. For the purposes of paragraph 1:

(c) When an award or decision of the first-tier tribunal is reversed in part with remand by the Permanent Appellate Tribunal in accordance with article 25, paragraphs 5, the remaining part the award or decision shall be considered as rendered by the Permanent Appellate Tribunal. That part of the award or decision may only be enforced after the first-tier tribunal makes an award or decision upon remand.”

protocols that make up the investor-State dispute settlement reform led by Working Group III.

44. The dedicated treaty approach appears preferable because a dedicated treaty (i) would only address the *inter se* modification, (ii) would only be ratified, accepted or approved by the ICSID States that wish to participate in the *inter se* modification, and (iii) would gather all the relevant changes to the ICSID Convention in a single, separate instrument. The proposed wording is subject to further revisions as needed, depending on the decisions reached by the Working Group and any changes to the Draft Statute.

### III. LANGUAGE FOR A PROTOCOL CONTAINING A POTENTIAL *INTER SE* MODIFICATION OF THE ICSID CONVENTION

Section III sets out the proposed language for an *inter se* modification of the ICSID Convention.

This proposal assumes that the modification satisfies all applicable requirements of international law and is considered advisable – an assessment that ICSID States are encouraged to undertake.

This Protocol would constitute a treaty. As such, it includes introductory (“Preamble”, “Definitions”) and closing provisions (“Final Clauses”), in addition to the language that would modify the ICSID Convention *inter se* (Articles 2 and 3).

Although its purpose would be to modify the ICSID Convention *inter se*, this treaty would form part of the investor-State dispute settlement reform pursued by Working Group III and take the form of a protocol attached to the MIIR.

#### **Preamble**

The parties to this Protocol,

Being parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,

Being parties to the [insert full name of the Statute],

Desiring to permit appeal of awards [and qualifying decisions] rendered pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other

States, as modified, before the Permanent Appellate Tribunal pursuant to the [insert full name of the Statute],

Recognizing that all the grounds for annulment being included as grounds for appeal, the remedy of annulment is not needed when the parties to the dispute consent to submit the award for appeal to the jurisdiction of the Permanent Appellate Tribunal,

**Have agreed** as follows:

Commentary:

The Preamble takes note that the Parties to the Protocol are also parties to the ICSID Convention and parties to the Statute.

The Preamble addresses the purpose of the Protocol, which is to allow awards rendered under the ICSID Convention, as modified, to be appealed before the Permanent Appellate Tribunal.

Finally, the Preamble acknowledges that, since all the grounds for annulment are covered as grounds for appeal, annulment is only needed when the disputing parties do not consent to the jurisdiction of the Permanent Appellate Tribunal. This acknowledgement is based on the assumption that the grounds for appeal in Article 20 of the Statute substantively would cover all grounds for annulment, even if the latter are not reproduced *verbatim*.

## Chapter I: Definitions

### Article 1

“ICSID Convention” means the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, in force since October 14, 1966.

“Centre” means the International Centre for Settlement of Investment Disputes, established pursuant to the ICSID Convention.

“*Inter Se* Modified ICSID Convention” means the ICSID Convention as modified by this Protocol.

“Contracting States” means States that are parties to the ICSID Convention.

“Protocol Parties” means Contracting States that are parties to this Protocol.

“Statute” means [insert full name of the Statute].

“Permanent Appellate Tribunal” means the appellate tribunal established under the Statute.

Commentary:

Chapter I contains the definitions used in the Protocol. To avoid confusion, it uses the same term used in the ICSID Convention to refer to the States that are parties to the ICSID Convention (“Contracting States”) and a different term to refer to the subsection of those States that are also parties to this Protocol (“Protocol Parties”).

