## Georgia's Comments and proposals to the amended ICSID Rules proposed by ICSID as provided in Working Paper #2:

| No | Rule Proposed by ICSID | Georgia's Comments and Proposals |
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| | **Administrative and Financial Regulations** | |
| **1** | **Regulation 14 – in relation to the issue of costs and efficiency** | Pursuant to the Working Paper #2, paragraph 22, in response to the comments by the states, ICSID has considered options to reduce arbitrators' fees for non-timely services, but at this stage decided not to "link the payment of the prescribed fees with the timeliness". We understand the reasoning behind this decision and recognize the importance of all other the procedures and tools included in amended rules to ensure efficiency; however, we still believe that there could be several ways to address the issue of efficiency and timeliness without introducing some drastic changes in the suggested fee-structure:<br>1. During the Second round of state consultations Canada has proposed to introduce a mechanism whereby arbitral tribunal will not be able to submit request for payment in case of delay of the award for the additional period of time they require to issue an award and will not be able to provide good justification for such delay. In case of such delay, arbitrator's fees could be suspended unless and until they present justification for the delay.<br>2. Inefficiency of arbitral tribunal/arbitrators or their failure to respect procedural time-limits could be considered by ICSID when considering the same persons for their possible appointment in future on other cases. During the second state consultations we have heard that ICSID |

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| | | is in fact paying due regard to such factors when making mandatory appointments of the members of the tribunal, however, it would be more effective if there is a written rule or guideline that could clearly provide for the criteria of appointing members of the tribunal by ICSID, including considering the efficiency and timeliness demonstrated on previous cases or the failures thereto. This could be an effective way to convey a message to the potential arbitrators that the efficiency and timely resolution of the case is of utmost importance and will be considered for their future appointments. ICSID Secretariat could be best places to suggest a proper pace and form of such regulation, be it in the Administrative and Financial Regulation or a separate legal instrument adopted within ICSID. |
| **Institutional Rules** | | |
| **2** | **Rule 2(2)** | It is very important that respondent state parties to the dispute are duly notified regarding the legal and factual basis of the dispute and the relief thought by the Claimant. The investigation of the facts and preparation of the defense requires ample time, resources and coordination inside (relevant governmental bodies and structures, or other entities involves) and outside (outside counsel, experts, etc.) the country. Therefore, it is crucially important that state receives this information as early on the case as possible. Base on the recent trends, states try more and more to include the requirements of the notice of dispute, including the information that it shall contain, in their investment treaties.<br><br>In the view of the above, it would be beneficial if this understanding is addressed and reflected in ICSID rules as well. We propose to include a language in Rule 2(2) of the Institutional Rules suggesting that the information included in the Request in not only for the purposes of the "jurisdiction of the Centre" but also to duly inform the respondent state party about the dispute initiated against it. |

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| | | Thus, Georgia proposes to amend the proposed Rule 2(2) in the following manner:<br>"*(2) With regard to the jurisdiction of the Centre and in order to duly inform the respondent state party to the dispute, the Request shall include:*<br><br>*(a) a description of the investment, a statement summary of the relevant facts and, claims, and the request for relief, and an indication that there is a legal dispute between the parties arising directly out of the investment;*" |
| **Arbitration Rules[1]** | | |
| **3** | **Rule 21(2)** | Georgia maintains its position regarding automatic suspension of arbitration proceedings during the proceedings on disqualification (See Georgia's comment to Working Paper #1[2]). As suggested in our previous comment, |

[1] Georgia's comments and proposals with respect to the amended Arbitration Rules proposed by ICSID shall equally extend to the corresponding provisions of the amended Additional Facility Arbitration Rules proposed by ICSID.

