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Draft SIAC Investment Arbitration Rules 2016—an overview

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Arbitration analysis: On 1 February 2016, the Singapore International Arbitration Centre (SIAC) released a draft of new rules designed specifically for investment arbitration disputes (the Draft SIAC IA Rules). The Draft SIAC IA rules, currently the subject of a public consultation process, will be finalised and announced at the SIAC Congress on 27 May 2016. Jonathan Lim and Dharshini Prasad of Wilmer Cutler Pickering Hale and Dorr discuss the Draft SIAC IA Rules and their significance.

The Draft SIAC IA Rules are the product of the careful consideration and hard work of SIAC's Rule-Revision Subcommittee on Investment Arbitration (the Subcommittee—for a list of the members, see Annex 1 below). They represent a significant innovation that tackles a number of the main challenges facing investment arbitration today, including:

- inefficiency
- the role of non-disputing parties and the public interest, and
- the lack of rules on practices such as third-party funding

By combining the strengths of SIAC's commercial arbitration rules, with modifications to accommodate issues and sensitivities that are specific to investment arbitration, the Draft SIAC IA Rules offer an efficient and progressive alternative for investors and States to arbitrations administered by other institutions, such as the International Centre for Settlement of Investment Disputes (ICSID), or the Permanent Court of Arbitration (PCA). SIAC will also be the first private arbitral institution with rules to cater separately to investment and commercial arbitrations, thus setting SIAC apart from contemporaries like the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC).

Efficient resolution of investment disputes

A frequent complaint by users is that investment disputes today are long and arduous. The statistics are well-rehearsed and studies have shown that it takes an average of three years and eight months from the time a request of arbitration is filed until a final award is rendered (see Allen & Overy study). In contrast, the average for commercial arbitrations administered by SIAC is 12 to 18 months (see SIAC FAQs). Drawing on its experience and strength in resolving disputes efficiently, SIAC has introduced a number of provisions in the Draft SIAC IA Rules that streamline and speed up the investment arbitration process.

Tribunal appointment

The appointment of the tribunal is a crucial step in the arbitration and the hallmark of party autonomy. However, it can also become subject to delay tactics by a recalcitrant party. Of all the newly registered ICSID cases in 2012, it took an average of 220 days to constitute a tribunal, with the fastest taking 91, and the slowest, 546 days (A Raviv, Achieving a Faster ICISD, in J. Kalicki and A. Joubin-Bret eds., Reshaping the Investor-State Dispute Settlement System (Brill Nijhoff, 2015), at pg 664).

Modelled after its commercial arbitration rules, the Draft SIAC IA Rules avoid these problems by imposing strict timelines on the appointment process. The Draft SIAC IA Rules provide that the SIAC Court will appoint the sole arbitrator if the tribunal is not constituted within 28 days of the notice of arbitration (Draft SIAC IA Rules, Rule 6.2). For three-member panels, the SIAC Court will make the appointment if a party fails to nominate its arbitrator within 28 days after receipt of the other party's nomination (Draft SIAC IA Rules, Rule 7.2). The SIAC Court will also appoint the presiding arbitrator, unless the parties agree otherwise (Draft SIAC IA Rules, Rule 7.3.). This is in contrast to article 38 of the ICSID Convention and Rule 4(1) of the ICSID Arbitration Rules, which only allows ICSID to make appointments if the tribunal has not been constituted within 90 days of the case being registered.

PCA Rules

In making the appointment of the sole or presiding arbitrator, the SIAC Court follows a default list procedure, unless parties otherwise agree on a different method of appointment (Draft SIAC IA Rules, Rules 7.3, 8). Inspired by the practice of the PCA, as set out in the 2012 PCA Rules (PCA Rules, art 8(2)), the list-procedure balances the need for efficiency with party autonomy, by giving parties an enhanced opportunity to participate in the constitution of the tribunal even if they cannot agree on specific candidates. The default list procedure feature is absent in the ICSID, SCC, ICC and LCIA Rules.

Challenges to the tribunal

Arbitrator challenges are another popular delay tactic, particularly where a challenge automatically suspends ongoing proceedings, as in the case of ICSID (ICSID Rules, Rule 9(6)). Even where there is no automatic suspension, challenges can be an unwanted distraction that diverts necessary party and tribunal resources away from the proceedings. The challenge process is further prolonged when there are no strict-time frames within which a party should raise, and the other party and challenged tribunal member should respond, to a challenge (for example the ICSID Arbitration Rules, Rule 9(1) which state that a party is required to raise a challenge 'promptly').

