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## 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

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## I. INTRODUCTION

1. The International Centre for Settlement of Investment Disputes (“**ICSID**”) has been participating in Working Group III as an observer since 2017.<sup>1</sup> Currently, 55 of the 158 ICSID Contracting States are UNCITRAL Member States and another 31 ICSID Contracting States have observer status. ICSID wishes to share this Note with the Working Group in the context of the discussions on the Draft Statute of the Standing Mechanism for the Resolution of International Investment Disputes (“**Draft Statute**”)<sup>2</sup> and, more specifically, the provisions on appeal. This Note addresses the potential *inter se* modification of the ICSID Convention to introduce appeal of ICSID awards before the Appeals Tribunal under the Draft Statute.
2. The appeal model that is currently under consideration is a standing Appeals Tribunal with jurisdiction over awards and decisions rendered by an arbitral tribunal or any other adjudicatory body, which the disputing parties consent in writing to submit to it. The intended scope of jurisdiction of the Appeals Tribunal would be broad enough to encompass ICSID awards.<sup>3</sup>
3. The ICSID Convention does not permit the appeal of ICSID awards, nor does it permit 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 accordingly.
4. 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>1</sup> In 2017, the UNCITRAL Commission entrusted its Working Group III (“**WGIII**”) with a broad mandate to work on the possible reform of investor-State dispute settlement (“**ISDS**”). After identifying and discussing perceived concerns regarding ISDS, WGIII determined that reform was desirable and proceeded to consider concrete elements of ISDS reform. One of these elements is the Appellate Mechanism (or appeal).

<sup>2</sup> Article 18 of the Draft Statute of a Standing Mechanism for the Resolution of International Investment Disputes (A/CN.9/WG.III/WP.239). The Draft Statute consolidates in one instrument a standing first-instance tribunal with a standing appeals tribunal. WGIII is currently considering the provisions of the Draft Statute without prejudice to the decision on whether and how to proceed with the two tribunals. The specific content of Article 18 will be discussed by WGIII in September 2025.

<sup>3</sup> Article 18(1) of the Draft Statute: “The jurisdiction of the Appeals Tribunal shall extend to appeals with regard to an award or decision rendered by an arbitral tribunal or any other adjudicatory body (referred to in this section and Section F as the “first -tier tribunal”), which the disputing parties consent in writing to submit to the Appeals Tribunal. When the disputing parties have given their consent, no party may withdraw its consent unilaterally.” This provision has not been discussed by WGIII as of the date of this Note.

<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 amendment of the Convention an onerous process.

5. If ICSID Contracting 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 only as between the ICSID Contracting States that participate in it.<sup>5</sup> This Note refers to any ICSID Contracting States that may wish to participate in such modification as “**Participating ICSID States**” and to those that may not wish to participate as “**Non-Participating ICSID States**”.
6. The potential *inter se* modification of the ICSID Convention, which is currently part of the discussions before the Working Group, is not a project initiated or led by the ICSID Secretariat. This Note does not take any view on whether such a modification is advisable, it does not purport to include every relevant consideration, and it assumes for the purpose of the analysis that the modification would comply with the substantive and procedural requirements of VCLT Article 41.<sup>6</sup>

## II. THE POTENTIAL *INTER SE* MODIFICATION OF THE ICSID CONVENTION

7. The following subsections address the content of the potential *inter se* modification of the ICSID Convention. They elaborate on the replacement of annulment under the ICSID Convention with appeal before the Appeals Tribunal (**A**), the relationship between appeal and the post-award remedies under the ICSID Convention other than annulment (**B**), the appealability of ICSID decisions (as opposed to ICSID awards) (**C**), the possibility to remand a dispute by the Appeals Tribunal (**D**), the certification of awards rendered under a modified

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<sup>5</sup> Article 41 of the Vienna Convention on the Law of Treaties (“VCLT”) contains the procedural and substantive requirements of an *inter se* modification. 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. Since the ICSID Convention predates the VCLT, the requirements in VCLT Article 41 apply to the extent that they constitute customary international law. The full article provides as follows:

“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.”

