

Portuguese comments on the proposed ICSID rules amendments

Portugal greatly appreciates the hard work of the ICSID Secretariat in carrying out a comprehensive revision of ICSID Arbitration Rules (AR) and the Additional Facility Arbitration Rules (AF).

In order to contribute to the abovementioned revision process and without prejudice to what is advocated in the joint EU-Member States document¹, which we fully subscribe, Portugal would like to provide some additional comments.

The solutions proposed below are essentially intended to improve SMEs' access to investor-state dispute settlement (ISDS) and it could be accommodated without the need to amend the ICSID Convention, which we understand is one of the main constraints to the process under consideration.

Special concerns with SMEs urge us to recommend to the Secretariat a review of its proposals to include, where possible, concrete measures appropriate to the specificities of SMEs. We therefore appeal to Secretariat's extensive experience in case management in identifying other examples to those describe below:

1. Allocation costs

Adding the nature of the investor to the list of factors, in Rule 19(4), would clarify that the tribunal could (and should) take into account the alleged lack of financial capacity of SMEs or natural persons when allocating costs.

2. Security for costs

The current amendment concerning security for costs does not specifically protect SMEs. We would tend to support an express reference to the specificities of these companies by providing for an exception to the general regime, such as the creation of an exemption in security for costs rule or a reduction of the respective amount, via definition of threshold.

Also considering the particular situation of SMEs, we express our support to what it is proposed on EU/Members-states document in the sense that Tribunals would not automatically order security for costs when it comes to third party funding.

¹ "Comments to the proposed amendments to the ICSID Rules submitted on behalf of the European Union and its Member States" of December 21, 2018.

3. Expedited arbitration procedure

The expedited procedure would in many cases be of great use to SMEs, while at the same time it could bring significant efficiency to ISDS, thus benefiting the respondent State as well.

Having said that, every effort should be made to improve the use of this more expeditious and simplified alternative dispute resolution procedure, namely by eliminating the reasons which have been preventing its wider acceptance by the disputing parties.

Again, Secretariat's extensive experience in case management should be used to obtain concrete proposals to improve the rules of this expedited procedure in order to increase its acceptance by the respondent States.