



## ***CHARANNE B.V. AND CONSTRUCTION INVESTMENTS S.A.R.L. v KINGDOM OF SPAIN***

### **PV SOLAR INVESTORS *VERSUS* THE KINGDOM OF SPAIN: FIRST STATE VICTORY, AT LEAST 27 MORE ROUNDS TO GO**

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*The first investment dispute against the Kingdom of Spain due to the 2010 amendments of its renewable energy regulatory framework came to an end on 21 January 2016 with the Tribunal issuing a final award dismissing the claim. In its award, the Tribunal upheld its jurisdiction but dismissed the claim on the merits, ordering a partial cost award in favor of the State.*

*Notwithstanding its importance, the decision is most likely to have limited impact. The dispute only covered the 2010 measures adopted by the State regarding the PV regulation. The award did not concern the 2013 and 2014 measures, which are considered to have a more serious effect on the PV projects in Spain and therefore, are more likely to be considered violation of the ECT provisions.*

Es pretensió del present treball analitzar la qüestió relativa al reconeixement i execució de laudos arbitralers anul·lats en el país de la sede del arbitratge. Les últimes decisions suposen un distanciament del Regne Unit i Estats Units de la que ha sigut la tendència majoritària fins a la data: que un laudo anul·lat en la sede del arbitratge no serà susceptible de reconeixement i execució en una altra jurisdicció.

PALABRAS CLAVE: Arbitratge, laudo arbitral, reconeixement i execució de laudos.

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L'objectiu d'aquest treball és analitzar el tema relatiu al reconeixement i execució de laudos arbitralers anul·lats en el país de la seu de l'arbitratge. Les últimes decisions suposen un distanciament del Regne Unit i dels Estats Units llocs on hi ha hagut una tendència majoritària fins a l'actualitat: un laudo anul·lat a la seu de l'arbitratge no serà susceptible de reconeixement i execució en una altra jurisdicció.

PARAULES CLAU: Arbitratge, laudo arbitral, reconeixement i execució de laudos.

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The purpose of this work is to examine the matter relating to the recognition and enforcement of arbitral awards that have been cancelled in the country where the arbitration was held. Recent decisions have seen the United Kingdom and United States distance themselves from what had hitherto been a majority trend: that an award cancelled in the country where the arbitration was held cannot be recognized and enforced in another jurisdiction.

Keywords: Arbitration, arbitral award, recognition and enforcement of awards.

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## I. INTRODUCTION AND BACKGROUND TO THE DISPUTE

On January 21, 2016, the Tribunal, chaired by Alexis Mourre, with co-arbitrators Guido Santiago Tawil (appointed by Claimant) and Claus Von Wobeser (appointed by Respondent) issued the Award under the Energy Charter Treaty (“ECT”).<sup>1</sup> The award upheld the jurisdiction of the Tribunal but dismissed all the claims filed against the Kingdom of Spain (“**Respondent**”) due to lack of merits. The Tribunal found that the 2010 amendments to Spain’s PV technology regulations do not amount to a breach of the ECT as (i) those do not totally deprive the investor of its investment; (ii) the measures are not irrational, disproportionate or contrary to the public interest; and (iii) investors should not have had an expectation regarding the maintenance of the regulatory framework. The Tribunal ordered Charanne B.V. and Construction Investments S.A.R.L. (“**Claimants**”) to pay Euro 1.3 MM of Respondent’s arbitration costs (corresponding to a 50% of the legal fees and a 100% of the expert fees).<sup>2</sup> The award contains a partial dissent by Mr. Guido Tawil, who agreed with the majority regarding the jurisdiction of the Tribunal but considered that investors had a legitimate expectation regarding the maintenance of the regulatory framework.<sup>3</sup>

### *(i) Kingdom of Spain regulatory framework evolution*

For context, the Kingdom of Spain currently faces twenty eight public reported claims due to its amendments to the PV technology tariff regulations issued on 2010, 2013 and 2014.<sup>4</sup>

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1. *Charanne B.V. and Construction Investments S.A.R.L. v. the Kingdom of Spain*, Arbitration No. 062/2012, Final Award, 21 January 2016.

2. *Id. supra*, para. 573.

3. *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, Arbitration No. 062/2012, Dissenting Opinion of Professor Guido Santiago Tawil, 21 December 2015.