Although the references to “this Convention” may appear confusing once there are two versions of the ICSID Convention in force (or rather, one ICSID Convention which modified provisions are contained in this Protocol and apply only as between Protocol Parties), there is no need to define or further specify these references. When the *Inter Se* Modified ICSID Convention applies, then “this Convention” refers to the *Inter Se* Modified ICSID Convention (regardless of whether the provision where “this Convention” appears has been modified itself), and when the ICSID Convention, without modification, applies, then “this Convention” refers to the ICSID Convention, without modification. For example, Article 54 is a provision that will not be modified itself. Therefore, the reference to “this Convention” contained in Article 54 will refer to the ICSID Convention, without modification, when it applies (*i.e.*, for a Contracting State that is not a Protocol Party) and it will refer to the *Inter Se* Modified ICSID Convention whenever the *Inter Se* Modified ICSID Convention applies (*i.e.*, as between Protocol Parties).

## Chapter II: Scope of Application

### Article 2

- (1) This Protocol modifies the ICSID Convention as between Protocol Parties.
- (2) This Protocol shall not affect the rights and obligations under the ICSID Convention of any Protocol Party or of any of its constituent subdivisions or agencies, or of any national of such Protocol Party arising out of consent to the jurisdiction of the Centre given before the date of entry into force of this Protocol.
- (3) Consent to jurisdiction of the Centre included in an investment treaty shall be considered consent to the jurisdiction of the Centre pursuant to the *Inter Se* Modified ICSID Convention, provided that this Protocol has entered into force for the State party to the investment treaty that is a party to the dispute and the State party to the investment treaty whose national is a party to the dispute.

- (4) Nothing in this Protocol shall be construed as dispensing with the requirements in Chapter II of the ICSID Convention.

Commentary:

Paragraph (1) addresses the modification of the ICSID Convention. It provides that the Protocol modifies the ICSID Convention as between Protocol Parties. To become a Protocol Party, Article 5 requires that Contracting States have ratified the Statute. Therefore, to modify the ICSID Convention *inter se*, Contracting States will need to become parties to both the Statute and this Protocol.

Paragraph (2) contains a rule of temporal application that mirrors ICSID Article 66(2). This non-retroactivity provision protects consent to the jurisdiction of the Centre given before the date of entry into force of this Protocol. Pursuant to this provision, consent that was already perfected by the disputing parties under the ICSID Convention, without modification, would not be affected by the *inter se* modification contained in this Protocol.

Paragraph (3) addresses a modification of investment treaties. The term “investment treaty” is used to refer to any international treaty that includes investor-State dispute settlement provisions. The purpose of this modification of investment treaties is to adjust consent already given to ICSID jurisdiction to consent to ICSID jurisdiction pursuant to the *Inter Se* Modified ICSID Convention once the Protocol has entered into force for the States concerned. While one could argue that a reference to the ICSID Convention in an investment treaty implicitly refers to whichever version of the Convention applies as between the relevant States, expressly modifying the treaty to that effect appears to be the more prudent and legally unambiguous approach.

Paragraph (4) clarifies that Chapter II of the ICSID Convention remains applicable. It is included for the avoidance of doubt, as all the provisions of the ICSID Convention that are not modified continue to apply as between modifying States.

### **Chapter III: Modifications to the ICSID Convention**

#### **Article 3**

As between the Protocol Parties:

- (1) Article 44 is modified to read:

“Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question. **The Tribunal shall apply any relevant provisions of the Statute and its rules of procedure.**”

Commentary:

The purpose of this modification is to acknowledge the impact of appeal on an ICSID tribunal. For example, the dispute may be remanded with instructions (Article 25(5) of the Statute) and the ensuing [decision or] award may be appealed for failure to follow those instructions (Article 26(6) of the Statute).

Many provisions in the Statute (or in its procedural rules) will not be relevant to the arbitration proceeding, like the provisions on establishment and governance of the Permanent Appellate Tribunal. Therefore, the modification only requires that the Tribunal apply the relevant provisions. An example of a relevant provision would be one that governs the effect of an appeal on an ongoing arbitration proceeding, assuming that there is no carve-out on the appealability of decisions for ICSID cases.

(2) The heading of Section 5 of Chapter IV is modified to read:

“Interpretation, Revision and Annulment **or Appeal** of the Award”.