<sup>6</sup> See above footnote 5.

ICSID Convention (E), and the recognition and enforcement of awards rendered under a modified ICSID Convention (F).

### A. The Replacement of Annulment with Appeal

8. The submission of an award to the jurisdiction of the Appeals Tribunal would require the written consent of the disputing parties.<sup>7</sup> In the case of ICSID awards, even if the disputing parties provided such consent, the jurisdiction of the Appeals Tribunal would still be subject to the limitation contained in Article 53 of the ICSID Convention, as acknowledged by Article 18(5) of the Draft Statute.<sup>8</sup>
9. Article 53 of the ICSID Convention contains a prohibition of appeal and of any other remedy that is not contained in the ICSID Convention.<sup>9</sup> To remove this limitation on the jurisdiction of the Appeals Tribunal and enable the appeal of ICSID awards before this body, the prohibition in Article 53 of the ICSID Convention would have to be lifted. This modification could be achieved by rewording Article 18(5) of the Draft Statute, along the following lines:

Article 18(5) of the Draft Statute	Revised wording
5. The jurisdiction of the Appeals Tribunal is subject to any limitation in the law(s) applicable to the proceedings of the first-tier tribunal and article **.	The jurisdiction of the Appeals Tribunal is subject to any limitation in the law(s) applicable to the proceedings of the first-tier tribunal and article **. <b><u>With regard to proceedings under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”), Article 53 of the ICSID Convention is modified as follows:</u></b>  <b><u>“(1) The award shall be binding on the parties and shall not be subject to any remedy, including the remedy provided for in Article 52 of this Convention, except:</u></b> <b><u>(a) the remedies provided for in Articles 49(2), 50, and 51 of this Convention; and</u></b>

<sup>7</sup> Article 18(1) of the Draft Statute: “The jurisdiction of the Appeals Tribunal shall extend to appeals with regard to an award or decision rendered by an arbitral tribunal or any other adjudicatory body (referred to in this section and Section F as the “first -tier tribunal”), which the disputing parties consent in writing to submit to the Appeals Tribunal. When the disputing parties have given their consent, no party may withdraw its consent unilaterally.”

<sup>8</sup> Article 18(5) of the Draft Statute: “The jurisdiction of the Appeals Tribunal is subject to any limitation in the law(s) applicable to the proceedings of the first-tier tribunal and article.”

<sup>9</sup> Article 53 of the ICSID Convention:

“(1) 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.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.”

	<p><b><u>(b) appeal before the Appeals Tribunal under the [insert final name of the Draft Statute].</u></b> <b><u>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.</u></b></p> <p><b><u>(2) For the purposes of this Section, “award” shall include any decision interpreting or revising such award pursuant to Articles 50 and 51.”</u></b></p>
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10. The proposed rewording of Article 18(5) of the Draft Statute would not only allow for the appeal of ICSID awards – it would replace annulment with appeal. It is understood at this juncture that the grounds for appeal in the Draft Statute would include some, if not all, of the grounds for annulment. In these circumstances, an award that is subject to appeal need not also be subject to annulment. Replacing annulment with appeal would avoid the possibility of parallel proceedings addressing overlapping grounds.
11. The replacement of annulment with appeal might be preferable to the solution in the current Draft Statute, which limits annulment through the use of a waiver but does not foreclose annulment completely. Pursuant to Articles 28(1) and 31 of the Draft Statute, the party requesting appeal must waive annulment,<sup>10</sup> but annulment remains open before a request for appeal is registered.<sup>11</sup> In the event that this results in parallel annulment and appeal proceedings,<sup>12</sup> a party’s options are limited to requesting the suspension of the annulment proceeding.<sup>13</sup> To address this potential overlap, it might be preferable to disable annulment completely for ICSID awards rendered under a modified ICSID Convention. If annulment is thus excluded, Articles 28(1) and 31 of the Draft Statute would require rewording: (i) Article 28(1) would not need to include a waiver of annulment; and (ii) Article 31 would not need to regulate the relationship between annulment and appeal.

