

US court declines to enforce ECT award against Spain

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In a first, a US court has refused to enforce an Energy Charter Treaty award against Spain, finding that under EU law the state lacked the legal capacity to extend an offer to arbitrate an intra-EU investment dispute.

Yesterday, **Judge Richard Leon** in the US District Court for the District of Columbia [dismissed](#) a petition by Delaware-registered Blasket Renewable Investments to enforce a €26.5 million UNCITRAL award against Spain.

Blasket was assigned the rights to the award earlier this year by Dutch entities AES Solar Energy Coöperatief and Ampere Equity Fund, and was substituted as petitioner in the US enforcement action this month.

The judge ruled that under EU law to which both Spain and the Dutch entities were subject, no valid agreement to arbitrate existed. As a result, he said the US court lacked subject-matter jurisdiction under the US Foreign Sovereign Immunities Act (FSIA).

It is the first time a US court has refused to enforce an intra-EU investment treaty award on such a basis. It also contradicts [rulings](#) by another DC judge last month which found that EU law could not deprive the US court of jurisdiction to hear similar enforcement actions against Spain.

Gibson Dunn & Crutcher is acting for Blasket in the US court, while Spain is using Williams & Connolly and Sovereign Arbitration Advisors.

AES and Ampere were part of a group known as the PV Investors who brought one of the earliest Energy Charter Treaty (ECT) cases against Spain over reforms to its subsidy regime for renewable energy. Spain has faced around 60 ECT cases over the measures, which were introduced following the 2008 financial crisis.

A Geneva-seated UNCITRAL tribunal consisting of **Gabrielle Kaufmann-Kohler** as chair, **Charles Brower** and **Bernardo Sepúlveda-Amor** upheld its jurisdiction in 2014 and issued an award in favour of the investors in 2020. The Swiss Federal Supreme Court rejected Spain's challenge to the award in the following year.

Meanwhile the Court of Justice of the European Union (CJEU) ruled in the *Achmea* case in 2018 that investor-state arbitration provisions in an intra-EU bilateral investment treaty violated the autonomy of EU law by taking disputes over EU law outside its judicial system.

The CJEU's 2021 ruling in *Komstroy* extended that principle to multilateral agreements such as the ECT, insofar as they apply to investment disputes between EU nationals and EU member states.

The Dutch entities applied to the US court for enforcement in 2021. Spain resisted enforcement on the basis of the CJEU decisions as well as EU state aid rules, and the European Commission appeared as an amicus in support of Spain's position.

In the latest ruling, Judge Leon said Spain had "established by a preponderance of the evidence that it lacked the legal capacity to make a valid offer to arbitrate with the Dutch companies." Accordingly, there was no subject-matter jurisdiction under the arbitration exception in the FSIA.

He rejected Blasket's argument that the arbitral tribunal's determination that a valid agreement to arbitrate existed was binding on him. He said that under DC Circuit case law, Spain's challenge to its legal capacity to extend an offer to arbitrate "falls outside the scope of matters entrusted to the arbitrator to resolve".

Blasket argued the court should follow the approach taken by **Judge Tanya Chutkan** in the *NextEra* and *9REN* enforcement cases against Spain. She found last month that the assertion that a party lacked a legal basis to enter into an arbitration agreement is "not a challenge to the jurisdictional fact of that agreement's existence" but rather a challenge to its arbitrability.

But Judge Leon says the DC precedents relied on by Judge Chutkan "merely stand for the proposition that a reviewing court must defer to an arbitral tribunal's judgment that a particular investment fell within the scope of an arbitration provision". It was not alleged in those cases that the parties were incapable of entering into an agreement to arbitrate anything at all. To defer to the tribunal in such a case "effectively assumes away the antecedent question of whether the parties could have agreed to do so in the first instance," he said.

The judge was satisfied that the text of the ECT precludes an ECT tribunal from disregarding a rule of international law applicable to the dispute before it. The tribunal therefore could not disregard EU law invalidating the purported agreement to arbitrate.

He said this view was supported by the "subsequent interpretation of the signatories", notably the 2007 Lisbon Treaty in which EU member states affirmed the primacy of EU law; and a 2019 declaration by 22 EU member states asserting that the *Achmea* decision applied to intra-EU investment arbitration under the ECT.

The judge said the 2019 declaration "offers persuasive evidence" that EU member states understood their obligations under the ECT's arbitration clause to be limited by their obligations under the EU Treaties.

He rejected Blasket's other argument based on a waiver exception in the FSIA, saying this "does not allow prospective litigants to make an end run around the requirement for a valid arbitration agreement".

