

Compatibility of an Appellate Mechanism (AM) with the ICSID System

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OUTLINE

- 1. ADVANTAGES OF ICSID FOR AN APPELLATE MECHANISM AND POSSIBLE AMENDEMENT OF THE ICSID CONVENTION [Meg KINNEAR]**
- 2. HOW TO BUILD AN APPELLATE MECHANISM THROUGH AN INTER SE MODIFICATION OF THE ICSID CONVENTION [Michele POTESTA]**
- 3. FRENCH / EU EXPERIENCE IN THE MAKING OF AN APPELLATE MECHANISM COMPATIBLE WITH THE ICSID CONVENTION [Mathieu RAUX]**
- 4. CONCLUDING REMARKS [Meg KINNEAR]**

ASSUMPTIONS FOR THIS DISCUSSION

- 1. Build a single AM available on a multilateral basis** – would address tribunal awards from the existing arbitral system (tribunals under ICSID Convention, ICSID AF, UNCITRAL Rules, SCC, other available fora to resolve IIDs)
- 2. AM should accommodate participation by some, but not all, States** – ensure no State is prejudiced by its choice of annulment/ setting aside/ vs. appeal
- 3. AM decision-makers** should be a defined group, ie, selected from a single list/roster/body
- 4. AM process should lead to enforceable decisions** – if available, ICSID Convention automatic enforcement system is preferable, otherwise under other applicable mechanism – and perhaps both

UNIQUE FEATURES OF THE ICSID SYSTEM

- Self-contained system
- Automatic enforcement mechanism
- Only ICSID can administer ICSID cases and issue ICSID Awards
- ICSID is the world leader in the field with global facilities and expertise

CURRENT REVIEW SYSTEM AT ICSID

– ART. 52-53 ICSID CONVENTION

- **Art. 52:** Either party may request annulment of Tribunal award on any of 5 grounds
- Was designed with a high threshold to address egregious concerns, mainly of a due process nature
- Results in a void decision if annulled
- **Art. 53:** The award “shall be binding on the parties” and “not be subject to any appeal or to any other remedy except those provided for in this Convention.”

CURRENT ENFORCEMENT SYSTEM AT ICSID

– ART. 54-55 ICSID CONVENTION

- **Art. 54 (1):** Each Contracting State “shall recognize an award rendered pursuant to this Convention as binding” and “enforce the pecuniary obligations imposed” as if it were a final judgment of a court in that State
- **Art. 54(3):** Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.
- **Art. 55:** Above does not derogate from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

AMENDMENT OF ICSID CONVENTION

– ART. 65-66

- **Art. 65:** Any Contracting State may propose amendment of this Convention.
- **Art. 66 (1):** Need two-thirds of membership to agree to circulate a proposed amendment and all States must ratify, accept or approve the amendment – unanimity requirement
- **Art. 66(2):** No amendment shall “affect the rights and obligations under this Convention of any Contracting State” 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.

AMENDMENT TO OFFER OPTION OF APPEAL FOR A SUBSET OF ICSID MEMBERS UNDER ICSID CONVENTION – ART. 65-66

- Propose amendment that allows any member State to opt for appeal under the ICSID Convention
- Amend Art. 53 of ICSID Convention to this effect
- Effect is to transform Art. 53 into a provision that allows either annulment or appeal, at the option of the member State

ICSID CONVENTION AMENDMENT

To establish the AM under the ICSID Convention for awards from all fora

SCOPE:

The AM would be established at ICSID and under the ICSID Convention. It would have jurisdiction over appeals of: (i) ICSID and non-ICSID awards between disputing parties from ICSID MS; and (ii) non-ICSID awards between disputing parties from non-ICSID MS if those parties agree to submit the award to appeal.

ENFORCEMENT:

The resulting appeal award would be enforceable under the ICSID Convention in all ICSID MS.

The NYC would remain available if enforcement is sought in territory of a non-ICSID MS.

