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Meg Kinnear
Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID)
ICSID
1818 H Street, N.W.
MSN J2-200
Washington, D.C. 20433
The United States of America

Re: **ICSID Rules Amendment Project**

Dear Ms. Kinnear:

1. Below please find some suggestions, based on my experience as counsel for claimants or respondents, or as arbitrator in ICSID cases, for amendments as per your kind request pursuant to the amendment consultations launched by ICSID under your auspices.

I. Increased supporting documents and *prima face* pre-registration scrutiny

2. Consideration should be given to reinforce scrutiny of the supporting documents at the registration stage and thus ICSID Institution Rule 2 safeguards given the serious allegations and high monetary claims made against States and some of the questionable claims that have had to be entertained. ICSID Institution Rule 2 for example could require, prior to the registration of the case, the documentation, or alternatively, when this documentation is claimed to have been seized and thus not in the possession of claimant, the information necessary to verify ownership/standing in the claimed investment. This would help to avoid or deter obviously fraudulent claims, or at least ensure that respondent States are provided early on with the information necessary to identify and

potentially raise jurisdictional objections, be it *ratione personae*, *ratione materiae*, or *ratione temporis*, under Rule 41(5) of the ICSID Arbitration Rules where the case manifestly lacks merit. In the current state of affairs, respondent States are often left with no choice but to await the Memorial, or even the document production phase after a first full round of pleadings on jurisdiction, merit, and quantum, or following its own extensive investigations, before being able to secure basic information on claimant's standing and identify otherwise valid and strong jurisdictional objections (see, e.g., Saba Fakes v. Turkey/ICSID Case No. ARB/07/20; Cementownia v. Turkey/ICSID Case No. ARB(AF)/06/2; Libananco v. Turkey/ICSID Case No. ARB/06/8; Burimi v. Albania/ICSID Case No. ARB/11/18; and Dagher v. Sudan/ICSID Case No. ARB/14/2). Good faith claimants would only benefit from such an amendment, as it will reinforce the integrity of the process.

II. Requirement that respondent States submit a summary Answer to the RfA

3. Consideration should be given to address the adverse consequences of the fact that under the ICSID Convention and present ICSID Arbitration Rules, the respondent State does not have an obligation, as under the ICC or UNCITRAL Arbitration Rules, to submit an Answer to the Request for Arbitration. The first time that a respondent State has no choice but to set out its position is therefore in the Counter Memorial, namely after the claimant has filed a Notice of Dispute, a Request for Arbitration, and then a Memorial.

4. As a result, the dispute cannot be narrowed down before the Parties have already set out in great detail their respective position by way of a first full round of submission on jurisdiction, merits, and quantum, potentially resulting in significant waste, both in terms of time and costs, if it turns out that the respondent State did not wish to dispute certain facts or legal issues.

5. Yet, it would be unwise to impose a requirement on the respondent State that it submits an Answer to the Request for Arbitration similar to that provided under the ICC or UNCITRAL Arbitration Rules, as the stakes in ICSID arbitrations are too high, and respondent States often need time to organize some sort of tender to retain counsel, and then undertake an initial document gathering exercise. This is even more so in light of the current shortcomings, flagged in point I above, of Rule 2 of the ICSID Arbitration Rules. Such a requirement may thus unfairly prejudice States, or cause them to submit answers that are incomplete, inaccurate, or substandard.

6. One solution however could be to include a provision at Rule 13 of the ICSID Arbitration Rules enabling the Tribunal, when appropriate, to request respondent States to set out their defences in a non-exhaustive and without prejudice manner within 15 days of the First Session, so as to have a better understanding of the likely disputed issues, as well as the requirements in terms of timing and management, specific to the case at hand, including to assess possible bifurcation, while affording the claimant a better opportunity to concentrate the Memorial on the core disputed issues.