Commentary:

This modification adds appeal to the list of post-award remedies in the title of Section 5 of Chapter IV. The reference to appeal is preceded by “or” instead of “and” because annulment and appeal would be mutually exclusive remedies, *i.e.*, consent to the jurisdiction of the Permanent Appellate Tribunal would bar access to annulment (see the commentary to Articles 52 and 52 Bis).

Annulment and appeal are structured as mutually exclusive in the understanding that the grounds for appeal in Article 20 of the Statute substantively would cover all the grounds for annulment, even if the latter are not reproduced *verbatim*.

The exclusion of annulment upon consent to appeal mirrors the “automatic exclusion of other remedies” in Article 19(B) of the Statute, which provides as follows: “Where an

award or decision of the first-tier tribunal is subject to appeal in accordance with article 14, it shall not be subject to any remedy (including annulment, set aside or other review before any forums) other than those set out in this Protocol.” The reference to consent to the jurisdiction of the Permanent Appellate Tribunal is implied in Article 19(B), as the parties would have to have consented to the jurisdiction of the Permanent Appellate Tribunal for an award to be “subject to appeal in accordance with article 14”. The alternative in 19(B) appears preferable to the alternative in 19(A), as the latter would require a waiver of annulment by the party requesting appeal and would not prevent the filing of an annulment by the other party until an appeal is registered.

(3) Article 52 is modified to read:

**“(1) If the parties have not consented to submit the award [and any qualifying decision] for appeal to the jurisdiction of the Permanent Appellate Tribunal, either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:**

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member

of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

Commentary:

The modification of Article 52 is discussed together with the addition of Article 52 Bis below.

(4) Article 52 Bis is added:

**“(1) If the parties have consented to submit the award [and any qualifying decision] for appeal to the jurisdiction of the Permanent Appellate Tribunal, either party may request appeal of the award [or of any qualifying decision] before the Permanent Appellate Tribunal pursuant to the Statute.**

**(2) The period of time to request appeal of the award shall run from the date of the award or any supplementary decision or rectification of the award made pursuant to Article 49(2) of this Convention.**

**(3) If an award [or a qualifying decision] is reversed in full or in part by the Permanent Appellate Tribunal, the dispute shall, in accordance with the Statute, be remanded to the Tribunal which rendered the original award [or qualifying decision] or resubmitted to a new Tribunal.**

Commentary:

Mutually exclusive remedies: Articles 52 and 52 Bis provide for annulment and appeal as mutually exclusive remedies. The application of each remedy would depend on whether the disputing parties have consented to the jurisdiction of the Permanent Appellate Tribunal. Accordingly, Article 52 Bis allows a party to file for appeal if the parties have consented to the jurisdiction of the Permanent Appellate Tribunal, and Article 52 allows access to annulment if they have not.

The exclusion of annulment upon consent to the jurisdiction of the Permanent Appellate Tribunal is consistent with Article 19(B) of the Statute, which provides as follows: “Where an award or decision of the first-tier tribunal is subject to appeal in accordance with article 14, it shall not be subject to any remedy (including annulment, set aside or other review before any forums) other than those set out in this Protocol.” For an award to be “subject to appeal in accordance with article 14”, the parties would have to have consented to the jurisdiction of the Permanent Appellate Tribunal.

Delayed Consent to the Permanent Appellate Tribunal: Disputing parties are encouraged to consent to the jurisdiction of the Permanent Appellate Tribunal when arbitration proceedings are instituted. Typically, that would be the case when an investor files a request for arbitration under an investment treaty that has been modified to include consent to the Permanent Appellate Tribunal.

However, the jurisdiction of the Centre and the jurisdiction of the Permanent Appellate Tribunal are separate jurisdictions, and Article 14(2) of the Statute provides that consent of the disputing parties to the jurisdiction of the Permanent Appellate Tribunal may be provided “at any time”. This means that consent to each jurisdiction could be provided at different times. For example, the parties could consent to ICSID jurisdiction under the *Inter Se* Modified ICSID Convention in a contract and later conclude an agreement to consent to the jurisdiction of the Permanent Appellate Tribunal. If consent to the Permanent Appellate Tribunal is given after the ICSID award has already been rendered under the modified Convention, this could lead to parallel annulment and appeal proceedings. States may therefore wish to consider whether the Statute should specify that the parties must consent to the jurisdiction of the Permanent Appellate Tribunal when arbitration proceedings are instituted.

