

ICSID Rules Amendment Process – WP#4: Israel's Comment

Israel hereby submits its comments to the Arbitration Rules for Convention proceedings, Mediation Rules, Fact-Finding Rules, and Conciliation Rules for Convention proceedings. These are in addition to the joint submission to which Israel is a party (that was submitted to the ICSID Secretariat on July 31, 2020).

ICSID CONVENTION PROCEEDINGS: Arbitration Rules

The following comments apply also to the corresponding provisions in the Additional Facility Arbitration Rules, Conciliation Rules for Convention proceedings, and Additional Facility Conciliation Rules.

#	Rule	Israel's Comments
1	Application of Rules	No comment
2	Party and Party Representative	The modification of para. (1) and the use of the word of "required by" is unclear and seems as setting a high interpretative threshold.
3	General Duties	No comment
4	Method of Filing	No comment

5	Supporting Documents	No comment
6	Routing of Documents	No comment
7	Procedural Languages, Translation and Interpretation	No comment
8	Correction of Errors	No comment
9	Calculation of Time Limits	No comment
10	Fixing Time Limits	No comment
11	Extension of Time Limits Applicable to Parties	No comment

12	Time Limits Applicable to the Tribunal	Israel views positively the Secretariat's comment in the explanatory notes stating that "[t]he Centre will adopt multiple rules and practices to reinforce compliance with AR 12." Israel would appreciate a clarification on this statement and the pursuant bullet points – have they been adopted or are they only being considered? In our view, these steps should be brought up for discussion between the Member States (especially the deferred payment).
13	General Provisions Regarding the Establishment of the Tribunal	No comment
14	Notice of Third- Party Funding	Please see the joint submission to which Israel is a party (that was submitted to the ICSID Secretariat on July 31, 2020).
15	Method of Constituting the Tribunal	No comment
16	Appointment of Arbitrators to a Tribunal Constituted in Accordance with	No comment

	Article 37(2)(b) of the Convention	
17	Assistance of the Secretary-General with Appointment	No comment
18	Appointment of Arbitrators by the Chair in Accordance with Article 38 of the Convention	No comment
19	Acceptance of Appointment	No comment
20	Replacement of Arbitrators Prior to Constitution of the Tribunal	No comment
21	Constitution of the Tribunal	No comment
22	Proposal for Disqualification of Arbitrators	It is Israel's position that AR 22 should give more weight to an agreement between parties to a dispute regarding the disqualification of an arbitrator, and determine, similarly to

		<p>(AF)AR 30(3), that in the case the other party agrees to the proposal to disqualify, the arbitrator shall resign.</p> <p>In addition, Israel would like to reiterate the comment it made in the Washington conference in November 2019, that similarly to para. (1)(e), para. 1(d) should also include the option for the arbitrator to submit his/her comments either five days from the receipt of the response or within five days after expiry of the time limit referred to in paragraph 1(c). This will enable greater certainty with regards to the timeline of the disqualification procedure. Otherwise, para. 1(d) may be interpreted so the ability of the arbitrator to submit a statement on a proposal to disqualify him/her may be dependent on the prior filing of a response by the 'other' party (under para. 1(c)).</p>
23	Decision on the Proposal for Disqualification	<p>Para. (1): For the sake of due process and transparency, Israel suggests adding a requirement to provide reasoning to the decision on the proposal for disqualification. This suggested requirement is in line with several ARs (e.g., 52(4), 59(1)(i)-(j), and</p>

		67(5)), which explicitly require a reasoned decision.
24	Incapacity or Failure to Perform Duties	No comment

25	Resignation	No comment
26	Vacancy on the Tribunal	Israel would like to reiterate the comment it made in the Washington conference in November 2019, with regards to para. (2), stating that this paragraph in our view should reflect the fact that in relation to disqualification procedures, the proceeding would have already been suspended prior to the notice of vacancy; we believe this should be reflected in the paragraph in order to avoid misunderstandings. Thus, a textual suggestion: <i>unless already suspended (under AR 22), the proceeding shall be suspended from the date of notice of the vacancy until the vacancy is filled.</i>
27	Orders and Decisions	No comment
28	Waiver	No comment
29	First Session	No comment

