

5 September 2019

Mr Dave Sharma MP
Chair, Joint Standing Committee on Treaties
PO Box 6021
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

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Committee,
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Section