SINGAPORE'S WRITTEN COMMENTS ON DRAFT PROVISIONS CONTAINED IN A/CN.9/WG.III/WP.244 ("WORKING PAPER 244")

Pursuant to paragraph 68 of A/CN.9/1194, Singapore provides our written comments on the Draft Provisions set out in Section A of Working Paper 244, on "Draft provisions on procedural and cross-cutting issues".

General

Singapore reaffirms the points previously made in:

(a) its interventions at UNCITRAL Working Group III's ("**WG III**") 46th session in October 2023;
(b) its interventions at WG III's 47th session in January 2024; and
(c) its written comments submitted pursuant to paragraph 30 of A/CN.9/1160,

which were in response to Working Paper 231, insofar as they continue to relate to the draft provisions presented in Working Paper 244.

Singapore also restates its interventions at WG III's 49th session in September 2024 on Working Paper 244.

Singapore understands that the Draft Provisions in Section A of Working Paper 244 are categorised as such, being in the nature of harmonisation with existing rules, and that the final categorisation of the Draft Provisions in Working Paper 244 should be ultimately guided by the content of the provisions as they develop. On the Draft Provisions that are in the nature of harmonisation, Singapore's overarching position is to consider aligning the content of the Draft Provisions as far as possible with various developments in this field, including the ICSID Arbitration Rules 2022 ("**ICSID Rules**").

Draft Provision 1: Evidence

Singapore suggests that the Draft Provision should be aligned as far as possible with the rules on evidence in the ICSID Rules and the UNCITRAL Arbitration Rules.

On paragraph 2, Singapore notes that it does not set out the threshold for when the tribunal may call upon a disputing party to produce further evidence. Singapore suggests adapting from Rule 36(3) of the ICSID Rules, to adjust paragraph 2 as follows:

> "At any time during the proceeding, the Tribunal may require the disputing parties to produce documents, exhibits or other evidence, if it deems it necessary".

On paragraph 3, Singapore suggests splitting the first sentence from the rest of paragraph 3, as it addresses a different issue. The first sentence concerns the possibility of establishing a procedure for document production, while the rest of the paragraph concerns the assessment of requests for document production and it can thus be a separate paragraph.

On paragraph 4, Singapore considers that this paragraph need not be confined to the "final decision", but may include a decision on jurisdiction or a partial merits award. Singapore suggests adapting from Rule 30(3) of the UNCITRAL Arbitration Rules, which reads "the arbitral tribunal may make the award on the evidence before it."

On paragraph 5, Singapore suggests also considering a further sentence akin to Rule 38(3) of the ICSID Rules, which states that "The Tribunal shall determine the manner in which the examination is conducted."

On paragraph 8, Singapore considers that it would be useful to add a sentence to paragraph 8, stating that "The parties shall have the right to participate in any visit or inquiry." This would be akin to Rule 40 of the ICSID Rules.

Draft Provision 2 – Bifurcation

Singapore notes that Draft Provision 2 is aligned with Rule 42 of the ICSID Rules.

Draft Provision 3 – Interim/provisional measures

Singapore suggests adapting from Rule 47 of the ICSID Rules.

Draft Provision 4 – Manifest lack of legal merit/early dismissal

Singapore strongly supports the inclusion of an early dismissal mechanism, which we believe can promote the savings of time and costs.

Singapore thanks the Secretariat for addressing two concerns that Singapore raised at WG III's 43rd session in September 2022, namely that it would be inappropriate for the tribunal to dismiss claims at its own initiative, and that this provision should not apply

to counterclaims. Singapore notes that Draft Provision 4 is generally aligned with Rule 41 of the ICSID Rules.

Draft Provision 5 – 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.

Addressing the Secretariat's question in paragraph 18 of Working Paper 245, on applying this Draft Provision to counterclaims, Singapore considers that a respondent State making a counterclaim may also be ordered to furnish security for costs. There is no principled reason to differentiate the application of this Draft Provision between claims and counterclaims. Singapore suggests adapting from Rule 53 of the ICSID Rules on security for costs, which is applicable to "any party asserting a claim or counterclaim".

