

# Confidentiality and Transparency - ICSID Convention Arbitration (2022 Rules)

 [icsid.worldbank.org/procedures/arbitration/convention/confidentiality-transparency/2022](https://icsid.worldbank.org/procedures/arbitration/convention/confidentiality-transparency/2022)

The level of confidentiality or transparency in an ICSID arbitration depends on the agreement of the parties or any applicable provisions in the instrument of consent. Absent these, the ICSID Rules on transparency will apply in a proceeding. In addition, there are specific rules applicable to the [ICSID Secretariat](#) and Members of a Tribunal.

## Provisions in Instrument of Consent

The treaty, contract or law containing the parties' consent to arbitration may include specific provisions on confidentiality and transparency applicable to the arbitration proceeding. They are usually recited in the Tribunal's first procedural order.

An example of a treaty provision on confidentiality and transparency is found in [Article 10.21 of the United States-Dominican Republic - Central America Free Trade Agreement \(CAFTA\)](#).

[The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration \(UNCITRAL Rules on Transparency\)](#) may apply in an ICSID case by virtue of the State parties to the applicable investment treaty having ratified the [Mauritius Convention](#), or by agreement of the disputing parties in the case. ICSID may also be designated to act as the repository of case documents (see e.g. [Procedural Order No. 2](#) in *BSG Resources Limited v. Republic of Guinea* (ICSID Case No. ARB/14/22)). The [UNCITRAL Rules on Transparency](#) contain detailed provisions on publication of case-related information, publication of documents, submissions by a non-disputing party, submissions by a non-disputing Treaty Party, hearings, and exceptions to transparency.

## ICSID Rules on Transparency

*The Award and Final Decision in a Post-Award Remedy Proceeding* ([Arbitration Rule 62](#))

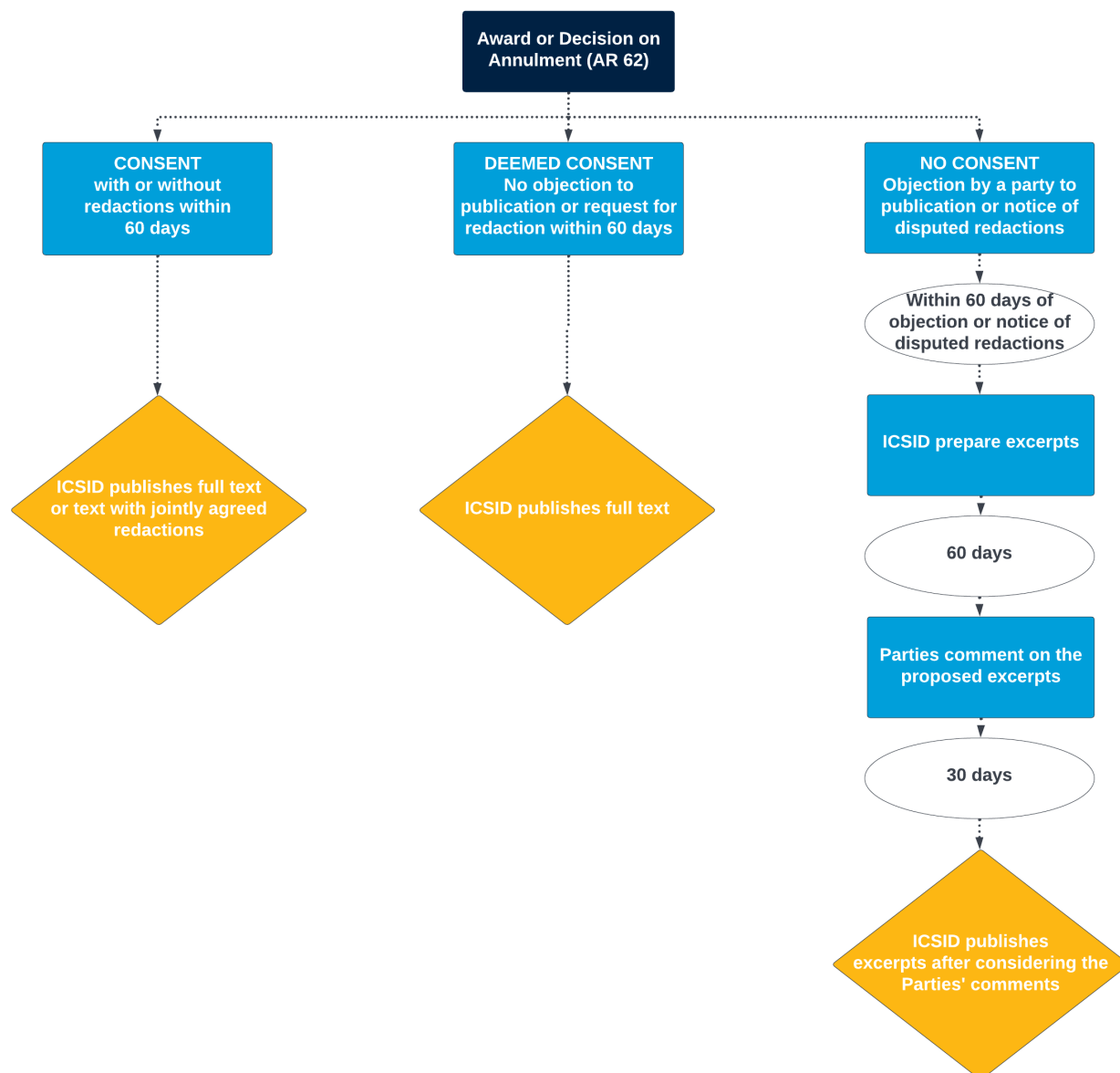
The parties can consent to ICSID's publication of the Award or the final decision in a post-Award remedy [proceeding](#). They may consent to publication with or without redaction of the document. If neither party objects to the publication of the document within 60 days after its issuance, consent to publish is deemed to have been given and it is made available on the ICSID website ([Arbitration Rule 62\(3\)](#)).

