

COMMENTS ON WORKING PAPER # 3

STATE:	TURKEY
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GENERAL	COMMENT
Process, Timing & Effective Date for Adoption of Proposals	
Approach to gender neutral language in Spanish/French	
Other:	

I. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR ICSID CONVENTION PROCEEDINGS	COMMENT ON PROVISION
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Chapter I - Procedures of the Administrative Council	
Regulation 1 - Date and Place of the Annual Meeting	
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Regulation 11 - Conditions of Employment	
Regulation 12 - Authority of the Secretary-General	
Regulation 13 - Incompatibility of Functions	
Chapter III - Financial Provisions	
Regulation 14 - Fees, Allowances and Charges	<p>The Regulation allows the Secretariat to higher the amount.</p> <p>Turkey has a concern about the high costs of arbitration including the arbitrators' fees. In some cases, the delays and non-cost effective procedure might be taken without any fault of the parties but the arbitrators themselves. Therefore, Turkey suggests the view that the ICSID might have the authority to decrease the amount of the arbitrator fees, especially in the occurrence of long delays by arbitrators' fault. This approach is also followed by the new 2017 ICC Rules of</p>

	Arbitrators, which takes into account of the cost-efficient and expeditious arbitration proceedings, the diligence of arbitrators.
Regulation 15 - Payments to the Centre	
Regulation 16 - Consequences of Default in Payment	
Regulation 17 - Special Services	
Regulation 18 - Fee for Lodging Requests	
Regulation 19 - The Budget	
Regulation 20 - Assessment of Contributions	
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Regulation 29 - Depositary Functions	
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II. INSTITUTION RULES FOR ICSID CONVENTION PROCEEDINGS	COMMENT ON PROVISION
Introductory Note	
Rule 1 - The Request	

Rule 2 - Contents of the Request	Turkey suggests in either Rule 2 the Contents of the Request or Rule 3 Recommended Additional Information, to add further information about the corporate structure of the requesting party. The corporate structure may assist in identifying whether the request is about a real foreign investment and made by a real foreign investor. Such information would assist to find out and prevent frivolous claims at the very first stage, even before the constitution of the arbitration tribunal.
Rule 3 - Recommended Additional Information	
Rule 4 - Filing of the Request and Supporting Documents	
Rule 5 - Receipt of the Request and Routing of Written Communications	
Rule 6 - Review and Registration of the Request	
Rule 7 - Notice of Registration	
Rule 8 - Withdrawal of the Request	
Rule 9 - Final Provisions	

III. ARBITRATION RULES FOR ICSID CONVENTION PROCEEDINGS	COMMENT ON PROVISION
Introductory Note	
Chapter I - General Provisions	
Rule 1 - Application of Rules	
Rule 2 - General Duties	<p>Turkey supports the explicit inclusion of Rule 2- General Duties and prefers to revise the Article paragraph 1 as follows: <i>“The Tribunal and the parties shall conduct the proceeding in an expeditious and cost-effective manner in as required by good faith”</i>.</p> <p>Turkey also supports deletion of paragraph 3 given the fact the States may not be expected to bound by provisional decisions, especially by provisional protection decisions taken by arbitral tribunals.</p>

