

# **Legal actions for foreign investors in Spanish PV plants**

**Brief description of legal actions available for  
foreign investors against RD 1565/2010 and RDL  
14/2010**

**KPMG's platform with Spanish National PV  
Association - ASIF**

# Brief description of legal actions available for foreign investors against RD 1565/2010 and RDL 14/2010

## Introduction

### Background situation

- Recently, two regulations with retroactive effects have significantly damaged the value and profitability of PV plants in Spain, mostly, those who benefit from the feed-in tariffs (FiTs) under Royal Decree 661/2007.
- Such regulations are Royal Decree 1565/2010 dated 19 November (regulating certain aspects of the special regime for producing electricity) (RD 1565/2010), as well as Royal Decree Law 14/2010 dated 23 December (establishing urgent measures for correcting the electricity sector deficit) (RDL 14/2010). Such RDL 14/2010 was confirmed by the Spanish Congress on January 26<sup>th</sup> (although some amendments could happen as a consequence of the enactment of another law called “Ley de Economía Sostenible” which is foreseen in the short term).
- Main retroactive aspects of such regulations are the following:
  - Limitation of the feed-in tariffs to a period of 25 years (modified afterwards as detailed below).
  - Imposition of additional technical obligations for certain PV plants and implying additional investments
  - Limitation of hours benefiting from FiTs (until 2013 without considering irradiation areas). A compensation is given consisting on the extension of FIT period to 28 years.
- Considering that the above regulatory changes may imply, in general terms, substantial damages to PV plant owners, we briefly detail below main legal actions that could be taken against such new rules, always without prejudice to the need of a case by case analysis.
- The legal actions described herein derive from the conclusions of the legal opinion on the above-mentioned regulations issued by KPMG last 31 December 2010 at the request of Asociación de la Industria Fotovoltaica (ASIF), the Spanish PV National Association.
- **It is very important to point out the difficulty of all the legal actions described in this document to succeed due to complexity of the claims and judicial-arbitration precedents which tend to be substantially favourable to State interests.**

# Brief description of legal actions available for foreign investors against RD 1565/2010 and RDL 14/2010

## Introduction

### KPMG's team and platform for legal actions against RD 1565/2010 and RDL 14/2010

- In order to take the most advantage of the existing economy of scale (at costs and knowledge basis), **ASIF has requested KPMG to form a team** for legal advise to “ASIF PV affected entities” (that is members of ASIF, entities related to them and clients to such members – which include clients of KPMG as member of ASIF).
- The present document aims to give a preliminary description of the different legal actions available, in general, to PV investors, giving a special detail to those actions specifically available for foreign investors.
- This document shall not be understood as a recommendation to litigate and is always subject to a particularised advise for each project and client.

# Brief description of legal actions available for foreign investors against RD 1565/2010 and RDL 14/2010

## Brief description of legal actions for foreign investors

### National legal actions

#### Legal actions with respect to Royal Decree 1565/2010

- As per legal actions **directly claiming against the validity of RD 1565/2010**, KPMG is advising ASIF on the claim filed against such regulation before the Spanish Supreme Court (*Tribunal Supremo*). Should the outcome of such claim be favorable, this would benefit all PV sector. Nevertheless, any administrative act applying such RD 1565/2010 (e.g. reactive energy penalties) shall be claimed on an individual basis.
- Aside from such direct legal action against RD 1565/2010, it could also be possible to file a **claim for damages against the State** (which is in fact compatible with the legality of the decree):
  - A claim for damages could be filed against the Administration to demand compensation for the economic losses incurred due to the enactment of Royal Decree 1565/2010 and the regulatory modifications triggered thereby (for instance, focused on the decrease in value of the plant as well as the economic losses caused by the technical regulations imposed). It is of the essence to attach to any such claim the corresponding expert witness' report.
  - This claim would first be addressed to the Council of Ministers, where if rejected, would be sent to the Supreme Court.
  - The possibility to file this claim depends on each project and the ability to prove substantial damages caused. Therefore, a particularized analysis should be carried out in each case.
  - In general terms, success of this kind of actions for state compensation proves to be complex and require the existence of substantial damages.
- It should be noted that state compensation can also be claimed if RD 1565/2010 is finally declared illegal (with regard to the articles claimed) based on the application of a regulation that is not in conformity with the applicable law.