If a party objects to the publication of the Award or relevant post-Award remedy decision, ICSID is required to prepare and publish excerpts of the document. To that end, ICSID:

- proposes excerpts to the parties within 60 days after the objection to publication or disagreement on redactions, and invites the parties to comment on the draft excerpts

- the parties comment on the proposed excerpts within 60 days after their receipt
- ICSID considers the parties' comments and publishes the final excerpts within 30 days ([Arbitration Rule 62\(4\)](#)).

The parties' comments should address whether any information in the proposed excerpts is confidential or protected and should therefore be redacted (see [Arbitration Rule 66](#)).

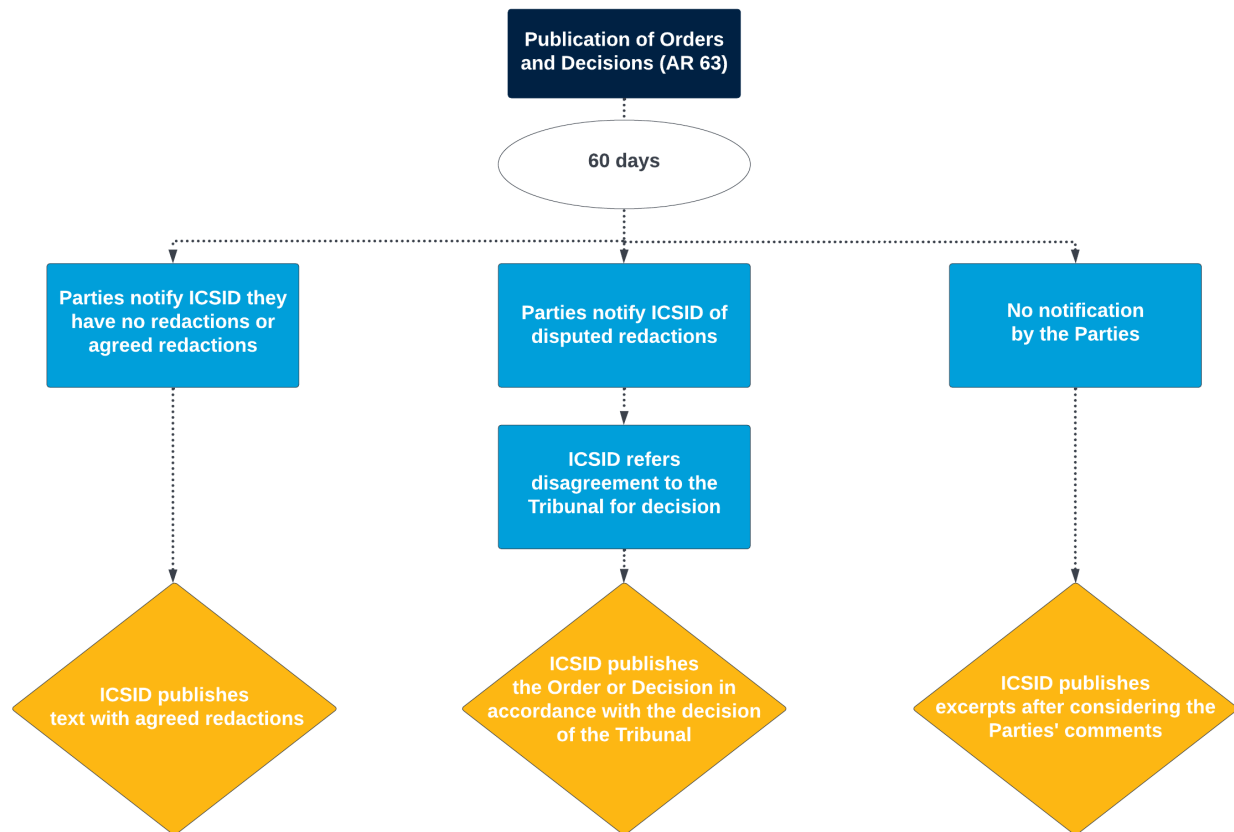


