

# **Advice on the Proposed Amendments to the ICSID Rules**

China Council for the Promotion of International Trade

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## **Introduction to ICSID Rules**

The Rules involved in proposed ICSID Rules are as follows:

The Rules applicable for procedures under ICSID Convention include: the Administrative and Financial Regulations, the Arbitration Rules, the Conciliation Rules and the Institution Rules.

The Rules applicable for procedures under ICSID Additional Facilitation include: the Additional Facility Rules, the (Additional Facility) Administrative and Financial Regulations, the (Additional Facility) Arbitration Rules, the (Additional Facility) Conciliation Rules, the (Additional Facility) Fact-Finding Rules and the (Additional Facility) Mediation Rules.

Among all the above Rules, the (Additional Facility) Mediation Rules are a newly introduced set of rules, with more rules to be amended for the arbitration rules. This Article makes recommendations on the proposed Arbitration Rules. Each proposal consists of four parts: (i) the original text of the draft, (ii) the modified text, and (iii) the reason for amendment, in which the advised amendments are shown in bold fonts in the modified text of Part (ii).

## **I. Advice on Procedural Languages**

The provisions advised to be modified are Rule 1 (Application of Rules) and Rule 5 (Procedural Languages, Translation and Interpretation) of the proposed Arbitration Rules.

### **A. Advice on Rule 1 (Application of Rules)**

#### **1. Original Text**

##### Rule 1 Application of Rules

(1) These Rules shall apply to any arbitration proceeding conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Convention”) in accordance with Article 44 of the Convention.

(2) The official languages of the Centre are English, French and Spanish. The texts of these Rules are equally authentic in each official language.

(3) These Rules may be cited as the “Arbitration Rules” of the Centre.

#### **2. Modified Text**

It is advised to amend paragraph (2) of Rule 1 (Application of Rules) of the proposed Arbitration Rules as follows:

The official languages of the Centre are **the official languages of the United Nations**. The texts of these Rules are equally authentic in each official language.

#### **3. Reason for Amendment**

(1) The issue of procedural language is very important in relation to whether the parties and their representatives can use the language to conduct arbitration proceedings and handle arbitration cases. For China, it is necessary to improve the use of Chinese in arbitration as much as possible, or at least to use it as an option. This is beneficial to practitioners in China who are involved in arbitration to learn about international investment arbitration cases, thus improving their professional skills. Therefore, if possible, there are some basic principles to comply with.

(2) Article 1 of the proposed Arbitration Rules states that the official languages of ICSID are English, French and Spanish. Considering that ICSID has the ability to handle 25 languages and the characteristics of international investment arbitration, that is, investors arbitrate against the host country, it is clear that the number of official ICSID languages does not match their ability to resolve investment disputes and the need for language for investment dispute resolution.

(3) ICSID is one of the members of the World Bank Group, and the World Bank Group is a specialized agency of the United Nations operating international financial services. The parties to the ICSID Convention and the members of the World Bank Group have a high degree of overlap, which means that ICSID and the members of the World Bank Group have an inseparable and close relationship between them and the United Nations. In order to solve the mismatch between the number of

official ICSID languages, their ability to resolve investment disputes and the need for investment dispute resolution for language, and to facilitate the active participation of national arbitrators in international investment arbitration, it is recommended that the official language of the United Nations be the official language of the Center.

## **B. Advice on Rule 5 (Procedural Languages, Translation and Interpretation)**

### **1. Original Text**

#### Rule 5 Procedural Languages, Translation and Interpretation

(1) The parties may agree to use one or two procedural languages in the proceeding. The parties shall consult with the Tribunal and the Secretariat regarding the use of a language that is not an official language of the Centre.

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Written submissions, observations, supporting documents and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Tribunal may require a party to file any document in both procedural languages.

(4) A document in a language other than a procedural language shall be accompanied by a translation into a procedural language. In a proceeding with two procedural languages, the Tribunal may require a

party to translate any document into both procedural languages. Translation of only the relevant part of a document is sufficient, provided that the Tribunal may require a fuller or a complete translation. If the translation is disputed, the Tribunal may require a certified translation.

(5) Any written communication from the Tribunal or the Secretariat shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal and, where applicable the Secretary-General, shall render orders, decisions, and the Award in both procedural languages, unless the parties agree otherwise.

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal may require interpretation into the other procedural language. The recordings and transcripts of a hearing shall be kept in the procedural language(s) used at the hearing.

(7) The testimony of a witness or an expert in a language other than a procedural language shall be interpreted into the procedural language(s) used at the hearing.

## **2. Modified Text and Reason for Amendment of Rule 5(1)**

### **(1) Modified Text**

It is advised to amend paragraph (1) of Rule 5 of the proposed Arbitration Rules as follows:

The parties may agree to use one or two procedural languages in the

proceeding. **The parties shall consult with the Secretariat or,if the Tribunal has constituted, the Secretariat and Tribunal,** regarding the use of a language that is not an official language of the Centre.

