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BY EMAIL

Meg Kinnear, Esq.
Secretary-General
ICSID
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Washington, D.C. 20433
U.S.A.

Dear Ms. Kinnear,

Re: Comments on ICSID Rules Amendment from Zhong Lun Law Firm

1. We admire the great efforts ICSID has made in increasing the efficiency and cost-effectiveness of arbitrations conducted under its rules. It is our great honour to contribute to the public input for possible further improvements. For this purpose, we respectfully submit our comments on the Proposals for Amendment of the ICSID Rules as follows. For ease of reading, our proposed modifications are also separately set out in the box immediately following relevant comments.

2. The body of the text only discusses the possible amendments to the Arbitration Rules (AR). References are also made to the corresponding provisions in the Institution Rules (IR), Conciliation Rules (CR), Additional Facility Arbitration Rules ((AF)AR), Additional Facility Conciliation Rules ((AF)CR) where applicable. If any suggestion is adopted, corresponding changes might also need to be considered in the relevant provision of the IR, CR, (AF)AR and (AF)CR.

A. Method of Filing (AR 3, IR 4, CR 3, (AF)AR 5, 11, AF(CR) 5, 11)

3. We fully support the method of electronic filing set out in proposed AR 3. We understand that in practice, electronic filing is often achieved by uploading the documents to a file-sharing platform provided by the ICSID Secretariat. It might be the case that the party and its counsel from one jurisdiction have greater difficulty in accessing the file-sharing platform than the other party due to different cybersecurity policies applying in each jurisdiction. It is therefore suggested that an accessibility test be conducted before the Secretariat deploys a document-sharing platform for the filing and exchange of documents for a particular case. An alternative mechanism, for example, by way of an electronic storage device, might be worth considering in specific situations.

B. Procedural Languages, Translation and Interpretation (AR 5, CR 5, (AF)AR 13, (AF)CR 13)

4. It is understood that AR 5(1) attempts to balance the interests of the parties with the Tribunal's ability to carry out its role using a language in which it has sufficient competence. In our view, the formulation of proposed AR 5(1) is less clear than the current rule provided in Rule 22(1). This is because the current version gives effect to the autonomy of the parties by expressly noting that the Tribunal has the authority to approve the parties' agreement on the use of a language that is not an official language. In contrast, AR 5(1) is silent as to how the Tribunal or the Secretariat ought to respond following a consultation with the parties. In general, we consider it appropriate to provide in the rules that the Tribunal should favour party autonomy when determining the use of a non-official language in the procedure, unless the Tribunal's approval would result in an undue burden on either party or the Tribunal or the Secretariat itself. Further, the approaches taken in AR 5(1) and AR 5(5) may need to be considered in conjunction, as the latter requires the use of two procedural languages in rendering orders, decisions and the Award (of which the parties may opt out). The Tribunal should not be discouraged from approving the use of non-official languages as procedural languages on the basis of the requirement in AR 5(5) for the Tribunal to render orders, decisions and the Award in both procedural languages. With these considerations in mind, we invite the Secretariat to consider whether proposed AR 5(1) needs to be further revised.

5. The second sentence of AR 5(3) proposes that, in a proceeding with two procedural languages, the Tribunal may require a party to file any document in both procedural languages. "Any document" is quite broad in scope and could encompass, for example, long exhibits written in one of the procedural languages. This broad language could lead to an excessive burden borne by a party who is required by the Tribunal to produce a translation. Accordingly, we consider it more appropriate for the burden to be placed on the party who considers it necessary to translate the document into the other procedural language. Thus, we suggest adding a new sentence after the second sentence so that AR 5(3) would read as follows:

Proposed AR 5(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. A document that is originally written in one of the procedural languages is not required to be translated into the other procedural language, unless one party requests the document to be translated and the Tribunal considers it necessary to do so in the circumstances.