Rule 3 - Party and Party Representative	
Rule 4 - Method of Filing	
Rule 5 - Supporting Documents	
Rule 6 - Routing of Documents	
Rule 7 - Procedural Languages, Translation and Interpretation	
Rule 8 - Correction of Errors	<p>Turkey suggests the wording “clerical” or “typographical” before the error in order to strengthen the meaning of incidental errors.</p> <p>Adding the word ‘clerical’ in the rule will limit an error to a manifest clerical error. This way, any modification that might affect the merits will definitely be eliminated.</p> <p>What we care about is, the parties should not be allowed to</p> <ul style="list-style-type: none"> *change their position *hide the documents *production of new documents *making new arguments <p>In other ways, we do not allow the guerrilla tactics or confuse the Tribunal and/or mislead the hearing.</p> <p>Turkey experienced in a case that the Requesting party presented new documents untruly produced to prove alleged “foreign” investors.</p> <p>Turkey just wants to be allowed typographical or clerical errors to be corrected.</p>
Rule 9 - Calculation of Time Limits	
Rule 10 - Fixing Time Limits	
Rule 11 - Extension of Time Limits Applicable to Parties	<p>In Paragraph 2; in the event that the decision on whether to accept a procedural matter or production of documents that may take place at the end of an extension of time is available only if there is a mutual agreement of the parties. It is considered that it would be appropriate to grant a limited discretion to the tribunal and to prevent any parties to abuse the procedure by not agreeing a reasonable and justifiable request for extension of time. Considering the fact that, it is</p>

	<p>unlikely for the parties to agree on any matter after the dispute arose, irrespective of the request was just and fair.</p> <p>To conclude Turkey suggests to add Art.11/2 ... <i>“or the tribunal decides in exceptional circumstances, where there are justifiable and reasoned application.”</i></p>
Rule 12 - Time Limits Applicable to the Tribunal	
Chapter II - Constitution of the Tribunal	
Rule 13 - General Provisions Regarding the Constitution of the Tribunal	
Rule 14 - Notice of Third-Party Funding	<p>Turkey considers that, third party funding should be regulated to provide transparency and be subjected to clear, detailed regulations including mandatory disclosure of the identity of the funder, the ultimate funder, as well as the terms on adverse costs <i>inter alia</i> considering that the funder is not a party to the arbitration case and there may be financial imbalance between host-States and foreign investors.</p> <p>Moreover, it would be useful to adopt a detailed Regulation on third party funding. With this kind of regulation respondent states’ financial rights are also protected.</p> <p>When considering cost and benefit balance, such a rule will better serve the purpose, since the third party should equally be subjected to interest as well as the potential costs of the arbitration. It may assist to a decrease in the number of frivolous claims. In this way, a fair trial can be fully ensured.</p> <p>To sum up, Turkey suggests to add para.1: <i>“This notice shall also include the terms on the liability of adverse costs of the third-party funding agreement in question.”</i> Or a similar formulation as stated in Singapore Rules.</p>

Rule 15 - Method of Constituting the Tribunal	
Rule 16 - Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention	
Rule 17 - Assistance of the Secretary-General with Appointment	
Rule 18 - Appointment of Arbitrators by the Chair in accordance with Article 38 of the Convention	
Rule 19 - Acceptance of Appointment	
Rule 20 - Replacement of Arbitrators Prior to Constitution of the Tribunal	
Rule 21 - Constitution of the Tribunal	
Chapter III - Disqualification of Arbitrators and Vacancies	
Rule 22 - Proposal for Disqualification of Arbitrators	<p>Turkey would like to comment on rule 22 and 23 together.</p> <p>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 strengthening the perception of impartiality and independence of the arbitral tribunal.</p> <p>Turkey would like to address the revision of rules on the disqualification of arbitrators from two perspectives:</p> <p>Firstly; the disqualification procedure which is based on a review by the arbitral tribunal members should be revised. As ISDS mechanism would lead to enormous amounts of 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 Article 27 of the Singapore Arbitration Center's Investment</p>

	<p>Rules where the disqualification procedure is not run by the tribunal itself, but by the Court. Therefore, to maintain objectivity in the ICSID mechanism, Rule 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.</p> <p>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.</p> <p>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.</p> <p>Therefore; Turkey suggests that to justifiable doubt test; should be stated in the rule as well as Explanatory Note to the ICSID Convention. The disqualification procedure is to be run by an independent, objective body; so the ICSID Secretariat should give a comment on the application for challenge of arbitrators or similar mechanism in order to guide the Tribunals.</p>
Rule 23 - Decision on the Proposal for Disqualification	
Rule 24 - Incapacity or Failure to Perform Duties	
Rule 25 - Resignation	
Rule 26 - Vacancy on the Tribunal	

