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Adversus Solem Ne Loquitor? New Dissenting Opinions in Spain's Solar Saga



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Arbitral awards in Spain's solar saga are piling up.¹ Since July of 2019, eleven additional awards have been rendered against Spain under the auspices of the Energy Charter Treaty ('ECT'). These newly decided cases, which except for PV have all been administered by the International Centre for Settlement of Investment Disputes ('ICSID'), are *Cube*,² *SolEs Badajoz*,³ *Infrared*,⁴ *OperaFund*,⁵ *Stadtwerke*,⁶ *BayWa GmbH*,⁷ *RREEF Infrastructure*,⁸ *RWE Innogy*,⁹ *Watkins Holdings*,¹⁰ *PV*,¹¹ *Hydro Energy*,¹² *Cavalum*,¹³ and *STEAG*.¹⁴ To date, a total of 16 adverse arbitral decisions have been notified to Spain for a total amount in excess of EUR 990 million. Five of these decisions, *BayWa GmbH*,¹⁵ *RWE Innogy*,¹⁶ *Hydro*

¹ Please refer to Issues 1, 2, 3, 4 and 5 of IAO for further insight into other awards or the recognition and enforcement attempts of those awards against Spain. Available online at <https://www.uria.com/en/publicaciones/Investment-Arbitration-Outlook.html>.

² *Cube Infrastructure Fund SICAV and others v Kingdom of Spain*, ICSID Case No ARB/15/20, Award (15 July 2019). A previous Decision on Jurisdiction, Liability and Partial Decision on Quantum was rendered on 19 February 2019.

³ *SolEs Badajoz, GmbH v Kingdom of Spain*, ICSID Case No ARB/15/38, Award (31 July 2019).

⁴ *InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain*, ICSID Case No ARB/15/12, Award (2 August 2019).

⁵ *OperaFund Eco-Invest SICAV, PLC. and Schwab Holding, AG v Kingdom of Spain*, ICSID Case No ARB/15/36, Award (6 September 2019).

⁶ *Stadtwerke München GmbH, RWE Innogy GmbH, and others v Kingdom of Spain*, ICSID Case No ARB/15/1, Award (2 December 2019).

⁷ *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v Kingdom of Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019).

⁸ *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain*, ICSID Case No ARB/13/30, Award (11 December 2019).

⁹ *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain*, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (30 December 2019).

¹⁰ *Watkins Holdings S.à r.l. and others v Kingdom of Spain*, ICSID Case No ARB/15/44, Award (21 January 2020).

¹¹ *The PV Investors v Kingdom of Spain*, PCA Case No 2012-14, Final Award (28 February 2020).

¹² *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v Kingdom of Spain*, ICSID Case No ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020).

¹³ *Cavalum SGPS, S.A. v Kingdom of Spain*, ICSID Case No ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (31 August 2020).

¹⁴ *STEAG GmbH v Kingdom of Spain*, ICSID Case No ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum (8 October 2020).

¹⁵ *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v Kingdom of Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019).

¹⁶ *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain*, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (30 December 2019).

Energy,¹⁷ *Cavalum*,¹⁸ and *STEAG*¹⁹ are not final since quantum has yet to be determined. However, the respective arbitral tribunals have already issued a ruling on liability and decided that –while to a much more limited degree than in previous decisions– Spain breached the ECT in all of these cases.²⁰

Additionally, according to the UNCTAD 'Fact Sheet on Investor-State Dispute Settlement Cases in 2018', Spain is the second most frequent respondent state in the 1987-2018 period,²¹ following Argentina with 60 cases and ahead of Venezuela with 47 cases. Three new ICSID proceedings were registered against Spain in 2019,²² which made Spain the most frequent ICSID respondent state in 2019 (tied with Colombia) and the only respondent state (with the exception of a case filed against Germany)²³ among Western European countries.

17 Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v Kingdom of Spain, ICSID Case No ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020).

18 Cavalum SGPS, S.A. v Kingdom of Spain, ICSID Case No ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (31 August 2020).

19 STEAG GmbH v Kingdom of Spain, ICSID Case No ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum (8 October 2020).

20 The cases *Cube*, *BayWa GmbH*, *Stadtwerke*, *RWE Innogy*, *Watkins Holdings*, *PV*, *Hydro Energy*, *Cavalum*, and *STEAG* are discussed in the companion article 'The Spanish Renewables Saga: *Jurisprudence Inconstante?*', also included in this issue of the *Investment Arbitration Outlook*.

