

COMMENTS ON WORKING PAPER # 3

STATE:	Singapore
	Where we have not made any comments, please take this to be a reflection that Singapore finds the proposed amendment to be acceptable.

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GENERAL	COMMENT
Process, Timing & Effective Date for Adoption of Proposals	<p>Singapore had made the following points during the third meeting and is reflecting them in our written comments for completeness.</p> <p>Singapore thanks the ICSID Secretariat for their herculean work over the past three years on this rules amendment project, and is extremely appreciative for ICSID’s proactive seeking and consideration of Member State’s input. In response to a proposal raised by the Secretariat at the third meeting to hiving off certain topics for a later date, Singapore is of the view that this, whilst not fatal, would be a disservice to the work done thus far.</p>

	<p>Whilst Working Paper 3 is not perfect, it represents an overall compromise package that meets a minimum level of consensus between all Member States. Singapore notes that there are options available for States to establish a higher level of discipline or protection at other <i>fora</i> or in their own bilateral or multilateral investment treaties. On this basis, Singapore is keen for concrete outcomes to be delivered sooner rather than later, and welcomes the possibility of putting such amendments to a vote in 2020.</p> <p>On the issue of further work on Working Paper 4, if further work is required, such work should be focussed and targeted. Where possible, further comments should take place by circulation or electronic means. Without prejudging the need for further meeting in April 2020, ICSID Member States should only look at having this meeting if absolutely necessary.</p>
Approach to gender neutral language in Spanish/French	
Other:	

I. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR ICSID CONVENTION PROCEEDINGS	COMMENT ON PROVISION
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Rule 4 - Method of Filing	
<p>Rule 5 Supporting Documents</p> <p>(1) Supporting documents, including witness statements, expert reports, exhibits and legal authorities, shall be filed together with the request, written submissions, observations or communication to which they relate.</p> <p>(2) An extract of a supporting document may be filed as a supporting document if the extract omission of the text does not render the extract is not misleading. The Tribunal or a party may require a fuller extract or a complete version of the document.</p>	<p>Singapore had made the following points during the third meeting and is reflecting them in our written comments for completeness.</p> <p>Singapore is of the view that the current drafting of Rule 5 represents a reasonable position. In particular, Singapore would not support a default rule that all documents ought to be produced in full, as these could take the form of articles or financial records that could be voluminous, where only an extract is relevant to the dispute. It would also increase time and costs of the proceedings as counsel would have to review these documents. In response to the Member States that advocate for disclosure of all documents in full, Singapore does not take the position that just because certain documents are produced in an extract, the producing party is trying to hide something.</p>

<p>(3) If the authenticity of a supporting document is disputed, the Tribunal may order a party to provide a certified copy or to make the original document available for examination.</p>	
<p>Rule 6 - Routing of Documents</p>	
<p>Rule 7 - Procedural Languages, Translation and Interpretation</p>	
<p>Rule 8 - Correction of Errors</p>	
<p>Rule 9 - Calculation of Time Limits</p>	
<p>Rule 10 - Fixing Time Limits</p>	
<p>Rule 11 - Extension of Time Limits Applicable to Parties</p>	
<p>Rule 12 - Time Limits Applicable to the Tribunal</p>	
<p>Chapter II - Constitution of the Tribunal</p>	
<p>Rule 13 - General Provisions Regarding the Constitution of the Tribunal</p>	
<p>Rule 14 - Notice of Third-Party Funding</p> <p>Rule 143 – Notice of Third-Party Funding</p> <p>(1) For purposes of completing the arbitrator declaration required by Rule 18(3)(b), a party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds or equivalent support for the pursuit or defense of the proceeding <u>through a donation or grant, or in return for remuneration dependent on the outcome of the dispute</u> (“third-party funding”).</p> <p>(2) A non-party referred to in paragraph (1) does not include a representative of a party.</p> <p>(3) A party shall file send the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding</p>	<p>Singapore had commented extensively on this rule in Working Papers 1 and 2. We reiterate that we are <i>strongly supportive</i> of the overall approach and think that the current rule 14 strikes appropriate balance between access to justice and confidentiality. However, we wish to address two main themes that were raised at the third meeting.</p> <p>First, it was strongly reiterated by a number of Member States that the duty of disclosure regarding the identity of the third party funder should apply also to disclosure of the <u>name and address</u> of any person with an ultimate financial interest in the outcome, in particular an ultimate beneficial owner. This is intended to address the potential situation that the companies directly funding the litigation could be shell entities with ultimate beneficial owners. Singapore would once again like to express its support for this suggestion. On tweaking the language, a delegation had suggested replacing “affiliate or representative” in paragraph (1) with “directly or indirectly”. Singapore will let the Secretariat consider such textual amendments.</p> <p>Second, there was extensive discussion on whether paragraph (2) ought to be deleted or retained. Based on Singapore’s treaty practice, we consider that third party disclosure would cover contingency fee and <i>pro bono</i> arrangements as these would satisfy the description of a “donation or grant, or in return for remuneration”. Nonetheless, Singapore is agnostic to the retention or deletion of this paragraph. We further note that this issue is related to Rule 52 (Security for Costs), and that this issue does not simply relate to conflict of interests, but includes procedural aspects on the abuse of process.</p>

