AUSTRALIA'S WRITTEN COMMENTS ON DRAFT PROCEDURAL RULES AND CROSS CUTTING ISSUES CONTAINED IN A/CN.9/WG.III/WP.244

I. Introduction

The Commonwealth of Australia ('Australia') expresses its gratitude to the Secretariat for presenting the Draft Procedural Rules and Cross Cutting Issues (WP.244). Australia provides the following comments on these rules, with a particular focus on their harmonization with other investor-state arbitration rules. Australia reserves its position as to whether it considers such provisions would be best incorporated into the UNCITRAL Rules or included as part of an instrument associated with the MIIR, and as to whether Australia would ultimately support either proposal.

II. Comments

Draft Provision 1: Evidence

1. Each disputing party shall have the burden of proving the facts relied on to support its claim or defence.
2. At any time during the proceeding, the Tribunal may require the disputing parties to produce documents, exhibits or other evidence within such a period of time as the Tribunal shall determine.
3. The Tribunal may reject any request, unless made by all disputing parties, to establish a procedure whereby each party can request another party to produce documents. In considering such requests for production of documents, the Tribunal shall consider all relevant circumstances, including:
   (d) The scope and timeliness of the request;
   (d) The admissibility, relevance, materiality and weight of the documents requested;
   (d) The burden of production; and
   (d) The basis of any objection by the other party.
4. If a disputing party, duly invited by the Tribunal to produce documents, exhibit s or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the Tribunal may make the award on the evidence before it.
5. Unless otherwise directed by the Tribunal, statements by witnesses, including expert witnesses, shall be presented in writing, and signed by them. The Tribunal may decide which witnesses, including expert witnesses, shall testify before the Tribunal if hearings are held.
6. The Tribunal shall determine the admissibility, relevance, materiality and weight of evidence offered.
7. The Tribunal may, at the request of a disputing party or on its own initiative, exclude from evidence or production any document, exhibits or evidence obtained illegally or based on the following reasons: […]
8. The Tribunal may order a visit to any place connected with the dispute, at the request of a disputing party or on its own initiative and may conduct inquiries there as appropriate.

Comment

Paragraphs 1, 2, and 6, and the first sentence of paragraph 5, reflect Article 27 of the UNCITRAL Rules 2021. The first sentence of paragraph 3 and the last sentence of paragraph 5 incorporate language from Article 15 of the UNCITRAL Expedited Arbitration Rules 2021. Paragraph 4 is drawn from Rule 30(3) of the ICSID Rules. Paragraph 7 appears to be drawn from the chapeau of Article 9(2) of the IBA Rules of the Taking of Evidence in International Arbitration, although the reasons listed in Article 9(2), and

elaborated on in Article 9(4), are not reflected in Draft Provision 1. Paragraph 8 appears to be a variation of Article 43(b) of the ICSID Convention.

Australia queries the intention behind this amalgamation of provisions. In particular, Australia queries the reason for incorporating provisions associated with expedited proceedings in Article 15 of the UNCITRAL Expedited Arbitration Rules 2021. While additional discretionary powers may be appropriate for a Tribunal in expedited contexts, Australia queries the appropriateness of their application in standard arbitration settings. Moreover, to the extent this provision was to be incorporated into the UNCITRAL Rules, Australia further queries what the status of sentence one of Article 27(2) of the current rules would be, as it is not reproduced in Draft Provision 1.

Draft Provision 2: Bifurcation

1. A disputing party may request that an issue, including a plea that the Tribunal does not have jurisdiction, be addressed in a separate phase of the proceeding ("request for bifurcation").
2. The request for bifurcation shall be made as soon as possible and shall state the issue to be bifurcated. The Tribunal shall fix the period of time within which submissions on the request for bifurcation shall be made by the disputing parties.
3. When determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:
    (a) Bifurcation would materially reduce the time and cost of the proceeding;
    (b) Determination of the issues to be bifurcated would dispose of all or a substantial portion of the claim; and
    (c) The issues to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.
4. The Tribunal shall decide on the request for bifurcation within [30] days after the last submission on the request and shall fix any period of time necessary for the further conduct of the proceeding.
5. If the Tribunal orders bifurcation, it shall suspend the proceeding with respect to any issues to be addressed at a later phase, unless the disputing parties agree otherwise.
6. The Tribunal may at any time on its own initiative decide whether an issue should be addressed in a separate phase of the proceeding.

