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BY EMAIL

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Comments on the Proposed Amendments to the ICSID Rules

Dear Ms. Kinnear:

Burford Capital is pleased to present comments on the comprehensive proposals for rule amendments released by the ICSID Secretariat on 2 August 2018. We would also be delighted to engage in further discussion about any of the matters discussed herein.

As the world's leading institution devoted to international investment dispute settlement, it is not surprising that ICSID is again at the forefront of efforts to modernize rules for resolving disputes between foreign investors and states. As the facility of choice for investor-state arbitration – having administered more than 70% of all known investment arbitrations – we have witnessed firsthand the increase in demand for the Centre's services, with ICSID having registered 57 new cases in FY2018, the highest number in its history. And owing to the transparency inherent in ICSID arbitrations, it is decisions and awards rendered by ICSID tribunals in recent years that have informed and motivated discussions among stakeholders about the use of arbitration finance.[1]

This has not gone unnoticed. As the world's largest legal finance provider by a clear distance – with more than US$3 billion currently invested in litigation and arbitration finance assets – Burford

[1] It is important to note that although traditional single case financing is an introductory product Burford offers to counsel and clients and is often a first step into arbitration finance, single case financing represents only 5% of our business, and clients tend to turn rapidly to portfolio finance. As a result, we do not consider ourselves a "third party funder" – the term used in the ICSID rule amendments – but rather, a provider of arbitration finance. This is not a mere dispute over terminology; rather, it is the sense that ICSID's approach to the entire area of arbitration finance is merely scratching the surface – addressing the 5% – and not joining issue on the bulk of the capital flowing into the arbitration space at present. This is a concern we take up again, in more detail below, in our comments on proposed Rule 21.

Burford

Capital has been active in financing investor state arbitrations since 2009, and its founders for many more years than that in a prior vehicle. We have the most experienced arbitration finance team in the industry, with particular expertise in financing ICSID Convention and ICSID Additional Facility arbitrations. We therefore value the opportunity to contribute our experience and knowledge towards the ICSID Rules amendment process. Consistent with this, we were delighted to see that the ICSID Secretariat looked to our scholarship in its Working Paper on the allocation of costs by tribunals,[2] decisions on security for costs,[3] and the length and costs of the investment arbitration process.[4]

Against this background, we will address three categories of ICSID's proposed rule revisions: (1) new disclosure obligations to avoid inadvertent conflicts of interest in funded ICSID arbitrations (Schedule 2 and ICSID Arbitration Rule 21); (2) the relationship of arbitration finance, if any, to a new rule on security for costs (ICSID Arbitration Rule 51); and (3) new proposed timelines for the issuance of awards by tribunals (ICSID Arbitration Rule 59).[5] We consider each of these in turn below.

1. Proposed Revisions to Schedule 2 (Arbitrator Declaration Form) and Rule 21 (Disclosures related to arbitration finance)

a. Practice in funded investor-state arbitrations suggests that an express rule on the disclosure of arbitration finance by users is unnecessary

A review of practice in funded ICSID arbitrations suggests that an express rule requiring disclosures about the use of arbitration finance from claimants is unnecessary. The ICSID Arbitration Rules do not currently contain provisions that address arbitration finance, and cases under those rules have been funded for considerably more than a decade.

We know for this for several reasons. *First*, ICSID itself has confirmed as much in its Working Paper, released in August 2018 in support of the proposed amendments. There, ICSID explains that "in at least 20 recent cases in which the existence of TPF was at issue before an ICSID Tribunal, the parties disclosed the existence of TPF and the identity of the funder without requiring an express order to this effect from the Tribunal".[6] This is unsurprising: neither a funder nor a

[2] ICSID Secretariat, "*Working Paper Proposals for Amendment of the ICSID Rules*", vol. 3, 2 August 2018, p. 138 (citing Jeffery Commission & Rahim Moloo, PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION, (OUP 2018), 201-202).

[3] ICSID Secretariat, "*Working Paper Proposals for Amendment of the ICSID Rules*", vol. 3, 2 August 2018, p. 137 (citing Jeffery Commission & Rahim Moloo, PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION, (OUP 2018), 38-40).

[4] ICSID Secretariat, "*Working Paper Proposals for Amendment of the ICSID Rules*", vol. 3, 2 August 2018, p. 898 (citing Jeffery P. Commission, "*How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years*", Kluwer Arbitration Blog, 29 February 2016).

