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**AMENDMENTS TO ICSID ARBITRATION RULES:  
PROPOSALS OF UKRAINE**

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**Introduction**

1. This note sets out Ukraine’s proposals on draft ICSID Arbitration Rules further to the consultations held in the ICSID headquarters in Washington, D.C. on 26 and 27 September 2018.
2. Capitalised terms used and not otherwise defined in this note shall have the following meanings:
  - (a) the “Arbitration Rules” – ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) in effect from 10 April 2006;
  - (b) the “Convention” – Convention on the Settlement of Investment Disputes between States and Nationals of Other States;
  - (c) the “ICSID Draft” – ICSID Convention Arbitration Rules, a part of Proposals for Amendment of the ICSID Rules of 2 August 2018;
  - (d) the “SG” – Secretary General of ICSID.
3. The proposed amendments are set out in a comparative table that is produced as Annex 1 to this note.

**Rules 8(1) and 9(2): extension of time limits**

4. The ICSID Draft takes the following approach to extensions of time:
  - (a) time limits set by Convention or by the Secretary General may be extended by agreement of the parties but not by the SG or the Tribunal upon application of a party;
  - (b) time limits set by the Tribunal may be extended by the Tribunal itself (upon application of a party) but not by agreement of the parties;
  - (c) an application for extension of time can be made prior to the expiry of the time limit, which suggests that the application can be made literally at any time before 11.59pm of the last day of the time limit (Rule 7(2)).
5. The ICSID Draft would benefit from taking the same approach to extension of time limits of all kinds, i.e. those set by the Convention or the SG or the Tribunal. The parties should endeavor to agree on an extension and approach the Tribunal or the SG absent an agreement. There is no reason why certain route for extension should be available for one kind of time limits and not for the others.
6. There is also room for improvement of rules on timing of applications for extension of time. An application should be made in the time that allows the Tribunal to deliberate and take a considered decision on the application; the Rules should not encourage last-minute applications that cause difficulties to everyone involved in the arbitration.

7. We would propose, accordingly, the following amendments to the rules on extensions of time limits:
  - (a) first, that time limits of all kinds be amenable to extension both by agreement of the parties or, absent such an agreement, by the SG or the Tribunal upon a reasoned application of a party; and
  - (b) second, that an application for extension of a time limit be made in reasonable time before, not just before, the expiry of the time limit.

**Rule 21(1): definition of third-party funding**

8. It appears that the definition of third-party funding has been intended to be as much embracing as possible. Indeed, to serve its purpose, the definition must include every form of TPF that is in existence now and, to the extent possible, may emerge in the years to come.
9. With this in mind, there appear to be the following possible areas for improvement of the definition:
  - (a) first, the reference to a “natural or juridical person” may not include all possible TPF providers. Notably, the definition of TPF as it stands does not include the provision of funds or other material support by a state since a state is not by definition a “natural or juridical person”. It is desirable, accordingly, to use a broader notion, and it is proposed to refer to a “person” rather than a “natural or juridical person”;
  - (b) second, the reference to a “a law firm representing that party” does not include all types of legal representatives that may act on behalf of the party receiving TPF. The definition as it stands leaves out sole practitioners and organisations that may act on behalf of the party but are not as such incorporated or constituted as law firms. In order to embrace all the possibilities, it is suggested to refer to “a counsel, advisor, or representative” rather than a law firm representing the party; and
  - (c) third, the forms of TPF referred to in Rules 21(1)(a) and 21(1)(b) may not embrace all varieties of TPF, and there remains room for interpretation that the list of TPF forms is not exhaustive. It is desirable, therefore, to make it clear that the list is exhaustive and that the forms of TPF are only provided by way of example.

**Rule 36(6): timing of decision on preliminary objections in bifurcated proceedings**

10. Rule 36(6) needs to make it clear that the shorter time limits for decision on preliminary objections (180 days after the last written or oral submission on the objections) apply only if the Tribunal decides to deal with the preliminary objection in a separate phase pursuant to Rule 37. Otherwise, if the Tribunal decides not to bifurcate the proceeding, and the decision on preliminary objections is joined to the award on merits, the default rule applies that the award shall be rendered no later than 240 days after the last submission (Rule 59(1)(c)).

**Rules 40(2) and 42: inquisitional powers of the Tribunal in respect of evidence**

11. Rule 40(2) of the ICSID Draft empowers the Tribunal to order, on its own initiative, a party to produce documents or other evidence; Rule 42 empowers the Tribunal to appoint independent experts.

