

5 September 2019

Mr Dave Sharma MP
Chair, Joint Standing Committee on Treaties
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Parliament House
Canberra ACT 2600

By email: jsct@aph.gov.au

Dear Mr Sharma

United Nations Conventions on Transparency in Treaty-based Investor-State Arbitration

The International Law Section of the Law Council of Australia (**Law Council**) welcomes the opportunity to provide a submission on the proposed ratification of the United Nations *Convention on Transparency in Treaty-based Investor-State Arbitration (the Convention)*. In preparing this submission, the International Law Section is grateful for the assistance of its International Arbitration Committee, especially its co-Chair, Damian Sturzaker.

The Law Council endorses the ratification of the Convention for the reasons outlined below.

The Convention was adopted on 10 December 2014 in New York at the 69th Session of the United Nations General Assembly. The Convention opened for signature in March 2015, and on 18 July 2017 Australia became the 21st signatory to the Convention. The Convention entered into force on 18 October 2017.

In accordance with article 9(2), the Convention will enter into force for Australia six months after the date of deposit of its instrument of ratification. Australia does not intend to make any reservations to the Convention.

The Convention extends the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (**Rules on Transparency**) to Investor-State arbitrations initiated under investment treaties concluded prior to 1 April 2014. The Rules on Transparency only apply to Investor-State arbitrations initiated under investment treaties concluded on or after 1 April 2014 which are conducted in accordance with the UNCITRAL Arbitration Rules, unless otherwise agreed by the parties.

Under the Convention, the Rules on Transparency apply to any Investor-State arbitration initiated under treaty where:

- a) both the investor's State and the host State are parties to the Convention; or

- b) where the host State is party to the Convention and the investor agrees to the application of the Rules on Transparency.

The Joint Standing Committee on Treaties (Committee) is empowered to inquire into and report on matters arising from treaties and related National Interest Analysis, and proposed treaty actions presented or deemed to be presented to Parliament. The Committee has invited interested persons and organisations to make submission.

Increased transparency

The International Law Section of the Law Council of Australia recognises the efforts that have been undertaken by various bodies to increase transparency for arbitration proceedings. For more information about this in relation to ICSID, see the Law Council of Australia submissions dated 25 January 2017 and 17 September 2018 (**attached**).

The Law Council welcomes the following two changes, which were both proposals put forward for consideration in the Law Council ICSID Submissions.

- a) The publication of additional documents, including pleadings, under Article 3.
- b) Public access to the hearings for the presentation of oral evidence under Article 6.

The Law Council previously advocated for this change to be considered in Investor-State arbitration, and believes that this is a positive step for arbitration proceedings in response to calls for increased transparency. This provides greater public access to the proceedings, additional insight into the arbitral process and an improved contextual understanding of the nature of the dispute and final determination.

Submissions by third persons

The Convention also provides a process for submissions to be made by:

- a) third persons that are not a disputing party and not party to the Convention on a matter within the scope of the dispute pursuant to article 4; and
- b) a non-disputing party that is party to the Convention on issues of treaty interpretation pursuant to article 5.

The factors the Tribunal will consider are whether the third person has a significant interest in the arbitral proceedings, and the extent to which the submission would assist the arbitral tribunal. This provides an appropriate safeguard to ensure that relevant and useful submissions are allowed to be provided to the Tribunal, but that a connection between the third person and the matter must still be demonstrated.

The Law Council welcomes this change to allow for submissions from interested parties that would assist the Tribunal. This is particularly important for matters of public interest, public policy and treaty interpretation, which are often raised in Investor-State arbitration.

Appropriate safeguards

There are appropriate protections to ensure information is protected where it is appropriate. The exceptions to transparency are outlined in Article 7, and include where the information is confidential or protected information or where disclosure would impact the integrity of the arbitral process.

The Law Council welcomes these safeguards to ensure that the balance between the need for transparency and the need to protect information is maintained. It would undermine the legitimacy of the Convention, and the confidence in States to apply it, if there were not appropriate safeguards to protect certain information.

The Convention also contains a provision in Article 2(5) that does not allow for a party to invoke a most favoured nation provision to seek to apply or avoid the application of the Rules on Transparency as applied by the Convention. This is an additional procedural safeguard to ensure that parties cannot seek to circumvent the Convention.