ISSUES:

- **Unanimity requirement**
- Requires the addition of “appeal” in Art. 53 and necessary adjustments to the Convention (eg: appealability of pre-award decisions; relationship with first-tier tribunal; relationship with other post-award remedies in the ICSID Convention)
- Requires extension of ICSID jurisdiction on appeal to: (i) disputes between disputing parties from ICSID MS under any forum; and (ii) disputes between disputing parties from non-ICSID MS that agree to submit their award for appeal to the ICSID AM
- For non-ICSID awards: potential for: (i) domestic set aside proceedings if a non-ICSID MS is the place of arbitration; (ii) refusal to enforce in a non-ICSID MS under the NYC

SCENARIO 2

ICSID CONVENTION AMENDMENT

To provide for appeal (or the option of appeal) of ICSID awards

SCOPE:

ICSID Convention amendment to allow for “appeal” under Art. 53 (via ICSID Art. 66). This scenario would also require the creation of an AM administered by ICSID (but not under the ICSID Convention), with jurisdiction over ICSID + non-ICSID appeal awards.

ENFORCEMENT:

ICSID appeal awards would be enforceable in all ICSID MS.

Non-ICSID appeal awards enforceable under the treaty establishing the AM in the participating States + enforceable in non-participating States under NYC.

ISSUES:

- Unanimity requirement
- Requires the addition of “appeal” in Art. 53 and necessary adjustments to the Convention (eg: appealability of pre-award decisions; relationship with first-tier tribunal; relationship with other post-award remedies in the ICSID Convention)
- For non-ICSID awards: enforceable only as between the signatories to the treaty establishing the AM - potential for: (i) domestic set aside if a non-participating State is the place of arbitration; (ii) refusal to enforce if enforcement is sought in a non-participating State under the NYC

SCENARIO 3

ICSID CONVENTION

INTER SE MODIFICATION

To provide for appeal of ICSID awards

SCOPE:

ICSID Convention inter se modification to allow for “appeal” under Art. 53 (via Art. 41 VCLT). This scenario would also require the creation of an ICSID administered appeal mechanism (not under the ICSID Convention), with jurisdiction over ICSID awards as between modifying inter se ICSID States + non-ICSID awards.

ENFORCEMENT:

ICSID appeal awards enforceable only as between the inter se modifying ICSID States

Non-ICSID appeal awards: enforceable under the treaty establishing the AM in the participating States + enforceable in non-participating States under NYC.

ISSUES:

- **Requires addition of “appeal” in Art. 53 and necessary adjustments to the Convention (eg: appealability of pre-award decisions; relationship with first-tier tribunal; relationship with other post-award remedies in the Convention)**
- For ICSID appeal awards: enforceable under the ICSID Convention only as between inter se modifying ICSID MS
- **For non-ICSID appeal awards: enforceable only as between the signatories to the treaty establishing the AM - potential for: (i) domestic set aside if a non-participating State is the place of arbitration; (ii) refusal to enforce if enforcement is sought in a non-participating State under the NYC**

Inter se Modification of ICSID Convention

- VCLT: “Amendment” (Arts 39-40) v. “Modification” (Art. 41)
- *Inter se* modification (Art. 41)
 - Rationale
 - Art. 41(1) VCLT codifies customary int’l law
 - Limited case law on Art. 41

Inter se Modification of ICSID Convention

Article 41

Agreements to modify multilateral treaties between certain of the parties only

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.

Question 1: Does the ICSID Convention prohibit an inter se modification?

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:

- Prohibition must be “stated expressly” in treaty
 - *E.g.: UNCLOS, Art. 311(6): “States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof”*
- ICSID Convention contains no express prohibition

Question 2: Does modification affect other Parties' rights or obligations?

(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**.

- ICSID Convention between States **A-B-C**:
 - Principal rights/obligations: **bilateral** nature
 - **A-B**: appeal
 - A-C: annulment
 - C / nationals of C **not** affected by AM between **A-B**
 - No additional financial burden on other States

Question 3: Is modification incompatible with object & purpose of ICSID Convention?

