

Modernization and Reform of the ICSID Mechanism: Based on New ICSID Rules for 2022

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Abstract. The Investor-State Dispute Settlement (ISDS) mechanism plays a significant role in international investment governance. Recent years, this mechanism has faced increasing criticism and reform pressures. In order to establish procedures that are more transparent, efficient, cost-effective, and environmentally friendly, the International Centre for Settlement of Investment Disputes (ICSID) initiated a modernization reform of its rules in 2016, and the new rules came into effect on July 1, 2022. This reform marks an important milestone. This article primarily employs methods of literature review, inductive analysis, and case study analysis. This reform improves procedural efficiency, reduces costs, and enhances the transparency of arbitration proceedings. This reform has also driven the modernization of ICSID rules, furthered the deepening of ISDS mechanism reform, and had a significant impact on the practices of relevant countries and stakeholders.

Keywords: ICSID reform; Investment arbitration; New ICSID Rules.

1. Introduction

As a depoliticized means of resolving international investment disputes and a crucial tool for host countries to attract foreign investment, the Investor-State Dispute Settlement (ISDS) mechanism has been widely applied globally in recent years, highlighting its significant role in investment protection. Simultaneously, the ISDS mechanism has also exposed various institutional drawbacks, such as encroaching on the regulatory power of host countries, inconsistent arbitration decisions without a correction mechanism, and high costs [1]. After six years of negotiations, ICSID has recently completed the reform of its rules, marking a significant chapter in the modernization of ISDS rules. This article summarizes the key highlights of this rule reform and subsequently analyzes the implications of this reform from a broader perspective of ISDS reform significance.

2. Key Highlights of the ICSID Rule Reform

The 2022 ICSID Rules of Arbitration are a significant and overall positive change from the 2006 Rules. It improves procedural efficiency, reduces costs, and enhances the transparency of arbitration proceedings. This section analyzes the improvements brought by the 2022 Rules in these above three aspects.

2.1. Improvements in Procedural Efficiency

Investment arbitration proceedings have become increasingly problematic for ISDS users due to their complexity, lengthy duration, and high costs, which is also true for ICSID arbitration cases. Lengthy proceedings have been a major criticism of ICSID, and resolving this issue has been a key focus of the current rule reform. The 2022 ICSID Rules have added or modified multiple provisions to enhance procedural efficiency and reduce the time spent on case adjudication. The related measures mainly include the following three points.

First, submitting documents electronically. 2022 rules do not require claimants to send arbitration requests to the ICSID location. Parties should submit electronic documents unless the arbitral tribunal has special format requirements [2]. This saves time and costs, and is also environmentally friendly [3].

Second, introducing a new expedited arbitration procedure with specific time requirements at each stage in the whole process is a critical innovation to enhance the efficiency of ICSID arbitration, greatly reducing the timeline. Expedited arbitration is a good choice, especially for parties seeking a quick and low-cost arbitration procedure [4]. The 2022 rules require both parties to agree to the expedited procedure, which is different from some other institutions' expedited arbitration rules. For example, ICC Arbitration Rules provide automatic triggering of expedited arbitration in small claims, and HKIAC Rules allow one party to apply for expedited arbitration in certain circumstances without the other party's consent [5-7].

Third, new arbitration rules for bifurcation. The arbitral tribunal considers the objection to jurisdiction as a preliminary issue, or merges it with the merits of the case; and the arbitral tribunal may decide on its own whether handle these issues bifurcately and the procedure and timetable for such decisions [8]. Bifurcated arbitration is one of the most significant factors affecting the duration of the procedure. The 2022 rules specify bifurcated arbitration and restrict the arbitral tribunal's discretion, requiring the arbitral tribunal to consider whether bifurcated arbitration would substantially reduce time and cost and whether resolving the preliminary issue (jurisdiction) would substantially impact the determination of the substantive issues [9]. Although this provision still grants the arbitral tribunal considerable discretion, it takes an important role in bifurcated arbitration and provides a basis for investors to oppose or support bifurcated arbitration based on their interests.

2.2. Reducing Cost

Investment arbitration costs are very high, causing a serious burden for both investors and the host State. First, the 2022 Arbitration Rules have adopted some measures that can shorten the procedural time or directly reduce the workload of lawyers, to some extent, which can reduce the costs of the parties. For example, limiting the length of all written submissions by the parties, not encouraging the submission of international law expert reports, not encouraging experts and witnesses to attend hearings unless necessary, and rejecting claims without legal basis in the early stages of the procedure [10].

