

In Focus: Objections that a Claim Manifestly Lacks Legal Merit (ICSID Convention Arbitration Rule 41(5))

In 2006, the International Centre for Settlement of Investment Disputes (ICSID) amended its rules to include an expedited procedure for objections that a claim manifestly lacks legal merit.¹ The aim was to dismiss manifestly unmeritorious claims early in the proceeding. It was incorporated into the provision dealing with preliminary objections as ICSID Arbitration Rule 41(5) and as ICSID Arbitration (Additional Facility) Article 45(6):

Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The Party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph [(1/2)] or to object, in the course of the proceeding, that a claim lacks legal merit.

Tribunals have set a high standard for determining whether a claim manifestly lacks legal merit, requiring the moving party “to establish its objection clearly and obviously, with relative ease and despatch.”² Tribunals have also established that the rule extends to jurisdictional objections, in addition to objections to the merits of a claim.³ The rule has also been applied in post-award remedy proceedings, including requests made by parties who were claimants in the original arbitration proceeding.⁴

Requests on the basis of this provision have been filed in 40 proceedings as of March 11, 2021.⁵ This corresponds to approximately 5% of the 754 arbitration and post-award remedy proceedings registered during the same period. These requests resulted in:

- Seven awards (in original arbitration proceedings) and decisions (in post-award proceedings) upholding the objections in full and disposing of the case in its entirety
- Four decisions partially upholding the objections and dismissing some of the claims
- Twenty-six decisions dismissing the requests

Three requests were pending as of March 11, 2021.

1. As background to the 2006 rule amendments, the Secretariat issued a discussion paper on October 22, 2004 titled [Possible Improvements of the Framework of ICSID Arbitration](#) and a working paper on May 12, 2005 titled [Suggested Changes to the ICSID Rules and Regulations](#).

2. *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan* (ARB/07/25), [Decision on the Respondent's Objection Under Rule 41\(5\) of the ICSID Arbitration Rules](#) (May 12, 2008), ¶¶ 88, 92. See also *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait* (ICSID Case No. ARB/18/2), [Award](#) (November 1, 2019), ¶ 33: “[...] our task will be to determine whether taking the facts as a given, unless they are plainly without foundation, the claims are such that they “manifestly” (i.e. clearly and obviously) lack legal merit.”

3. *Ansung Housing Co., Ltd v. People's Republic of China* (ARB/14/25), Award (March 9, 2017).

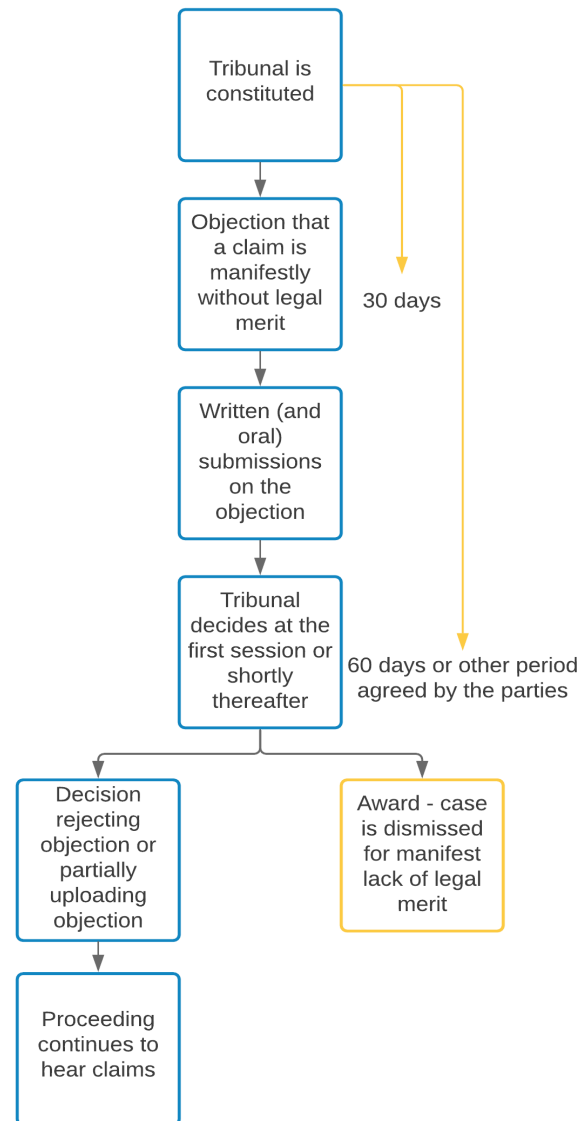
4. Rule 41(5) has been raised in several annulment and revision proceedings in cases conducted under the ICSID Convention. See e.g. [InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain](#) (ARB/14/12).

