Comments to the proposed amendments to the ICSID Rules submitted on behalf of the European Union and its Member States

1. Following the entry into force of the Lisbon Treaty on 1 December 2009, the European Union has acquired competence in the field of foreign direct investment, which forms part of the European Union's common commercial policy.[1] As a consequence, the European Union is today responsible for establishing a common European Union-wide investment policy, inter alia, by negotiating investment provisions embodied in Free Trade Agreements or in self standing Investment Protection Agreements.

2. As ICSID is a key international organisation facilitating the settlement of disputes between foreign investors and States, the European Union and its Member States follow its work very closely. The European Union and its Member States take particular interest in the on-going rules amendment process of ICSID, and welcome this opportunity to provide comments for consideration to the ICSID Secretariat.

3. 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. 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, the European Union and its Member States would have welcomed discussing more ambitious reform proposals within the ICSID context, including with regard to institutional aspects such as the possible creation of an appeal mechanism or reliance on permanent adjudicators.

4. This being said, the European Union and its Member States consider that the current rules amendment process should at a minimum be used to make ICSID arbitration more transparent, more time and cost effective, and protect better against frivolous claims. The rules amendment process should also provide appropriate safeguards for the independence an impartiality of arbitrators, including through a binding code of conduct for arbitrators on which ICSID is encouraged to start working promptly.

5. The comments submitted on behalf of the European Union and its Member States, detailed below, relate to the following issues:

    a. Inclusion of 'Regional Economic Integration Organisations' and related amendment proposals (Additional Facility Rules - Articles 1(4), 1(5), 1(8), 2(1) and 2(2); Additional Facility Arbitration Rules – Rule 3(2)(c)-(e), Rule 30)

    b. Disclosure of Third Party Funding (ICSID Arbitration Rules – Rule 21; Additional Facility Arbitration Rules – Rule 32)

    c. Disqualification (ICSID Arbitration Rules – Rules 29(3) and 30; Additional Facility Arbitration Rules – Rules 39(3) and 40)

[1] Article 207 of the Treaty on the Functioning of the European Union.

d. Consolidation (ICSID Arbitration Rules – Rule 38; Additional Facility Arbitration Rules – Rule 48)

e. Transparency (ICSID Arbitration Rules – Rules 16, 44-49; Additional Facility Arbitration Rules – Rules 26, 54-58)

f. Costs of proceedings – allocation of costs (ICSID Arbitration Rules – Rule 19(4); Additional Facility Arbitration Rules – Rule 29(4))

g. Security for costs (ICSID Arbitration Rules – Rule 51; Additional Facility Arbitration Rules – Rule 60)

Inclusion of 'Regional Economic Integration Organisations' and related amendment proposals

6. 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).

7. The definition of 'Regional Economic Integration Organisation' that ICSID has put forward in AFR Article 1(4) ("*an organisation constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to take decisions binding on them in respect of these matters*") is a definition that has been used in other international treaties (eg. Energy Charter Treaty) and can be supported by the European Union and its Member States. The same applies for the proposed definitions of "nationals", both with respect to natural and juridical persons, as spelled out in AFR Article 1(5)(a)-(c). The European Union and its Member States would invite the ICSID Secretariat to also consult with other potentially interested REIOs about these provisions.

8. As to the proposal to include a definition of 'Contracting REIOs' as part of the definitions for the purpose of the application of AFR Article 1(8), the European Union and its Member States would see merit in including such a definition. The inclusion of such a definition does not prejudge the outcome of any possible future discussions on whether REIOs should or could become Contracting Parties to the ICSID Convention. The European Union and its Member States understand that such a discussion is not part of the current ICSID reform proposals.

9. With respect to the constitution of the Tribunal, as set out in the proposed Additional Facility Arbitration Rule ((AF)AR) 30, the European Union and its Member States are of the view that in cases where a REIO is a disputing party, the proposed rule should clarify that investment treaties under which the disputes are initiated may derogate from the conditions regarding the nationality of the majority of the arbitrators (Rule (AF)AR) 30(2)) or the appointment of arbitrators (Rule (AF)AR) 30(3)), in addition to the derogations foreseen by agreement of the disputing parties.

Disclosure of third party funding

10. 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. The inclusion of such disclosure requirements contributes significantly to increased transparency of investment disputes. The proposed language is similar to recent practice followed by the European Union and its Member States in investment agreements approved at EU-level. The European Union and its Member States note the importance of requiring the disclosure of the existence of third party funding and the name of the third party funder, and of making the disclosure requirement an obligation before the start of the proceedings (notice to be filed "immediately upon registration of the Request for arbitration"), as well as a "standing obligation" during the proceedings (notice to be filed without delay "upon concluding a third party funding arrangement").

