



## **PART 3: CASE 2 SOLAR IN EUROPE – SPAIN**

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# Content

1. General introduction to the solar energy sector in Spain
2. Case study: sale of photovoltaic plants on rooftops

# 1.1. Background and main regulatory framework in Spain

## Spain's policies favouring renewable energy and Royal Decree 661/2007:

- Increased the remuneration for facilities using technologies such as solar.
- Guaranteed “priority of dispatch” ensuring that all production could be introduced into the grid subject at the established tariff.
- Established two different tariffs: a fixed tariff per unit of production (the “Fixed Tariff Option”) and a premium for each unit on top of the market price (the “Premium Option”).
- Established tariffs based on production for the entire operational life of the facility and without setting limits on total lifetime payments.

# 1.1. Background and main regulatory framework in Spain

## New regulatory scheme approved in 2010 due to tariff deficit:

- Eliminated fixed tariffs for solar photovoltaic facilities once they have operated for 26 years (extended to 30 years in 2011).
- Introduced additional technical requirements: requiring facilities or groups of photovoltaic facilities exceeding 2 MW to comply with requirements determined to overcome voltage dips.
- Limited the operating hours of photovoltaic facilities.
- Imposed a charge of €0.50/MW for access to transport and distribution networks.

# 1.1. Background and main regulatory framework in Spain

- 2010: measures were not sufficient to overcome tariff deficit (in 2012 it was still €22 billion).
- 2012: approval of a 7% tax on the total value of all energy fed into the National Grid by electricity producers.

## New regulatory scheme approved in 2013 and 2014: a completely different regulatory approach

- Abandoned the tariff regime set out in RD 661/2007 (the entire system of fixed tariffs and premiums was eliminated).
- Introduced a new “specific remuneration” system based on hypothetical (not real) “standard” costs per unit of installed power, plus “standard” amounts for operating costs, with remuneration limited to an operating life of 25 years.

# 1.1. Background and main regulatory framework in Spain

- Remuneration parameters include the initial investment in the plant ( $R_{inv}$ ), the operation of the plant ( $R_o$ ), its useful regulatory life, the number of hours it operates and the market price of electricity.
- Instead of basing remuneration on production, it is based on the investment made.
- Applies to existing plants.
- New regime pays no regard to actual costs (including loan servicing) or efficiencies of specific existing plants.

# 1.1. Background and main regulatory framework in Spain

- Each investment would be entitled to a “reasonable rate of return” with the yardstick set by a hypothetical efficient plant.
- Reasonable return: 10-year KoS bond + 300bpp
  - Determined for six-year periods.
  - The big question: Will 7.398% be maintained?
  - Criteria:
    - **Spanish economy**
    - **Demand for electricity**
    - **Appropriate remuneration**

# 1.1. Background and main regulatory framework in Spain

- *Useful regulatory life*. Once the installation has exceeded its useful regulatory life, it will not receive any support (i.e. for investment or operation). These installations would receive the electricity market price if they continue to sell their electricity in the market after their useful regulatory life has expired.
- Tender to allocate support to new plants.
- New projects:
  - need not be 100% identified.
  - term to identify projects.
- Marginal price award basis.












## 1.2. Spanish market situation

- New project solutions
- New Renewable Energy Directive proposed in 2016: gives priority to energy efficiency, increases the percentage of renewable energies in the energy mix and converts consumers into active agents in the electricity market.
- Growth in self-generation: subsidies for PV installations or tax deductions.
- Enormous demand for this type of energy in sectors such as agricultural, agri-food and aquaculture.
- Drop in prices.

## 1.2. Spanish market situation

Top 10 countries based on installed capacity and cumulative installed capacity in 2015.