[5] Our comments herein apply also to the draft language of the corresponding ICSID Additional Facility Arbitration Rule amendments (AF Arbitration Rule 32, Disclosure of Third-Party Funding; AF Arbitration Rule 69, Timing of the Award), which track that of the ICSID Arbitration Rule amendments.

[6] ICSID Secretariat, "*Working Paper Proposals for Amendment of the ICSID Rules*", vol. 3, 2 August 2018, pp. 135-136. The figure reported by ICSID is consistent with the publicly known number of funded investor state arbitrations.

claimant in an ICSID or UNCITRAL arbitration has any desire to risk an undisclosed conflict of interest delaying proceedings or jeopardizing enforcement of an award. And in the few cases where ICSID Convention tribunals opted to invite or order disclosure of a funder's identity, they acted within their inherent discretion, and required no express rule to do so.[7]

Second, although it has been suggested that disclosure of the identity of funders in cases is necessary to address potential arbitrator conflicts, practice in funded arbitrations suggests that the threat is more theoretical than real:

- There is not one known ICSID arbitration in which an arbitrator has been disqualified based on conflicts of interest arising from his/her connections with an arbitration finance firm; and
- There is no known ICSID arbitration in which an award has been successfully challenged – or even challenged at all – based on conflicts of interest involving arbitration finance.

Third, none of the other arbitration rules that figure prominently in investment arbitration disputes expressly require any disclosures from users of arbitration finance.[8] As reported by UNCTAD in 2017, the majority of the 817 publicly known investment arbitrations (61%) have been brought under the ICSID Convention or ICSID Additional Facility Rules. According to UNCTAD, "the UNCITRAL Arbitration Rules were the second most used procedural basis, followed by the Arbitration Rules of the SCC Arbitration Institute".[9] Neither the UNCITRAL Arbitration Rules nor the SCC Arbitration Rules require disclosure of arbitration finance by claimants.

b. <u>The purpose of the disclosure rules: to "avoid inadvertent conflicts of interest"</u>

Nonetheless, in the event ICSID is minded to proceed ahead with rules requiring the disclosure of arbitration finance – which appears to be the case – before assessing the proposed rules, one must first consider the purpose of such rules. To be sure, ICSID has been clear about the rationale for disclosure in funded arbitrations: to avoid conflicts of interest with a potential arbitrator. The ICSID Secretariat has consistently reiterated this purpose in statements before the proposed rules were introduced, during the introduction of the proposed rules, and in a variety of sessions around the world explaining the rule amendment process and proposals in the days and months following their release:

See, e.g., Jeffery Commission & Rahim Moloo, PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION, (OUP 2018), 202 ("Third-party funding is known to have been used by claimants in at least twenty-two investor-state arbitrations").

[7] *See, e.g., Muhammet Çap v. Turkmenistan* (ARB/12/6), Procedural Order No. 3 (12 June 2015); *EuroGas v. Slovak Republic* (ARB/14/14), Procedural Order No. 3 – Decision on the Parties' Request for Provisional Measures (23 June 2015).

[8] Although both the Singapore International Arbitration Centre (***SIAC***) and the China International Economic and Trade Arbitration Commission (***CIETAC***) have each introduced provisions addressing the disclosure of arbitration finance (SIAC Investment Arbitration Rules, Rules 24, 33.1, 35; CIETAC Investment Arbitration Rules, Art. 27), neither figure prominently in investment arbitrations. Indeed, having only been introduced in 2017 and not featured in many investment treaties, it is unlikely that the SIAC or CIETAC Investment Arbitration Rules will supplant the ICSID and UNCITRAL Arbitration Rules any time soon, if ever.

[9] UNCTAD, Special Update on Investor- State Dispute Settlement: Facts and Figures, November 2017, Issue No. 3.