On paragraph 4(e) of the Draft Provision, Singapore's view is that the existence of third party funding should <u>not</u> be a relevant factor in and of itself when determining whether to order security for costs. 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 a decision on costs. We thus propose to delete paragraph 4(e) which is currently in square brackets. Singapore suggests adapting from Rule 53(4) of the ICSID Rules, which was agreed upon only after undergoing an immense amount of debate, to address third party funding in the following manner in Draft Provision 5: "The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (4), including the existence of third-party funding."

Draft Provision 6 – Suspension of the proceeding

As a general comment, Singapore's view is that it is useful to split the provisions on suspension and termination into two separate provisions, and notes with appreciation that this is now reflecting in Draft Provisions 6 and 7 respectively.

On paragraph 4, Singapore supports the addition of the last sentence. If the disputing parties agree on the extension of suspension, then the Tribunal must give effect to the extension.

Draft Provision 7 – Termination of the proceeding

Singapore suggests adapting from Rules 55 to 57 of the ICSID Rules.

Draft Provision 8 – Period of time for making the award

On paragraph 2, Singapore's view is that counting the period of time from the date of the constitution of the Tribunal may cause some difficulties, because things that happen in the process of the arbitration may be outside the tribunal's control. In this regard, Singapore suggests adapting from the tailored approach in Rule 58 of the ICSID Rules, which specifies different timelines, calculated either from the constitution of the tribunal or from the last submission, for different kinds of award.

Singapore further invites the Secretariat to consider making it clear that the period of time specified in this Draft Provision is subject to any other periods of time set out in other Draft Provisions catering to specific circumstances. This would prevent any confusion as to which period of time is applicable. We note, for example, Draft Provision 4, which provides a time period for an award on an objection that a claim is manifestly without legal merit.

Draft Provision 9 – Allocation of costs

Singapore can go along with Draft Provision 9.

Draft Provision 11 – Consolidation and coordination of proceedings

As a general comment, Singapore considers that insofar as the consolidation being contemplated is taking place only for proceedings under the same arbitration rules, such as when they are all ICSID cases or they are all non-ICSID cases, this Draft Provision should fall under Section A of Working Paper 244.

Singapore suggests having a consolidation and coordination provision that seeks to consolidate proceedings that may be taken under *different* rules or *different* institutions. In that regard, such a Draft Provision would have to fall under Section B of Working Paper 244, as such a provision would necessarily have to be in a treaty, rather than in the procedural rules of a particular institution. In relation to such a Draft Provision, Singapore invites the Secretariat to consider who the consolidating authority ought to be in such cases. The consolidation and coordination process must be fair and

transparent in such cross-institutional cases.[1] Singapore further invites the Secretariat to consider including 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 have consented to the consolidation. 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 in such circumstances.

On paragraph 1, Singapore suggests stating that the consolidation or coordination of proceedings may be agreed to by the disputing parties only where the two or more claims involve the same responding State, adapting from Rule 46(2) of the ICSID Rules.

On paragraph 3, Singapore proposes adjustments based on Rules 46(4) and (5) of the ICSID Rules, as follows:

> 3. The disputing parties shall jointly provide the administering institution, or the tribunals where there is no administrating institution, with the proposed terms for the conduct of the consolidated proceedings, and consult with the administering institution or the tribunals to ensure that the proposed terms are capable of being implemented.
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> 4. Where there is an administering institution, after the consultation referred to in paragraph (3), the administering institution shall communicate the proposed terms agreed by the parties to the tribunals. Such tribunals shall make any order or decision required to implement these terms.
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> 5. Where there is no administering institution, after the consultation referred to in paragraph (3), the tribunals shall implement the proposed terms as agreed by the disputing parties and shall make any order or decision as required to implement these terms.

Draft Provision 12, paragraphs 1 to 5 and 7 – Third-party funding

Singapore can go along with paragraphs 1, 2, 4, 5 and 7.

On paragraph 3, Singapore considers that it is not 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 does not

[1] The Secretariat may wish to refer to "Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol", prepared by Singapore International Arbitration Centre, which contains helpful thinking on the issue.

agree 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. Singapore proposes to simply state that all further information is subject to the requirement that the Tribunal deems such information necessary, as is the approach adopted in the ICSID Rules.

For completeness, Singapore reiterates its interventions at WG III's 49th session in September 2024 on paragraphs 6 and 8 of Draft Provision 12. Singapore is strongly of the view that paragraphs 6 and 8 are inappropriate and should be deleted.

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