12. The new Rule 40(2) appears to be a recast Rule 34(2)(a) of the effective Arbitration Rules with one significant modification: the new Rule 40(2) expressly empowers the Tribunal to act on its own initiative. Rule 42 appears to have no counterpart at all in the effective Arbitration Rules.
13. The proposed new inquisitional powers of the Tribunal are not fully consistent with the adversarial nature of arbitration and may frustrate parties' expectations of the conduct of arbitration.
14. Notably, the practical application of Rule 40(2) may result in undesirable outcomes where the Tribunal orders one party to produce a document material to the dispute (the materiality may be to the point of being dispositive for the entire arbitration) which the other party, by omission, has failed to request. In doing so, the Tribunal may play in the hands of one party to the detriment of the other, and that may give rise to due process concerns.
15. Rule 42 may tempt the Tribunal to appoint an independent expert in every instance where the party-appointed experts disagree – and they almost always disagree – which will add significantly to the costs of arbitration and give rise to a risk of the Tribunal-appointed expert assuming the role of the Tribunal on the matters referred to expert determination. A more practical approach appears to be to allow the Tribunal to choose between testimonies of the party-appointed experts.
16. If the parties are content to grant the Tribunal the inquisitional powers in respect of evidence, the parties are free to agree so to the deviation from the default rule that Tribunal has no such inquisitional powers, which agreement may be endorsed in a procedural order of the Tribunal. There appears to be, however, no reason to change the default rule itself.

#### **Rule 51: the party entitled to seek security for costs**

17. The ICSID Draft makes the remedy of security for costs available to “a party” to arbitration rather than to the respondent alone, which is not acceptable.
18. Firstly, that security for costs is made available to the claimant, on top of the respondent, is not consistent with the internal logic of the ICSID Draft. Draft Rule 51(4) empowers the Tribunal to suspend the proceeding if a party fails to comply with an order for security for costs, and discontinue the proceeding if it is suspended for more than 90 days. From the claimant's perspective, suspension or discontinuance of the proceeding would be the most undesirable outcome, and it would be, indeed, inappropriate to allow the respondent to essentially shut down the claim by just having failed to comply with an order for security for costs.
19. Secondly, security for costs has historically been a remedy available to respondents against impecunious claimants, and not the other way around. There are sound considerations behind that principle: a claimant can choose a respondent to sue, and the claimant is able to refrain from suing an impecunious respondent. A respondent, however, has no such a freedom of choice, and the respondent will have to defend a claim even if the claimant is impecunious. That is why, unlike a claimant whose self-help remedy is a considered choice of respondents, a respondent is in an acute need for a remedy of security for costs.
20. It is proposed, therefore, that the remedy of security for costs be made available to respondents rather than to all parties to arbitration.

#### **Rule 69(3): document production and extensions of time in expedited proceedings**

21. Extensions of various time limits and document production patently affect the length of arbitral proceedings.
22. The ICSID Draft seeks to exclude the application of Rule 8(1) but not Rule 9(2), with the result that it will be impossible to extend time limits set by the SG or the Convention but not those set by the Tribunal.
23. This gives rise to two issues:
  - (a) first, if there should be different treatment of time limits set by the SG or the Convention, on one hand, and time limits set by the Tribunal, on the other. There appears to be no discernible reason for that; and
  - (b) second, whether expedited proceedings indeed require a complete ban on extensions of time limits, and there appears to be no reason why the Rules should go that far.
24. It is proposed, accordingly, that extension of all kinds of time limits be allowed in expedited proceedings in the usual way.
25. Since document production is a much more time consuming exercise and requires significant resources of the parties (which extension of time, of itself, does not), it is proposed to forego document production in expedited proceedings entirely – unless the parties decide to opt in document production and agree otherwise.

**ANNEX 1: COMPARATIVE TABLE**

<b>current</b>	<b>proposed</b>	<b>comparison</b>
<b>Rule 8(1)</b>		
The parties may agree to extend a time limit fixed by the Secretary-General or specified by the Convention or these Rules if such time limit is not mandatory under the Convention.	A time limit fixed by the Secretary-General or specified by the Convention or these Rules, provided that such time limit is not mandatory under the Convention, may be extended by agreement of the parties or, absent such an agreement, by the Secretary General upon reasoned application by a party made in reasonable time prior to the expiry of the time limit.	<del>The parties may agree to extend a</del> <u>A</u> time limit fixed by the Secretary-General or specified by the Convention or these Rules, <del>provided that</del> <del>if</del> such time limit is not mandatory under the Convention <del>;</del> , <u>may be extended by agreement of the parties or, absent such an agreement, by the Secretary General upon reasoned application by a party made in reasonable time prior to the expiry of the time limit.</u>
<b>Rule 9(2)</b>		
The Tribunal may extend a time limit it fixed upon reasoned application by a party made prior to the expiry of the time limit. The Tribunal may delegate this power to its President.	A time limit fixed by the Tribunal may be extended by agreement of the parties or, absent such an agreement, by the Tribunal upon reasoned application by a party made in reasonable time prior to the expiry of the time limit, which power the Tribunal may delegate to its President.	<del>The Tribunal may extend a</del> <u>A</u> time limit <del>it fixed by the Tribunal</del> <u>may be extended by agreement of the parties or, absent such an agreement, by the Tribunal</u> upon reasoned application by a party made <u>in reasonable time</u> prior to the expiry of the time limit <del>;</del> , <u>which power</u> <del>The Tribunal may delegate this power to its President.</del>
<b>Rule 21(1)</b>		