III. Stricter deadlines for the submission of the Memorial and Counter Memorial

7. Consideration should be given to set a fixed deadline at Rule 31 of the ICSID Arbitration Rules for the submission of the Memorial, which would then serve as the starting point for working out dates for the submission of the Counter Memorial, Reply, and Rejoinder.

8. It could be provided, for example, that the Memorial be submitted, by default, within 30 days of the First Session. This would be all the more justified since there is no requirement to submit an Answer to the Request for Arbitration, and that usually a significant amount of time lapses between the Request for Arbitration and the First Session, namely at least 120 days (four months) under the default appointment procedure provided for in Rule 4 of the ICSID Arbitration Rules, which can moreover be extended by agreement of the Parties. Taking into account the additional month or two, or more, for the Parties and the Tribunal to agree on a date on which to hold the First Session, more than six months can have lapsed between the Request for Arbitration and the First Session. The claimant could during this period work on the Statement of Claim, especially as the respondent State will not submit an Answer in the meantime. We have managed to submit the Memorial on the day of the First Session, or within 30 days thereof, in Lahoud v. Congo/ICSID Case No. ARB/10/4, Arif v. Moldova/ ICSID Case No. ARB/11/23, EuroGas & Belmont v. Slovakia/ICSID Case No. ARB/14/14, and Attila Dogan v. Oman/ICSID Case No. ARB/16/7, or even in Bank Melli & Bank Saderat v. Bahrain under the UNCITRAL Arbitration Rules, which shows that this is a very workable solution.

9. Such a requirement would moreover benefit investors who are not necessarily familiar with the process and may find an additional delay after the First Session to be a standard practice or requirement. It would also ensure procedural economy in general as respondent States often use the fact that claimants require an additional three or four

months after the First Session to submit the Memorial, to in turn request six months or more to prepare the Counter Memorial.

10. Regarding the date for the submission of the Counter Memorial, a provision of a 3-month default rule, subject to adaptation by the Tribunal where appropriate (see Article 15 of the LCIA Arbitration Rules) would be reasonable. Such a flexible starting point is moreover necessary as there is too much inconsistency, and thus uncertainty, unfairness in the practice of the different tribunals. Some are excessively lax (see Caratube v Kazakhstan/ICSID Case No. ARB/13/13 or Attila Dogan v Oman/ICSID Case No. ARB/16/7, where respondent was granted 6 months, and this moreover, as the latter case is concerned, from the time of the decision, issued 3 months after the submission of the Memorial, rejecting the request for bifurcation). Other tribunals want to impress and flex their muscles, as in Burimi v. Albania/ICSID Case No. ARB/11/18, where the respondent was required to file its Counter Memorial within two months and was rejected a request for an extension/reconsideration of the same, which led to tensions and even a letter addressed directly to you that ultimately caused the Tribunal to reconsider its position and grant Albania the minimum 3 month time that it required.

11. Therefore, having a 30-day fixed delay for the submission of the Memorial, and a three month flexible starting point for the Counter Memorial will ensure that time, costs, foreseeability and reputation is preserved for all, while still giving the Tribunal the flexibility to turn 30 days into 60 and three months into four, but not much more, except in compelling circumstances.

12. A second "Session" could then be provided for in the ICSID Arbitration Rules for the Tribunal to address the way forward and establish a procedural calendar for the submission of the Reply and the Rejoinder. This would "pressure" arbitral tribunals to read the submissions so as to prepare for the Second Session and would allow them to use this opportunity to give appropriate directions on what and how they wish certain questions to be addressed going forward.

IV. First Session

13. Consideration should be given to amend Rule 13 of the ICSID Arbitration Rules to require that, save for exceptional circumstances, the First Session (which some overbooked or *blasé* or busy tribunals/counsel have turned into a bureaucratic useless step over the

phone) be held in person as it is important for all players to meet and be able to voice and hash out any misunderstanding regarding the applicable ground rules and expectations (see point IX below), as well as to discuss deadlines and the management of the case going forward, so as to avoid any unnecessary issues down the line and thus save time and costs. This is all the more important in the context of ICSID proceedings where counsel as well as certain arbitrators may not be very familiar with the process and/or have different legal/arbitral background and expectations, as well as for the further reasons set out in point IX below.