4. There are currently 28 cases against the Kingdom of Spain, being the most recent registration in

Before 2010, the Kingdom of Spain had a PV technology regulation based on a special regime of incentives and subventions in order to promote the production of removable energy. Among other measures, such special regime implied the establishment of a premium system and regulated tariffs in order to repay the production of electricity with a PV origin.

The liberalization of the Spanish electric sector took place through the 54/1997 Act that regulates the electric sector ("*Ley que regula el sector eléctrico*") dated November 27, 1997.<sup>5</sup> Such Act distinguished between the ordinary regime of energy production and the so-called "special" regime, regulated in its Chapter II.<sup>6</sup> In order to promote the energy production through renewable energy sources, the special regime was favored in relation to the ordinary regime and was granted a more favorable remuneration scheme to be complemented with the collection of a premium.<sup>7</sup> The Act was later developed and complemented through different legislations (*Real Decreto 436/2004* dated 12 March 2004;<sup>8</sup> *Renewable Energy Plan 2005-2010*;<sup>9</sup> *European Directive 2001/77* dated 27 September 2001;<sup>10</sup> *Real Decreto 661/2007* which entered into force on March 25, 2007, which established a new regulation for the production of electric energy in special regimen but maintained its basic structure.<sup>11</sup> The legal and economic regimes of the electric energy production sector in special regime was modified (establishing three different tariff categories according to the power of each plant and, within each category, two regulated tariffs were fixed: a higher one applicable to the first 25 years of the facility and a lower one applicable from the twenty sixth year on), with a prevision of a transitory regime for those facilities included under the regime prescribed by the *Real Decreto 436/2004*; *Real Decreto 1578/2008* dated September 26, 2008).<sup>12</sup>

The State had adopted a clear policy in favor of renewable energy and a good investment climate for investors. However, the amount of investment

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March 2016. All the cases are based on the ECT. Spain is not the only State facing claims due to its PV amendments. At least, 40 investment arbitrations have been filed (i) 28 against the Kingdom of Spain; (ii) 5 against Italy; and (iii) 7 against the Czech Republic.

5. *Id. supra* No. 1, para. 82.

6. *Id. supra* No. 1, para. 84.

7. *Id. supra* No. 1, para. 87-88.

8. *Id. supra* No. 1, para. 92-94.

9. *Id. supra* No. 1, para. 96-100.

10. *Id. supra* No. 8.

11. *Id. supra* No. 1, para. 110-128.

12. *d. supra* No. 1, para. 133-142.

attracted was excessive and, in the long term, the feed-in tariff seemed a practical impossibility.<sup>13</sup>

Consequently, in 2010, the Kingdom of Spain decided to limit the PV technology incentive based regulations through the *Real Decreto 1565/2010* dated November 19, 2010;<sup>14</sup> *Real Decreto 1614/2010*, dated December 7, 2010;<sup>15</sup> and *Real Decreto-Ley 14/2010* dated December 23, 2010.<sup>16</sup> The 2010 tariff modifications introduced three basic changes to the PV remuneration scheme: (i) limitation of the life span after the start of the 26th year;<sup>17</sup> (ii) capped the number of hours that the installations could benefit from the feed-in tariff; and (iii) imposed a transmission charge of EUR 0.55 MWh.

Further regulation which affected the existing PV regulatory framework entered into force between 2010 and 2014: *Ley 2/2011 de Economía Sostenible* dated March 2, 2011;<sup>18</sup> *Real Decreto-Ley 1/2012* dated January 27, 2012;<sup>19</sup> *Real Decreto-Ley 9/2013* dated July 12, 2013;<sup>20</sup> *Ley 24/2013 del Sector Eléctrico* dated December 26, 2013<sup>21</sup> and *Orden IET/1045/2014* dated June 21, 2014.<sup>22</sup>

On 2015, both the Spanish Constitutional Court and the Spanish Supreme Court confirmed that the regulatory amendments issued by the Government on 2010, 2013 and 2014 were legal under Spanish law.<sup>23</sup>

*(i) Investment*

Charanne B.V., a company based in the Netherlands, and Construction Investments S.A.R.L., a company based in Luxemburg, started their operations in Spain back in 2009. These companies acquired a participation in Grupo T-Solar Global, S.A., a company constituted in 2007 under Spanish law for

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13. *Vid Before the Other Shoe Drops: The Current State of Renewable Energy Arbitration in Spain*, Clifford J. Hendel, available at: <http://efilablog.org/2015/09/22/before-the-other-shoe-drops-the-current-state-of-renewable-energy-arbitration-in-spain/>

14. *Id. supra* No.1, para. 148-153.