<p>“Third-party funding” is the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute (“third-party funder”), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided:</p> <p>(a) through a donation or grant; or</p> <p>(b) in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.</p>	<p>“Third-party funding” is the provision of funds or other material support for the pursuit or defense of a proceeding, by a person that is not a party to the dispute (“third-party funder”), to a party to the proceeding, an affiliate of that party, a counsel, advisor, or representative of that party. Such funds or material support may be provided, without limitation, through a donation or grant, in return for a premium, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.</p>	<p>“Third-party funding” is the provision of funds or other material support for the pursuit or defense of a proceeding, by a <del>natural or juridical</del> person that is not a party to the dispute (“third-party funder”), to a party to the proceeding, an affiliate of that party, <del>or a law firm representing a counsel, advisor, or representative of</del> that party. Such funds or material support may be provided, <u>without limitation</u>,: <del>(a)</del> through a donation or grant,; <del>or (b)</del> in return for a premium, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.</p>
<b>Rule 36(6)</b>		
<p>The Tribunal shall issue its decision on the preliminary objection within 180 days after the last written or oral submission on the objection.</p>	<p>If the Tribunal decides to address the preliminary objection in a separate phase pursuant to Rule 37, the Tribunal shall issue its decision on the preliminary objection within 180 days after the last written or oral submission on the objection.</p>	<p><u>If the Tribunal decides to address the preliminary objection in a separate phase pursuant to Rule 37,</u> <del>The</del> Tribunal shall issue its decision on the preliminary objection within 180 days after the last written or oral submission on the objection.</p>
<b>Rule 40(2)</b>		
<p>The Tribunal may at any time on its own initiative order a party to produce documents or other evidence.</p>	–	<p><del>The Tribunal may at any time on its own initiative order a party to produce documents or other evidence.</del></p>
<b>Rule 42</b>		
<p>1) The Tribunal may appoint one or more independent experts to report to it on specific matters.</p> <p>(2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference of the expert.</p>	–	<p><del>1) The Tribunal may appoint one or more independent experts to report to it on specific matters.</del></p> <p><del>(2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference of the expert.</del></p>

<b>Rule 51(1)</b>		
A party may request that the Tribunal order the other party to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.	The respondent may request that the Tribunal order the claimant to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.	<del>A party</del> <u>The respondent</u> may request that the Tribunal order the <del>other party</del> <u>claimant</u> to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.
<b>Rule 51(2)(c)</b>		
if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and	if the respondent requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and	if <del>a party</del> <u>the respondent</u> requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and
<b>Rule 51(3)</b>		
In determining whether to order a party to provide security for costs, the Tribunal shall consider the party's ability to comply with an adverse decision on costs and any other relevant circumstances.	In determining whether to order the claimant to provide security for costs, the Tribunal shall consider the claimant's ability to comply with an adverse decision on costs and any other relevant circumstances.	In determining whether to order <del>a party</del> <u>the claimant</u> to provide security for costs, the Tribunal shall consider the <del>party's</del> <u>claimant's</u> ability to comply with an adverse decision on costs and any other relevant circumstances.
<b>Rule 51(4)</b>		
If a party fails to comply with an order for security for costs, the Tribunal may suspend the proceeding until the security is provided. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.	If the claimant fails to comply with an order for security for costs, the Tribunal may suspend the proceeding until the security is provided. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.	If <del>a party</del> <u>the claimant</u> fails to comply with an order for security for costs, the Tribunal may suspend the proceeding until the security is provided. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.
<b>Rule 69(3)</b>		

<p>Chapters I-XI of the Arbitration Rules shall apply to an expedited arbitration except that:</p> <p>(a) Rules 8(1), 22, 23, 25, 35, 37, 38, 42, and 43 do not apply in an expedited arbitration pursuant to this Chapter; and</p> <p>(b) Rules 26, 30, 34, 36, 40, 53, 59, 62 and 66, as modified by Rules 70-78, apply in an expedited arbitration pursuant to this Chapter.</p>	<p>Chapters I-XI of the Arbitration Rules shall apply to an expedited arbitration except that:</p> <p>(a) Rules 22, 23, 25, 35, 37, 38, 42, and 43 do not apply in an expedited arbitration pursuant to this Chapter;</p> <p>(b) Rules 26, 30, 34, 36, 53, 59, 62 and 66, as modified by Rules 70-78, apply in an expedited arbitration pursuant to this Chapter; and</p> <p>(c) Rule 40 does not apply in an expedited arbitration pursuant to this Chapter unless the parties agree otherwise.</p>	<p>Chapters I-XI of the Arbitration Rules shall apply to an expedited arbitration except that:</p> <p>(a) Rules <del>8(1)</del>, 22, 23, 25, 35, 37, 38, 42, and 43 do not apply in an expedited arbitration pursuant to this Chapter; <del>and</del></p> <p>(b) Rules 26, 30, 34, 36, <del>40</del>, 53, 59, 62 and 66, as modified by Rules 70-78, apply in an expedited arbitration pursuant to this Chapter-; <u>and</u></p> <p><u>(c) Rule 40 does not apply in an expedited arbitration pursuant to this Chapter unless the parties agree otherwise.</u></p>
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