

Alert | International Arbitration & Litigation



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Investor-State Arbitration: 2022 ICSID Rule Amendments and Update on Japanese Renewable Energy Claims

ICSID Arbitration

The International Centre for Settlement of Investment Disputes (ICSID) was established under the ICSID Convention, signed by 165 countries to date, and is a preeminent institution for administration of investor-state disputes. ICSID has administered over 650 investment dispute cases to date, 58 cases in 2020, 66 cases in 2021, and 19 cases in 2022 (to June 30).

The **ICSID Arbitration Rules** (“Rules”) offer a robust procedural framework for arbitrations administered by the institution and apply from the date of registration of a Request for arbitration until an Award is rendered and to any post-Award remedy proceedings.

Amendment Overview

The amended Rules took effect July 1, 2022, and apply to all requests for arbitration filed after that date. The amended Rules are the product of a consensus-based process that began in November 2016 in which Member states provided direct input on a range of topics, such as disclosure requirements for third-party funding; enhanced transparency through the publication of awards; introduction of a new provision on security for costs; and further elaboration on the declaration of impartiality and independence required of arbitrators.

The 2022 amendments are significant and reflect broad changes for greater transparency, efficiency, and modernization to reflect current ICSID practice. A list of notable amendments is set forth below.

- Notice of Third-Party Funding (Rule 14)
- Publication of Awards and Decisions on Annulment (Rule 62)
- Submission Non-Disputing Parties (Rule 67)
- Observation of Hearings (Rule 65)
- Provisional Measures (Rule 47)
- Bifurcation (Rule 42)
- Timing of the Award (Rule 58)
- Consent of Parties to Expedited Arbitration (Rule 75(1))

Key Amendments – Third-Party Funding

Increased complexity of disputes has contributed to growth in third-party funding in international investment arbitration. Under the 2006 ICSID Arbitration Rules, which still apply to cases filed before July 1, 2022, disclosure of third-party funding was not obligatory. As stakeholders pushed for more transparency, the role of third parties in claim funding became a focal point of the ICSID Rule amendments.

Under Rule 14, third-party funding is defined as “directly or indirectly” receiving from a non-party “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 proceedings.” As this definition includes “indirect” funding, it would cover situations where funding is provided through affiliates or an ultimate beneficial owner of the party receiving funds.

Parties must file a written notice disclosing the name and address of the funder upon registration of the Request for Arbitration or immediately upon concluding a third-party funding arrangement if after registration of the request. This is a continuing duty throughout the proceeding and applies to both parties. Disclosure of the funding agreement is not required; however, under Rule 14(4), arbitral tribunals may order the disclosure of further information on funding arrangements, which means parties using third-party funding may be forced to disclose additional information on a case-by-case basis.

To avoid potential conflicts of interest, the Secretary-General transmits the notice to appointed arbitrators for the purpose of their declaration of “independence, impartiality, availability and commitment to maintain the confidentiality of the proceeding” set by Rule 19 (3)(b).

The 2022 amendments also introduced Rule 53, which sets a specific procedure for the filing of security for costs. In deciding on an application for security for costs, the Rule requires the tribunal to consider all relevant circumstances, including the existence of third-party funding.

Update on Japanese Investors' Renewable Energy Claims

Investors from Japan were among the numerous stakeholders that brought claims against the Kingdom of Spain under the Energy Charter Treaty (“ECT”), to which Japan is a party, following changes to the special legal framework set forth in Spain’s 1997 Electricity Law that incentivized investment in solar, wind, and other renewable energy projects.

On Oct. 24, 2022, *Eurus Energy v. Spain* (ICSID ARB/16/4) ended, with Spain defeating the majority of Japanese investor claims under the ECT. ICSID registered this case on March 1, 2016. Eurus alleged that Spain breached the ECT by modifying the renewables incentives regime that applied to Eurus’ investment in Spanish wind farms. In the March 17, 2021 decision on jurisdiction and liability the tribunal ruled by majority that Eurus did not have a legitimate expectation of stable subsidies or Feed-In Tariffs for their wind plants, but rather only an expectation of a “reasonable rate of return.” The tribunal unanimously ruled that one of Spain’s reforms had impermissible retroactive effects and resulted in a breach of fair and equitable treatment protections under the ECT.

In *JGC Holdings Corporation v. Kingdom of Spain* (ICSID Case No. ARB/15/27), an ICSID tribunal found that changes to Spain’s renewable energy regime frustrated the investor’s legitimate expectations under the ECT’s fair and equitable treatment protections and ordered Spain to pay over € 23.5 million in damages plus interest and 40% of JGC’s legal fees and 25% of the total cost of arbitration. The arbitral tribunal rejected Spain’s arguments that the investor should have been aware of the possibility of sweeping changes to the regulatory regime under which it received Feed-In Tariffs, reasoning that JGC had undertaken reasonable due diligence. The award was rendered Nov. 9, 2021, and Spain has bid to annul the award. An ICSID *ad hoc* Committee was constituted earlier this year and will annul the award only on limited grounds, such as corruption or manifest excess of power by the tribunal, or a serious departure from fundamental procedural rules, among other grounds specified in Article 52 of the ICSID Convention.

In another investment claim, Japanese general trading company Mitsui’s case against Spain remains ongoing. *Mitsui v. Spain* (ICSID ARB/20/47), registered on Oct. 30, 2020. Mitsui has alleged breaches under the ECT arising from its investments in the construction and operation of renewable power facilities. The tribunal held a hearing on jurisdiction and the merits in Washington, D.C. in early October 2022.

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