

ICSID's Experience with Objections that a Claim Manifestly Lacks Legal Merit**(Data as of March 10, 2021)**

1. 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. The main purpose of the provision was to dismiss manifestly unmeritorious claims early in the process, before they unnecessarily consume the parties' resources. 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):

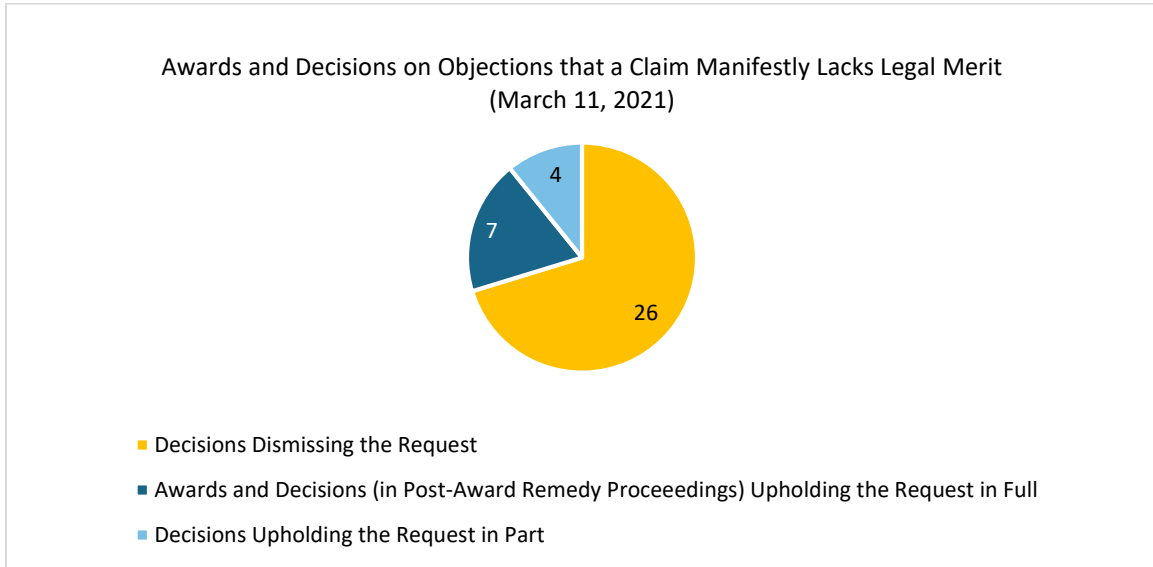
Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The 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.

2. Tribunals have employed 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.”¹
3. Tribunals have also established that the rule extends to jurisdictional objections, in addition to objections to the merits of a claim.² The rule has also been applied in post-award remedy proceedings, including requests made by parties who were claimants in the original arbitration proceeding.³
4. Requests on the basis of this provision have been filed in 40 proceedings to date. This corresponds to approximately 5% of the 754 arbitration and post-award remedy proceedings registered since the provision was adopted. These requests resulted in 7 awards (in original arbitration proceedings) and decisions (in post-award proceedings) upholding the objections in full and disposing of the case in its entirety, 4 decisions partially upholding the objections and dismissing some of the claims, and 26 decisions dismissing the requests. Three requests were pending as of March 11, 2021.

¹ *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.”

² *Ansung Housing Co., Ltd v. People's Republic of China* (ARB/14/25), [Award](#) (March 9, 2017).

³ 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. 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 or such other period as agreed by the parties. If the parties agreed on another expedited procedure, e.g. in an investment treaty, that expedited procedure applies.⁴ 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. The decision is sometimes notified orally at the first session or hearing on the objection, and the written reasons communicated later.

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), and was on average 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 e.g. the CAFTA, which provides that a decision or award must be issued no later than 150 days after the date of the request.⁵ The average time from the last submission to the Tribunal’s decision or award was 56 days.

⁴ See e.g. Chapter 10, Art. 10.20.4-6 of the Central America Free Trade Agreement (CAFTA). 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.

⁵ See Art. 10.20.5 of the CAFTA. The time limit may be extended by 30 days.