Chapter IV - Conduct of the Proceeding	
Rule 27 - Orders and Decisions	
Rule 28 - Waiver	
Rule 29 - First Session	
Rule 30 - Written Submissions	<p>Regarding Rule 30, the parties shall not state a new claim/defence that was not submitted in their first submission. Turkey would like to clarify that the parties shall be entitled to support legal arguments in the scope of their claim/defence state in their first submission. Therefore, the claim and defence rights of the parties shall be protected.</p> <p>Thus, Turkey suggests to adding the following sentence to the end of paragraph 2 or in an explanatory note <i>“provided that each party may support their legal arguments asserted in their first submissions or develop for newly discovered documents.”</i></p>
Rule 31 - Case Management Conference	
Rule 32 - Hearings	
Rule 33 - Quorum	
Rule 34 - Deliberations	
Rule 35 - Decisions Made by Majority Vote	
Chapter V - Evidence	
Rule 36 - Evidence: General Principles	
Rule 37 - Disputes Arising from Requests for Documents	
Rule 38 - Witnesses and Experts	
Rule 39 - Tribunal-Appointed Experts	
Rule 40 - Visits and Inquiries	
Chapter VI - Special Procedures	
Rule 41 - Manifest Lack of Legal Merit	<p>“Manifest Lack of Legal Merit” is crucial for the states in order to ensure early termination of frivolous claims at an early stage.</p>

	<p>However in practice, the Tribunals generally discuss the merits of the case; although the jurisdiction of the Centre or the competence of the Tribunal should be decided initially.</p> <p>As a matter of fact, if the arbitration cases filed by the persons and institutions that do not fall into the category of foreign investors as envisaged in the ICSID arbitration mechanism, it is better to conclude the proceedings for the interests of both parties in order not to bear high legal costs. From the claimant's side, it will continue to bear expenses and from the defendant state's side, it will spend tax payers' money for frivolous claims.</p> <p>At this point, Turkey proposes introduction of a preliminary review mechanism as foreseen in other systems (<i>such as Stockholm Arbitration Rules</i>) where in the first stage, the tribunal deals with the sole question of whether the claimant is in a position to purport a claim against a state as a foreign investor and its investments are protected within the jurisdiction of ICSID Convention or any other treaty in question. In this respect, Turkey supports the revision of Rule 41 granting a party the right to object with regard to a claim which is frivolous.</p>
Rule 42 - Bifurcation	
Rule 43 - Preliminary Objections	
Rule 44 - Bifurcation of Preliminary Objections	
Rule 45 - Consolidation or Coordination of Arbitrations	
Rule 46 - Provisional Measures	<p>Provisional measure is regulated comprehensively in Article 46 of the Draft. It is stated that a party may at any time request that the Tribunal recommend provisional measures to protect that Party's rights. What kind of and under which circumstances, the provisional measures may be requested by the Parties, are stated in an exemplary manner under Article 46.</p>

	<p>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 and not an order.</p> <p>Turkey suggests that Article 46, which is regulated as recommendatory, might be revised or the ICSID Convention might have an Explanatory Note stating that:</p> <ul style="list-style-type: none"> • The tribunals may only recommend provisional measures on the subject matter of investment dispute, • The provisional measure is applied in extraordinary and exceptional circumstances. <p>Therefore, Turkey suggests an emphasis which explicitly states that provisional measures are non-binding upon parties should be added,</p> <ul style="list-style-type: none"> • 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.
Rule 47 - Ancillary Claims	
Rule 48 - Default	
Chapter VII - Costs	
Rule 49 - Costs of the Proceeding	
Rule 50 - Statement of and Submission on Costs	
Rule 51 - Decisions on Costs	
Rule 52 - Security for Costs	<p>The provision related to security for costs can be a basis upon which the defendant States requests security against the legal costs to be incurred. While in practice claimant may have also recourse to security for costs, it can be an important tool for States in numerous cases where the tribunal decides that the costs borne by the defendant are to be recovered by the Claimant upon failure of</p>

frivolous claims. States cannot enforce such an award against the claimants who have hidden their assets or have no financial resources. Even though the provision as stipulated in WP#3 contains cost-efficient management of proceedings, it is still inevitable for States to incur a large amount of legal expenses in the ISDS mechanism.