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<sup>10</sup> Article 28(1) of the Draft Statute: “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].”

<sup>11</sup> Article 31 of the Draft Statute:

“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.

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.”

<sup>12</sup> This could happen if one party requests annulment before the other party’s request for appeal is registered.

<sup>13</sup> The Draft Statute does not seem to envisage the possibility of suspending the appeal proceeding. *See above* Article 31(2) in footnote 11.

## B. The Relationship between Appeal and the Post-Award Remedies in the ICSID Convention other than Annulment

12. The post-award remedies under the ICSID Convention are rectification and supplementation (Article 49(2)), interpretation (Article 50), revision (Article 51), and annulment (Article 52).
13. Each remedy is available within its respective time limit,<sup>14</sup> except that rectification and supplementation defer the time periods to request revision and annulment.<sup>15</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 one has concluded.
14. The Draft Statute does not appear to address the post-award remedies in the ICSID Convention (other than annulment) and their relationship to appeal. The Draft Statute includes the grounds for annulment as grounds for appeal, and it provides for remedies equivalent to rectification, supplementation, and interpretation for awards rendered by the Dispute Tribunal<sup>16</sup> and for decisions issued by the Appeals Tribunal,<sup>17</sup> but it does not refer to rectification, supplementation, interpretation and revision under the ICSID Convention.<sup>18</sup> On the other hand, the reference to “any other review proceedings” in Article 31 of the Draft Statute could be considered broad enough conceivably to cover the ICSID post-award remedies other than annulment. To the extent that Article 31 is intended to cover these

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<sup>14</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>15</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>16</sup> Article 23(5) of the Draft Statute: “Within [a period of time to be specified] days of the communication of the decision by the Panel, a party may make a request to the Executive Director that the Panel: (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 Panel. The Executive Director shall notify the other party and if the request is justified, the Panel 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 Panel.”

<sup>17</sup> Article 33(9) of the Draft Statute: “Within [a period of time to be specified] 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 [a period of time to be specified] days, which shall form part of the decision of the Chamber.”

<sup>18</sup> The current draft does include revision as a potential ground for appeal (see Article 29(2)(h) of the Draft Statute), but as noted by Switzerland, revision should remain separate from appeal “if only because revision grounds may arise much later than the expiration of the time limit for appeal.” A/CN.9/WG.III/WP.241, para. 9.



remedies, it would limit their application considerably. This is because Article 31 provides that an award shall no longer be the subject of the review proceedings to which it refers upon the registration of a request for appeal or, if any of those review proceedings have already commenced, it provides for the possibility to request their suspension until the Appeals Tribunal issues its decision.

15. The relationship between appeal and the ICSID post-award remedies other than annulment could benefit from clarification. For example, it could be clarified that an appeal may not be filed until a decision on rectification or supplementation has been issued. It could also be clarified that revision and interpretation would be available concurrently with appeal – in the same way that they are now available concurrently with annulment (within their respective time limits).<sup>19</sup>
16. In the event of any parallel proceedings, each tribunal would need to determine whether a suspension of the relevant post-award remedy proceeding would be appropriate in the circumstances. In this scenario, it might be prudent to avoid a presumption that appeal is never the proceeding to be suspended.<sup>20</sup> The possibility of suspending the appeal proceeding may be particularly important in light of Article 35 of the Draft Statute, which provides that a decision by the Appeals Tribunal shall not be subject to any review proceedings.<sup>21</sup>

### C. The Appealability of ICSID Decisions (as Opposed to ICSID Awards)

17. This section addresses the scope of appeal and, in particular, whether a party may appeal certain decisions issued prior to the award or whether only the award may be appealed.
18. There is only one award in the ICSID system, and it is the only ruling that is subject to the ICSID post-award remedies. The term “award” is not defined in the ICSID Convention, but it may be described as “the final decision of an arbitral tribunal by which it disposes of all questions before it.”<sup>22</sup>

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<sup>19</sup> For an example of clarified wording, *see* Section IV below (Articles 28(2) and 31(3) of the Draft Statute).