(2) Reason for Amendment

1) The investment arbitrations between investors and host states involve the host country. If the investment agreements between parties stipulate that the official language of the host country is the procedural language, whether such agreements are binding or not should be clarified. We believe that the choice of procedural language should respect the autonomy of the parties. If the investment agreement stipulates that the official language of the host country or any language should be used as the arbitration language, it should be binding. Therefore, in the text of the future investment agreements or trade agreements, the Chinese government needs to consider the procedural language(s) in the text, suggesting that Chinese is the only or one of the procedural languages.

2) The proposed Arbitration Rules stipulate that if a non-Central official language is used, the parties shall consult with the arbitral tribunal and the Secretariat. The question needs to be asked does the requirement require consultation with both the arbitral tribunal and the Secretariat when using a non-Central official language. Since the claimant first contacts the Secretariat and selects the arbitrator, and then the arbitral tribunal is constituted, the claimant or the respondent needs to consider

the language issue when selecting arbitrators. Therefore, if the parties agree to use a non-Central official language before the constitution of the arbitral tribunal, is it only necessary to consult the Secretariat. If the consultation with the arbitral tribunal is required, the members of the arbitral tribunal should determine the possibility of using a non-Central official language, it is conducive to selecting appropriate arbitrators and improving arbitration efficiency.

### **3. Modified Text and Reason for Amendment of Rule 5(2)**

#### (1) Modified Text

It is advised to amend paragraph (2) of Rule 5 of the proposed Arbitration Rules as follows:

If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre, **and both the official languages selected are procedural languages. The agreement on the procedural language(s) reached in the Investment Agreements or Trade Agreement which binding on the parties shall be valid.**

#### (2) Reason for Amendment

1) Final determination of procedural languages, while the parties did not reach an agreement on procedural languages

While the parties select different official languages of the Centre, whether both languages are procedural languages, or will it be decided which one is the formal arbitration language by the Secretary-General or



the Chairman. It is not specified in the Rules, and it is recommended that when the parties select different official languages of the Centre, it should be clear that both languages are procedural languages to avoid ambiguity.

2) Alternatively, it may provide that when the parties select different official languages of the Centre, it should be decided by Secretary-General which one is the formal arbitration language.

### **C. Other Consideration of Amendment of Procedural Languages**

1. The issue of language in arbitration is considered not only in the arbitration process, but also in the stages of consultation, conciliation and mediation. Therefore, the issue of procedural language needs to be clarified in the Rules and should have some continuity of application.

2. In addition, when the procedural language selected is not the official languages of the nationality of a party to the dispute, the translation work-load is relatively heavy, the translation of materials will affect the delivery time and the impartiality of procedures to a certain extent, which should also be considered.

## **II. Advice on Rule 21(Disclosure of Third-party Funding)**

### **A.Original Text**

The provision advised to be modified is Rule 21 (Disclosure of Third-party Funding) of the proposed Arbitration Rules. The Rule provides as follows:

#### Rule 21 Disclosure of Third-party Funding

(1) “Third-party funding” is the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute (“third-party funder”), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided:

(a) through a donation or grant; or

(b) in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.

(2) A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration.

(3) Each party shall have a continuing obligation to disclose any changes to the information referred to in paragraph (2) occurring after the

initial disclosure, including termination of the funding arrangement.

### **B. Modified Text**

1. It is advised to amend Rule 21(2) of the proposed Arbitration Rules as follows:

A party shall file a written notice disclosing that it has third-party funding and **the information of the third-party funder, including the identity, nationality, domicile, shareholders of the third-party funder, and Funding Agreement.** Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, **or to all the parties, arbitral tribunal and Secretariat within 5 working days** upon concluding a third-party funding arrangement after registration.

2. It is advised to amend Rule 21(3) of the proposed Arbitration Rules as follows:

Each party shall have a continuing obligation to disclose any changes, within **5 working days after the change occurs**, to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement.

### **C. Reason for Amendment**

1. In order to avoid conflicts of interest arising between the arbitrators and the third-party funder, in addition to In addition to disclosure the existence and the name of the third-party funder as provided for in Rule 21(2) of the proposed Arbitration Rules, other

relevant information of third-party funders shall also be disclosed, including the identity, nationality, domicile, shareholders of the third-party funder, and Funding Agreement, in order to make clear whether the third-party funders bear the costs against the funded party, and to review whether there are any other issues related.

2. The obligation to inform all parties, the arbitration tribunal and the secretariat within 5 working days upon concluding a third-party funding arrangement, should be clarified in the Rules.

3. The purpose of disclosing the nationality of the third-party funder is to prevent the arbitrator's nationality from being the same as that of the third-party funder in the arbitrator's selection process; the disclosure of the third-party funder's shareholding structure will help the arbitrator candidates determine whether he or she has a conflict of interest with the third-party funder; the disclosure of the funding agreement can facilitate the arbitral tribunal to understand the distribution of benefits of the third-party funding in the case, and provide empirical basis for the arbitral tribunal and the international community as to application of third-party funding in the field of international investment arbitration, and whether it will lead to abuse of litigation and other issues.

