



## **Approval of the Amendments to the ICSID Rules**

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### **1. Introduction**

On March 21, 2022, Member States of the International Centre for Settlement of Investment Disputes (“ICSID”) approved a comprehensive set of amendments to the ICSID’s flagship rules for resolving disputes between foreign investors and their host States, after a five-year long process. This marks the fourth time the ICSID rules have been updated. Also, this is the most extensive review until now, as also explicitly acknowledged by the ICSID.<sup>1</sup> The amendments will come into effect on July 1, 2022 and will apply to arbitrations commenced from that date onwards.

The amendment of the ICSID rules aim at modernising the rules based on case experience, expediting proceedings, making the process cost effective, enhancing the availability of alternative dispute resolution, leveraging information technology to reduce the environmental footprint of ICSID proceedings, increasing transparency and addressing former deficiencies such as a lack of guidance surrounding cost allocation.<sup>2</sup> The purpose of the amendment of the ICSID rules was explained by David Malpass, President of the World Bank Group and Chair of the ICSID Administrative Council, as follows: “*The amended rules streamline procedures to enable greater access and speed, increase transparency, and enhance disclosures, with the ultimate goal of facilitating foreign investment for economic growth.*”

Indeed, upon the examination of the amended rules, it can be seen that the significant amendments were introduced to achieve the projected purposes. This work aims to highlight the key amendments to the ICSID rules.

### **2. Key Amendments to the ICSID Rules**

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<sup>1</sup> “ICSID Rules and Regulations Amendment” (International Centre for Settlement of Investment Disputes) <<https://icsid.worldbank.org/resources/rules-amendments>> accessed April 11, 2022.

<sup>2</sup> *Ibid.*

## **2.1. Broader access to ICSID’s dispute resolution rules and services.**

One of the most significant amendments was made in relation to jurisdictional requirements. In this scope, the ICSID’s ability to administer arbitration and conciliation proceedings was enhanced with the approved amendments to the ICSID Additional Facility Rules<sup>3</sup>, by extending access to the ICSID arbitration and conciliation to non-ICSID Member States and their nationals, as well as to Regional Economic Integration Organizations (“REIO”).

Under the new amendments, ICSID’s authority cover legal disputes arising out of an investment between a State or a REIO on the one hand, and a national of another State on the other hand, where (a) none of the parties to the dispute is a Member State or a national of a Member State; (b) either the State party to the dispute, or the State whose national is a party to the dispute, but not both, is a Member State; or (c) an REIO is a party to the dispute.<sup>4</sup>

So, with these amendments, States and investors will have access to Additional Facility arbitration and conciliation where one party or both the parties of the dispute is not an ICSID Member State or when a REIO (such as the European Union) is a party to the dispute.<sup>5</sup>

## **2.2. Greater transparency.**

The amendments introduced a new chapter titled “Publication, Access to Proceedings and Non-Disputing Party Submissions”, with a view to increase transparency in ICSID proceedings.

Firstly, under the current rules (non-amended rules), party consent is needed for publication of awards, and publication of awards without the consent of the parties is prohibited. In this scope, what the amendments bring forth is that consent to publish awards (also, to publish supplementary decisions on awards, rectifications, interpretations, and revisions of awards, and decisions on annulment) “*shall be deemed to have been given if no party objects in writing to such publication within 60 days after the dispatch of the document*”.<sup>6</sup> In other words, the introduced amendments deem consent to publication of these documents,

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<sup>3</sup> The ICSID Additional Facility offers arbitration, conciliation, and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention.

<sup>4</sup> 2022 ICSID Additional Facility Arbitration Rules, Article 2.

<sup>5</sup> “ICSID Administrative Council Approves Amendment of ICSID Rules” (International Centre for Settlement of Investment Disputes, March 21, 2022) <<https://icsid.worldbank.org/news-and-events/communiqués/icsid-administrative-council-approves-amendment-icsid-rules>> accessed April 11, 2022.

<sup>6</sup> 2022 ICSID Arbitration Rules, Rule 62.

unless a party objects within 60 days after their dispatch. Moreover, in case a party objects to publication, the ICSID shall publish excerpts of the aforesaid documents, in parallel with the previous rules and practice.

