

Global Affairs Canada

Department of Justice



CANADA

Affaires mondiales Canada

Ministère de la Justice

125 Sussex Drive
Ottawa, Ontario
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September 8, 2021

Dear Secretary General Kinnear,

I write on behalf of the governments of Australia, Canada, Chile, Colombia, Costa Rica, Israel, Republic of Korea, Mexico, Peru, and Singapore in response to ICSID's Working Paper #5. We note that the preparation of this joint submission also involved discussions with the European Union. While the European Union and its Member States' governments are not formally joining this submission because of timing issues, we understand that these governments have made their own written submission which makes similar points.

As an initial matter, we would like to thank the Secretariat for its work so far on these amendments, and note with satisfaction the great progress that has been made to date. In reviewing Working Paper #5 and making these further comments, we have tried to show the utmost flexibility and, thus, have limited our further comments to only two remaining important issues: Arbitration Rules 14(1) and 52(2) (with the understanding that corresponding changes would be made to relevant Additional Facility Arbitration Rules). However, such flexibility should not be construed as a lack of support for the amendment of other Rules or a lack of support for the amendments that were previously proposed by our governments, whether individually or collectively.

With respect to Arbitration Rule 14(1), the governments making this submission suggest that this proposed Rule be amended by adding a sentence at the end of the paragraph which would read "**Where the non-party providing funds is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person.**" Including this additional sentence will ensure that important information about any third-party funder would be required to be disclosed. This would close a potentially significant loophole because as it is currently drafted the proposed rule could allow funders to hide their true identity through complex corporate structures. This information, which is already in the possession of the funder, will ensure, among other things, that conflicts checks can be completed accurately and fully at the appropriate time.

With respect to Arbitration Rule 52(2), the governments making this submission jointly propose amendments to the following sentence (with the amendments in **bold**): "If the Tribunal renders an Award **or a decision** pursuant to Rule 41(3) **upholding the objection pursuant to Rule 41(1) or parts thereof**, it shall award the prevailing party its reasonable costs, unless the

Tribunal determines that there are special circumstances justifying a different allocation of costs.” This amendment to the proposed text is important to ensure that the presumption applies where a part of a claim is dismissed as manifestly without legal merit, but another part of the claim survives. In our view, for example, there is no justifiable reason why the presumption would apply in cases where the whole case is dismissed as frivolous but not in the case where a number of the claims (even a vast majority) are dismissed as frivolous. The goal of this presumption is to deter the filing of frivolous claims, in whole or in part.

In the interests of transparency, and to further aid the reform process, the governments making this joint submission request that it be published.

Best Regards,

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