4. Whether all parties, including additional parties and all parties of the consolidation of arbitrations, funded by third-party funder shall fulfill the corresponding obligation of disclosure, and if so, whether such duty

needs to be clarified in the Rules.

### **III. Advice on Rule 19(Payment of Advances and Costs of the Proceeding)**

#### **A. Original Text**

The provision advised to be modified is Rule 19 (Payment of Advances and Costs of the Proceeding) of the proposed Arbitration Rules.

The Rule provides as follows:

#### **Rule 19 Payment of Advances and Costs of the Proceeding**

(1)The Tribunal shall determine the portion of the advances payable by each party in accordance with Administrative and Financial Regulation 14(5) to defray the costs of the Tribunal and the Centre in connection with the proceeding.

(2)The costs of the proceeding are all costs incurred by the parties in connection with the proceeding, including:

- (a)the legal fees and expenses of the parties;
- (b)the fees and expenses of the members of the Tribunal; and
- (c)the administrative charges and direct costs of the Centre.

(3)The Tribunal shall request that each party file a statement of costs before allocating the costs of the proceeding between the parties.

(4)In determining and allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:

- (a)the outcome of any part of the proceeding or overall;
- (b)the parties' conduct during the proceeding, including the extent to

which they acted in an expeditious and cost-effective manner;

(c) the complexity of the issues; and

(d) the reasonableness of the costs claimed.

(5) The Tribunal may at any time make interim decisions on the costs of any part of a proceeding.

(6) The Tribunal shall ensure that all decisions on costs are reasoned and form part of the Award.

### **B. Modified Text**

It is advised to amend Rule 19 (Payment of Advances and Costs of the Proceeding) of the proposed Arbitration Rules as follows:

(2) The costs of the proceeding are all costs incurred by the parties in connection with the proceeding, including:

(a) the legal fees and expenses of the parties, **except any expenses or costs relating to third-party funding;**

### **C. Reason for Amendment**

1. Explicit exclusion of the third-party funding costs from recoverable costs incurred by the parties

The Article 19(2)(a) of the proposed Arbitration Rules provides that the costs of the proceeding include the legal fees and expenses of the parties, but it is not clear whether the costs of the proceeding include costs of third-party funding. At the same time, paragraph 272 of the specific interpretation of the Article states that:

“Similarly, whether the costs associated with TPF (third-party funding) are recoverable in an order for costs remains a question of fact for the Tribunal and is not expressly addressed in the proposed (Arbitration Rules).”

Because the issue is not clear in the Rules, and modification interpretation of ICSID Rules states that the issue will be decided by the arbitral tribunal. There is only one international commercial arbitration case, in which the arbitral tribunal ruled that the respondent should bear the contingency fee (for a certain percentage of the recovered amount) specified in the claimant’s funding agreement. In addition, for third-party funding, the Secretariat’s amendment proposal also mentioned that only Singapore and Hong Kong have amended the relevant laws to allow third parties to provide funding in international arbitration, but such permission is only adopted in principle, and the specific implementation and supervision regulations are yet to be implemented. In practice, it is unreasonable for the respondent country to bear high third-party funding costs. The question remains to be determined and clarified is whether the third-party funding costs belong to the costs of proceeding. We recommend that the third-party funding costs be explicitly excluded from the reasonable expenses of the party in the Rules, and the successful party has no right to ask the other party to bear the costs. When discussing the Guidelines for the Administration of Arbitral Procedures in 2016, the



UNCITRAL had suggested that third-party funding costs should be supported by member states (only in the field of international commercial arbitration), but due to opposition from most states, the UNCITRAL did not discuss this issue, and did not include the costs into the scope of costs of proceedings. Therefore, the issue should be expressly clarified in the Rules, thereby the respondent states will not be responsible for the unreasonable expenses.

## **IV. Advice on Rule 20 (General Provisions Regarding the Constitution of the Tribunal)**

### **A. Original Text**

The provision advised to be modified is Rule 20 (General Provisions Regarding the Constitution of the Tribunal) of the proposed Arbitration Rules. The Rule provides as follows:

Rule 20 General Provisions Regarding the Constitution of the Tribunal

(1) The parties shall constitute a Tribunal without delay after registration of the Request for arbitration.

(2) The majority of the arbitrators on a Tribunal shall be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute, unless the Sole Arbitrator or each individual member of the Tribunal is appointed by agreement of the parties.

(3) A party may not appoint an arbitrator who is a national of the State party to the dispute or the State whose national is a party to the dispute without agreement of the other party.

(4) A person previously involved in the resolution of the parties' dispute as a judge, mediator, conciliator or in a similar capacity may be appointed as an arbitrator only by agreement of the parties.

## **B.Modified Text**

It is advised to amend Rule 20 (General Provisions Regarding the Constitution of the Tribunal) of the proposed Arbitration Rules as follows:

Rule 20 General Provisions Regarding the Constitution of the Tribunal

(2) The majority of the arbitrators on a Tribunal shall be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute **or third-party funder**, unless the Sole Arbitrator or each individual member of the Tribunal is appointed by agreement of the parties.

