

## THE 2022 ICSID RULES – WHAT DO THEY MEAN FOR ASIA?

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On 21 March 2022, the International Centre for Settlement of Investment Disputes (“ICSID”) Convention Member States approved a new set of amendments to the ICSID Rules (the “Rules”), the flagship procedural guidelines for investor-state arbitrations.<sup>1</sup> The 2022 ICSID Rules, which come into effect on 1 July of this year, contain some crucial changes. Asian states and investors should know what they mean and how to use them.

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### WHAT ARE THE ICSID RULES?

ICSID is the world’s leading forum for investment dispute resolution. Created in 1966 as part of the World Bank Group, ICSID offers an array of dispute resolution and conciliation services to investors and states under the ICSID Convention.<sup>2</sup> ICSID also offers an Additional Facility, providing a suite of ICSID administration services to certain parties outside the ICSID Convention.<sup>3</sup>

The ICSID Rules govern key aspects of arbitral procedure, including rules of evidence and arbitrator appointment. The Rules are updated irregularly – the last round of amendments was in 2006. But they are used often and remain the gold standard for investor-state procedures.

### WHY AMEND THE RULES NOW?

The new Rules arrive at a strange time. Globally, investor-state arbitration is under harsh scrutiny. States complain that investment treaties allow foreign investors to hold public policy hostage, infringing sovereignty and preventing needed regulation. They protest that private tribunals are adjudicating important public matters in secret, issuing awards that often cannot be appealed. Even investors fear that traditional arbitration may be too costly and time-consuming.

Asia is no exception. Asian countries signed hundreds of bilateral investment treaties (BITs) in the 1990s and early 2000s. These older treaties often contain extremely generous investment protections, allowing investors to challenge all manner of state action in arbitration proceedings. Now, backlash is building, and states take a more cautious approach. Stung by adverse arbitration awards, some countries such as India and Indonesia are terminating old treaties outright.

Asian countries, however, generate significant outbound foreign direct investment (FDI) themselves. Asian investors need protections for their business activities overseas. Their governments have a vested interest in obtaining those protections. To do this, states are pivoting towards:

- **Multilateral free trade agreements (FTAs):** These are broad-based agreements governing free trade generally, often between dozens of countries. Investor protections are only one facet among many. Where they exist, they are explicitly balanced against states’ sovereign right to regulate, especially in key areas, including the environment and labour protections. FTA dispute resolution systems vary. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is a new-model FTA struck in 2018 by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru and Vietnam – it allows investment arbitration, but procedures differ by treaty party; and
- **State-to-state dispute resolution:** Under these systems, individual investors have no standing to bring claims. Instead, their home state raises their grievances directly with the treaty counterparty. State-to-state systems can generate results (negotiated concessions or tariff relief, for example), but investors don’t win damages. State-to-state talks are often time-consuming, too. The Regional Comprehensive Economic Partnership (RCEP) between China, Australia, Japan, New Zealand, Korea and the ASEAN countries (the world’s largest free trade agreement) relies primarily on this state-to-state procedure.

Against this backdrop, the 2022 ICSID Rules try to modernise the investment arbitration process. They provide simple updates, capturing the state of play in investor-state arbitration by codifying common practices and illustrating others. However, the Rules make some big changes. Above all, they aim to create a speedy, intelligible system that is responsive to recent criticism and competitive with other forms of dispute resolution.

### WHAT’S NEW IN THE ICSID 2022 RULES?

"If you intend to use third-party funding in a dispute under the 2022 Rules, please consider the information you need to disclose and stay current on those disclosures."

Plenty. Here are the highlights:

- **Increased transparency:** Arbitration's "black box" reputation is controversial. Investor-state proceedings are not a guaranteed matter of public record, and the system's been criticised for its closed-door habits. Transparency concerns were high on the list for ICSID Member States during the amendment process. The Rules now require:

Mandatory third-party funding disclosure: Third-party funding is an increasingly common, and criticised, presence in investor-state arbitration. Often, outside funders (hedge funds, banks, and others) front the costs of arbitration in exchange for a share in any future award. This allows cash-strapped investors to bring claims they otherwise could

not. And third-party funding isn't limited to investors. Outside stakeholders sometimes help states cover their costs in proceedings they deem important (those involving crucial public policy questions or key areas of international law, for example). Under the 2022 Rules, all parties must disclose their use of third-party funds. They must provide information on "any non-party" they "directly or indirectly" take funds from, whether it be "through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding."<sup>4</sup> Where the funder is a company, parties must explain who owns and controls that company. If the funding arrangements change, parties must also disclose the changes. These provisions aim to split the difference on third-party funding: permitting the practice while preventing conflicts of interest;

Document publication: Under the 2022 Rules, awards become public by default, unless the parties object to the tribunal in writing within 60 days.<sup>5</sup> Tribunal orders and decisions are also published,<sup>6</sup> along with the parties' written submissions (if they consent).<sup>7</sup> These changes promise clearer pictures of investor-state proceedings. But they also raise confidentiality issues – parties may wish to protect trade secrets, internal government deliberations or other sensitive information from public disclosure. The Rules allow the parties to agree on redactions, which should mitigate this danger; and

Third party involvement: Arbitral hearings will be open unless parties object, so non-parties can observe them.<sup>8</sup> Tribunals can also allow third party submissions. Non-disputing treaty parties (countries that are party to a treaty but not involved in a given dispute) can provide their views on proper treaty interpretation.