30	Written Submissions	No comment
31	Case Management Conference	No comment
32	Hearings	No comment
33	Quorum	No comment
34	Deliberations	Israel can accept the comment made by other countries as referred to in the explanatory notes (in WP#4) – that the Secretary of the Tribunal could attend the deliberations. However, in our view, the proposed text of the Rule does not closely reflect that comment, thus creating a different arrangement. The main focus of the rule was the attendance at the deliberations of the Tribunal, which in our view should remain limited in principle. As currently drafted, the focus changed to assistance rather than attendance, leaving the question of attendance in the

		deliberations open. We suggest reintroducing a para. to regulate attendance.
35	Decisions Made by Majority Vote	No comment
36	Evidence: General Principle	No comment
37	Dispute Arising from Requests for Production of Documents	<p>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. As commented by Israel previously, Israel is of the view that proposed AR 37 should enforce the ability of parties to object to the production of documents. Moreover, disclosure of documents clauses should not be used as an opportunity to receive documents that are not necessarily linked to the proceeding in ICSID but for other purposes. We suggest an addition to subpara. (b) to that effect. Pursuant to the above comments, please see the following suggested modifications to the wording of AR 37 (in green):</p> <p>The Tribunal shall decide any dispute arising out of a party's objection to the other party's request for production of documents.</p> <p>In deciding the a dispute arising out of a party's objection to the other party's request for production of documents, the Tribunal shall:</p>

		<p>(a) allow the party making the objection to provide reasons for its objection, including, <i>inter alia</i>, on the grounds that the requested documents are exempted or protected from disclosure by applicable privileges and laws or by having special political or institutional sensitivity; and</p> <p>(b) consider all relevant circumstances, including:</p> <p>(a) (i) the scope and timeliness of the request;</p> <p>(b) (ii) the relevance and materiality of the documents requested to the dispute before the Tribunal;</p> <p>(c) (iii) the burden of production; and</p> <p>(d) (iv) the basis of the objection pursuant to paragraph (a).</p>
38	Witnesses and Experts	No comment
39	Tribunal-Appointed Experts	No comment
40	Visits and Inquiries	No comment

41	Manifest Lack of Legal Merit	No comment
42	Bifurcation	No comment
43	Preliminary Objections	No comment
44	Preliminary Objections with a Request for Bifurcation	No comment
45	Preliminary Objections without a Request for Bifurcation	<p>Following the separation of the paragraphs of this Rule from AR 43:</p> <p>Para. (2) refers to preliminary objections in general (not only with respect to a request for bifurcation of preliminary objections) and therefore is more suitable to be moved back to Rule 43.</p> <p>Also, it is not clear whether AR 42(6) applies to AR 45, i.e., to preliminary objections in cases where no party asked for bifurcation.</p>
46	Consolidation or Coordination of Arbitrations	No comment

47	Provisional Measures	No comment
48	Ancillary Claims	No comment
49	Default	No comment
50	Costs of the Proceeding	No comment
51	Statement of and Submission on Costs	No comment
52	Decisions on Costs	Please see the joint submission to which Israel is a party (that was submitted to the ICSID Secretariat on July 31, 2020).

53	Security for Costs	Please see the joint submission to which Israel is a party (that was submitted to the ICSID Secretariat on July 31, 2020).
54	Suspension of the Proceeding	No comment
55	Settlement and Discontinuance by Agreement of the Parties	No comment
56	Discontinuance at Request of a Party	No comment
57	Discontinuance for Failure of Parties to Act	No comment
58	Timing of the Award	No comment
59	Contents of the Award	No comment
60	Rendering of the Award	No comment

61	Supplementary Decision and Rectification	No comment
62	Publication of Awards and Decisions on Annulment	No comment
63	Publication of Orders and Decisions	<p>Israel wishes to reiterate the comments made by it previously, that in the same manner and for similar rationales for which the publication of awards is contingent upon the consent of the parties, so should be the case with respect to Decisions and orders. Decisions and orders may also divulge details of the dispute. The explanatory notes refer to the fact that the Convention clearly requires consent to publication of Awards and does not extend this requirement to the category of orders and decisions. Israel's view is that as the Convention is silent with regards to publication of Decisions and orders, its regulation under the ARs is not contrary to the Convention.</p>

		In regards to ARs 63-65 (including the reference to confidential information on AR 66): Similarly to AR 62, in our view these ARs should explicitly state that they apply to proceedings of rectification, interpretation, revision and annulment as well. Otherwise, it may be inferred that these rules do not apply, contrary to AR 62, to such proceedings.
64	Publication of Documents Filed in the Proceeding	Israel is concerned that AR 64 as it currently stands (alongside other relevant ARs) does not regulate all documents that may be submitted in the proceeding. For example, submissions of experts appointed by the tribunal. We believe that the publication of these documents should also be regulated.
65	Observation of Hearings	No comment
66	Confidential or Protected Information	No comment
67	Submission of Non-Disputing Parties	Para. (6): In Israel's position, the word "may" should be reinstated, as it should not be automatic that the NDPs are immediately given access to documents in the case. Furthermore, it is unclear what in practice