[2] "Georgia proposes to include an exception to the general rule on suspension of proceedings during the vacancy, whereby the Chairman of the Administrative Council or the Secretary General, as appropriate, could allow the proceedings to continue pending the procedures to fill-in the vacancy with the agreement of the parties. There can be situations when the vacancy appears at a stage of the proceedings when the arbitral tribunal has a very limited involvement (for example, the stage of written submissions of the parties). In such cases suspension of the proceedings would prolong the process without serving any reasonable or practical purpose. In such situations it would be useful if there was a possibility for continuing the proceedings according to the procedural timetable (subject to reasonable extensions of times as requested by the parties later) with the consent of the parties to the dispute.

The Convention (including Article 56) does not provide anything regarding the suspension of the proceedings in case of vacancy. Georgia also tends to believe that content and context of Article 56 and in particular the phrase - "[Tribunal's] composition shall remain unchanged" - does not exclude the possibility of continuing proceedings pending the procedure to fill-in the vacancy. The composition of the Tribunal is not altered by not suspending proceedings; the vacancy will be filled-in to reinstate the composition of the tribunal and in the meantime no decisions would be taken by the reminder of the tribunal (accept for the matters that President is authorized to decide individually)."

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| | | there can be situations when the proposal for disqualification is filed at a stage of the proceedings when the arbitral tribunal has a very limited involvement (for example, the stage of written submissions of the parties). In such cases suspension of the proceedings would prolong the process without serving any reasonable or practical purpose.<br><br>We still believe that some middle approach can be found: if the timing on the proceedings allows, procedural calendar may be maintained but powers of the arbitral tribunal to issue decisions suspended. This decision could be made by the Chairman of the Administrative Council or the Secretary General, as appropriate, upon the request of the part. This could be a good possibility to on the one hand, avoid unnecessary prolongation of proceedings and the delay of the final resolution of the case, and on the other hand, a good tool to disincentives a party to use the procedure of disqualification for dilatory tactics on the matter. |
| **4** | **Rule 36** | Document production is one of the most painful stages of the proceedings; on some cases it can results in an unreasonably lengthy and costly exercise. It has been noted in paragraph 241 of the Working Paper #2 that the arbitral tribunal has a "power to grant, deny or modify the scope of the document production", however, in practice arbitrators tend to be reluctant to use their inherent powers to properly address the lengthy and/or unreasonable production requests or abusive conduct of the party during documents production process (fishing expeditions, dilatory tactics, obstructing the other party in preparing its case and directing its resources thereto by endless written exchange on document production, etc.).<br><br>It would be highly beneficial if this problem is somehow addressed in the rules or in a separate instrument issued within ICSID that could provide guidance to the tribunal and encourage arbitrators to use their inherent powers more effectively in addressing this problem. |

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| **5** | **Rule 42BIS(3)** | In Georgia's understanding, bifurcation in relation to the preliminary objections is a very useful tool to avoid spending additional resources on a matter that might successfully disappear as a result of the decision on preliminary objections. Therefore, we believe that unlike other situations, in terms of time and cost effectiveness, it will make more sense if in case of bifurcation arbitration proceedings are automatically suspended on a compulsory basis. The only exception to this rule could be if parties to the dispute agree otherwise.<br><br>In the view of the above, Georgia proposes to delete sub-paragraph (a) of Article 42BIS (3) and introduce a separate paragraph providing that the proceedings on the merits are automatically suspended unless the parties to the dispute agree otherwise. |
| **6** | **Rule 44(7)** | We believe that the application to judicial authorities should not require prior consent of the disputing parties and should be available in addition to the power of the Arbitral Tribunal to grant such measures. In our view, such approach would not be in contradiction with Article 26 of the Convention, since we understand it to refer to the exclusivity of ICSID jurisdiction with respect to the subject-matter of the dispute that is to be decide by ICSID Tribunal with a final and binding award. In the same way, disputing parties or ICSID Tribunals could refer to domestic courts for the assistance in collection of evidence. Besides, involvement of national courts might be necessary for the enforcement of the measures granted by the Tribunal anyways. Therefore, we are convinced that the exclusivity of ICSID jurisdiction cannot be undermined by recognizing in the ICSID Arbitration Rules the authority of local courts to order provisional measures.<br><br>We believe that the possibility to apply to the local courts for provisional measures may be an important tool for the disputing party in need of such measures. This remedy might be especially important on a very early stage of the proceedings until the Tribunal is constituted, since in practice considerable |