<sup>20</sup> For an example regarding the possibility to suspend the appeals proceeding, *see* Section IV below (Article 31(3) of the Draft Statute).

<sup>21</sup> Article 35 of the Draft Statute: “A decision by the Appeals Tribunal shall not be subject to appeal or any other review proceedings before any forums.”

<sup>22</sup> Schill, S.W, Malintoppi L., Reinisch A., Schreuer C., Sinclair A., eds. ‘Schreuer’s Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 3rd ed. Cambridge: Cambridge University Press (2022), p. 1121, para. 24.



19. Questions that have been decided through an earlier decision of the tribunal, such as a decision upholding jurisdiction or a decision on liability, will become part of the award when it is rendered. A decision is only subject to post-award remedies if and when it becomes part of the award.
20. Under the current wording of the Draft Statute, the scope of jurisdiction of the Appeals Tribunal would extend beyond awards to decisions on jurisdiction, decisions on the merits, and decisions on interim measures.<sup>23</sup> The current wording also lists the types of decisions that would not be subject to appeal.<sup>24</sup>
21. The Annotations to the Draft Statute explain that the list approach is meant to ensure that “the scope of appeal should not be too broad so as to ensure efficient operation of the Appeals Tribunal.”<sup>25</sup> While the scope of appeal may be reduced by limiting the type of decisions that may be submitted for appeal, it is the possibility of submitting decisions for appeal that broadens the scope (compared to a scenario where only the award may be appealed). This possibility may multiply the number of appeal proceedings and the associated costs in any given case, and its effects would extend beyond the operation of the Appeals Tribunal to the ongoing arbitration proceeding.
22. To avoid the potential drawbacks mentioned in the previous paragraph, States may wish to indicate that only (final) awards are subject to appeal.<sup>26</sup> Alternatively, they could consider a carve-out for ICSID that limits the scope of appeal to *the* award in line with the conceptual approach taken in the ICSID Convention.<sup>27</sup>

#### **D. The Possibility to Remand a Dispute**

23. This section addresses the possibility of the Appeals Tribunal deciding to remand a dispute to the original tribunal or, in certain circumstances, to a new tribunal. This may happen where the Appeals Tribunal finds that the facts established by the first-tier tribunal are insufficient for the Appeals Tribunal to uphold, modify or reverse the award.<sup>28</sup>

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<sup>23</sup> Article 27(1) of the Draft Statute.

<sup>24</sup> The list includes procedural orders, decisions on bifurcation, and decisions on challenges of arbitrators or adjudicators (Article 27(2) of the Draft Statute).

<sup>25</sup> Annotations to the Draft Statute (A/CN.9/WG.III/WP.240), Article 27.

<sup>26</sup> As envisaged for instance in Switzerland’s proposal. See A/CN.9/WG.III/WP.241, paras. 3-5.

<sup>27</sup> For an example of a potential carve-out, see Section IV below (Article 27).

<sup>28</sup> Article 33(4) of the Draft Statute: “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.”