Another amendment relating to increased transparency is the new rules providing for the publication of orders and decisions with any redactions agreed to by the parties and jointly notified to the Secretary-General within 60 days after the order or decision is issued.<sup>7</sup>

Furthermore, as a transparency-related change, the amended rules also create a presumption in favour of open hearings by stating that “*The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal, to observe hearings, unless either party objects.*”<sup>8</sup> In other words, after the entry into force of the amended rules, the Tribunal shall allow non-parties to observe hearings “*unless either party objects*”. If none of the parties objects to holding an open hearing and thus hearings will be open to non-parties, the Tribunal will be required to establish procedures to prevent the disclosure of confidential or protected information.<sup>9</sup>

### **2.3. Expediting and increasing the efficiency of the proceedings.**

The amendments introduced various regulations to expedite arbitrations and increase the efficiency of the proceedings, such as:

- **Expedited arbitration:**<sup>10</sup> The updated rules provide that at any time, the parties to an arbitration conducted under the ICSID Convention may consent to expedite the arbitration by jointly notifying the Secretary-General in writing of their consent. Expedited arbitration is deemed to be suitable for lower-valued and less complex claims.
- **Electronic filing of documents:**<sup>11</sup> The amended rules require all documents to be filed electronically. It is also regulated under the new rules that in special circumstances, the Tribunal may order that documents also be filed in a different format. This amendment is, in addition to reducing time and costs, also a significant step in terms of reducing the environmental footprint of the ICSID proceedings.

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<sup>7</sup> 2022 ICSID Arbitration Rules, Rule 63; 2022 ICSID Additional Facility Arbitration Rules, Rule 73.

<sup>8</sup> 2022 ICSID Arbitration Rules, Rule 65(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 75(1).

<sup>9</sup> 2022 ICSID Arbitration Rules, Rule 65(2); 2022 ICSID Additional Facility Arbitration Rules, Rule 75(2).

<sup>10</sup> 2022 ICSID Arbitration Rules, Rules 75 – 86; 2022 ICSID Additional Facility Arbitration Rules, Rule 79 – 88.

<sup>11</sup> 2022 ICSID Arbitration Rules, Rule 4; 2022 ICSID Additional Facility Arbitration Rules, Rule 12.

- **Mandatory case management conferences:**<sup>12</sup> The amended rules regulate that with a view to conducting an expeditious and cost-effective proceeding, the Tribunal shall convene one or more case management conferences with the parties at any time after the first session to (a) identify uncontested facts; (b) clarify and narrow the issues in dispute; or (c) address any other procedural or substantive issue related to the resolution of the dispute.
- **Consolidation and coordination of related cases:**<sup>13</sup> According to the amended rules, parties to two or more pending arbitrations administered by the ICSID may agree to consolidate or coordinate these arbitrations.
- **Bifurcation of the proceedings:**<sup>14</sup> The amended rules explicitly regulate that a party may request that a question be addressed in a separate phase of the proceeding. This request is called as a “request for bifurcation”. Moreover, the amended rules confirm the Tribunal’s authority to bifurcate proceedings *ex officio*, by stating that the Tribunal may at any time on its own initiative decide whether a question should be addressed in a separate phase of the proceeding.
- **Stricter timelines at various stages in the proceedings, specifically, mandatory timeframes for issuing awards and decisions:**<sup>15</sup> The amended rules provide for reduced timeframes for various stages of the process. In particular, the new rules express that the Tribunal shall render the award as soon as possible, and also foresee certain mandatory timeframes in this regard, depending on the ground based on which is rendered.

#### 2.4. Required disclosure of third-party funding.

An amendment was introduced to the ICSID arbitration rules to address third-party funding. With the amendment, the ICSID arbitration rules address third-party funding for the first time. In relation to this amendment, it was explained in the official website of the ICSID that “*Disputing parties have an ongoing obligation to disclose third-party funding—including the name and address of the funder—to avoid conflicts of interest that may arise out of such financing arrangements*”.<sup>16</sup>

<sup>12</sup> 2022 ICSID Arbitration Rules, Rule 31; 2022 ICSID Additional Facility Arbitration Rules, Rule 40.

<sup>13</sup> 2022 ICSID Arbitration Rules, Rule 46; 2022 ICSID Additional Facility Arbitration Rules, Rule 56.

<sup>14</sup> 2022 ICSID Arbitration Rules, Rule 42; 2022 ICSID Additional Facility Arbitration Rules, Rule 52.

<sup>15</sup> 2022 ICSID Arbitration Rules, Rule 58; 2022 ICSID Additional Facility Arbitration Rules, Rule 69.

<sup>16</sup> “ICSID Administrative Council Approves Amendment of ICSID Rules” (International Centre for Settlement of Investment Disputes, March 21, 2022) <<https://icsid.worldbank.org/news-and-events/communiqués/icsid-administrative-council-approves-amendment-icsid-rules>> accessed April 11, 2022.

