



Australian Government
Attorney-General's Department



Australian Government
Department of Foreign Affairs and Trade

17/12348

22 January 2018

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 your invitation to provide additional suggestions and comments on potential amendments to the ICSID Convention Rules and Regulations following the publication of comprehensive proposals for rule amendments by the ICSID Secretariat on 3 August 2018, in particular Volume 2, which sets out the Consolidated Draft Rules.

The Australian Government notes that there are a number of other organisations and institutions considering reforms to investor-State dispute settlement (ISDS) mechanisms and suggests that relevant developments be taken into account by ICSID as part of its amendment process. In this regard, the Australian Government welcomes ICSID's ongoing participation in UNCITRAL Working Group III, which is looking at possible reform of ISDS.

The Australian Government notes that a number of its proposals are reflected in the Consolidated Draft Rules. After consultations with relevant stakeholders, and following our participation in ICSID's September 2018 consultation with Member States, the Australian Government makes the following comments on the Consolidated Draft Rules.

1. Gender-neutral Language

Australia welcomes the adoption of plain, modern and gender-neutral language in the redrafting of the ICSID Rules and Regulations. Language is important as it signals the culture of an organisation.

2. Electronic Filing

Australia strongly supports AR 3, which provides that filings are to be done electronically, unless there are special reasons to maintain paper filing.

3. Arbitrator Challenges

Australia notes that the process for challenging arbitrators has been revised, including the introduction of an expedited schedule for parties filing a challenge. Australia welcomes the proposed amendments relating to arbitrator challenges and makes the following comments.

AR 19 – Payment of Advances and Costs of the Proceeding

Australia recognises that the Tribunal may allocate costs with respect to any part of the proceeding under AR 19 and suggests including an express power to award costs related to arbitrator challenges.

AR 29 – Proposal for Disqualification of Arbitrators

Australia appreciates the expedited schedule for challenges to arbitrators, including the introduction of time limits associated with each step of the process, in AR 29. In particular, we support the removal of the provision for an automatic suspension of proceedings upon one party filing a disqualification proposal against an arbitrator in AR 29. Australia also welcomes the specific time limit of 20 days to file for disqualification from the date of the constitution of the Tribunal or the later discovery of relevant facts. We believe these changes will reduce the disruptive effect of arbitrator challenges under the current rules.

AR 30 – Decision on the Proposal for Disqualification

Australia recognises that AR 30 addresses issues which we have previously identified around the consistency of decision-making in relation to arbitrator challenges and supports these changes.

4. Disclosure of Third-party Funding

Australia supports AR 21 which requires a party to the proceeding to disclose third-party funding and therefore promotes greater transparency in relation to funding arrangements.

Australia suggests that AR 21 (2) be amended to require that any terms of a third-party funding agreement which may impact on whether the claimant in fact remains the true party with an interest in the proceedings or whether it has assigned its rights to the funder, also be disclosed. This information goes to whether a claimant fulfils the jurisdictional requirements to bring a claim under Article 25 of the ICSID Convention.

Australia suggests consideration is given to ensuring that this provision does not inadvertently capture sub-national governments in a federal state like Australia, which may, from time to time contribute to the costs of defending a measure adopted by that level of government.

Finally, Australia considers that it should be necessary to disclose whether or not the third party funding arrangement provides that the third party funder will pay any adverse costs order made against the claimant.

5. Manifest Lack of Legal Merit

Australia strongly supports AR 35 which sets out a process related to abusive and frivolous claims and expands upon the rule setting out the Tribunal's ability to render an order where all claims are manifestly without legal merit.

6. Bifurcation

Australia supports AR 37 which allows bifurcation of cases, noting that Tribunals have been reluctant to bifurcate cases which has led to respondents having to plead the merits where material objections to jurisdiction exist.

7. Consolidation or Coordination on Consent of Parties

Australia also welcomes AR 38 which proposes a new rule for consolidation or coordination of claims, with the consent of the parties.

8. Transparency

Australia welcomes new rules which support increased transparency in ISDS proceedings and the presumption of transparency that the Consolidated Draft Rules deliver. In particular, we support holding open hearings and publishing recordings and transcripts (AR 47), as well as the introduction of revised criteria for the participation of non-disputing parties (AR 48) and non-disputing treaty parties (AR 49).

9. Security for Costs

Australia supports AR 51, which allows the Tribunal to order a party to provide security for costs. We believe a party should be able to seek security for costs from another party where there are reasonable grounds to believe that they would not be able or willing to pay an order for costs. In this regard, Australia considers that AR 51 should be amended to explicitly include as a relevant circumstance, whether the party has received third party funding and the terms thereof.

10. Timing of the Award

Australia supports the changes to AR 59 which, read alongside AR 8(3), require Tribunals to use best efforts to meet these expedited timeframes, while providing sufficient flexibility to revise timeframes where special circumstances arise.

11. Annulment Procedures

Australia supports AR 63, which clarifies and streamlines the process for interpretation, revision and annulment of awards.

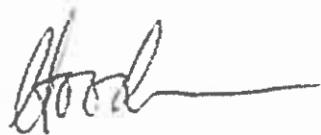
12. Code of Conduct for Arbitrators

Australia notes that the Consolidated Draft Rules do not include a Code of Conduct for Arbitrators. However, the ICSID Secretariat's Synopsis on Proposals for Amendment of the ICSID Rules states that 'ICSID is currently working with the UNCITRAL Secretariat on a Code of Conduct for Arbitrators.' We would welcome clarification on the status of this project.

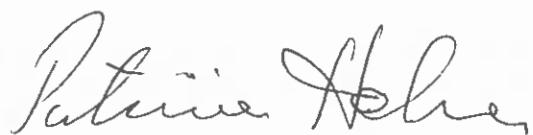
Australia strongly supports the development of a Code of Conduct for Arbitrators, which could address issues such as ethics and conflicts of interest specific to investment arbitration.

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

Yours sincerely



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