Ms. Anna Joubin-Bret
Secretary
UNCITRAL, United Nations
Vienna International Centre, P.O. Box 500
A-1400 Vienna, Austria
anna.joubin-bret@un.org

May 1, 2018

Dear Ms. Joubin-Bret,

In response to the invitation from the Secretariat at Working Group III's 35th session, which took place from April 23-27, 2018 in New York, the Columbia Center on Sustainable Investment ("CCSI"), a non-governmental observer, takes this opportunity to submit in writing its interventions related to:

Document A/CN.9/WG.III/WP.142 (*Possible Reform of Investor State Dispute Settlement (ISDS)*)**, Section III** (*Concerns Expressed Regarding ISDS*):

- **Subsection C** (*Arbitrators/decision-makers*)**, para 44, bullet #5** (*Perception that arbitrators are less cognizant of public interest concerns than judges holding a public office*); and
- **Subsection D** (*Perceptions of States, investors and the public*)**.**

****

Subsection C (*Arbitrators/decision-makers*), para 44, bullet #5 (*Perception that arbitrators are less cognizant of public interest concerns than judges holding a public office*)

Thank you for allowing us to take the floor and to be in the room; and thank you to the governments for so seriously and thoughtfully considering these important issues.

To briefly introduce ourselves, we are with the Columbia Center on Sustainable Investment (CCSI). CCSI is a joint center of the Earth Institute and Columbia Law School at Columbia University; our mission is to undertake interdisciplinary research and policy analysis aimed at maximizing the contributions that international investment makes to sustainable development. A core part of our work entails examining how legal frameworks including, in particular, international investment treaties, impact investment flows and development outcomes.

This bullet point we are discussing is an important one, and goes beyond the issues of arbitrator qualifications. It relates, for instance, also to what they see as their duties, and what they see as their powers. In terms of their duties, public judges often are bound by rules that require them to dismiss cases pending elsewhere, or to dismiss cases for which relief has already been sought in other proceedings. As has been highlighted in discussions of parallel proceedings, however, tribunals have in some cases seemed to view themselves as self-contained entities, handling the case before them and not feeling bound to consider what is happening or has happened in parallel proceedings, nor bound to consider the systemic issues that such parallel proceedings raise.

With respect to the issue of powers, tribunals have raised questions of whether they have the authority to consider certain issues of public interest or impacts on non-parties, or to dismiss cases on public interest grounds, such as on the basis of the doctrine of unclean hands.

These concerns that arbitrators are less cognizant of public interest concerns also relate to questions regarding the applicable standard of review, and whether and to what extent tribunals can scrutinize decisions of fact or law made at the domestic level.

Finally, these issues of whether arbitrators are adequately cognizant of public interest issues also relate to technical rules of procedure and evidence. For instance, rules of evidence regarding what documents are or are not privileged, or what evidence is or is not admissible, often reflect important public policies. When arbitrators do not follow those rules in arbitral proceedings, there are therefore policy implications and oftentimes implications for the outcomes of proceedings. Thus, we would argue that there is much to unpack in this particular bullet point, perhaps under part D of our discussions or perhaps on the basis of a further note by the secretariat.

Subsection D (*Perceptions of States, investors and the public*)

Thank you for allowing us to take the floor again.

We want to make a few points, one about the overarching objectives of this work here at UNCITRAL, and some more technical points about the issues under consideration.

First, we think it is crucial to place these discussions in context. In order to know how to reform the system of ISDS we need to consider what the system of IIAs aims to achieve. With those objectives in mind, we can then identify what reforms are necessary to meet those objectives.

If, for instance, the objective is to improve domestic governance essential to attract and retain investment, then it seems important to take into account research on how, in order for international law to generate improvements in domestic legal systems, the international system should engage with the relevant domestic systems. A key way through which this engagement can take place is through requirements for exhaustion of domestic remedies, something that the current ISDS system does not, but arguably should, require.

Similarly, if the objective is to depoliticize disputes, we may want to consider whether and how to govern the discretion of home states regarding whether and on what issues to provide their

interpretations of treaty provisions. In some cases, we see home states provide interpretations of crucial treaty standards, which may or may not support the positions of their investors; but in other cases, we've seen home states take the *political* decision to stay silent even when they disagree with the treaty interpretations being offered by their investors. Thus, we may want to consider what we mean about the objective of depoliticizing disputes, and further consider how that objective can be better advanced in the dispute settlement system.

And finally, if the objective is increasing investment for economic development of state parties – we would design the system so as to help overcome the barriers impeding investment in the activities and locations where it is not going at optimal levels; and ensure that the dispute settlement mechanism is part of a fair, just, and balanced system governing the rights and obligations of covered investors and investments and other stakeholders.

In short, we believe that ISDS is not working well in terms of advancing its purported objectives of increasing investment, improving the rule of law, or depoliticizing disputes; we also therefore believe that, rather than fixing some problems that have been identified with ISDS, we should be taking advantage of these extremely important discussions on reform here at the UN to ask the more fundamental questions of (1) what objectives are we trying to achieve with this system, and (2) what dispute settlement system is best suited for advancing those objectives.

Turning to the specific points, I want to highlight a number of issues we see in need of reform, but that haven't yet been adequately addressed. Now, the line between substance and procedure is infamously hard to draw, but in identifying the issues I do and categorizing them as issues of procedure, I do so on the basis that they are typically included in the dispute settlement sections of investment treaties.

- First is the **issue of standing**, an issue that was highlighted in the discussion of parallel claims, but that goes beyond it. One standing issue that has generated concerns relates to the question of who has the power to bring claims for harms to a foreign-owned enterprise. Some more modern treaties attempt to expressly clarify what claims belong to the company and what claims belong to shareholders, but the majority of existing treaties do not, allowing claims by multiple shareholders in a single enterprise, upsetting well-established principles and policies of corporate governance, and giving investors numerous opportunities to win, and states numerous opportunities to lose.

- The second issue relates to the **rights and interests of non-parties**. Domestic legal systems typically have mechanisms for protecting non-parties, and have rules allowing non-parties who are interested in or are affected by disputes to actually intervene in those disputes; some domestic jurisdictions, including the US, even mandate dismissal of suits if a non-party will be affected by a dispute but cannot be joined. One key concern about ISDS is that decisions and settlements can impact the rights and interests of non-parties, but those non-parties have no power to join, and tribunals have no clear authority or mandates to dismiss the case in such circumstances.

- Third is the issue of a **lack of state control over the claims that are brought** - some treaties include provisions that send issues to state-to-state mechanisms for attempted resolution before those issues can be addressed by an ISDS tribunal; inclusion of these filter provisions can be an important tool for reducing the number and types of ISDS claims challenging sensitive and complex issues of public policy, claims that have given rise to concerns about the system.

- Fourth is the **issue of remedies** - treaties increasingly include provisions on remedies in their dispute settlement sections. This includes restrictions on tribunals' powers to enjoin states from adopting or maintaining certain measures, and restrictions on tribunals' powers to order punitive damages. We would argue that some decisions on injunctive relief and damages, including decisions to award compound interest and tax gross-ups, have contributed to concerns about problems of ISDS, and so should also be flagged here in phase I.

- Fifth is the **issue of exclusions**: The dispute resolution sections of some more recent treaties such as the CETA include provisions expressly barring ISDS claims arising from investments made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process. Claims by investors acting illegally, or by investors falling short of accepted norms of responsible business conduct, are issues that have triggered concerns about ISDS, and that have also been addressed through procedural reforms in some more modern treaties. We believe they are therefore also important to highlight here in Phase I.

Thank you again for your time.