Law Council
OF AUSTRALIA

International Law Section

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Private International and Commercial Law Section
Attorney-General's Department
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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.

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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.

Yours sincerely

Dr Wolfgang Babeck

Title

ANNEXURE A

Law Council Recommendation	**ICSID Implementation in Draft Rules**
Develop clear ICSID standards regarding conflict of interest considerations when constituting tribunals	• 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.
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	• Draft Arbitration Rule 29 sets out procedure for disqualification under art 57 of Convention (see working paper at [322]-[332]).
Remove the 'automatic suspension' rule for arbitrator challenges	• Draft Arbitration Rule 29 eliminates automatic suspension rule upon filing of a challenge (see working paper at [330]).
Clarify the issue of costs in the context of arbitrator challenges	• 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.
Formally establish a pool of arbitrators to serve solely as ad hoc committee members and exclude those arbitrators from serving as counsel	• Appointment of *ad hoc* 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

ANNEXURE A

	finding Committee member, mediator or expert (see working paper at [301]).
Increase the transparency of ISDS proceedings	• 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	• 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'.