Secondly, the modifications to the allocation of arbitration costs in the 2022 Rules also affect arbitration expenses. Costs of lawyers, appraisers, and witnesses generally are not clarified in arbitration rules. The arbitral tribunal has great discretion in cost allocation. The tribunal should also make criteria to allocate costs. In latest years, the ICSID arbitral tribunal is inclined to modify expenses that each party should bear according to the specific factors of the case, rather than simply having parties pay themselves or sharing costs equally. The 2022 rules explicitly stipulate the specific factors that the arbitral tribunal should consider when adjusting the allocation of costs, mainly about results of cases, parties' actions, like the compliance of arbitration rules and the tribunal's orders in the arbitration process, the difficulty of cases, and the fairness of the claim expenses [11]. Therefore, the allocation of expenses not only considers the outcome of cases, and the successful party can also pay some of the losing party's costs. The reasonableness standard for claiming costs may help prevent unreasonably high claims.

Finally, the 2022 Rules contain rules about security for costs, which was previously under provisional measures [12]. The arbitral tribunal can ask either party with a claim or counterclaim to pay cost security by one party's demand [13]. According to Working Paper 1, some States say only States have the right to demand cost security [14]. To ensure a balance between parties, the 2022 Rules provide criteria for cost security. The arbitral tribunal should think about related situations, mainly about the ability of the party required to obey an adverse cost decision; the will of that party to obey the decision; the influence of providing cost security on the providing party's ability to assert a claim or counterclaim; and parties' actions [15]. The 2022 rules also explicitly stipulate the arbitral tribunal should think about the whole evidence, containing third-party funding [16].

2.3. Improvement of Transparency in the Arbitration

Since commercial arbitration is the predecessor of investment arbitration, investment arbitration has retained confidentiality in arbitration procedures, and many arbitration processes and results are not disclosed to the public. With the development of investment arbitration, its public nature has become increasingly apparent, and measures to ensure the transparency of investment arbitration have become increasingly important [17]. In 2006, ICSID issued revised arbitration rules, taking reference from NAFTA. The transparency of arbitration procedures was further improved. If parties do not agree to fully disclose the award, ICSID must publish part of the award; if both parties do not object, the hearing can be made public [18,19]. The arbitral tribunal may also decide to accept submissions from third parties [20]. However, the 2006 Rules do not have a separate chapter on transparency provisions. 2022 Rules establish a dedicated transparency chapter, which indicates that transparency and openness are increasingly important in investment arbitration. The publication of awards should have both parties' consent [21,22]. Thus, under the 2006 Rules, parties' consent gives ICSID rights to publish awards [23]. Under the premise of meeting the requirements of the consent by both parties, the 2022 Arbitration Rules consider that the parties have agreed to publish awards. ICSID should publish each award, supplemental decision regarding the award, correction, interpretation, reform, and revocation decision, unless objections are raised by the parties within 60 days after the publication of these documents [24]. When the parties object to publication, ICSID should publish an excerpt of these documents after consultation with the parties. ICSID also publishes orders and decisions, like reforms with both parties' consent and unreached reforms about the arbitral tribunal's decision. The arbitral tribunal cannot disclose confidential or protected information [25]. Rule 66 clearly explains confidential and protected information, to safeguard critical information and protect parties and arbitrators [26]. With parties' consent, both parties' written pleadings and supporting documents can be published as well [27]. The arbitral tribunal can decide to publish revised written pleadings upon the request of one party without the parties' agreement [28].

3. The Impacts and Limitations of this Round of ICSID Rules Reform

As the longest and most comprehensive rules reform in the history of ICSID, this reform has three significant impacts.

3.1. Modernization of ICSID Rules

Firstly, this reform has greatly propelled the modernization of ICSID rules, contributing to its continued leading position in the field of investment dispute resolution.

With the widespread expansion of international investment activities and the rapid growth of international investment agreements, investor-state disputes have become one of the most active categories of disputes in the international economic and trade arena. Such disputes often involve host country public policy areas or significant public interests, such as human rights and the environment, attracting considerable public attention. In this process, the Investor-State Dispute Settlement (ISDS) mechanism has gradually revealed a series of deficiencies, including lack of independence and impartiality of arbitrators, lack of transparency in procedures, excessive discretion of arbitral tribunals, high time and monetary costs of arbitration proceedings, lack of fairness, consistency, and predictability in decisions, and harm to host country public interests. These shortcomings have led to a significant increase in opposition to ISDS and evolved into a legitimacy crisis, triggering international reflection on this mechanism.