<p>arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.</p> <p>(4) The Secretary-General shall transmit the notice of third-party funding and any changes to such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b).</p>	
<p>Rule 15 - Method of Constituting the Tribunal</p>	
<p>Rule 16 - Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention</p>	
<p>Rule 17 - Assistance of the Secretary-General with Appointment</p>	
<p>Rule 18 - Appointment of Arbitrators by the Chair in accordance with Article 38 of the Convention</p>	
<p>Rule 19 - Acceptance of Appointment</p> <p>(1) A party appointing an arbitrator shall notify the Secretary-General of the appointment and provide the appointee's name, nationality(ies) and contact information.</p> <p>(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected. The Secretary-General shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).</p> <p>(3) Within 20 days after receipt of the request for acceptance of an appointment, an appointee shall:</p> <ul style="list-style-type: none"> (a) accept the appointment; and (b) provide a signed declaration in the form published by the Centre, addressing matters 	<p>Singapore had made the following points during the third meeting and is reflecting them in our written comments for completeness. The current Rule 13 and Schedule 3 as crafted, strike a reasonable balance. At the third meeting, there was extensive discussion on whether there ought to be a higher level of regulation by prohibiting double hatting in its entirety. In response, a Member State had stated that whilst this ought to be regulated, we ought to be careful of over-regulation as it might create an inadvertent chill on diversity. Singapore associates ourselves with the latter view.</p>

<p>including the arbitrator's independence, impartiality, availability and commitment to maintain the confidentiality of the proceedings.</p> <p>(4) The Secretary-General shall notify the parties of the acceptance of appointment by each arbitrator and provide the signed declarations.</p> <p>(5) The Secretary-General shall notify the parties if an arbitrator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as arbitrator in accordance with the method followed for the previous appointment.</p> <p>(6) Each arbitrator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).</p>	
Rule 20 - Replacement of Arbitrators Prior to Constitution of the Tribunal	
Rule 21 - Constitution of the Tribunal	
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Rule 43 - Preliminary Objections	
Rule 44 - Bifurcation of Preliminary Objections	
Rule 45 - Consolidation or Coordination of Arbitrations	
Rule 46 - Provisional Measures	
Rule 47 - Ancillary Claims	
Rule 48 - Default	
Chapter VII - Costs	
Rule 49 - Costs of the Proceeding	
Rule 50 - Statement of and Submission on Costs	
Rule 51 - Decisions on Costs	
<p>Rule 52 - Security for Costs</p> <p>Rule 521 – Security for Costs</p> <p>(1) Upon the 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> <p>(a) the request shall specify the circumstances that require security for costs;</p>	<p>Singapore had made the following points during the third meeting and is reflecting them in our written comments for completeness. If a reference to third party funding is included in this rule, the current balance in paragraph (4) represents a reasonable compromise and Singapore would support retaining paragraph (4) as currently drafted. In particular, the word “<i>may</i>” is an appropriate reflection of the compromise. We are not in favour of deleting the the second part – “<i>but the existence of third-party funding by itself is not sufficient to justify an order for security for costs</i>”. In light of the comments raised at the third meeting, should the Secretariat wish to make any textual amendments to this phrase, it could be clarified as “<i>the existence of third-party funding <u>does not</u> by itself <u>automatically</u> justify an order for security for costs.</i>”</p>