TOP 10 COUNTRIES IN 2015 FOR CUMULATIVE INSTALLED CAPACITY

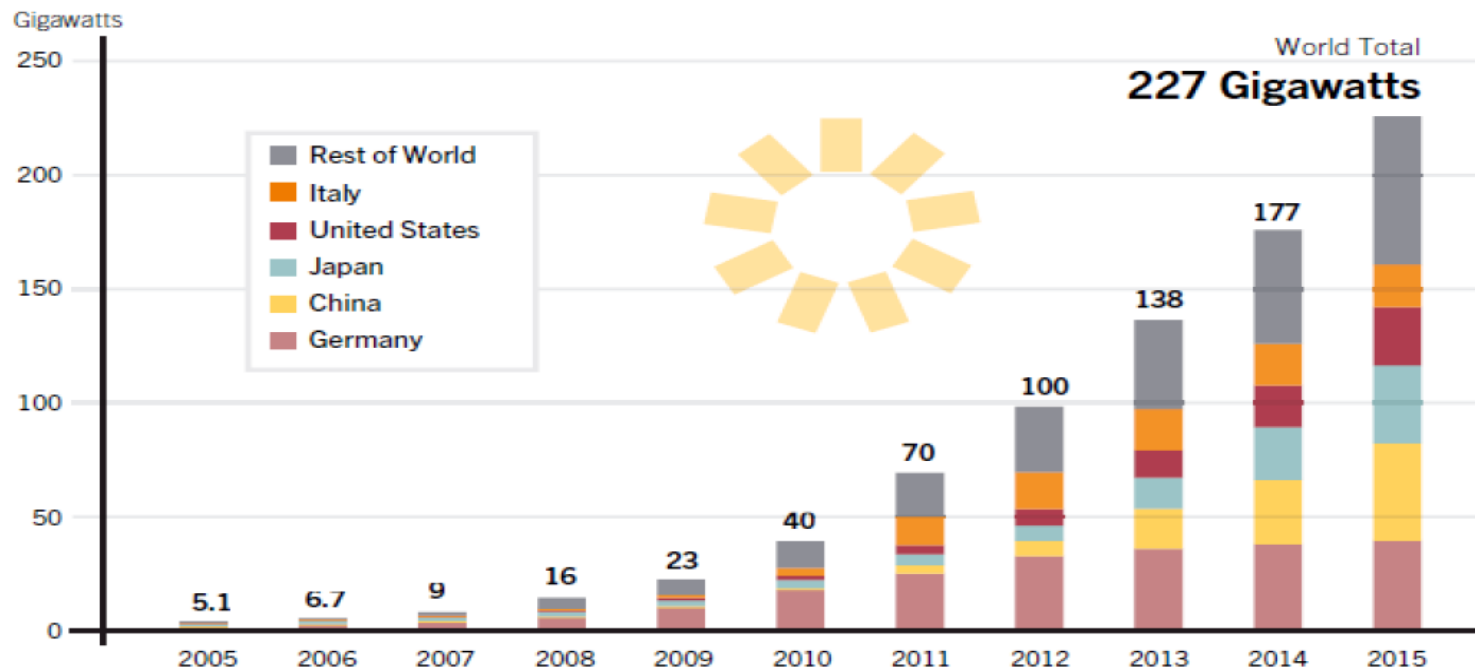
1		China	43,5 GW
2		Germany	39,7 GW
3		Japan	34,4 GW
4		USA	25,6 GW
5		Italy	18,9 GW
6		UK	8,8 GW
7		France	6,6 GW
8		Spain	5,4 GW
9		Australia	5,1 GW
10		India	5 GW

©Snapshot of Global PV Markets – IEA PVPS 

Fuente: [Snapshot of Global Photovoltaic Market \(2015\) – IEA PVPS](#)

## 1.2. Spanish market situation

By the end of 2015, the total installed capacity worldwide was 227 GW: 43.5 GW in China, 39.7 GW in Germany, 34.4 GW in Japan, 25.6 GW in USA, 18.9 GW in Italy and 5.4 GW in Spain.



Fuente: [Renewables 2016 - Global Status Report, REN21](#)

\*La potencia fotovoltaica instalada en España reportada por REE es la correspondiente en AC (4,4 GW). La tendencia habitual en otros países es reportar esta potencia en DC, por ello se indica el valor correspondiente para la potencia fotovoltaica instalada en España en DC (5,4 GW).

