Petition for participation as Non-disputing party pursuant to Article 41(3) of the ICSID Arbitration (Additional Facility) Rules

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International Centre for Settlement of Investment Disputes
Case No. ARB(AF)/07/01

between

PIERO FORESTI, LAURA DE CARLI & OTHERS
(Claimants)

and

THE REPUBLIC OF SOUTH AFRICA
(Respondent)

Petitioner:

International Commission of Jurists

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Assisted by:

Professor John Dugard
Professor Jorge E. Vinuales
Mr Florian Grisel

CONTENTS OF THE PETITION

1. OVERVIEW OF THE PETITION

1. By the present petition ("**the Petition**"), the International Commission of Jurists ("**ICJ**") seeks leave from the Arbitral Tribunal to file a written submission as a non-disputing party in the above-referenced arbitration. The ICJ believes that this arbitration raises important issues of a public nature that may have repercussions well beyond the Parties to the dispute. Since its establishment in 1952, the ICJ has carried out its mandate to advance human rights and the Rule of Law at the global, regional, national and local levels. The ICJ considers that it can assist the Tribunal and the Parties by providing, on the basis of its expertise and experience, an informed and objective perspective on the public interest and international law issues raised by this dispute.

2. The Petition is structured as follows: Section 2 lays out the applicable standard for the admission by ICSID tribunals of a written submission by a non-disputing party; Section 3 provides a brief description of the petitioner; Section 4 sets out the reasons for the Petition; and Section 5 focuses on the form of the proposed submission.

2. APPLICABLE STANDARD

3. Since the revision of the ICSID Procedural Rules in 2006, it is well established that ICSID tribunals (including those acting in accordance with the revised Additional Facility Rules) have jurisdiction to grant non-disputing parties leave to file written submissions in the course of the proceedings. This is expressly stated in Article 37(2) of the ICSID Arbitration Rules (2006) and Article 41(3) of the ICSID Additional Facility Rules (2006). In addition, several provisions of these sets of rules give arbitral tribunals general procedural powers covering other aspects of non-disputing parties' intervention, in particular Articles 27 and 35 of the ICSID Additional Facility Rules.

4. By agreement of the Parties and the Tribunal, non-disputing parties seeking to make a written submission in this case were directed to file an application with the Tribunal including the following information (**"the Intervention Instructions"**)[1] :

   i) Identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the Parties to the dispute;
   ii) The nature of the petitioner's interest in the case;
   iii) Whether the petitioner has received financial or other material support from any of the Parties or from any person connected with the Parties in this case; and
   iv) The reasons why the Tribunal should accept the petitioner's written submission.

5. Upon receipt of an application for leave to file a written submission, the Tribunal proceeds pursuant to Article 41(3) of the ICSID Additional Facility Rules (2006). Article 41(3) reads as follows:

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Article called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

[1] Note prepared by the Tribunal and communicated by the Secretary of the Tribunal, upon request by the ICJ, by letter of 5 November 2008.

6. According to the Intervention Instructions, the Tribunal will also take into account the following criteria for the admission of an application from a non-disputing party to file a written submission:

   i) All information contained in the petition;
   ii) The views of Claimants and Respondent;
   iii) Any undue burden or unfair prejudice which the acceptance of written submissions by non-disputing parties may place on the Parties, the Tribunal, and the proceedings; and
   iv) The degree to which the proposed written submission is likely to assist the Tribunal in the determination of a factual or legal issue related to the proceeding.

7. This Petition provides the information requested by the Tribunal in the following order. Section 3 provides a description of the petitioner and counsel assisting it, as well as of the relevant factors concerning its independence from the Parties and from any person connected with the Parties. Section 4 specifies the public dimension of the case and the nature of the petitioner's interest, and it explains the reasons why the Tribunal should accept the petitioner's submission. Section 5 discusses the form of the brief to be submitted so as to ensure that it would not disrupt the proceedings or unduly burden or unfairly prejudice either Party. Section 6 specifies the order sought.

3. BRIEF DESCRIPTION OF THE PETITIONER

3.1. Description, membership and relationship to the Parties

8. The ICJ is an international non-governmental organization legally constituted under Swiss law. The ICJ is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights.