- **15 April 2018**: "What we do propose is required disclosure by parties of third party funding and by arbitrators of a relationship with a funder to identify, and hopefully avoid, conflicts of interest."[10]
- **3 August 2018**: "AR 21 ((AF)AR 32) imposes a new obligation on the parties to disclose whether they have third-party funding, the source of the funding, and to keep such disclosure of information current through the proceeding. They are not required to disclose the funding agreement or its contents for this purpose. The name of an involved funder will be provided to the arbitrators prior to appointment to avoid inadvertent conflicts of interest, and the Arbitrator Declaration requires confirmation that there is no conflict with the named funder."[11]
- **27 August 2018**: "States also noted that disclosure is important to avoid conflicts of interest that may arise with third-party funders. Therefore, under the proposed rules, both parties must advise whether a claim or defense is being funded by a third party as soon as the claim is registered, and arbitrators must disclose whether they have any relationship to that funder."[12]
- **22 October 2018**: "Require disclosure of third-party funding to avoid potential conflicts of interest."[13]
- **31 October 2018**: "Obligation for both parties to disclose existence of TPF and name of funder as early as possible after registration to prevent conflicts of interest".[14]
- **1 November 2018**: "Proposed Arbitration Rule 21 approaches regulation of third party funding from the perspective of avoiding conflicts of interest between the parties and the arbitrators selected for the tribunal".[15]
- **3 December 2018**: "Third-Party Funding – Parties would be obliged to disclose whether they have third-party funding, and if so, the source of the funding. The name of an involved funder will be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest."[16]

With ICSID's stated purpose in mind – to avoid inadvertent conflicts of interest – we next turn to the two proposals advanced by ICSID to do so: one involving disclosures by arbitrators (Schedule 2), and the other, disclosures by claimants (Rule 21).

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[10] Crina Baltag, "*Interview with Meg Kinnear, ICSID Secretary General*", Kluwer Arbitration Blog, 15 April 2018.
[11] ICSID, "*Backgrounder on Proposals for Amendment of the ICSID Rules*", 3 August 2018.
[12] Meg Kinnear, "*Moving with the times: amending the ICSID rules*", Columbia FDI Perspectives on topical foreign direct investment issues No. 233, 27 August 2018.
[13] Meg Kinnear, "*UNCTAD High-level International Investment Agreements (IIA) Conference 2018",* World Investment Forum, 22 October 2018.
[14] Martina Polasek, "*Overview of Proposed Amendments to the ICSID Rules*", UNCITRAL Working Group III, 31 October 2018.
[15] ICSID, "Proposed Amendments to the ICSID Rules: Third-Party Funding", Rule Amendment Video Series Part Five, 1 November 2018.
[16] Martina Polasek and Martin Vis Dunbar, "*Modernizing ICSID's Rules for Resolving Investment Disputes*", International Litigation Blog, 3 December 2018.

c. Disclosures by arbitrators (Schedule 2, section 4(a)(iv)) to "avoid inadvertent conflicts of interest"

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.

As made clear by ICSID during this rule amendment process, the person best situated to assess whether or not a potential conflict with a provider of arbitration finance may exist is the decision-maker with those relationships: the arbitrator. The better approach, therefore, is to only seek disclosure from arbitrators about potential conflicts of interest owing to relationships with arbitration finance firms, as ICSID proposes to do with amendments to Schedule 2, the Arbitrator Declaration Form. This way, it is only upon disclosure by an arbitrator about a relationship with an arbitration finance firm, that a party would be required to disclose a potential conflict of interest.

Burford is not alone in recommending that this is likely the most effective approach to achieve ICSID's stated purpose of avoiding or preventing conflicts of interest. In the words of one of the most frequently appointed ICSID arbitrators, Judge Charles N. Brower, having acted in at least 27 ICSID proceedings:

> *"Therefore, a disclosure for the purpose of precluding conflicts of interest on the part of the arbitrators would best be sought from the arbitrators, who should be required to disclose any relationship to a third-party funder, whether as shareholder, director, officer or user, including use by anyone with whom his or her business is associated, e.g., his or her law firm, and to identify the funder(s). Thereafter the parties should be required either to disclose any resulting conflict or to certify that there is none. That information is not intrusive in respect of the arbitrating parties and law firms can adjust their conflicts systems to accommodate this. Thus, only upon such a disclosure by an arbitrator would it be up to a party to disclose a potential conflict of that arbitrator to the adverse party, the arbitrator and the tribunal."*[17]

[17] Judge Charles N. Brower, "*Comments on ICSID's proposed amendments to its chapter on the Constitution of the Tribunal*", 16 December 2018, p. 3. Gustaf Möller, also an ICSID arbitrator, and former Judge of the Supreme Court of Finland, fully concurs with the comments of Judge Brower. Gustaf Möller, "*Comments on ICSID Rule Amendments – AR Rules 20-22*", 27 December 2018.