		<p>the word "access" means in this context, in comparison with being provided with documents. This is the only Rule in the ARs that employs the term "access" to documents.</p> <p>In our view, the use of the word "shall" as exists now places a heavy burden on the disputing parties in every case of NDPs' submission to scrutinize the need to object to the provision of documents to the NDPs.</p>
68	Participation of Non-Disputing Treaty Party	<p>Para (1): Israel wishes to reiterate the comments made by it previously, that an important characteristic of the ISDS mechanism is distancing States from disputes between their own investors and other States. In that context, we have 2 concerns:</p> <ol style="list-style-type: none"> 1. We believe that the reference to an oral non-disputing treaty Party submission should not be added. In our approach, if an NDTP would like to express its position on a matter, a written submission is sufficient. It is crucial that the NDTP should not be pressured to express its opinion orally by any of the disputing parties. In our view, it might lead to unwanted politicization of the proceeding. 2. We are concerned that the current suggested addition at the end of

		<p>paragraph 1 may lead to involvement in disputes which is unwanted by the State.</p> <p>As a general note on the issue, Israel believes that a decision to bring all treaty-parties to a dispute proceeding should be left for the discretion of interested States under bilateral discussions and treaty negotiations.</p> <p>Para. (2): Within the framework of submissions on the interpretation of the treaty, although this is the intention, in Israel's view it should be clarified within the text that the tribunal should be allowed to limit and focus the submissions to specific issues or articles of the treaty at issue. Therefore, "scope" should be reinstated.</p> <p>Para (3): In line with the addition to Rule 67(3), we think that the parties should have the right to make observations on publication as well.</p>
69	The Application	No comment
70	Interpretation or Revision: Reconstitution of the Tribunal	No comment
71	Annulment: Appointment of the <i>ad hoc</i> Committee	No comment
72	Procedure Applicable to Interpretation,	No comment

	Revision and Annulment	
73	Stay of Enforcement of the Award	No comment
74	Resubmission of Dispute after an Annulment	No comment
75	Consent of Parties to Expedited Arbitration	Para. (3): Israel would like to reiterate the comment it made in the Washington conference in November 2019, that the failing of an arbitrator to confirm his/her availability for an expedited schedule should not prevent the parties from proceeding to an expedited arbitration if they so desire. Thus, the parties should be allowed to replace the unavailable arbitrator or, for example, agree to proceed with a sole arbitrator.
76	Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration	No comment
77	Appointment of Sole Arbitrator for Expedited Arbitration	Para(2)(c): Israel supports the comment made previously by one of the States, and request the deletion of para 2(c). There is no justification to assign the SG automatically with the power to appoint the sole arbitrator

		in cases where the parties could reach an agreement but the candidate happened to be unavailable.
78	Appointment of Three-Member Tribunal for Expedited Arbitration	Please see our comment above on AR 77.
79	Acceptance of Appointment in Expedited Arbitration	No comment
80	First Session in Expedited Arbitration	No comment
81	Procedural Schedule in Expedited Arbitration	Upon the combination of ARs 22 and 76, it is inferred that proposals for disqualification of arbitrators are included among the submissions referred to in Rule 81(4). Thus, the proposals are to be considered in parallel with the main schedule of the proceeding. However, it is Israel's view that the basic principle of Rule 22(2) should be maintained, according to which the proceedings should be suspended upon the filing of the proposal until a decision on the proposal has been made, except to the extent

		<p>that the parties agree to continue the proceeding. In Israel's view, the rationales for suspending a proceeding during a procedure for disqualification of an arbitrator in expedited arbitration are similar to those applicable to the suspension of proceedings in the case of regular arbitration (AR 22(2)) and are substantive enough to be maintained even in expedited proceedings.</p> <p>This comment also refers to AR 84(2).</p>
82	Default in Expedited Arbitration	No comment
83	Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration	No comment
84	Procedural Schedule for Interpretation, Revision or Annulment in Expedited Arbitration	Please see our comment above on AR 81.
85	Resubmission of a Dispute after	No comment