9. The ICJ was founded in 1952. Former President of Ireland and United Nations High Commissioner for Human Rights Mary Robinson, presently serves as its President. Its membership is composed of sixty eminent jurists (see attachment 1) who are

representative of the different legal and judicial systems of the world. The ICJ's only members are the Commissioners themselves. Commissioners are appointed by the Commission upon recommendation by the ICJ Executive Committee. Commissioners must not hold a government position or have other potentially conflicting allegiances that may threaten their independence or impartiality.

10. The ICJ is distinguished by its impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law. The ICJ provides legal expertise at the international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level. The ICJ has played a leading role in the process of international legal standard-setting in a number of intergovernmental and expert fora.

11. Based in Geneva, the ICJ's International Secretariat is responsible for the realization of the aims and objectives of the Commission. In carrying out its work, the International Secretariat benefits from a network of autonomous national sections and affiliated organizations located in all continents (see attachment 2). The ICJ also has regional offices in Thailand, Guatemala and South Africa.

12. The ICJ has established a fully staffed office in South Africa focusing on human rights and the rule of law in post-apartheid South Africa and neighboring countries. The ICJ Africa Regional Programme builds on the organisation's years of experience working with African judges, lawyers, civil society, legislators, and executive government agencies, officials and diplomats, as well as its important role in the establishment of the African human rights system. The ICJ Africa office in Johannesburg, South Africa, works to promote and strengthen the independence of the judiciary and the legal profession, to improve the administration of justice and the protection of economic, social, civil and political rights, and to promote business human rights responsibilities in the country. The office also carries out activities in Zimbabwe, Malawi, Botswana and other countries.

13. Several awards have recognized the ICJ's contributions to the promotion and protection of human rights, including the first European Human Rights Prize awarded by the Council of Europe, the Wateler Peace Prize, the Erasmus Prize, and the United Nations Award for Human Rights. The ICJ has consultative status with a number of international organizations, including the United Nations, the Council of Europe, the Organization of African Unity and the UNESCO.

14. The ICJ is independent from the Parties to the dispute as well as from any person connected with the Parties to the dispute and shall remain so at all relevant times. In particular, the ICJ has not received, nor will it receive in the future, any financial or other material support from any of the Parties to the dispute or from any person connected with the Parties to the dispute that may affect its position in relation to this dispute or its independence. The ICJ is funded through contributions from governments, private foundations, and individual donations. Some grants are earmarked for projects, while others are made as a general contribution to the ICJ's activities. All funds are accepted on the understanding that they in no way influence or affect the independence or objectivity of the ICJ's work. The ICJ has not received and will not receive any contribution from any donor in connection with its potential participation in the present case as a non-disputing party.

3.2. Counsel for the Petitioner:

15. For the purposes of this petition, the ICJ will be assisted by the following persons. The ICJ may also call on the assistance of other persons and experts if its petition for leave is accepted. The ICJ will name those persons in an appropriate manner in the text of its written submission.

Prof. John Dugard – University of Pretoria, South Africa

16. For many years Prof. Dugard was Professor of Law at the University of Witwatersrand, Johannesburg, where he was also Dean (1975-1977) and Director of the Centre for Applied Legal Studies (1978-1990), a research centre committed to the promotion of Human Rights in South Africa. From 1998 to 2006 he was

Professor of Law at the University of Leiden, Netherlands. Today he is a Professor of Law in the Centre for Human Rights of the University of Pretoria. From 1995-1997 he was Director of the Lauterpacht Research Centre for International Law, Cambridge University. His publications include *The South West Africa/Namibia Dispute* (1973), *Human Rights and the South African Legal Order* (1978), *Recognition and the United Nations* (1987), *International Law: A South African Perspective* (2005). He is a member of the *Institut de Droit International*. Since 1997 he has been a member of the UN International Law Commission and was, from 2000 to 2006, Special Rapporteur on Diplomatic Protection to the Commission. He was, from 2002 to 2008, a Judge *ad hoc* in the International Court of Justice. From 2001 to 2008 he served as Special Rapporteur to the UN Commission on Human Rights on the situation of Human Rights and International Humanitarian Law in the Occupied Palestinian Territory.