(3) A party may not appoint an arbitrator who is a national of the State party to the dispute or the State whose national is a party to the dispute **or third-party funder** without agreement of the other party.

## **C. Reason for Amendment**

1. The selection of arbitrators when there is a third-party funding.

To maintain the impartiality and independence of arbitrators, it is recommended that the arbitrators not only shall not be the nationals of State party to the dispute and the State whose national is a party to the dispute, but also shall not be the nationals of a State whose national is a third-party funder of a party to the dispute. Therefore, as stated below, the Rules should include an additional information in the scope of the disclosure of third-party funding, namely the nationality of third-party

fundere.

Currently, third-party fundere are mainly British and American financial institutions. Third-party fundere involved in arbitration cases have expected to benefit from the proceedings. In addition, the arbitration tribunal may order the respondent to cover the costs associated with third-party funding (if unable to reach a consensus on modification, as mentioned above). In this case, the third-party fundere serve as the invisible parties to the arbitration proceedings, and needed to be imposed corresponding limits. Therefore, the disclosure of information and nationality of third-party fundere are extremely important.

## **V. Advice on Rule 51(Security for Costs)**

### **A. Original Text**

The provision advised to be modified is Rule 51(Security for Costs) of the proposed Arbitration Rules. The Rule provides as follows:

#### Rule 51 Security for Costs

(1) A party may request that the Tribunal order the other party to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.

(2) The following procedure shall apply:

(a) the request shall specify the circumstances that require security for costs;

(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the request;

(c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal;

(ii) the last written submission on the request; or

(iii) the last oral submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider the party's ability to comply with an adverse decision on costs and any other relevant circumstances.

(4) If a party fails to comply with an order for security for costs, the Tribunal may suspend the proceeding until the security is provided. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(5) A party must promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(6) The Tribunal may at any time modify or revoke its order for security for costs, on its own initiative or upon a party's request.

### **B. Modified Text**

It is advised to amend Rule 51 (Security for Costs) of the proposed Arbitration Rules as follows:

#### Rule 51 Security for Costs

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider the party's ability to comply with an adverse decision on costs and any other relevant circumstances. **A party funded by a third-party funder shall be the decisive element as being ordered to provide security for arbitration cost and all the expenses of the other party once it so requests.**

(4) If a party fails to comply with an order for security for costs, the

Tribunal **shall** suspend the proceeding until the security is provided. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(5) A party must promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(6) The Tribunal may at any time modify or revoke its order for security for costs, on its own initiative or upon a party's request, **after having given all the parties reasonable opportunity to present its view.**

### **C. Reason for Amendment**

1. The proposition is that the claimant is required to provide security for costs to prevent abuse of international commercial claims. The consequence of filing an frivolous arbitration is that the arbitral tribunal may rule the claimant bear the costs of arbitration, attorneys' fee, travel expenses, etc. incurred by the respondent. Of course, the arbitral tribunal's premise of such a ruling is that the claimant's financial situation is not good and may not be able to bear the unfavorable costs. Nevertheless, in order to prevent the respondent from using the security for costs as strategy to intentionally create obstacles for the claimant, the respondent should be required to provide corresponding evidence to prove the reasonableness of security for costs.

2. In order to prevent abuse of claims due to the involvement of third-party funding, claimants are required to provide security for costs to

reduce the risks. The argument and its basis is that the involvement of third-party funding does not lead to abuse of claims, which is expressed in the ICCA-QUEEN MARY Third-Party Funding Report, and is mainly provided by third-party funders. Therefore it could not conclude that the involvement of third-party funding would not lead to abuse of claims.

3. The key to determining whether a security for costs is required is the ability of the party to assume an adverse costs award. While third-party funding is increasingly being used by large, solvent companies, however, it is undeniable that parties using third-party funding are more likely to be underprivileged. Therefore, when a party seeks for third-party funding, it should be presumed that the party does not have the ability to comply with adverse cost decisions.

4. If third-party funding, which appears to be in its beginning in the field of international commercial arbitration, is used in international arbitration cases involving investors against the host state, more caution should be taken, as small countries may face bankruptcy as a result and this need to be prevented.

5. Therefore, the existence of third-party funding should be the basis for the claimant's inability to bear the costs of unfavorable arbitration costs, attorneys' fee, etc. The arbitral tribunal should accordingly request the claimant provide security for costs, that is, if the proceeding is funded by third-party funder, then the claimant must bear the consequences of the



corresponding unfavorable expenses by providing a security for costs (we could not agree that the use of the funding does not mean the claimant's inability to afford the unfavorable costs).

## **VI. Other Issue of Third-party Funding**

There are two categories of views on third-party funding. The first category consists of suggestions that third-party funding be prohibited entirely, on the basis that third-party funding promotes frivolous claims and is inapt for dispute settlement involving a State. The second category suggests that third-party funding should be permitted, but only if the relevant information of third-party funding is disclosed.