"If your dispute is highly political or contentious, have a strategy for managing being in the spotlight. Chances are, it will prove a crucial part of your legal campaign;"

- **New rules on expedited arbitration:** Investor-state proceedings are long and expensive. They may be unattractive for parties who lack unlimited legal budgets or hold smaller claims. ICSID's new expedited arbitration rules try to fix this by (among other things) shortening timelines and limiting the length of written submissions. Expedited arbitration is not automatic. It requires party consent, and parties can jointly opt out.<sup>9</sup> A tribunal may also "decide that an arbitration should no longer be expedited" if one party so requests.<sup>10</sup> But the time savings could be substantial – ICSID thinks that its expedited procedures could cut case times in half;
- **Mandatory time limits:** The 2022 Rules set timeframes for tribunals to issue orders and awards, which should reduce the time and costs of proceedings and give parties some surety on dispute timetables. But the limits are advisory – the Rules simply ask tribunals to use their "best efforts" to meet them. Their efficacy will depend on real-world practice;
- **Expanded Additional Facility jurisdiction:** The ICSID Rules apply only to legal disputes covered by the ICSID Convention (those involving Member States and their nationals). The ICSID Additional Facility has a broader scope, covering cases involving only one ICSID Convention party. The new Additional Facility Rules expand that reach still further. Now, the Additional Facility Rules can apply to any investor-state dispute, so long as the parties agree to use them.<sup>11</sup> They also cover regional economic integration organisations (ASEAN, for example) that often set investment rules and are party to investment treaties.<sup>12</sup> The Additional Facility Rules provide access to ICSID's administrative offerings and expertise, which are substantial. But they lack some key benefits available to Convention participants such as streamlined award enforcement procedures in Member State courts; and
- **Improved procedural tools.** The 2022 Rules contain some useful procedural innovations, including:

"ICSID's new expedited procedures may open doors for you. Expedited arbitration – along with other popular "intermediate" routes, such as mediation and conciliation – can be attractive alternatives to full-bore proceedings, and ICSID's new procedures offer some welcome flexibility."

Dismissing meritless claims: The new Rules allow tribunals to dismiss manifestly meritless legal claims outright, before the proceedings get well underway.<sup>13</sup> This is subject to time limits – parties must move for this relief within 45 days of the tribunal's constitution.<sup>14</sup> Tribunals must then rule within 60 days following their constitution or the last submission, whichever is later;<sup>15</sup>

Bifurcated proceedings: The Rules explicitly allow tribunals to split proceedings (handling legal and quantum issues successively, for example).<sup>16</sup> ICSID tribunals have long done so under their own authority. The Rules codify this authority while giving tribunals criteria to consider whether bifurcation will materially reduce dispute time or effectively address questions separately;<sup>17</sup>

Consolidation: Parties to "two or more pending arbitrations administered by the Centre" can agree to consolidate them.<sup>18</sup> Tribunals, however, cannot consolidate proceedings on their own authority;

**Provisional measures:** Tribunals often issue pre-award orders (such as interim injunctions) to protect parties' rights during proceedings. The 2022 Rules clarify this practice. ICSID tribunals can now grant provisional measures to 1) maintain the status quo pending a dispute, 2) preserve evidence and 3) secure a party's "rights" (including preventing action "that is likely to cause current or imminent harm to that party or prejudice to the arbitral process."); and<sup>19</sup>

**Costs awards:** Arbitration costs awards are sometimes under-reasoned and vulnerable to too much party influence. The Rules direct ICSID tribunals to consider certain factors when crafting cost awards, such as the dispute's outcome, the parties' conduct, the complexity of the issues involved, and whether the parties' costs claims are reasonable.<sup>20</sup>