11. Disclosure of third party funding is primarily relevant from a 'conflict of interest' point of view. By making the fact of third party funding transparent, the parties and the Tribunal will be in a position to act (e.g. by means of a proposal for disqualification) if the third party funding would create a conflict of interest for a Tribunal member. In case of more complex funding arrangements, further clarifications could be included to ensure that the disclosure also reveals the identity of the ultimate funder.

12. Consequences of failure to disclose third party funding should be also addressed. In this respect, the European Union and its Member States would consider it useful to explicitly mention under the applicable arbitration rules (AR Rule 19(4)(b), (AF)AR Rule 29(4)(b)) that in determining and allocating the costs of proceedings, the Tribunal shall consider the parties' conduct during the proceeding, including in particular any failure to comply with disclosure obligations such as regarding third party funding.

13. While the knowledge that there is third party funding could be a relevant factor for the respondent when assessing whether it is useful to request security for costs (see below), the European Union and its Member States are of the view that Tribunals should not automatically order security for costs in the presence of third party funding. In all such instances a case-by-case evaluation appears more appropriate, in particular when the claimant is a natural person or a small or medium-sized enterprise.

Disqualification

14. The European Union and its Member States note the stated rationale (speeding up the procedures) of the proposal as set out in ICSID Arbitration Rule 29(3), mirrored in the relevant rule of the (AF)AR, not to automatically suspend the proceeding pending a disqualification proposal. In view of more and more frequent challenges of arbitrators and the resulting delays of ISDS proceedings, the European Union and its Member States see merit in this proposal. To maintain the balance with the requirement of safeguarding the legitimacy of the process, the Rule should provide that if the challenge results in a disqualification, any order or decision issued by the Tribunal while the proposal was pending, should automatically be reconsidered by the reconstituted Tribunal.

15. The European Union and its Member States also welcome the proposals that aim to entrust independent outside persons with the decisions on challenges, as opposed to the current ICSID practice where co-arbitrators decide on most challenges. In this respect, the European Union and its Member States particularly welcome the proposal in (AF)AR Rule 40 to entrust the ICSID Secretary General to take any decision on the disqualification of arbitrators under the (AF)AR Rules. We also note with interest the new proposal for ICSID Arbitration Rule 30, that would leave to the Chairman of ICSID Administrative Council the decision on disqualification each time the co-arbitrators are unable to take such decisions for any reason (presumption of being "equally divided" in the sense of Article 58 of the ICSID Convention), which, in practice, could increase the number of challenges decided by the Chairman.

Consolidation

16. 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. Further advantages of consolidation are that costs can be

reduced and that the risk of inconsistent interpretations and of conflicting or contradictory awards is avoided.

17. The European Union and its Member States are willing to engage with ICSID Members in further reflections on introducing, under certain well-defined conditions, the possibility of mandatory consolidation.

Transparency

18. Transparency is a general policy objective of the European Union and one of the main pillars of its reformed approach to investment dispute settlement. The European Union's approach to transparency relies mainly on recent rules agreed multilaterally within the United Nations (the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration), which are incorporated into agreements approved by the European Union and its Member States at EU-level, but such agreements also go beyond the level of transparency of the UNCITRAL rules.

19. Transparency is as an essential tool to guarantee public accountability and to promote public understanding of the investment dispute settlement regime. Transparency also contributes to creating consistency in international investment law by making a body of law widely available, allowing Tribunals to develop a consistent approach to common questions of interpretation.

20. The European Union and its Member States therefore welcome the proposals of the ICSID Secretariat aiming at increasing the level of transparency of the procedures administered by ICSID, including with respect to the publication of awards and other documents related to a dispute, as well as the publication of recordings or transcripts of hearings, while ensuring appropriate protection of confidential information.

21. It appears, however, that some of the ICSID Secretariat's proposals still remain below the level of transparency achieved in most recent investment agreements or in the recently adopted UNCITRAL Transparency Rules. This seems to be particularly the case with regard to the possibility given to the disputing parties to object to the public access to hearings in arbitration proceedings, or to object to the publication of awards rendered under the ICSID Arbitration Rules. Mindful of the potential limitations that may stem from the ICSID Convention itself (such as Article 48(5) ICSID Convention), the European Union and its Member States would nevertheless like to invite the ICSID Secretariat and ICSID Members to reflect further about possible ways to achieve a level of transparency that would be at least equal 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. With regard to submissions of non-disputing parties, the European Union and its Member States are of the view that such submissions should, as a matter of principle, be welcomed and encouraged as – by way of greater participation of stakeholders – they contribute to the increased procedural legitimacy of the investment dispute system. For this reason, the European Union and its Member States propose to add to the wording of Rule 48 an additional paragraph providing that the Tribunal and the disputing parties shall give positive consideration to a request from a non-disputing third party to file a submission, and requiring the Tribunal to give the reasons for a decision to deny such a request.