To address external criticism, the international community has been advancing reforms of the ISDS mechanism on various levels. These reforms encompass the reform of the ICSID Convention and Rules, ongoing ISDS reform by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III, and the modernization of the Energy Charter Treaty, among others. Therefore, this current round of ICSID rules reform is not an isolated event but an important component within a larger landscape of parallel reforms.

As the most important and prolific international organization in this field, ICSID, following a six-year consultation process, has recently completed the reform of its rules, marking a significant chapter in the modernization of ISDS rules. The revised rules, applicable from July 1, 2022, draw upon the accumulated experience and numerous past cases of the ICSID Secretariat in applying the 2006 Regulations and Rules. They extensively incorporate input from various stakeholders, comprehensively addressing previous issues with the ICSID dispute resolution mechanism and taking into account new challenges emerging in the current international context and against the backdrop of the global COVID-19 pandemic. The revised Regulations and Rules feature lower entry barriers, more streamlined procedures, and increased transparency. These changes undoubtedly will better serve both investors and host countries, aiding in alleviating the legitimacy crisis of ISDS, enhancing the mechanism's reasonability and accessibility, and fostering the vigorous development of international investment and its dispute resolution.

Currently, in the field of international investment law, there isn't a unified institution with compulsory jurisdiction similar to the Dispute Settlement Body (DSB) under the World Trade Organization (WTO) law. The primary issue with the existing ISDS system is that it relies on an arbitration model derived from commercial arbitration. Although investor-state disputes can involve public legal policies, ISDS relies on ad hoc arbitral tribunals and arbitrators appointed by the parties to resolve one-time disputes [29]. Apart from ICSID, other organizations such as the International Chamber of Commerce (ICC), domestic institutions like the London Court of International Arbitration (LCIA), and commercial bodies play important roles in investment dispute resolution services. Over the past half-century since investor-state arbitration was introduced, the number of arbitration institutions capable of handling ISDS cases has grown. With an increase in the number of cases in recent years, ISDS institutions have demonstrated a trend toward diversification [30]. According to UNCITRAL statistics, the known ISDS cases are primarily managed by the following institutions: ICSID (761 cases), the Permanent Court of Arbitration (PCA) (217 cases), the Stockholm Chamber of Commerce (SCC) (56 cases), the International Chamber of Commerce (ICC) (23 cases), the London Court of International Arbitration (5 cases), the Moscow Chamber of Commerce and Industry (MCCI) (3 cases), the Cairo Regional Centre for International Commercial Arbitration (CRCICA) (2 cases), the Hong Kong International Arbitration Centre (HKIAC) (1 case), and the Panama Center for Conflict Resolution (CESCON) (1 case) [31]. ICSID, with its fixed dispute resolution venue, dedicated administrative personnel, and comprehensive institutional framework, has long been regarded as the most important and widely used permanent arbitration institution for managing investment arbitration cases. In recent years, in response to calls for ISDS reform and to enhance the competitiveness of investment dispute management services, many institutions have updated their rules and procedures. ICSID has faced increasing external criticism and competitive pressures, making this modernization reform undoubtedly helpful for ICSID to maintain its leading position in this field.

3.2. Further Deepening the Reform of the ISDS Mechanism

In addition to the aforementioned, this reform has fostered and consolidated international consensus, contributing to the further deepening of the reform of the ISDS mechanism.

Over the past decade, various stakeholders have proposed different approaches to ISDS reform. Some advocate for maintaining the current ISDS system and improving its procedures, while others propose the introduction of an appellate mechanism or the establishment of a permanent international investment court as an alternative to the existing ad hoc arbitration. Some emphasize relying on market mechanisms to resolve disputes, while others focus on increasing state intervention. It is in this context that, after six years of discussions, including three rounds of face-to-face negotiations with treaty parties, six rounds of written comments, and hundreds of briefings and events, ICSID completed its reform of the Regulations and Rules. This reform process benefited from the active engagement of numerous ICSID contracting states and stakeholders, involving hundreds of government officials, legal experts, and business representatives, marking the most in-depth and

sustained dialogue ICSID has ever had with treaty parties and the wider public [32]. Many aspects of this ICSID rules reform encompass procedural reform proposals that have been presented in various international forums over the past few years. The final text that emerged from such an extensive review and consultation process not only demonstrates contemporary relevance but also adequately reflects the fundamental consensus of the international community on various procedural reform matters. From the initial draft of over 900 pages to the final draft of 80 pages, this process has not only enhanced confidence in the effectiveness and legitimacy of the procedures administered by ICSID among all parties, but it also serves as an essential tool for developing and consolidating consensus.