24. Remand would have to invalidate the original award and eliminate *res judicata*, in the same way annulment does. Article 34(3) of the Draft Statute establishes that a remanded award “shall have no effect”,<sup>29</sup> which suggests that the award would continue to exist albeit without effect. It is assumed that this lack of effect would extend to the *res judicata* force of the award, but more definitive language may be appropriate.
25. Remand does not exist under the ICSID Convention. If the award is annulled, a dispute may be resubmitted to a new tribunal,<sup>30</sup> but an *ad hoc* committee may not remand a dispute to the original tribunal.
26. Implementing remand of the dispute to the original tribunal or to a new tribunal under the ICSID Convention would require a provision to that effect. The particulars of the remand procedure contained in the procedural rules under the Draft Statute would govern the remand procedure under the ICSID Convention by agreement of the disputing parties.
27. States may wish to consider a carve-out that excludes the possibility to remand a dispute for awards rendered under the modified ICSID Convention.<sup>31</sup>

#### **E. The Certification of Awards Rendered under the Modified ICSID Convention**

28. ICSID awards are certified by the ICSID Secretary-General.<sup>32</sup> A copy of the award certified by the Secretary-General is all that a party seeking recognition or enforcement needs to present to the competent court or authority to ascertain the award’s authenticity.<sup>33</sup> Many courts have acknowledged that their role is limited to ascertaining the award’s authenticity, recognizing that there is no scope of review of an ICSID award at the recognition and enforcement stage.<sup>34</sup>

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<sup>29</sup> Article 34(3) of the Draft Statute: “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.”

<sup>30</sup> Article 52(6) of the ICSID Convention: “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.”

<sup>31</sup> Alternatively, for an example of a remand provision in the ICSID Convention, *see* Section IV below (Article 33(4)).

<sup>32</sup> *See* Articles 49(2) and 54(2) of the ICSID Convention and Rule 60 of the ICSID Arbitration Rules.

<sup>33</sup> *See* Article 54(2) of the ICSID Convention.

<sup>34</sup> For a comprehensive overview of the ICSID Convention’s regime governing compliance with, recognition, enforcement and execution of an ICSID Convention award, *see* Background Paper: Compliance with and Enforcement of ICSID Awards, March 2024.

[https://icsid.worldbank.org/sites/default/files/publications/Background\\_Paper\\_on\\_Annulment.pdf](https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Annulment.pdf)

29. ICSID awards rendered under a modified ICSID Convention would also need to be certified by the ICSID Secretary-General. The certificate would note that the award is rendered under the ICSID Convention as modified between the Participating ICSID States.

**F. The Recognition and Enforcement of Awards Rendered under the Modified ICSID Convention**

30. This section considers the enforceability of awards rendered under a modified ICSID Convention.
31. The provision that governs enforcement<sup>35</sup> in the ICSID Convention is Article 54. The Draft Statute contains its own enforcement provision in Article 36, which largely mirrors Article 54. It thus appears that Article 54 of the ICSID Convention governs the enforcement of *ICSID awards*, and Article 36 of the Draft Statute governs the enforcement of *appeal decisions*.
32. It is assumed that any ICSID States that may be interested in modifying the ICSID Convention *inter se* would also become parties to the Draft Statute, and so the question is twofold: (i) whether Article 54 of the modified ICSID Convention would extend the enforcement obligation to Non-Participating ICSID States, thus expanding the pool of States with enforcement obligations beyond the parties to the Draft Statute; and (ii) the relationship between Article 54 of the modified ICSID Convention and Article 36 of the Draft Statute.

*Whether Article 54 of the modified ICSID Convention would impose an enforcement obligation on Non-Participating ICSID States*

33. Article 54 governs the recognition and enforcement of awards “rendered pursuant to this Convention”. Between the Participating ICSID States to the modified ICSID Convention, “this Convention” would seem to refer to the modified ICSID Convention. Accordingly, Participating ICSID States would *have* an obligation to enforce awards rendered under the modified ICSID Convention. Conversely, “this Convention” would seem to refer to the non-modified ICSID Convention for Non-Participating ICSID States. Accordingly, Non-Participating ICSID States would *not have* an obligation to enforce awards rendered under the modified ICSID Convention. An expansive interpretation of Article 54 that extends the enforcement obligation of awards rendered under the modified ICSID Convention to Non-

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<sup>35</sup> The ICSID Convention distinguishes between the “recognition,” “enforcement” and “execution” of awards. When reference is made to “enforcement” in this Note, it denotes the broader concept of “recognition” and “enforcement” under the ICSID Convention, unless otherwise indicated.

