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Submission Regarding Amendments to the ICSID Arbitration Rules

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Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

March 31, 2017

ICSID Secretariat

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Illustrative Suggestions for Amendments to the ICSID Arbitration Rules

We at the Columbia Center on Sustainable Investment (CCSI) are grateful for the opportunity to provide input to the ICSID Secretariat regarding proposed revisions to ICSID’s arbitration rules.

CCSI, as a joint center of Columbia Law School and the Earth Institute at Columbia University, focuses on international investment, including related dispute resolution mechanisms, and the impacts such investment and dispute resolution can have on inclusive, rights-compliant sustainable development. While not comprehensive, our comments below briefly highlight some issues that we believe need to be addressed on a priority basis in order to help address some of the gaps regarding the legitimacy and fairness of investor-state arbitration. This submission is not meant to be exhaustive. CCSI looks forward to opportunities to further engage in ongoing discussions on priorities and options for reform.

We thank you for your consideration of this submission.

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Recognizing and safeguarding the rights and interests of non-parties

Disputes between two litigating parties often impact the rights and interests of those not party to the litigation or arbitration.¹ In recognition of that reality, the procedural rules governing some systems of dispute resolution (1) provide a mechanism for mandatory or permissive joinder by those interested or affected non-parties, and (2) require dismissal of cases when a non-party's rights will be affected by the dispute resolution proceedings but cannot join them.²

ICSID's arbitration rules (like other arbitration rules commonly used in investor-state arbitration) contain no such protections for interested and affected non-parties. Consequently, the litigation positions adopted in and outcomes of investor-state arbitral disputes risk harming the rights of other natural and legal persons. We thus urge that ICSID address this issue to ensure fairness to non-parties and recommend adoption of a rule mandating dismissal of claims or cases in which (1) the rights or interests of non-parties will be affected by the arbitration, and (2) those non-parties are not willing or able to join the arbitration as parties.

Improving transparency of the dispute resolution process

Nearly four years ago, the United Nations Commission on International Trade Law (UNCITRAL), recognizing "the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations," adopted its Rules on Transparency in Treaty-Based Investor-State Arbitration (the "Transparency Rules").³ ICSID, however, has yet to similarly update its rules and bring them in line with modern norms regarding transparency and good governance.

In other contexts, the World Bank Group has highlighted the significance of transparency for improved governance of, and accountability regarding, investment. The World Bank's recently revised Environmental and Social Standard (ESS),⁴ for example, highlights the importance of open

¹ There are innumerable circumstances in which arbitration/litigation can affect non-parties' rights and interests; this submission does not purport to catalogue them. Nevertheless, they can include situations in which the dispute involves

- a challenge to the validity of a court/arbitral award received by a non-party to the litigation/arbitration in a separate proceeding;
- a claim by shareholders regarding alleged harms to a non-party corporation; and
- a claim by one entity to obtain a permit or other permission to use or occupy land over which there are also competing claims by individuals or communities.

Risks to the rights and interests of non-parties may be particularly acute in cases involving disputes over access to land or resources, in claims for injunctive or declaratory relief, and in cases requiring judgments regarding the legitimacy of non-parties' rights or actions.

² See, e.g., US Fed. R. Civ. Proc. R. 19(a) & (b).

³ Report of the United Nations Commission on International Trade Law, forty-sixth session (July 8-26, 2013), Gen. Assem., supp. no. 17, para. 128. The Transparency Rules are available on UNCITRAL's website, <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>. For more information on the Transparency Rules, see Lise Johnson and Nathalie Bernasconi-Osterwalder, "New UNCITRAL arbitration rules on transparency: Application, content and next steps," August 2013, pp. 23-25.

⁴ World Bank Environmental and Social Framework (August 4, 2016), available at: http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/the_esf_clean_final_for_public_disclosure_post_board_august_4.pdf. Note that Environmental and Social Standard 10 (ESS10) regarding Stakeholder Engagement and Information Disclosure applies to all projects supported by the Bank through Investment Project Financing. See ESS10, para. 4.

and transparent engagement around investment projects *throughout their life-cycle* “as an essential element of good international practice.”⁵ To be meaningful, this transparency regarding investor-state relations must include dispute resolution processes at the national and international levels.

Indeed, the lack of transparency investor-state dispute settlement has been identified by critics as one of the features that undermines the legitimacy and accountability of the current system.⁶ UN human rights experts, among others, have publicly voiced concern about the impact of investor-state dispute settlement on human rights, pointing to *inter alia* the lack of transparency in the current system.⁷

Supporters of investor-state arbitration are also concerned about the lack of transparency, as they recognize that transparency of the system is inexorably tied to its legitimacy. Proponents often argue that the system can improve domestic rule of law in the host state.⁸ However, by excluding interested third parties (including project-affected sectors of host state citizens) from accessing information about disputes, the current system arguably runs counter to rule of law principles of equality, accountability, fairness, and procedural and legal transparency.⁹ Moreover, the lack of transparency prevents states and investors from understanding the law that applies to them, and their rights and obligations under that law.

