Corporate Counsels' International Arbitration Group
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February 20, 2020

Meg Kinnear, Esq.
Secretary-General
International Centre for Settlement of International Disputes
1818 H St., NW
MSN C3-300
Washington, DC 20433
USA

Dear Ms. Kinnear:

Re: CCIAG Comments regarding Proposed Amendments to the ICSID Arbitration Rules

On behalf of the Corporate Counsel International Arbitration Group (CCIAG), please accept our thanks for the opportunity to comment on the proposed amendments to the ICSID Arbitration Rules. I can confirm that these can be added to the public compilation of comments.

The CCIAG is an association of corporate counsel from a broad variety of international companies focused on international arbitration and dispute resolution. Our members consider the availability of ISDS, including fair and impartial procedural rules, to be an important consideration in their decisions to invest abroad. Some of our members have also used the ICSID Arbitration Rules to resolve investment disputes in the past, and no doubt will use the rules in the future. Accordingly, we have reviewed your proposals and working papers, as well as the submissions from ICSID Member States and the public, with great interest. We commend you for your stewardship of an open and inclusive process.

The promise of these reforms is that the ICSID Arbitration Rules can be improved to take advantage of 40 years of lessons learned and address new challenges while preserving the fundamental features that have made the rules an effective and reliable tool to guide the resolution of investment disputes. In our view, your proposed amendments have the potential to deliver on that promise. If dutifully acted on, the proposals can improve the efficiency, fairness, transparency, and legitimacy of the dispute settlement process. They will benefit all the users of the system, including both states and investors. Further, your proposals are a

rejoinder to the view that the existing system is incapable of meaningful reform and should be eliminated and replaced with a flawed multilateral investment court.[1]

In light of the advanced stage of the reform process, we limit our detailed comments below to four issues raised in the ICSID Secretariat's third working paper of August 16, 2019.

(1) Code of conduct for arbitrators

The CCIAG commends the ICSID Secretariat's cooperation with the UNCITRAL Secretariat to develop a code of conduct for arbitrators.[2] The absence of a universal code of conduct for arbitrators in ISDS cases is a glaring flaw in the current system. Arbitrators in ISDS cases have generally exhibited great integrity, but we believe that a code of conduct is necessary to ensure arbitrators have a clear understanding of their ethical obligations and to ensure that conflicts of interest can be identified and addressed. This will establish a level playing field which is transparent and fair for all.

As a general matter, we consider that the main elements of a code of conduct should include: independence and impartiality; integrity; diligence and efficiency; confidentiality; competence or qualifications; and disclosure. We look forward to providing detailed comments on the code of conduct when it is prepared. At this stage, it is important to note that we strongly oppose a broad double-hatting prohibition, which would narrow the pool of qualified arbitrators and produce other unintended consequences that would outweigh any potential benefits of such
an approach.

(2) Transparency

The CCIAG believes that it is critical to implement reforms to enhance the transparency of ISDS proceedings, with appropriate protection for confidential information. Transparency will showcase the professionalism of ISDS arbitrators and counsel and the integrity of the process, and thereby help counter the harmful myths and misconceptions that have been circulating for some time regarding ISDS. It will also enable the public meaningfully to take the opportunity to offer non-disputing party submissions in ISDS cases (as contemplated by Rule 66 of the proposed rules), which will enhance the quality and legitimacy of arbitral decisions.

With respect to transparency, the CCIAG supports the ICSID Secretariat's proposal to publish the full text of an award if neither disputing party objects in writing within 60 days of the award being rendered. In our view, this approach provides the maximum transparency that is permissible under ICSID Convention Article 48(5), which requires the Secretariat to obtain the consent of the disputing parties to publish an award. "Deeming" the consent of the disputing

[1] The CCIAG has separately made a submission to UNCITRAL Working Group III criticizing the proposed multilateral investment court and offering preliminary thoughts on alternative, pragmatic reforms that would improve the system for all its users. The submission can be found here: https://uncitral.un.org/sites/uncitral.un.org/files/cciag_isds_reform_0.pdf.
[2] ICSID Secretariat's Proposals for Amendment of the ICSID Rules – Working Paper #3, at p. 294, para. 49.

parties after 60 days without objection is a creative and legally sound approach to working within the limits of the ICSID Convention, which is difficult to modify.

(3) Third-party funding

Third-party funding is an important tool to ensure that investors – or states – without adequate resources can effectively defend their interests in ISDS cases. To ensure that third-party funding continues to provide access to justice while preventing real or perceived conflicts of interests from arising, the CCIAG supports the ICSID Secretariat's proposal to require a disputing party to disclose the identity of its third-party funder at the very earliest stages of the arbitration.

We also support three other important aspects of the Secretariat's proposal.

- *First*, we concur that the disclosure requirement should not extend to the terms of the funding arrangement, which can be sensitive for many reasons, including the risk that it may reveal the funder's perception of the strengths or weaknesses of the party's case. The terms are not relevant to assessing a potential conflict of interest.

- *Second*, we concur that the disclosure obligation should not extend to contingency arrangements between the attorney and client, as such disclosure may undermine attorney-client privilege in some jurisdictions (in addition to potentially revealing perceptions of the strengths and weaknesses of the party's case while not helping assess potential conflicts of interest).

- *Third*, we concur that the existence of third-party funding should not dictate that a party must provide a security for costs. Obtaining third-party funding is simply not evidence of impecuniosity or a disclination to comply with an adverse costs order.

(4) Efficiency

As discussed above, the CCIAG broadly supports the ICSID Secretariat's effort to improve the efficiency of ISDS cases; neither states nor investors benefit from unduly lengthy and expensive proceedings. However, we are concerned that in some instances, the current proposals would lengthen, rather than shorten, the proceedings.

We would highlight, in particular, the proposal to allow a respondent 45 days after the constitution of the tribunal, rather than the current 30 days, to file an objection that a claim is manifestly without merit under Rule 41 of the proposed rules. As the Secretariat notes, by the time the tribunal is constituted, the respondent will have already had 5-6 months on average to prepare such an objection.[3] An additional 15 days will needlessly lengthen the proceedings.

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[3] *Id.* at p. 320, para. 103.

We would respectfully urge the Secretariat to revert to 30 days, barring compelling reasons to the contrary.

Thank you again for the opportunity to participate in this important discussion regarding the reform of the ICSID Arbitration Rules. Please do not hesitate to contact me if the CCIAG can be of further assistance.

Yours sincerely,

Andrew T Clarke
Chair