These risks are surmounted in the Draft SIAC IA Rules in at least three ways.

First, the Draft SIAC IA Rules impose strict timelines for the challenge process. A party is required to raise its challenge within 14 days of becoming aware of the circumstances that give rise to the challenge (Draft SIAC IA Rules, Rule 12.1), and the other party and the challenged tribunal member have 14 days from the date of the challenge to agree to the challenge (Draft SIAC IA Rules, Rule 12.1). At the end of this 28 day period, if the challenge has not been resolved, the SIAC Court will rule on the challenge (Draft SIAC IA Rules, Rule 12.1).

Second, unless ordered by the SIAC Registrar, a challenge does not operate to automatically suspend proceedings. This removes a significant incentive for parties to launch challenges to stall proceedings.

Third, because it is the SIAC Court that rules on the challenge and not the tribunal, the tribunal can focus its resources on resolving the dispute between the parties, while the challenge proceeds in parallel.

This is in contrast to the ICSID Rules, where the tribunal determines a challenge unless it is composed of a sole arbitrator or the challenge relates to a majority of the tribunal (ICSID Rules, Rules 9(2)(a), 9(4)).

Emergency arbitrator

It is a common feature today for commercial arbitration rules to provide for recourse to an emergency arbitrator for expedited interim relief before the constitution of the tribunal. Yet, this procedure is not prevalent in investment arbitration rules. The ICSID and PCA Rules do not contain emergency arbitrator provisions. Likewise, the ICC Rules exclude the application of emergency arbitrator provisions to investment disputes

(Article 29(5) of the ICC Rules—the emergency arbitrator provisions 'shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories'). As such, ICC Rules, art 29(5) implicitly excludes investment disputes because investors are not signatories to the investment treaty that forms the basis of the arbitration agreement between the investor and the disputing State (see El Castineira, The Emergency Arbitrator in the 2012 ICC Rules of Arbitration (2012) 74 Paris Journal of International Arbitration, at p 74).

Commentators cite a number of reasons why emergency arbitrator provisions may not be suitable for investment disputes. For instance, emergency arbitrators may be required to make decisions on complex jurisdictional questions, which can be challenging given the limited time frames within which emergency arbitrators operate. Emergency arbitrator provisions may also undermine mandatory cooling-off periods in investment treaties, and prejudice States that might lack the resources and infrastructure to respond in an expedited process.

The Draft SIAC IA Rules provide for the availability of an emergency arbitrator procedure in investment disputes, while also demonstrating a cognizance of the above issues. Rather than taking a categorical approach that excludes their application altogether, the Draft SIAC IA Rules state that the emergency arbitrator provisions only apply if parties 'expressly agree' to their application (Draft SIAC IA Rules, Rule 24.6) (eg in the investment treaty that confers the tribunal with jurisdiction). This approach firmly places the discretion with States, who are best placed to determine what protections (if any) they wish to confer on investors (here, the right to obtain expedited interim relief), and what burdens the States are willing to undertake in return (here, in responding to applications for interim relief within compressed timeframes).

Early dismissal mechanism

An early dismissal process is crucial to filter out frivolous and unmeritorious claims, which leads to significant savings in costs and time. At present, ICSID is the only arbitral institution besides SIAC to offer such a mechanism.

The Draft SIAC IA Rules, Rule 25.1 allows parties to file an application for the early dismissal of a claim, no later than 30 days after the constitution of the tribunal, on three grounds:

- the claim is manifestly without legal merit
- the claim is manifestly outside the jurisdiction of the tribunal, or
- the claim is manifestly inadmissible

The provision is similar to ICSID Arbitration Rules, Rule 41(5) which allows the early dismissal of a claim if it is 'manifestly without legal merit'. Drawing from ICSID jurisprudence interpreting ICSID Rule 41(5), the Draft SIAC IA Rules provide more clarity to parties by setting out the specific grounds on which admissibility, jurisdiction and merits challenges can be raised.

To prevent the abuse of the early dismissal mechanism as a delay tactic, Draft SIAC IA Rules, Rule 25 includes a number of safeguards. First, parties must comply with the strict 30-day time frame to raise challenges. Second, the tribunal has the discretion to hold an oral hearing, but the default position is for a documents-only process (Draft SIAC IA Rules, Rule 25.3). Third, because of the high threshold set by the 'manifestly' standard for dismissal, parties will be deterred from bringing baseless objections, particularly as the tribunal has a wide discretion to penalise such a party through costs (Draft SIAC IA Rules, Rule 34). Draft SIAC IA Rules, Rule 25.4 also clarifies, however, that the tribunal’s decision on early dismissal does not prevent a party from later raising further objections on different grounds.