Disputed consent to the Permanent Appellate Tribunal: It is also possible that the disputing parties may disagree over whether they have consented to the jurisdiction of the Permanent Appellate Tribunal. For example, a dispute could arise as to whether the investment treaty had been modified when the investor perfected consent to ICSID jurisdiction in light of some discrepancy between the list notifications provided pursuant to the MIIR. In this scenario, the party that considers that there is no consent to the jurisdiction of the Permanent Appellate Tribunal could file for annulment. If the other party files for appeal, this could lead to conflicting decisions on the issue of consent and, as a result, potentially a decision that annuls the award (by the annulment committee) as well as a decision that upholds the award (by the Permanent Appellate Tribunal).

Appeal procedure: Article 52 Bis addresses appeal. For efficiency, paragraph (1) refers to the Statute rather than replicating in the *Inter Se* Modified ICSID Convention the wording of the appeal mechanism contained in the Statute.

The bracketed references to “qualifying decision” acknowledge the possibility of limiting the scope of appeal to the award only, at least in the case of an award rendered under the *Inter Se* Modified ICSID Convention, to increase the efficiency of the Permanent Appellate Tribunal, reduce costs and remain in line with the conceptual approach taken in the ICSID Convention. If a carve-out is considered for the *Inter Se* Modified ICSID Convention, the following sentence could be added to Article 18(1) of the Statute: “[...] *In the case of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, as modified, an appeal may be requested only with regard to the award.*”

Paragraph (2) mirrors the impact on the deadline for appeal that rectification and supplementation decisions have on the deadlines for revision and annulment pursuant to ICSID Article 49(2). The deferral of the deadline to request appeal contained in paragraph (2) is the logical consequence of Article 15(3) of the Statute providing that the deadline to request appeal shall run from the date of the award and ICSID Article 49(2) providing that rectification and supplementary decisions form part of the award. For the avoidance of doubt, a clarifying sentence could be added to Article 15(3) of the Statute, along the following lines: “[...] *In the case of an award rendered pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, as modified, the 120 days shall run from the date of the award or any supplementary decision or rectification of the award made pursuant to Article 49(2) of said Convention.*” If this sentence is included in the Statute, paragraph (2) would be eliminated.

Paragraph (3) confirms that the dispute shall be remanded or resubmitted, as appropriate, in accordance with the Statute, further to the reversal of the award [or decision] by the Permanent Appellate Tribunal.

(5) Article 53 is modified to read:

“(1) The award shall be binding on the parties and shall not be subject to any appeal, **other than as provided in Article 52 Bis**, or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

**(2) For the purposes of this Section:**

**(a) “Award” shall include any decision annulling the award pursuant to Article 52 and, subject to subparagraph (b), [any decision interpreting or revising such award pursuant to Articles 50 or 51 and] any award rendered upon remand or resubmission following a decision by the Permanent Appellate Tribunal reversing the award in full or in part;**

**(b) Any award that is submitted for appeal shall not constitute an “award” from the registration of the request for appeal, unless the appeal proceeding is discontinued.”**

Commentary:

This modification addresses the prohibition of appeal in Article 53 and clarifies the meaning of “award” for the purpose of its final and binding nature and obligations of recognition and enforcement under the *Inter Se* Modified ICSID Convention.

Paragraph (1) continues to prohibit appeal, except for appeal pursuant to the Statute, as provided for in Article 52 Bis of the *Inter Se* Modified ICSID Convention. Any form of appeal before any other tribunal or court would remain expressly prohibited.

Paragraph (2) affords clarity as to what is included and what is excluded under the term “award” for the purposes of Section 6 of Chapter IV of the *Inter Se* Modified ICSID Convention, titled “Recognition and Enforcement of the Award”.

