Revised comments to the proposed amendments to the ICSID Rules submitted on behalf of the European Union and its Members States

1. The European Union and its Member States welcome this opportunity to discuss further the proposed changes put forward by the ICSID Secretariat in its Working Paper #2. We commend the Secretariat colleagues for their dedication and efficiency in working through the comments from the members and the interested public, and providing helpful clarifications through technical meetings and webinars.

2. As already indicated in the written comments submitted to the ICSID Secretariat in December 2018, throughout the last years, the European Union and its Member States have been engaged in a process of fundamental reform of their investment policy and in particular of the functioning of the investor-state dispute settlement (ISDS) system.

3. The European Union and its Member States are also actively engaged in the on-going work of the UNCITRAL Working Group III on the reform of investor-state dispute settlement and are pursuing the objective of establishing a permanent mechanism for the settlement of international investment disputes. Against this background, more systemic reform proposals as regards the functioning of ICSID would also have been welcomed. In this regard, the European Union and its Member States note the Secretariat's readiness, expressed in Working Paper #2 (§434), to assist States in further discussions of the possible creation of an appeal mechanism. In the meantime, the European Union and its Member States encourage the ICSID Secretariat to engage constructively in the work of the UNCITRAL Working Group III, including in the discussions on systemic reform proposals.

Small and medium-sized enterprises

4. The European Union and its Member States would have liked to see the current rules amendment process resulting in making ICSID arbitration more accessible for small and medium-sized enterprises. The European Union and its Member States encourage the ICSID Secretariat to consider ways to better take into account their interests throughout the ICSID rules, notably in the financial provisions, provisions on expedited procedures and consolidation, and other rules addressing specifically the particular situation of small and medium-sized enterprises.

Regional Economic Integration Organisations

5. The European Union and its Member States welcome the proposal to include 'Regional Economic Integration Organisations' (REIO) among the entities that can be parties to disputes under the ICSID Additional Facility Rules (AFR). Inclusion of REIOs would be a recognition of the fact that regional economic integration organisations, including the European Union, have become more active in the area of international investment policy and the conclusion of international investment agreements (IIAs).

6. We also welcome that our comments regarding the constitution of the Tribunal and the related nationality requirements have been taken into account to explicitly permit the parties to derogate from such provisions. It is the EU's and its Member States understanding that different provisions contained in investment treaties (that will be

accepted by the claimants when submitting the claim) will equally prevail over the default provisions contained in the proposal.

Rights and obligations of tribunal members

7. With respect to Rule 11 of the Arbitration Rules and Rule 14 of the Administrative and Financial Rules, the European Union and its Member States encourage a prompt revision of the ICSID Schedule of Fees, with a view to strengthening the incentives for Tribunals to meet applicable time limits. Such a revision could include the consideration of financial consequences in cases of unjustified failure to comply with such obligations (e.g. withholding or docking fees).

8. The European Union and its Member States also invite the ICSID Secretariat to speed up the on-going work on the elaboration of a binding Code of Conduct for ICSID Arbitration (as referred to in §298 of Working Paper #1). Pending the availability of such a Code of Conduct, the European Union and its Member States suggest that the acceptance of appointment (Rule 18 of Arbitration Rules and arbitrator declaration in Schedule 2) also includes a commitment to comply with existing relevant ethic rules.

Content of the request

9. The European Union and its Member States are in favour of including among the mandatory content of the request for arbitration or conciliation, set out in Rule 2 (Institution Rules), information on the estimated amount of damages sought.

Correction of errors

10. The European Union and its Member States suggest clarifying the extent of the term "any deficiency" in Rule 8 of the Arbitration Rules, by incorporating some elements of the explanation provided in §93 of Working Paper #2.

Disclosure / Notice of third party funding

11. The European Union and its Member States welcome the proposed inclusion into the ICSID Arbitration Rules and the Additional Facility Arbitration Rules of specific disclosure requirements regarding third party funding (Rule 13 and Rule 22, respectively). The European Union and its Member States are of the view that the provision should establish a clear obligation of disclosure for the parties, and not only be done for the purpose of the completion of the arbitrator declaration. In this respect, the European Union and its Member States suggest to maintain the original draft of Rule 13 (2) AR in Working Paper #1 that created an autonomous disclosure obligation. The European Union and its Member States would also suggest adding language that will ensure that in cases of complex funding arrangements the provisions also ensures that disclosure reveals the identity of the ultimate funder.

12. The European Union and its Member States could also accept a requirement to disclose the main features or conditions of the third party funding arrangements, where warranted and upon request, provided that the protection of confidential business or strategic information is ensured.

13. With respect to consequences of failure to disclose third party funding, the European Union and its Member States propose to add language stating that failure to comply

with disclosure obligations regarding third party funding can be a factor for Tribunals to consider in determining and allocating the costs of proceedings.

Appointment of Arbitrators by the Chair in accordance with Article 38 of the Convention

14. While recognising that professional qualifications and expertise should be the primary factors in appointment of arbitrators, the European Union and its Member States would welcome a codification of the current ICSID practice to strive for more gender and geographical balance.

Disqualification

15. The European Union and its Member States take note of the fact that the proposal not to automatically suspend the proceedings pending a disqualification proposal has not found the support of a majority of ICSID members. We consider that in view of more and more frequent challenges of arbitrators and the resulting delays of ISDS proceedings, ICSID's original proposal had merit. We would have preferred to see this proposal maintained. In order to maintain the balance with the requirement of safeguarding the legitimacy of the process, we propose the introduction of additional language providing that if the challenge results in a disqualification, any order or decision issued by the Tribunal, as well as any taking and hearing of evidence while the proposal was pending, should automatically be reconsidered by the reconstituted Tribunal.