Comment

Australia sees merit in Draft Provision 2. However, while Draft Provision 2 is substantively similar to Rule 42 of the ICSID Rules, it does not contain distinct treatment of bifurcation requests accompanying preliminary objections as per Rule 44 of the ICSID Rules. Australia queries the intention behind not specifying the procedure in relation to such bifurcation requests. Australia acknowledges that paragraph 1 differs from ICSID Rules 42(1) by specifying that the issues for which bifurcation can be sought include 'a plea that the Tribunal does not have jurisdiction', making it unambiguous that preliminary objections concerning jurisdiction can be bifurcated. Australia supports this clarification.

Draft Provision 4: Manifest lack of legal merit/early dismissal

1. A disputing party may object that a claim is manifestly without legal merit.

2. A disputing party shall make the objection as soon as possible after the constitution of the Tribunal and no later than [45] days after its constitution. The Tribunal may admit a later objection if it considers the delay justified.
3. The objection may relate to the substance of the claim or the jurisdiction of the Tribunal. The objection shall specify the grounds on which it is based and contain a statement of the relevant facts, laws and arguments. The Tribunal shall fix the period of time within which submissions on the objection shall be made by the disputing parties.
4. The Tribunal shall decide on the objection within [60] days after the last submission on the objection.
5. If the Tribunal decides that all claims are manifestly without legal merit, it shall make an award to that effect. Otherwise, the Tribunal shall make a decision on the objection and fix any period of time for the further conduct of the proceeding.
6. If the Tribunal makes an award in accordance with paragraph 5, the Tribunal shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are exceptional circumstances justifying a different allocation of costs.
7. A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of the disputing party to raise a plea that the Tribunal does not have jurisdiction or to argue subsequently in the proceeding that the claim is without legal merit.

Comment

Australia sees merit in Draft Provision 4. Draft Provision 4 is substantively similar to Rule 41 of the ICSID Rules. Australia notes, however, that unlike Rule 41 of the ICSID Rules, Draft Provision 4 grants tribunals discretion to accept objections that a claim is manifestly without legal merit (MWLM) if submitted more than 45 days after the constitution of the Tribunal, as per sentence two of paragraph (2) above.

Australia further notes that the proposed Draft Provision 4 does not provide a procedure for MWLM objections prior to the composition of the tribunal. We agree with this approach in the context of ad hoc arbitration governed by the UNCITRAL Rules, noting that the relevant Agreement could provide such a right if desired by the State parties.

Australia considers that costs in paragraph (6) could be better dealt with in the proposed provision concerning costs (presently Draft Provision 9).

Draft Provision 5: Security for costs

At the request of a disputing party, the Tribunal may order any disputing party making a claim [or counterclaim] to provide security for costs.
The request shall include a statement of the relevant circumstances and the supporting documents. The Tribunal shall fix the period of time within which submissions on the request shall be made by the disputing parties.
The Tribunal shall decide on the request within [30] days after the last submission on the request.
In determining whether to order a disputing party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:
That disputing party's ability to comply with an adverse decision on costs;

That disputing party's willingness to comply with an adverse decision on costs;

The effect that providing security for costs may have on that disputing party's ability to pursue its claim [or counterclaim];

The conduct of the disputing parties; and

[(e) The existence of third-party funding to support that disputing party in pursuing its claim or counterclaim]. – (comment: bracketed)

The Tribunal shall specify any relevant terms in an order to provide security for costs and fix a period of time for compliance with that order.

If a disputing party fails to comply with the order to provide security for costs, the Tribunal may order the suspension of the proceeding for a fixed period of time. If the proceeding is suspended for more than [90] days, the Tribunal may, after inviting the disputing parties to express their views, order the termination of the proceeding.

A disputing party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

The Tribunal may at any time modify or terminate its order to provide security for costs, at the request of a disputing party or on its own initiative.

Australia sees merit in Draft Provision 5. Security for costs can protect a respondent State against a claimant's inability or unwillingness to pay costs, and discourage frivolous claims. We would consider it appropriate to extend this provision to counterclaims, akin to ICSID Rule 53(1). We support the inclusion of a Tribunal considering the existence of third-party funding to support a disputing party in pursuing its claim or counterclaim, as currently drafted in Draft Provision 5(4)(e).