Advantages of increased transparency

The nature of Investor-State arbitration means there is a public interest in the proceedings. The involvement of a State as a party is a matter of public importance, it concerns the potential liability and financial impact for the State, involves potential misconduct by a State, and may address broader public policy issues. An example of this was the Phillip Morris arbitration, which was particularly controversial and involved broader public health policy issues with significant public interest.

Increased transparency aids the legitimacy and integrity of the arbitral process, improves confidence in the current system, and aids function and efficiency of the arbitral system. Additionally, the public will have access to all pleadings, hearings and decisions. This greater access will allow for greater assessment of the quality of arbitration process and understanding of the determinations made by the tribunal.

Requires greater state participation

The Convention will be most effective if widely adopted by states. As at 2 September 2019, there are only 5 parties to the Convention and 23 signatories.

There is the possibility for states to apply the rules on an ad hoc basis if they are not party to the Convention. However, this allows them to elect to not apply the Rules on Transparency in the event of a sensitive or reputationally damaging matter that they do not want publicized. This undermines the intention of the Convention to increase transparency overall, not simply when it is convenient to a party.

Conclusion

The Law Council endorses the ratification of the Convention. The Convention will increase transparency for Investor-State arbitration, which will provide additional legitimacy to arbitration and greater public access to the proceedings of a public interest due to the involvement of States.



Yours sincerely

Mr Damian Sturzaker
Co-Chair, International Arbitration
Committee,
Executive Member, International Law
Section



Law Council
OF AUSTRALIA

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

25 January 2017

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

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.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- 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

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- 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.¹ 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

¹ 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.² 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.³
13. Some of the inconsistency in interpretation can be 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

² 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.

³ 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.⁴ 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.⁵
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.

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

⁵ 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 provided⁶ 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.

⁶ <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.



Law Council
OF AUSTRALIA

International Law Section

17 September 2018

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Consultation on Proposed Amendments to the International Centre for Settlement of Investment Disputes (ICSID) Rules

The Law Council understands that the ICSID Secretariat is hosting a meeting in Washington D.C. on 27-28 September 2018 to present proposed amendments of the ICSID Rules to Member States. This meeting will be the first opportunity for States to discuss the amendment proposals with the Secretariat and amongst themselves.

The Law Council's International Law Section (ILS) is grateful for the opportunity to provide input to these discussions. This submission focusses on the following issues:

- Security for Costs and the potential impact of Draft Rule 51;
- Increased transparency in ICSID proceedings;
- Improved efficiency in ICSID proceedings;
- Annulment and guidance for Ad Hoc Committee Members;
- Amendments to the Conciliation Rules; and
- Improved ICSID legitimacy.

The ILS 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, committee member Richard Braddock, and co-opted non-committee members including Dr Sam Luttrell, Ms Lucy Martinez, Dr Luke Nottage and Ms Danielle Kroon.

Comments on the Proposed amendments to the International Centre for Settlement of Investment Disputes (ICSID) Rules

Owing to the 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 on 30 August 2018. Submissions to the Commonwealth Attorney General's Department were sent on 17 September 2018. The International Law Section intends to comment further on the proposed amendments to the Rules in due course.

Comments on Previous Law Council Submission

As referred to above, the Law Council made a submission in January 2017. We note that a number of the requested changes have been recommended in the Draft Rules. Annexure A summarises the recommendations that were made, and the manner in which they have been adopted by ICSID. The annexure also makes comments on the redraft of the Rules and these comments should be read as part of this submission. The high correlation between the recommendations that were made and the adoption of those recommendations means that the further recommendations are limited in scope.

Security for Costs (Draft Rule 51)

Representatives for commercial entities have expressed concerns about the new Draft Arbitration Rule 51 (Draft AR 51). If this draft rule is implemented, they believe investors could face a security for costs application in almost every case. States threaten to apply for security in most cases, so security is already a weapon of choice. One of the co-opted non committee members is currently representing a client resisting a security application in an ICSID case against Indonesia. We understand that that member has made a separate submission specifically addressing his concerns in relation to Draft AR 51.

The Working Paper says ICSID has tried to strike a balance with this draft rule. It is the view of the Law Council that priority has been given to State interests. The Working Paper even says it is trying to make it easier for States to win security applications. By de-coupling security for costs from the wider provisional measures regime (under which a party needs to show 'exceptional circumstances' to get relief), the bar for security will be lowered.

