

UNCITRAL Working Group III on ISDS reform - Compilation of selected procedural provisions in recent IIAs (see A/CN.9/WG.III/WP.219)

	<u>ICSID Arbitration Rules &amp; ICSID Convention (2022)</u>	<u>Comprehensive Trade and Economic Agreement between Canada and the European Union (CETA) (2016)</u>	<u>Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018)</u>	<u>Agreement between the United States of America, the United Mexican States, and Canada (USMCA) (2018)</u>
<b>Early Dismissal</b>	<p><b>Rule 41 (Manifest lack of legal merit)</b></p> <p>(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.</p> <p>(2) The following procedure shall apply:</p> <p>(a) a party shall file a written submission no later than 45 days after the constitution of the Tribunal;</p> <p>(b) the written submission shall specify the grounds on which the objection is based and contain a statement of the relevant facts, law and arguments;</p> <p>(c) the Tribunal shall fix time limits for submissions on the objection;</p> <p>(d) if a party files the objection before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the objection, so that the Tribunal may consider the objection promptly upon its constitution; and</p> <p>(e) the Tribunal shall render its decision or Award on the objection within 60 days after the later of the constitution of the Tribunal or the last submission on the objection.</p> <p>(3) If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision on the objection and fix any time limit necessary for the further conduct of the proceeding.</p> <p>(4) A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 43 or to argue subsequently in the proceeding that a claim is without legal merit.</p> <p><b>Rule 43 (Preliminary Objections)</b></p> <p>(1) A party may file a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal (“preliminary objection”).</p> <p>(2) A party shall notify the Tribunal and the other party of its intent to file a preliminary objection as soon as possible.</p> <p>(3) The Tribunal may at any time on its own initiative consider whether a dispute or an ancillary claim is within the jurisdiction of the Centre or within its own competence.</p>	<p><b>Article 8.32 (Claims manifestly without legal merit)</b></p> <p>1. The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, file an objection that a claim is manifestly without legal merit.</p> <p>2. An objection shall not be submitted under paragraph 1 if the respondent has filed an objection pursuant to Article 8.33.</p> <p>3. The respondent shall specify as precisely as possible the basis for the objection.</p> <p>4. On receipt of an objection pursuant to this Article, the Tribunal shall suspend the proceedings on the merits and establish a schedule for considering such an objection consistent with its schedule for considering any other preliminary question.</p> <p>5. The Tribunal, after giving the disputing parties an opportunity to present their observations, shall at its first session or promptly thereafter, issue a decision or award stating the grounds therefor. In doing so, the Tribunal shall assume the alleged facts to be true.</p> <p>6. This Article shall be without prejudice to the Tribunal’s authority to address other objections as a preliminary question or to the right of the respondent to object, in the course of the proceeding, that a claim lacks legal merit.</p> <p><b>Article 8.33 (Claims unfounded as a matter of law)</b></p> <p>1. Without prejudice to a Tribunal’s authority to address other objections as a preliminary question or to a respondent’s right to raise any such objections at an appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted pursuant to Article 8.23 is not a claim for which an award in favour of the claimant may be made under this Section, even if the facts alleged were assumed to be true.</p> <p>2. An objection under paragraph 1 shall be submitted to the Tribunal no later than the date the Tribunal fixes for the respondent to submit its counter-memorial.</p> <p>3. If an objection has been submitted pursuant to Article 8.32, the Tribunal may, taking into account the circumstances of that objection, decline to address, under the procedures set out in this Article, an objection submitted pursuant to paragraph 1.</p> <p>4. On receipt of an objection under paragraph 1, and, if appropriate, after rendering a decision pursuant to paragraph</p>	<p><b>Article 9.23 (Conduct of Arbitration) (4)-(6)</b></p> <p>4. Without prejudice to a tribunal’s authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal’s jurisdiction, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.29 (Awards) or that a claim is manifestly without legal merit.</p> <p>(a) An objection under this paragraph shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.</p> <p>(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.</p> <p>(c) In deciding an objection under this paragraph that a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.29 (Awards), the tribunal shall assume to be true the claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment 9-26 thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in the relevant article of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.</p> <p>(d) The respondent does not waive any objection as to competence, including an objection to jurisdiction, or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.</p> <p>5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 or any objection that the dispute is not within the tribunal’s competence, including an objection that the dispute is not within the tribunal’s jurisdiction. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefor, no later than</p>	<p><b>Article 14. D.7 (Conduct of Arbitration) (4)-(6)</b></p> <p>4. Without prejudice to a tribunal’s authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal’s jurisdiction, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 14.D.13 (Awards) or that a claim is manifestly without legal merit.</p> <p>(a) An objection under this paragraph shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.</p> <p>(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.</p> <p>(c) In deciding an objection under this paragraph that a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 14.D.13 (Awards), the tribunal shall assume to be true the claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in the relevant article of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.</p> <p>(d) The respondent does not waive any objection as to competence, including an objection to jurisdiction, or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.</p> <p>5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 or any objection that the dispute is not within the tribunal’s competence, including an objection that the dispute is not within the tribunal’s jurisdiction. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefor, no later than</p>

