# Significantly lower award of damages against Spain in latest investor-state arbitration claim over renewable energy tariffs (PV Investors v Spain)

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**Arbitration analysis: The award in PV Investors v Spain represents a departure from a number of investor-state arbitrations brought against Spain concerning breaches of Article 10(1) of the Energy Charter Treaty (ECT) arising out of changes made to incentives offered to encourage investment in the renewable energy sector. In this instance, while Spain was found to have breached Article 10(1) of the ECT, the basis for that finding differed from the majority of the previous awards, resulting in a significantly lower award of damages than if the previous decisions had been followed. Written by Neil Newing, of counsel, and Johnny Shearman, professional support lawyer, at Signature Litigation LLP.**

*PV Investors v Spain,* PCA Case No. 2012-14—Final Award dated 28 February 2020 and Concurring and Dissenting Opinion of Charles Brower

## What is the practical importance of this award?

Prior to this award, of the 18 known awards involving the ECT, Spain and renewable energy tariffs, 15 had found for the claimants. In 11 of those 15 (the other four being factually distinguishable) the tribunals ruled that the claimants should be awarded their entitlement to the projected returns on their investment on the basis of the regime in place at the time of the investment (see below, described as the 'primary claim').

Contrary to this line of reasoning the tribunal in the present case (by majority) found that the claimants could not have legitimately expected that regime to remain in place, and so awarded damages based on an average reasonable rate of return as it stood at the time of their investment (see below, described as the 'alternative claim'). This resulted in a significant reduction in the amount of damages awarded. The dissenting arbitrator would have allowed the primary claim.

This case demonstrates the risk involved in investor-state arbitration where there is no system of binding precedent. Although the tribunal itself considered it had a duty to adopt principles established in a series of consistent cases, it then proceeded to depart from the findings of the 11 previous tribunals. In fact, the dissenting arbitrator noted that four of the previous decisions were based on very similar facts and the tribunals in all of them had found on the equivalent of the primary claim. This case appears to be somewhat of an anomaly in the jurisprudence of the cases against Spain on this issue, and could be said to lend support to the current call for a permanent investment court to ensure consistency in investor-state cases.

## What was the background to the arbitration?

For over a decade, Spain had laws subsidising new investments in renewable energy in order to encourage investment. One incentive offered was a feed-in tariff, which permitted owners of photovoltaic (solar) plants to sell electricity at a higher rate for the first 25 years and at a reduced rate thereafter (this was provided for in Royal Decree (RD) 661/2007). However, from 2010, Spain enacted a series of measures which had the effect ultimately of replacing the economic incentives granted under RD 661/2007.

As a result, a number of groups of investors have brought claims against Spain under the ECT on the basis that the measures are unfair and constitute a breach of the investors' legitimate expectations at the time of investment. The PV Investors in this instance represented fourteen different investor groups.

Of the arbitrations brought against Spain, the *PV Investors* case represents one of the longest running. This is in part due to a lengthy procedural history resulting from Spain allowing claims made by multiple investors to be heard by a single UNCITRAL tribunal. The tribunal was subsequently required to confirm its jurisdiction in light of objections made by Spain that intra-EU claims did not fall within the scope of the ECT. This, at the time, represented one of the first jurisdictional rulings in the

renewable energy arbitrations brought against Spain. The jurisdiction ruling in this matter preceded the *Achmea* decision, and as a matter of Swiss law (the law of the seat) the tribunal considered that the question of jurisdiction was *res judicata* and so could not be re-considered thereafter.

The PV Investors contended that they invested approximately €2bn in the Spanish photovoltaic sector in reliance on the economic incentives contained in RD 661/2007 and various representations and public statements made by Spain, pursuant to which they had a reasonable and legitimate expectation that the incentives granted in RD 661/2007 would remain unchanged. The PV Investors claimed that the new measures introduced breached these legitimate expectations in violation of Article 10 of the ECT and primarily the obligation to provide fair and equitable treatment. This in essence was the PV Investors' 'primary claim'.

Spain's defence to the primary claim was that the PV Investors were or should have been aware that their incentives were subject to an overarching principle of reasonable profitability, and that there was no basis for them to have expected the regime to remain unchanged. They were only entitled to a reasonable rate of return applicable at the time of investment (which Spain contended they had received).

In their reply, the PV Investors proffered an 'alternative claim'. While maintaining the primary claim, the PV Investors argued that in the event the tribunal agreed with Spain on that, Spain was still liable under the ECT because the new measures significantly lowered the reasonable rate of return such that the investors had not received the rate of return applicable at the time of investment. The PV Investors quantified their Alternative Claim at €520m.

### What did the tribunal decide on liability?

The tribunal (by majority) dismissed the primary claim concluding that the regulatory framework did not provide for a stabilization guarantee according to which investors would enjoy an immutable tariff for the life of their plants. The tribunal agreed with Spain that the PV Investors could only expect to receive a reasonable rate of return, and found the disputed measures to be reasonable, proportionate, transparent and, importantly, not arbitrary.

However, the tribunal agreed with the alternative claim that the measures introduced by Spain frustrated the PV Investors' legitimate expectations of receiving the rate of return applicable at the time of investment.

### What did it decide on quantum and what did the dissenting arbitrator say?

The majority tribunal calculated quantum on the basis that the PV investors were entitled to receive a seven per cent post-tax rate of return. The tribunal found that, as a result of the measures introduced, ten of the PV Investors had not received this rate of return and awarded each of them appropriate compensation, in an aggregated sum of €91.1m.

One of the arbitrators, the Hon Charles Brower, dissented from the other members of the tribunal. He saw no reason not to award damages on the basis of the primary claim—this was the basis of the award in the previous eleven successful tribunals and, in his opinion, should only be derogated from where there was a compelling reason to do so. There was no compelling reason here (nor had the majority identified one) and therefore this tribunal had a duty to be consistent and follow the prior decisions. He further noted that if the PV Investors had been successful on the primary claim the damages awarded could have been in the region of €540m (significantly more than what was awarded).

### What were the costs and what did the tribunal decide about allocation of costs?

The tribunal ordered that the parties pay in equal shares the costs of the arbitration (circa €2.5m) and that each party bear its own costs incurred in connection with the arbitration (the claimants' costs were circa £11.3m, and Spain's costs were circa €6.1m).

The fact that the PV Investors were not awarded costs despite ostensibly winning and being awarded a significant sum (€1.1m) appears to be reflective of the fact that the PV Investors were unsuccessful on the primary claim and were awarded a far lesser sum on the alternative claim.

## Case details

- Permanent Court of Arbitration registry; UNCITRAL Arbitration Rules 1976

- Arbitrators: Prof. Gabrielle Kaufmann-Kohler, The Hon Charles N. Brower and Judge Bernardo Sepúlveda-Amor
- Date of decision: 28 February 2020

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