21 UNCTAD, 'Fact Sheet on Investor-State Dispute Settlement Cases in 2018', Issue 2, International Investment Agreements Issues Note (May 2019), Figure 2.

22 ICSID, The ICSID Caseload - Statistics, Issue 2020-1, p 24.

23 On 20 September 2019, ICSID registered the case *Strabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v Federal Republic of Germany*, ICSID Case No ARB/19/29.

Following the lead of previous decisions, almost all of the new awards have largely found in favour of claimants.²⁴ This arguably comes as no surprise, given that in almost all other cases arising out of Spain's changes to its renewable energy investment system, arbitral tribunals have upheld the position of investors.²⁵

It seems however that every now and then some differing positions surface in the form of partly or fully dissenting opinions by arbitrators. To date, of the 16 unfavourable awards issued against Spain, four include dissenting opinions by respondent-appointed arbitrators (namely, *Foresight*,²⁶ *Infrared*,²⁷ *OperaFund*,²⁸ and *Watkins Holdings*²⁹). In other cases, such as *RREEF*

24 The only exception being the *Stadtwerke* Award, which has found entirely in favour of Spain, albeit with a dissenting opinion issued by Professor Kaj Höber – appointed by claimant–. In addition, the tribunal in *RREEF Infraestructure* only awarded USD 67 million out of the USD 512 million requested by claimant and the partial decisions in *BayWa GmbH* and *RWE Innogy* arbitral tribunals rejected the claimants' contentions to a considerable degree.

25 Prior to *Stadtwerke*, Spain had only entirely prevailed in the first two arbitrations before the Stockholm Chamber of Commerce ('SCC'), namely *Charanne and Construction Investments v Kingdom of Spain*, SCC Case No 062/2012 and *Isolux Netherlands, BV v Kingdom of Spain*, SCC Case No 2013/153. An additional case before the SCC was withdrawn by the claimant; namely *Solarpark Management GmbH & Co. Atum I KG v Kingdom of Spain* SCC Case No 2015/163.

26 *Foresight Luxembourg Solar 1 S. à R.L., et al. v Kingdom of Spain*, SCC Case No 2015/15, Partial Dissenting Opinion by co-arbitrator Raúl. E. Vinuesa (30 October 2018).

27 *Infrared*, Partial Dissenting Opinion by co-arbitrator Pierre-Marie Dupuy (2 August 2019).

28 *OperaFund*, Dissent on Liability and Quantum by co-arbitrator Phillipe Sands QC (13 August 2019) ('*Sands Dissent*').

29 *Watkins Holdings*, Dissenting Opinion by co-arbitrator Helène Ruiz-Fabri (21 January 2020).

To date, of the 16 unfavourable awards issued against Spain, four include dissenting opinions by respondent-appointed arbitrators

Infraestructure,³⁰ *Cube*³¹ and *BayWa GmbH*,³² and *STEAG*³³ a dissenting opinion is attached to pre-award decisions on issues of jurisdiction, liability and/or quantum.

For the sake of brevity, this article focuses on one of the latest of the available dissenting opinions by respondent-appointed arbitrators, which was issued by Professor Sands QC in the *OperaFund* case, and particularly on the matter of legitimate expectations under Article 10 of the ECT.

Before that, it is important to note that the Sands Dissent contains certain *obiter dicta* in relation to the general status and public understanding of the investment protection system that some may label as provocative 'food for thought.' Particularly, paragraph 3 of the Sands Dissent reads as follows: 'The system of investor-State arbitration is a fragile creature, and one that attracts an increasingly critical eye.

30 *RREEF Infraestructure*, Partially Dissenting Opinion to the Decision on Responsibility and the principles of Quantum by Robert Volterra –appointed by claimant– (30 November 2018).

31 *Cube*, Separate and Partial Dissenting Opinion by Professor Christian Tomuschat –appointed by respondent– (19 February 2019) ('*Tomuschat Dissent*').

32 *BayWa GmbH*, Dissenting Opinion by Dr. Horacio A. Grigera Naón –appointed by claimant– (2 December 2019). Two additional dissenting opinions by claimant-appointed arbitrators have been issued: a dissenting opinion by Prof. Kaj Höber in the *Stadtwerke* (award entirely favourable to respondent) and a concurring and dissenting opinion by Charles N. Brower in *PV* (award favourable to claimant where compensation awarded was –at a minimum– less than 20% of the amount claimed).

33 *STEAG*, Dissenting Opinion by Professor Pierre-Marie Dupuy –appointed by respondent– (8 October 2020).