15. *Id. supra* No. 1, para. 154-155.

16. *Id. supra* No. 1, para. 156-168.

17. This change was subsequently modified until the 30th year.

18. *Id. supra* No. 1, para. 176-177.

19. *Id. supra* No. 1, para. 178.

20. *Id. supra* No. 1, para. 179-183.

21. *Id. supra* No. 1, para. 184-185.

22. *Id. supra* No. 1, para. 186.

23. *Id. supra* No. 1, para. 169-173.

the generation and commercialization of electric energy through PV facilities, among other activities. When the dispute was registered in the Stockholm Chamber of Commerce, Grupo T-Solar Global owned, through special companies constituted *ad hoc*, thirty four (34) facilities for the production of electric energy in special regime through PV technology. In December 2012, Claimants transferred their shares in Group T-Solar Global to Grupo Isolux Corsán Concesiones, S.L. Claimants also purchased participation in such company, as well as in its parent company, Grupo Isolux Corsán, S.A.<sup>24</sup>

In 7 May 2012, Claimants filed a request for arbitration against the Kingdom of Spain requesting compensation of almost EUR 10 million for the alleged damages suffered due to the tariff changes in PV technology regulations.

## II. POSITION OF THE PARTIES TO THE DISPUTE

### *(i) Jurisdictional Objections*

The Kingdom of Spain rejected the jurisdiction of the Tribunal on the following basis: (i) lack of object in the proceeding as the regulation by which Claimants sue the State had been derogated;<sup>25</sup> (ii) fork in the road provision contained in article 26(3)(b)(i) of the ECT<sup>26</sup> due to the proceedings initiated by Claimants before the Spanish domestic courts and the European Court of Human Rights;<sup>27</sup> (iii) the subject-matter should be resolved according to the European Union (EU) judicial system as all the parties involved in the dispute were EU Member States or nationals from a EU Member State;<sup>28</sup> and (iv) Claimants should not be considered investors according to article 1(7) of the ECT<sup>29</sup> as Claimant's shareholders were Spanish nationals.<sup>30</sup>

24. *Id. supra* No. 1, para. 1-9.

25. *Id. supra* No. 1, para. 188-193.

26. Article 26(3)(b)(i) of the ECT: The contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

27. *Id. supra* No. 1, para. 194-206.

28. *Id. supra* No. 1, para. 207-224.

29. Article 1(7) of the ECT: “‘Investor’ means: (a) with respect to a Contracting Party: (i) a natural persona having citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; (ii) a company or other organization organized in accordance with the law applicable to that Contracting Party; (b) with respect to a “third state”, a natural persona, company or other organization which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.”

30. *Id. supra* No.1, para. 225-268.

Notwithstanding the aforementioned jurisdictional objections, the Tribunal considered: (i) that pursuant to the ECT it had jurisdiction for ruling on the merits of the proceeding;<sup>31</sup> (ii) that the lack of object argument was to be resolved with the merits of the proceeding;<sup>32</sup> (iii) that Claimants were investors under the ECT as the treaty only required claimants to be organized in accordance with the applicable law in a Contracting Party, and Claimants met the threshold.

*(ii) Merits of the Proceeding*

Claimants argued that (i) the regulations approved by the Kingdom of Spain had affected retroactively the legal and economic regimes provided by the previous regulations in which Claimants based their investments; (ii) the new regulations constituted a breach of the ECT; and (iii) such breach had caused them a harm which needed to be compensated.<sup>33</sup>

As per the first argument, Claimants considered that the new regulation limited the time that investors were granted with regulated tariffs and limited the equivalent hours of energy production for being granted with regulated tariffs. It also obliged to comply with particular technical requirements for giving response to tension holes, and established a toll for accessing to the energy network.<sup>34</sup>

Regarding the breach of the ECT obligations imposed to the State, Claimants considered that there had been an expropriation of the investment pursuant to article 13 of the ECT,<sup>35</sup> that there had been a breach of Fair and Equitable

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31. *Id. supra* No. 1, para. 394-450.