Participating ICSID States would appear to be inconsistent with VCLT Article 41(1)(b)(i).<sup>36</sup> This provision requires that an *inter se* modification not affect the performance of the obligations of the non-participating States, and it would have been a condition for the permissibility of the modification.

34. This result (that Non-Participating ICSID States would not have an obligation to enforce awards rendered under the modified ICSID Convention) would not seem to change if Article 54 itself were modified. An *inter se* modification only applies to the participating States. Accordingly, the obligations of the Non-Participating ICSID States under Article 54 may not be altered through a modification of this provision in which they do not participate.
35. This result (that Non-Participating ICSID States would not have an obligation to enforce awards rendered under the modified ICSID Convention) would not seem to change either if the award is not ultimately appealed. Such awards would have been rendered under the modified ICSID Convention regardless of whether appeal is ultimately sought in the particular instance. This conclusion is determined when the disputing parties agree to submit the dispute to arbitration under the ICSID Convention and consent is thus perfected. If consent to ICSID arbitration is perfected after the modification of the ICSID Convention has entered into force for the relevant States, then the award will have been rendered under the modified ICSID Convention.

*The relationship between Article 54 of the modified ICSID Convention and Article 36 of the Draft Statute*

36. As noted above, the fact that ultimately an award may or may not be appealed does not change the fact that it was rendered under the modified ICSID Convention, which means that no obligations will ensue for Non-Participating ICSID States in any scenario. However, this does not mean that the materialization of appeal would not have any consequences in the context of enforcement for Participating ICSID States. This group of States would benefit from a clear relationship between Article 54 of the modified ICSID Convention and Article 36 of the Draft Statute.
37. As noted in paragraph 31 above, it would appear that Article 54 applies to awards and Article 36 applies to appeal decisions. It would also appear that resort to Article 54 would no longer be available from the moment that an appeal is registered.<sup>37</sup> The unavailability of Article 54

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<sup>36</sup> Article 41(1)(b)(i) of the VCLT: “Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: [...] (b) the modification in question is not prohibited by the treaty and: [...] (ii) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations [...].”

<sup>37</sup> Should enforcement proceedings already be pending by the time an appeal is registered, a party may request the suspension of the enforcement proceeding (*see* Article 31(2) of the Draft Statute).

once an appeal is registered is provided for in Article 31 of the Draft Statute. If this is how States wish to proceed, they may consider a mirroring provision in the ICSID Convention. States may also consider whether Article 54 would apply if the appeal proceeding is discontinued and does not result in an appeal decision that may be enforced through Article 36.<sup>38</sup>

### III. POSSIBLE IMPLEMENTATION OF THE POTENTIAL *INTER SE* MODIFICATION OF THE ICSID CONVENTION

38. The following subsections address the instrument where the *inter re* modification could be codified (A) as well as the application in time of the modification (B).

#### A. A Possible Instrument to Implement the Modification of the ICSID Convention

39. The *inter se* modification of the ICSID Convention would be implemented through the agreement of the Participating ICSID States. This agreement could take the form of a dedicated treaty as between the Participating ICSID States or be included in a treaty that also addresses other matters and includes other States, like the Draft Statute.