Countries like Australia with large outbound investment programs should be opposing this draft rule in the strongest possible terms, or requiring that it be amended to include a reference to the 'exceptional circumstances' rule that has so far applied uniformly to security for costs applications in ICSID arbitration. SMEs will be hit hardest. If a company only has one asset and it has been expropriated (as is the case in many ICSID claims), there is a high likelihood that the SME will be ordered to post security.

The Law Council is concerned that Draft AR 51 has the potential stifle many legitimate claims.

Increased transparency

We recognise the efforts that have been undertaken by ICSID to increase transparency of proceedings, which are referred to in Schedule 8 of the Working Paper. Nonetheless, as explained in the January 2017 Submission, ICSID could consider additional steps to increase transparency.

The proposals identified in Schedule 8 to increase transparency of proceedings are relatively modest and incremental but positive.

The provisions requiring disclosure of third party funding are a welcome addition and reflect the growing trend towards the availability of third party funding in arbitration. Nonetheless, this is a complex issue and a balance needs to be struck between the need for transparency, which will assist in the identification of potential arbitrator conflicts, and an unwelcome intrusion into the methods of financing employed by claimants. For example, a claimant that chooses to finance its claim via a loan from a commercial bank would not be caught by the rules relating to the disclosure of third party funding. Contrast that with a claimant who

decides to make third party funding arrangements, perhaps to take the matter off balance sheet. The second of these scenarios would require disclosure.

More broadly, it seems that there is more work to be done in considering the right balance on transparency in the ICSID system. It is not clear that the changes proposed will be seen as an adequate response to the increasing calls for increased transparency in ISDS. Further steps worth consideration are listed below.

- Publish pleadings as well as final decisions/awards online, as is done for most NAFTA cases.
- Allow members of the public (including non-governmental organisations (NGOs)) to attend hearings and/or live stream them over the objections of the parties.
- Clarify the role of the tribunal secretary/assistant (if any).

Improved efficiency

The proposed amendments contain a number of provisions intended to increase the efficiency of proceedings and avoid undue delays and associated costs. For example, Draft AR 8 and 9 stipulates that steps taken by a party after expiry of a time limit are disregarded unless the late party establishes there were special circumstances justifying the delay. These kinds of disciplines are useful in reducing the risk of undue delays and the possibility of one litigant seeking to frustrate or draw-out the process (and the associated increased costs). The related proposal to increase efficiency in the constitution of tribunals is also welcome from this perspective.

The proposal for an expedited process to request bifurcation (in Draft AR 37) is a useful idea. Bifurcating proceedings earlier in the process would be expected to result in a saving of time and costs for the disputing parties.

The new proposal for optional Expedited Arbitration (in Draft AR 69-79) is an interesting innovation. From a cost-saving perspective, an expedited process is attractive. However as both disputing parties must consent to the use the expedited process it is not clear how often this procedure would be utilised. Given that claimant investors would generally have more time to prepare for a dispute, an expedited process such as this may be seen as being less advantageous for respondent States.

Consideration could be given to enabling the Secretary-General to recommend to parties that they pursue expedited arbitration to further encourage this option.

Having reviewed the excellent work undertaken by the ICSID Secretariat, the Law Council considers that further thought could be given to implementing the following suggestions. With more time, we would be pleased to make more detailed submissions on these points.

- Multiple case management conferences/mini-hearings throughout the proceedings to address procedural issues.
- Streamline document production.
- Set page limits for briefs, where appropriate.

- Noting the rule changes permitting electronic filing of the Request, we further suggest there be no hard copy filings unless exceptional circumstances.
- Mandatory meetings for arbitrators after the hearing to discuss preliminary views on the award.
- Costs allocated based on success of underlying arguments.
- Costs sanctions on frivolous challenges.

Annulment

Annulment is an additional area of concern, with some ad hoc committees acting more as appellate courts and/or substituting their own views for those of the tribunal.

This is probably less an issue for Rules amendment, but ICSID could consider reinforcing via internal publications and guidelines to ad hoc committee members the exceptional nature of annulment.