23. As indicated during the technical discussions, the European Union and its Member States are concerned with the proposal, as currently drafted in Rule 48(4), on the conditions the Tribunal may attach to its permission to a non-disputing party to file a written submission. The main concern relates to Rule 48(4)(c), on "*the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party participation*".

24. The current wording of this provision it not sufficiently precise, and could theoretically lead to a cost award that would assign to non-disputing parties an obligation to bear, beyond their own costs, also costs of the parties. This outcome would be contrary to the prevailing practice of arbitral tribunals, ordinary courts as well as other international courts and tribunals, that as a general principle follow the rule that non-disputing parties (*amicus curiae*) only bear their own costs. This may, in fact, have an undue chilling effect on interventions by non-disputing parties and constitute a barrier for non-disputing parties to participate in dispute settlement proceedings and thus lead to a result contrary to the intention to embrace more transparency in the proceedings.

25. The European Union and its Member States note that in the case of certain types of entities, institutionally it may not be possible to commit in advance to a yet unknown financial responsibility that the current wording could entail for a non-disputing party.

26. The European Union and its Member States recall that Rule 48(2) already includes among the factors to be considered by the Tribunal whether to grant leave precisely that submissions by non-disputing parties should not disrupt the proceedings or unduly burden the parties. In addition, Rule 48(4)(a) provides that Tribunals have the possibility to limit the scope and length of the submission. Taken together, the European Union and its Member States consider that these are in general sufficient guarantees to avoid undue prolongation of proceedings or significant additional costs.

27. The European Union and its Member States consider that in the light of the function and role of non-disputing party (*amicus curiae*) submissions, it would be appropriate to clarify that if the submission is filed by an entity with a public mandate, such non-disputing parties should only bear their own costs, but not those of the other parties.

28. In case of other non-disputing parties, different considerations apply and there could be merit in giving the Tribunal the possibility to impose additional conditions with respect to costs. However, such costs should not go beyond the actual increase of costs attributable to the non-disputing party in question. We propose that the language of Rule 48(4)(c) is adjusted accordingly.

29. As regards submissions by 'Non-disputing Treaty-Parties' (AR Rule 49), the European Union and its Member States are not convinced by the usefulness to apply the same criteria as for non-disputing parties (*amicus curiae*) for deciding on whether or not to permit a submission on matters beyond issues of treaty interpretation (see current proposal for AR Rule 49(2)). As currently drafted, AR Rule 49 (2) equals 'Non-disputing Treaty Parties' with 'non-disputing parties', whereas AR Rule 48 does not appear well-suited to the particular nature of governments and States (and REIOs). This is the case, in particular, of Rule 48(4)(d) requiring the disclosure of "*the identity, activities, organisation and ownership*" of the Party, and any possible provisions on costs as currently proposed under Rule 48(4)(c). The European Union and its Member States suggest in this respect to align the current draft AR Rules 49 with Article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-

State Arbitration, to better reflect the particular nature of governments and States, as opposed to the broader group of entities who could ask for permission to file a submission as non-disputing parties. To take into account the particular situation of regional economic integration organisations, the European Union and its Member States also propose to add a footnote to Rule 49 with the following wording: "This is understood to include submissions made by regional economic integration organisations as defined in AFR Article 1(4) of which the non-disputing Treaty Party forms part".

Costs of proceedings – allocation of costs

30. The European Union and its Member States welcome the proposals to provide for certain factors giving guidance to Tribunals on how to allocate costs (AR Rule 19(4), (AF)AR Rule 29(4)), including in particular the assessment of the reasonableness of the costs claimed. The European Union and its Member States also recall their proposal made in this respect in the context of third party funding (para. 12 above).

31. At the same time, 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. In the view of European Union and its Member States, such a rule also would also have the advantage of deterring unfounded claims.

Security for costs

32. The European Union and its Member States welcome a separate provision on security for costs (in addition to a rule on provisional measures in general) which is also in line with the recent treaty practice of the European Union and its Member States in agreements approved at EU-level.

33. Regarding the link between third party funding and security for costs, the European Union and its Member States acknowledge that the existence of third party funding could be an important and relevant factor for the respondent when assessing whether it is useful to request security for costs. Having said this, the European Union and its Member States maintain their view expressed above, that an order on security for costs should always be based on a case-by-case evaluation by the tribunal and the mere presence of third party funding should not *ipso facto* warrant such an order, in particular where the claimant is a natural person or a small or medium sized enterprise.