Counsel to Blasket, **Matthew Rosen** of Gibson Dunn tells GAR: "The district court's decision is sharply at odds with dozens of rulings recognizing that Spain cannot now escape its promise to arbitrate these disputes. We look forward to obtaining a definitive resolution of these issues in the court of appeals."

Spain also brought litigation in the Netherlands against AES and Ampere last December to compel them to cease their enforcement efforts.

In January, the Dutch funds assigned their interests in the award to Blasket – whose ultimate beneficial owner has not been identified. The funds have described the assignment as the conclusion of a transaction with an "unaffiliated financier" that was agreed in 2020.

Spain also brought two further sets of summary proceedings in the Amsterdam District Court requesting injunctions to prevent AES and Ampere from seeking an anti-suit injunction in the US court or from substituting Blasket as petitioner in those proceedings. The Dutch courts rejected both requests.

Houthoff is representing the Dutch funds and Blasket in those proceedings, while Spain is using Simmons & Simmons.

Last year, Blasket was also assigned interests in two ICSID awards against Spain worth a combined €88 million. The assignors were Luxembourg's RREEF and the UK's Infrared Capital. Gibson Dunn & Crutcher also acts in DC proceedings to enforce those awards.

Spain faces around 10 such enforcement actions in the DC courts. It is variously using Foley Hoag, Squire Patton Boggs and K&L Gates in some of those cases.

Blasket Renewables Investment v Kingdom of Spain

In the US District Court for the District of Columbia

Bench

- **Judge Richard Leon**

Counsel to Blasket Renewables Investment (replaced AES and Ampere)

- Gibson Dunn & Crutcher

Partners **Matthew McGill** and **Matthew Rosen** and of counsel **Ankita Ritwik** in Washington, DC

Counsel to Spain

- Williams & Connolly

Partner **Jonathan Landy** and associate **Benjamin Graham** in DC

- Sovereign Arbitration Advisors

Csaba Rusznak in DC

Counsel to the European Commission

- Arnold & Porter

Stanton Jones and **Sally Pei** in DC

In the Amsterdam District Court

Counsel to Spain

- Simmons & Simmons

Partner **Paul Tjiam** and associate **Edwin van der Velde** in Amsterdam

Counsel to AES, Ampere and Blasket

- Houthoff

Partners **Dirk Knottenbelt** and **Remme Verkerk** and senior associate **Hans Biezenaar** in Rotterdam

Counsel to Johannes Zijferveld, Panagiotis Haskopolous, Petrus Kager and Christian Mathiesen Jr (directors)

Did not appear

Counsel to William Blaasse and Anne Marie Snel-Simmons

- De Brauw Blackstone Westbroek

Partner **Eelco Meerdink** and senior associate **Pieter van Slobbe** in Amsterdam

PV Investors v Spain arbitration (PCA case no. 2012-14)

Tribunal

- **Gabrielle Kaufmann-Kohler** (Switzerland) (chair)
- **Charles Brower** (US)
- **Bernardo Sepúlveda-Amor** (Mexico)

Counsel to the PV Investors

- Allen & Overy

Partner **Marie Stoyanov** in Paris, partner **Antonio Vázquez-Guillén**, consultant **Antonio Jiménez-Blanco**, senior associate **Pablo Torres** and associates **David Ingle** and **Carmen de la Hera** in Madrid, and senior associate **Tomasz Hara** in London

- Gibson Dunn & Crutcher

Partner **Jeffrey Sullivan KC** in London

Counsel to Spain

- Herbert Smith Freehills

Partners **Eduardo Soler-Tappa** and **Jaime De San Román**, senior associate **Beverly Timmins** and associate **Mélissa Sanchez** in Madrid, and partner **Christian Leathley** and counsel **Florencia Villaggi** in New York

- Abogacía General del Estado

José Manuel Gutiérrez Delgado, **Pablo Elena Abad**, **Antolín Fernandez Antuña***, **Roberto Fernández Castilla**, **Patricia Froehlingsdorf Nicolás**, **María del Socorro Garrido Moreno**, **Rafael Gil Nievas**, **José Luis Gómara Hernández**, **Elena Oñoro Sáinz**, **Amaia Rivas Kortazar****, **Mariano Rojo Pérez**, **María José Ruiz Sánchez**, **Diego Santacruz Descartín**, **Francisco de la Torre Díaz**, **Alberto Torró Molés**, and **Luis Vacas Chalfoun** in Madrid

*[opened](#) his own boutique, *Antuña & Partners*, in 2019

**Now with *Pinsent Masons* in Madrid

Documents

Opinion



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