Re: Comments on the ICSID Rules Amendments[*]

Dear Meg Kinnear,

The Silk Road Institute for International and Comparative Law ("SRIICL") is privileged to have the opportunity to offer some comments and suggestions on the proposed amendments to the ICSID rules and regulations. As the leading institution in facilitating the settlement of disputes between foreign investors and host states, the ICSID has periodically modernized its rules and regulations to adapt to the developments of international investment law and the evolving needs of the disputing parties. The SRIICL is deeply impressed by the great efforts made by the ICSID secretariat to systematically update the ICSID rules to order to make them clearer, more simplified, more cost-effective and more balanced.

The SRIICL is aware that the proposed amendments are made to the ICSID rules and regulations, not to the ICSID Convention, which can only be amended by unanimous ratification, pursuant to Article 66 of the ICSID Convention. Therefore, the main body of the comments relates to the ICSID arbitration rules and regulations, concerning aspects such as: 1) Third Party Funding; 2) Appointment of arbitrators by Chairman; 3) Resignation of arbitrators; and 4) Emergency arbitration. The final suggestion relates to the new mediation rules.

Meanwhile, the SRIICL has noted that the ICSID also welcomes "more ambitious proposals." Accordingly, the SRIICL ventures to propose two amendments to the ICSID Convention, which we consider could significantly improve the legitimacy of the ICSID mechanism: **One is to make the panels of arbitrators and conciliators compulsory for ICSID arbitration and conciliation**. In other words, all the arbitrators and conciliators for any of the ICSID arbitration and conciliation have to be chosen from the panels of arbitrators and conciliators of the ICSID, which are designated by the ICSID Member States and the ICSID Administrative Council. This should help boost the legitimacy of the arbitrators and conciliators as their qualifications and quality would have to be first checked and approved by the member states or the ICSID Administrative Council making sure that they are fit for ISDS proceedings. **The other proposal is to establish a permanent annulments committee (PAC) to improve consistency and authority of the ICSID mechanism.** As the PAC proposal requires

[*] This piece of comments are prepared by a team of the Silk Road Institute for International and Comparative Law (SRIICL) at Xi'an Jiaotong University led by Professor Wenhua Shan, with assistance from Associate Professor Dr. Sheng Zhang. Other team members include Dr. Peng Wang, Dr. Chaoen Wang, Associate Professor Dr. Hongrui Chen and Ms. Yunyafeng (PhD Candidate). We appreciate the comments and suggestions received from other members of the institute during its preparation.

further elaboration it is attached as an appendix to the comments.

1. Third Party Funding

The SRIICL is pleased to see that the proposed amendments have addressed the third party funding issues, which have become a major concern affecting the legitimacy of international investment arbitration. The proposed amendments have set up a framework for the disclosure of third party funding. However, the SRIICL proposes two changes regarding the definition of third party funding and the allocation of cost respectively.

Rule 21 of the proposed amendments to ICSID Arbitration Rules defines third party funding. But it fails to consider such circumstances where the funding is given to a counsel representing the party, which may or may not be affiliated with a law firm. The SRIICL therefore suggests revising Rule 21(1) 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 counsel 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.

Also, the SRIICL suggests adding a requirement that the tribunal should take the fact of third party funding and its disclosure into consideration when determining the allocation of cost. This should help to encourage compliance with the disclosure requirement. Without such regulation, the funded parties will be reluctant to disclose the related information, because even if they do not do so, they do not have to bear any legal consequences. The EU-Viet Nam Free Trade Agreement has a similar provision requiring that, when deciding on the cost of proceedings the tribunal shall take into account whether the requirements of disclosure of third party funding have been respected. The China International Economic and Trade Arbitration Commission (CIETAC) International Investment Arbitration Rules also provide that, when making a decision on the costs of arbitration and other fees, the arbitral tribunal may take into account the existence of any third party funding arrangement, and the fact whether the disclosure requirements are complied with by the party or parties accepting the funds.

2. Appointment of Arbitrators by Chairman

The SRIICL suggests shortening the waiting period after which the Chairman could appoint the arbitrator(s) from 90 days (ICSID Arbitration Rules, Rule 25) to 75 days to save time. Similar provisions of period have been provided in the United States-Mexico-Canada Agreement (Article 6.3 of Annex 14-D) and the Trans-Pacific Agreement (paragraph 2, Article 9.22), which is now the Comprehensive and Progressive Trans-Pacific Partnership Agreement. The period of 75 days is still longer than what is provided in other investment arbitration rules, i.e. the Singapore Investment Arbitration Rules, which specifies that the Court could proceed to make the appointment after 42 days since the commencement of the arbitration.

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 75~~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.

3. Resignation of arbitrators

Rule 32 sets out the conditions to be satisfied when an arbitrator resigns, and the proposed amendments grant more discretion to the arbitrators. In practice, there are diverse reasons for the arbitrators to resign. At least 71 arbitrators (or members of the annulment committee) resigned in the 456 concluded ICSID cases, though in most cases, the reasons for resignation were not publicized. Among them, there are cases where an arbitrator chooses to resign before the tribunal making its decision on the request made by a disputing party for disqualification of himself or herself. For example, in *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, Professor Philippe Sands offered to resign after he was challenged.