We believe that this stance taken by the tribunals in favor of the investors should be balanced by a more subtle threshold to be highlighted in the security for costs provisions to meet the needs of States who are spending tax payers' money for the legal costs. ICSID ISDS mechanism as it is now and the revision suggested in WP#3 does not provide enough protection for host States bearing high amount of legal costs incurred due to frivolous claims, even if entitled to do so upon the grant by the tribunals.

With this regard, Turkey prefers to delete "*but the existence of third-party funding by itself is not sufficient to justify an order for security for costs.*" from paragraph 4, or alternatively, we suggest to revise paragraph 4 as, "*(4) The Tribunal may shall consider third-party funding as evidence relating to a circumstance in paragraph (3), but the existence of third-party funding by itself is may not be sufficient to justify an order for security for costs.*"

In addition to that, revising paragraph 3/a as "*(a) that party's financial ability and availability of financial resources to comply with an adverse decision on costs;*"

Chapter VIII - Suspension, Settlement and Discontinuance	
Rule 53 - Suspension of the Proceeding	
Rule 54 - Settlement and Discontinuance	
Rule 55 - Discontinuance at Request of a Party	
Rule 56 - Discontinuance for Failure of Parties to Act	

Chapter IX - The Award	
Rule 57 - Timing of the Award	
Rule 58 - Contents of the Award	
Rule 59 - Rendering of the Award	
Rule 60 - Supplementary Decision and Rectification	
Chapter X - Publication, Access to Proceedings and Non-Disputing Party Submissions	
Rule 61 - Publication of Awards and Decisions on Annulment	
Rule 62 - Publication of Orders and Decisions	<p>Turkey's comments are related to Rule 61 and 62 as follows. Transparency is important for Turkey. We support the introduction of 61 par.3. But we have a concern about Rule 62.</p> <p>Rule 62 of the draft regulates that publication of the decisions and orders to be decided by tribunals. The draft rule has not taken consents of the parties into account in terms of publication of decisions and/or orders as regulated in Rule 61 of the draft and ICSID Convention for awards. The main rule and principle of confidentiality in the Convention requires 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.</p> <p>The main principle in the Convention is publication with the consent of the parties. The loophole for the decisions other than awards and annulment should not derogate and also follow the main principle of consent.</p>
Rule 63 - Publication of Documents Filed in the Proceeding	
Rule 64 - Observation of Hearings	
Rule 65 - Confidential or Protected Information	
Rule 66 - Submission of Non-Disputing Parties	
Rule 67 - Participation of Non-Disputing Treaty Party	
Chapter XI - Interpretation, Revision and Annulment of the Award	

Rule 68 - The Application	
Rule 69 - Interpretation or Revision: Reconstitution of the Tribunal	
Rule 70 - Annulment: Appointment of the ad hoc Committee	
Rule 71 - Procedure Applicable to Interpretation, Revision and Annulment	
Rule 72 - Stay of Enforcement of the Award	
Rule 73 - Resubmission of Dispute after an Annulment	
Chapter XII - Expedited Arbitration	
Rule 74 - Consent of Parties to Expedited Arbitration	
Rule 75 - Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration	
Rule 76 - Appointment of Sole Arbitrator for Expedited Arbitration	
Rule 77 - Appointment of Three-Member Tribunal for Expedited Arbitration	
Rule 78 - Acceptance of Appointment in Expedited Arbitration	
Rule 79 - First Session in Expedited Arbitration	
Rule 80 - Procedural Schedule in Expedited Arbitration	
Rule 81 - Default in Expedited Arbitration	
Rule 82 - Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration	
Rule 83 - Procedural Schedule for Interpretation, Revision or Annulment in Expedited Arbitration	
Rule 84 - Resubmission of a Dispute after Annulment in Expedited Arbitration	
Rule 85 - Opting Out of Expedited Arbitration	