Prof. Jorge E. Vinuales - Graduate Institute of International and Development Studies, Switzerland

17. Dr. Vinuales joined the Institute's Law Faculty in 2009. He is also Counsel with the law firm Lévy Kaufmann-Kohler, Geneva, as well as the Executive Director of the Latin American Society of International Law. Before joining the Institute, he was a full-time law practitioner specializing in international investment law. He worked on numerous cases under ICSID, UNCITRAL, ICC or LCIA rules, including several high profile inter-State and investor-State disputes. He has published several studies and articles on *amicus* intervention in investment disputes in major law journals and practitioner reviews, including the ICSID Review and the Dispute Resolution Journal (AAA). Professor Viñuales was educated in France (Sciences Po Paris), the United States (Harvard Law School), Switzerland (Universities of Geneva and Fribourg), and Argentina (UNICEN).

Mr. Florian Grisel – Université Paris 1 Panthéon-Sorbonne, France/Yale Law School, United States

18. Mr. Grisel is pursuing an LL.M. degree at Yale Law School and completing a Doctorate in Law at Université Paris 1 Panthéon-Sorbonne. A graduate of Sciences Po Paris and Columbia University, he was counsel at ICSID, taught at the Université Paris 1 Panthéon-Sorbonne, before joining Lévy Kaufmann-Kohler as an associate. He has published two studies on *amicus* intervention and other articles, including a chapter in a forthcoming book published by Oxford University Press (*Human Rights in International Investment Law and Arbitration*).

19. Counsel assisting the ICJ in this Petition are independent from the Parties to the dispute as well as from any person connected with the Parties and will remain so at all relevant times.

4. REASONS FOR THE PETITION

4.1 Public dimension of the dispute

20. The dispute involves an important public dimension arising from the responsibility of the Republic of South Africa (**"the RSA"**), both under international and domestic law, to dismantle the legal and factual legacy of the apartheid regime.

21. According to the ICJ's current understanding of the main allegations of the Claimants, based on the Intervention Instructions and on publicly available accounts, the investors claim to have made "investments" in the form of rights to prospect, explore, or exploit quarries under the South African Minerals Act of 1991 (**"the 1991 Act"**), which, according to the investors, would be protected by the bilateral investment treaties between Italy and the RSA and between the Belgo-Luxembourg Economic Union and the RSA (**"the BITs"**). In this connection, the investors claim that the adoption by the RSA of the Mineral and Petroleum Resources Development Act of 2002 (**"the 2002 Act"**), amounts to a breach of the expropriation and fair and equitable treatment clauses of the BITs, because it prompts the conversion of the investors' alleged rights under the 1991 Act into less

valuable rights under the 2002 Act (the adoption of the 2002 Act is hereafter referred to as **"the measure challenged"**).

22. An important matter to be considered by the Tribunal in deciding these claims is whether the measure challenged should be regarded as a breach of the RSA's obligations under the BITs or, rather, as a legitimate exercise of the RSA's regulatory powers to further the social and economic development of its population that is still suffering from the consequences of the *apartheid* regime. More generally, the dispute has broader public repercussions, as it concerns the highly sensitive issue of the legality and legitimacy of the RSA's post-apartheid legislation and policies, known as Black Economic Empowerment (**"BEE"**), under international law.

23. The ICJ respectfully submits that the Tribunal's assessment of the claims before it should take into account:

    (a) The RSA's international obligations with respect to non-discrimination and equality;

    (b) The RSA's responsibilities under its post-apartheid Constitution and legislation;

    (c) The factual background underlying the adoption of the 2002 Act as well as, more generally, the other measures taken to repair the adverse consequences of the apartheid regime as well as their legitimacy and legality under international law.

    (d) The links between the 1991 Act and the apartheid policies.

