

Arbitration & Energy – Informative Note

Spain wins first renewable energy international arbitration

On 21 January 2016 the first award in connection with a claim filed against Spain under the Energy Charter Treaty (ECT) (Arbitration No.: 062/2012 Stockholm Chamber of Commerce) deriving from cuts in solar energy tariffs made by the Spanish Government in 2010 (RD 1565/2010 and RDL 14/2010) was issued.

In the 156-page award, which contains a dissenting opinion (both available on the webpage of the Ministry of Industry, Energy and Tourism), the Arbitral Tribunal dismissed the jurisdictional objections raised by Spain, confirming its own jurisdiction to resolve the dispute (I) and, on the merits, dismissed Claimant's request for relief and (II) ordered Claimants to pay a limited portion of the costs incurred by Spain.

I. JURISDICTION

Spain asserted several challenges to the jurisdiction of the Arbitral Tribunal, the principal argument being that Claimants should not be considered as investors under Article 1(7) of the ECT, since they were controlled by Spanish nationals.

Spain argued that Claimants, companies existing under the laws of the Netherlands and Luxembourg, were just vehicles through which two Spanish citizens had invested in Spain, so they should not deserve the protection awarded to investors from other contracting states pursuant to Article 1(7) of the ECT.

However, the Arbitral Tribunal concluded that since Article 1(7)(a)(ii) of the ECT does not contain any requirement other than that the investor be incorporated under the laws of the Contracting Party, i.e., a purely legal (not economic) criteria, it could not be concluded that the drafters of the ECT wanted to deny its protections to legal entities controlled by nationals from the contracting State which receives the investment. The Arbitral Tribunal noted that while piercing the corporate veil may be justified to detect a fraud, this argument had not been discussed in the case.

II. MERITS

The Arbitral Tribunal dismissed all of Claimant's arguments on the merits, as briefly summarized below:

1) About the expropriation (Article 13 of the ECT)

The Arbitral Tribunal concluded that the standard for indirect expropriation is characterized by the existence of a substantial effect on property rights. In the Arbitral Tribunal's view, such an effect was not established here. Indeed, taking into consideration the figures presented by Claimants (unrevealed in the award published), the Arbitral Tribunal indicated that a mere decrease of the value of the shares as a result of the reduction of their profitability (which remained positive), that is to say, a decrease which does not deprive the investor of its investment, either total or partially, could not meet the standard for indirect expropriation in the circumstances.

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2) About the obligation to provide effective means for the assertion of claims (Article 10(12) of the ECT)

The Arbitral Tribunal determined that the existing means in Spain to attack a Royal-Decree Law (in this case, the RDL 14/2010), either by requesting a judge to seek a ruling from the Constitutional Court on the constitutionality of the law or by claiming for damages against the Public Administration, are sufficient to fulfill the obligation to provide investors with effective means for the assertion of claims to ensure and protect their investments. Therefore, Spain has not breached Article 10(12) of the ECT.

3) About fair and equitable treatment (Article 10(1) of the ECT)

First, Claimants alleged that Spain had violated the standard of fair and equitable treatment for having amended the legal framework and frustrated the investors' legitimate expectations.

In light of the large number of cases currently pending that are challenging similar but subsequent norms, the Tribunal Arbitral took pains to note that its analysis is limited to the regulations approved in 2010 by the Spanish Government, excluding from the scope of this arbitration the regulations issued in 2013, as expressly requested by Claimants.

The Tribunal Arbitral (by majority) considered that when enacting RD 1565/2010 and RDL 14/2010, Spain did not frustrate the investors' legitimate expectations arising from the previous rules of law, namely, RRDD 661/2007 and 1578/2008, asserting that even if the previous rules of law were addressed to a reduced group of investors, this does not convert those rules into specific commitments adopted by Spain vis-à-vis the investors, but rather they were rules of general application. The Tribunal Arbitral similarly interpreted that the promotion and encouragement of investments implemented by Spain announcing high profitability in the solar field, absent any specific commitments, could not create any legitimate expectations to the effect that the tariff set out when the investment was made would never change.

The Tribunal Arbitral concluded that Claimants could have no legitimate expectations about the RRDD 661/2007 and 1578/2008 remaining frozen for the entire life of their plants. The Tribunal Arbitral pointed out that recognizing such an expectation would be tantamount to freezing the applicable legal framework, even though the circumstances may change. In the view of the Arbitral Tribunal, this conclusion is reinforced by the fact that the jurisprudence of the high Spanish courts had already established, prior to the investment, the principle that the national law allowed amendments to the regulation. Consequently, the Arbitral Tribunal considered that Claimants could have made a due diligence on the Spanish legal framework when they invested in 2009 to conclude that the amendment of the rules enacted in 2007 and 2008 could not be ruled out.

In any event, the Arbitral Tribunal, in view of the analysis of the proportionality and rationale of the rules of 2010 enacted by the Spanish Government, concluded that such rules had the aim and effect of to adjusting and adapting the applicable rules, but they did not affect the essence of the existing legal framework. Thus, one cannot conclude, under international law, that a frustration of legitimate expectations had occurred. To sum up, in the Arbitral Tribunal view, even though such rules may have had a negative impact on the financial interests of the generators, those rules were adopted based on objective criteria and cannot be considered unfair, incoherent, irrational, arbitrary, disproportionate or against the public interest and, hence, in violation of international law.

Second, Claimants alleged that the rules of law approved by Spain violated the principle of non-retroactivity, to the extent applicable to plants already registered.

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The award refused this argument because even if the rules approved in 2010 did apply upon their enactment to plants which were already operative, those rules did not apply retrospectively to the prior periods. Furthermore, the Arbitral Tribunal pointed out that there is no principle under international law, except if there were specific commitments, prohibiting a State from enacting regulatory measures which are immediately applicable to ongoing situations.

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