From: Babajide Sodipo
To: icsidrulesamendment
Cc: leyou@iarbafrica.com; posu@ajumogobiaokeke.com; Chiza Charles Newton CHIUMYA; H.E Albert M. Muchanga
Subject: Comments on the proposed ICSID Rules amendment: Suggestions relevant to the African Union and its Member States
Date: Friday, December 28, 2018 4:20:58 PM
Attachments: ICSID MEMO Submission 271218 v2.pdf
ATT00001.htm
ICSID Memo for AU by Leyou.pdf
ATT00002.htm

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Dear Colleagues,

As a follow up to our participation in the first ICSID Rules Amendment meeting held in Washington DC, please see below some written comments on the proposed amendments to the ICSID rules, related to a number of the comments and clarifications we raised during the said meeting.

1. Regional Economic International Organizations and Additional Facility Rules related to them (AFR)
We noted the proposed amendments related to Regional Economic Organizations and the Additional Facility Rules related to them. We concur with the idea that they can be parties to ICSID proceedings, provided that such REIOs have clearly expressed their consent, either by becoming parties to the ICSID Conventions or by expressing such consent clearly in writing under the Additional Facility Rules.

2. Diversity in relation to nomination of Arbitrators on the panels
We reiterate the importance of ensuring diversity in the nomination of Arbitartors to the Panel. We therefore urge that the new rules on the participation of REIOs should not be drafted in a manner that will further reduce African participation as panelists in disputes, especially disputes involving African parties. We also urge for more proactive measures to deepen the pool of African Arbitartors, including through capacity building where necessary. As discussed with Ambassador Muchanga, the African Union Commissioner for Trade and Industry during the bilateral meetings held in April, the African Union Commission stands ready to provide any support if necessary.

In addition, we are attaching 2 additional memos covering these same themes, developed by our collaborative experts - Patrick Osu of Ajumogobia and Okeke, Lagos Nigeria; and Ms. Leyou Tameru, Founder and Director, I-Arb Africa (International Arbitration Africa) for submission to the Committee. They cover the issues I have summarized above in much greater and clearer detail, and we endorse their submissions as it relates to the broader African and AU issues.

Thank you once again for the opportunity to participate in this process, and we look forward to our continuing engagement.

Best regards
Babajide Sodipo

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MEMORANDUM

Date: 26th December 2018

From: Leyou Tameru

To: International Center for the Settlement of Investment Dispute (ICSID), World Bank Group

Re: ICSID Rules Amendments

I. EXECUTIVE SUMMARY

1. This memo sets out my recommendations to the African Union with regards to on-going process of Amendments at ICSID

2. The memo addresses two (2) major points regarding the amendments that would impact the AU or affiliated entities and make the following recommendations:

   a. Observations related to Diversity at ICSID and during ICSID procedures (see section II) I propose that the African Union and ICSID take active steps to increase the appointment for African Conciliators and Arbitrators in ICSID disputes.

   b. The addition of Regional Economic International Organizations (REIOs) to the definition of party and issues arising out of this addition, (see section III). I propose that the provision be amened so as to include an opt-in mechanism or add additional mechanisms whereby RECs provide consent to be parties in ICSID disputes.

II. DIVERSITY IN THE PANELS AND ICSID

3. There are currently 46 African countries that are members to the ICSID Convention. According to the ICSID Case Load Statistics, as of May 31, 2017, ICSID had registered 613 cases under the ICSID Convention and Additional Facility Rules. One hundred and thirty-five (135) of these cases (22%) involved an African State Party.

4. The 135 cases emerged from 36 African countries. This places the places continent as the third largest in the geographic distribution of disputes following Eastern Europe & Central Asia and South America.

5. According to the report on Arbitrators, Conciliators and ad hoc Committee Members Appointed in Cases Registered under the ICSID Convention and Additional Facility Rules, there have been 47 African Arbitrators or Conciliators appointed by ICSID and 45 by the Parties.

6. When compared to appointment of Arbitrators or Conciliators from other regions which are: 716 appointed by the parties and 263 by ICSID from Western Europe, 364 party appointed and 73 ICSID appointed from North America, and 58 ICSID appointed and 155 party appointed from South America, the appointment of African Arbitrators and by parties and ICSID stands at 5th.