And ICSID would not be alone in proceeding in this manner. Earlier this month, on 19 December 2018, the ICC – the leading arbitration institution for the settlement of international commercial disputes – released updates to its Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration. The updates, schedule to take effect on 1 January 2019, squarely address the use of arbitration finance, clarifying that "in assessing whether a disclosure should be made, an arbitrator or prospective arbitrator should consider relationships with non-parties having an interest in the outcome of the arbitration."[18] Like the UNCITRAL Arbitration Rules and the SCC Arbitration Rules, the ICC Arbitration Rules do not include an express disclosure requirement for users of arbitration finance.

d. Disclosures by claimants (Rule 21) to "avoid inadvertent conflicts of interest"

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.

As explained above, Burford recommends that ICSID proceed with its proposed amendments to Schedule 2, but not with the introduction of Rule 21. We believe that this is the most effective approach for ICSID to pursue to avoid conflicts of interest, as well as maintain the integrity of proceedings. Nonetheless, if ICSID is minded to proceed with the mandatory disclosure – of the fact of funding and the identity of the funder – by claimants as contemplated in Rule 21, we recommend that any such disclosure be made to ICSID and the arbitrators, but not to counsel for

[18] ICC, "*Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration*", p. 5.

the respondent. ICSID can mandate this through either an amendment to the current draft of Rule 21 or through a practice direction.

In its current formulation, Rule 21(2) requires that a party must disclose funding in a notice to "be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration". This is in contrast to the rules on disclosure of arbitration finance adopted by other arbitral institutions and in treaty practice, which require the disclosure be made directly to the other disputing party (as contemplated in Article 27 of the CIETAC Investment Arbitration Rules; CETA, Article 8.26(1); EU-Vietnam FTA, Chap. 8(II), Sec. 3, Art. 11(1); and EU-Singapore IPA, Art. 3.8).

Against this background, and given the fact that ICSID canvassed these rules and treaty provisions in its Working Paper, the language of proposed Rule 21(1) appears deliberate. And so must be the exclusion of any language requiring disclosure of arbitration finance directly to respondents. This way, the disclosure can be considered by ICSID and the arbitrators once the tribunal is constituted, which will serve the stated purpose of avoiding conflicts but avoid the associated procedural maneuvering once the disclosure is made to the respondent. Had that not been the case, then ICSID's draft Rule 21(2) would not have parties notifying the Secretariat about funding arrangements that occur post-registration – a not infrequent occurrence – as opposed to the tribunal and parties directly.

This interpretation of Rule 21 makes sense. The requirement for the disclosure of the existence of funding and the identity of the funder should not place undue encumbrance upon one category of finance provider over other forms of finance used for arbitration (e.g. insurance, equity capital). In circumstances where the legal funder is a passive provider of finance, it is unclear why there should be any distinction between how the ICSID Arbitration Rules treat arbitration finance in comparison to other capital sources.

There are complex issues here, however, that the contemplated rule does not navigate well, as it is currently drafted. In the event ICSID is minded to ignore our views and attempt to promulgate some sort of claimant disclosure rule, it should be noted that the language of this rule is at risk of being outmoded in short order. The reality of capital provision to the legal industry is that it is considerably more complex in structuring and application than is captured in the definition of "third party funding" used here.

If ICSID is indeed intent on proceeding with a rule mandating claimant disclosure – a path with which we do not agree – we would recommend that it develop a rule that better reflects the current state of the financing market, a market that is now advanced well beyond just single case funding. For example, what if Burford:

- Buys common equity in a public company engaged in an ICSID arbitration with the purpose of the equity purchase being the further capitalization of the company so that it can pay its legal fees;
- Lends money to a law firm secured by the firm's at-risk receivables in a pool of litigation and arbitration matters, some of which are ICSID arbitrations; or
- Provides insolvency financing ("DIP" or debtor-in-possession financing) approved by a bankruptcy court to a claimant with an ICSID claim, where the capital is used for general

corporate purposes (which can include meeting legal fee obligations, at the discretion of the bankruptcy administrators).

Would those constitute instances of "third-party funding" under the proposed Rule 21? And how would that rule apply to the funding provided in the *Crystallex v. Venezuela* ICSID Additional Facility arbitration – one of the largest single capital provisions in arbitral finance history (as well as one of the largest ICSID awards ever rendered) – were it to be filed in a Rule 21 regime? In short, there is a real risk that Rule 21 – as currently formulated – will be problematic in practice and ineffectual in achieving its sole purpose: to avoid inadvertent conflicts of interest.