Conciliation

The Law Council welcomes the changes to the Conciliation Rules under the Rules and under the Additional Facility Rules. In particular we note the obligation for continuous disclosure by conciliators has been updated and expanded.

We further note the recognition that a settlement agreement can be potentially enforced via the draft Convention on Mediated Settlements as a positive development. The Australian Government recently had a positive experience of state to state conciliation via the United Nations Convention on the Law of the Sea following the claims brought by Timor-Leste. After compulsory conciliation proceedings were commenced by Timor-Leste on 11 April 2016 and after Australia's opposition was over-ruled, the process led a settlement which was formalized in a final award on 9 May 2018.

Improving ICSID legitimacy

In light of perceived legitimacy issues, the Rules amendment process should continue to be widely publicized, with views expressly solicited from NGOs, academics, and political groups opposed to ISDS, to ensure these voices are heard (and seen to be heard). The Law Council recognizes the enormous efforts that are being undertaken by ICSID in this regard.

Every effort should be made to increase diversity, noting that diversity in this context includes gender, geographic and socio-economic diversity.

- Increase diversity of tribunals and ad hoc committees, including consideration of quotas.
- Encourage diversity for counsel and experts.

Conclusion

Noting that the process of consultation will continue until the end of 2018, the Law Council would welcome the opportunity to participate more fully with the Australian Government in advocating for appropriate amendments to the ICSID Rules and remain available to further consult with you.

W. Babeck

Yours sincerely

Dr Wolfgang Babeck

Title

ANNEXURE A

Law Council Recommendation	ICSID Implementation in Draft Rules
<p>Develop clear ICSID standards regarding conflict of interest considerations when constituting tribunals</p>	<ul style="list-style-type: none"> • Addressed in working paper at [298]-[308] (Draft Arbitration Rule 26). • The proposed arbitration rules do not yet include a Code of Conduct for ICSID Arbitration. • Note that ICSID is currently working on this with arbitrators at UNCITRAL Working Group III. The Law Council favours this approach as it has potential to memorialise a uniform set of ethical expectations for ISDS generally. • In the interim, we propose expanded disclosure in declarations by arbitrators, providing parties with more information to determine where reasonable concern as to conflict of interest.
<p>ICSID Secretariat, in consultation with Chairman of Administrative Council, should provide guidelines for interpreting Art 57 for the uniform development and consistent application of principles</p>	<ul style="list-style-type: none"> • Draft Arbitration Rule 29 sets out procedure for disqualification under art 57 of Convention (see working paper at [322]-[332]).
<p>Remove the 'automatic suspension' rule for arbitrator challenges</p>	<ul style="list-style-type: none"> • Draft Arbitration Rule 29 eliminates automatic suspension rule upon filing of a challenge (see working paper at [330]).
<p>Clarify the issue of costs in the context of arbitrator challenges</p>	<ul style="list-style-type: none"> • Discussed in working paper at [319]. • Notes that the Tribunal may allocate costs with respect to any part of the proceeding, including a disqualification proposal, under Draft Arbitration Rule 19. These proposed amendments provide a tool to deter frivolous challenges.
<p>Formally establish a pool of arbitrators to serve solely as ad hoc committee members and exclude those arbitrators from serving as counsel</p>	<ul style="list-style-type: none"> • Appointment of <i>ad hoc</i> Committee addressed in working paper at [629]-[634] (Draft Arbitration Rule 65). • Process by which Member States identify and select Panel designees remains within discretion of that State – Centre encourages States to continue designating candidates with qualifications. • Have to sign a declaration. • Potential tribunal members have to declare other cases where counsel, conciliator, arbitrator, ad hoc Committee member, fact

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	finding Committee member, mediator or expert (see working paper at [301]).
Increase the transparency of ISDS proceedings	<ul style="list-style-type: none">• Schedule 8 specifically considers transparency provisions (including access to documents, access to hearings, and non-disputing party participation).• Working paper, pp 933-974.
Introduce a provision that clarifies the test for provisional measures	<ul style="list-style-type: none">• Draft Arbitration Rule 50 discusses provisional measures (see working paper at [482]-[483]).• The Draft Arbitration Rule 50 fails to set out criteria: 'Tribunal shall consider all relevant circumstances' and 'shall only recommend provisional measures if it determines that they are urgent and necessary'.