



# Potential rule amendments or improvements to the arbitration and conciliation procedures of the International Centre for Settlement of Investment Disputes (ICSID)

Attorney-General's Department

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

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- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The International Law Section is grateful for the assistance of its International Arbitration Committee for preparing this submission at short notice. Given the tight deadline the Section appreciates the input of its Co-Chair, Damian Sturzaker and co-opted non-committee members including Dr Sam Luttrell, Monty Taylor, Richard Braddock and Matthew Lee.

# Executive Summary

1. The Commonwealth Attorney-General's Department has sought views on potential rule amendments or improvements to the arbitration and conciliation procedures of the International Centre for Settlement of Investment Disputes (**ICSID**).
2. ICSID is among the world's leading institutions for the settlement of investor-State disputes. ICSID has periodically modernized its rules and regulations to ensure they best serve all facility users. The last such amendment occurred in 2006. ICSID has now begun work to further update and modernise the existing ICSID Rules and Regulations. This amendment process is intended to focus on simplification of the dispute settlement procedure to improve cost and time effectiveness, while ensuring due process and equal treatment of the parties. ICSID has also noted that the balance between the interests of investors and States, which is a basic pillar of the ICSID Convention and Rules, must be maintained to ensure continued credibility and confidence in the process.
3. ICSID has asked its Member States, including Australia to provide suggestions on potential rule amendment or concerning improvement of the arbitration and conciliation procedures of ICSID by 31 January 2017.
4. We understand that as part of this project, the ICSID Secretariat will conduct surveys and prepare background papers concerning various procedural rules for potential amendment. It will in due course provide these papers and proposed draft amendments to the Member States and seek their feedback.
5. The International Law Section of the Law Council of Australia has identified a number of areas in which amendments could be made to the ICSID procedures including:
  - Develop clear ICSID standards regarding conflict of interest considerations when constituting tribunals;
  - The ICSID Secretariat, in consultation with the Chairman of the Administrative Council, should provide guidelines for interpreting Article 57 for the uniform development and consistent application of principles;
  - Remove the "automatic suspension" rule for arbitrator challenges;
  - Clarify the issue of costs in the context of arbitrator challenges;
  - Formally establish a pool of arbitrators to serve solely as *ad hoc* committee members and exclude those arbitrators from serving as counsel;
  - Amend the ICSID Rules to introduce an express "equal treatment" provision;
  - Increase the transparency of ISDS proceedings; and
  - introduce a provision that clarifies the test for provisional measures.

# Comments on potential rule amendments or improvements to the arbitration and conciliation procedures of the International Centre for Settlement of Investment Disputes (ICSID)

6. Owing to time constraints to provide a submission, the International Law Section has not had the opportunity to seek the views of all of its members on the Exposure Draft. The International Law Section notes that the call for submissions was made in late December 2016. Submissions to the Committee were due on 23 January 2017. The time of year meant that most if not all organisations were closed and detailed consultation with members was difficult. The International Law Section understands that there will be further rounds of consultation with ICSID and would appreciate the opportunity to have further input to the process.
7. A number of the most significant challenges facing the ICSID system could likely only be remedied through amendment of the ICSID Convention, rather than the Rules. For example, the establishment of an appellate body would require Art. 53 to be amended, expanding the definition of "Contracting State" would likely require Art. 1(2) to be amended and reform of the challenge mechanism would require Art. 58 to be amended. The method for appointing ad hoc committee members is also prescribed under the Convention, rather than the Rules.
8. This submission outlines commonly identified areas of concern within the ICSID Rules of Procedure for Arbitration Proceedings ("the Rules"). It proceeds to suggest revisions which address some of these issues.

## Constitution of Tribunal: Conflicts of Interest

9. Conflicts of interest and duties to disclose are governed by Rule 6, which mandates that arbitrators sign a declaration and disclose any conflicts. Article 14(1) of the ICSID Convention ("the Convention") stipulates that appointed arbitrators should "be relied upon to exercise independent judgment". There are no other provisions governing how conflicts of interest should be responded to when constituting a tribunal.
10. Consequently, decisions are made with inconsistent regard to the IBA Guidelines on Conflicts of Interest in international arbitration, or are made as otherwise subjective judgments. The challenge process, in cases where the appointment is disputed under Article 57, requires an apparently higher threshold to succeed than the 'justifiable doubts' standard held under the UNCITRAL Arbitration Rules. In reaching a decision to disqualify, once again only inconsistent consideration is often given to the IBA Guidelines. There is also a perception (whether reasonable or not) that a number of arbitrators are repeatedly subject to—largely unsuccessful—challenges on the basis of conflicts of interest.<sup>1</sup> This brings to light a degree of dissatisfaction with the procedure for constituting a tribunal.
11. Other perceived conflicts of interest relate to arbitrators concurrently acting as counsel in separate proceedings. Several of the publicised challenges to arbitrators in

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<sup>1</sup> D Kapeliuk, 'Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration' (2012) 31 *The Review of Litigation* 267, cited in Leon E. Trakman, 'The ICSID Under Siege' (2012) 45 *Cornell International Law Journal* 603, 661.