The proposed Arbitration Rules does not prohibit third-party funding on the basis that the receipt of third-party funding does not, in itself, mean a claim is frivolous; More generally, third-party funding is available for litigation in many Member States. Full prohibition of third-party funding remains a policy choice for individual States in their investment instruments rather than in the ICSID Rules. However, the proposed Arbitration Rules, while allowing third-party funding, left the following issues unaddressed.

1. Whether the costs associated with third-party funding are recoverable;
2. The appointment of arbitrators where there is a third-party funding;
3. The scope of information disclosure of third-party funding;
4. Relationship of third-party funding to Security for Costs.
- ...

The issue of third-party funding is a new issue, and UNCITRAL

expressly excluded the issue of “third-party funding” from consideration in its 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, which is adopted on 8 July 2016. International investment arbitration is different from international commercial arbitration, that is, the respondent of the former is a sovereign state. Changes in a country's policies and laws can result in a number of enterprises being affected and can lead to lawsuits. The rules should therefore try to avoid the abuse of a country by third-party funding. Proposed additional conditions for the use of third-party funding, specifically:

1. Entirely prohibit the use of third-party funding in the field of international investment arbitration; or

2. Allow third-party funding, but only if the third-party funder agree to be bound by the Arbitration Agreement, and assume the adverse award rendered against the funded party; or

3. If so, the Rules may provide that, the participation of a third-party funder means that the funder is bound by the Arbitration Agreement, and involved in arbitration proceedings, thereby the arbitration tribunal can order the third-party funder to assume the adverse consequences of losing the case.

## **VII. Advice on Appointment of Arbitrators**

### **A. Original Text**

The provisions advised to be modified include Rule 23 (Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention) and Rule 24 (Assistance of the Secretary-General with Appointment) of the proposed Arbitration Rules. The Rules provide as follows:

Rule 23 Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention

If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention, each party shall appoint an arbitrator and the parties shall jointly appoint the President of the Tribunal.

Rule 24 Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a President of the Tribunal or a Sole Arbitrator.

Rule 25 Appointment of Arbitrators by the Chairman of the Administrative Council in Accordance with Article 38 of the Convention

(1) If the Tribunal has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Chairman appoint the arbitrator(s) who have not yet been appointed pursuant to Article 38 of the Convention.

(2) The Chairman shall appoint the President of the Tribunal after

appointing any members who have not yet been appointed.

(3)The Chairman shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint.

### **B.Modified Text**

It is advised to amend Rule 23 (Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention),Rule 24(Assistance of the Secretary-General with Appointment) and Rule 25 (Appointment of Arbitrators by the Chairman of the Administrative Council in Accordance with Article 38 of the Convention) of the proposed Arbitration Rules as follows:

Rule 23 Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention

If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention, each party shall appoint an arbitrator and the parties shall jointly appoint the President of the Tribunal, **from or out of the Panel of Arbitrators.**

Rule 24 Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a President of the Tribunal or a Sole Arbitrator **from or out of the Panel of Arbitrators.**

Rule 25 Appointment of Arbitrators by the Chairman of the

Administrative Council in Accordance with Article 38 of the Convention

(1) If the Tribunal has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Chairman appoint the arbitrator(s) who have not yet been appointed pursuant to Article 38 of the Convention.

(2) The Chairman shall appoint the President of the Tribunal after appointing any members who have not yet been appointed. **All members of the Tribunal appointed by Chairman shall be appointed from the Panel of Arbitrators.**

(3) The Chairman shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint.

### **C. Reason for Amendment**

When a party appoints an arbitrator, the Secretary-General assists in the appointment of an arbitrator or the arbitrator appointed by the chairman, whether the arbitrator must be on the Panel of Arbitrators, is an issue should be clarified.

1. The Rule 33 of the proposed Arbitration Rules provides for the replacement of the vacancy of the tribunal by the Chairman from the Panel of Arbitrators, however, the appointment by the parties, or by the Chairman or assisted by the Secretary-General has not been specified whether the arbitrator must be in the Panel of Arbitrators. It should be

made clear, especially it should be made clear that the arbitrator is to be appointed from the Panel of Arbitrators by the Chairman when appointing an arbitrator who has not been appointed, in order to be consistent with the manner in which Article 33 provides for vacancy filling.

2. Such modification is conducive to the modification of procedural language, and can also address the issue of general participation of arbitrators.

3. Despite provisions in Article 57 of the Convention, the qualifications of arbitrators needed to be further defined.

## **VIII. Advice on the Availability of Arbitrators**

### **A. Original Text of Rule 26 of proposed Arbitration Rules**

#### Rule 26 Acceptance of Appointment

...

(3) Within 20 days after the receipt of the request for acceptance of an appointment, an appointee shall:

(a) accept the appointment; and

(b) provide a signed declaration in the form published by the Centre, addressing matters including the arbitrator's independence, impartiality, availability and commitment to maintain the confidentiality of the proceedings.

...

### **B. Original Text of Schedule 2: Arbitrator Declaration**

The Schedule 2: Arbitrator's Declaration does not include any content relating to the arbitrator's commitment of availability. It provides as follows:

#### SCHEDULE 2: ARBITRATOR DECLARATION

...