7. In light of the number of Member-States from the African Continent and the number of cases concerning African parties, the appointment of African Arbitrators and Conciliators by parties and ICSID is very low.

8. I propose that ICSID, in collaboration with its Member States make significant efforts in increasing appointments of African Arbitrators and Conciliators and have more transparency in the appointment of Arbitrators and Conciliators.

9. Simultaneously, I propose that the African Union and its member states make significant efforts in building capacity of African Arbitrators so as to increase their participation in ICSID cases. This can be done through collaborations with ICSID and other international arbitration, training and educational institutions.

III. REGIONAL ECONOMIC INTERNATIONAL ORGANIZATIONS AND ADDITIONAL FACILITY RULES RELATED TO THEM (AFR)

10. Under the proposed amendments, Regional Economic International Organization has been defined as "Regional Economic Integration Organization" or "REIO" means an organization 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 those matters."

11. The proposed amendment further defines "Contracting REIO" as "an REIO for which the Convention is in force" providing the possibility for REIOs to join the ICSID Convention. This means that a REIO can become a party to an ICSID dispute as per the ICSID Convention.

12. Furthermore, the addition of REIO definition into the Additional Facility Rules (AFR) means that REIOs can now become party to a dispute, arbitration or conciliation, under the AFR without becoming signatories to the ICSID Convention or contracting REIOs.

13. There are institutions within the African continent that fit into the definition of REIO provided above. In 1991 the African Union undertook the creation of economic communities through the Treaty Establishing the African Economic Community, commonly referred as the Abuja Treaty. The Treaty establishes a Community which it defines as the organic structure for economic integration and constituting an integral part of the OAU.

14. This Treaty has paved the way to the creation and/or recognition of 8 economic institutions, referred to as Regional Economic Communities in the African continent. According to this definition of REIOs, these 8 institutions that would qualify as a REIO.

15. As mandated by the Abuja Treaty, the RECs are closely integrated with the AU's work and serve as its building blocks. In addition to the Treaty, the relationship between the AU and the RECs is mandated by the AU Constitutive Act, and guided by the: 2008 Protocol on Relations between the RECs and the AU; and the Memorandum of Understanding (MoU) on Cooperation in the Area of Peace and Security between the AU, RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern and Northern Africa.

16. The AU recognises eight RECs, they are:

    a. Arab Maghreb Union (UMA) is composed of Algeria, Libya, Mauritania, Morocco, and Tunisia and established with the view of working gradually towards achieving free movement of persons and transfer of services, goods and capital among them It is not a signatory of the Protocol on Relations between the RECs and the AU.

    b. Common Market for Eastern and Southern Africa (COMESA) is economic community that has established a is a free trade area with 21 member States: Burundi, the Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Somalia, Eswatini, Seychelles, Tunisia, Uganda, Zambia and Zimbabwe.

    c. Community of Sahel–Saharan States (CEN–SAD) was established in 1998 to with the aim of promotion of external trade through an investment policy in member States. The 24 Member States are Benin, Burkina Faso, Central African Republic, Chad, the Comoros, Côte d'Ivoire, Djibouti, Egypt, Eritrea, the Gambia, Ghana, Guinea-Bissau, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, the Sudan, Togo and Tunisia.

    d. East African Community (EAC) is a regional intergovernmental organisation of six (6) Partner States, comprising Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda established in 1999.

    e. Economic Community of Central African States (ECCAS) was established in 1983 to strengthen the economic ties among Central African States and has 11 Member States: Angola, Burundi, Cameroun, Central African Republic, Republic of Congo,

Gabon, Equatorial Guinea, Democratic Republic of Congo, Sao Tome & Principe, Chad and Rwanda.

f. Economic Community of West African States (ECOWAS), composed of 15 West African countries established on 28 May 1975. The countries are: Benin, Burkina faso, Cabo verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

g. Intergovernmental Authority on Development (IGAD) was created in 1996 to supersede the Intergovernmental Authority on Drought and Development (IGADD) which was founded in 1986 to mitigate the effects of the recurring severe droughts and other natural disasters that resulted in widespread famine, ecological degradation and economic hardship in the region. Its members are: Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda, Eritrea and South Sudan.

