

ICSID Rules Amendment Process: Comments by Israel

General note

It seems to us that in several instances there may be duplication of provisions between different sets of rules - mainly the ARs and the IRs. For the sake of avoidance of un-clarity in the future we recommend identifying and eliminating such duplications (perhaps when the different rules are further finalized).

Arbitration Rules

#	Rule	Israel's Position
1	Application of Rules	No comment
2	General Duties	In light of the discussion held in the April meeting, Israel believes it is necessary to reach a broad consensus on this issue.
3	Meaning of Party and Party Representative	No comment
4	Method of Filing	No comment
5	Supporting Documents	<p>With regard to para. 1, we believe that room should be left for submission of supporting documents also after written submissions, as was previously allowed.</p> <p>With regard to para. 2, we contend that a party (different to the tribunal) should only be entitled to <i>request</i> "a fuller extract or a complete version of the document" rather than being entitled to <i>require</i> it (as the latter may impose a heavy burden on the Respondent and may deter parties from submitting material that may be part of a broader document that may not all be relevant to the proceedings.).</p>
6	Routing of Documents	No comment
7	Procedural Languages, Translation and Interpretation	In light of the potential added burden, both in cost and in time, of conducting a procedure in two languages, we suggest including a provision calling the parties to use their best endeavors to agree on one procedural language (we do not ask for an obligatory text in this regard but a provision to signal to the parties that the preference is towards one language). Article 24 of UNCITRAL Notes on Organizing Arbitral Proceedings also indicates that parties to arbitration will usually choose one language,
8	Correction of Errors and Deficiencies	Regarding para. 2, in light of the explanation of the Working Paper as well as clarifications provided in the April meeting, we believe that the provision should clarify that the Secretariat's role in

		making corrections is limited to technical/clerical corrections.
9	Calculation of Time Limits	With regards to para. 3, it is our view that the rules should also take into consideration holidays observed in the countries of the parties to the dispute.
10	Time Limits Applicable to Parties	With regard to para. 3, it is suggested to include a duty for the SG to consult with the other party (such duty applies to the tribunal according to Rule 26(3)).
11	Time Limits Applicable to the Tribunal	No comment
12	General Provisions Regarding the Constitution of the Tribunal	<p>In order to avoid intertwining investment disputes with political ones, Israel proposes adding a new paragraph. (5):</p> <p><i>(5): "party may not appoint an arbitrator who is a national of a State which does not maintain diplomatic relations with the state party to the dispute or with the State whose national is a party to the dispute, without agreement of the other party".</i></p> <p>We have taken notice of WP#2 explanation regarding Art. 39 of the Convention. However, we would argue that Art. 39 does not entail an exhaustive list of possible restrictions/rationales/causes governing the appointment of an arbitrator. In other words, there need not be a contradiction between Art. 39 and our suggestion. Hence, a reconsideration of our suggestion would be highly appreciated.</p> <p>With regard to para. 4, we would request the inclusion of 'arbitrator' in the list of persons previously involved in the dispute – as we view the arbitrator too as relevant to this provision.</p>
13	Disclosure of Third-Party Funding	<p>Third-Party Funding is a major issue in recent investment arbitration discussions. It is our position that although TPF could serve as a legitimate tool for parties to a dispute, one should also be mindful of its possible risks, which go beyond a mere transparency issue or conflict of interests (e.g., abuse of the tool and politicization of the dispute).</p> <p>Therefore, it is our view that TPF should be broadly defined, as well as who may be a third party funder.</p> <p>Regarding para. (1): further transparency regarding TPF is desirable. We suggest expanding the scope of the disclosure. Further, we suggest enabling the tribunal, upon request of a party to the dispute, or on its own initiative, to require extra information regarding the TPF.</p>

		<p>Para. (2): We are concerned that the preclusion of "a representative of a party" might render the obligation of disclosure incomplete, as there are cases where TPF involves some form of legal representation. We hold that the disclosure should apply to funding (or equivalent support) by a representative of a party as well.</p> <p>Additionally, it seems that proposed AR 13, as it stands now, is lacking some possible scenarios that should be addressed. For example, cases where discovery was made in a very late stage of the procedure (even after the rendering of an award); would such an overdue discovery impact the results of the procedure? Put differently, the implications of overdue discovery should be explicitly regulated, including the imposition of any "sanction" (e.g. explicit reference to TPF in the provisions relating to allocation of costs). Lastly, in our view, the wording of the first paragraph on page 3 of the Background on Proposals for Amendment of the ICSID Rules (WP#1) should be incorporated into AR 13, stating that: "[t]he name of an involved funder will be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest."</p> <p>Coordination with UNCITRAL discussions on this topic is recommended.</p>
14	Method of Constituting the Tribunal	No comment
15	Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention	No comment
16	Assistance of the Secretary-General with Appointment	No comments.
17	Appointment of Arbitrators by the Chair in accordance with Article 38 of the Convention	
18	Acceptance of Appointment	No comment
19	Replacement of	No comment