In this scope, the amended rules impose an obligation on the funded party to disclose third-party funding. More specifically, under the updated rules, 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 defence of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.

## **2.5. Provisional measures.**

Although the previous rules included broadly-worded provisions about provisional measures, the updated rules provide a clearer scope and standard on this matter.

In this scope, the amended rules exemplify the measures that can be recommended by the Tribunal upon a party's request, with a view to preserve that party's rights.<sup>17</sup> Moreover, under the new amendments, procedure for requesting and granting provisional measures are specifically listed, as well.<sup>18</sup> The new rules also provide that the Tribunal should consider "*all relevant circumstances*" in deciding whether to recommend provisional measures, including "*whether the measures are urgent and necessary*" and "*the effect that the measures may have on each party*".<sup>19</sup>

## **2.6. Clearer guidance on cost allocation.**

Further to the criticism received in relation with the Tribunal's broad discretion regarding cost allocation, the amended rules, aiming at addressing these negative feedbacks, state that "*the Tribunal shall consider all relevant circumstances*" in allocating the costs of the proceeding and continue by providing a non-exhaustive list of factors that shall be considered to that end.<sup>20</sup> In this scope, following factors are the ones explicitly listed to be taken into account under the new rules for allocating of the costs: (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.<sup>21</sup>

## **2.7. Obtaining an early dismissal of a case due to manifest lack of legal merit.**

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<sup>17</sup> 2022 ICSID Arbitration Rules, Rule 47(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 57(1).

<sup>18</sup> 2022 ICSID Arbitration Rules, Rule 47(2); 2022 ICSID Additional Facility Arbitration Rules, Rule 57(2).

<sup>19</sup> 2022 ICSID Arbitration Rules, Rule 47(3); 2022 ICSID Additional Facility Arbitration Rules, Rule 57(3).

<sup>20</sup> 2022 ICSID Arbitration Rules, Rule 52(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 62(1).

<sup>21</sup> 2022 ICSID Arbitration Rules, Rule 52(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 62(1).

Even though objecting a claim on the ground that is “manifestly without legal merit” was included in the previous rules, under that framework, such an objection was dealt as a “preliminary objection”. The new rules regulate the case of “manifest lack of legal merit” as a standalone rule under the chapter titled “Special Procedures”.

In order to cull out the claims which are manifestly ill-founded betimes, the new rules regulate that “*a party shall file a written submission no later than 45 days after the constitution of the Tribunal*” and “*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*”<sup>22</sup>

### 3. Conclusion

The long-awaited amendments of ICSID rules were approved by the ICSID Member States on March 21, 2022 and they will come into effect on July 1, 2022. These amendments reflect “*extensive dialogue with ICSID’s membership and the public*” and “*the lessons learned from hundreds of ICSID cases*”.<sup>23</sup> The ICSID announced that, over the coming months, it will publish guidance notes to assist users in applying the updated rules.<sup>24</sup>

In the official website of the ICSID, it is expressed that the changes are intended to, among others, modernize the rules that a number of lessons learned by virtue of hundreds of case experience, make the process increasingly time and cost effective, and make the procedure less paper-intensive, with greater use of technology for transmission of documents and case procedures.<sup>25</sup> We are yet to see the ability of the amendments to actually meet the aims and needs of their adoption. That said, it is safe to state that these comprehensive set of amendments to ICSID’s flagship rules demonstrate the ICSID’s responsiveness to the suggestions and feedbacks of the Member States and the public, include innovative amendments and incorporate important improvements to the system in consideration of the needs of its users.

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<sup>22</sup> 2022 ICSID Arbitration Rules, Rule 41; 2022 ICSID Additional Facility Arbitration Rules, Rule 51.

<sup>23</sup> “ICSID Submits Amended Rules to the Administrative Council for a Vote” (International Centre for Settlement of Investment Disputes, January 20, 2022) <<https://icsid.worldbank.org/news-and-events/news-releases/icsid-submits-amended-rules-administrative-council-vote>> accessed April 11, 2022; “ICSID Rules and Regulations Amendment” (International Centre for Settlement of Investment Disputes) <<https://icsid.worldbank.org/resources/rules-amendments>> accessed April 11, 2022.

<sup>24</sup> “ICSID Administrative Council Approves Amendment of ICSID Rules” (International Centre for Settlement of Investment Disputes, March 21, 2022) <<https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules>> accessed April 11, 2022.

<sup>25</sup> “About the ICSID Rule Amendments” (International Centre for Settlement of Investment Disputes) <<https://icsid.worldbank.org/resources/rules-and-regulations/amendments/about>> accessed April 11, 2022.