

Comments submitted by China
on ICSID Secretariat Working Paper #4

China welcomes this opportunity to submit written comments to the proposed changes put forward by the ICSID Secretariat in its Working Paper #4. Further to the written comments submitted by Chinese government on December 28, 2018, China hereby proposes the following comments. China is looking forward to working with other Member States and Secretariat to this rules amendment process.

Unless otherwise noted, all rules referenced in the comments are those rules stipulated in the ICSID Arbitration Rules.

1. On Treaty interpretation and application rules

To avoid erroneous or manifestly inappropriate interpretation of treaties, which may affect the correctness and predictability of rules of treaties, China suggests that the Arbitration Rules add a requirement that the rules as codified in Article 31 and 32 of the Vienna Convention on the Law of Treaties shall be adopted by the tribunal in treaty interpretation. Therefore, China proposes to add an individual article in Chapter IV with the title of “Treaty Interpretation”.

Treaty Interpretation

When rendering its orders, decisions and awards, the Tribunal shall interpret the rules of international laws referred to in Article 42(1) of the Convention in accordance with Article 31 and 32 of the *Vienna Convention on the Law of Treaties*, and other rules and principles on international law applicable between the Parties.

2. On disclosure of third-party funding

Considering the potential influence of third-party funding on the fairness of arbitration, China proposes to increase transparency of third-party funding, and the relevant legal consequences shall be clarified:

1) to avoid potential conflict of interests between arbitrator and the funder due to third-party funding, apart from those information as required in Rule 21(2), other information of the funder shall also be disclosed, such as the contents of the funding contract or arrangement and nationality. Therefore, China proposes to amend the Rule 14(1) as follow,

Rule 14 Notice of Third-Party Funding

(1) A party shall file a written notice disclosing the name, address, **contents of the funding contract or arrangement, nationality** and where applicable, ultimate beneficial owner and corporate structure, of any non-party from which the party, its affiliate or its representative, individually or collectively, has received, directly or indirectly, funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the dispute (“third-party funding”).

2) the party receiving the funding may not refuse to disclose the above mentioned information on the excuse that such information are business confidential information. Therefore, China proposes to add a separate paragraph in the Rule 14 as follow,

Rule 14 Notice of Third-Party Funding

For greater certainty, the party receiving the third-party funding may not refuse to disclose the information referred to in paragraph (1) on the excuse that such information are business confidential information.

3) the relevant legal consequence shall also be clarified. For instance, the party receiving the funding shall bear the obligation to provide security for costs, upon the request of the other party. Therefore, China proposes to amend the Rule 53(4) as follow,

Rule 53 Security for Costs

(4)The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3). The existence of third-party funding ~~may form part of such evidence but is not by itself~~ sufficient to justify an order for security for costs. **Upon request of the other party, the Tribunal shall order the party receiving the third-party funding to provide security for costs.**

3. Protection of Confidential Information

As the investment disputes may involve information of protected information relating to government measures under dispute, or the information which the respondent considers contrary to its essential security. Such information shall be protected from disclosure. Therefore, China proposes to add a separate paragraph in the Rule 36 as follow,

Rule 36 Evidence: General Principles

The respondent shall not be required to disclose protected information by the law of the respondent, or any information which it considers contrary to its essential security interest. The tribunal may not draw adverse inference based on the fact that such information is not disclosed by the respondent.