INDONESIA'S POSITION PAPER FOR ICSID RULES AMENDMENT

1. In light of ICSID's working paper proposals for ICSID Rules Amendment (issued on August 2, 2018), Indonesia would like to submit its second amendment proposals (the first being sent on 26 September 2018, also included in this position paper, with modification)) for the Secretariat's and Member States' consideration. This, of course, is without prejudice to Indonesia's right to make subsequent modifications to this proposal and to complement its proposal at a later stage, including by modifying, supplementing or withdrawing all, or any part, at any time.

2. Our current proposal, mainly, relates to the following issues:
   a) Security for Costs (Arbitration Rule 51)
   b) Disclosure for Third-Party Funding (Arbitration Rule 21)
   c) Consolidation by Order (Arbitration Rule 38BIS)
   d) Provisional Measures (Arbitration Rule 50)
   e) Acceptance of Appointment (Arbitration Rule 26)
   f) Written Submissions and Observations (Arbitration Rule 13 (2))
   g) Bifurcation (Arbitration Rule 36)

3. Security for Costs (AR 51)
   In general, Indonesia is amenable with the security of costs proposal under Rule 51, except with the reciprocal nature of the proposal. We do not see the necessity to make this article to apply to the responding Contracting State. The rule should only apply to claimants that are nationals of the other Contracting State. The rule should not apply to Contracting States. Contracting States are sovereign entities with unlimited number of 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. Please find below our proposed modification for the current proposal.

Arbitration Rule 51
Security for Costs

(1) A ~~party~~ Contracting State may request that the Tribunal order the national of the other party Contracting State to provide security for the costs […].
(2) The following procedure shall apply:
   (a) […]
   (b) […]
   (c) if a ~~party~~ Contracting State requests security for costs […]
   (d) […]
(3) In determining whether to order a national of the other party Contracting State to provide security for costs, the Tribunal shall consider the party's national's ability to comply with an adverse decision on costs and any other relevant circumstances.
(4) If a the national of the other party Contracting State fails to comply […].
(5) A The national of the other party Contracting State must promptly disclose […].

(6) The Tribunal may at any time modify or revoke its order for security for costs, on its own initiative or upon a party's request
(7) In relation to the TPF, should include any financial agreement with a third-party, amongother security for costs.

4. Disclosure for Third Party Funding (AR 21)
   a. In line with our position in the security for costs proposal, Indonesia suggests that the Disclosure of Third-Party Funding proposed rule for only to apply to claimant nationals of a Contracting States. Though there were cases where Contracting States were given donations to help their defense in a proceeding, the rationale of the disclosure of a third-party funding is to help Tribunals to assess whether a claim by a national of a Contracting State is a frivolous one, hence the disclosure of third-party funding to Contracting States is irrelevant. In addition, to help Tribunals in assessing whether a claim is a frivolous one, especially for funding that are provided in return for a premium or exchange for remuneration or reimbursement, Indonesia considers that it is really necessary for Tribunals to know terms and conditions of such third-party funding, as were requested by Tribunals in several cases.

   b. We believe that the TPF 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 (iii) 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 a Respondent State 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.

   c. We also propose to expand the scope of disclosure of the third-party funder to the extent its beneficial owner so it would enable a more thorough conflicts of interest assessment between the arbitrator and the beneficial owner if the TPF is structured through a special purpose vehicle (SPV). This is also important as the use SPV may cloud the repeated appointment of an arbitrator by a particular funder that owns the SPV.

   d. For clarity, the definition of "Third-party funding" in this provision shall include, but not limited to: (i) loan specifically for the pursuit of arbitration proceeding, or (ii) new capital injection specifically for the pursuit of proceeding, or (iii) contingency fee arrangement by the law firm representing the party, or (vi) indemnity for all costs incurred in the proceeding.

Arbitration 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 that is a national of a ~~party~~ Contracting State 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 or repayment of loan or gain of the investment or any form of other profit wholly or partially dependent on the outcome of the proceeding.
(2) A national of a ~~party~~ Contracting State shall file a written notice disclosing that it has third-party funding, and the name of the third-party funder and details including the name of the beneficial owner of the third-party funder or the fund provided, and evidences of the third-party funding arrangement. 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) A national of a Contracting State ~~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.

Furthermore, for clarity purposes, Indonesia proposes that disclosure of third-party funding be reflected in the Institutional Rule 2 on Contents of the Request, to make these two rules correspond with each other. Please find below our proposed modification to both rules.

In Institution Rule 2, we propose requirement for national of a contracting state, submitting a request for arbitration to disclose any existence of TPF in its request. We think, that this ealy disclosure is important to prevent challenge to the arbitrator in later stage of the arbitration, which will prejudice many stakeholders in the arbitration. The same principle, must apply in the event of appointment of arbitrator under Arbitration Rule 26.

Institution Rule 2
Contents of the Request

(1) The Request shall:
    (a) state whether it relates to an arbitration or conciliation proceeding;
    (b) be in English, French or Spanish;
    (c) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;
    (d) be signed by each requesting party or its representative and be dated;
    (e) attach proof of any representative’s authority to act; and
    (f) if the requesting party is a juridical person, state that it has obtained all necessary authorizations to file the Request, and attach the authorizations.

(g) state, in the event there is third party funding pursuant to Arbitration Rule 21, the details of the third-party funder including the name of the beneficial owner of third-party funder or the fund provided, the details of the third-party funding arrangement, and address of the third-party funder in accordance with Arbitration Rule 21.