h. Southern African Development Community (SADC), established in 1992 with a goal to further socio-economic cooperation and integration as well as political and security cooperation among 16 southern Africa states, notably: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia, Zimbabwe

17. In addition to the 8 RECs above and pursuant to article 4 and 6 of the Abuja Treaty, the African Union is currently negotiating the African Continental Free Trade Area (AfCFTA), with 44 AU Member States have signed Agreement Establishing The African Continental Free Trade Area. So far, 12 African States have ratified the existing Protocols. The AfCFTA will come into force after the ratification of 22 Member States.

18. All of the RECs and the AfCFTA prescribe the establishment of dispute resolution mechanism in the form of a Court of Justice or other, with the capacity to resolve disputes between Member States as to the interpretation of the instituting document as well as dispute resolution mechanisms under protocols or related agreements governing investments related matters.

19. The dispute envisaged within the dispute resolution mechanisms in the RECs or AfCFTA concern disputes between State and Nationals or State and State. There is, so far, no dispute resolution mechanism envisaged within these institutions where the RECs are a party to an investment dispute.

20. I propose that the organizations that fit within the definition of REIO in the AFR be provided with a mechanism through which they opt-in to the AFR through for e.g. a letter indicating the organization's consent to be a party to an arbitration or conciliation according to the AFR Thus I propose that the definition of REIO be amended as follows "an organization 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 those matters and have opt-ed into the AFR"

21. In the alternative, as the proposed AFR amendments would extend the availability of AF arbitration and conciliation at ICSID to cases where both the claimant and the respondent are not ICSID Contracting States or REIOs, or nationals of ICSID Contracting States or of any constituent States of Contracting REIOs as some IIAs currently offer this possibility. I therefore propose that availability for arbitration and conciliation under the AFR be made available in instances where IIAs or the REIOs make specific reference to ICSID while not being Contracting Parties to the Convention.

22. Accordingly, I propose the definition of REIOs be amended to "an organization 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 those matters and have listed ICSID as a option under their dispute resolution provisions"

23. As a final alternative, I propose that the definition of REIOs to be included in disputes under the AFR be strictly limited to only those REIOs with no dispute resolution mechanisms (i.e. courts, commissions etc…) or whose dispute resolution mechanisms have become defunct.

24. Accordingly, I propose the definition of REIOs be amended to "an organization 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 those matters where the dispute resolution mechanism is not operational at the time of the dispute"

MEMORANDUM

TO: **ICSID Rules Amendment Committee**

FROM **Patrick Osu**
Ajumogobia & Okeke

DATE: **27 December 2018**

SUBJECT: **Comments on the proposed ICSID Rules amendment: Suggestions relevant to the African Union and its Member States**

In light of ICSID's working paper proposals for ICSID Rules Amendment we have raised certain concerns with some of the proposals for the Secretariat's and Member States' consideration.

The most important issues that would most likely impact African stakeholders are:

1. Third Party Funding
2. Regional Economic International Organizations and Additional Facility Rules related to them (AFR)
3. Diversity in relation to nomination of Arbitrators on the panels

Third Party Funding (TP Funding)

The basis for TP Funding is that it generally assists parties with the costs of arbitral proceedings. It impacts a party's access to justice and allows parties arbitrate matters that ordinarily would be impossible without TP funding, and also serves to mitigate party risk in respect of any given arbitration for a cost perspective.. This method of funding arbitrable matters appear to be a veritable way of ensuring access to justice is guaranteed, however it is not without its challenges, some of which include matters that affect issues of security for cost and the impact, conflict of interest issues as it relates to arbitrator and Funder amongst other matters.