2. Proposed Addition of Rule 51 (Security for Costs)

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.

(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.

ICSID and UNCITRAL investment tribunals have generally held that the mere existence of arbitration finance, without any other relevant circumstances, is an insufficient basis for requiring a party to provide security for costs.[19] In what has become a frequent occurrence in ICSID arbitrations, upon learning of the existence of an arbitration finance arrangement, respondents proceed to file applications seeking security for costs. They do so either as a stand-alone application or as part of a sequence of strategic procedural requests. As explained by Judge Charles Bower:

> *"There is nothing per se "evil" about third-party funding. Any such disclosure by a party, however, is likely to open to the non-disclosing party the "evil" possibility of misusing the information it receives for the purpose of delay and harassment through requesting ever more detailed information regarding the funding."*[20]

[19] *See, e.g.*, *EuroGas v. Slovak Republic* (ARB/14/14), Procedural Order No. 3 – Decision on the Parties' Request for Provisional Measures (23 June 2015); *RSM v. St. Lucia* (ARB/12/10), Decision on St. Lucia's Request for Security for Costs (13 Aug. 2014); *South American Silver Limited v. Bolivia* (UNCITRAL, PCA Case No. 2013-15), Procedural Order No. 10 (11 Jan. 2016) 59, 77-78, 83; *Guaracachi & Rurelec v. Bolivia* (UNCITRAL, PCA Case No. 2011-17), Procedural Order No. 14 (11 March 2013) 6-7).

[20] Judge Charles N. Brower, "*Comments on ICSID's proposed amendments to its chapter on the Constitution of the Tribunal*", 16 December 2018, p. 3. Gustaf Möller, also an ICSID arbitrator, and former Judge of the Supreme Court of Finland, fully concurs with the comments of Judge Brower. Gustaf Möller, "Comments on ICSID Rule Amendments – AR Rules 20-22", 27 December 2018.

One form of that harassment is the filing of spurious security for costs applications, which are rarely, if ever, successful. The results are unambiguous: a 5% success rate for security for costs applications (as of 1 June 2018), among the lowest for any procedural application advanced in ICSID arbitrations. In the 20 cases where a respondent filed a security for costs application, only one has been successful. In the other 19 arbitrations, tribunals denied security for costs applications because the exceptional circumstances required were absent. In those 19 decisions, the involvement of arbitration finance, if any, has proven not to be an exceptional circumstance.[21]

What is more, although ICSID has explained that states share a central concern – the risk that claimants will fail to comply with costs awards – in practice, very few costs awards in favor of states go unpaid. And this is not just anecdotal. As part of the rule amendment process, ICSID undertook to conduct a survey concerning compliance with awards of costs, based on all ICSID Convention and Additional Facility awards and post-award decisions issued between October 14, 1966 and April 1, 2017. The results are striking: "most awards in favor of States are paid" and for those few that are not paid, "States do not always seek to enforce awards in their favor that have not been complied with".[22]

Consistent with this, ICSID's proposed Rule 51 on security for costs is a new rule and properly does not address the use of arbitration finance, but requires the tribunal to consider the responding party's ability to comply with an adverse costs decision and whether a security order is appropriate in light of all the circumstances. In the words of ICSID "[a]s a result, the mere fact of TPF, without relevant evidence of an inability to comply with an adverse costs decision, will continue to be insufficient to obtain an order for security for costs under proposed AR 51."[23]

That said, in light of the low success rate for security for costs applications – the lowest for any procedural application advanced in ICSID arbitrations – we would recommend that ICSID revise Rule 51 to encourage tribunals to make interim decisions on costs in respect of unsuccessful security for costs applications, consistent with the proposed amendments to Rule 19(5).[24] Alternatively, ICSID could issue a practice direction encouraging tribunals to issue interim decisions on costs, payable within 30 days, following any unsuccessful application for security for costs. The rationale for issuing interim costs orders is straightforward: to deter any further procedural or other misconduct during the pendency of the arbitration. And there are multiple reasons why such interim costs orders are effective: (a) "costs orders made at the stage of the final award rarely reflect with any precision the conduct of the parties"; (b) "final costs awards do not deter procedural misconduct during the course of the arbitration itself"; and (c) "issues of