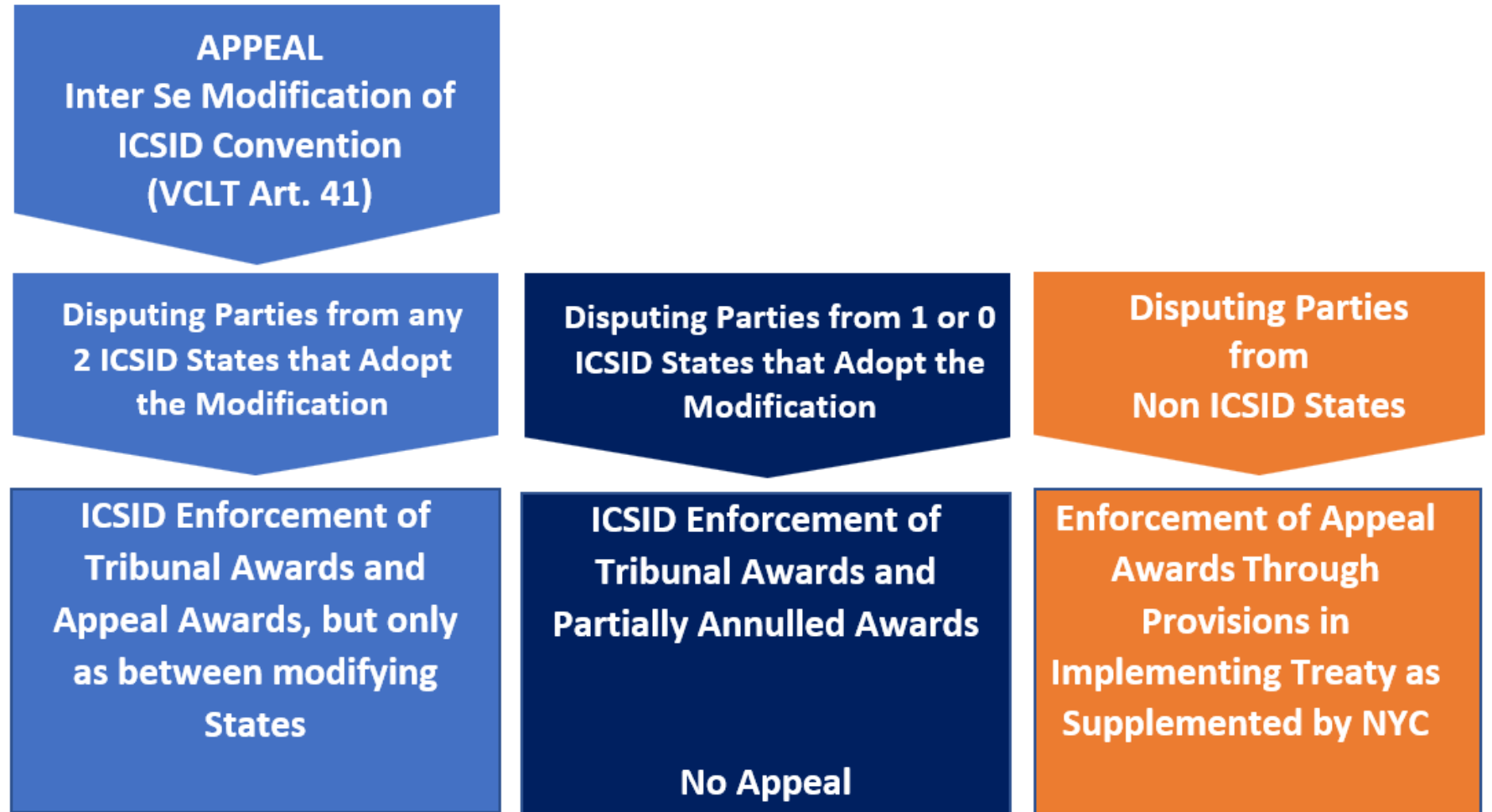
(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the **object and purpose of the treaty** as a whole.