In such cases, the challenged arbitrator's resignation may possibly be read as an acceptance of the validity of the grounds for the challenge, which increases the pressure of the challenged arbitrator when deciding whether or not resign at first place In order to alleviate this pressure of honor, many arbitral institutions, including the Permanent Court of Arbitration (PCA), UNCITRAL, Singapore Investment Arbitration Centre and CIETAC, provide in their arbitration rules that in neither case the resignation implies the acceptance of the validity of the grounds for the challenge. The SRIICL suggests the same should be included and Rule 32 should be revised as follows:

Rule 32
Resignation

(1) An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal and providing reasons for the resignation. Resignation of an arbitrator

in se does not imply the acceptance of the validity of the grounds for the proposal referred to in Rule 29.
(2) If the arbitrator was appointed by a party, the other members of the Tribunal shall promptly notify the Secretary-General whether they consent to the arbitrator's resignation for the purposes of Rule 33(3)(a).

4. Emergency arbitration

The SRIICL suggests incorporating an emergency arbitration mechanism into the amendments. As the constitution of an investment arbitral could take several months or even longer, there is a risk that one disputing party would suffer irreparable damages in such period. The emergency arbitration mechanism will mitigate such risk and make interim measures available before the constitution of the tribunal. Several arbitral institutions have introduced the provisions on emergency arbitration in their arbitration rules, and among them, the CIETAC International Investment Arbitration Rules, SIAC Investment Arbitration Rules and the SCC Arbitration Rules explicitly allow one party to refer a dispute to emergency arbitrator.

It is noted that the emergency arbitration mechanism was discussed in the background papers and the Secretariat expressed its concerns over the due process issues raised by such mechanism. To mitigate such concerns, the emergency arbitrator mechanism might be provided on an opt-in basis so that its use is subject to the consent of the disputing parties.

5. Mediation rules

With respect to the mediation rules, the SRIICL suggests that the parties be granted more freedom to determine the procedural language, as does the conciliation rule (Rule 13). Hence a new provision should be added to the mediation rules as follows:

> "The parties may agree to use one or two procedural languages in the mediation. The parties shall consult with the Secretary-General regarding the use of a language that is not an official language of the Center. If parties cannot agree on the procedural language(s), each party may select one of the official language of the Centre."

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Appendix: Proposing a Permanent Annulment Committee

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The SRIICL submits that a permanent annulment committee (PAC) may significantly enhance the legitimacy of ICSID arbitration. We understand that this change require an amendment of the ICSID Convention. To avoid triggering such an amendment, we propose that an "opt-in" mechanism might be adopted. Key features of the PAC design are contemplated as follows:

1. Appointment of Members of Permanent Annulment Committee

It is submitted that an institutionalized review body of tenured experts will contribute to the consistency of awards. However, the consistent awards will be desirable only when they are within the converging zone of the majority, if not all, of the contracting states. This highlights the importance of appointment of members of annulment committee. To be exact, the permanent Annulment Committee should be of sufficient representation.

The proposed design of appointment of annulment committee members is a combination of relevant rules of International Court of Justice (ICJ) and World Trade Organization (WTO): 7 tenured members; members appointed by an absolute majority vote of Administrative Council; members of recognized authority and competence; and the Annulment Committee as a whole representing the main forms of civilization and of the principal legal systems of the world should be assured.

2. Decision-Making of Annulment Committee

The decision-making procedure of annulment committee could be modeled after WTO Dispute Settlement Body (DSB): a division of three persons will be constituted on rotation to hear the cases; the annulment committee as a whole to make the annulment or upholding decision collectively; the deliberation of the annulment committee is confidential and the individual opinion of member will not be revealed in the annulment decision.

An important design to keep the nature of whole procedure as annulment (rather than as appeal) is that the annulment committee could only annul the decision. And this will also keep the arbitral nature of whole procedures as the final awards will be made by a new Tribunal appointed by the investor and host state, rather than the permanent annulment committee.

3. Grounds for Annulment Application

The scope of grounds for annulment application is a difficult question. If current rules covering only procedural issues are adopted, the annulment committee would have no opportunity to address issues of law which is one of the primary reasons for

inconsistency of ISDS awards. However, if all issues of law are covered, the annulment procedure might be initiated too frequently, jeopardizing the finality of awards of the tribunal appointed by investor and host state. Therefore, manifest error in interpretation of applicable rules of law will be a good compromise. This resembles the Article 17.6 of WTO DSU ("an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel") but with a higher threshold ("manifestly erred").

Accordingly, the ICSID Convention Article 52 is proposed to be revised as follows:

Article 52
(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure;
(e) that the award has failed to state the reasons on which it is based; or
(f) that the Tribunal manifestly erred in the interpretation of applicable rules of law.
(2) The application shall be made within 60 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 60 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.
(3) On receipt of the request the Chairman shall forthwith appoint a Division of three persons on rotation from members of Permanent Annulment Committee to hear the case. The Permanent Annulment Committee is consisted of 7 members appointed by an absolute majority vote of Administrative Council. The member of Annulment Committee should be persons of recognized authority, with demonstrated expertise in law, international investment and the subject matter of the covered agreements generally, and the Annulment Committee as a whole should represent the main forms of civilization and of the principal legal systems of the world should be assured. The members of Permanent Annulment Committee should be appointed for a fixed term of 6 years with a possible renewal. The Annulment Committee shall decide to uphold or annul the award or any part thereof on any of the grounds set forth in paragraph (1). The deliberations of the Annulment Committee shall be confidential. Opinions expressed in the Annulment Committee decision by members serving on the Annulment Committee shall be anonymous.
(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee.
(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.
(6) If the award is annulled the dispute shall, at the request of either party, be submitted

to a new Tribunal constituted in accordance with Section 2 of this Chapter.