

TARIFF CHANGES ENERGISING CLAIMS AGAINST THE SPANISH STATE - HERBERT SMITH

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Reductions in tariffs available to producers of solar photovoltaic energy are prompting many to consider legal action, say Miguel Riaño and Ignacio Díez-Picazo, partners with Herbert Smith

Las reducciones en las “feed-in tariffs” (sistemas de prima regulada) están provocando que muchos productores de energía fotovoltaica se planteen emprender medidas legales contra el Gobierno español. Interponer una demanda supone numerosos retos legales para ambas partes, afirman Miguel Riaño e Ignacio Díez-Picazo, socios de Herbert Smith en Madrid.

The Spanish Government announced controversial plans last August contemplating a reduction in solar photovoltaic (PV) tariffs, previously among the most generous in Europe. This became a reality in November when a Royal Decree reduced the rates payable to new PV producers by up to 45 percent. A further Decree was announced just before the end of 2010 retroactively limiting the number of production hours that PV plants could qualify for the subsidies.

"There has understandably been a sense of shock among producers and sponsors of PV schemes as to the scale of the reductions and we have subsequently seen a lot of analysis on the impact, to both existing and planned future schemes," says Riaño, who leads Herbert Smith's Spanish energy practice.

A number of investors and investment funds have subsequently been organising themselves to ascertain what response, if any, they may have in light of the changes made, he says.

"Different options are clearly being explored including the potential for claims against the Spanish Government in the domestic Courts and through arbitration under the relevant investment treaties before international tribunals such as ICSID (International Centre for Settlement of Investment Disputes) in Washington DC."

The likelihood of the success of a claim has however to be considered very carefully, cautions Díez-Picazo, an international disputes partner in the firm's Madrid office. Despite strong headlines and the opinion of many industry commentators there may be no clear-cut cases.

"There is an evident desire among many investors to seek compensation. The underlying financials of many schemes have altered significantly as a result of the tariff reductions, even calling the viability of some into question. But there is no single solution. Different options have to be considered depending on operators' or investors' particular circumstances."

The general sentiment is that while actions may yet be launched the relative chances of success depend not only on the strength of the claims made but also how any claim is initiated.

"There is a perception that the Spanish Government feels relatively comfortable with its position, and that at least in the domestic courts a successful action may prove challenging – in any event, there are a lot of technical and operational variables that have to be considered before an entity may subsequently be able to prove that the tariff changes have had a significantly adverse effect," says Riaño.

Parties may claim a breach of legitimate expectations, but factors including the specification, age and location of the plant will have an impact on any chances of success, they say, while there are also issues surrounding the jurisdiction of Arbitral Tribunals to hear any claims.

"Some parties may therefore find more options open to them in the international arena. The Kingdom of Spain is a party to a multilateral treaty under which a claim may be made. But reliance on such a mechanism may also depend on a party's own corporate structure, and significantly their own home country being a signatory to the relevant treaty," says Díez-Picazo.

Much thought will need therefore to go into the strategies employed to pursue a claim and in the relative merits of pursuing individual or collective actions. But in any event, any litigation or arbitration is likely to be challenging and drawn out not least because claims against the Kingdom of Spain may break new legal ground. "There is no doubt that pursuing a claim either domestically or internationally will involve a long battle and that certain parties will be in a stronger position than others.

To date however we have seen few investment arbitrations against Spain, and this is likely to bring added complexities and challenges," says Díez-Picazo.



Ignacio Díez-Picazo