As a representative of the reformist camp, the current ICSID rules reform does not have a disruptive effect, but it does possess its own characteristics that reflect a significant direction in the development of ISDS rules. While there are still divisions between different factions such as Paradigm Shifters, Systemic Reformers, and Incrementalists in the international community [33], it is undeniable that most countries recognize the importance of improving the ICSID mechanism rather than completely abandoning it and starting anew. For instance, the European Union (EU), which has a "special interest" in ICSID rules reform, is seeking to establish a multilateral investment court to replace the current investment arbitration system through a permanent mechanism, including reforms within the framework of UNCITRAL Working Group III. The EU Commission explicitly states in its proposed document supporting the proposed new ICSID rules that it is currently "seeking to establish a multilateral investment court to replace the current investment arbitration system with a permanent mechanism", which includes reforms within the framework of UNCITRAL Working Group III; the Commission emphasizes that only a permanent court "can fully and comprehensively address all the problems currently created by the interim investment arbitration system"; while waiting to achieve this goal, the current investment arbitration system will continue to apply, and any improvements to its rules will be welcome; although not reaching the goal of establishing a multilateral investment court, the ICSID amendments address some of the deficiencies in the current ISDS system, hence should receive the support of EU member states[34]. Currently, UNCITRAL is promoting ISDS reform on a broader level, with its Working Group III expected to complete all rule negotiations and drafting work by 2027. Many aspects of the current ICSID rules reform overlap with the discussions of Working Group III, laying a solid foundation for its timely completion [35].

3.3. Beneficial for National Practice

Lastly, several institutional innovations may have a significant impact on the practices of relevant countries and stakeholders.

The new ICSID rules encompass various institutional innovations, such as the broader use of ICSID's Additional Facility Rules, the establishment of new expedited arbitration rules, delineation of claimant ownership and control rights, disclosure requirements for third-party funding, and the introduction of mandatory time limits, cost security, and transparency provisions for arbitrator disqualification, early dismissal, orders, and awards. These institutional innovations may significantly influence the practices of stakeholders. For example, ICSID's introduction of new fact-finding and mediation rules offers a wider array of dispute resolution tools to parties. Traditional ISDS mechanisms have predominantly focused on procedural reform within arbitration, generating considerable opinions on changes to arbitration procedures. However, regardless of procedural changes, the fundamental arbitration process remains complexly nested within the mechanism. In contrast, fact-finding and mediation mechanisms offer more potential for dispute resolution and inject new momentum into overall ISDS reform. By expanding the types of dispute resolution procedures and methods available, parties have more options when determining the best way to resolve disputes.

Furthermore, the new ICSID rules make significant strides in enhancing procedural transparency, potentially rendering the confidentiality principles inherited from commercial arbitration a thing of the past [17]. Under the new rules, hearings are presumed to be public, third parties can submit opinions to the tribunal, and most (if not all) case documents should be disclosed to the public.

Consequently, practitioners in this field will have access to numerous procedural orders, decisions, and materials submitted by parties. The public, such as citizens of the host country, can observe their government's accountability, attend hearings, and witness witness testimonies. Countries can also utilize the new rules to implement domestic policies concerning transparency and information freedom.

Additionally, the extension of jurisdiction under the “Additional Facility Rules” to cases where neither party is an ICSID contracting state or a national of one, as well as situations involving a party that is a regional economic integration organization (REIO), presents an intriguing and highly anticipated development. This change might contribute to expanding ICSID’s market share further and establishing connections for non-ICSID treaty parties like the European Union. However, as noted by ICSID Secretary-General Meg Kinnear, parties might need several years to fully understand and leverage the extended scope of the “Additional Facility Rules,” thereby initiating cases on a broader scale. For REIOs, a certain amount of time may also be necessary to consider incorporating the “Additional Facility Rules” into their dispute clauses when negotiating new treaties and agreements [36].

4. Conclusion

In conclusion, the 2022 ICSID Arbitration Rules some extent solve the issues of low efficiency, high costs, and the lack of transparency in the arbitration process that existed in the previous 2006 Arbitration Rules. These changes show that compared to the 2006 Rules, the 2022 ICSID Arbitration Rules have a significant and comprehensive positive change. Simultaneously, this reform has also driven the modernization of ICSID rules, furthered the deepening of ISDS mechanism reform, and had a significant impact on the practices of relevant countries and stakeholders.

* This article has been checked for plagiarism only as an assignment and has not been published publicly.

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