(h) Attach proof of any third-party funding arrangement, under the condition that the provision under point (g) and (h) herewith also apply for the responding party

(2) […]

5. Consolidation by Order (AR 38BIS).

On consolidation, Indonesia considers voluntary consolidation under Rule 38 as sufficient enough to address situations of multiple claims that might be joined for efficiency purposes. In this regard, Indonesia considers that the optional proposed mandatory consolidation under Rule 38BIS as unnecessary.

Nevertheless, Indonesia may be amenable to the optional Rule 38BIS (to replace Rule 38) only if this rule is modified so that it may only be triggered by a responding Contracting State, and not by a claimant that is a national of the other Contracting State. We consider consolidations to be the sole discretion of responding Contracting States. Furthermore, having this rule reliant on the discretion of claimant investors will boost frivolous claims, hence this will not be in the best interest of host Contracting States. Please find below our proposed modification for the current Rule 38BIS proposal.

Rule 38BIS

Consolidation by Order

(1) A Contracting ~~party~~ State may request full or partial consolidation of two or more arbitrations ("the individual arbitrations") pending under the ICSID Convention Arbitration Rules.

(2) […]

(3) A Contracting ~~party~~ State requesting consolidation shall file a written request with the Secretary-General specifying:

(a) the arbitrations proposed for consolidation;

(b) the grounds for consolidation;

(c) the relevant facts and evidence relied on, attaching supporting documents;

(d) observations on why consolidation is warranted; and

(e) the terms of consolidation sought in the order.

(4) […]

6. Provisional Measures

   The Rule regarding provisional measures now specifies which types of measures may be recommended, and provides that provisional measures will only be recommended if the Tribunal determines that they are both urgent and necessary.

   Experience shows that applying the criteria of Rule 50 (including urgency and necessity, but of, *inter alia*, the financial standing of the Claimant), can lead to incorrect outcomes. This issue should be clarified by the Secretariat. The procedure and the cirteria applicable to, on the one hand, applications for provisional measures and, on the other hand, applications for security for costs, should be completely separate.

7. Acceptance of Appointment

   The objectives of the amendments to this rule is to broaden the arbitrators' duty of disclosure. The Secretariat includes a form that asks the arbitrator to disclose professional, commercial, and other important relationships which have existed during the previous five years with the parties, the parties' legal representatives, other members of the Tribunal and any third party funders, including arbitrator's involvement in any prior investor-state case. While this new, broader disclosure requirement is helpful, it omits to include one important type of relationship that which may exist between an arbitartor and a legal, techical and economic experts who appears in the case. Therefore, the Secretariat's disclosure form should also include relationship with legal, techinical or economic experts.

   (1) A party appointing an arbitrator shall notify the Secretariat of the appointment and provide the appointee's name, nationality(ies) contact information, and the party's or the third party funder's or the beneficial owner of the third party funder's, direct or indirect, with the arbitrator. The party shall have a continuing obligation to notify the Secretariat if any relationship arises between the party or the third-part funder during the proceeding.

   (2)...

8. Written Submissions and Observations

   The proposed amendment introduces the possibility for the Claimant to elect to treat its Request for arbitration as a memorial. The amended Rule does not indicate at what point in the proceeding the Claimant must make this election. The current proposed wording would appear to permit the Claimant to make this election at any time up until the procedural calendar for the case is determined. This could lead to a Respondent State finding out very late that, in fact, the first written submission to be made in the case after the Tribunal is constituted is to come from the State, since the Claimant has elected to treat its Request for arbitration as its (first) memorial. This places the Respondent State in the awkward and uncertain position of not knowing how to proceed to organize its defense. It could lend itself to the tactic of filing a very detailed Request for arbitration, essentially bombarding the Respondent State with a very large documentary filing and significant volumes of evidence to preserve the Claimant's option of electing to treat this documentation as its memorial, while deliberately delaying the communication of any such election so as to try to place the Respondent State at a disadvantage. The Respondent State will be using its best

efforts to (i) communicate with its relevant departments or subdivisions to understand the basis for the claim(s) and the State's response, (ii) choose its arbitrator, and perhaps (iii) select outside counsel/advisors, without knowing whether it also urgently needs to (iv) digest the very large volume of evidence presented, and (v) prepare its first full memorial in its defense, together with evidence, witness statements and expert reports, etc.

9. Bifurcation

In its commentary, the Secretariat noted that various Contracting States had argued that bifurcation should be admitted more often or should be automatic.

Rule 37 establishes a period of 30 days after the presentation of the memorial on the merits by the Claimant for the Respondent State to present a request for bifurcation. This could be interpreted by Claimants to mean that they are always permitted to present their full memorial on the merits priorto any request for bifurcation being presented by the Respondent State. Experience shows that, once a Claimant is permitted to submit a full memorial on the merits, the probability that a Tribunal bifurcates the proceeding to deal first with jurisdictional objections, is diminished substantially. A further problem is that this time-limit applies to all requests for bifurcation. Thus, the time for the Respondent State to consider its request for bifurcation, and fully develop its arguments in this regard, is very short. In our experience, it may be difficult to develop fully a strong argument for bifurcation of such preliminary objections within the very short 30-day window, placing Respondent States at a disadvantage, leading perhaps to requests for bifurcation being rejected when, with more developed argumentation and consideration, they should and would be granted.