### Orders and Decisions ([Arbitration Rule 63](#))

ICSID is required to publish orders and decisions issued during any arbitration or post-Award remedy proceeding.

When an order or decision is issued, the parties have 60 days to notify ICSID whether they propose any redactions and whether they agree on those redactions ([Arbitration Rule 63\(1\)](#)). If the parties agree on all redactions, ICSID publishes the order or decision with those redactions. If the parties disagree on any redactions, ICSID refers the

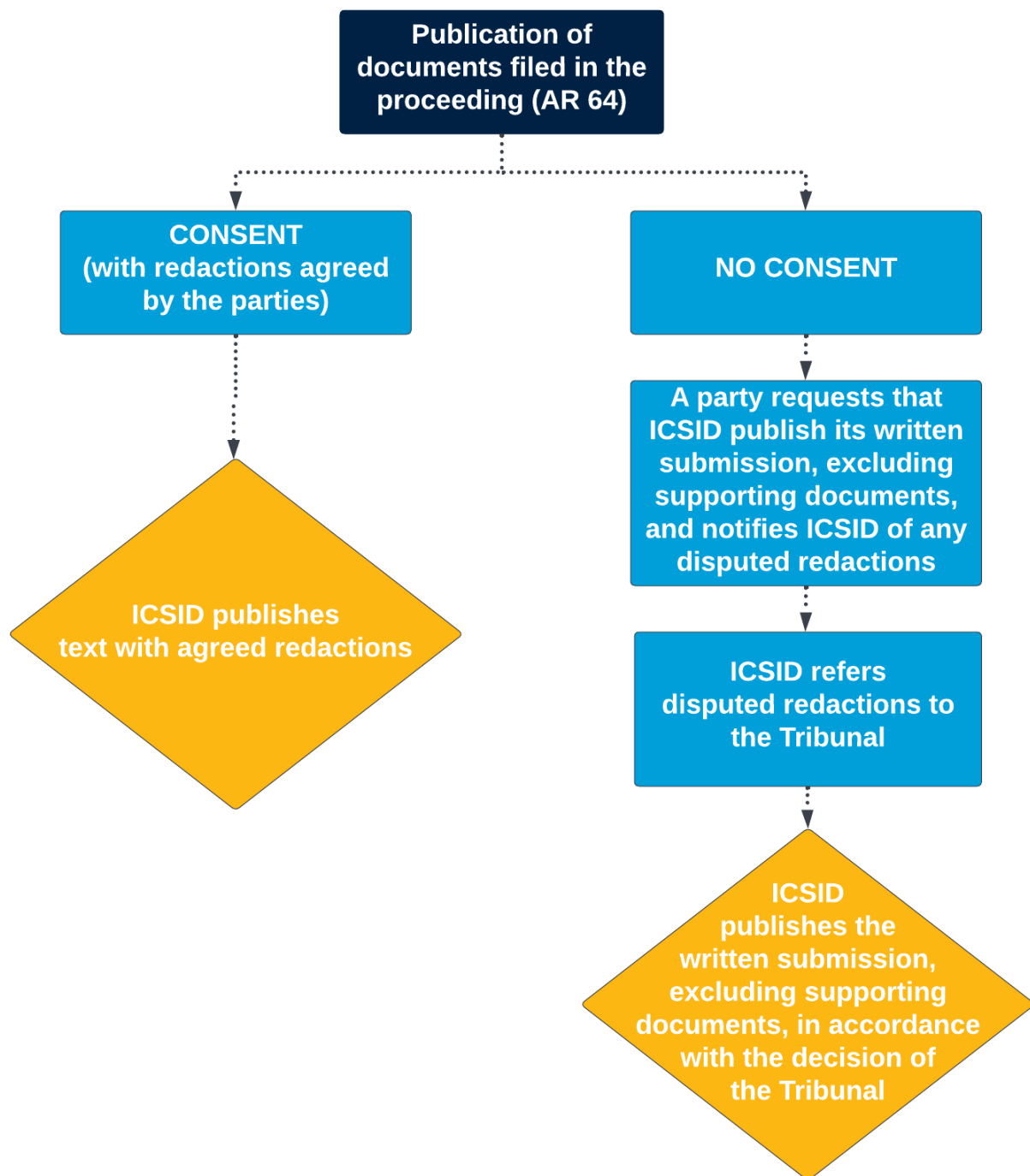
disputed redactions to the Tribunal for decision ([Arbitration Rule 63\(2\)-\(3\)](#)). If the parties do not notify ICSID of any redactions within 60 days after the issuance of the order or decision, ICSID publishes the document without redaction.