ICSID have arisen as the result of this dual-role issue.<sup>2</sup> Clearer guidelines are required to minimise the persistence of this trend, thereby bolstering ICSID's legitimacy.

#### *Suggestions*

- Formally incorporate the International Bar Association Guidelines on Conflicts of Interest in International Arbitration as ICSID policy *mutatis mutandis*  
*or*
- Develop clear ICSID standards regarding conflict of interest considerations when constituting tribunals.

### **Disqualification of Arbitrators**

12. Article 57 of the Convention provides the standard required to disqualify an arbitrator, namely "a manifest lack of the qualities" outlined in Article 14(1) above. Many commentators have enunciated concern regarding the ambiguity of how Articles 57 and 14(1) interact, which has been the subject of contradictory interpretations throughout ICSID's history.<sup>3</sup>
13. Some of the inconsistency in interpretation can explained by the most common means by which challenges are determined subject to Article 58, that is, by decision of the unchallenged tribunal members. Evidently, revising the Convention is beyond the scope of this inquiry. Rather, the Rules could include guidelines for coherent interpretation of Article 57. These should stipulate the precise interpretation of "manifest", and how and to what extent this threshold differs from the more common "justifiable doubts" formulation.

#### *Suggestion*

- The ICSID Secretariat, in consultation with the Chairman of the Administrative Council, provide guidelines for interpreting Article 57 for the uniform development and consistent application of principles.

### **Remove "automatic suspension" rule for arbitrator challenges**

14. Under Rule 9(6) of the ICSID Arbitration Rules, the proceeding is automatically ("shall be") suspended as soon as a challenge is filed, and it remains suspended "until a decision has been taken on the proposal". This rule of automatic suspension operates as an incentive to challenge arbitrators because it signals to parties that challenges are a guaranteed way of buying time. As an illustration, we refer to the case of Conoco Phillips v Venezuela: in that case, Venezuela filed six separate challenges to the same arbitrator; all six challenges were frivolous and all were dismissed, but they extended the proceeding by over 13 months, with zero consequence to Venezuela (no costs orders were made). No other major system of international arbitration contains a rule prescribing automatic suspension of proceedings when an arbitrator is challenged: the norm is to provide that the proceedings may be suspended pending determination of

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<sup>2</sup> N Bernasconi-Osterwalder, L Johnson, F Marshall, 'Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel' (Paper presented at IV Annual Forum for Developing Country Investment Negotiators, New Delhi, 27-29 October 2010), 4.

<sup>3</sup> S Luttrell, 'Testing the ICSID Framework for Arbitrator Challenges' (2016) 31(3) *ICSID Review* 597, 601.

a challenge. We recommend that Rule 9(6) of the ICSID Rules be amended by simply changing to "shall" to "may".

15. For further discussion of the problems that arise from the current wording of Rule 9(6), see Dr S Luttrell's article "Testing the ICSID Framework for *Arbitrator Challenges*", *ICSID Review*, Vol. 31, No. 3 (2016), pp. 597-621.

### Clarify costs powers for arbitrator challenges

16. Amendments are also needed to clarify the issue of costs in the context of arbitrator challenges. The issue here is that the incentive offered by Rule 9(6) (automatic suspension) is heightened by the fact that unsuccessful challengers are rarely (if ever) ordered to pay costs. Indeed, where the Chairman of the ICSID Administrative Council decides the challenge (for example, because the challenge is to more than one arbitrator), it is not clear whether he or she even has the power to award costs. Accordingly, we suggest that Rule 9 be amended by addition of the following sub-rules:

- (a) *"(7) In deciding the proposal, the other members of the Tribunal or the Chairman (as the case may be) may decide that the party that made the proposal shall pay some or all of the fees and expenses incurred by the Tribunal in connection with the proposal."*
- (b) *"(8) Where during the proceeding a party makes more than one proposal pursuant to Article 57 of the Convention in respect of the same member of the Tribunal, the other members of the Tribunal or the Chairman (as the case may be) may decide that the party that made the proposals shall pay some or all of the fees and expenses incurred by the Tribunal and the other party (or parties) in connection with the subsequent proposal."*