	Arbitrators Prior to Constitution of the Tribunal	
20	Constitution of the Tribunal	No comment
21	Proposal for Disqualification of Arbitrators	No comment
22	Decision on the Proposal for Disqualification	No comment
23	Incapacity or Failure to Perform Duties	No comment
24	Resignation	No comment
25	Vacancy on the Tribunal	No comment
26	Orders, Decisions and Agreements	No comment
27	Waiver	No comment
28	First Session	No comment
29	Written Submissions	No comment
30	Case Management Conferences	No comment
31	Hearings	No comment
32	Quorum	No comment
33	Deliberations	No comment
34	Decisions Made by Majority Vote	No comment
35	Evidence: General Principle	No comment
36	Dispute Arising from Requests for Documents	Israel believes that it is desirable to avoid unnecessary allocation of time and funds and to avoid abuse of this procedure. Thus, the right balance needs to be reached. We are of the view that proposed AR 36 should include explicit conditions upon which the parties can object to the production of documents, such as confidentiality and/or commercial secrets.
37	Witnesses and Experts	No comment
38	Tribunal-Appointed Experts	We contend that there is a need to strike a balance between the Tribunal's authority to appoint an expert (even without the parties' agreement) and the parties' obligation to provide the expert "with any information, document or other evidence, as the expert may require". That is, clear and restrictive provisions regarding the

		<p>latter must be added (para. 3), or in the alternative, the Tribunal's appointment of an expert must require the parties' agreement (para. 2) (as opposed to a mere consultation).</p> <p>Israel also reiterates its position that such an expert may only be allowed in the case where the expert is necessary for the Tribunal to have a better understanding of the facts and claims presented to it, taking into account that any relevant information should normally be supplied by the Parties and their experts throughout the arbitration procedure.</p>
39	Visits and Inquiries	In order to avoid the risk of adverse measures to State sovereignty, Israel wishes to reiterate that it deems it necessary to subject the execution of visits and inquiries to applicable domestic law.
40	Manifest Lack of Legal Merit	No comment
41	Bifurcation	No comment
42	Preliminary Objections	No comment
42BIS	Bifurcation of Preliminary Objections	<p>Para. (3)(a): We hold that the proceeding on the merit should be automatically suspended upon a decision to bifurcate a preliminary objection.</p> <p>Also, there seems to be some ambiguity concerning the distinction between proposed AR 42BIS (bifurcation of preliminary objections) and proposed AR 42 (preliminary objections). We are of the view that the distinction between the two proceedings should be clarified in the text.</p> <p>Lastly, Israel believes that 30 days may be too short to allow a party to submit a request for bifurcation of preliminary objections.</p>
43	Consolidation or Coordination of Arbitrations	In light of the discussion in the April meeting we request adding to para. 4 wording referring to the fact that along with the ToRs the parties shall provide the SG proposed procedural outline for the consolidation process, including reference to the issue of nomination/merging of arbitration tribunals in a consolidated procedure.
44	Provisional Measures	No comment
45	Ancillary Claims	No comment
46	Default	No comment
47	Costs of the	

	Proceeding	
48	Payment of Advance	No comment
49	Statement of and Submission of Costs	No comment
50	Decisions on Costs	Regarding para. 2, we suggest adding wording as follows: (2) The Tribunal may make interim decisions on the costs of any part of a proceeding, at any time, <u>'Without prejudice to the final decision.'</u>
51	Security for Costs	. Regarding para.3: we support the views shared by quite a few States during the April meeting in Washington, according to which TPF should be added to the list of criteria in determining whether to order security for costs (as the existence of TPF might increase the risk of encountering difficulties in enforcing a decision on costs). Additionally, we suggest adding the following wording to para. 4: <i>The Tribunal shall specify any relevant terms in an order to provide security for costs <u>the amount required to be paid and shall fix a time limit for compliance with the order, and shall decide disputes regarding compliance with the order.</u></i> The suggested wording reflects our view that the tribunal is responsible for setting the amount due for security for costs but shall not set the terms by which the amount can be paid- as these may vary. To support this suggested amendment we suggest that in cases of disagreement the tribunal shall decide disputes regarding the compliance with the order.
52	Suspension of the Proceeding	No comment
53	Settlement and Discontinuance	No comment
54	Discontinuance at Request of a Party	No comment
55	Discontinuance for Failure of Parties to Act	No comment
56	Discontinuance for Failure to Pay	No comment
57	Timing of the Award	No comment
58	Contents of the Award	No comment
59	Rendering of the	No comment