[21] Jeffery Commission, "*Security for costs: A procedural right or outcome-related worry?*", Burford Arbitration Blog, 24 July 2018.
[22] ICSID Secretariat, "*Survey for ICSID Member States on Compliance with ICSID Awards*", 2018, p. 5.
[23] ICSID Secretariat, "*Working Paper Proposals for Amendment of the ICSID Rules*", vol. 3, 2 August 2018, p. 137.
[24] As part of its Rule Amendment Project, ICSID has proposed to revise Rule 19 ("Payment of Advances and Costs of the Proceeding") to encourage the issuance of interim costs decisions with the addition of subsection (5): "The Tribunal may at any time make interim decisions on the costs of any part of a proceeding".

procedural misconduct can get lost amid the analysis of the underlying merits of the claim" when costs are awarded in the final award.[25]

3. Proposed Revisions to Rule 59 (Timing of the Award)

Rule 59
Timing of the Award

(1) The Tribunal shall render the Award as soon as possible and in any event no later than:

(a) 60 days after the last written or oral submission if the Award is rendered pursuant to Rule 35(4);

(b) 180 days after the last written or oral submission if the Award is rendered pursuant to Rule 36(7); or

(c) 240 days after the last written or oral submission on all other matters.

(2) A statement of costs filed in accordance with Rule 19(3) shall not be considered a submission for the purposes of calculating the time limits referred to in paragraph (1).

We commend ICSID's proposed Rule 59 ("Timing of the Award"), as it sets concrete expectations on tribunal members to render an award in a timely manner, and at the same time, maintains flexibility based on the circumstances of each case. The introduction of this provision makes sense, since the average duration of ICSID proceedings from registration to award is 3.86 years, and a significant portion of that time is the period between the close of the hearing and the issuance of an award by the tribunal. Specifically, the average time between the last day of a final hearing and an award, however, is 13.3 months.[26]

That said, Rule 59 does not address any sanctions for arbitrators failing to adhere to time limits (as the ICC has recently done), nor does it address the timing of payments to arbitrators. Although we appreciate that ICSID Administrative and Financial Regulations currently contain no schedule for the payment of arbitrators, we would suggest that ICSID include a requirement that 50 percent of fees will only be paid upon issuance of the final award. We are not alone in requesting a

[25] Jeffery Commission & Rahim Moloo, PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION, (OUP 2018), p. 197 (citing Jeffrey Sullivan and David Ingle, '*Interim Costs Orders: The Tribunal's Tool to Encourage Procedural Economy'*, in RESHAPING THE INVESTOR- STATE DISPUTE SETTLEMENT SYSTEM (Brill, 2015)).

[26] Jeffery Commission & Rahim Moloo, PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION, (OUP 2018), p. 193; *see also*, UNCITRAL Working Group III, "*Possible reform of investor-State dispute settlement (ISDS) — cost and duration*", Doc. A/CN.9/WG.III/WP.153, 31 August 2018 ("The JC Study also reviewed the duration taken to issue arbitral awards after the final hearing. It notes that the average period was 379 days for both UNCITRAL and ICSID proceedings. The median for UNCITRAL proceedings was 329 days and for ICSID proceedings was 330 days").

proposed revision of this kind.[27] Indeed, there are numerous examples of inexcusable delay in the rendering of ICSID awards. Burford has been publicly identified as having provided financing in an ICSID Convention arbitration (*Teinver S.A., et al. v. Argentina*) that was filed in 2009, had its final hearing in March 2014 and did not receive an award until July 2017. And this case is no outlier. We have identified at least 12 other ICSID cases where an award was not issued until between 2-3 years after the final hearing, and 4 other cases where an ICSID tribunal did not render an award until more than 3 years after the final hearing.[28] These seventeen lamentable examples demonstrate the unmistakable need for a rule linking payment of fees to ICSID arbitrators and the timely issuance of awards.

Yours faithfully,

Burford Capital

[27] Freshfields Bruckhaus Deringer, "*ICSID Rules Amendments: Proposals from Freshfields Bruckhaus Deringer LLP (International Arbitration Group)*", 30 March 2017 ("The ICSID Administrative and Financial Regulations do not provide for a predetermined payment schedule for the payment of arbitrators. In practice, arbitrators are paid on an ongoing basis with the advances of the parties covering 3 to 6 month periods. Providing for the payment either after specific milestones are reached, or for 50 percent of fees during the proceedings, and 50 percent upon issuance of the award, could encourage a more efficient administration of the case.").

[28] Jeffery Commission, "*How long is too long to wait for an award?*", Global Arbitration Review (18 February 2016).