24. In this regard, the ICJ draws the attention of the Tribunal to the fact that the RSA, Italy and Luxembourg have signed and ratified *inter alia* the International

Convention on the Elimination of All Forms of Racial Discrimination (**"ICERD"**),[2] which has the prohibition of racial discrimination as its main theme, the International Covenant on Civil and Political Rights (**"ICCPR"**),[3] and that Italy and Luxembourg have also ratified the International Covenant on Economic, Social and Cultural Rights (**"ICESCR"**),[4] while the RSA has only signed it. It is a common feature of these treaties that they contain a clause prohibiting discrimination on any grounds (i.e. Articles 2 and 27 of ICCPR,[5] Article 2 of ICESCR[6]). These treaties expressly require, or have been interpreted as requiring, State parties to take special measures to achieve substantive (real) equality together with formal equality as a way to ensure that the prohibition against discrimination materializes in substantive equality in the enjoyment of rights. Thus, the United Nations Human Rights Committee has indicated that the "principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."[7] Substantive equality in the economic and social fields is also specifically targeted in article 2(2) of the ICERD.[8]

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[2] United Nations, Treaty Series, Vol. 660, p. 195. Entered into force on 4 January 1969. South Africa ratified the ICERD on 10 December 1998, Luxembourg on 1 May 1978, Italy on 5 January 1976, and Belgium on 7 august 1975

[3] United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407 Belgium 21april 1983, Luxembourg on 18 August 1983, Italy on 15 September 1978 and South Africa on 10 December 1998.

[4] United Nations, Treaty Series, vol. 993, p. 3; Belgium ratified on 21 April 1983, Italy on 15 September 1978, Luxembourg on 18 August 1983 and South Africa has only signed on 3 October 1994

[5] Article 2(1) "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[6] Article 2(2). The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[7] CCPR General Comment No. 18: Non-Discrimination, thirty-seventh session, 1989 paragraph 10.

[8] Article 2(2) of the ICERD provides that: "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."

25. The ICJ also notes that the prohibition of racial discrimination (and *apartheid*) has attained the status of customary international law. Most importantly, as the International Law Commission (ILC) has underlined, the prohibition against racial discrimination has been "clearly accepted and recognized" as a peremptory norm of international law (*jus cogens*) by the international community as a whole. [9] Under the international law of state responsibility, in case of a serious breach of an obligation arising under a peremptory norm of general international law, all States have an obligation to cooperate to bring an end to the situation caused by a breach and to desist from rendering aid or assistance to maintain that situation. [10] The peremptory status of the norm that prohibits racial discrimination and apartheid also serves as a powerful interpretative element in establishing priority among potentially conflicting international obligations.

26. The ICJ also draws the attention of the Tribunal to the responsibilities of the RSA under its post-apartheid Constitution, adopted by the Constitutional Assembly on 8 May 1996, and signed into law on 10 December 1996 (**"the Constitution"**). Section 9(2) (Chapter 2 – Bill of rights) of the Constitution provides that: "Equality includes the full and equal *enjoyment* of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken."[11] The Constitution further refers, at paragraphs (4),[12] (5)[13] and (8) of

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[9] International Law Commission, Responsibility of States for Internationally Wrongful Acts, Commentary, Report of the International Law Commission, Fifty-third session, G.A. Official Records, Fifty-sixth session, Supp. No. 10 A/56/10 at p. 208 and 283.

[10] International Law Commission, Responsibility of States for Internationally Wrongful Acts, annex to UN GA Resolution 56/83 of 12 December 2001, A/56/49(Vol. I)/Corr.4, articles 40 and 41.

[11] The commitment of the Constitution to the achievement of substantive equality was confirmed by the South African Constitutional Court in 1998 in the Soobramoney case. In paragraph 8 of its ruling, the Court stated as follows: "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring", *Soobramoney v Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC), para. 8.

[12] Section 25(4) provides that: "For the purposes of this section

a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

Section 25 (property), to the achievement of equality in the specific context of access to land and natural resources. In particular, Section 25(8) provides that "[n]o provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination [...]."[14] The 2002 Act is based on these provisions of the Constitution, as noted in the Act's preamble.[15]

27. The ICJ does not express an opinion on the adequacy of the RSA's BEE policies with international human rights obligations or with its responsibilities under its domestic law. It notes however that the United Nations Committee on the Elimination of Racial Discrimination has welcomed other special measures adopted by the RSA as being in accordance with article 2(2) of the ICERD, and that it has expressed concern at the persistence of the *apartheid* legacy in practice, especially regarding ownership of property, access to finance and social services despite the measures the RSA has adopted.[16] The adoption of BEE policies and related legislation seems generally in line with these objectives.