- ILC: object & purpose is “*raison d’être*” of treaty / essence / mission / fundamental core
- Object & purpose of ICSID Convention? (*preamble, Art. 1(2), Report of Executive Directors, travaux*)
 - Promotion of int’l investments through neutral DR mechanism based on consent
 - AM does **not** affect such object & purpose

Question 4: How will enforcement work?

- How will new award subject to AM be enforced?
 - Modifying parties v. non-modifying parties
 - Non-modifying parties
 - Not *precluded* from applying Art. 54 if they wish!
 - Declaration?
 - Not *obliged* to apply Art. 54
 - But award nevertheless enforceable under **New York Convention!**

Appeal at ICSID via Inter Se Modification



Question 5: How will modification be carried out?

- 1st instrument: **AM Statute** (treaty) (*composition, financing, grounds for appeal, enforcement between States Parties, ...*)
 - Distinguish from Rules of AM (procedural – can be adopted by AM)
- 2nd instrument: ***inter se* modification of ICSID Convention** (treaty)
 - Part of MIIR (opt-in for those ICSID MS that want AM)
 - Also effects modification of underlying IIAs (Art. 30 VCLT)
 - In coordination with ICSID / notification to ICSID MS (Art. 41(2) VCLT)
- 3rd instrument: **optional** declaration by *non-modifying* ICSID MS
 - Enforcement of new AM award under Art. 54

Question 6: Are investors' rights protected from inter se modification?

- Preservation of rights arisen under original regime?
- Art. 66(2) ICSID Convention (amendment) by analogy?

“No amendment shall affect the rights and obligations under this Convention of any Contracting State ..., 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.**”
- Importance of inter-temporal rules

Question 7: Can investors use MFN to bypass the AM?

- What is “better treatment” for purposes of MFN?
 - Appeal or annulment?
- “MFN-bar” in new instrument

“Most favoured nation provision in an investment treaty

The Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention.” (Art. 1(5) Mauritius Convention)

Conclusion

- ✓ Art. 41 VCLT **efficient mechanism** to create AM – especially because of unanimity rule for *amendments* (Art. 66)
- ✓ ICSID Convention **does not prohibit** *inter se* modification
- ✓ **Nothing** that suggests ICSID Convention **absolutely immutable** over time
- ✓ Different dispute settlement rights / obligations **can co-exist** amongst ICSID MS

French/EU experience & perspectives on the establishment of an appeal

- Historical background
- EU experience in the establishment of bilateral appeal mechanisms
- EU perspectives on the establishment of a multilateral appeal facility

Historical background

- The Multilateral Investment Agreement negotiations

The establishment of an appeal mechanism in the MAI.

9. At the High Level Meeting on 16-17 February, one delegation proposed the establishment of an appeal mechanism in the MAI for both state-state and investor-state dispute settlement [DAFFE/MAI/RD(98)11]. Delegations in the informal consultations broadly agreed with the objectives of ensuring the development of a coherent jurisprudence and permitting an appeal where there may have been an error in law -- particularly concerning the interpretation of MAI obligations. However, concerns were expressed about the delays and costs an appeal might add to dispute settlement, particularly the traditional forms of investor-state arbitration, and its departure from the philosophy of fast, inexpensive and final one step arbitration.

Selected issues on Dispute Settlement, [DAFFE/MAI\(98\)12](#) (13 March 1998)

Historical background

- The « TTIP debate »

The option that consists in derogating from the Washington convention in order to create an appeal mechanism when this convention is applied for the European Union and Parties, with which it has signed investment protection agreements, could be envisaged pursuant to Article 41 of the Vienna Convention on the Law of Treaties.

Towards a new way to settle disputes between States and investors, [French non-paper](#) (May 2015)

EU experience in the establishment of bilateral appeal mechanisms

CONSENT (1)

2. Paragraph 1 of this Article shall constitute the consent of the respondent to the submission of a claim under this Section. The consent under paragraph 1 and the submission of a claim under this Section shall be deemed to satisfy the requirements of:

- (a) Chapter II of the ICSID Convention, and the ICSID Additional Facility Rules, for written consent of the disputing parties; and
- (b) Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (hereinafter referred to as "New York Convention") for an "agreement in writing".