Time limits to close proceedings

The PCA (PCA Rules, art 31(1)) and ICSID Rules (ICSID Rules, Rule 38(1)) leave the tribunal to determine, in its discretion, when to close proceedings. This has inevitably prolonged the average time between the hearing and the award.

The Draft SIAC IA Rules, Rule 29.1 nips this issue in the bud, by requiring the tribunal to declare proceedings closed no later than 30 days after the last hearing on the matters to be decided in the award, or the filing of the last post-hearing submissions, whichever is later. Beyond this, the tribunal can only reopen proceedings on the application of a party or on its own motion, but it would have to seek an extension of the timeline and demonstrate that such extension was 'necessary'. From the close of proceedings, the tribunal has 45 days to submit a draft award to the tribunal unless the parties agree on or the SIAC Registrar grants an extension (Draft SIAC IA Rules, Rule 29.2).

Third party funding

One of the more significant innovations in the Draft SIAC IA Rules is a set of provisions that deals with third party funding, an issue that no other set of institutional rules currently regulates. The Draft SIAC IA Rules address third-party funding in two ways.

First, Draft SIAC IA Rules, Rule 23.l empowers the tribunal to 'order the disclosure of the existence and details of a party's third party funding arrangement, including details of the identity of the funder, the funder's interest in the outcome of the proceedings, and whether or not the funder has committed to undertake adverse costs liability.' Neither the ICSID nor PCA Rules (or the ICC/SCC Rules) provide for a similar express power to inquire into a third party funder's involvement. Although ICSID tribunals have found such a power to order disclosure in cases involving a potential conflict of interest, relying on their inherent powers (see *Muhammet*), this is not a settled issue of law.

In contrast, the Draft SIAC IA Rules expressly confer on the tribunal a broad discretion to inquire into both the existence and details of third party funding arrangements. The tribunal can also determine whether the third party funder has obtained after the event (ATE) insurance for adverse costs liability in considering any applications for security for costs. These tools will enable the tribunal to discern and take appropriate account of the nature and extent of a third party funder's involvement in the proceedings.

Second, Draft SIAC IA Rules, Rule 32.1 allows the tribunal to take into account any third party funding arrangements in apportioning the costs of the arbitration and Draft SIAC IA Rules, Rule 34 empowers the tribunal to make adverse costs orders against third party funders 'where appropriate'. Although most major funders will provide ATE insurance and are required by self-regulatory bodies such as the Association of Litigation Funders to provide in their funding agreements the extent to which they will bear adverse costs liability, such self-regulatory practices are neither uniformly observed nor mandatory. Successful respondent States may therefore be exposed to a costs bill that they cannot recover from a funded claimant. Draft SIAC IA Rules, Rules 32.1, 34 reduce that risk, and may also deter the funding of frivolous claims.

Other key provisions

Submissions by non-disputing parties

Investment disputes often implicate matters of public interest, particularly where they affect the ability of a State to regulate for public welfare. In *Methanex v United States*, for example, the disputed State action was a ban imposed by California on the use of Methyl tert-butyl ether (MBTBE) because it contaminated water supplies. Likewise, in *Piero Foresti v South Africa*, the disputed State action related to South Africa's Black Economic Empowerment Program, a post-apartheid measure to ameliorate the disenfranchisement of his-

torically disadvantaged South Africans. As a matter of good democratic governance, there have been increasing calls for greater public participation in investment disputes to ensure that a diversity of view-points are considered by the tribunal (See J Delaney and D Barstow Magraw, Procedural Transparency, in P Muchlinksi and F Ortino eds. et. al, The Oxford Handbook of International Investment Law (Oxford University Press, 2008) at pp 777–779).

As a result, provisions on non-disputing party submissions are becoming an increasingly common feature in investment treaties. The ICSID Rules, Rule 37 and Article 4 of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules) contain similar provisions.