V. The double hat "issue"

14. It is not advisable to impose any bans/rigid rules but rather a case to case approach on the "double" hat issue or non-issue.

15. There should not be any restrictions on lawyers acting as counsel to sit as arbitrators, as their practical experience as counsel have great added valued when addressing procedural motions or substantive issues ranging from appreciating a party's difficulty in accessing documents or need to be granted an extension. Arbitrators that regularly act as counsel are also less likely to be dependent on future appointments and the risks associated therewith. Their exclusion would moreover significantly reduce the pool of available ICSID arbitrators.

16. There is moreover no need for such strict bans as issue conflicts can, are and should continue to be resolved on a case by case basis via disclosures at the appointment stage and challenges if need be.

17. It is, however, not generally advisable that arbitrators, whose awards have been annulled, or are subject to annulment proceedings, be appointed as *ad hoc* Committee members, even if only to lift the serious conflict or at least discomfort caused by any reliance by the annulment applicants before these *ad hoc* Committee members on ICSID decisions that have annulled these *ad hoc* Committee members' awards in support of the annulment applications (see Togo Electricité v. Togo/ICSID Case No. ARB/06/7 and reliance by annulment applicants before *ad hoc* Committee President Albert Jan van den Berg on the *ad hoc* Committee decision in Enron v. Argentina/ICSID Case No. ARB/01/3 that had partially annulled an award precisely rendered by the tribunal including Albert Jan van den Berg).

VI. Collegial body in charge of default appointments/ICSID Panel

18. Consideration should be given to create a collegial body, headed by ICSID's Secretary General, and composed of rotating prominent arbitration specialists within and outside ICSID (which could consist of a mix of practitioners, state officials, in house counsels and academics), to oversee default appointments by way of ballots or otherwise, both for the underlying ICSID arbitrations and for *ad hoc* Committees. This will provide investors and States with assurances as to the independent nature of the process for the selection of the arbitrators that will decide disputes that often involve very high stakes for all parties involved, as well as to correct perceptions or misperceptions of the last decades and thus reassure the international arbitration community as well as investors and ICSID Member States that no one is being neglected be it by omission or privileged for one reason or another.

19. ICSID should call more often on arbitrators on the ICSID Panel appointed by Sovereign States as this is what the bargained for ground rules provide but refuse appointment of unexperienced candidates to the ICSID Panel or warn member States that it serves no purpose to appoint unexperienced candidates to the ICSID Panel of Arbitrators as they will never be selected by ICSID.

VII. Collegial Body to Rule on Challenges

20. For some of the same reasons set out in point VI above, a collegial body should be considered to rule on challenges of any of the arbitrators before the constitution of the Tribunal when the appointment has been made by the Secretary General. This would lift the present discomfort for a party to raise challenges to arbitrators already appointed and would allow for proper checks and balances, as opposed to leaving this in the hands of the person who appointed the challenged Tribunal member.

VIII. Tribunal secretaries

21. Consideration should be given to implement provisions to ensure that the secretary of the Tribunal in the underlying arbitration is not appointed as secretary of the *ad hoc* Committee tasked with reviewing the award rendered in the underlying arbitration. This is because the secretary, whatever his or her degree of contribution in the underlying arbitration, has had some meaningful involvement therein, as well as access to confidential information, be it concerning the arbitrators' interactions, deliberations, and

shifts in opinion, the evolution of the draft award, or the factual, legal, and quantum issues considered, so that if the award is perceived as flawed, the secretary may feel or be perceived as having some responsibility. Even if the secretary did not approve the award rendered in the underlying arbitration, he or she may be tempted to directly or indirectly influence the *ad hoc* Committee. ICSID appears in fact to have already implemented corresponding measures.

