

HERBERT SMITH ADVISES KINGDOM OF SPAIN IN VICTORIOUS INVESTOR-STATE ARBITRATION

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Herbert Smith Freehills advised the Kingdom of Spain in its victorious investor-state arbitration under the Stockholm Chamber of Commerce rules commenced by European investors Charanne (of the Netherlands) and Construction Investments (of Luxembourg).

The disputes concerned regulatory changes made by Spain in 2010 to the feed in tariff regulation governing the photovoltaic (PV) sector in Spain. The claimants alleged that these regulatory changes breached the investment protection provided for in Articles 10 (fair and equitable treatment and effective means for the assertion of claims) and 13 (expropriation) of the Energy Charter Treaty.

On 21 January 2016, an international tribunal comprised of Alexis Mourre (president), Guido Tawil and Claus Von Wobeser, rejected the totality of the claimants' claims and ordered the claimants to pay the Kingdom of Spain's costs, which amounted to €1.3 million.

The tribunal was persuaded by Spain's arguments that the regulatory changes did not breach the "fair and equitable

treatment" standard under international law. Particularly, it found that Spain never made a specific commitment to the claimants of stabilisation of the legal framework of the investment. The tribunal held that, in the absence of such commitment, no investor can have a legitimate expectation that the regulatory framework will not change.

The tribunal emphasised that such a conclusion was reinforced by the fact that, before the date of the claimants' investments, the Spanish Supreme Court had already held that changes to the regulatory regime of renewable energy were permissible under Spanish law. While such decisions of the Spanish Supreme Court did not bind the tribunal, they were determinative as a matter of fact.

The tribunal considered that the investors have a duty to conduct due diligence of the legal framework of the investments, and that if the claimants would have done so, they should have expected the possibility of changes to the regulatory regime.

Furthermore, the tribunal concluded that the regulatory changes were not retroactive – they were reasonable, proportional, made in the public interest and maintained all the fundamental characteristics of the regulatory regime at the time of the investment (particularly the right to a subsidised tariff through the PV plant's life).

The claimants' allegations that their investment was also expropriated were also rejected by the tribunal.

A Herbert Smith statement said: "This is an extremely important victory for Spain, that faces another 26 cases before international arbitral tribunals on similar facts."

The legal team in this case comprised the State Attorney Office and Herbert Smith Freehills partners Eduardo Soler Tappa and Christian Leathley, as well as associates Florencia Villaggi, Pilar Colomes, Jaime de San Román and Beverly Timmins.

Herbert Smith partner Christian Leathley said: "This is a significant outcome for Spain, as it determines key issues that are relevant to all the other cases that follow it. The Tribunal has ruled on Spain's right to regulate, and taken an important step in clarifying the position under international law."