(b) the Tribunal shall fix time limits for written and oral submissions on the request, as required; ~~on the request~~;

(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

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

- (i) the constitution of the Tribunal;
- (ii) the last written submission on the request; or
- (iii) the last oral submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:

- (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; ~~and~~
- (e) ~~all other relevant circumstances~~.

(4) The Tribunal may consider third-party funding as evidence relating to a circumstance in paragraph (3), but the existence of third-party funding by itself is not sufficient to justify an order for security for costs.

(54) 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.

(65) 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.

(76) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(87) 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.

Chapter VIII - Suspension, Settlement and Discontinuance

Rule 53 - Suspension of the Proceeding

Rule 54 - Settlement and Discontinuance

Rule 55 - Discontinuance at Request of a Party

Rule 56 - Discontinuance for Failure of Parties to Act

Chapter IX - The Award

Rule 57 - Timing of the Award

Rule 58 - Contents of the Award

Rule 59 - Rendering of the Award

Rule 60 - Supplementary Decision and Rectification

Chapter X - Publication, Access to Proceedings and Non-Disputing Party Submissions	Whilst Singapore had not commented on Chapter X at the third meeting, we would like to state that Singapore continues to support having this chapter, and that the current approach strikes an appropriate balance.
Rule 61 - Publication of Awards and Decisions on Annulment	
Rule 62 - Publication of Orders and Decisions	
Rule 63 - Publication of Documents Filed in the Proceeding	
Rule 64 - Observation of Hearings	
<p data-bbox="111 456 674 483">Rule 65 - Confidential or Protected Information</p> <p data-bbox="111 532 737 560"><u>New - Rule 65 Confidential or Protected Information</u></p> <p data-bbox="111 605 737 667"><u>For the purposes of Rules 61-64, confidential or protected information is information which:</u></p> <p data-bbox="153 712 737 774"><u>(a) is protected from disclosure pursuant to the instrument of consent to arbitration;</u></p> <p data-bbox="153 820 737 881"><u>(b) is protected from disclosure pursuant to the applicable law;</u></p> <p data-bbox="153 927 737 989"><u>(c) is protected from disclosure in accordance with the orders and decisions of the Tribunal;</u></p> <p data-bbox="153 1034 737 1096"><u>(d) is protected from disclosure by agreement of the parties;</u></p> <p data-bbox="153 1141 737 1169"><u>(e) constitutes confidential business information;</u></p> <p data-bbox="153 1214 737 1276"><u>(f) would impede law enforcement if disclosed to the public;</u></p> <p data-bbox="153 1321 737 1383"><u>(g) would prejudice the essential security interests of the State if disclosed to the public;</u></p> <p data-bbox="153 1429 737 1490"><u>(h) would aggravate the dispute between the parties if disclosed to the public; or</u></p>	<p data-bbox="766 456 1997 599">Singapore concurs with positions of several delegations at the third meeting that the simple reference to “applicable law” in paragraph (b) is insufficient. One solution would be to draw inspiration from Article 7 paragraphs (2)(b) and (c) of the UNCITRAL Transparency Rules, which are reproduced below for ease of reference.</p> <p data-bbox="863 651 947 672">Article 7</p> <p data-bbox="863 683 1367 704">2. Confidential or protected information consists of:</p> <p data-bbox="863 743 1761 764">(b) Information that is protected against being made available to the public under the treaty;</p> <p data-bbox="863 776 1955 862">(c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information.</p>

(i) would undermine the integrity of the arbitral process if disclosed to the public.	
Rule 66 - Submission of Non-Disputing Parties	
Rule 67 - Participation of Non-Disputing Treaty Party	
Chapter XI - Interpretation, Revision and Annulment of the Award	
Rule 68 - The Application	
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Rule 85 - Opting Out of Expedited Arbitration	
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