SINGAPORE'S WRITTEN COMMENTS ON DRAFT PROVISIONS CONTAINED IN A/CN.9/WG.III/WP.231

Pursuant to paragraph 130 of A/CN.9/1160, Singapore provides our written comments on the Draft Provisions set out in Section II of the Working Paper on "Draft provisions on procedural and cross-cutting issues" in A/CN.9/WG.III/WP.231.

General

As an overarching comment, Singapore restates the points made in its oral interventions at UNCITRAL Working Group III's 46th session in October 2023 on Working Paper 231. In particular, Singapore agreed with other distinguished delegates that Working Group III should prioritise certain draft provisions in Working Paper 231, given the limited amount of time. Singapore suggested prioritising those provisions that could update, modify or in fact harmonise existing arbitration procedures undertaken across the different sets of arbitration rules, including the ICSID Arbitration Rules and UNCITRAL Arbitration Rules. For these purposes, Singapore considers that the Working Group should focus on Draft Provisions 13-16, 19-22, and 24-25. We consider that the other Draft Provisions in Working Paper 231 go beyond the current mandate of the Working Group and veer into substantive elements, or have been adequately addressed in existing instruments and thus in the interests of efficiency, need not be revisited.[1] Therefore for those Draft Provisions, Singapore does not express any specific comments below.

Turning to Draft Provisions 13-16, 19-22, and 24-25, Singapore recalls the caution that was sounded by the distinguished delegate of ICSID about the risk of further fragmentation vis-à-vis other existing institutional rules such as the new ICSID Arbitration Rules 2022. Singapore's position is to consider aligning the content of the Draft Provisions in Working Paper 231 as far as possible with various developments in this field, including the ICSID Arbitration Rules 2022. The bulk of Singapore's comments on these Draft Provisions are made against this backdrop. Detailed comments are below.

Draft Provision 13: Evidence

[1] For instance, in respect of Draft Provision 18: Transparency, Singapore suggests that there is no need for a specific Draft Provision on Transparency, given the various platforms on which the issue of transparency in ISDS is already being addressed. For example, for States Parties to the Mauritius Convention, their IIAs would continue to be governed by that Convention. For ISDS cases initiated under the UNCITRAL Arbitration Rules 2014, the UNCITRAL Transparency Rules would already govern those proceedings since the former already incorporates the latter. In contrast, for ISDS cases initiated at ICSID, we recall that in the ICSID Arbitration Rules 2022, there are also already extensive and detailed rules on transparency which would apply to these cases and which adopt broadly similar standards as the UNCITRAL Transparency Rules anyway. We consider that it would not be appropriate to specify that the UNCITRAL Transparency Rules must necessarily – in this sense – be regarded as the "overriding" set of rules in such situations.

Singapore suggests adapting from Chapter V Rules 36-40 of the ICSID Arbitration Rules 2022.

Draft provision 14: Bifurcation

Singapore suggests adapting from Rule 42 of the ICSID Arbitration Rules 2022.

Draft provision 15: Consolidation of proceedings

Singapore invites the Secretariat to consider whether it is feasible to include a discretionary power to order consolidation of two or more related proceedings upon application of a disputing party, ie where not all the disputing parties consent to the consolidation. The Secretariat may also wish to consider whether such a discretionary power is feasible where the related proceedings have been initiated in different fora (eg, where one dispute has been initiated under the ICSID Rules and another has been initiated under the UNCITRAL Rules), and who the consolidating authority ought to be in such cases. Article 9.28 of the CPTPP and Article 3.24 of the EU-Singapore IPA may serve as examples of provisions relating to the consolidation of proceedings without the consent of all disputing parties.

Alternatively, the Secretariat could include a new paragraph 4 to clarify that the 3 existing paragraphs (which are currently premised on the agreement of all disputing parties) are without prejudice to States being able to include a procedure for non-consensual consolidation requests in their international investment agreements ("IIAs").

Draft provision 16: Interim/provisional measures

Singapore suggests adapting from Rule 47 of the ICSID Arbitration Rules 2022.

Draft provision 19: Early dismissal

Singapore suggests adapting from Rule 41 (Manifest Lack of Legal Merit) of the ICSID Arbitration Rules 2022. Additionally, Singapore makes two comments on Draft Provision 19.