### Annulment Procedures

17. Under Rule 50 a party may, *inter alia* make an application for annulment of an award within 120 days of the rendering of the award. Arguably 120 days is a needlessly long window in which to file an annulment application. Consideration could be given to shortening this time. We note this would require an amendment to Article 52 and may be beyond the ambit of the current review.
18. The constitution and function of *ad hoc* committees which determine the annulment of awards have also frequently been subject to criticism.<sup>4</sup> Alleged conflicts are perceived to arise where appointees to *ad hoc* committees were members of tribunals whose awards are subject to their own annulment proceedings. Others have raised concerns regarding annulment committee members who act as counsel in separate ICSID arbitrations.<sup>5</sup>
19. As annulment is the only possible form of review provided under the Convention (which expressly prohibits judicial review of awards in domestic courts), its legitimacy — both perceived and actual — is of utmost importance to uphold ICSID's esteem. Ensuring coherency within the annulment regime and the application of Article 52 is fundamental to this goal.

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<sup>4</sup> G Bottini, 'Present and Future of ICSID Annulment: The Path to an Appellate Body?' (2016) 31(3) *ICSID Review* 712.

<sup>5</sup> N Ziadé, 'Is ICSID heading in the wrong direction?', *Global Arbitration Review*, 24 February 2015.

### *Suggestions*

- Formally establish a pool of arbitrators to serve solely as *ad hoc* committee members; and
- Exclude *ad hoc* committee members from serving as counsel in ICSID arbitrations.

### **Introduce "equal treatment" provision**

20. The ICSID Rules should be amended to introduce an express "equal treatment" provision. We recommend that the text of Article 18 of the UNCITRAL Model Law be adopted. Commentators suggest that in ICSID cases, investors and States are not always treated equally in procedural terms.
21. For arbitration to be effective as a means of resolving disputes between private entities and sovereign States, the disputing parties must be placed on the same footing. The introduction of an express equal treatment obligation will help achieve this objective. Equal treatment is a norm of due process (and therefore part of customary international law) and so the introduction of such a rule should not be controversial.

### **Transparency**

22. ICSID could consider increasing the transparency of ISDS proceedings in areas such as those covered by the recent amendments to the UNCITRAL (2013) Rules. Some commentators consider that UNCITRAL has now overtaken ICSID in terms of the level of transparency which applies to ISDS disputes (under applicable treaties). We accept that States could sign-up to the Mauritius Convention but submit that amending the ICSID Rules may be a more effective way to do this. Furthermore consideration should be given to providing:
  - (a) Public access to information regarding when ISDS disputes commence;
  - (b) Reasons for granting/denying third party access.
23. In addition live-streams of hearings such ICSID Case No. ARB/12/12 (Vattenfall v Germany) as recently provided<sup>6</sup> should be encouraged to contribute to education and transparency.

### **Cost and Time Efficiency**

24. The length of proceedings is a particular concern in investment arbitration. Those in the investment arbitration community submit that consideration be given to introducing some procedural safeguards. Time limits for awards, as appear in the institutional rules of other centres, could be a useful starting point.
25. A mechanism needs to be added so that arbitrators issue awards more quickly. Average time now is 8 months to a year. Stakeholders should not have to wait so long to have awards issued. One proposal is that ICSID could adopt the new ICC rule that reduces the fees to arbitrators due to undue delay.

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<sup>6</sup> <http://isdsblog.com/2016/10/14/vattenfall-v-germany-live-stream/>

26. Security for costs: this remains on the radar as well, particularly since Panama filed its memo with ICSID last year. A rule amendment to specifically empower tribunals to award security for costs would likely provide States with some protection against 'judgment proof' claimants.

### **Elucidate test for provisional measures**

27. Provisional measures are an important part of the ICSID process, for both States and investors. However, neither the ICSID Convention nor the ICSID Rules provides any real guidance on the test that a Tribunal is to apply to determine whether or not provisional measures should be granted. This uncertainty makes the process of seeking (and opposing) provisional measures more time-consuming and expensive than it is in other arbitration systems. Accordingly, we recommend that consideration be given to amending Rule 39 to introduce a provision that elucidates the test for provisional measures under Article 47 of the ICSID Convention. The elucidation need not be binding or exhaustive - it could be in the form of an inclusive list of relevant considerations only ("may take into account the following factors [...]"). However, some guidance would be useful. Given that ICSID practice is relatively stable in this area (i.e. an "ICSID test for provisional measures" can be gleaned from the jurisprudence), the list should not be too difficult to construct. Guidance may be taken from Article 17A of the UNCITRAL Model Law.