

**SUBMISSION OF THE REPUBLIC OF TURKEY
REGARDING PROPOSED AMENDMENT OF THE ICSID RULES**

July, 30, 2020

Without prejudice

Turkey respectfully submits its comments on the amendments to the ICSID Rules proposed in Working Paper #4. We also note that Turkey's comments on the proposed changes to the Arbitration Rules are set out below and those comments refers only to those proposals in Working Paper #4 and any absence of comment by Turkey should not be taken to mean that Turkey agrees with the explanations provided by the Secretariat in Working Paper #4.

4- ARBITRATION RULES FOR ICSID CONVENTION PROCEEDINGS

Rule 19- Acceptance of Appointment

The rule can refer to Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, and unless otherwise agreed by the parties, the parties and the members of the Tribunal agrees to apply the Draft Ethical Code.

Rule 22,23- Proposal for Disqualification of Arbitrators, Decision on the Proposal for Disqualification

Turkey would like to comment and repeat its concerns on both rules 22 and 23 together. Even though, the Article 58 of the ICSID Convention states that the decision on any proposal to disqualify an arbitrator shall be taken by the other members of the tribunal, we believe that the procedure for disqualification of arbitrators should be more transparent and needs to be tailored with the objective of ensuring full impartiality and independence of the arbitral tribunal.

Turkey would like to address the revision of the rules on the disqualification of arbitrators from two perspectives:

Firstly; the disqualification procedure, which is based on a review by the arbitral tribunal members themselves, should be revised. As ISDS mechanism would lead to some disputes, it is a legitimate expectation of states that the mechanism ensures the independence and impartiality of arbitrators. These expectations of states are recently being reflected in the

arbitration rules of different ISDS mechanisms, such as the Article 27 of the Singapore Arbitration Center's Investment Rules where the disqualification procedure is not run by the tribunal itself, but by the Court. Therefore, to maintain objectivity in the ICSID mechanism, Rules 22 and 23 may be amended in a similar way so that the disqualification procedure is held by an objective body instead of the tribunal itself. Likewise, under the Arbitration Rules of Stockholm Chamber of Commerce (SCC) Arbitration Institute, London Court of International Arbitration (LCIA) Rules, International Chamber of Commerce (ICC) Rules of Arbitration, and American Arbitration Association (AAA) International Center for Dispute Resolution (ICDR) Rules provide a similar mechanism.

Secondly; the disqualification rules should provide an objective criterion for disqualification. In practice, most decisions are based on "manifest lack of quality" test. Under such a test, the challenging party is required to purport evidence on the high probability that the challenged arbitrator is manifestly biased or unable to judge independently. Therefore, Turkey proposes replacing manifest lack of quality test with "justifiable doubt test" as applied in the UNCITRAL Arbitration Rules. The Rules may specify the grounds for disqualification of an arbitrator; parallel to the grounds in institutional rules.

Moreover, ICSID Additional Facility Arbitration Rules [Rule 30/1(b)] provides that a party may file a proposal to disqualify one or more arbitrators on the ground that circumstances exist give rise to justifiable doubts as to the qualities of the arbitrator required by the Rule 22, including impartiality and independence. In this regard, there is no reason why there is a basic difference between ICSID Additional Facility Arbitration Rule 30/1(b) and ICSID Arbitration Rule 22 in terms of disqualification threshold. Both rules aim and serve to ensure impartiality and independence in dispute settlement processes. Therefore, we believe that disqualification threshold of ICSID Arbitration Rules should be revised in accordance with the ICSID Additional Facility Arbitration Rules [Rule 30/1(b)].

In addition, there might be reference to "Code of Conduct for Adjudicators in Investor-State Dispute Settlement" on the qualifications of the arbitrators.

Therefore, Turkey suggests that the justifiable doubt test should be stated in the rule or as an Explanatory Note. It should be noted that Explanatory Note would not be contrary to the Convention itself, which is also applied by the UNCITRAL. The disqualification procedure is to be run by an independent objective body, therefore the ICSID Secretariat should at least be involved on the application for challenge of arbitrators, such as able to give a commentary or guidance the Tribunals and attend the deliberations for challenge, parallel to newly suggested

Rule 34 (“may be assisted by the Secretary of the Tribunal”) and/or similar observatory or supervisory mechanism.

Rule 32 – Hearings

Article 32 of the Arbitration Rules states that “2. *The President of the Tribunal shall determine the date, time and method of holding a hearing after consulting with the other members of the Tribunal and the parties.*” While in arbitration the main principle is parties’ consent, according to the sub-paragraph 2 of the Article 32 the authority of deciding the method of holding a hearing is delegated to a tribunal against to this main principle.

Turkey suggests that the form of hearings should be decided on the consent of the parties. In other words, if one party does not consent on the method proposed by the other party or the tribunal, the proposed method should not have an effect. This position is more appropriate than delegating the power to a tribunal taking the right of fair trial and due process right of parties into account.

As stated by the Article 31 of the WP#2 Draft Arbitration Rules by the Secretariat, the prevalent practice is in-person hearing.

Other methods of hearing (remote-online-virtual hearings) are envisaged to provide flexibility for the participation of an expert, witness, or Tribunal Member via video conferencing in exceptional cases. Therefore, Turkey suggests adding a default rule to Article 32, which requires that the hearings shall be held in-person unless otherwise agreed by the parties, with reserve to exceptional circumstances.