On one hand is the need for the disclosure of TP funding because of its potential effect on security for cost. For example, in the case of S&T Oil v Romania, ICSID case no. ARB/07/13 [2010], the respondent to the Arbitration was not aware that the Claimant had instituted the proceedings with TP funding until a litigation between the TP funder and the Claimant came to light in view of the fact that the TP funder had backed out on the TP funding agreement with the Claimant. If the Respondent had been aware of the fact that the Claimant was unable to fund the arbitration without TP funding, it would have made an application for security for costs which the Tribual may have considered on the basis of the facts of the matter. This sort of case could have ended with the respondent not being able to recover its costs if the award had been in its favour.

The proposed amendment to the ICSID Rule on Security for Costs provides a new, stand-alone rule that would allow a Tribunal to order security for costs. The rule states

that the Tribunal must consider the relevant party's ability to comply with an adverse decision on costs and any other relevant circumstances, which should cover whether the TP funder has any obligations towards costs.

Regardless of the benefits of the disclosure of TP Funding, it is essential to ensure that there are safeguards against respondents using its disclosure as a weapon instead of a shield. It can be argued that requiring full disclosure on all aspects of a TP Funding agreement is an overkill when information regarding the identity of the TP Funder and its obligations towards costs is sufficient to resolve the challenges of conflict of interest and security for costs.

In addition to the proposal made in Rule 21 on Disclosure of TPF, we observe that there is indeed timing for the disclosure of TPF 21 (2) which is immediately upon registration for a request for arbitration, however sub rule (3) simply discusses a continuing obligation if there are any changes to the information supplied and when such arrangement terminates without specifically stating when that information must be provided. We suggest that Rule 21 (3) could be amended by adding wording as shown below at the end of the current sentence.

> *"Each party shall file a written notice of such changes or termination of the funding arrangement with the secretariat within 5 days of the occurrence of such changes".*

The necessity for such inclusion would ensure that the disclosure are made within specific time limits as a disclosure that is important but left to be made by parties whenever they choose may be inimical to the process especially as it would likely affect the kind of application that a party to the process may be required to make given knowledge of new information timeously.

Regional Economic International Organizations and Additional Facility Rules related to them (AFR)

The proposal to amend the Additional Facility Rules (AF) is appears to suggest the expansion of the reach of the activities of the International Centre for Settlement of Investment Dispute (ICSID). It has been argued that the AF seeks to ensure the inclusion of Regional Economic and International Organizations (REIO) and their nationalities in the activities of ICSID as parties to investor state dispute. While we note that it is a welcome idea, we support the fact that Article 2 which deals with the Additional Facility Proceedings suggest that the Secretariat of the Centre is authorised to administer proceedings between a State and a REIO or a National and a State *which the parties consent in writing to submit to the Centre*. This article ensures that the Centre would exercise jurisdiction only where parties have given their consent to arbitrate under the AF.

Diversity in relation to nomination of Arbitrators on the panels

The Rules for constituting the Tribunal (Rule 20) suggest that majority of the arbitrators shall be Nationals of States (signatories to the convention) other than the State party to the dispute and the State whose National is a party to the dispute unless in the case of a Sole Arbitrator such a person is appointed by agreement of parties.

The wording of Rule 20 seem to be fair from a point of achieving neutrality for the process however, it has also been the basis of concentrating the appointment of arbitrators from certain parts of the globe while other parts with equally competent arbitrators are ignored.

From available statistics almost 60% of the African originated disputes have been administered by Arbitrators of European decent while the percentage is below 10% in appointing Arbitrators from Africa, even though the Investment disputes have originated from Africa. While we understand that every single rule cannot be written, even more so matters that could be interpreted as being discriminatory, it is our view that the Secretary General of ICSID has the power and the unique opportunity under Rule 24 (Assistance of Secretary General with Appointments) to encourage the principles of diversity in the appointment of Arbitrators.

We suggest that ICSID should pay special attention to the mode and manner of appointment of Arbitrators especially in relation to disputes from the African region, by ensuring that there is a balance in the way nominations are made. We also suggest that the Centre collaborate with the African Union and all Regional Economic International Organisations to deliberately assist in the development of its pool of African Arbitrators and also provide the opportunity to be appointed as Arbitrators once the opportunity provides itself. We suggest that the ratios must significantly improve if the Centre must be exemplary and open in its appointments.