ICSID'S NEW RULES AND PROPOSED ADJUDICATOR CODE OF CONDUCT

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The International Centre for the Settlement of Investment Disputes ("ICSID") is nearing the end of the fourth and most complete overhaul of its rules and regulations since ICSID's founding in 1966. As part of a multi-year reform process, ICSID has solicited input from key investor-state dispute settlement ("ISDS") stakeholders, and—after three prior rounds of consultations—issued the fourth and final round of proposed amendments to its Rules and Regulations ("Rules") in late February 2020. In early May—and in collaboration with the United Nations Commission on International Trade Law ("UNCITRAL") Working Group III—ICSID also issued a new Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement ("Draft Code").

ICSID's stated objective is not only to streamline its procedures, but also to increase the overall transparency and efficiency of ISDS. While several of the proposed changes are a welcome step toward that goal, some will no doubt find that the proposed changes do not go far enough. We outline below the key aspects of the proposed Rules and Draft Code.

THE ICSID RULE AMENDMENT PROJECT AND PROPOSED NEW RULES

Since it began this round of revisions to its Rules in 2016, ICSID has held three in-person consultations with its Member States, solicited multiple rounds of public comments, and issued four Working Papers and substantial commentary outlining the proposed changes. ICSID issued the fourth and final Working Paper on the proposed Rule amendments on 28 February 2020. The Secretariat expects the rules to come into effect later this year, after a final vote by Member States.

Notable proposed changes to the Rules include:

- ***Efficiency.*** In keeping with current best practices, the new rules impose a general duty of cost-effectiveness and efficiency on both the parties and the tribunal, and make electronic filings the default rule (*see* **Proposed Rules 3 and 4**). **Proposed Rule 12** goes a step further and creates an obligation to use best efforts to comply with

specific time limits for certain tribunal decisions, such as the 30-day deadline for a decision on a provisional measures request (**Proposed Rule 47(2)(d)**) and 240-day deadline for issuing a final award (**Proposed Rule 58(1)(c)**). In enforcing these limits, the new rules opted for transparency as opposed to penalties. The Working Paper announces that "the Secretariat will track compliance with tribunal time limits on its website," and that "payment of arbitrator invoices will be postponed if an order, decision or Award is not rendered in accordance with [Arbitral Rule] 12" (*see* Working Paper No. 4, dated 28 February 2020 ¶ 44). ICSID has not, however, proposed reducing arbitrators' fees on account of delays.

- ***Disclosure of Third-Party Funding***. One of the key new proposals is the obligation to provide notice of third-party funding (*see* **Proposed Rule 14**). Under this rule, parties are obliged to disclose the existence, name and address of any third-party funder either on registration of the Request for Arbitration, or immediately upon the conclusion of a funding agreement. ICSID explains, "[t]he focus of AR 14 continues to be the prevention of conflicts of interest" (Working Paper No. 4 ¶ 51). While there is no requirement to disclose the *terms* of any funding arrangement, the proposed Rules also make clear that, should those terms become relevant and material to the dispute, the tribunal has the power to order further disclosure.

- ***Deemed Consent to Publication of Awards***. Consistent with its stated objective of greater transparency, ICSID has proposed publication of a final award as the default rule, absent objection by any party within 60 days (*see* **Proposed Rule 62**). For interim orders and decisions, ICSID's proposal largely tracks the Mauritius Convention on Transparency: the parties must agree to the publication of either a full or a redacted version of the documents, and any disputes about redactions are to be resolved by the tribunal (*see* **Proposed Rule 63**).

DRAFT CODE OF CONDUCT FOR ADJUDICATORS IN INVESTOR-STATE DISPUTE SETTLEMENT

- ***Pre-Appointment Interviews***. The Draft Code proposes a pre-appointment interview process for potential adjudicators that "shall be limited" to discussions about arbitrator availability and potential conflicts of interest (*see* **Draft Article 10(1)**). Discussion of issues "pertaining to jurisdictional, procedural or substantive matters potentially arising in the proceedings" is prohibited.

- ***Disclosure***. The Draft Code does not set specific limits on repeat appointments. Instead the Code adopts a disclosure framework that includes an obligation for adjudicators to make "reasonable efforts" to disclose (i) any "significant" relationship

with the parties, their subsidiaries, the parties' counsel, experts, other adjudicators, or third-party funders within the past five years, (ii) any financial interest in the proceeding, (iii) a list of all ISDS proceedings in which the adjudicator has been involved as counsel, arbitrator, annulment committee member, or expert, without any express time restriction, and (iv) a list of all publications and "relevant public speeches" by the adjudicator, again without any express time restriction (*see* **Draft Article 5(2)**).

- ***Double-Hatting***. The draft code includes two different proposed solutions to address issues arising from adjudicators acting in various ISDS proceedings in different roles ("double-hatting")—disclosure and recusal. The Draft Code does not take a definitive position on which solution is most appropriate, and reaches no conclusion regarding the threshold for triggering either. The Code foresees disclosure or recusal when the adjudicator participated in a prior proceeding involving (i) the same parties, (ii) the same facts, or (iii) the same treaty. The broadest proposed language included in the Draft Code would prohibit an adjudicator from serving as an arbitrator when he or she has previously acted as counsel, expert, witness, agent, or in another relevant role, in a matter involving the same treaty, subject to an as-yet-undetermined time limit (*see* **Draft Article 6**).

The ICSID and UNCITRAL Secretariats are currently accepting public comments on the Draft Code and plan to submit the document to UNCITRAL's Working Group III for finalization. Once finalized, the Draft Code could remain as "soft law," or become binding through incorporation into investment treaties and arbitral procedural rules (*see* **Draft Code,** ¶ 97).

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Please do not hesitate to reach out to us with any questions regarding the reforms.

NEW YORK

Catherine Amirfar
camirfar@debevoise.com

Donald Francis Donovan
dfdonovan@debevoise.com

Mark W. Friedman
mwfriedman@debevoise.com


Ina C. Popova
ipopova@debevoise.com


Dietmar W. Prager
dwprager@debevoise.com


Natalie L. Reid
nlreid@debevoise.com


David W. Rivkin
dwrivkin@debevoise.com


William H. Taft V
whtaft@debevoise.com


Christopher K. Tahbaz
cktahbaz@debevoise.com

LONDON


Sebastian Dutz
spdutz@debevoise.com


Adam Moss
dajmoss@debevoise.com


Tony Dymond
tdymond@debevoise.com


Lord Goldsmith QC
phgoldsmith@debevoise.com


Wendy J. Miles
wjmiles@debevoise.com


Samantha J. Rowe
sjrowe@debevoise.com

HONG KONG


Patrick Taylor
ptaylor@debevoise.com


Mark Johnson
mdjohnson@debevoise.com

PARIS


Antoine F. Kirry
akirry@debevoise.com