(4) I understand that I am required to disclose:

a. my professional, business and other significant relationships, within the past five years with:

i. the parties;



ii. counsel for the parties;

iii. other members of the Tribunal (presently known); and

iv. any third-party funder disclosed pursuant to [Rule 21(2) of the Arbitration Rules/ Rule 32(2) of the (Additional Facility) Arbitration Rules].

b. investor-State cases in which I have been involved as counsel, conciliator, arbitrator, ad hoc Committee member, Fact-Finding Committee member, mediator, or expert; and

c. other circumstances that might reasonably cause my independence or impartiality to be questioned.

(5) I acknowledge that I have a continuing obligation to disclose any change of circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

(6) I shall keep confidential all information coming to my knowledge as a result of my participation in this arbitration, as well as the contents of any Award made by the Tribunal.

(7) I will not engage in any unilateral communication concerning this arbitration with a party or their counsel.

(8) I have sufficient availability to perform my duties as arbitrator in an expeditious and cost-effective manner and in accordance with the time limits in the applicable arbitration rules.

(9)I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this arbitration.

...

### **C.Modified Text**

It is advised to insert the following text as paragraph 6 of Schedule 2 (Arbitrator Declaration),and paragraph 6 of the original declaration changes its order to paragraph 7, and so on, as follows:

#### **SCHEDULE 2: ARBITRATOR DECLARATION**

...

5. I acknowledge that I have a continuing obligation to disclose any change of circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

**6. I promise that I have sufficient availability to perform my duties as arbitrator in an expeditious and cost-effective manner and in accordance with the time limits in the applicable arbitration rules, and provide with all the parties the schedule as attached within two years from my signature of this statement as commitment.**

### **D. Reason for Amendment**

Schedule 2 (Arbitrator Declaration) has not provided any provisions regarding the availability of arbitration, information contained in which is

a basic commitment of the arbitrator to prompt and efficient handling of the arbitration case. This commitment helps to avoid the procrastination, which has been widely criticized in the international investment arbitration process. The missing part is recommended to be supplemented.

For the practice of “availability” of arbitrators, we recommend referring to the approach adopted by ICC International Court of Arbitration, which is, requesting the arbitrators to provide a timeline of the following two years from receipt of the notice of appointment, in which showing the specific available time, as a basic commitment for the arbitrator to have time to handle the case. This would prevent international investment arbitration cases from being dominated by a small group of about 20 main arbitrators and thereby reducing the credibility of arbitration. As to whether the parties may challenge or propose the qualification of an arbitrator when the arbitrator fails to fulfill its commitments, it still needs to be verified through practice and further discussion.

## **IX. Advice on Rule 30 (Decision on the Proposal for Disqualification)**

### **A. Original Text**

The provision advised to be modified is Rule 30 (Decision on the Proposal for Disqualification) of the proposed Arbitration Rules. The Rule provides as follows:

#### **Rule 30 Decision on the Proposal for Disqualification**

(1) The decision on a proposal shall be taken by the arbitrators not subject to the proposal or by the Chairman in accordance with Article 58 of the Convention.

(2) For the purposes of Article 58 of the Convention:

(a) if the arbitrators not subject to a proposal are unable to decide the proposal for any reason, they shall notify the Secretary-General and shall be considered equally divided;

(b) if a subsequent proposal is filed while the decision on a prior proposal is pending, both proposals shall be decided by the Chairman as if they were a proposal to disqualify a majority of the Tribunal.

(3) The decision on any proposal shall be made within 30 days after the later of the expiry of the time limit referred to in Rule 29(2)(e) or the notice in Rule 30(2)(a).

### **B. Modified Text**

It is advised to amend Rule 30 (Decision on the Proposal for

Disqualification) of the proposed Arbitration Rules as follows:

#### Rule 30 Decision on the Proposal for Disqualification

(1) **If the parties so agree, the decision on a proposal** shall be taken by the arbitrators not subject to the proposal or by the Chairman in accordance with Article 58 of the Convention. **If the parties fail to do so, the decision on any proposal shall be taken by the Chairman.**

(2) For the purposes of Article 58 of the Convention:

(a) if the arbitrators not subject to a proposal are unable to decide the proposal for any reason, they shall notify the Secretary-General and shall be considered equally divided;

(b) if a subsequent proposal is filed while the decision on a prior proposal is pending, both proposals shall be decided by the Chairman as if they were a proposal to disqualify a majority of the Tribunal.

(3) The decision on any proposal shall be made within 30 days after the later of the expiry of the time limit referred to in Rule 29(2)(e) or the notice in Rule 30(2)(a).