We urge ICSID and its state parties to recall UN member states’ commitments under Goal 16 of the Sustainable Development Goals to *inter alia* promote the rule of law, and to “[d]evelop effective, accountable and transparent institutions at all levels.”¹⁰ Fulfilling these commitments requires, among other things, ensuring transparency of investor-state arbitrations.

In this effort to ensure transparency of international arbitration, ICSID is aided by the work of UNCITRAL, which established an important framework for transparency of treaty-based investor-state arbitration, and by the growing number of treaties that also require transparency of the investor-state disputes that arise under them. Importantly, ICSID could and should also advance the standard for its peers by ensuring transparency of contract-based disputes in addition to treaty-based investment disputes.

Owing to the significance of investor-state contracts for the governance and outcomes of international investment,¹¹ consensus is emerging on the need for greater transparency around these

⁵ *Id.*, para. 1.

⁶ See Lise Johnson and Lisa Sachs, “International investment agreements, 2013: A review of trends and new approaches” in Andrea K Bjorklund (ed), *Yearbook on International Investment Law & Policy 2013–2014* (Oxford University Press 2015) 59-64.

⁷ See e.g., “Investor-State dispute settlement undermines rule of law and democracy, UN expert tells Council of Europe,” (April 19, 2016); “International trade: UN expert calls for abolition of Investor-state dispute settlement arbitrations” (October 26, 2015); “UN experts voice concern over adverse impact of free trade and investment agreements on human rights” (June 2, 2015).

⁸ See e.g., Benjamin K. Guthrie, “Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law,” (2013) 45 *NYU Journal of International Law & Politics* 1151 (for a summary of arguments in support of this statement).

⁹ See Report of the Secretary-General to the UN Security Council, “The rule of law and transitional justice in conflict and post-conflict societies” (August 23, 2004) UN Doc. S/2004/616.

¹⁰ UN Sustainable Development Goals (SDGs) Targets 16.3 and 16.6 respectively.

¹¹ On the significance of investor-state contracts for the governance and outcomes of international investment, see e.g., Kaitlin Cordes, Lise Johnson, and Szoke-Burke, “Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections,” Columbia Center on Sustainable Investment (2016); Lorenzo Cotula, “Foreign Investment, Law and Sustainable Development: A Handbook on Agriculture and Extractive

agreements. This consensus is evident in certain guidelines and principles regarding responsible international investment,¹² and in the steps that some host states have taken to advance or require contract disclosure.¹³ Moreover, proactive disclosure of investor-state contracts is arguably required under existing host and home state obligations to respect, protect and fulfill rights to participation and access to information, protected under several existing human rights treaties to which many (or most) ICSID contracting and signatory states are party.¹⁴ This obligation to proactively disclose arises from both the general public interest nature of investor-state contracts (which involve the exercise of state powers and form a key source of rules governing international investment), and from the specific implications that investor-state contracts can have for affected individuals and communities in the context of international investment.¹⁵ The rationale underlying arguments for proactive disclosure of investor-state contracts can be extended to investor-state disputes based in, or concerning, these agreements. Investor-state disputes can, among other things: result in the interpretation of contractual commitments in a manner that profoundly affects the underlying investment, and rights and obligations of the contracting parties; allow for enforcement of investor-state contracts deemed illegal or invalid under domestic law; and require or result in the renegotiation of these agreements.

The need for transparency of investor-state contracts thus implies a need for transparency of any processes and outcomes that may affect the content and enforcement of these agreements, including investor-state dispute settlement. These issues should therefore also form a part of ICSID's upcoming efforts to modernize its rules.

Promoting transparency of ownership

Driven in part by tax planning strategies and regulatory arbitrage, ownership structures for investments are increasingly and infamously complex. One consequence is that respondent states may have difficulty assessing whether investor/claimants are actually entitled to protection under the relevant investment treaty that is being invoked. Rather than requiring states to embark on costly and wasteful efforts to disentangle corporate ownership structures each time they face a case, the

Industries,” (Natural Resource Issues No. 31.) International Institute for Environment and Development (2016); Carin Smaller, with contributions from H. Mann, N. Bernasconi-Osterwalder, L. Pinter, M. McCandless, and J. Parry, “The IISD Guide to Negotiating Investment Contracts for Farmland and Water,” International Institute for Sustainable Development (2014).