Duration of the Procedure on Objections that a Claim Manifestly Lacks Legal Merit

Written and Oral Submissions	Number of Cases	Median time Between Request and Decision (Days)	Average Time between Request and Decision (Days)
One Round of Written Submissions (No Hearing)	6	55	76
One Round of Written Submissions + Hearing	9	91	120
Two Rounds of Written Submissions (No Hearing)	4	68	69
Two Rounds of Written Submissions + Hearing	10	138	143
One or Two Rounds of Written Submissions + Hearing + Submissions on Costs and/or Post-Hearing Briefs	8	161	200
Total Number of Cases	37	104	131

7. ICSID 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 concerning the [ICSID Rule amendment project](#). As a result of the comments received, revisions have been made to clarify the scope of the provision and to provide more detail concerning the procedure. The current proposed rule is found in [ICSID's Working Paper # 4](#) (see Arbitration Rule 41 and (Additional Facility) Arbitration Rule 51).
8. ICSID considered whether to address objections that a claim manifestly lacks legal merit in its proposed expedited arbitration rules ("EAR"), which are part of the Rule amendment proposals. The EAR will be offered in Chapter XII of the ICSID Arbitration Rules and Chapter XIII of the ICSID (Additional Facility) Arbitration Rules (*see* latest versions in [ICSID WP # 4](#)). Parties may opt into the EAR by consenting in writing to apply them for any dispute that qualifies for proceedings under the ICSID Convention or the Additional Facility. Once the EAR process has started, parties may opt out of the EAR at any time by agreement or by Tribunal decision upon party request.
9. The EAR are specifically designed for investor-State disputes and focus on reducing the time to establish the Tribunal, for the written procedure, and rendering the award, with clear deadlines for the steps in the process. The EAR process is estimated to conclude with an award within 18 months from registration of the request for arbitration. The following table shows the basic steps in the process and the timeline with a sole arbitrator (a sole arbitrator is the default under the EAR).

Expedited Arbitration Under the ICSID Draft Arbitration Rules

Day No. (Cumulative)	Step in the Proceeding	No. of Days for Step
Day 1	Registration	-
Day 30	Agreement on Expedited Arbitration	[e.g., 30] days after registration
Day 60	Agreement on number & method for constituting the Tribunal – Sole Arbitrator (SA)	30 days after notice of consent to EA
Day 80	Parties appoint SA	20
Day 90	SA accepts appointment / constitution of Tribunal	10
Day 120	First session	30
Day 180	Claimant(s)' memorial	60
Day 240	Respondent(s)' counter-memorial	60
Day 280	Claimant(s)' reply	40
Day 320	Respondent(s)' rejoinder	40
Day 380	Hearing (no. of days determined between SA and parties)	60
Day 390 (+ no. of hearing days)	Parties' statements of costs	10
Day 510	Award	120

10. The EAR merge all matters before the Tribunal in one procedural schedule and do not allow for bifurcation. Since the provision addressing an objection that a claim manifestly lacks legal merit is a form of automatic bifurcation, this option is also excluded from the EAR. A study of bifurcated proceedings made by ICSID showed that these could significantly extend the duration of the proceeding if the bifurcated issues do not dispose of the entire case (see [WP # 1, Vol. 3, Schedule 9, p. 901](#)). In the case of objections that a claim manifestly lacks legal merit, this could add up to 131 days to the process if the objections are dismissed (the average duration from the objection to a decision). Therefore, limits on possible applications, a clear timeline and certainty concerning the steps in the process were preferred for the EAR. If a party would like to raise any objections concerning the jurisdiction or the merits, these would be examined jointly with all claims and an award would be rendered within 18 months.
11. The EAR might not be apt for all investor-State cases, in particular those with complex facts or where the parties wish to make various preliminary motions (see [ICSID WP # 1, Vol. 1, pp. 292-295](#)). However, the EAR may be useful in specific cases, for example those based on consent in investment contracts, or treaty cases with few disputed facts. Given its potential to reduce the time and costs of a dispute, the EAR may be especially helpful to small and medium-sized enterprises involved in a dispute.