Paragraph (2)(a) provides that decisions interpreting, revising or annulling awards are to be considered “awards”. This clarification already exists in the original version of Article

53. The modified version separates decisions annulling the award (which are not subject to the restriction in paragraph (2)(b)) from decisions revising or interpreting the award (which are subject to the restriction in paragraph (2)(b)). This difference is due to the fact that the relationship between annulment and appeal is already governed by Articles 52 and 52 Bis, such that annulment need not be subject to the restriction in paragraph (2)(b). The brackets covering interpretation and revision signal that these remedies and their interaction with appeal are yet to be fully addressed by Working Group III.

The list in paragraph (2)(a) also includes “any award rendered upon remand or resubmission following a decision by the Permanent Appellate Tribunal to reverse the award in full or in part.” This clarifies that awards that result from remand or resubmission are enforceable in Protocol Parties under the *Inter Se* Modified ICSID Convention even if the dispute was only remanded or resubmitted in part. The part that was not remanded or resubmitted “shall be considered as rendered by the Permanent Appellate Tribunal” and would be enforceable after the new award is rendered pursuant to Article 28(1) and (2)(c) of the Statute.

The list in paragraph (2)(a) is not exhaustive and would also include, for example, an award that is not submitted to any post-award remedy.

With the exception of annulment decisions, the list in paragraph (2)(a) is subject to the restriction in paragraph (2)(b). This restriction is exhaustive. In essence, the restriction means that, once appealed, no award would be enforceable under the *Inter Se* Modified ICSID Convention (unless the appeal is discontinued). Instead, the appeal decision would be enforceable under the Statute.

Paragraph (2)(b) excludes awards that are appealed from the moment that appeal is registered. This is derived from Article 23(1) of the Statute, which provides that the award “shall not be final and binding and shall not be subject to annulment, set aside, recognition, enforcement or any other remedy” upon the registration of appeal. Paragraph (2)(b) also provides for a discontinuance exception, which would allow the award to retain its final and binding nature and be subject to recognition and enforcement in Protocol Parties under the *Inter Se* Modified ICSID Convention in the event that the appeal proceedings were discontinued. This exception could be mirrored in Article 23(1) of the Statute as follows: “When the request for appeal is registered in accordance with article 15, paragraph 4, *and unless the appellate proceedings are discontinued*, the award or decision of the first-tier tribunal subject of appeal shall not be final and binding and shall not be subject to annulment, set aside, recognition, enforcement or any other remedy.”

The combined reading of subparagraph (2)(a) and (b) is consistent with the Statute:

- (i) Awards would not be final and binding or subject to recognition or enforcement under the modified Convention from the moment that appeal is registered. If

modified or upheld on appeal, they would be considered decisions of the Permanent Appellate Tribunal, enforceable under Article 28(1) and (2)(a)(b) of the Statute;

- (ii) Reversed awards (or the reversed part of an award) would have no effect (Article 26(5) of the Statute);
- (iii) Awards that are appealed but where the appeal is discontinued (or not registered), awards that are not appealed, and awards that are rendered on remand or resubmission and are not themselves appealed, would all be enforceable in the Protocol Parties under the *Inter Se* Modified ICSID Convention.

### Chapter III: Final Clauses

#### Commentary:

The Final Clauses mirror those in the Statute, except where changes appeared appropriate in light of the ICSID Convention.

#### Article 4

- (1) The [to be identified] is designated as the depositary of this Protocol.
- (2) Instruments of ratification, acceptance or approval of this Protocol and of amendments thereto shall be deposited with the depositary of this Protocol. The depositary of this Protocol shall transmit certified copies of this Protocol and of any amendments to the depositary of the ICSID Convention.
- (3) The depositary of this Protocol shall register this Protocol with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.
- (4) The depositary of this Protocol shall promptly notify the depositary of the ICSID Convention of the following:
  - (a) signatures in accordance with [Article];

- (b) deposits of instruments of ratification, acceptance and approval in accordance with [Article];
- (c) the date on which this Protocol enters into force in accordance with [Article];
- (d) any adopted amendment of this Protocol as well as the date on which any such amendment enters into force in accordance with [Article]; and
- (e) any notification of withdrawal as well as the date on which the modification takes effect in accordance with [Article].