Consistent with this emerging trend, the Draft SIAC IA Rules, Rule 28.2 confer tribunals with the discretion to permit non-disputing party submissions. However, the tribunal must first consult with all parties to the dispute. This gives the tribunal the opportunity to balance the public interest and non-disputing party participation with the confidentiality of proceedings. In addition, the tribunal must consider the extent to which the non-disputing party submissions will bring a different perspective to the legal or factual matters that are relevant to dispute, and whether the non-disputing party has a 'sufficient interest' in the proceedings (Draft SIAC IA Rules, Rule 28.3). This is a lower threshold than under the ICSID Rules (ICSID Rules, Rule 37(c)). See also UNCITRAL Transparency Rules, art 4(3)(a), which may allow experts and amicus curiae without a strong link to the proceedings per se, but who nonetheless have important expertise to bring to bear on the understanding or resolution of the dispute, to meaningfully participate in the proceedings.

Submissions by non-disputing contracting parties

In addition to the general provision on non-disputing party submissions in the Draft SIAC IA Rules, Rules 28.1–28.2, also specifically permit 'a party to the contract, treaty or other instrument that is not a party to the dispute' (ie a non-disputing contracting party) to make submissions to the tribunal, on written notice to the parties (Draft SIAC IA Rules, Rule 28.1). Under Rule 28.1, neither tribunal nor disputing party consent is required, but the submissions must be limited to a 'question of treaty or contractual interpretation that is directly relevant to the dispute' (Draft SIAC IA Rules, Rule 28.1). The tribunal has the discretion to invite oral submissions (Draft SIAC IA Rules, Rule 28.1). These are modelled after similar provisions in the Trans-Pacific Partnership (TPP) (Article 9.22(2) of the TPP, see Appendix A, at p 4), the Canada-EU Comprehensive Economic Trade Agreement (CETA) (CETA, Annex I, Amicus Curiae Submissions, see Appendix A, at p 5), the CAFTA (Article 10:20(2) of CAFTA, see Appendix A, at p 5), and various Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs). For example, see Colombia-US FTA, Article 10:20(2), Peru-US FTA, Article 10:20(2), Australia-Chile FTA, Article 10:21(2), Canada-South Korea FTA, Article 8:31(1), Canada-Romania BIT, Annex C, Canada-China BIT, Article 27(2), see Appendix A, at pp 9–32).

Unlike the more general provision on non-disputing party submissions, Draft SIAC IA Rules, Rule 28.1 is more narrowly crafted, both in terms of the subject matter of the submissions, and the identity of the party making submissions. Such submissions are available, however, to non-disputing contracting parties as of right under the Draft SIAC IA Rules. This may be an attractive provision for States because it protects the interest of contracting parties in ensuring an accurate interpretation of the relevant legal instrument. Although similar provisions exist in the recent UNCITRAL Transparency Rules (UNCITRAL Transparency Rules, art 5), they are absent in most other institutional rules such as the ICSID, ICC, SCC or LCIA Rules.

Publication of information on the dispute

The Draft SIAC IA Rules enable SIAC to publish key information relating to the dispute, unless the parties agree otherwise—this includes, for example, the identity of the parties, the identity of the parties' counsel, the tribunal, the date of commencement of the arbitration, and whether the proceedings are on-going or have

been terminated (Draft SIAC IA Rules, Rules 37.1-2). In addition, SIAC may publish any orders, directions and awards, with the consent of all parties (Draft SIAC IA Rules, Rule 37.2).

Conclusion

As seen from the above discussion, the Draft SIAC IA Rules are a hybrid between modern commercial arbitration rules and arbitration rules typically used in investment disputes. To the extent they are successful in combining the best features of both types of rules, the SIAC IA Rules will offer an attractive and viable alternative for inclusion by States in their treaties besides the ICSID, UNCITRAL, ICC or SCC Rules. Indeed, although no treaty to date has included the option to arbitrate according to the rules of an arbitral institution located in Asia, Africa, the Middle East or Latin America, this may soon change with the new SIAC IA Rules. Once finalised, the SIAC IA Rules would be a prime candidate for inclusion in bilateral and multilateral treaties under negotiation or recalibration, including those involving Asian, African or Latin American parties, such as the Regional Comprehensive Economic Partnership (RCEP).

It remains to be seen how investors and States will respond to SIAC's new offering—but if successful, the SIAC IA Rules will no doubt augment SIAC's position as a premier centre for the resolution of both commercial and investment disputes.

Annex 1

The SIAC Rule-Revision Subcommittee on Investment Arbitration is composed of:

- Ms Claudia Annacker (Chair)
- Professor Gary Born
- Professor Jan Paulsson,
- Mr John Savage, and
- Mr Toby Landau QC

Ms Maricef Valderrama, Managing Counsel at SIAC, assisted the Subcommittee as secretary. Jonathan Lim, one of the authors of this article, also assisted the Subcommittee in its work and is a member of the Young SIAC Committee.