#### **C. Reason for Amendment**

One party to an investment arbitration case is an investor and the other party is a sovereign state. On the one hand, compared with the ordinary commercial arbitration, the impact of the results of investment arbitration results is far-reaching, especially when the sovereign state loses its case, its national interests are often affected, and a series of

similar claims will be triggered. On the other hand, from the perspective of investors, its economic strength and influence are difficult to compete with the host country as the respondent. In short, investment arbitration cases have higher requirements for the arbitrators' qualifications, independence and impartiality, and the decision on the proposal for disqualification must be treated with caution. In contrast, the number of arbitrators in the community of investment arbitration is limited, and arbitrators may be familiar with each other or have interests in common. In the three-member arbitral tribunal, when a party proposes disqualification of one arbitrator, the other two arbitrators may be reluctant to dismiss the proposal, thereby reducing the likelihood of success of the proposal.

Under Article 58 of the ICSID Convention: "The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision."

In the above case, we believe that the Arbitration Rules may provide a limited interpretation to the provisions of Article 58 of the ICSID Convention, that is, limit the right of decision of the remaining arbitrators on the proposal of qualification to the premise of "consensus consent of

the parties”. This means that all proposals of disqualification will be decided by the chairman unless the parties agree that it would be decided by the other members of the arbitral tribunal and then by the chairman if those members are equally divided. In addition, the decision on the proposal for disqualification should be allowed for judicial review.

## **X. Advice on Interest Conflict and Challenge of Arbitrators**

### **A. Original Text**

The provision advised to be modified is Rule 31 (Incapacity or Failure to Perform Duties) of the proposed Arbitration Rules. The Rule provides as follows:

#### **Rule 31 Incapacity or Failure to Perform Duties**

If an arbitrator becomes incapacitated or fails to perform the duties required of an arbitrator, the procedure in Rules 29 and 30 shall apply.

### **B. Modified Text**

It is advised to amend Rule 31 (Incapacity or Failure to Perform Duties) of the proposed Arbitration Rules as follows:

#### **Rule 31 Challenge of Arbitrators**

**Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality, independence, or availability, or if the arbitrator does not possess qualifications agreed by the parties, or if the arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay, the procedure in Rules 29 and 30 shall apply.**

### **C. Reason for Amendment**

Rule 29(1) of the proposed Arbitration Rules provides that the parties may propose disqualification of an arbitrator under Article 57 of the



ICSID Convention, on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14 of the ICSID Convention (ie. Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law; commerce; industry or finance, who may be relied upon to exercise independent judgment), or on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV (the composition of the arbitral tribunal). Rule 31 of the proposed Arbitration Rules provides that an arbitrator is disqualified becomes incapacitated or fails to perform the duties required of an arbitrator. However, the proposed Arbitration Rules do not provide for any provisions of the challenge of arbitrators.

The conflict of interest of the arbitrators and the multiple roles of arbitrators are the main issues of international investment arbitration. However, the proposed Arbitration Rules do not provide how conflicts of interest should be dealt with when constituting an arbitral tribunal, and there is no corresponding procedural requirement. This should be supplemented.

We recommend introducing the provisions of Article 11.6 of the latest Hong Kong Arbitration Rules regarding the challenge of arbitrators (as stated in the proposed text). In addition, in cases where the arbitrator fails to act without undue delays, such as when the arbitrator fails to

perform his or her commitment to “availability” in the statement of the arbitrator, the parties may challenge the arbitrator based on undue delay.

In addition to the above suggestions, in avoiding the conflict of interest of arbitrators, it is also necessary to pay attention to the lack of procedural provisions on conflicts of interest of arbitrators, such as: conflict of interest guidelines, grounds of challenge of arbitrators, challenge procedures to be followed, decision mechanisms, judicial supervision, etc.

## **XI. Advice on Arbitrator's Double-hatting**

### **A. The Issue in Dispute**

There is a debate about double-hatting of the arbitrator. Some suggest that double-hatting should be prohibited because it creates either an actual conflict of interest or because it creates a perception of conflict of interest that undermines confidence in the ISDS system to such a degree that it should not be permitted. Others disagree, and the supporting reasons are as follows.

1. The determination of whether there is a conflict of interest must in every case be decided on the basis of the specific facts of the case. The mere fact that an arbitrator also acts as counsel or expert in unrelated cases, without anything further, does not establish conflict of interest and that double-hatting cannot be used as a proxy for a reasoned and fact-specific determination of conflict in the circumstances of the individual case.

2. A prohibition on double-hatting as a contradiction of the principle of party-autonomy in the selection of arbitrators.

3. A prohibition on double-hatting will result in a shortage of qualified arbitrators with experience in ISDS.

4. A prohibition on double-hatting will adversely affect arbitrator diversity.

5. A prohibition on double-hatting would also be difficult to reconcile

with the fact that the ICSID Member States have designated numerous individuals to the Panels of Arbitrators and Conciliators who are practicing attorneys and would become ineligible to act if a blanket prohibition on double-hatting were imposed.

### **B. Comments and Advice**

The proposed Amendment does not take a position on double-hatting, and leaves this for the joint ICSID – UNCITRAL discussions. However, the proposed Rules do require greater disclosure and provide a better basis to assess whether a conflict exists in fact. The disclosure of additional information regarding an arbitrator’s other roles proposed in the declaration would enhance transparency and enable the parties to consider potential conflicts of interest deriving from double-hatting on a case-by-case basis, and to pursue the available remedies should they choose to do so.