4.2. Interest of the Petitioner

28. The ICJ's interest in participating in the present case as a non-disputing party flows from its mission; its expertise in international law, including international human rights law; its long-standing work and engagement with the Rule of Law and human rights in South Africa; and its role in promoting the views of judges and lawyers as a distinct constituency in matters relating to the Rule of Law. Ever since its

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b. property is not limited to land."

[13] Section 25(5) reads as follows: "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

[14] The full text of Section 25(8) reads as follows: "No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)." Section 36(1) is the general clause on limitation of rights.

[15] See paragraphs 5 to 7 of the Preamble to the 2002 Act.

[16] UN Doc. CERD/C/ZAF/CO/3 paragraph 13

foundation in 1952 the ICJ has worked for the protection and realization of all human rights (economic, social, political and civil) in all continents. It works primarily with judges and members of the legal profession and intervenes before national and regional courts when the protection of human rights is at stake. It plays a special role in the work of the United Nations bodies dedicated to human rights. As explained above, the present dispute raises very important issues for the protection and realization of the right to non-discrimination by the people of South Africa. It would also have an impact on the effectiveness of the Rule of Law in South Africa, since the dispute concerns the application of South Africa's domestic legislation, which the national courts have a primary responsibility to enforce.

29. To fulfill its mission, the ICJ works with national judicial systems and also with universal and regional bodies charged with the protection and promotion of human rights. Over the years, the ICJ and its network have acquired a deep knowledge and understanding of the jurisprudence of regional and international courts and bodies and have also had an important impact on the development of that jurisprudence. The ICJ played a leading role in the drafting of number of human rights treaties, including the African Charter on Human and People's Rights.[17]

30. Racial discrimination and its extreme form of *apartheid* have always constituted an important challenge for the protection of all human rights. The ICJ's concern and involvement with human rights in South Africa started with its foundational commitment to fight racial discrimination. Over the years it has made representations and carried out activities to advocate for a pacific and democratic change in that country. During and before 1964, the ICJ sent teams of observers to the trials of Nelson Mandela and other persons detained by the *apartheid regime*. In 1987, the ICJ published the comprehensive report of a mission of legal experts sent to assess the legal system established by the *apartheid* regime.[18] Additional missions were undertaken to the region and South Africa in the following years. In

[17] OAU Doc. CAB/LEG/67/3 rev. 5, South Africa ratified the African Charter on 7 September 1996

[18] South Africa and the Rule of Law, International Commission of Jurists, Edited by Geoffrey Bindman, Pinter Publishers, 1987

recognition for its commitment to the Rule of Law in South Africa, the ICJ was invited to be represented at the inauguration of the first post-apartheid government in 1994. Through the foregoing activities and study, the ICJ has gained special knowledge and familiarity with the constitutional legal system of South Africa and its evolution.

31. The ICJ represents a broad range of legal expertise from all over the world. This asset comes from its own membership and also from its network of national sections, affiliates, and field offices. In addition, the ICJ works closely with other non-governmental groups, the academia and grass-root groups, including in South Africa. Its broad base is complemented by the comparative perspective that such broad base of legal experts can offer.

4.3. ICJ's proposed contribution to the Tribunal's consideration of the case

32. The ICJ believes that it can assist the Tribunal by providing, on the basis of its expertise and experience, an informed and objective perspective on the following issues:

    (a) The RSA's international obligations under international law with respect to non-discrimination and equality, and their bearing on the assessment of the measure challenged;

    (b) The RSA's responsibilities under its post-apartheid Constitution and legislation, and their bearing on the assessment of the measure challenged;

    (c) The factual background of the adoption of the measure challenged and its role as part of a general strategy to deal with the consequences of the apartheid regime;

    (d) The links between the 1991 Act and the apartheid policies.