	(4) The Tribunal may address a preliminary objection in a separate phase of the proceeding or join the objection to the merits. It may do so upon request of a party pursuant to Rule 44 or at any time on its own initiative, in accordance with the procedure in Rule 44(2)-(4).	3, the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection stating the grounds therefor.	150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.  6. When the tribunal decides a respondent's objection under paragraph 4 or 5, it may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.	150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.  6. When the tribunal decides a respondent's objection under paragraph 4 or 5, it may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.
<b>Security for Costs</b>	<p><b>Rule 53 (Security for Costs)</b></p> <p>(1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs.</p> <p>(2) The following procedure shall apply:</p> <p>(a) the request shall include a statement of the relevant circumstances and the supporting documents;</p> <p>(b) the Tribunal shall fix time limits for submissions on the request;</p> <p>(c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and</p> <p>(d) the Tribunal shall issue its decision on the request within 30 days after the later of the constitution of the Tribunal or the last submission on the request.</p> <p>(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:</p> <p>(a) that party's ability to comply with an adverse decision on costs;</p> <p>(b) that party's willingness to comply with an adverse decision on costs;</p> <p>(c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and</p> <p>(d) the conduct of the parties.</p> <p>(4) The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3), including the existence of third-party funding.</p> <p>(5) The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.</p> <p>(6) If a party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal</p>	<b>NO SPECIFIC PROVISION ON SECURITY FOR COSTS</b>	<b>NO SPECIFIC PROVISION ON SECURITY FOR COSTS</b>	<b>NO SPECIFIC PROVISION ON SECURITY FOR COSTS</b>

	<p>may, after consulting with the parties, order the discontinuance of the proceeding.</p> <p>(7) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.</p> <p>(8) The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party's request.</p>			
<p><b>Allocation of Costs</b></p>	<p><b>ICSID Convention</b></p> <p><b>Article 61 (Costs of Proceedings) (2)</b></p> <p>(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.</p> <p><b>Rule 50 (Costs of the Proceeding)</b></p> <p>The costs of the proceeding are all costs incurred by the parties in connection with the proceeding, including:</p> <ul style="list-style-type: none"> <li>(a) the legal fees and expenses of the parties;</li> <li>(b) the fees and expenses of the Tribunal, Tribunal assistants approved by the parties and Tribunal-appointed experts; and</li> <li>(c) the administrative charges and direct costs of the Centre.</li> </ul> <p>[...]</p> <p><b>Rule 52 (Decision on Costs)</b></p> <p>(1) In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:</p> <ul style="list-style-type: none"> <li>(a) the outcome of the proceeding or any part of it;</li> <li>(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;</li> <li>(c) the complexity of the issues; and</li> <li>(d) the reasonableness of the costs claimed.</li> </ul> <p>(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.</p> <p>(3) The Tribunal may make an interim decision on costs at any time, on its own initiative or upon a party's request.</p> <p>(4) The Tribunal shall ensure that all decisions on costs are reasoned and form part of the Award.</p>	<p><b>Article 8.39 (Final Award) (5)</b></p> <p>5. The Tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, the Tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the claim. If only parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims</p>	<p><b>Article 9.29 (Awards) (3)-(4)</b></p> <p>3. A tribunal may also award costs and attorney's fees incurred by the disputing parties in connection with the arbitral proceeding, and shall determine how and by whom those costs and attorney's fees shall be paid, in accordance with this Section and the applicable arbitration rules.</p> <p>4. For greater certainty, for claims alleging the breach of an obligation under Section A with respect to an attempt to make an investment, when an award is made in favour of the claimant, the only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the proximate cause of those damages. If the tribunal determines such claims to be frivolous, the tribunal may award to the respondent reasonable costs and attorney's fees.</p>	<p><b>Annex 14-D, Article 14.D.13 (Awards) (4)</b></p> <p>4. A tribunal may also award costs and attorney's fees incurred by the disputing parties in connection with the arbitral proceedings, and shall determine how and by whom those costs and attorney's fees shall be paid, in accordance with this Annex and the applicable arbitration rules.</p>

<p><b>Counterclaims</b></p>	<p><b>Rule 48 (Ancillary Claims)</b></p> <p>(1) Unless the parties agree otherwise, a party may file an incidental or additional claim or a counterclaim (“ancillary claim”) arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre.</p> <p>(2) An incidental or additional claim shall be presented no later than in the reply, and a counterclaim shall be presented no later than in the counter-memorial, unless the Tribunal decides otherwise.</p> <p>(3) The Tribunal shall fix time limits for submissions on the ancillary claim.</p>	<p><b>NO SPECIFIC PROVISIONS ON COUNTERCLAIMS</b></p>	<p><b>Article 9.19(2) (Submission of a Claim to Arbitration)</b></p> <p>2. When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.</p>	<p><b>NO SPECIFIC PROVISIONS ON COUNTERCLAIMS</b></p>
<p><b>Third-Party Funding</b></p>	<p><b>Rule 14 (Notice of Third-Party Funding)</b></p> <p>(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.</p> <p>(2) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.</p> <p>(3) The Secretary-General shall transmit the notice of third-party funding and any notification of changes to the information in such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b).</p> <p>(4) The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3).</p>	<p><b>Article 8.1 (Definitions)</b></p> <p>[...] Third party funding means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute.</p> <p>[...]</p> <p><b>Article 8.26 (Third-Party Funding)</b></p> <p>1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third-party funder.</p> <p>2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded, or the donation or grant is made.</p>	<p><b>NO PROVISION ON THIRD-PARTY FUNDING</b></p>	<p><b>NO PROVISION ON THIRD-PARTY FUNDING</b></p>