EU-Singapore [IPA](#), article 3.6

EU experience in the establishment of bilateral appeal mechanisms

CONSENT (2)

1. A claim may be submitted under this Section only if:
 - (a) the submission of the claim is accompanied by the claimant's consent in writing to dispute settlement in accordance with the procedures set out in this Section and the claimant's designation of one of the fora rules referred to in paragraph 1 of Article 3.6 (Submission of Claim to Tribunal) as the rules for dispute settlement;

EU-Singapore IPA, article 3.7

EU experience in the establishment of bilateral appeal mechanisms

CONSENT (3)

(f) the claimant:

(iii) declares that it will not enforce any award rendered pursuant to this Section before such award has become final, and will not seek to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section.

EU-Singapore IPA, article 3.7

EU experience in the establishment of bilateral appeal mechanisms

REVIEW (1)

1. Either disputing party may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance. The grounds for appeal are:

EU-Singapore IPA, article 3.19

EU experience in the establishment of bilateral appeal mechanisms

REVIEW (2)

The grounds for appeal are:

- (a) that the Tribunal has erred in the interpretation or application of the applicable law;
- (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,
- (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).

EU-Singapore IPA, article 3.19

EU experience in the establishment of bilateral appeal mechanisms

REVIEW (3)

2. If the Appeal Tribunal dismisses the appeal, the provisional award shall become final. The Appeal Tribunal may also dismiss the appeal on an expedited basis where it is clear that the appeal is manifestly unfounded, in which case the provisional award shall become final.

3. If the appeal is well founded, the Appeal Tribunal shall modify or reverse the legal findings and conclusions in the provisional award in whole or in part. The Appeal Tribunal shall refer the matter back to the Tribunal, specifying precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal. The Tribunal shall be bound by the findings and conclusions of the Appeal Tribunal and shall, after hearing the disputing parties if appropriate, revise its provisional award accordingly. The Tribunal shall seek to issue its revised award within 90 days after the referral of the matter back to it.

EU-Singapore IPA, article 3.19

EU experience in the establishment of bilateral appeal mechanisms

ENFORCEMENT (1)

1. An award rendered pursuant to this section shall not be enforceable until it has become final pursuant to Articles 3.18(4) (Award), 3.19(2) (Appeal Procedure), or 3.19(3) (Appeal Procedure). Final awards issued pursuant to this Section by the Tribunal shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy.¹

EU-Singapore IPA, article 3.22

EU experience in the establishment of bilateral appeal mechanisms

ENFORCEMENT (2)

2. Each Party shall recognise an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.

EU-Singapore IPA, article 3.22

EU experience in the establishment of bilateral appeal mechanisms

ENFORCEMENT (3)

5. For the purposes of Article I of the New York Convention, final awards issued pursuant to this Section are arbitral awards relating to claims that are considered to arise out of a commercial relationship or transaction.

6. For greater certainty and subject to paragraph 1, where a claim has been submitted to dispute settlement pursuant to Article 3.6(1)(a) (Submission of Claim to Tribunal), a final award issued pursuant to this Section shall qualify as an award under Section 6 of Chapter IV of the ICSID Convention.

EU-Singapore IPA, article 3.22

EU perspectives on the establishment of a multilateral appeal facility

OPEN ARCHITECTURE

- Treaty, Law & Contracts claims
- State-to-State Dispute Settlement
- Ad hoc first instance awards
- Only if Respondent State is Party to the MIIR?

EU perspectives on the establishment of a multilateral appeal facility

EFFICIENCY FOR DISPUTING PARTIES

- Cumulative grounds of appeal / annulment
- 2 tiers system / no third layer

EU perspectives on the establishment of a multilateral appeal facility

LEGITIMACY FOR THE SYSTEM

- Permanent structure at appeal level...
- ... preferably also at first instance level

CONCLUSIONS

- AM can be done if MS want
- Need core number of MS to make it viable
- Danger of fragmentation
- Platform selected has significant ramifications, especially for enforceability