# 1.3. Recent arbitral awards concerning Spain's renewable energy policy

## FIRST INVESTOR-STATE ARBITRATION AWARD

### CHARANNE B.V. (*Claimant*) vs KoS (*Respondent*)

- The claimants were shareholders of Grupo T-Solar. T-Solar generates and sells electricity produced by photovoltaic solar plants. At the time the dispute was notified, T-Solar indirectly owned 34 solar photovoltaic facilities.
- Analysis of the scope of the 2010 regulatory scheme:
  - limitation of the tariff to 30 years
  - limit on operating hours of photovoltaic facilities
  - additional technical requirements
  - charge of €0.50/MW

# 1.3. Recent arbitral awards concerning Spain's renewable energy policy

- Tribunal analysed when a measure can be considered as equivalent to an expropriation.
- Regulatory changes had to be expected over time.
- States' right to modify their legislation vs investors' fair and equitable treatment guarantee.
- Article 10(1) of the ECT: *Fair and equitable treatment*

Article 10(1) of the ECT provides that “[e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.”

- Decision of the Tribunal: The 2010 provisions do not infringe the ECT.

## 1.3. Recent arbitral awards concerning Spain's renewable energy policy

- The tribunal found that regulatory measures modifying the feed-in tariff regime for the photovoltaic sector in Spain did not amount to an indirect expropriation and did not violate the investors' legitimate expectations.
- A partial dissenting opinion on the point of “legitimate expectations” was issued by one of the arbitrators in the case.

# 1.3. Recent arbitral awards concerning Spain's renewable energy policy

## Award:

### **EISER** (*Claimants*) vs **KoS** (*Respondent*)

EISER had invested in concentrated solar power plants since 2007. Its facilities became operational in 2012. Since the historical financing and operational costs of Eiser's investments deviated from the "hypothetical efficient plant" standard that was employed by the Spanish authorities, its revenue fell by 66% compared to what it earned under the previous regime.

- Analysis of the scope of the 2013 and 2014 provisions:
  - tariff regime set forth in RD 661/2007 is abandoned.
  - new regime pays no regard to actual costs (including loan servicing) or actual efficiencies of specific existing plants.

## 1.3. Recent arbitral awards concerning Spain's renewable energy policy

- Tribunal analysed when a measure can be considered as equivalent to an expropriation.
- States' right to modify their legislation (to deal with a legitimate public policy problem such as the tariff deficit) vs “unreasonable” changes.
- A regulatory change is proportionate as long as: (i) it is not capricious or unnecessary; and (ii) it does not eliminate, in an unforeseeable and sudden way, the main elements of the existing regulatory framework.
- Investors' fair and equitable treatment guarantee.



# 1.3. Recent arbitral awards concerning Spain's renewable energy policy

- Charanne tribunal: its decision did not address RDL 9/2013, RD 413/2014 or Ministerial Order IET/1045/2014.

Tribunal:

- Total and unreasonable change of the regulatory regime.
  - KoS breach of Article 10(1) of the ECT.
- Full reparation of the loss. The arbitral tribunal determined that damages should be awarded based on the reduction in the fair market value of the investment, determined by calculating the current value of the past and present cash flows that had allegedly been lost.
  - Current status: KoS has requested the award to be declared null.

# 2

## Case study: sale of photovoltaic plants on rooftops

### **2.1. Background to the transaction; focus on the risks.**

- Client
- Client's main corporate object
- Location of the photovoltaic installations
- “Material” agreements
- Share capital
- Annual accounts
- Company financing
- Management body

## 2.1. Background to the transaction; focus on the risks

Key points to be considered in the transaction:

- 1) Sale strategy
- 2) Main commercial aspects
- 3) Main regulatory aspects

## 2.2. Sale strategy

Direct sale of the facilities **vs** Sale of the shares:

- Authorizations
- Consent from third parties
- Conditions precedent

## 2.3. Main commercial aspects

- Cap
- Franchise
- R&W
- Definition of damages

## 2.4. Main technical aspects

- Buyer considered that the photovoltaic installations were part of a group (*agrupación*).
- Article 14 Royal Decree 413/2014: sets objective criteria for grouping installations and takes into account the sum of installed powers.
- Grouping is detrimental in terms of remuneration.
  - **Reason:** larger projects take advantage of economies of scale (price and production unit costs are lower than in a smaller project).

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