

ICSID Procedural Provisions and the UNCITRAL Supplementary Provisions on the Conduct of Proceedings to resolve international investment disputes

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Road Map

- Legal Framework of the ICSID Convention & Rules, the UNCITRAL Arbitration Rules/ ICSID Additional Facility Rules
- Update on the application of the 2022 ICSID Rules
- Supplementary Provisions and ICSID's experience with the equivalent ICSID provisions
- Considerations for Implementation

Legal Framework of ICSID Convention Proceedings

CHAPTER I INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Section 1 Establishment and Organization

Article 1

- (1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).
- (2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

CHAPTER I GENERAL PROVISIONS

Rule 1 Application of Rules

- (1) These Rules shall apply to any arbitration proceeding conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention") in accordance with Article 44 of the Convention.
- (2) The Tribunal shall apply any agreement of the parties on procedural matters to the extent that it does not conflict with the Convention or the ICSID Administrative and Financial Regulations.

Rule 2 Party and Party Representative

- (1) For the purposes of these Rules, "party" includes all parties acting as claimant or as respondent.
- (2) Each party may be represented or assisted by agents, counsel, advocates or other advisors, whose names and proof of authority to act shall be promptly notified by that party to the Secretary-General ("representative(s)").

Legal Framework of UNCITRAL Arbitration Rules/ ICSID Additional Facility Rules

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ADDITIONAL FACILITY RULES AND REGULATIONS

 **ICSID** | International Centre for
Settlement of Investment Disputes
WORLD BANK GROUP

UNCITRAL

UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL
Arbitration Rules
(2021)

UNCITRAL
Expedited Arbitration Rules

UNCITRAL
Rules on Transparency
in Treaty-based
Investor-State
Arbitration

2022 ICSID Rules

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CONVENTION, REGULATIONS
AND RULES

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ADDITIONAL FACILITY
RULES AND REGULATIONS

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MEDIATION RULES AND REGULATIONS

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FACT-FINDING
RULES AND REGULATIONS

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Implementation of the 2022 Rules

- 192 cases administered under the 2022 Rules to date
 - ICSID Arbitration Rules → 174
 - ICSID Additional Facility (Arbitration) Rules → 16
 - ICSID Conciliation Rules → 2
- Status of the Cases
 - 163 Pending Cases
 - 20 Suspended
 - 29 Cases Concluded
 - 5 Awards (one currently in annulment stage)
 - 24 settled or otherwise discontinued
- Of the pending arbitration cases many are still in early stage:
 - Eg: Post Registration / Appointments in progress → 52
 - First session completed → 98
 - Submissions in progress → 60

Supplementary Provisions

WGIII Supplementary Provisions	ICSID Convention and Arbitration Rules 2022
SP 1: Evidence	ICSID Convention Article 43 ICSID Arbitration Rules 36, 37, 38, 39, and 40
SP 2: Bifurcation	ICSID Arbitration Rules 42, 43, and 44
SP 3: Interim/ Provisional Measures	ICSID Convention Article 47 ICSID Arbitration Rule 47
SP 4: Manifest Lack of Legal Merit/ early dismissal	ICSID Arbitration Rule 41
SP 5: Security for Costs	ICSID Arbitration Rule 53
SP 6: Suspension of the Proceeding	ICSID Arbitration Rule 54
SP 7: Termination of the Proceeding	ICSID Arbitration Rules 55, 56, and 57
SP 8: Period of Time for Making the Award	ICSID Arbitration Rule 58
SP 9: Allocation of Costs	ICSID Convention Article 61 ICSID Arbitration Rules 51 and 52
SP 10: Consolidation	ICSID Arbitration Rule 46
SP 11: Third-party funding	ICSID Arbitration Rule 14

Bifurcation

- ICSID Rules include separate provision for bifurcation of preliminary objections
- To date, 41 decisions on bifurcation