C. Written Submissions and Observations (AR 13, (AF)AR 22)

6. Proposed AR 13(2) accords the requesting party the right to "elect to have the Request for Arbitration considered as the memorial". It is not entirely clear when the election shall be made, thereby causing some uncertainty as to the time that would be available for the other party to prepare the counter-memorial. We suggest that a time limit for such an election be provided for in the rules, for example, in an added sentence to the effect that the election shall be made no later than [5] [subject to further discussions] days after the Tribunal circulates an agenda to the parties and invites their views on procedural matters in accordance with AR 34(4). With our proposed modification, AR 13(2) would read:

Proposed AR 13(2)
The requesting party may elect to have the Request for arbitration considered as the memorial~~.~~, as long as the election is made no later than [5] days after the Tribunal circulates an agenda to the parties and invites their views on procedural matters in accordance with Rule 34(4).

7. It is a bit opaque whether the parties would be allowed to introduce new facts and arguments in the reply and rejoinder without the Tribunal's approval. We

do not anticipate due process issues to arise if the new facts and arguments are introduced to respond to the issues raised in a previous written submission. We thus suggest making it clear that the reply and rejoinder may include new facts and arguments. Please see below for our proposed modification to AR 13(3).

Proposed AR 13(3)
A memorial shall contain a statement of the relevant facts, law and arguments, and the request for relief. A counter-memorial shall contain a statement of the relevant facts, including an admission or denial of facts stated in the memorial, and any necessary additional facts, a statement of law in reply to the memorial, arguments, and the request for relief. A reply and rejoinder (including the introduction of any new fact(s) or argument(s)) shall be limited to responding to the previous written submission.

D. Payment of Advances and Costs of the Proceeding (AR 19, CR 6, (AF)AR 29, (AF)CR 14) and Contents of the Award (AR 60, CR 37, (AF)AR 70, (AF)CR 45)

8. In some cases, the Tribunal or the President of the Tribunal will retain an assistant for additional clerical support with the consent of the parties. While we understand that the involvement of assistants is controversial, we consider it prudent to reflect this practice in the rules so that the parties are clear of the costs consequences if they agree to use assistants. Thus, we suggest making it clear that the costs of the tribunal assistant are included in proposed AR 19(2)(b). With our suggested modification, AR 19(2)(b) would read:

Proposed AR 19(2)(b)
the fees and expenses of the members of the Tribunal and person(s) assisting the Tribunal with the consent of the parties (where applicable); and

9. In line with the above the suggestion, it is recommended that a statement of the costs of the person(s) assisting the Tribunal be contained in the Award as well. Therefore, we suggest further adjusting proposed AR 60(1)(j) to the following:

Proposed AR 60(1)(j)
a statement of the costs of the proceeding, including the fees and expenses of each member of the Tribunal and of the person(s) assisting the Tribunal, and a reasoned decision regarding the allocation of the costs of the proceeding.

10. In this connection, we respectfully invite the Secretariat to consider whether it would facilitate the conduct of the proceeding to allow any party to request that a statement of the costs of the proceeding be provided before the parties file a final statement of costs in accordance with AR 19(3).

E. Acceptance of Appointment (AR 26, CR 14, (AF)AR 36, (AF)CR 22)

11. In addition to the arbitrator's declaration under proposed AR 26, we find it reasonable to impose on the parties an obligation to disclose the matters that could possibly give rise to doubts on the arbitrators' independence and impartiality. This is because the arbitrator's declaration may not be complete or accurate due to inadvertent omissions or lack of information. Such obligation should be read in conjunction with proposed AR 21(2) and 21(3), under which the disclosure of a third-party funding arrangement may raise concerns of connections between a third-party funder and the members of the Tribunal. Further, we are cognizant of the practical difficulty to impose a broad disclosure burden on a state, given its different layers of government structure. As such, we suggest that the disclosure obligation for a state party to the dispute be limited to the state organ/ministry/department designated to act on behalf of the state. By reference to the language of article (7) "Duty of the Parties and the Arbitrator" in Part I of the IBA Guidelines on Conflicts of Interest in International Arbitration 2014, the following addition may be worth considering:

> Proposed AR 26(7)
> A party shall inform an arbitrator, the Tribunal, the other party and the Secretariat of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration, or where the party is a state, the state organ/ministry/department designated to act on behalf of the state), or between the arbitrator and a third-party funder, or between its counsel and the arbitrator. The party shall do so on its own initiative at the earliest opportunity, subject to Rules 21(2) and 21(3).
> In order to comply with the above requirements, a party shall conduct reasonable enquiries and provide to the arbitrator, the Tribunal, the other party and the Secretariat any relevant information available to it.