Experts and witnesses

16. The European Union and its Member States are of the view that experts and witnesses giving evidence in arbitration proceedings should provide a written declaration on their independence and impartiality, on past or present, direct or indirect relationships with the disputing parties, their counsel, members of the Tribunal and any other participant or third party funder involved in the dispute.

Consolidation

17. The European Union and its Member States consider that consolidation can be a useful tool for respondents when faced with multiple claims on similar facts or abusive litigation tactics. It could further contribute to the reduction of costs and of the risk of inconsistent interpretations, and to avoidance of conflicting or contradictory awards. In this respect, the European Union and its Member States welcome the inclusion of specific language on voluntary consolidation and the clarification of the role of the Secretary General in the process.

18. The European Union and its Member States remain willing to engage with ICSID Members in further reflections on introducing, under certain well-defined conditions, the possibility of mandatory consolidation and welcome the openness of the Secretariat to such discussions in the future.

Transparency

19. In their first written comments, the European Union and its Member States explained in detail the utmost importance of transparency as a general policy objective and one of the main pillars of the EU' reformed approach to investment dispute settlement.

20. The European Union and its Member States regret that the current proposals by the ICSID Secretariat – including on public access to hearings in arbitration proceedings, and on the publication of awards rendered under the ICSID Arbitration Rules –, remain below the level of transparency achieved in most recent investment agreements or in the recently adopted UNCITRAL Transparency Rules.

21. Mindful of the potential limitations stemming from the ICSID Convention, the European Union and its Member States reiterate their invitation to the ICSID Secretariat and ICSID Members to reflect further about possible ways to achieve a greater level of transparency that would be at least similar to the UNCITRAL Transparency Rules for all investment arbitration proceedings administered by ICSID. Such increased transparency requirements should be discussed in parallel with a more precise description of what would constitute protected or confidential information, similar to what has been agreed within the UNCITRAL Transparency Rules.

22. On the positive side, with regard to **submissions of non-disputing parties**, the European Union and its Member States are pleased to see that the initially proposed language that would have made it possible to require non-disputing parties to bear parts of the costs of the proceedings has not been retained in the revised text proposal. Similarly, we welcome that the ICSID Secretariat has taken on board our comment on the requirement for a Tribunal to give the reasons for a decision whether to permit a non-disputing party to file a submission.

23. As regards submissions by **'Non-disputing Treaty-Parties'**, the European Union and its Member States welcome that this rule has been de-linked from the provision relating to 'non-disputing parties', and is thus better suited to the particular nature of governments and States (and REIOs).

24. The European Union and its Member States are, however, concerned that the wording in Working Paper #2 does not address appropriately all the situations that the language proposed by the European Union and its Member States to this rule intended to cover. To reflect the particular situation of REIOs, and the relationship with its constituent Members, we wold request the Secretariat to reconsider including, in a footnote to what would become Rule 66, language that would state that submissions covered by that rule are understood to include submissions made by REIOs of which the non-disputing Treaty Party forms part.

25. The European Union and its Member States also note that in its current wording the proposal would limit the submissions to issues of "interpretation". We suggest reconsidering to include a provision that would leave it to the discretion of the Tribunals to allow interventions on further matters within the scope of the dispute, as a Tribunal may deem it helpful in light of the circumstances of a particular case, provided that such submissions do not support the claim of the investor in a manner tantamount to diplomatic protection. This would also align the provision with Article 5(2) of the UNCITRAL Transparency Rules and hence contribute to the coherence of existing dispute settlement rules.

Costs of proceedings – allocation of costs

26. The European Union and its Member States welcome the proposals to provide for certain factors giving guidance to Tribunals on how to allocate costs, including in particular the assessment of the reasonableness of the costs claimed and the conduct

of parties. The European Union and its Member States would also welcome a practice note by the ICSID Secretariat giving guidance on the different factors listed in Rule 50 (1).

27. As a general principle, the European Union and its Member States would favour a clearer provision establishing the pre-eminence of the loser-pays principle among the factors to be taken into account by Tribunals when allocating costs. Providing for the loser-pays rule to be applied as a matter of principle, unless a different cost apportionment is appropriate in the circumstances of the case, would be more in line with Article 42 of the UNCITRAL Arbitration Rules, as well as recent treaty developments and case-law. Such a rule would also have the advantage of deterring unfounded claims. At a minimum, the rule should apply when a claim is dismissed on a preliminary basis for manifest lack of legal merit.

Discontinuance

28. To address concerns raised by a number of ICSID Members, the European Union and its Member States encourage the ICSID Secretariat to investigate further solutions that allow respondent States, upon request, to effectively recover costs engaged through cases where the arbitration proceedings are discontinued due to failure of the claimant to act or its failure to pay.

Security for costs

29. The European Union and its Member States welcome a separate provision on security for costs. We also support the proposal of the ICSID Secretariat that the mere presence of third party funding should not *ipso facto* warrant a security for costs order.

30. With respect to the wording used in Rule 51(3)(b), the European Union and its Member States suggest to clarify the language and refer to "history of non-compliance with previous awards in relevant proceedings" instead of "willingness to comply".