Rule 42 Bifurcation

- (1) A party may request that a question be addressed in a separate phase of the proceeding ("request for bifurcation").
- (2) If a request for bifurcation relates to a preliminary objection, Rule 44 shall apply.
- (3) The following procedure shall apply to a request for bifurcation other than a request referred to in Rule 44:
 - (a) the request for bifurcation shall be filed as soon as possible;
 - (b) the request for bifurcation shall state the questions to be bifurcated;
 - (c) the Tribunal shall fix time limits for submissions on the request for bifurcation;
 - (d) the Tribunal shall issue its decision on the request for bifurcation within 30 days after the last submission on the request; and
 - (e) the Tribunal shall fix any time limit necessary for the further conduct of the proceeding.

Rule 44 Preliminary Objections with a Request for Bifurcation

- (1) The following procedure shall apply with respect to a request for bifurcation relating to a preliminary objection:
 - (a) unless the parties agree otherwise, the request for bifurcation shall be filed:
 - (i) within 45 days after filing the memorial on the merits;
 - (ii) within 45 days after filing the written submission containing the ancillary claim, if the objection relates to the ancillary claim; or
 - (iii) as soon as possible after the facts on which the preliminary objection is based become known to a party, if those facts were unknown to that party on the dates referred to in paragraph (1)(a)(i) and (ii);

Provisional Measures

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Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Rule 47 Provisional Measures

- (1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights, including measures to:
 - (a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process;
 - (b) maintain or restore the status quo pending determination of the dispute; or
 - (c) preserve evidence that may be relevant to the resolution of the dispute.

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1. The Tribunal may, at the request of a disputing party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the Tribunal orders a disputing party, for example [and without limitation], to:
 - (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the process itself; or
 - (c) Preserve evidence that may be relevant and material to the resolution of the dispute.
3. The disputing party requesting an interim measure under paragraphs 2 (a) to (b) shall satisfy the Tribunal that:
 - (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the disputing party against whom the measure is directed if the measure is granted; and
 - (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the Tribunal in making any subsequent determination.

Dismissal for Manifest Lack of Legal Merit (MLLM)

- 2022 Rules clarify that an MLLM objection can relate to jurisdiction and adds detail concerning the procedure
- If the Tribunal dismisses a claim for MLLM, the prevailing party is awarded its reasonable costs, unless special circumstances justify a different allocation

Rule 41 Manifest Lack of Legal Merit

- (1) A party may object that a claim is manifestly without legal merit. The objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal.

Rule 52 Decisions on Costs

- (2) If the Tribunal renders an Award pursuant to Rule 41(3), it shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are special circumstances justifying a different allocation of costs.

Security for Costs (SfC)

- Express provision on SfC available to a Party defending a Claim or Counter-Claim
- Includes circumstances to be considered by the Tribunal in determining whether to order SfC

Rule 53 **Security for Costs**

- (1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs.
- (3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:
 - (a) that party's ability to comply with an adverse decision on costs;
 - (b) that party's willingness to comply with an adverse decision on costs;
 - (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and
 - (d) the conduct of the parties.

Timing of the Award

- Includes time limits for Tribunal decisions and the Award
- Rule 12 says Tribunals must use their **best efforts** to meet time limits. If they cannot comply Tribunal must advise of the **special circs. justifying the delay and when it anticipates rendering the ruling**

- Aims to reduce time and costs

- 5 Awards under 2022 Rules

Rule 58 Timing of the Award

- (1) The Tribunal shall render the Award as soon as possible, and in any event no later than:
 - (a) 60 days after the later of the Tribunal constitution or the last submission, if the Award is rendered pursuant to Rule 41(3);
 - (b) 180 days after the last submission if the Award is rendered pursuant to Rule 44(3)(c); or
 - (c) 240 days after the last submission in all other cases.
- (2) A statement of costs and submission on costs filed pursuant to Rule 51 shall not be considered a submission for the purposes of paragraph (1).