	Annulment in Expedited Arbitration	
86	Opting Out of Expedited Arbitration	<p>Para. (2): For the sake of due process and transparency, Israel suggests adding a requirement to provide reasoning to a decision made under para. (2). This suggested requirement is in line with several ARs (e.g., 52(4), 59(1)(i)-(j), and 67(5)), which explicitly require a reasoned decision.</p> <p>We may propose a modification to the wording: <i>The tribunal shall issue a reasoned decision on this matter.</i></p>

Mediation Rules

#	Rule	Israel's Comments
1	Definitions	Israel would like to question the omission of the definition of "a Party". The phrase appears several times in the MRs and such definition exists in the ARs, CRs, (AF)ARs and (AF)CRs, and we are of the view that the

		definition is necessary in the Mediation Rules as well.
2	Mediation Proceedings	Israel wishes to reiterate its previous comment that the mediation proceeding is related to a dispute relating to an investment, as also reflected in the substance of the rules. Therefore, we view that para. (1) should reflect this by referring explicitly to a dispute. A suggested drafting modification: <i>"The Secretariat is authorized to administer mediations <u>in disputes/on issues in dispute</u> that relate to an investment..."</i>
3	Application of Rules	No comment
4	Party Representative	No comment
5	Institution of Mediation Based on Prior Party Agreement	No comment
6	Institution of Mediation Absent a Prior Party Agreement	No comment
7	Registration of the Request	No comment
8	Calculation of Time Limits	No comment

9	Costs of the Mediation	No comment
10	Confidentiality of the Mediation	No comment
11	Use of Information in Other Proceedings	No comment
12	Qualifications of the Mediator	No comment
13	Number of Mediators and Method of Appointment	No comment
14	Acceptance of Appointment	In reference to the comments in the explanatory notes: it is Israel's position that TPF clause should be inserted in the Mediation Rules. For the most part, the rationales are similar to those supporting the introduction of TPF clauses to the Arbitration Rules (i.e. prevention of conflict of interests with the mediators, assessment of a party's ability to reach an agreement or settlement independently, etc.). Therefore, it is our view that an express TPF clause is desired for the MRs and that it should indeed draw from and resemble AR 14 (as will be concluded).
15	Transmittal of the Request	No comment

16	Resignation and Replacement of Mediator	No comment
17	Role and Duties of the Mediator	No comment
18	Duties of the Parties	No comment
19	Initial Written Statements	It is unclear why the last part of para. (1) was deleted. Israel finds it important to ensure that the mediators and the other parties receive the written statement prior to the first session, so that the session be efficient and focused.
20	First Session	No comment
21	Mediation Procedure	No comment
22	Termination of the Mediation	No comment

Fact-Finding Rules

#	Rule	Israel's Comments
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1	Definitions	Israel would like to question the omission of the definition of "a Party". The phrase appears several times in the FFRs and such definition exists in the ARs, CRs, (AF)ARs and (AF)CRs, and we are of the view that the definition is necessary in the Fact-Finding Rules as well.
2	Fact-Finding Proceedings	No comment
3	Application of Rules	No comment
4	Party Representative	No comment
5	The Request	No comment
6	Contents and Filing of the Request	No comment
7	Receipt and Registration of the Request	No comment
8	Qualifications of Members of the Committee	No comment
9	Number of Members and Method of	No comment

	Constituting the Committee	
10	Acceptance of Appointment	No comment
11	Constitution of the Committee	No comment
12	Sessions and Work of the Committee	No comment
13	General Duties	No comment
14	Calculation of Time Limits	No comment
15	Costs of the Proceeding	No comment
16	Confidentiality of the Proceeding	No comment
17	Use of Information in Other Proceedings	No comment
18	Manner of Terminating the Proceeding	No comment
19	Failure of a Party to Participate or Cooperate	Israel wishes to reiterate its previous comment that the FFRs should maintain a similar arrangement as that of the existing rule (in the fact-finding rules under the Additional Facility Rules) on failure to participate or cooperate. It is our view that when one party fails to appear or participate in the proceeding and the Committee

		determines that as a result thereof it is unable to carry out its task, it shall, after notice to the parties, close the proceeding and draw up its Report.
20	Report of the Committee	No comment
21	Issuance of the Report	No comment

ICSID CONVENTION PROCEEDINGS: Conciliation Rules

#	Rule	Israel's Comments
12	Notice of Third-Party Funding	It is Israel's view that the modifications suggested to AR 14 in the joint submission to which Israel is a party (that was submitted to the ICSID Secretariat on July 31, 2020) should also apply to CR 12 and (AF)CR 21 <i>mutatis mutandis</i> .