Commentary:

Article 4 addresses the depositary of this Protocol. Paragraphs (2) and (4) include obligations of transmittal and notification by the depositary of this Protocol to the depositary of the ICSID Convention.

As this Protocol would be incorporated as a Protocol to the MIIR, it is understood that it would have the same depositary as all the other protocols to the MIIR.

## Article 5

- (1) This Protocol is open for signature by the Contracting States that are parties to the Statute.
- (2) This Protocol is subject to ratification, acceptance or approval by its signatories.
- (3) Instruments of ratification, acceptance or approval are to be deposited with the depositary of this Protocol.

Commentary:

Article 5 limits the States that may become parties to this Protocol to the States that are parties to both the ICSID Convention and the Statute.

This provision also governs the means of expressing consent to be bound by this Protocol.

## Article 6

This Protocol shall enter into force six months after the date of deposit of the [number to be determined] instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Commentary:

Article 6 governs entry into force of the Protocol itself, as well as with respect to each State that subsequently deposits its instrument of ratification, acceptance or approval.

### Article 7

- (1) Any Protocol Party may propose an amendment to this Protocol. The proposal shall be submitted to the depositary, which shall promptly communicate it to all Protocol Parties. The Protocol Parties may adopt the amendment by a majority of two-thirds. Once adopted, the amendment shall be communicated to the depositary of this Protocol.
- (2) The depositary of this Protocol shall submit the adopted amendment to all Protocol Parties for ratification, acceptance or approval. The adopted amendment shall enter into force 30 days after the date of deposit of the instrument of ratification, acceptance or approval by all Protocol Parties.
- (3) No *inter se* modifications may be made to this Protocol.

Commentary:

Article 7 addresses amendment and modification. Paragraphs (1) and (2) govern the amendment procedure, which would require unanimity.

Paragraph (3) prohibits the *inter se* modification of this Protocol. Given that the purpose of this Protocol is to implement a modification, it may be advisable to preclude modifications of the modification.

### Article 8

- (1) Any Protocol Party may at any time withdraw from this Protocol by means of a formal notification addressed to the depositary of this Protocol. The depositary of this Protocol shall inform the Protocol Parties promptly. The withdrawal shall take effect [a period of time to be specified] days after the notification is received by the depositary of this Protocol.

- (2) A notification by a Protocol Party pursuant to paragraph (1) shall not affect the rights or obligations under this Protocol of that Protocol Party or of any of its constituent subdivisions or agencies or of any national of that Protocol Party arising out of consent to the jurisdiction of the Centre given by one of them before such notification was received by the depositary.

Commentary:

Article 8 addresses withdrawal from this Protocol by any of its parties. Paragraph (1) governs the procedure for withdrawal and the moment it takes effect.

Paragraph (2) protects consent to the jurisdiction of the Centre that was perfected by the disputing parties under the *Inter Se* Modified ICSID Convention before withdrawal was notified.

### Article 9

Any dispute arising between Protocol Parties concerning the interpretation or application of this Protocol which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

Commentary:

Article 9 addresses disputes between the parties to this Protocol. It mirrors the wording of the equivalent provision in the ICSID Convention, which is Article 64.

### Article 10

Each Protocol Party shall take such legislative or other measures as may be necessary for making the provisions of the Protocol effective in its territories. These measures shall not affect the effectiveness in its territories of the ICSID Convention, without modification, where applicable.

Commentary:

The ICSID Convention and the Protocol would be concurrently in force. Therefore, application of the ICSID Convention or of the *Inter Se* Modified ICSID Convention would depend on the States involved.

Article 10 requires that States ensure that the *Inter Se* Modified ICSID Convention is effective in their territories, where applicable, without disturbing the effectiveness of the ICSID Convention, without modification, where applicable. For example, domestic provisions will include provisions on recognition and enforcement of awards rendered under the ICSID Convention, without modification, that should continue to apply.