¹² For example, following a review of guidelines and principles regarding land governance and responsible investment, the Columbia Center on Sustainable Investment found that most prominent best practice recommendations call for transparency around land-based investments, with many such guidelines calling for disclosure of land contracts specifically. *See* Columbia Center on Sustainable Investment, “Recommending Transparency in Land-Based Investment: A Summary of Relevant Guidelines and Principles,” (March 2016). More generally, the UN Principles for Responsible Contracts, endorsed by the Human Rights Council in 2011, recommend that “[t]he contract’s terms should be disclosed.” *See* UN Principles for Responsible Contracts (2015). The Principles were endorsed as part of the Guiding Principles on Business and Human Rights on June 16, 2011. *See* UN Human Rights Council Resolution 17/4 on Human rights and transnational corporations and other business enterprises (UN Doc. A/HRC/RES/17/4).

¹³ With respect to extractive industry investments, contract disclosure is fast becoming the norm among Extractive Industries Transparency Initiative (EITI) countries. As of March 2017, at least 29 host states had published some contracts, licenses or leases pertaining to extractive industry projects. *See* Don Hubert and Rob Pitman, “Past the Tipping Point? Contract Disclosure within EITI,” Natural Resource Governance Institute (March 2017). A handful of states have also taken steps to disclose investor-state contracts concerning commercial agriculture and forestry projects.

¹⁴ *See* Jesse Coleman and Kaitlin Y. Cordes, “Articulating a Rights-Based Argument for Land Contract Disclosure” (forthcoming).

¹⁵ *Id.*

ICSID arbitration rules should require companies to fully disclose their corporate family structures and beneficial owners when filing a request for arbitration. In addition to helping reduce the time and expense of arbitration by clarifying certain issues at the outset of the dispute, such a rule on early disclosure would also likely reduce incentives for companies to abuse the flexibilities afforded by corporate law, and would enable other interested and potentially affected individuals and entities such as creditors and shareholders to be aware of the case.

Preventing abuse of requests for interim measures

In a growing number of cases, investor/claimants in investor-state disputes are seeking interim measures of injunctive relief that aim to compel states to halt their own governmental investigations of or claims against the investor relating to the investor's alleged wrongdoing.¹⁶ In other cases, requests for interim measures of injunctive relief ask for an order compelling the state to halt litigation private parties have brought against the investor, or to stop private parties from collecting sums awarded against the investor through separate legal proceedings.¹⁷

These types of requests can potentially interfere with legitimate government and private actions to hold investors accountable for harms they cause in the host state. Given the persistent challenges that many host countries and communities face in terms of securing relief for injuries caused by projects involving foreign investment,¹⁸ giving investors these added tools for avoiding responsibility is particularly problematic.

Revision of ICSID's arbitration rules should therefore seek to prevent investors from abusing requests for interim measures through, for example, bans on such requests or rules requiring imposition of financial penalties on investors who seek to shut down any non-frivolous case or investigation against the investor.

Preventing actual and apparent conflicts of interest

The independence and impartiality of dispute settlement mechanisms, including investor-state arbitration, is critical for preserving the credibility and viability of such mechanisms. Under current ICSID arbitration rules, however, guarantees of independence and impartiality are inadequate.

Among the issues that should be addressed in this context are the practice of arbitrators wearing "dual hats" – simultaneously practicing both as arbitrators and counsel in investor-state arbitral disputes. ICSID arbitration rules should be revised to preclude that practice. Similarly, the procedures by which challenges are decided should be revised. The present system, whereby a challenge to one arbitrator is resolved by his/her two fellow arbitrators, "does not fulfill the

¹⁶ See, e.g., Luke Eric Peterson, Analysis: Arbitrators Revoke an Interim Measures Decision, But Continue to Offer Little Explanation for How 'Procedural Integrity of Arbitration' Was in Peril, *IA Reporter* (Oct. 18, 2016); Joel Dahlquist, Interim Tax-Related Measures Revealed to Have Been Ordered by Full ICC Tribunal – Constituted on an Expedited Basis – and Later Vacated, *IA Reporter* (Mar. 21, 2016).

¹⁷ See, e.g., Luke Eric Peterson, *ICSID Tribunal Orders State-Owned Companies to Work to Get Local Court Injunction Lifted*, *IAReporter* (Jul. 20, 2016); Luke Eric Peterson, In "Show Cause" Proceeding, Chevron Quantifies Alleged Losses Due to Ecuador's Failure to Block Enforcement of Lago Agrio Judgment, *IAReporter* (Nov. 19, 2013).