## WHAT DO ASIAN STATES AND INVESTORS NEED TO KNOW?

- **Be careful with third-party funding:** Third-party funding is popular in Asia. Jurisdictions such as Singapore and Hong Kong have already established comprehensive guidelines for third-party funding in litigation and arbitration. Other states may follow their lead. Third-party funding will probably remain a crucial factor of investor-state proceedings, at least in the near term. If you intend to use third-party funding in a dispute under the 2022 Rules, please consider the information you need to disclose and stay current on those disclosures. You should also try your best to avoid conflicts of interest, as these can generate lengthy procedural challenges and undercut your case;
- **Manage your image and disclosure:** The 2022 ICSID Rules guarantee greater transparency, which means you need to think about how your case will be perceived. Be attentive to your claims, defences and the evidence you need to prove them. If confidentiality is a concern, have a robust redaction plan in place ahead of time. Expect some degree of public scrutiny and third-party involvement. If your dispute is highly political or contentious, have a strategy for managing being in the spotlight. Chances are, it will prove a crucial part of your legal campaign;
- **Consider expedited arbitration.** ICSID's new expedited procedures may open doors for you. Expedited arbitration – along with other popular "intermediate" routes, such as mediation and conciliation – can be attractive alternatives to full-bore proceedings, and ICSID's new procedures offer some welcome flexibility. If you are a smaller investor (or hold a smaller claim), you may now have a viable route to arbitrate disputes you previously considered too expensive. Moreover, states may prefer simplified proceedings and lower costs. Expedited arbitrations will demand less in the way of resources and institutional capacity, so you may find them easier to navigate even if you have little previous dispute resolution expertise;
- **Use the Additional Facility:** The Additional Facility's new jurisdictional scope will allow more parties to participate in ICSID arbitration. Vietnam, Laos and India, for example, are not ICSID Member States. Under the new regime, they and their investors can now choose Additional Facility arbitration even if their counterparty also lacks ICSID status. The same goes for Thailand, which signed the ICSID Convention in 1985 but never ratified it. ASEAN – now the primary driver for investment agreements in Southeast Asia – can also access the Additional Facility as a distinct party. This flexibility is extremely attractive. Consider incorporating the Additional Facility rules in your investment concessions and contracts, especially if your counterparty is not covered by the Convention;
- **Make the 2022 ICSID Rules work for you.** They are a compromise, not a cure-all. Investors negotiating new concessions can request arbitration under the 2022 Rules as a middle ground between old-model procedures and national courts. States can select the new Rules in future treaties or investment laws, as they reform the arbitral process in key respects while still preserving its efficiencies and familiarities. If investor-state arbitration is simply off the table, you can consider ICSID mediation and conciliation procedures instead; and
- **Plan your dispute carefully.** If you are in an investor-state dispute, you need a good roadmap. You need to have a strategy that takes you from start to finish – from a notice of intent all the way to award enforcement proceedings, if need be. To do this, you need to know what your treaty says, what your opponent will likely argue, where the evidence is and who it favours, and many other similar points. States and newer investors may lack the requisite institutional knowledge to navigate proceedings efficiently, so ensure you know the Rules and other key areas of investor-state proceedings.

Watson Farley and Williams' (WFW) dispute resolution lawyers can assist. WFW is a truly international law firm and has a Dispute Resolution Group which works across WFW offices to provide a bespoke arbitration service. We work for governments and investors in the region and can assist with investment structuring and planning as well as investment treaty and ICSID arbitrations. We can also explain the issues arising in such arbitrations with clear, commercial advice.

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- [1] ICSID, *ICSID Administrative Counsel Approves Amendment of ICSID Rules* (21 March 2022), available at: <https://icsid.worldbank.org/news-and-events/communiqués/icsid-administrative-council-approves-amendment-icsid-rules#:~:text=March%2021%2C%202022-,ICSID%20Administrative%20Council%20Approves%20Amendment%20of%20ICSID%20Rules,investors%20and%20their%20host%20States.>
- [2] As of April 2022 164 countries have signed the ICSID Convention and 156 have ratified it. See ICSID, *Database of ICSID Member States*, available at: <https://icsid.worldbank.org/about/member-states/database-of-member-states>
- [3] ICSID, *ICSID Additional Facility Rules*, available at: <https://icsid.worldbank.org/resources/rules-and-regulations/additional-facility-rules/overview>
- [4] 2022 ICSID Rules, Rule 14(1).
- [5] 2022 ICSID Rules, Rule 62(3).
- [6] 2022 ICSID Rules, Rule 63.
- [7] 2022 ICSID Rules, Rule 64.
- [8] 2022 ICSID Rules, Rule 65(1).
- [9] 2022 ICSID Rules, Rules 75(1), 86(1).
- [10] 2022 ICSID Rules, Rule 86(2).
- [11] 2022 ICSID Rules, Additional Facility Rule 2(1)(a).
- [12] 2022 ICSID Rules, Additional Facility Rule 2(1)(c).
- [13] 2022 ICSID Rules, Rule 41.
- [14] 2022 ICSID Rules, Rule 41(2)(a).
- [15] 2022 ICSID Rules, Rule 41(2)(e).
- [16] 2022 ICSID Rules, Rule 42.
- [17] 2022 ICSID Rules, Rule 42(4).
- [18] 2022 ICSID Rules, Rule 46.
- [19] 2022 ICSID Rules, Rule 47(1).
- [20] 2022 ICSID Rules, Rule 52(1).

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