33. Moreover, given the highly sensitive context in which the Tribunal's award is expected to intervene, the ICJ believes that proper consideration of the views of civil society groups articulating the interests of formerly discriminated sectors of the population and the broader repercussions of the dispute would enhance the legitimacy of the decision reached by the Tribunal.

5. FORM OF THE PROPOSED SUBMISSION

34. For the reasons given above, it is respectfully requested that the Tribunal grant the ICJ leave to have access to the submissions of the Parties (5.1), and to file a written submission in accordance with the applicable standard discussed in Section 2 above (5.2). The ICJ also sets out below its views in relation to its own costs incurred by reason of its proposed intervention (5.3).

5.1. Access to the written record

35. The ICJ believes that in order to be fully enabled to act as a non-disputing party, it would need access to the Parties' written submissions presented so far, namely the Claimants' Memorial (and, as applicable, its Reply), as well as the Respondent's Counter-Memorial (and, as applicable, its Rejoinder). The ICJ would also wish to have access to the Parties' exhibits, including witness statements and expert reports (if any). The ICJ understands that information that is designated by the Parties as commercially confidential or legally privileged would be redacted or otherwise protected.

36. The ICJ understands that when allowing non-disputing parties to intervene in the course of the proceedings, the Tribunal has discretion in granting leave to such non-disputing parties to have access to the written record. Indeed, pursuant to Article 35 of the Additional Facility Rules, the Tribunal has the power to decide questions of procedure not covered by the Rules or by the rules agreed by the Parties. The ICJ believes that in order to fully carry out its task as *amicus curiae*, it needs access to the written record.

37. In particular, access to the Parties' arguments and evidence is necessary 1) to avoid responding to the Parties' allegations, and 2) to avoid reiterating the Parties' arguments. Of course, if the Tribunal were to decline to grant the ICJ access to all or part of the written record, the ICJ still considers that it can provide an informed and objective view on the issues raised in this arbitration articulating the interests of its constituencies.

5.2. *Amicus* written submission

38. In requesting leave from the Tribunal to file a non-disputing party submission in these proceedings, the ICJ understands that its role is not to take position on the relative merits of the Parties' argumentation in this dispute. As specified above in Section 4, the ICJ intends to provide the Tribunal with an original and comparative perspective on a) the RSA's international obligations with respect to non-discrimination and equality, and their bearing on the assessment of the measure challenged; b) the RSA's responsibilities under its post-apartheid Constitution and legislation, and their bearing on the assessment of the measure challenged; c) the factual background of the adoption of the measure challenged and its role as part of a general strategy to deal with the consequences of the apartheid regime; d) The links between the 1991 Act and the apartheid policies.

39. In order to ensure that the proposed submission does not disrupt the proceedings or unduly burden or prejudice either Party, the format of the ICJ's submission would be the following:

- The ICJ would file a written submission that is limited in length (for instance, 40 pages);

- The ICJ would not respond to or comment upon the Parties' prayers for relief but focus on factual and substantive issues as described above;

- The ICJ would file a limited number of exhibits so as to substantiate its views and facilitate the Parties' response.

5.3. Costs

40. The ICJ will assume the entirety of its own costs in connection with this Petition as well as with the proposed submission.

6. ORDER SOUGHT

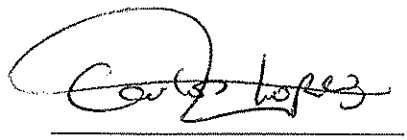
41. The ICJ respectfully requests the Tribunal to make an order granting the ICJ:

a) Access to all or part of the written record, with the scope defined in Section 5.1 above; and

b) Leave to file a written submission with the Tribunal focusing on the issues described in this Petition;

RESPECTFULLY SUBMITTED
19 August 2009

For the International Commission of Jurists



Dr Carlos Lopez

Assisted by:

Prof. John Dugard

Prof. Jorge E. Vinuales

Mr Florian Grisel

Annexes:

Attachment 1 – List of Current Commissioners of the ICJ
Attachment 2 – List of ICJ's affiliated organizations