F. Replacement of Arbitrators Prior to Constitution of the Tribunal (AR 27, (AF)AR 37)

12. We understand that proposed AR 27(1)(b) follows the current Rule 7 under which each party may replace any arbitrator appointed by it at any time before the Tribunal is constituted. The exercise of a party's right to replace its appointed arbitrator at any time may negatively impact the stability of the Tribunal. In the interests of efficiency and promotion of good faith, we consider that any such replacement should be made subject to the other party's consent. Accordingly, we suggest deleting AR 27(1)(b) after which the right to replace

the arbitrator can still be covered by AR 27(1)(c). Alternatively, it may be worth considering that replacement by any party be limited to certain enumerated situations such as what is provided for in Rule 14.2 of SIAC 2017 Investment Arbitration Rules.

13. Proposed AR 27(2) does not set out a time limit for the appointment of a replacement arbitrator in addition to an "as soon as possible" request. By comparison, when there is a vacancy after the constitution of the Tribunal as a result of the resignation of a party-appointed arbitrator, such vacancy will be filled by the Chairman automatically under proposed AR 33(3)(b) if it has not been filled within 45 days of the notice of the vacancy. To promote the efficient formation of the Tribunal, we suggest that a specific time limit be provided in AR 27(2) for the appointment of the replacement arbitrator, which should also take into account the mandatory period for the Chairman to use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint under AR 25(3).

G. First Session (AR 34, CR 29, (AF)AR 44, (AF)CR 37)

14. We welcome the detailed and thoughtful list of matters to be addressed at the First Session in proposed AR 34(4), which will encourage an early consultation and resolution of the procedural matters. However, some of the matters (for instance AR 34(4)(b)-(g), (k)) have already been provided for within some of the other rules, which we believe represent the established practice or the balanced approach after careful consideration. However, it is unclear what provisions of these rules are mandatory and what provisions are subject to the parties' agreement. To avoid the tendency for the parties to negotiate the matters set out in AR 34(4) irrespective of the provisions already available in the rules, we respectfully invite the Secretariat to consider whether it will be helpful to draw the parties' attention to the existing rules concerning relevant matters and request that reasons be provided if any party wishes to deviate from the existing rules.

15. In this connection, we believe that the parties are free to negotiate and change the expiration of a time limit, which is referred to as 11:59 p.m. at the seat of the Centre in proposed AR 7. In practice, consideration should be given to different time zones of the parties and the members of the Tribunal in deciding on the expiration of a time limit. We raise this point for the Secretariat to consider whether it is necessary to clarify that this issue is included in either AR

34(4)(e)(the method of filing and routing of written communications) or AR 34(4)(i)(the procedural calendar) for the parties to consider.

H. Participation of Non-disputing Treaty Party (AR 49, (AF)AR 58)

16. Proposed AR 49(1) is introduced to grant a non-disputing Treaty Party a right to make a submission on a question of interpretation or application of the disputed treaty. We note that restrictions in proposed AR 48 only apply to the submissions on other matters made by the non-disputing Treaty Party. While we appreciate the value of the submissions by a non-disputing Treaty Party on a question of interpretation or application of the treaty at issue, we are concerned with the potential disruption to the proceeding if limits are not imposed on a submission of this kind. There will be a stronger need to coordinate the filings if a multilateral treaty is involved. Thus, we suggest that the same conditions set out in proposed AR 48(4) apply as well to the submissions under proposed Rule AR 49(1). If our suggestion is accepted, we propose the following wording:

Proposed AR 49(1) The Tribunal shall permit a Party to a treaty that is not a party to the dispute ("non-disputing Treaty Party") to make a written submission on the application or interpretation of a treaty at issue in the dispute, subject to the conditions set out in Rule 48(4).

Thank you for your kind attention.

Yours sincerely,

Huawei SUN　　Lijun CAO