22. On the other hand, consideration should be given to increase the role of the Tribunal's secretary to enable some degree of influence and/or pressure regarding the effectiveness and procedural economy during the arbitration and regarding the timeline for the rendering of the award. If his or her role in this respect is officially legitimized in the Arbitration Rules or otherwise, the secretary will be more successful in diplomatically pushing late arbitrators who tend to be otherwise dismissive of such interventions.

IX. Procedural efficiency and timely rendering of awards

23. It has become too common for extensive time to lapse, sometimes up to two years, between the hearing and the rendering of the award and to serve standard excuses, ranging from complexity of cases to dissents. In general, it should be made clear that it is unacceptable to receive awards more than a year after the evidentiary hearing, whether or not there are post hearing briefs.

24. The ICC's recent practice, however, of informing the parties that the arbitrators' fees have been reduced due to a delay in the rendering of the award is not the correct approach. It undermines the authority of the Tribunal in its adjudicatory function. Any process for controlling the delay in rendering the award should remain confidential, and overseen by the ICSID Secretariat, potentially via the Tribunal's secretary, without opening up the issue with the Parties to the extent possible.

25. The same applies to ICC's recent policy to reduce or increase arbitrators' fees based on whether they complied with the three months deadline as of the last hearing or substantive pleading submitted by the parties. Each case, depending on the nature of the dispute, extent of the parties' submissions, or professional manner in which each party put forward its case and engaged with the opposing side, will call for more or less time to render an adequate and high quality award, regardless of the amount in dispute. Moreover, the ICC's recent practice has had the perverse effect of encouraging requests from the

President for several additional rounds of post-hearing briefs, even when the same is not necessary, merely to afford the President more time to draft the award solely to avoid being penalized.

26. The above being said, the exercise of the foregoing pressure by the ICC has led some arbitrators to privilege working on ICC awards rather than ICSID or other awards.

27. What is needed is some pressure and transparency but more importantly stricter procedural timetables and procedural efficiency.

28. Even before their appointment but with the caveat/mind-set that most in demand are often the most diligent, timely and efficient, candidates considered for the mandate of arbitrator should indicate the number of cases pending as arbitrator or as counsel and the exact stages thereof, as well as their existing hearing engagements for the upcoming 24 months so that the parties know what they are getting into. The ICSID Secretariat should also call the President appointed to stress the importance both for the Parties and for ICSID that the arbitration be conducted and concluded with an award in a timely manner, including by indicating that the award is in principle expected to be rendered within e.g. 6 to 9 months from the evidentiary hearing, irrespective of post hearing briefs or dissents and have him or her sign a statement to this effect together with the co-arbitrators.

29. As I already stated above (point IV), the First Session should always, save for exceptional circumstances, be held in person, so as to hash out any misunderstandings between the parties, as well as with the Tribunal and its expectations. A summary Answer to the Request for Arbitration, on a non-exhaustive and without prejudice basis would also help to narrow down the issues in dispute. The Tribunal should also invite the claimant to indicate at the First Session, especially if it is expected to submit its Memorial within 30 days thereof, the number of witness and expert testimonies it expects to rely on, so as to have a first impression of the complexity and extent of evidence to examine at the hearing.

30. At the same time, the Tribunal should remind the Parties that they should give guidelines about their expectations and how they perceive the process. There is a Turkish expression which says “each person eats yoghurt in its own way”. Arbitrators and practitioners do things differently -- hence costs, delays and misunderstandings. Guidelines could and should be given during the First Session to Parties to, for example, focus on quality rather than quantity, and that each party is not expected to match the other side’s number of

witnesses and/or experts, or even to call each one of them, if not strictly necessary, as the failure to do so will not be construed as an admission to the same. Moreover, the Tribunal should take advantage of the First Session to indicate how it expects pleadings to be structured, what factual and legal issues it expects to be extensively pleaded (often, experienced tribunals no longer require a detailed course on applicable standards under international law, save for particularly contentious issues), and how it expects cross examinations to be conducted. Similarly, expectations should be exchanged in terms of document production. Some arbitrators expect or find normal 100 document production requests whereas others, like in a recent pending case, have written *ex officio* upon receipt of the document production to warn the applicant that these extensive requests will be considered for allocating costs, which is inappropriate from all perspectives and moreover entails prejudgment, thus giving rise to tense correspondences with the Tribunal.