32. *Id. supra* No. 1, para. 394.

33. *Id. supra* No. 1, para. 268.

34. *Id. supra* No. 1, para. 269-276.

35. Article 13 of the ECT: (1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation. Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date"). Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment. (2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of

treatment pursuant to article 10(1) of the ECT<sup>36</sup> and a breach of the obligation to provide effective means for assertion of claims and enforcement of rights with respect to the investments, pursuant to article 10(2) of the ECT.<sup>37</sup>

Finally, Claimants claimed damages due to the aforementioned obligations' breach together with the interests over the allegedly suffered damages. Claimants proposed a method for calculating the damages, arguing that the State shall not benefit from the uncertainty created by its regulation in order to oppose to compensation and that the *Real Decreto-Ley 9/2013* did not affected the way damages had been calculated.<sup>38</sup>

The Kingdom of Spain objected to all claims raised by the investors and argued that no damages had been caused to them.<sup>39</sup> The State also argued that neither the damages nor its amount had been proved in the proceeding and therefore, due to the *affirmanti incumbit probatio* principle, no compensation should be granted.<sup>40</sup>

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that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1). (3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.

36. Article 10(1) of the ECT: “Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favorable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”

37. *Id. supra* No. 1, para. 277-312. Article 10(2) of the ECT: “Each Contracting Party shall endeavor to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).”

38. *Id. supra* No. 1, para. 313-336.

39. *Id. supra* No. 1, para. 337-372.

40. *Id. supra* No. 1, para. 373-391.

### III. DECISION OF THE TRIBUNAL

#### *(i) Final Award*

After careful consideration of the evidence and arguments provided by the Parties, the Tribunal dismissed Respondent's objection regarding the lack of object in the proceeding, as the regulation challenged was applied during a period of time and had therefore affected investor's rights.<sup>41</sup>

While analyzing if there had been an expropriation of the investment, direct or indirect, the Tribunal stated that the object of the investment was the company itself and not the return on the investment or financial gains as Claimants argued. Claimants had invested in shares, not in returns or financial gains, and Claimants still owned their shares on T-Solar, which still was a profitable company (or at least it was not proved otherwise in the proceeding). Even if the new regulation might have affected the company's profitability, T-Solar had not been deprived of all or any of its assets. Therefore, the Tribunal considered that there had been no expropriation.<sup>42</sup>

Regarding Spain's alleged breach of the obligation to provide effective means for assertion of claims and enforcements of rights with respect to investments, the Tribunal rejected Claimants' position. As recognized in the award, Spanish domestic law provides for different ways of challenging new regulation. In this case, both the Supreme Court and the Constitutional Court ruled over the lawfulness of the regulation. The Tribunal considered that Spain had provided with enough means for challenging the new regulation to Claimants and that the latter had effectively used those means, notwithstanding the outcome of such proceedings.<sup>43</sup>

As per the alleged breach of the Fair and Equitable Treatment, the Tribunal considered that due to Claimants' arguments only focused on the 2013 regulation, arguing that such regulation was the one creating the incognita on how the PV energetic sector is regulated, it lacked of jurisdiction as the 2013 regulation was not part of the arbitral proceeding. Therefore Claimant's argument in this regard was rejected on a jurisdictional basis.<sup>44</sup>

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41. *Id. supra* No. 1, para. 452-454.

42. *Id. supra* No. 1, para. 455-467.

43. *Id. supra* No. 1, para. 468-474.

44. *Id. supra* No. 1, para. 480-485.



Claimants also argued that they had legitimate expectations in relation to the non-alteration of the regulatory framework, in which they had based their investments.<sup>45</sup> Claimants considered that modifying such regulatory framework implied a breach of Spain's specific compromises with investors regarding their investment, and therefore a breach of the ECT obligations provided under its article 10(1).<sup>46</sup> The Tribunal considered that Spain had not entered into specific compromises with investors regarding the non-alteration of the regulatory framework. For adopting this ruling and in order to determine if the legal system in force at the time of the investment created legitimate expectations for investors and which were those, if any, the Tribunal analyzed such legal system.<sup>47</sup> The Tribunal considered that investors cannot have a legitimate expectation regarding a particular framework not to be altered when no specific agreement in this regard existed.<sup>48</sup> The Tribunal also considered that a particular analysis of the Spanish legal system should have been done by Claimants before investing in order to determine whether the legal framework could be modified. If Claimants would have done such analysis, they would have realized that a modification of the legal system could be expected at some point, or at least that such modification could take place at some point, as Spanish domestic legislation leaves such door open.<sup>49</sup>