Rules 47- Provisional Measures

Provisional measure is regulated comprehensively in the Article 47 of the WP#4, the same as the WP#3. Turkey wants to put an emphasis on the recommendatory nature of the provisional measures in accordance with the previous comments given for the WP#3. Thus, although the word “recommend” is used in the Article, different interpretations are brought in practice. As Secretariat underlined during the WP#3 meeting, it is a recommendation, not an order. Turkey suggests that Article 47, which is regulated as recommendatory, should be revised or the ICSID Convention should devise an Explanatory Note stating that:

- The tribunals may only recommend provisional measures on the subject matter of investment dispute,

- The provisional measure is applied in extraordinary and exceptional circumstances. Therefore, Turkey suggests the addition of an emphasis which explicitly states that provisional measures are non-binding upon parties,

- Tribunals cannot grant provisional measures which interfere with the Contracting States' sovereign rights and contradict with the constitutional provisions of the Contracting States and the principles of the national legal framework,
- Lastly, provisional measures shall be urgent, necessary and proportionate, and also shall only be granted in exceptional circumstances.

We believe that the above note could be added at least as an Explanatory Note. The ICSID Secretariat in the WP#3 Meeting (in Washington DC in November 2019) confirmed its view that tribunals only have the power to “recommend” non-binding measures according to Article 47 of the Convention and Rule 39 of the ICSID Rules, in reply to our inquiry. However, some ICSID tribunals have interpreted this term in the same vein as the term “order”, such as *Maffezini*¹ case, and followed by many tribunals, including in *Pey Casado* and others² in the view of so-called *jurisprudence constante*. We believe that, we as rule makers of the Rules, should expressly explain the meaning and the intent of the term, for avoidance of any ambiguity.

Rule 63- Publication of the Decisions and Orders

Turkey repeats its concerns about the Article 63 which does not comply with the Convention's main approach on the publication.

First, the Rule 63 of the draft regulates that publication of the decisions and orders to be decided by tribunals. The draft rule has not taken consent of the parties into account, specifically, the publication of decisions and/or orders as regulated in the Rule 62 of the draft and ICSID Convention for awards. Additionally, it has not taken consent requirement into account in terms of the written submission or supporting document filed by a party in the proceeding regulated by the Article 64. The main rule and principle of confidentiality in the Convention requires

¹ *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Procedural Order No 2 (28 October 1999)

² *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision on Provisional Measures (25 September 2001) *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Procedural Order No 1 (1 July 2003) paras 2, 4; *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Claimant's Request for Provisional Measures (17 May 2006) para 32; *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No ARB/08/6, Decision on Provisional Measures (8 May 2009) paras 66–77; *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Decision on Claimant's Request for Provisional Measures (13 December 2012) para 120; *City Oriente Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/06/21, Decision on Provisional Measures (9 November 2007) para 92

parties' consent for publication. The intent of the Convention is that only the parties should be able to decide whether to publish the decisions instead of tribunals.

The main principle in the Convention is publication with the consent of the parties. The loophole for the decisions other than awards and decisions on annulment should not derogate and also follow the main principle of consent. Publication of all decisions, awards and process may also considerably increase the risk on the leak of private or confidential information, as well as that would put heavy burden on the Secretariat for detailed and sensitive control and may even put the Secretariat the responsibility for damages in case of any breach of confidentiality.

Second, in terms of the Article 63 "Publication of Orders and Decisions" of the Arbitration Rules, and the Article 73 "Publication of Orders, Decisions and Awards" of the Additional Facilities Arbitration Rules, it should be reconsidered taking the principle of procedural economy into account whether publishing *all* kind of decisions and orders even a basic time extension decision by the Secretary is appropriate.

6. RULES FOR MEDIATION PROCEEDINGS

Rule 6 - Institution of Mediation Absent a Prior Party Agreement

Rule 6(5) precludes mediation unless the other party agrees on the offer to mediate.

Mediation, focusing on the parties' interests rather than legal rights and obligations, is fundamentally suited to investment arbitration. For the sake of increasing its use, mandating mediation for certain types of investment disputes, such as disputes below or above a certain financial threshold, may encourage litigants to embrace mediation and use it for a wider range of investment disputes.

Rule 13- Number of Mediators and Method of Appointment

Rule 13(1) stipulates for one or two co-mediators, whereas Rule 13(2) excludes appointment of co-mediators unless the parties agree on the number of mediators.

Instead of conducting the mediation process by one mediator, empanelling two mediators—an expert in the process and an expert in substantive issues—would be an optimal solution. Accordingly, -while mediating- the former could ensure the fair process and techniques to encourage effective discussion between the parties, whereas the latter could understand and evaluate with a better insight into the substantive issues of the investment dispute.

Rule 21 - Mediation Procedure

Rule 21(3) precludes mediator recommendations for settlement terms, unless all parties request the mediator to do so.

The mediator should be granted the opportunity to advise a settlement proposal to all parties at the appropriate stage of the mediation—especially when there’s an impasse or stuck point in the bargaining, and each party should be given the option of accepting or rejecting it without modification. Needless to state, unless both parties accept, bargaining continues, otherwise settlement occurs. In terms of the mediator’s settlement proposal, if the parties accept the same, a complimentary letter could also be issued for the purposes of acknowledging that negotiations were conducted in good faith focusing on the interests of the parties and that the settlement agreement is commercially reasonable.