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| | | time can go by from the date of the Request for Arbitration until the constitution of the tribunal that can be detrimental for a disputing party in need of the provisional measures. Therefore, Georgia suggests to remove any additional consent requirements with regard to the authority of judicial bodies to order provisional measures upon the request of the disputing party. |
| **7** | **Rule 47(a)** | Dose notion of "the legal fees and expenses of the Parties" include fees and expenses of party-appointed experts? Paragraph (b) makes explicit reference to the fees and expenses of Tribunal-appointed experts that might provide basis for some misinterpretation whether the same expenses regarding the Party-appointed experts are included in paragraph (a). Therefore, it might be useful to explicitly include fees and expenses of party-appointed experts in paragraph (a) as well or at least clarify in the Working Paper that "the legal fees and expenses of the Parties" contemplate such costs incurred by the parties as well. |
| **8** | **Chapter X** | Based on the discussion during the second state consultations and concerns expressed by delegations of other states, Georgia maintains its position regarding the necessity to establish more balanced approach with respect to the transparency in investor-state arbitration. In particular, we propose to include certain exceptions to the proposed regime of transparency in order to protect integrity of the arbitral process and guarantee the effective resolution of the dispute. (See Georgia's comments to Working Paper #1[3]) |

[3] "Georgia believes that there should be certain balance between the need and desire for more publicity on investor-state arbitration matters and related proceedings, on the one hand, and the integrity of arbitral proceedings and effective resolution of the disputes, on the other hand. In this context, we believe that together with the new regulations enshrined in the proposed rules on publicity in Chapter VII, there should be a rule and the respective procedure providing for the exception to the proposed rules on publicity; in particular, such exceptions should aim to avoid jeopardizing integrity of the arbitral process or the effective resolution of the dispute that should be the primary goal in investor-state arbitration proceedings.

Article 7(6)(7) of the Rules on Transparency in Treaty-based Investor-State Arbitration could be a good guidance in regard to this issue."

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| | | In addition, we would like support the proposal made by the delegation of Australia and several other delegations during the second state consultations to introduce some language in the relevant part of this Chapter regarding the protection of confidential or otherwise privileged or protected information of the state party or that of the investor party to the dispute (such as state, commercial or bank secret, business confidential information or personal date). Inclusion of similar language is very common in free trade agreements, including in dispute settlement chapters, as well as in new generation investment treaties (whether as a general exception or as part of the dispute settlement procedure). |
| **9** | **Rule 66(1)** | Georgia proposes to maintain the version of the Rule 66(1) as proposed in Working Paper #2. In particular, Georgia believes that the participation of the Non-disputing Treaty Party (NDTP) in investor-state arbitration is important in order to make sure that the treaty is interpreted accurately in compliance with the will of the contracting parties and the meaning attributed to the terms of the treaty by the latter. In our understanding the aim of extending the possibility to the NDTPs in investor-state arbitration proceedings is to ensure correct and consistent interpretation of treaty provisions by the arbitral tribunals, which have been extensively criticized lately on this subject. However, the participation of NDTPs should not go beyond assisting the disputing parties and the arbitral tribunal in interpreting the treaty terms, i.e. NDTPs should not have a possibility to argue the case or dispute or comment in any manner on factual or legal evidence presented by the parties to the dispute.<br><br>Extending the scope of the NDTP's participation to the "application" of the treaty might provide possibility for non-disputing Treaty Parties to attempt arguing the case or somehow effecting the outcome on the case. |

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| | | In case any issue with respect to the application of the treaty arises Contracting State Parties to the Treaty at hand can always discuss or argue through the mechanism of Inter-State negotiations or Inter-State dispute settlement that is provided in almost all investment treaties (Settlement of Disputes Between Contracting Parties). |