¹⁸ See, e.g., Guide to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking (The Laboratory for Advanced Research on the Global Economy & the LSE Investment and Human Rights Project, 2016), at 18 (quoting OHCHR Report, UN doc A/HRC/29/39, para 25; *Progress report of the United Nations High Commissioner for Human Rights on legal options and practical measures to improve access to remedy for victims of business-related human rights abuses* (May 2014)).

appearance-of-independence requirement, and thus undermines the normative and sociological legitimacy” of arbitral tribunals.¹⁹

Addressing concerns raised by third-party funding

The apparent rise of third-party funding in investor-state arbitration raises a host of concerns relating to, among other things, potential conflicts of interests and the ability of respondent states to recover costs awarded against unsuccessful and insolvent claimants. Depending on the nature of the funding arrangement, third-party funding may also potentially impact the fundamental question of who is the investor/claimant, and whether that investor/claimant is – and should be – protected under international investment treaties and the ICSID Convention given the object and purpose of those instruments.

It is crucial to launch a multi-stakeholder dialogue on the role of third-party funders in ICSID investor-state arbitration, and to consider rules for governing whether, in what circumstances, and under what conditions different funding arrangements may be permitted.²⁰

Ensuring legitimacy of settlement agreements²¹

A significant percentage of investor–state dispute settlement claims are reportedly settled between the parties to the dispute before an award is issued.²² While settlements can be seen as positive outcomes, saving parties the time and expense of arbitration and permitting more certainty over an outcome, in the context of disputes involving governments, settlements raise threats to principles of good governance, including government accountability, respect for the rule of law, transparency, and respect for citizens’ rights and interests under domestic law and international human rights norms.²³ When a settlement agreement also includes the settlement of a counterclaim, the threats are exacerbated.

Settlements can significantly impact, often negatively, the rights and interests of non-parties to the dispute,²⁴ and could also allow a governments to avoid legislatively established norms that govern

¹⁹ Chiara Giorgetti, *Between Legitimacy and Control: Challenges and Recusals and Arbitrators in International Courts and Tribunals*. 49 *George Washington International Law Review* 205, 208-09 (2016).

²⁰The Singapore Investment Arbitration Centre (SIAC) is the first arbitration institution to include rules expressly addressing third party funding. See, e.g., SIAC Investment Arbitration Rules, Rules 24.1 & 33.1.

²¹ This section on settlement summarizes a recent publication by Lise Johnson & Brooke Skartvedt Guven, “The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest,” *Investment Treaty News* (March 13, 2017).

²² United Nations Conference on Trade and Development (UNCTAD). (June 2016). *Investor–state dispute settlement: Review of developments in 2015*. *IIA Issues Note*, 2. Retrieved from http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d4_en.pdf.

²³ See United Nations, Office of the High Commissioner on Human Rights (UN OHCHR). *Good governance and human rights*.

²⁴ Kaitlin Y. Cordes, et al., *Land deal dilemmas: Grievances, human rights, and investor protections* (March 2016). (highlighting how competing claims of non-parties may be marginalized; see, generally, Morley, M. T. (2014). Consent of the governed or consent of the government? The problems with consent decrees in government-defendant cases. *Journal of Constitutional Law*, 16(3), 637–696, pp. 647–649. Retrieved from <http://scholarship.law.upenn.edu/jcl/vol16/iss3/2>. See also Lise Johnson & Lisa Sachs, *The TPP’s investment chapter: Entrenching rather than reforming a flawed system* (2015). Retrieved from <http://ccsi.columbia.edu/2015/11/18/the-tpps-investment-chapter-entrenching-rather-than-reforming-a-flawed-system>.

the rulemaking process.²⁵ While various rules and mechanisms exist in some domestic contexts for public and judicial oversight of settlement agreements,²⁶ ICSID's arbitration rules do not currently contain protections for non-party rights and interests, or mechanisms for ensuring public oversight of proposed settlement agreements. As such, any rule revisions surrounding settlement would need to go hand-in-hand with rule revisions surrounding transparency and the rights and interests of non-parties.

Ensuring legitimacy of the rule revision process

To date, roughly 600 investor-state arbitrations have been brought against states around the world under ICSID's arbitration rules.²⁷ ICSID's arbitration rules thus have significant and growing implications for issues of fundamental importance around the world.

The mere fact that the cases are brought against states, involving allegations of government wrongdoing and potential liability, makes them important matters of public concern. But the nature of the disputes and the range of laws, policies, practices, actions and omissions they challenge magnify these arbitrations' relevance for non-parties. And, just as the public needs to be enabled to play a greater role in framing the substantive standards of protection that are used as the basis for investor-state cases (both treaty- and contract-based), the public must be engaged in this rule revision process. This is particularly so given that the content of procedural rules can play a determinative role in shaping substantive outcomes. We therefore commend ICSID for enabling public participation in this phase of its process, and emphasize the importance of continued efforts to ensure meaningful participation of diverse stakeholders around the world as this initiative advances.

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²⁵ U.S. Chamber of Commerce. (2013, May). *Sue and settle: Regulating behind closed doors*, p. 3. Retrieved from <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>.

²⁶ See *supra* n.21.

²⁷ ICSID, The ICSID Caseload - Statistics (Issue 2017-1), 7.