



Australian Government

Attorney-General's Department



Australian Government

Department of Foreign Affairs and Trade

17/12348

14 June 2019

Ms Meg Kinnear
Secretary-General
International Centre for Settlement of Investment Disputes
1818 H Street, NW
WASHINGTON DC USA 20433

Dear Ms Kinnear

ICSID Convention Rules and Regulations Amendment Process – Australian Government submission

Thank you for the opportunity to provide additional suggestions and comments on potential amendments to the ICSID Convention Rules and Regulations following the second meeting of state representatives in Washington DC on 7-9 April 2019. The Australian Government makes the following comments on the Administrative & Financial Regulations, the Institution Rules, the Arbitration Rules and the (Additional Facility) Administrative and Financial Regulations.

1. Administrative & Financial Regulations

Regulation 14 Financial Provisions

In Australia's view, there may be merit in considering some sort of sanction for arbitrators who, without reasonable justification, fail to meet prescribed timelines.

2. Institution Rules

Rule 2 Contents of the Request

ICSID's screening process to prevent frivolous claims performs a valuable role and Australia supports this comprehensive "checklist" of the required contents of a Request. However, Australia considers that an estimate of the amount of damages sought might usefully be added to this checklist.

3. Arbitration Rules

Rule 2 General Duties

Australia welcomes the explicit inclusion of these general duties, including the existing obligation for parties to conduct proceedings in good faith.

Rule 11 Time Limits Applicable to the Tribunal

Australia is pleased to note that tribunals will be explicitly required to use their best efforts to meet all applicable time limits.

Rule 13 Notice of Third-Party Funding

Australia considers that disclosure in relation to third-party funding is important in terms of promoting transparency and avoiding conflicts of interest. Such disclosure should involve more than merely providing the name of the funder. It should also, taking into account confidentiality considerations, include the nature of the terms of the funding arrangement, particularly regarding the payment of adverse costs awards. Further guidance on the consequences of non-disclosure might also be helpful.

Rule 18 Acceptance of Appointment

Australia supports the expanded Arbitrator Declaration set out in Schedule 2 and welcomes work being undertaken by ICSID and UNCITRAL to develop a Code of Conduct for arbitrators.

Rule 26 Orders, Decisions and Agreements

Australia suggests that consideration might be given to moving the 'horizontal rule' in Rule 26(4), regarding tribunals applying any agreement of the parties on procedural matters, to Rule 2 General Duties.

Rule 30 Case Management Conference

In Australia's view, case management conferences could be a useful tool to increase the efficiency of arbitration proceedings, both in terms of cost and duration.

Rule 36 Disputes Arising from Requests for Documents

Given the material impact that document production can have on the overall cost and length of proceedings, Australia considers that there may be value in including further guidance for tribunals in this regard.

In addition, Australia considers that the rules should explicitly recognise exemptions from production for various types of confidential information.

Rule 37 Witnesses and Experts and Rule 38 Tribunal-Appointed Experts

Australia suggests that further consideration might be given to disclosure requirements regarding the independence and impartiality of experts.

Rule 40 Manifest Lack of Legal Merit

In Australia's view, the rules should contain an explicit presumption that where a claim manifestly lacks legal merit the respondent shall be entitled to costs.

Rule 50 Decisions on Costs

In Australia's view, further consideration could be given as to how the rules might accommodate the issue of costs in cases of discontinuance.

As noted above, Australia also supports the inclusion of an explicit presumption that costs follow the event upon a finding that a claim manifestly lacks legal merit.

Rule 51 Security for Costs

Australia welcomes the inclusion of this rule but would prefer if it explicitly listed third party funding as one of the factors for tribunals to consider in determining whether to order a party to provide security for costs.

Rule 61 Publication of Awards and Decisions on Annulment

Australia is a strong supporter of promoting further transparency in arbitration proceedings (subject to the appropriate protection of confidential information). Australia therefore suggests that the deemed consent language be reinstated in this rule.

Rule 66 Participation of Non-disputing Treaty Party

In Australia's view non-disputing treaty party submissions can play an important role in promoting coherence and consistency in arbitral awards. Accordingly, consideration might be given as to whether this rule, as currently drafted, is too narrow.

4. (Additional Facility) Administrative and Financial Regulations

Regulation 13 Prohibition Against Testimony and Limitation of Liability

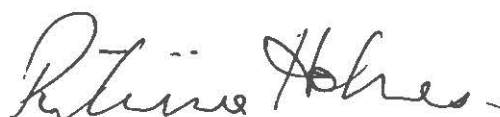
Australia is giving this issue further consideration.

Thank you again for the opportunity to provide additional comments to inform this process. Please do not hesitate to seek further information as necessary. We look forward to contributing further to this important reform process.

Yours sincerely



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