This Award –long on description of the Parties' arguments, short on scrutiny of the actual evidentiary record and reasoning as to the legal principles to be applied– will not enhance confidence in the system, or a sense of its legitimacy.³⁴

Dissenting Opinion in *OperaFund*

Prof. Sands dissents from the findings of the Majority in *OperaFund* ('Majority')³⁵ with respect to liability and quantum, and more specifically, he finds that the Majority's decision is premised on findings that are 'entirely unsupported by evidence on the record, and reached without reasoning and explanation.'³⁶

In the view of the dissenting arbitrator, the 'unsupported' factual premise is that claimants:

- (i) 'had an expectation that the tariff regime established by RD 661/2007 was immutable during the reasonable life of their investments,
- (ii) relied on that expectation in making their investments, and
- (iii) carried out the necessary exercise in due diligence required by the Energy Charter Treaty.'

34 A response by the Majority to the Sands Dissent can be found in para 491 of the *OperaFund* Award.

35 The rest of the arbitral tribunal was composed of Karl-Heinz Böckstiegel (President, appointed by the parties) and August Reinisch (appointed by the claimants).

36 Sands Dissent, para 2.

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Professor Sands further adds that the Majority did not 'set out a legal standard applicable to its conclusion on legitimate expectations, and provided no explanation or reasons on a number of important points, not least the substitution of its views on Spanish law for those adopted by the Spanish Supreme Court on the meaning and effect of RD 661/2007'.³⁷

With regard to legitimate expectations, the dissenting arbitrator contends that the premise in paragraph 510 of the *OperaFund* Award is accurate in stating that, under the ECT, the fair and equitable treatment standard ('FET') may be breached where legal and business stability, or the legal framework, suffer alterations that could frustrate legitimate and *reasonable* expectations of investors.

However, the Sands Dissent further adds that such proposition is incomplete in the absence of clear principles that ought to determine the source and boundaries of

those investor expectations, as well as the notion that investors need to provide investment tribunals with evidence that they have carried out a certain degree of due diligence.³⁸

In this regard, paragraph 44 of the Sands Dissent suggests that evidence on the record showed that the claimant-appointed expert had acknowledged that an immutable and high rate of return (i.e. 7.8% as established by Spanish Royal Decree 661/2007) combined with remarkably low interest rates would create windfall profits for investors.

According to Professor Sands,³⁹ applicable case law, such as the case of *Phillip Morris v Uruguay*⁴⁰ which in turn relied on *EDF v Romania*,⁴¹ prevents investors from relying on investment

treaties as a 'kind of insurance policy against the risks of any changes in the host State's legal and economic sector' (in the absence of specific promises). In Professor Sands' view, the claimants could not reasonably or fairly expect the windfall profits to remain immutable in the midst of an '*unprecedented economic crisis and historically low rates of interest*'.

Conversely, the Majority pointed out that the Sands Dissent failed to explain why it departed from the rest of the arbitral awards rendered against Spain in previous renewable energy cases which, in the Majority's view, have addressed 'almost the same factual and legal scenarios as in the present case while the Dissent relies on cases dealing with very different factual⁴² and legal

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scenarios without explaining why these should nevertheless be more relevant for and prevail for the present case over the awards in the Spanish cases.⁴³

Conclusion

The Latin expression used in the title suggests that one should not 'speak against the sun'; that is, not question the obvious.

It appears that some arbitrators are actually daring to speak against the sun from which many investors tried to profit in Spain and, in doing so, are not following the mainstream view taken in previous cases.⁴⁴ However, it remains to be seen whether these (still a minority) dissenting voices will continue to surface and to what extent (if any) they will affect the outcome of the ever-growing number of cases against Spain.

regards investments in hydro installations (see, *inter alia*, paras 22-27 of the Tomuschat Dissent).

⁴³ *OperaFund*, para 491.

⁴⁴ Indeed the recent *Stadtwerke* Award has found entirely for respondent.

³⁸ *Ibid*, para 16.

³⁹ *Ibid*, para 44.

⁴⁰ Philip Morris Brand S.à.r.l. (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay, ICSID Case No ARB/10/7, Award (8 July 2016), paras 423-424.

⁴¹ EDF (Services) Limited v Romania, ICSID Case No ARB/05/13, Award (8 October 2009), para 219.

⁴² The importance of the factual differences between cases, even within the Spain's solar saga, was highlighted in the Tomuschat Dissent (*Cube*), which drew a line between legitimate expectations in the hydro installations and the photovoltaic installations. Prof. Tomuschat held that the expectations of investors in the hydro sector could not be the same as those of investors in the photovoltaic sector and thus departed from the majority in *Cube* only as

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