40. As currently envisaged by Working Group III, the implementation of the Draft Statute itself envisions a framework treaty currently called Draft Multilateral Instrument on ISDS Reform or MIIR. The Draft Statute would be one of several protocols to the MIIR, and a State would have to ratify both the Draft Statute and the MIIR to become a party to the Draft Statute.<sup>39</sup>

41. The ICSID Convention would not need to be modified through the MIIR as opposed to the Draft Statute. In any event, as currently drafted, the MIIR amendment procedure does not appear to be suitable for modifying the ICSID Convention *inter se*:

- a. Most importantly, the MIIR amendment procedure establishes a list notification system that requires that the relevant investment treaty be listed by all the parties to it for the “modification” of that treaty to take effect.<sup>40</sup> Assuming that the purpose is to modify the ICSID Convention *as between the interested States only*, the

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<sup>38</sup> For an example of a mirroring provision in the ICSID Convention that also addresses discontinuance, see Section IV below (Article 31(4)).

<sup>39</sup> Article 1(1) of the Draft Multilateral Instrument on ISDS Reform (A/CN.9/WG.III/WP.246), para. 21: “One of the reasons for this approach is that there is no substantive obligation arising from becoming a party to the Convention and that the legal effect of the Protocols modifying existing investment treaties is provided for in the Convention.”

<sup>40</sup> Article 7(2) and (3) of the MIIR.

requirement that the treaty be listed by *all* the parties to it suggests that this procedure is not meant to address the ICSID Convention.

- b. Moreover, although not strictly an impediment, the requirement for each party to detail how the protocol would modify the investment treaties listed in each party's notification would be difficult to manage in the case of a multilateral treaty.<sup>41</sup>
- c. In any event, it is not clear that the ICSID Convention would qualify as an "investment treaty" in the sense of the MIIR as currently drafted.<sup>42</sup>

## B. The Temporal Application of the Modified ICSID Convention

- 42. If the modification of the ICSID Convention is included in the Draft Statute, it would enter into force pursuant to Article 42 of the Draft Statute.<sup>43</sup>
- 43. The modification of the ICSID Convention would apply to disputes which the disputing parties consent to submit to ICSID jurisdiction after the modification of the ICSID Convention has entered into force between the relevant Participating ICSID States. Previous consent would have been perfected before the modification had entered into force and, therefore, under the terms of the non-modified ICSID Convention.
- 44. As a consequence, and assuming that there is also consent of the disputing parties to the jurisdiction of the Appeals Tribunal, appeal would not apply retroactively to existing ICSID awards, or to awards to be rendered in pending or future proceedings where the disputing parties consented to the jurisdiction of the Centre under the terms of the non-modified ICSID Convention.
- 45. The conclusion in the previous paragraph follows from ICSID Article 25,<sup>44</sup> which is the core provision governing the jurisdiction of the Centre. It provides in its relevant part that

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<sup>41</sup> Article 6(3) of the MIIR.

<sup>42</sup> In this sense, consider (i) the distinction noted in the Preamble to the MIIR between "provisions on the protection of investments and investors" and "mechanisms to address disputes arising therefrom", and (ii) the wording of paragraph 30 of the MIIR: "The term 'investment treaty' is used to refer to any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors."

<sup>43</sup> Article 42 of the Draft Statute: "This Protocol shall enter into force sixth months after the date of deposit of the [number to be determined] instrument of ratification, acceptance or approval or of accession provided that: [conditions to be set forth]."

<sup>44</sup> Article 25 of the ICSID Convention: "When the parties have given their consent, no party may withdraw its consent unilaterally."

perfected consent may not be undone by a disputing party. Perfected consent is thus unilaterally<sup>45</sup> irrevocable, including by indirect means such as denunciation (ICSID Article 72),<sup>46</sup> amendment (ICSID Article 66),<sup>47</sup> and, in this case, *inter se* modification.