According to the analysis of the Tribunal, the regulation implemented by the Kingdom of Spain in order to limit the deficit and evolution of price cannot be considered irrational, disproportional or contrary to the public order.<sup>50</sup> Therefore, the Tribunal ruled that the Kingdom of Spain did not breach its obligation of Fair and Equitable Treatment under the ECT.<sup>51</sup>

*(ii) Dissenting Opinion*

Even though the majority of the Tribunal rejected all of the Claimants' arguments, the co-arbitrator appointed by Claimants, who agreed with most of the majority's findings (jurisdiction of the Tribunal and non-expropriation of the investment),<sup>52</sup> dissented regarding the legitimate expectations, integrated in

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45. *Id. supra* No. 1, para. 475.

46. *Id. supra* No. 1, para. 491. *Id. supra* No. 33.

47. *Id. supra* No. 1, para. 490-506.

48. *Id. supra* No. 1, para. 511, 532, 548.

49. *Id. supra* No. 1, para. 507.

50. *Id. supra* No. 1, para. 534-538.

51. *Id. supra* No. 1, para. 539-540, 549.

52. *Id. supra* No. 3, para. 1-2.

the Fair and Equitable Treatment obligation, that were created to Claimants in relation to the non-alteration of the regulatory framework.<sup>53</sup>

Mr. Tawil considered that the legitimate expectations cannot be restricted to the existence of a specific agreement, but should also include the existing regulatory framework at the time of the investment.<sup>54</sup> The existence of a particular regulatory framework together with declarations made by the Kingdom of Spain determined Claimant's decision for investing in the Spanish PV energy sector.<sup>55</sup>

Mr. Tawil agreed that a State always maintains its regulatory discretion, but if the valid exercise of such regulatory discretion affects investors' legitimate expectations, the State should compensate for the damages caused.<sup>56</sup>

#### IV. SIGNIFICANCE AND EFFECTS OF THIS DECISION

The award resolves the first of the twenty eight existing disputes that investors have brought against the Kingdom of Spain. Nevertheless, it should be noted that the award is not binding for other Arbitral Tribunals.

It should be remarked that the dispute only implied the challenge of the effects caused by the 2010 regulation, and therefore the Tribunal did not address the possible effects of the 2013 and 2014 measures.<sup>57</sup> Such regulations are considered to have a more serious effect on the renewable energy projects in Spain and are more likely to be considered a breach of ECT. The 2013 and 2014 measures included the imposition of claw-back taxes in order to take back the incentives provided for investors and a reduction in the agreed feed-in tariffs to rates way below what is required for the operation of a going concern. Therefore, the award is most likely to have limited effects in the pending proceedings.

Lastly, it must be noted that the applicable arbitration rules to the dispute provide confidentiality for both the proceeding and the decision, unless parties

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53. *Id. supra* No. 3, para. 3.

54. *Id. supra* No. 3, para. 5.

55. *Id. supra* No. 3, para. 6-10.

56. *Id. supra* No. 3, para. 11.

57. *Id. supra* No. 1, para. 542.

have agreed otherwise.<sup>58</sup> Disregarding such rules, Respondent has made public the award, except for the amounts claimed by the investors and Professor Tawil's dissenting opinion. To the knowledge of the authors, the Kingdom of Spain has breached its confidentiality obligation. The downside for the investors is that there is no effective remedy for this breach under the rules.

In any case, round 2 is still to come due to the second claim filed by Claimants under the 2013 and 2014 law amendments, but that is another story.

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58. Article 46 (Confidentiality) of the Rules of the Arbitration rules of the Stockholm Chamber of Commerce: Unless otherwise agreed by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award. Article 9 (Procedures) of the Appendix I (Organization) of the aforesaid rules: *"The SCC shall maintain the confidentiality of the arbitration and the award and shall deal with the arbitration in an impartial, practical and expeditious manner."*