Costs

- Tribunal discretion in allocating costs under Art. 61(2) of the Convention
- No presumption that the prevailing party should be awarded costs except when there is an Award under Rule 41(3) MLLM
- Clarifies relevant factors in costs Awards

Rule 52 **Decisions on Costs**

- (1) In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:
 - (a) the outcome of the proceeding or any part of it;
 - (b) the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner and complied with these Rules and the orders and decisions of the Tribunal;
 - (c) the complexity of the issues; and
 - (d) the reasonableness of the costs claimed.
- (2) If the Tribunal renders an Award pursuant to Rule 41(3), it shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are special circumstances justifying a different allocation of costs.
- (3) The Tribunal may make an interim decision on costs at any time, on its own initiative or upon a party's request.
- (4) The Tribunal shall ensure that all decisions on costs are reasoned and form part of the Award.

Consolidation and Coordination

- 1 consolidation under the 2022 Rules
 - First Majestic Silver Corp. v. United Mexican States (ICSID Case No. ARB/23/28)
- 2 coordinations under the 2022 Rules, one of them including an REIO (EU)
 - Klesch Group & others v. European Union (ARB(AF)23/1), Kingdom of Denmark (ARB/23/48) and Federal Republic of Germany (ARB/23/49)
 - PowerChina HuaDong Engineering Corporation and China Railway 18th Bureau Group Company Ltd v. Socialist Republic of Viet Nam (ARB(AF)22/7 and ARB/ADM/1)

Rule 46 Consolidation or Coordination of Arbitrations

- (1) Parties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations.
- (2) Consolidation joins all aspects of the arbitrations sought to be consolidated and results in one Award. To be consolidated pursuant to this Rule, the arbitrations shall have been registered in accordance with the Convention and shall involve the same Contracting State (or constituent subdivision or agency of the Contracting State).
- (3) Coordination aligns specific procedural aspects of two or more pending arbitrations, but the arbitrations remain separate proceedings and result in separate Awards.
- (4) The parties referred to in paragraph (1) shall jointly provide the Secretary-General with proposed terms for the conduct of the consolidated or coordinated arbitrations and consult with the Secretary-General to ensure that the proposed terms are capable of being implemented.
- (5) After the consultation referred to in paragraph (4), the Secretary-General shall communicate the proposed terms agreed by the parties to the Tribunals constituted in the arbitrations. Such Tribunals shall make any order or decision required to implement these terms.

Third-Party Funding

- Upon registration parties must disclose the name and address of the funder, and of the persons and entities that own and control the funder
- Intended to avoid inadvertent conflicts of interest
- TPF has been notified in **14% of arbitrations** under 2022 Rules
- SP10
 - Wider disclosure for funders
 - Longer time limits to disclose TPF

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Rule 14 Notice of Third-Party Funding

- (1) A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). If the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person.

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1. "Third-party funding" means the direct or indirect provision of any funds to a disputing party by a non-party for the pursuit or defence of a proceeding, either through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.
2. A disputing party in receipt of third-party funding or that has entered into an arrangement to receive third-party funding (the "funded party") shall disclose to the Tribunal and the other disputing parties the following information:
 - (a) The name and address of the third-party funder (in case of a legal entity, the name of the person(s), who own or control that entity);
 - (b) The name and address of the [beneficial owner(s)] [effective beneficiary] of the third-party funder and any person(s) with decision-making authority for or on behalf of the third-party funder in relation to the proceeding;
 - (c) Whether the third-party funder agrees to pay any adverse decision on costs;
 - (d) Whether the third-party funder has any right to terminate the funding agreement;
 - (e) Whether the third-party funder has any right to make decisions regarding the management of the claim or the proceeding; and
 - (f) Whether the remuneration of the third-party funder is dependent on the outcome of the proceeding.

Considerations for Implementation

- 2022 ICSID Rules are working well so far
- How to update the UNCITRAL Arbitration Rules for investment disputes?
- Truly procedural provisions necessary for the conduct of the proceeding should be maintained as rules and not as treaty provisions



THANK YOU