

INDONESIA'S POSITION PAPER FOR ICSID RULES AMENDMENT

We would like to convey our comments on ICSID Working Paper 2, as follow:

1. Notice of Third-party Funding (AR 13)

We appreciate secretariat's explanation regarding the changed phrase from "Disclosure of Third-party Funding" to "Notice of Third-party Funding". Based on our experience, the Disclosure of Third-party Funding is not merely about the independency of the arbitrators and counsel. Hence, we persist in our previous position that the Third-party Funding arrangement (including TPF in form of contingency fee arrangement by the law firm representing the party) has to be disclosed to the tribunal for the purpose of determining whether the party engage in "arbitral hit and run" or whether the claimant raise financing from TPF in a way which frustrate future enforcement of the award against them, and therefore it has ground to order security for costs.

The reason for this is that, while disclosure of the existence and the identity of a third-party funder may address the issue of a potential conflict of interest with counsel and the arbitrators, it does not address the fundamental issues of: (i) which entity has true ownership and control over the claim (which can go to the issue of jurisdiction), and (ii) whether the funder is liable to pay an adverse costs order in the event that costs are ordered against the Claimant, and the terms governing when third-party funder may withdraw funding for the claim. This information is important to parties, when determining whether to request security for costs, to the Tribunal when evaluating any such request, and to the issue of apportionment of costs more generally.

2. Security for Costs (AR 51)

In general, we propose the provision regarding Security for Costs would be prevail automatically once the Party register Third-party Funder. This provision could avoid Party, especially host state upon loss of compensation of Government's expenses in arbitration proceeding if host state won the case. State has assets, we have state owner enterprises, and government account. Even it is a commercial assets, the otherwise party can easily located our assets. This is entirely different with individual or corporate claimants which may have insufficient assets, especially, as a result of bankruptcy, corporate structuring or otherwise. Therefore, Indonesia proposes to make this rule only to apply to claimants that are nationals of Contracting States.