

Proposals for the ICSID Rule Amendment Process (Japan)

1. Further to the publication of the set of proposed amendments for the ICSID rules (“working paper”) by ICSID on August 2, 2018 and the consultation held on September 26 and 27, 2018, Japan submits the following proposals for consideration.

2. AR – Rule 11 (General Duties)

Japan appreciates that the equal opportunity for parties and expeditious and cost-effective proceedings, as proposed in Rule 11 of the Arbitration Rules in the working paper, are fundamental guiding principles of proceedings, both of which are of great value to incorporate in the amended rules.

Adding to these important principles, Japan proposes to include also a provision regarding parties' responsibility to act in good faith. Despite the abstract nature of the additional provision regarding parties' responsibility to act in good faith, Japan is of the view that it would be imperative to add this principle so that it would prevail in all instances in the implementation of the procedural rules.

Given the significance of the set of guiding principles for the ICSID arbitration procedures as stipulated in proposed Rule 11, Japan also proposes to move this article on general duties to the first few set of provisions, perhaps to Rule 2 of the Arbitration Rules in the working paper.

AR – Rule 11 (General Duties) → **AR – Rule 2 (General Duties)**

(1) The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case.

(2) The Tribunal shall consult with the parties prior to making an order or decision authorized by these Rules to be made by a Tribunal on its own initiative.

(2)bis The parties shall conduct the proceeding in good faith.

(3) The Tribunal and the parties shall conduct the proceeding in an expeditious and cost-effective manner.

(4) The parties shall cooperate in implementing the Tribunal's orders and decisions.

3. AR – Rule 9 (Time Limits Fixed by the Tribunal)

Japan recognizes that Rule 9 of the Arbitration Rules in the working paper is aimed at encouraging parties to meet reasonable time limits and achieving the acceleration and cost efficiency of proceedings, consistent with the guiding principles of proceedings provided for in Rule 11 of the Arbitration Rules in the working paper, as amended by Japan's abovementioned proposal to include parties' responsibility to conduct proceedings in good faith.

In this connection, in Japan's view, not only is it important to address the issue of actions taken by parties after expiration of time limits, there is also a need to address the issue of submissions and evidence presented at an excessively late stage of proceedings which would inevitably cause proceedings to extend. With full respect to the guiding principles of proceedings as described above, submissions and evidence must be presented in a timely fashion in the reasonable course of proceedings. It is crucial to make clear that no surprises that will prolong the conclusion of the case may be tolerated. At the same time, it is important to keep in mind that there are some circumstances where late submissions by parties are not avoidable for good reason. To this end, Japan proposes, as Rule 9bis, a provision to vest Tribunals with authority to disregard late submissions and evidence under specific circumstances where a party is deemed to have acted in an unfaithful manner.

AR - Rule 9 (Time Limits Fixed by the Tribunal)

(1) The Tribunal shall fix time limits for completion of each step in the proceeding, other than time limits specified by the Convention or these Rules.

(2) 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.

(3) The Tribunal shall disregard any step taken after expiry of a time limit it fixed unless it concludes that there are special circumstances justifying the delay.

AR – Rule 9bis (Addressing Late Submissions)

The Tribunal may disregard, upon application by a party, any statement contained in submissions or evidence when it finds that the statement was presented with unreasonable delay, intentionally or by gross negligence, and that further consideration of the statement will prolong the conclusion of the case.

4. AR – Rule 14 (Case Management Conference)

Japan recognizes Rule 14 of the Arbitration Rules in the working paper to be an important amendment that would empower Tribunals to manage cases in a proactive manner and enable them to get to the heart of the dispute without delay. This proposed rule should be implemented in a manner consistent with the guiding principles, provided for in Rule 11 of the Arbitration Rules in the working paper, as amended by Japan's abovementioned proposal to include parties' responsibility to conduct proceedings in good faith. To improve the effectiveness of proposed Rule 14 in line with the guiding principles, Japan proposes the following amendments. With these amendments, Tribunals should be able to actively interact with parties with a view to specifying the issues at dispute. Once the issues in dispute are specified through the case management conference amongst the Tribunal and the parties, the Tribunal will have legitimate grounds to convince, as necessary, the parties that the process should be respected and the process should basically not be revisited. Japan especially sees advantage in proposed Rule 14, providing for the convening of a case management conference, when it is implemented to function together with Japan's abovementioned proposal for Rule 9bis aimed at addressing late submissions.

AR – Rule 14 (Case Management Conference)

With a view to expediting the proceeding, the Tribunal may convene a case management conference with the parties at any time to:

(a) identify uncontested facts;

(a)bis clarify the content of submissions;

(b) narrow **and specify** the issues in dispute; and

(c) address any other procedural or substantive issue related to the resolution of the dispute.

5. AR – Rule 42 (Tribunal-Appointed Experts)

Japan recognizes that cases which require knowledge of a specific field of expertise generally tend to take longer than others and that it is indispensable for Tribunals to seek the relevant expert's assistance at an early stage of proceedings so as to identify the core issue in dispute without delay. In this regard, Japan

appreciates the secretariat's attempt to incorporate current practices, as reflected in Rule 42 of the Arbitration Rules in the working paper.

Considering the likeliness that Tribunals would depend more on Tribunal-appointed experts than it would on party-appointed experts, Japan proposes the following amendment so that Tribunals would make a careful assessment on the independence and impartiality necessary for Tribunal-appointed experts.

AR – Rule 42 (Tribunal-Appointed Experts)

(1) The Tribunal may appoint one or more independent experts to report to it on specific matters.

(2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference of the expert.

(2)bis The Tribunal shall take into account the expert's independence, impartiality and availability upon its appointment.

(3) The parties shall provide the Tribunal-appointed expert with any information, document or other evidence that the expert may require. The Tribunal shall decide any dispute regarding the evidence required by the Tribunal-appointed expert.

(4) The parties shall have the right to make written or oral submissions on the report of the Tribunal-appointed expert.

(5) Rule 41(1)-(5) and (8) shall apply, with necessary modifications, to the Tribunal-appointed expert.

6. AF Rules – Article 1 (Definitions)

Japan recognizes that Article 1(8) has been proposed in consideration of the possibility that the Article 67 of the Convention might be amended and would allow REIOs to join the Convention in the future.

However, Japan proposes to delete the proposed Article 1(8) to preclude any prejudice to future discussions on the amendment of the Convention. The necessity of the definition of "Contracting REIO", in Japan's view, should be discussed under a process for the amendment of the Convention.

AF Rules – Article 1 (Definitions)

- (1) "Secretariat" means the Secretariat of the Centre.
- (2) "Centre" means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention.
- (3) "Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which entered into force on October 14, 1966
- (4) "Regional Economic Integration Organization" or "REIO" means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to take decisions binding on them in respect of those matters.
- (5) "National of another State" means, unless otherwise agreed:
 - (a) a natural person that is not, at the date of consent to the proceeding and at the date of the Request, a national of the State party to the dispute, or a national of any constituent State of the REIO party to the dispute;
 - (b) a juridical person that is not, at the date of consent to the proceeding, a national of the State party to the dispute, or a national of any constituent State of the REIO party to the dispute; and
 - (c) any juridical person that is, at the date of consent to the proceeding, a national of the State party to the dispute or that is a national of any constituent State of the REIO party to the dispute, and which the parties agree not to treat as a national of that State for the purpose of these Rules.
- (6) "Request" means a request for arbitration, conciliation, fact-finding or mediation.
- (7) "Contracting State" means a State for which the Convention is in force.
- ~~(8) "Contracting REIO" means an REIO for which the Convention is in force.~~