#### IV. COMPILATION OF POTENTIALLY REVISED WORDING

Article 18(5) of the Draft Statute	Revised wording
5. The jurisdiction of the Appeals Tribunal is subject to any limitation in the law(s) applicable to the proceedings of the first-tier tribunal and article **.	5. The jurisdiction of the Appeals Tribunal is subject to any limitation in the law(s) applicable to the proceedings of the first-tier tribunal and article **. <b><u>With regard to proceedings under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”), Article 53 of the ICSID Convention is modified as follows:</u></b>  <b><u>“(1) The award shall be binding on the parties and shall not be subject to any remedy, including the remedy provided for in Article 52 of this Convention, except:</u></b> <b><u>(a) the remedies provided for in Articles 49(2), 50, and 51 of this Convention; and</u></b> <b><u>(b) appeal before the Appeals Tribunal under the [insert final name of the Draft Statute].</u></b> <b><u>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.</u></b>  <b><u>(2) For the purposes of this Section, “award” shall include any decision interpreting or revising such award pursuant to Articles 50 and 51.”</u></b>

<sup>45</sup> The reference to “unilaterally” refers to one of the parties to perfected consent, not to the means by which perfected consent may not be undone, which may be collective – as in the case of an amendment or an *inter se* modification.

<sup>46</sup> Article 72 of the ICSID Convention: “Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.”

<sup>47</sup> Article 66(2) of the ICSID Convention: “No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.”



Article 27 of the Draft Statute	Revised wording
<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: 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>(a) Procedural orders; (b) Decisions on bifurcation; (c) Decisions on challenges of arbitrators or adjudicators; (d) [...].</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: 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: (a) Procedural orders; (b) Decisions on bifurcation; (c) Decisions on challenges of arbitrators or adjudicators; (d) [...].</p> <p><b><u>3. With regard to the ICSID Convention, a party may only appeal the award.</u></b></p>

Article 28 of the Draft Statute	Revised wording
<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 [a period of time to be specified] days from the date of the award or decision.</p>	<p>1. An appeal may be requested in accordance with article 19 only if the party expressly waives its rights to initiate <del>annulment</del>,—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 [ a period of time to be specified] days from the date of the award or decision. <b><u>With regard to awards rendered under the ICSID Convention, the period of time to request appeal shall run from the date of the award or any supplementary decision or rectification of the award made pursuant to Article 49(2) of the ICSID Convention.</u></b></p>

Article 31 Draft Statute	Article 31 as proposed by Switzerland:	Article 31 as proposed by Switzerland, with revised wording:
<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>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>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 fora other than those set out in this Statute.</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. [in a two-tier system in which the first-tier tribunal is an ICSID arbitral tribunal] 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. [...].</p>	<p>Article 31 - <del>Exclusion of o</del>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 <del>any other remedy</del>, <b>including</b> annulment, set aside or any other <b>such</b> review before any fora other than those set out in this Statute.</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><b><u>3. With regard to awards rendered under the ICSID Convention, the exclusion of other remedies in the first two paragraphs shall not apply to proceedings pursuant to Articles 49(2), 50, and 51 of the ICSID Convention. When a post-award remedy pursuant to Articles 49(2), 50, and 51 of the ICSID Convention is pending or commences during an appeal proceeding, the Appeals Tribunal may suspend the appeal proceeding until the decision of the ICSID tribunal has been dispatched to the parties.</u></b></p> <p><b><u>4. With regard to awards rendered under the ICSID Convention, Article 54(1) of the ICSID Convention is modified as follows: “(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state. A party</u></b></p>

		<u>may not seek recognition or enforcement under this Article once an appeal before the Appeals Tribunal is registered unless the proceeding before the Appeals Tribunal is discontinued.”</u>
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Article 33(4) of the Draft Statute	Revised wording
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.	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. <b><u>With regard to awards rendered under the ICSID Convention, Article 48 of the ICSID Convention is modified as follows: “(6) If the Appeals Tribunal decides to remand a dispute decided in an award rendered under the ICSID Convention, the dispute shall be remanded to the original tribunal or, if this shall not be possible or the Appeals Tribunal determines that it would be inappropriate do so, a new tribunal shall be constituted upon the request of either party in accordance with Section 2 of this Chapter.”</u></b>

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46. ICSID remains available to address any matters in this Note or to provide further information to Working Group III.