IV. CONCILIATION RULES FOR ICSID CONVENTION PROCEEDINGS	COMMENT ON PROVISION
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Rule 3 - Method of Filing	
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Rule 5 - Routing of Documents	
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Rule 7 - Calculation of Time Limits	
Rule 8 - Costs of the Proceeding	
Rule 9 - Confidentiality of the Conciliation	
Rule 10 - Use of Information in Other Proceedings	
Chapter II - Constitution of the Commission	
Rule 11 - General Provisions, Number of Conciliators and Method of Constitution	
Rule 12 - Notice of Third-Party Funding	
Rule 13 - Appointment of Conciliators to a Commission Constituted in Accordance with Article 29(2)(b) of the Convention	
Rule 14 - Assistance of the Secretary-General with Appointment	
Rule 15 - Appointment of Conciliators by the Chair in Accordance with Article 30 of the Convention	
Rule 16 - Acceptance of Appointment	
Rule 17 - Replacement of Conciliators Prior to Constitution of the Commission	
Rule 18 - Constitution of the Commission	
Chapter III - Disqualification of Conciliators and Vacancies	
Rule 19 - Proposal for Disqualification of Conciliators	
Rule 20 - Decision on the Proposal for Disqualification	
Rule 21 - Incapacity or Failure to Perform Duties	
Rule 22 - Resignation	

Rule 23 - Vacancy on the Commission	
Chapter IV - Conduct of the Conciliation	
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Rule 25 - General Duties of the Commission	
Rule 26 - Orders, Decisions and Agreements	
Rule 27 - Quorum	
Rule 28 - Deliberations	
Rule 29 - Cooperation of the Parties	
Rule 30 - Written Statements	
Rule 31 - First Session	
Rule 32 - Meetings	
Rule 33 - Preliminary Objections	
Chapter V - Termination of the Conciliation	
Rule 34 - Discontinuance Prior to the Constitution of the Commission	
Rule 35 - Report Noting the Parties' Agreement	
Rule 36 - Report Noting the Failure of the Parties to Reach Agreement	
Rule 37 - Report Recording the Failure of a Party to Appear or Participate	
Rule 38 - The Report	
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V. THE ADDITIONAL FACILITY RULES	COMMENT ON PROVISION
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Article 1 - Definitions	
Article 2 - Additional Facility Proceedings	
Article 3 - Convention Not Applicable	
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VI. (ADDITIONAL FACILITY) ADMINISTRATIVE AND FINANCIAL REGULATIONS	COMMENT ON PROVISION
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Rule 58 - Default	
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Rule 79 - Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration	
Rule 80 - Appointment of Sole Arbitrator for Expedited Arbitration	

Rule 81 - Appointment of Three-Member Tribunal for Expedited Arbitration	
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IX. ICSID FACT-FINDING RULES	COMMENT ON PROVISION
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Rule 17 - Manner of Terminating the Proceeding	
Rule 18 - Failure of a Party to Participate or Cooperate	
Rule 19 - Report of the Committee	
Rule 20 - Issuance of the Report	

