

The Republic of Korea’s Comments on Working Paper #4

The Republic of Korea (“Korea”) sincerely appreciates the incredible leadership and effort put forth by the Secretariat in the ICSID Rule Amendment process during the COVID-19 crisis. Below are Korea’s comments to Working Paper #4.

Korea requests the Secretariat to take the following comments into consideration along with the Joint Submission on Working Paper #4 that Korea participated in as well as Korea’s previous submissions. Korea’s comments herewith are provided to further clarify Korea’s current position. Any comments made by Korea in the ICSID Rule Amendment process (written, oral, and joint) are without prejudice to and do not reflect Korea’s final position as to any relevant issues in the discussions of ISDS reform outside of the context of the ICSID Rules.

Proposed Amendments to the ICSID Arbitration Rules	Korea’s Comments & Observations
Chapter I: General Provisions	
<p style="text-align: center;">Rule 7</p> <p style="text-align: center;">Procedural Languages, Translation and Interpretation</p> <p>(1) The parties may agree to use one or two procedural languages in the proceeding. The parties shall consult with the Tribunal and the Secretary-General regarding the use of a language that is not an official language of the Centre. If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.</p> <p>(2) In a proceeding with one procedural language:</p> <p style="padding-left: 20px;">(a) documents shall be filed and hearings shall be conducted in that</p>	<ul style="list-style-type: none"> • Korea maintains its position regarding interpretation and translation in a proceeding with two procedural languages, and proposes to replace “unless the Tribunal orders” in subparagraphs (3)(a), (b), and (c) with “unless the Tribunal or a party requires...” Korea believes that a party’s right to require interpretation and/or translation for the timely and accurate comprehension of the other party’s submissions is indispensable for due process and procedural equality. • At the very least, Korea suggests that statutory guidance be given to the

<p>procedural language;</p> <p>(b) documents in another language shall be accompanied by a translation into that procedural language; and</p> <p>(c) testimony in another language shall be interpreted into that procedural language.</p> <p>(3) In a proceeding with two procedural languages:</p> <p>(a) documents may be filed and hearings may be conducted in either procedural language, unless the Tribunal orders that a document be filed in both procedural languages or that a hearing be conducted with interpretation into both procedural languages;</p> <p>(b) documents in another language shall be accompanied by a translation into either procedural language, unless the Tribunal orders translation into both procedural languages;</p> <p>(c) testimony in another language shall be interpreted into either procedural language, unless the Tribunal orders interpretation into both procedural languages;</p> <p>(d) the Tribunal and the Secretary-General may communicate in either procedural language; and</p> <p>(e) all orders, decisions and the Award shall be rendered in both procedural languages, unless the parties agree otherwise.</p> <p>(4) Translation of only the relevant part of a supporting document is sufficient, unless the Tribunal orders a party to provide a fuller or a complete translation. If the translation is disputed, the Tribunal may order a party to provide a certified translation.</p>	<p>tribunal to consider the time and cost burdens of non-native speakers of the official languages of the Centre when deciding upon an application for an order for interpretation and/or translation by a party.</p>
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Chapter VII: Costs

<p style="text-align: center;">Rule 53 Security for Costs</p> <p>(1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs.</p> <p>(2) The following procedure shall apply:</p>	<ul style="list-style-type: none"> • Korea reiterates its concerns on subparagraph (3)(c) and suggests that it be deleted. In Korea’s opinion, consideration of subparagraph (3)(c) significantly contradicts the general object and purpose of security for costs and, in the same vein, the intent behind listing subparagraphs (3)(a) and (3)(b) as possible circumstances for consideration. That is, if and
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<p>(a) the request shall specify the circumstances that require security for costs;</p> <p>(b) the Tribunal shall fix time limits for written and oral submissions on the request, as required;</p> <p>(c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and</p> <p>(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:</p> <ul style="list-style-type: none"> (i) the constitution of the Tribunal; (ii) the last written submission on the request; or (iii) the last oral submission on the request. <p>(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:</p> <ul style="list-style-type: none"> (a) that party's ability to comply with an adverse decision on costs; (b) that party's willingness to comply with an adverse decision on costs; (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and (d) the conduct of the parties. <p>(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.</p> <p>(5) The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.</p> <p>(6) If a party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.</p>	<p>when the Tribunal determines that ordering a party to provide security for costs adversely affects that party's ability to pursue its claim or counterclaim, and if consideration of subparagraph (3)(c) is given more weight than to subparagraphs (3)(a), (b) or (d), the Tribunal may end up not issuing a security for costs order which then may put the other party at a greater risk of not recovering costs. Any necessary concerns regarding access to justice can be well addressed as other 'relevant circumstances' prescribed in paragraph (3).</p> <ul style="list-style-type: none"> • Korea also maintains its position that the consequence of the failure of a party to comply with an order to provide security for costs should be mandatory suspension of the proceedings to ensure compliance. The other party may entertain a chance to object to such suspension, assuming that the other party may prefer to seek an enforceable final award against the non-complying party.
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<p>(7) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.</p> <p>(8) The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party's request.</p>	
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Chapter X: Publication, Access to Proceedings and Non-disputing Party Submissions

<p style="text-align: center;">Rule 67</p> <p style="text-align: center;">Submission of Non-disputing Parties</p> <p>(1) Any person or entity that is not a party to the dispute ("non-disputing party") may apply for permission to file a written submission in the proceeding. The application shall be made in the procedural language(s) used in the proceeding.</p> <p>(2) In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:</p> <ul style="list-style-type: none"> (a) whether the submission would address a matter within the scope of the dispute; (b) how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the parties; (c) whether the non-disputing party has a significant interest in the proceeding; (d) the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and (e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission. <p>(3) The parties shall have the right to make observations on whether a non-disputing party should be permitted to file a written submission in the proceeding and on any conditions for filing or publication of such a submission.</p>	<ul style="list-style-type: none"> • Korea welcomes inclusion of the requirement that an application for a non-disputing party submission be made in the procedural language(s) used in the proceeding. This will ensure that third-party participation does not unnecessarily increase the procedural burdens of the parties. • For the sake of completeness, Korea suggests that the second sentence to paragraph (4) also includes reference to the tribunal's power to decide the language in which the written submission is made, if the application to make a written submission is successful.
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<p>(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to the format, length, scope or publication of the written submission and the time limit to file the submission.</p> <p>(5) The Tribunal shall issue a reasoned decision on whether to permit a non-disputing party submission within 30 days after the later of the last written or oral submission on the application.</p> <p>(6) The Tribunal shall provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects.</p> <p>(7) If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission.</p>	
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