First, a dismissal for a manifest lack of legal merit should only be ordered upon the request of a disputing party. We do not think it is appropriate to specifically empower a tribunal to dismiss claims solely at its own prerogative. Being ultimately an adversarial process, we consider that allowing a disputing party to challenge the other disputing party's claim as being manifestly lacking in legal merit, already provides sufficient safeguard against such claims from being unnecessarily or unjustifiably pursued. In

contrast, if a tribunal takes the step of dismissing a claim on its own motion, we wonder if this could then unnecessarily attract criticism about the independence of the tribunal, or about potential overreach.

Second, a dismissal for manifest lack of legal merit should only be available against claims, but not against counterclaims. If a claim is duly dismissed by a tribunal for a manifest lack of legal merit, it can entirely dispose of the case, and therefore actually save time and costs. In contrast, even if the Tribunal were to dismiss a counterclaim, which presumably also means that the proceedings would have to continue with respect to the Claimant's claim, the dismissal would not be dispositive of the entire case. As a result, any savings in time and costs appear to be limited at best.

Draft provision 20: Security for costs

Singapore strongly supports a rule on Security for Costs, as this mechanism is important in deterring frivolous or unmeritorious claims. We think that this procedural rule would go a long way in reforming ISDS. Singapore suggests adapting from Rule 53 of the ICSID Arbitration Rules 2022.

On the issue of third-party funding and its link to security for costs, Singapore's position is that third-party funding is <u>not</u> a relevant factor in and of itself. Therefore, Singapore disagrees with the inclusion of sub-paragraph 4(d) of the Draft Provision. We note that the rest of the circumstances in paragraph 4 are materially similar to those set out in Rule 53(3) of the ICSID Arbitration Rules 2022, ie, whether that party is able or willing to comply with an adverse decision on costs, the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim, and the conduct of the parties.

However, a disputing party may obtain third-party funding for a multitude of reasons, and the existence of third-party funding is not in itself a sign that the disputing party will not be able to satisfy an order of costs. Rule 53(4) of the ICSID Arbitration Rules 2022 addresses the question of third-party funding in a more indirect manner, which we recall was a finely-balanced compromise.

Draft provision 21: Third-party funding

As a general comment, Singapore welcomes efforts to address third-party funding in ISDS. We recognise the potential risks of conflicts of interest that third-party funding may bring, especially when there is *no transparency*. To us, that is a key mischief. The lack of transparency could affect the perceived or actual independence of arbitrators and the integrity of the process.

As set out in Singapore's intervention previously at the 38th and 43rd session (in Vienna in Oct 2019 and Sep 2022) Singapore takes the view that third-party funding can, in the

context of ISDS, promote access to justice, especially for individuals, as well as micro, small and medium-sized enterprises, with their more limited resources. We also recall that even States have been able to benefit from third-party funding in ISDS cases. These views were reflected in paragraph 81 of this Working Group's report for the 38th session (A/CN.9/1004*). Singapore further recalls that in paragraph 85 of that same report, the Working Group had "the view that over-regulation of [third-party funding] should be avoided."

In Singapore's view, the right balance to be struck is the development of a set of disclosure obligations on third-party funding. Singapore strongly supports para 2, as disclosure should not only be limited to the identity of the third-party funder, but should also cover the identity of the beneficial owner of the third-party funder for transparency reasons. On para 3, Singapore does not think that it is necessary to specify circumstances in which the Tribunal may order further information, in order not to prejudge the situations in which the Tribunal may order further information. Specifically, Singapore disagrees with para 3(d), ie, that specific terms of the funding agreement should be disclosed as a matter of course, as this could lead to a regulatory chill on third-party funding. We thus propose to simply state that all further information is subject to the requirement that the Tribunal deems such information necessary, as was the approach in the ICSID Arbitration Rules 2022.

We do not support prohibiting third-party funding in its entirety or limiting circumstances in which third-party funding may be sought, as these risk stymieing access to justice. Consequently, we are of the view that paragraphs 6 and 8 should be deleted. It is not appropriate for the Tribunal to limit third-party funding, which we consider to be an overreach of the tribunal's decision-making powers.

Draft provision 22: Suspension and termination of the proceeding

Singapore suggests adapting from Rules 55-57 of the ICSID Arbitration Rules 2022.

Draft provision 24: Period of time for making the final decision

Singapore can go along with draft provision 24.

Draft provision 25: Allocation of costs

Singapore can go along with draft provision 25, with a slight edit to paragraph 6 for clarity:

> "The Tribunal shall ensure that ~~its~~ all decisions on costs ~~is~~are reasoned and form part of the final decision.