	Award	
60	Supplementary Decision and Rectification	No comment
61	Publication of Awards and Decisions on Annulment	We acknowledge the importance of transparency. At the same time there is a need to protect confidential information, such that it would be explicitly defined and excluded from publication (this is also true of proposed AR 62, 63 and 64). This suggestion is in line also with UNCITRAL Rules on Transparency (2013).
62	Publication of Orders and Decisions	We wish to reiterate our view that provisions regulating the publication of orders and decisions should be similar to those of the publication of Awards (i.e. require consent of the parties).
63	Publication of Documents Filed by a Party	See #61
64	Observation of Hearings	See # 62 Additionally, we suggest adding a para. to the Rule, allowing the tribunal, after consultation with the disputing parties, to decide to hold all or part of the hearings in closed session when it is necessary for logistical reasons. This too, is also in line with the UNCITRAL transparency Rules (2013).
65	Submission of Non-disputing Parties	Para. (6): we hold that providing the non-disputing party with access to documents filed in the proceedings must be subject to the parties' consent (i.e., the burden should be reversed). In order to fulfill the requirements set forth in para. 2, we propose setting a corresponding disclosure obligation on NDPs. With regard to the issue of NDP, including NDTP (Rule 66), Israel reiterates its position reflected during the April meeting, that NDP/NDTP submissions and participation should be limited and should include NDP/NDTP reference to a specific treaty and interpretation of such a treaty or its rules. It is less desirable to provide NDP/NDTP an option to comment on the merits of a specific case, as such an option could create a leeway for external intervention and could bring excessive pressure into the procedure.
66	Participation of Non-disputing Treaty Party	See #65
67	The Application	No comment
68	Interpretation or Revision: Reconstitution of the	No comment

	Tribunal	
69	Annulment: Appointment of <i>ad hoc</i> Committee	
70	Procedure Applicable to Interpretation, Revision and Annulment	No comment
71	Stay of Enforcement of the Award	No comment
72	Resubmission of Dispute after an Annulment	No comment
73	Consent of Parties to Expedited Arbitration	No comment
74	Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration	No comment
75	Appointment of Sole Arbitrator for Expedited Arbitration	No comment.
76	Appointment of Three-Member Tribunal for Expedited Arbitration	No comment
77	Acceptance of Appointment in Expedited Arbitration	No comment
78	First Session in Expedited Arbitration	No comment
79	The Procedural Schedule in Expedited	In view of rendering the expedited procedure feasible and usable (especially on part of states) we suggest to reconsider the proposed timeline provided in this rule (and for the entire procedure) and

	Arbitration	extending.
80	Default during Expedited Arbitration	No comment
81	The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration	No comment
82	The Procedural Schedule for an Application for Interpretation, Revision or Annulment of an Award Rendered in Expedited Arbitration	No comment
83	Resubmission of a Dispute after an Annulment in Expedited Arbitration	No comment
84	Opting Out of Expedited Arbitration	No comment

Administrative and Financial Regulations under ICSID Convention Proceedings:

#	Regulation	Israel's Position
14	Fees, Allowances and Charges	We support the view shared by some States during the April meeting in Washington, according to which a provision regarding the arbitrator's obligation to conduct the proceeding in an expeditious and cost-effective manner should be added.
[WP # 2 proposes the deletion of	Time Limits	Israel supports the reinstatement of a provision regarding the calculation of time limits, for sake of procedural certainty. We also support the reinstatement of a provision regulating a time limit that expires on a holiday or a Saturday or Sunday observed at the place of delivery, pushing the time limit to

Regulation 27 in WP # 1.]		CoB on the next business day.
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Institution Rules under ICSID Convention Proceedings:

#	Rule	Israel's Position
3	Recommended Additional Information	Regarding para. (b), we suggest adding the language from the old provisions: ... "and any provisions agreed to that effect".
4	Filing of the Request and Supporting Documents	As reflected in our general comments, we believe that there may be some unnecessary duplication that may cause inconsistencies between these regulations and the Arbitration Rules – we refer now to the SG's authority to require a fuller extract or certified copy of a document. As these are also authorities given to the tribunal, we wonder whether a clarification should be made that the SG could also require such documents, but only when necessary for the management of the part of the proceedings prior to the establishment of the tribunal.
7	Notice of Registration	With regards to para. (d), we suggest adding an invitation for the parties to indicate whether they agreed to conduct an arbitration under the expedited procedure.
9	Final Provisions	With regards to para.1: is the change in language of this para. in comparison to existing language intended to allow the possible addition of other translations to other languages (as mentioned by the secretariat staff in the discussion in Washington in April 2019)? Should this be the case, would this imply prevalence of the English, French and Spanish texts over other future translations? If so, we believe that this should be clarified for avoidance of doubt in the future.