X. (FACT-FINDING) ADMINISTRATIVE AND FINANCIAL REGULATIONS	COMMENT ON PROVISION
Introductory Note	
Chapter I - General Provisions	
Regulation 1 - Application of these Regulations	
Chapter II - General Functions of the Secretariat	
Regulation 2 - Secretary	
Regulation 3 - The Registers	
Regulation 4 - Depositary Functions	
Regulation 5 - Certificates of Official Travel	
Chapter III - Financial Provisions	
Regulation 6 - Fees, Allowances and Charges	
Regulation 7 - Payments to the Centre	
Regulation 8 - Consequences of Default in Payment	
Regulation 9 - Special Services	
Regulation 10 - Fee for Lodging Requests	
Regulation 11 - Administration of Proceedings	
Chapter IV - Official Languages and Limitation of Liability	
Regulation 12 - Languages of Regulations	

Regulation 13 - Prohibition Against Testimony and Limitation of Liability	
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XI. RULES FOR MEDIATION PROCEEDINGS	COMMENT ON PROVISION
Introductory Note	
Chapter I - General Provisions	
Rule 1 - Definitions	
Rule 2 - Mediation Proceedings	
Rule 3 - Application of Rules	
Chapter II - Institution of the Mediation	
Rule 4 - Institution of Mediation Based on Prior Party Agreement	
Rule 5 - Institution of Mediation Absent a Prior Party Agreement	
Rule 6 - Registration of the Request	
Chapter III - General Procedural Provisions	
Rule 7 - Calculations of Time Limits	
Rule 8 - Costs of the Mediation	
Rule 9 - Confidentiality of the Mediation	
Rule 10 - Use of Information in Other Proceedings	
Chapter IV - The Mediator	
Rule 11 - Qualifications of the Mediator	<p>Turkey considers that Rule 12(1) stipulates for one or two co-mediators, whereas Rule 12(2) does not state the appointment of co-mediators unless the parties agree on the number of mediators. We suggest to include co-mediators in the system. Instead of conducting the mediation process by one mediator, empanelling two mediators—an expert in the process and an expert in substantive issues—might be an optimal solution.</p> <p>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. It is very</p>

	<p>difficult for the parties to agree on any terms of the dispute and its procedure, including the number of mediators.</p> <p>Therefore, we support the view that ICSID should have the authority to appoint co mediators where it is more appropriate or needed, especially where the dispute is complex in nature.</p>
Rule 12 - Number of Mediators and Method of Appointment	
Rule 13 - Acceptance of Appointment	
Rule 14 - Transmittal of the Request	
Rule 15 - Resignation and Replacement of Mediator	
Chapter V - Conduct of the Mediation	
Rule 16 - Role and Duties of the Mediator	
Rule 17 - Duties of the Parties	
Rule 18 - Initial Written Statements	
Rule 19 - First Session	
Rule 20 - Conduct of the Mediation	<p>Turkey considers that Rule 20(5) precludes mediator recommendations for settlement terms unless all parties request the mediator to do so. We suggest that the mediator should be granted the opportunity to propose a settlement agreement to the parties at the last stage of the mediation proceeding—especially it is useful where there is an impasse or stuck point in the bargaining, and each party should be given the option of accepting or rejecting it.</p> <p>Finally, Turkey supports an active mediator, especially when there is a deadlock and as the last resort.</p>
Rule 21 - Termination of the Mediation	

XII. (MEDIATION) ADMINISTRATIVE AND FINANCIAL REGULATIONS)	COMMENT ON PROVISION
Introductory Note	
Chapter I - General Provisions	
Regulation 1 - Application of these Regulations	
Chapter II - General Functions of the Secretariat	
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Regulation 3 - The Registers	
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Regulation 6 - Fees, Allowances and Charges	
Regulation 7 - Payments to the Centre	
Regulation 8 - Consequences of Default in Payment	
Regulation 9 - Special Services	
Regulation 10 - Fee for Lodging Requests	
Regulation 11 - Administration of Proceedings	
Chapter IV - Official Languages and Limitation of Liability	
Regulation 12 - Languages of Regulations	
Regulation 13 - Prohibition Against Testimony and Limitation of Liability	