5. See [ICSID Tables of Decisions: Manifest Lack of Legal Merit](#) for details.

Timelines for Rule 41(5)

The procedure is designed to be completed at the first session of the Tribunal (or the Committee in annulment proceedings), which must be held within 60 days after the Tribunal's constitution. The objection must be filed within 30 days after the constitution of the Tribunal or at the latest before the Tribunal holds the first session, and the Tribunal must notify the parties of its decision at the first session or promptly thereafter.

A longer or shorter timeline may also be agreed by the parties or set out in a treaty.⁶ In practice, parties have often agreed on a longer process than was contemplated by the rule. The table below shows the various scenarios of written and oral submissions on the objections and the median and average times between the respondent's request and the decision or award. The duration of the procedure has varied depending on the number of submissions and whether a hearing was held (at the first session or separately). The average has been 131 days from the date of the request to the date of the Tribunal's decision or award on the objection. This is within the time for the expedited procedure contemplated by the Central American Free Trade Agreement (CAFTA), which requires that a decision or award must be issued no later than 150 days after the date of the request.⁷ The average time from the last submission to the Tribunal's decision or award was 56 days.



6. See e.g. Chapter 10, Art. 10.20.4-6 of the Central America Free Trade Agreement. See also *Pac Rim Cayman LLC v. Republic of El Salvador* (ARB/09/12), [Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5](#) (August 2, 2010) for an example of an ICSID case based on that provision.

7. See Art. 10.20.5 of the CAFTA. The time limit may be extended by 30 days.

Rule 41(5) in the Proposed Amended ICSID Rules

ICSID is currently amending its procedural rules, and has received comments on the scope, standard and procedure of ICSID Arbitration Rule 41(5) and ICSID Arbitration (Additional Facility) Rule 45(6) in public consultations. In response to the comments received, ICSID has proposed a number of revisions, including to the scope of the provision. As a few Tribunals have questioned whether the provision extends to jurisdictional objections, the amended rule clarifies that the rule covers objections to jurisdiction and to the Tribunal's competence—in addition to covering objections to the merits of a claim. The amended provision also provides more detail concerning timelines for the procedure. The provision establishes that a party may file a request that a claim manifestly lacks legal merit no later than 45 days after the constitution of the Tribunal. In turn, the Tribunal must render its decision or Award on the objection within 60 days after the last submission. The current proposed rule is found in ICSID's [Working Paper # 4](#) (see Arbitration Rule 41 and (Additional Facility) Arbitration Rule 51).

Conclusion

ICSID Arbitration Rule 41(5) and ICSID Arbitration (Additional Facility) Rule 45(6) are one of a number of innovative provisions introduced in the 2006 version of the ICSID rules. In clarifying that the Tribunal may be asked to dismiss all or part of a claim on an expedited basis, the provision addressed concerns over the Secretary-General's limited power to screen requests for arbitration. The Secretary-General's authority does not extend to the merits of the dispute, for example, or to cases where jurisdiction is doubtful (but not manifestly lacking). While used relatively infrequently (i.e. 5% of proceedings), it has provided a means for parties to raise objections to allegedly manifestly unmeritorious claims early in the arbitral process, before unnecessarily consuming the parties' resources. The proposed amendments to the provision reflect the scope of the objection as established by caselaw and the practice as to the procedure.

Related Resources

[Tables of Decisions in ICSID Cases](#): The ICSID Secretariat has developed tables of decisions in ICSID cases on various procedural and substantive topics, including [decisions on manifest lack of legal merit](#).

[ICSID Caseload - Statistics](#): The ICSID Caseload - Statistics contains a profile of the ICSID caseload since the first case was registered in 1972.