Draft Provision 8: Period of time for making the award

1. The Tribunal shall make the award as soon as possible.
2. Unless otherwise agreed by the disputing parties, the Tribunal shall make the award within [period of time] after the date of the constitution of the Tribunal.
3. The Tribunal may, in exceptional circumstances and after inviting the disputing parties to express their views, extend the period of time established in accordance with paragraph 2 and indicate a period of time within which it shall make the award.

Comment

Australia notes that paragraph 2 indicates that the relevant time period for making an award shall run from the date of the constitution of the tribunal. We note that the ordinary period for the tribunal to make an award under Rule 58(1)(c) of the ICSID Rules is '240 days after the last submission in all other cases'. We consider it is appropriate to align Draft Provision 8 with the ICSID rules in this respect, so that the period commences after the date of the last submissions rather than the date of constitution of the tribunal. This is because the time necessary for the proceedings may differ significantly based on the number and complexity of the claims. A period running from the date of constitution of the tribunal would be available for State parties to implement through their underlying Agreements, if desired.

We note also that Rule 58(1) of the ICSID Rules makes specific provision for time periods for awards concerning an objection that a claim is manifestly without legal merit, as well as for preliminary objections addressed on a bifurcated basis. Australia considers that alternative time periods should be

explicitly incorporated into Draft Provision 8, such as that presently contained in Draft Provision 4(4) or as may be developed in Draft Provision 3.

Draft Provision 9: Allocation of costs

1. The costs of the proceeding shall in principle be borne by the unsuccessful disputing party.
2. However, the Tribunal may allocate the costs between the disputing parties, if it determines the allocation to be reasonable taking into account all relevant circumstances of the case, including:
   (a) The outcome of the proceeding or any parts thereof;
   (b) The conduct of the disputing parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner in accordance with the applicable rules and complied with the orders and decisions of the Tribunal;
   (c) The complexity of the issues;
   (d) The reasonableness of the costs claimed by the disputing parties;
   (e) The existence of third-party funding; and
   (f) The amount of monetary damages/compensation claimed by the claimant in proportion to the amount awarded by the Tribunal.
3. Unless otherwise determined by the Tribunal, expenses incurred by a disputing party related to or arising from third-party funding shall not be included in the costs of the proceeding.
4. Paragraphs 1 to 3 apply to any costs arising from a request by a disputing party that a claim is manifestly without legal merit pursuant to Draft Provision 4.
5. The Tribunal may, at the request of a disputing party or on its own initiative, make an interim decision on costs at any time.
6. The Tribunal shall ensure that all decisions on costs are reasoned and form part of the award.

This provision is an amalgamation of the current UNCITRAL rules Article 42 and ICSID Rule 52, although the list of considerations in paragraph 2 has been expanded. Australia supports the starting principle that costs follow the event, as set out in paragraph 1 of this provision.

Draft Provision 11: Consolidation and coordination of proceedings

1. Where two or more claims have been submitted separately, the disputing parties may agree to consolidate or coordinate the relevant proceedings.
2. Consolidation shall join all aspects of the proceedings sought to be consolidated and result in a single decision. Coordination aligns specific procedural aspects of the proceedings, but they remain separate and result in separate decisions.
3. The disputing parties shall provide the proposed terms for the conduct of the consolidated or coordinated proceedings to the Tribunals.
4. This provision shall be without prejudice to the right of a disputing party to seek consolidation or coordination under the Agreement.

Comment Paragraphs 1-3 above are substantively similar to Rule 46 of the ICSID Rules. Australia overall sees merit in Draft Provision 11, however Australia queries two points concerning paragraph 2.

Firstly, Australia queries the language in sentence one of paragraph 2 that consolidation "shall join all aspects of the proceedings sought to be consolidated and result in a single decision". While this reflects the language in ICSID Rule 46(1), we consider it ambiguous as to whether "all aspects" of the proceedings must be consolidated, or whether "all aspects … sought to be consolidated" must be consolidated. We request clarification on the intention of this paragraph.

Secondly, and related to Australia's first query, Australia queries the formulation in paragraph 2 sentence one that consolidation shall 'result in a single decision'.