#### *Documents Filed by the Parties ([Arbitration Rule 64](#))*

The parties may agree to publish any written submission that they filed in the proceeding, including pleadings, witness statements, expert reports, legal authorities and exhibits.

Even if the parties do not agree on publication of such documents, a party can request that ICSID publish its own written submission (without witness statements, expert reports, legal authorities and exhibits). The other party cannot object to such publication but can request that the document be redacted. If the parties disagree on any redactions, either party may refer disputed redactions to the Tribunal for decision ([Arbitration 64\(2\)-\(3\)](#)).



#### *Observation of Hearings ([Arbitration Rule 65](#))*

The Tribunal must allow persons other than the participants in the hearing to observe the hearing, unless either party objects.

Public access to hearings is achieved through web or video broadcasting or in person. ICSID posts an advance notice of hearings open to the public on its website and details about how to obtain access to such hearings.

ICSID can also publish recordings and transcripts of hearings upon the request of a party, if the other party does not object ([Arbitration Rule 65\(3\)](#)).

## *Confidential and Protected Information ([Arbitration Rule 66](#))*

When dealing with disputes concerning redaction of documents, the Tribunal must ensure that confidential and protected information is not disclosed to the public ([Arbitration Rules 63\(3\)](#) and [64\(3\)](#)). Similarly, the Tribunal must establish procedures to prevent disclosure of such information during open hearings ([Arbitration Rule 65\(2\)](#)). For example, the Tribunal could suspend broadcasting during the portion of a hearing dealing with confidential or protected information.

Among other examples, confidential and protected information includes proprietary or privileged information under the applicable law, confidential business information, and protected personal data ([Arbitration Rule 66](#)).

The parties are invited to discuss the implications of any applicable laws concerning confidential and protected [information](#) at the first session of the Tribunal, which will allow for appropriate protective measures. For example, this could include consideration of data privacy laws such as the [General Data Protection Regulation \(GDPR\)](#).

The parties usually agree on the information and documents that they wish to keep confidential through a confidentiality agreement. The confidentiality agreement is usually signed by the parties and adopted by the Tribunal in an order. The agreement may allow either party to designate documents as confidential, in whole or in part, for use only in the arbitration.

## **Publication of Case Registers**

In addition to Awards, decisions, orders, and documents filed by parties, ICSID also publishes information on the registration of requests for arbitration, conciliation and post-Award remedies and maintains registers of all proceedings ([Administrative and Financial Regulations 25](#) and [26](#)). The registers are continuously updated under the Procedural Details published for each case on ICSID's website. They include details concerning the method of constitution and composition of each Tribunal, Conciliation Commission and Committee, and the procedural steps in the proceedings.

## **Rules Applicable to Arbitrators**

Tribunal members must keep confidential all information obtained as a result of their participation in the proceeding, including the contents of the Award and the deliberations ([Arbitration Rule 34\(1\)](#)). They are required to sign a declaration with this undertaking at the time of their acceptance of appointment. Any [Tribunal Assistant](#) is subject to the same duty of confidentiality.