As respect to the double-hatting of arbitrators, we believe that double-hatting of arbitrators should be allowed. On the one hand, this approach can make full use of the experience accumulated by arbitrators during other duties, and also the principle of autonomy of the parties; on the other hand, the improvement of the disclosure system can well solve the conflict of interest caused by the double-hatting of arbitrators. Considering that the arbitrator's multiple positions are very common in practice, this means that for the time being, the Rules have implied that

the arbitrators are allowed multiple identities. We believe that there is no need to explicitly allow multiple identities of arbitrators in the Rules at this stage, but because this issue is also the main factor leading to the decline of the credibility of international investment arbitration, we recommend that the issue be discussed and defined in depth. If the results of in-depth research tend to prohibit multiple identities of arbitrators, then they should be clarified in the Rules.

## **XII. Advice on Initiation of Expedited Arbitration**

### **A. Original Text**

The provision advised to be modified is Rule 69 (Consent of Parties to Expedited Arbitration) of the proposed Arbitration Rules. The Rule provides as follows:

#### **Rule 69 Consent of Parties to Expedited Arbitration**

(1) The parties to an arbitration conducted under the ICSID Convention may consent to expedite the arbitration in accordance with this Chapter (“expedited arbitration”) by following the procedure in paragraph (2).

(2) The parties shall jointly notify the Secretariat in writing of their consent to an expedited arbitration in accordance with this Chapter. Such notice must be received within 20 days after the date of registration of the Request for arbitration.

(3) Chapters I-XI of the Arbitration Rules shall apply to an expedited arbitration except that:

(a) Rules 8(1), 22, 23, 25, 35, 37, 38, 42, and 43 do not apply in an expedited arbitration pursuant to this Chapter; and

(b) Rules 26, 30, 34, 36, 40, 53, 59, 62 and 66, as modified by Rules 70-78, apply in an expedited arbitration pursuant to this Chapter.

### **B. Modified Text**

It is advised to amend Rule 69 (Consent of Parties to Expedited

Arbitration) of the proposed Arbitration Rules as follows:

Rule 69 Consent of Parties to Expedited Arbitration

(1)The parties to an arbitration conducted under the ICSID Convention may consent to expedite the arbitration in accordance with this Chapter (“expedited arbitration”) by following the procedure in paragraph (2).

(2)The parties shall jointly notify the Secretariat in writing of their consent to an expedited arbitration in accordance with this Chapter. Such notice must be received within 20 days after the date of registration of the Request for arbitration.

**(3)The expedited arbitration is recommended to apply if:**

**(a)the amount in dispute does not exceed half of the average amountof all investment arbitration cases registered by ICSID of last calendar year at the time ofthe notice referred to in arbitration; and**

**(b)The merit in dispute is clear to permit the tribunal to issue its reward within a relevant time limit for expedited arbitration.**

(4)Chapters I-XI of the Arbitration Rules shall apply to an expedited arbitration except that:

(a)Rules 8(1), 22, 23, 25, 35, 37, 38, 42, and 43 do not apply in an expedited arbitration pursuant to this Chapter; and

(b)Rules 26, 30, 34, 36, 40, 53, 59, 62 and 66, as modified by Rules 70-78, apply in an expedited arbitration pursuant to this Chapter.

### **C. Reason for Amendment**

Rule 69 of the proposed Arbitration Rules states that the application for initiation of the expedited arbitration shall be submitted by the parties in writing, but the applicable standards for the expedited arbitration proceedings are not clearly defined. The vagueness of the applicable standards of procedures is not conducive to the promotion of expedited arbitration and may lead to the abuse of expedited arbitration. It is therefore recommended to supplement the applicable standards of expedited arbitration procedures.

There is no strict distinction between good and bad between ordinary arbitration and expedited arbitration. For cases which are complicated or with large amounts involved, the application of ordinary proceeding can achieve better results in terms of impartiality, but more costs and time are needed. The disadvantages of investment arbitration, namely, high costs and long time-consuming, have long been criticized. The application of the expedited arbitration can considerably improve the efficiency of arbitration and reduce the cost, which can offset the deficiency of the ordinary arbitration to a certain extent.

However, the current proposed Arbitration Rules simply stipulate that the expedited arbitration applies upon an agreement reached by the parties, and there is no explicit provision in terms of the applicable standards applied. In this case, on the one hand, the parties may apply the



expedited arbitration to cases which are complicated or with large amounts involved, in order to pursue high efficiency and low cost, which in turn may result in the arbitral tribunal's failure to comply with the time limits applicable to the expedited arbitration, and also may raise concern about the impartiality of the arbitrators. On the other hand, the parties may also choose to apply the ordinary arbitration to cases which is simple or with small amount involved, because of lack of understanding of the expedited arbitration, thereby the advantage of the expedited arbitration cannot be reflected. The two reference standards added above in the suggestions help to review the cases in dispute and decide whether to apply the expedited arbitration. It may also improve the matching degree between the arbitration and the cases, and the credibility of ICSID.