31. As set out at point III above, it is advisable to hold a second "Session" in person or by phone this time, so as to encourage the Tribunal to read the Memorial and the Counter-Memorial and allow the Tribunal to give appropriate directions on the way forward. Then, upon completion of written exchanges, the Tribunal should take advantage of the pre-hearing conference call, having read the Reply and the Rejoinder, to identify the issues on which it expects particular emphasis to be put by the Parties in their opening statements, as well as the manner in which it wishes evidence to be presented in a user friendly way for purposes of drafting the award.

32. Once the hearing is concluded, the ICSID Secretariat, be it through the Tribunal's secretary or otherwise, should closely follow the Tribunal's progress in drafting the award, including by way of updates from the Tribunal every 45 days after the hearing, whether or not post-hearing briefs have been ordered, as the Tribunal should be able to advance on other portions of the award in the meantime. No more than one day for the collective preparation, in the presence of all Tribunal members, and one day for deliberations, should be allowed, save for specific circumstances justifying a derogation.

33. Efforts should also be made to impress on the tribunals in general to work on the award as soon as possible after the hearing, as the less time has elapsed between the hearing and the rendering of the award, the better is the Tribunal's recollection of the evidence presented during the hearing, and in turn the higher is the quality of the ultimate award.

34. The ICSID Secretariat should scrutinize, offer transparency and strongly sanction double bookings by arbitrators, which have become far too common. In one UNCITRAL investment case, a co-arbitrator cancelled the scheduled hearing, despite both Parties having done their utmost to comply with the agreed procedural timetable, alleging an inadvertent double booking, when it later became known and confirmed by the President that the arbitrator in question had in fact cancelled the hearing because that arbitrator did not want to forego an appointment on the Court of Arbitration for Sport in relation to the Olympic Games. Similarly, there have been many cases where scheduled hearings have been postponed or reduced because of subsequent conflicting engagements. And the Parties are, as arbitrators are well aware, left in these circumstances powerless and in any event unwilling to engage in tense correspondence with their decision makers.

35. All cancellations or reductions of hearings should be run via and communicated via and authorized by the Secretary General upon substantiation as Tribunal members, when confronted with a request to postpone or reduce, tend to want, and this rightly so, to protect their colleagues on the panel and preserve a good working relationship.

36. The ICSID Secretary General should be allowed not to confirm a co-arbitrator or President or propose that his or her appointment be reconsidered by the Parties because of the delays or postponement experienced by this same arbitrator in the past.

X. Dissenting opinion

37. Consideration should be given to include a provision that would allow the Secretary General to fix a deadline (to be communicated or not to the Parties) for the rendering of a dissent upon the request of any member of the Tribunal.

XI. Scrutiny of the Award

38. Consideration collegial body should scrutinize awards to pressure the Tribunal to make an effort re quality and timing as there is a considerable and growing disparity in this regard. This is reinforced by the fact that there is no scrutiny at the enforcement stage and no review *per se* at the annulment stage that could pressure Tribunal members to be more attentive to quality, whereas quality control is even more so required precisely because of the pro-enforcement ICSID regime.

XII. Interim Awards

39. It may be difficult given the corresponding changes/modifications/State consents that this would entail, yet advisable to allow issuance of interim awards available in other institutions and under UNCITRAL Rules for purposes of provisional measures and interim awards on costs.

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40. In closing, allow me to congratulate ICSID for having initiated a procedure for possible amendment of the ICSID Rules and Regulations, and for having invited me to submit comments on the same.

Sincerely,

Hamid G. Gharavi