The UNICTRAL Rules distinguish between 'awards or other decision[s]', although both shall be made by a majority of arbitrators (UNCITRAL Rules, Article 33(1) and subject to Article 33(2)). A tribunal operating under these rules may make separate awards on different issues at different times, and these are final and binding on those issues (UNCITRAL Rules, Article 34(1)). The term 'decision' is not otherwise clarified. This differs to the ICSID Rules, under which an award is a decision made by a majority of votes of a tribunal's members which deals with every question submitted to the tribunal (ICSID Rules, Rule 46(2)). The ICSID Rules further provide that a tribunal shall make the orders and decisions required for the conduct of the proceeding (ICSID Rules, Rule 27(1)).

We query whether 'single decision' is intended to refer to only an 'award' or also 'other decision[s]' (as per Article 33(1)); that is, is it envisaged that consolidation could result in a decision which is not an award? We note that the relevant annotations to this provision do not explain the choice of the word 'decision' in place of 'award'.

Australia raises the same question in relation to the use of 'separate decisions' in sentence two of paragraph 2.

Additionally, Australia notes that paragraph 4 is not reflected in Rule 46 of the ICSID Rules.
If Draft Provision 11 is to be included in the UNCITRAL Rules, we suggest removing paragraph 4 so that it is left up to each underlying Agreement to specify the relationship between any consolidation and coordination provisions in that Agreement with the UNCITRAL rules.]

Draft Provision 12: Third-party funding

1. "Third-party funding" means the provision of any direct or indirect funding to a disputing party by a natural or legal person that is not a party to the proceeding but enters into an agreement to provide, or otherwise provides, funding ("third -party funder") for a proceeding either through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.
2. A disputing party in receipt of third-party funding shall disclose to the Tribunal and the other disputing party the following information:
   (c) The name and address of the third-party funder; and
   (c) The name and address of the beneficial owner of the third-party funder and any natural or legal person with decision-making authority for or on behalf of the third-party funder in relation to the proceeding.
   3. In addition, the Tribunal may require the funded party to disclose:

(c) Information regarding the funding agreement and the terms thereof;

(c) Whether the third-party funder agrees to cover any adverse cost award;

(c) Any right of the third-party funder to control or influence the management of the claim or the proceeding or to terminate the funding agreement;

(c) Any agreement between the third-party funder and the legal representative of the disputing party; and

(c) Any other information deemed necessary by the Tribunal.

4. The disputing party shall disclose the information listed in paragraph 2 when submitting its statement of claim, or if the funding agreement is entered into after the submission of the statement of claim, immediately thereafter. The disputing party shall disclose the information required by the Tribunal in accordance with paragraph 3 as promptly as possible.
5. If there is any new information or any change in the information disclosed in accordance with paragraphs 2 and 3, the disputing party shall disclose such information to the Tribunal and the other disputing party as promptly as possible.
6. The Tribunal may limit third-party funding in the following exceptional circumstances:

   (c) When the expected return to the third-party funder exceeds a reasonable amount;

   (c) When the number of cases that the third-party funder funds against the respondent Contracting Party with regard to the same measure exceeds a reasonable number; or

   (c) […].
7. If the disputing party fails to comply with the disclosure obligations in paragraphs 2 to 5, the Tribunal may:

   (c) Suspend or terminate the proceeding in accordance with Draft Provisions 6 or 7;

   (c) Order security for costs in accordance with Draft Provision 5; or

   (c) Take this fact into account when allocating costs in accordance with Draft Provision 9.
8. If the disputing parties receive funding which is not permissible under paragraph 6, the Tribunal may take the measures listed in paragraph 7 and in addition order the disputing party to terminate the funding agreement and to return any funding.

Comment

Australia sees merit in this provision and the disclosure of third-party funding in principle as a way of preventing conflict of interests, as well as enhancing transparency in the dispute process.

Australia proposes the following minor amendments to Draft Provision 12 paragraph (1), by inserting the word 'disputing' as a qualifier to provide clarity and ensuring that treaty parties are captured within the provision as drafted:

> "Third-party funding" means the provision of any direct or indirect funding to a disputing party by a natural or legal person that is not a <u>disputing</u> party in the proceeding but enters into an agreement to provide, or otherwise provides, funding ("third -party funder") for a proceeding either through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.