HERBERT SMITH FREEHILLS SECURES MAJOR VICTORY FOR KINGDOM OF SPAIN IN INVESTOR-STATE ARBITRATION

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Deals and cases

Herbert Smith Freehills has helped secure an important victory for the Kingdom of Spain in a long-running investor-state arbitration concerning regulatory changes made by Spain in 2010 to the Feed-in Tariff regulation governing the photovoltaic ("PV") sector in Spain.

On February 28, 2020, a Tribunal constituted by Prof. Gabrielle Kaufmann-Kohler (President), Judge Charles Brower (appointed by the Claimants) and Judge Bernardo Sepúlveda Amor (appointed by the Respondent) issued a final award (the "Award") in the case *The PV Investors v. the Kingdom of Spain*. The Tribunal rejected the principal claim of approximately €2 billion, giving a tremendous victory to Spain. Due to an alternative claim made, Spain is liable for only a small amount of damages claimed which, when aggregated across the many claimants, is in total €91.1 million, or about 5% of what the claimants were originally seeking at the beginning of the arbitration. Some of the claimants have been refused any compensation.

The cross-office Herbert Smith Freehills team from Madrid and New York representing Spain included Christian Leathley (partner, New York), Eduardo Soler-Tappa (partner, Madrid), Florencia Villaggi (counsel, New York), Jaime de San Román (senior associate, Madrid), Beverly Timmins (senior associate, Madrid) and Mélissa Sánchez (associate, Madrid).

Christian Leathley, who is US Head of International Arbitration commented: "*Spain has succeeded on the main claim, and the huge financial claims that were brought against it have been significantly reduced to about 5% of what had previously been publicized, or the claims have been rejected in their totality. Given the profile of the Tribunal, this is an important decision for Spain*".

Eduardo Soler-Tappa, who is Head of the Dispute Resolution practice in Madrid, remarked: "*It has been a long legal battle of over 8 years. In the end, the Tribunal sided with Spain's position from the very beginning, i.e., that the Claimants could only have a legitimate expectation to receive a reasonable rate of return. The Tribunal also concluded that the disputed measures were reasonable, not arbitrary, proportionate and transparent. This was the core of the dispute*".

Background

This ad hoc arbitration was brought under the Energy Charter Treaty ("ECT") pursuant to the 2010 UNCITRAL Arbitration Rules, administered by the Permanent Court of Arbitration. The claim was first brought at the end of 2011 by a group of 88 individual claimants that invested in Spain from 2007 to 2010. On October 13, 2014 in a Preliminary Award on Jurisdiction, the Tribunal dismissed 62 of the PV investors for lack of standing, while assuming jurisdiction over 26 claimants that grouped in 14 corporate groups (the "Claimants").

This was the first case filed under the ECT against Spain in relation to the Spanish energy reform that took place between 2010 and 2014. The long awaited Award comes after more than 8 years since the initiation of the claim, and after 18 awards have been rendered by different tribunals against Spain related to the same issue.

The Tribunal dismissed in full the Claimants' Primary Claim, that Spain breached Article 10 of the ECT by (i) violating the Claimants' legitimate expectations of obtaining the fixed tariff under RD 661/2007; and/or (ii) enacting measures that were unreasonable, arbitrary, disproportionate and not transparent.

The Tribunal concluded that "the regulatory framework, including RD 661/2007, 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 under the Spanish regulatory framework at the time of the investment, the Claimants could only expect to receive a reasonable rate of return. The Tribunal further sided with Spain in finding that the disputed measures were reasonable, not arbitrary, proportionate and transparent.

This is a critically important decision, since it pushes against the tide of decisions that were coming out against Spain, and rejects the proposition that the law enacted can be interpreted to have a stabilizing effect. This was the core of our defense. Coming from Prof. Kaufmann-Kohler also means this is a very important victory for Spain.

The Tribunal then turned to consider the Claimants' Alternative Claim, which was that Spain did not provide a reasonable rate of return to the Claimants' investments. It found that since there were 10 Claimants that were receiving a return that was slightly below a 7% post-tax rate, they were not receiving a reasonable return under the disputed measures.

The Tribunal ordered Spain to compensate those 10 Claimants. The aggregated amount that Spain was ordered to pay those Claimants totals €91.1 million, which is around 5% of what the Claimants were requesting at the beginning of the arbitration.

The Tribunal ordered that the costs of the arbitration shall be borne in equal shares by the Parties and that each Party shall bear the legal fees and other expenses which it incurred.

Judge Brower concurred with the majority of the Tribunal in finding that Spain breached the ECT. However, he disagreed with the majority on the dismissal of the Claimants' Primary Claim. In his dissenting opinion he concluded that since there were eleven tribunals that decided to condemn Spain based on the Claimants' Primary Claim, he did not see any reason to depart from the reasoning applied by such previous awards.

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