# Brief description of legal actions available for foreign investors against RD 1565/2010 and RDL 14/2010

## Brief description of legal actions for foreign investors

### National legal actions (cont.)

#### Legal actions with respect to Royal Legislative Decree 14/2010

- In order to claim against RDL 14/2010 it is necessary to wait until its effective application. Thus, legal actions against this regulation would be directed, for instance, **against the liquidation by National Energy Commission** of energy production without premium (since hours limit is surpassed). The procedure would begin with an administrative appeal against such liquidation (each of them) and, if rejected, an appeal would be filed before National Audience (*Audiencia Nacional*). Also, it could be requested to the court that the latter files a consultation to the Constitutional Court.
- Aside from the claim to the liquidation of the FIT, it could also be possible to **claim damages to the State** (which is in fact, again, compatible with the legality of the law) requesting compensation for the economic losses incurred as a consequence of the enactment of RDL 14/2010. This claim would be addressed to the Council of Ministers, where if rejected, would be sent to the Supreme Court. Again, it is essential to attach to any such claims the corresponding expert witness' report. Furthermore, in general terms, success of this kind of actions for state compensation proves to be complex and requires the existence of substantial damages.
- It should be noted that state compensation can also be claimed if RDL 14/2010 is finally declared illegal (with regard to the articles claimed) based on the application of a regulation that is not in conformity with the Constitution.

# Brief description of legal actions available for foreign investors against RD 1565/2010 and RDL 14/2010

## Brief description of legal actions for foreign investors

### International legal actions

- Aside from the national actions described before, **certain foreign investors have special protection of their investments under several International Treaties ratified by Spain**. In particular, foreign investors protection treaties give special protection against certain actions of governments that damage investments.
- Therefore, depending on each situation, such international actions could be an interesting alternative to national legal actions (already described).
- Main international legal actions relate to:
  - 1994 Energy Charter Treaty.
  - Protection of investments under bilateral treaties that exist with certain countries.
- A detailed study of these actions should be carried out on a case by case basis.

# Brief description of legal actions available for foreign investors against RD 1565/2010 and RDL 14/2010

## Brief description of legal actions for foreign investors

### International legal actions (cont.)

#### Energy Charter Treaty (ECT)

- 1994 Energy Charter Treaty aims to establish a legal framework to promote long term cooperation between states in the energy sector. Disputes against contracting states based on ECT are submitted to international arbitration (ICSID – International Center for Settlement of Investment Disputes, among others).
- In particular, main articles of ECT affected by the Spanish regulations could be article 10 and 17. Furthermore, in general terms, claims based on ECT relate to: (i) obligation to provide fair and equitable treatment; (ii) prohibition of unreasonable and discriminatory measures; (iii) constant protection and security; (iv) prohibition of expropriation, etc.
  - We would like to highlight case law under ICSID regarding “legitimate expectations” such as *Duke Energy v. Republic of Ecuador*, *Tecmed v. United Mexican States*, *LG&E Energy v. Argentine Republic*, but particularly last case law published by ICSID on December 2010 which refers to a claim against the Republic of Hungary which gives important precedents to cases similar to RD 1565/2010 and RDL 14/2010). Particularly, such last case expressly gives legal effects to “government representations and assurances” which could be interpreted to be linked to article 44 of RD 661/2007.
- It should be noted that this **international arbitration actions are not, in general terms, compatible with national legal actions** (article 26 ECT) and, thus, investors shall decide on their litigation strategy based on such restriction. In this regard, in general terms, an eventual procedure started by European Commission to investigate possible EU law infraction should not affect this requirement.
- Furthermore, it is of the essence to analyse nationality and investment structure in order to determine the possibility for a foreign investor to claim based on ECT protection. Depending on the investment structure this alternative could not be available.
  - With regard to jurisdiction of ICSID under ECT, it is important to note article 26 (7) that states that an investor (other than natural persons) which has the nationality of a contracting party which, before a dispute arises, is controlled by investors of another contracting party shall be, for the purposes of article 25 (2) b of ICSID Convention, treated as a “national of such other contracting party”.
- States member of such treaty are, among others, European Union member states.
- Furthermore, prior to starting an arbitration procedure against Spain, article 26 ECT establishes the necessity of a 3 months dispute amicable settlement period.

# Brief description of legal actions available for foreign investors against RD 1565/2010 and RDL 14/2010

## Brief description of legal actions for foreign investors

### International legal actions (cont.)

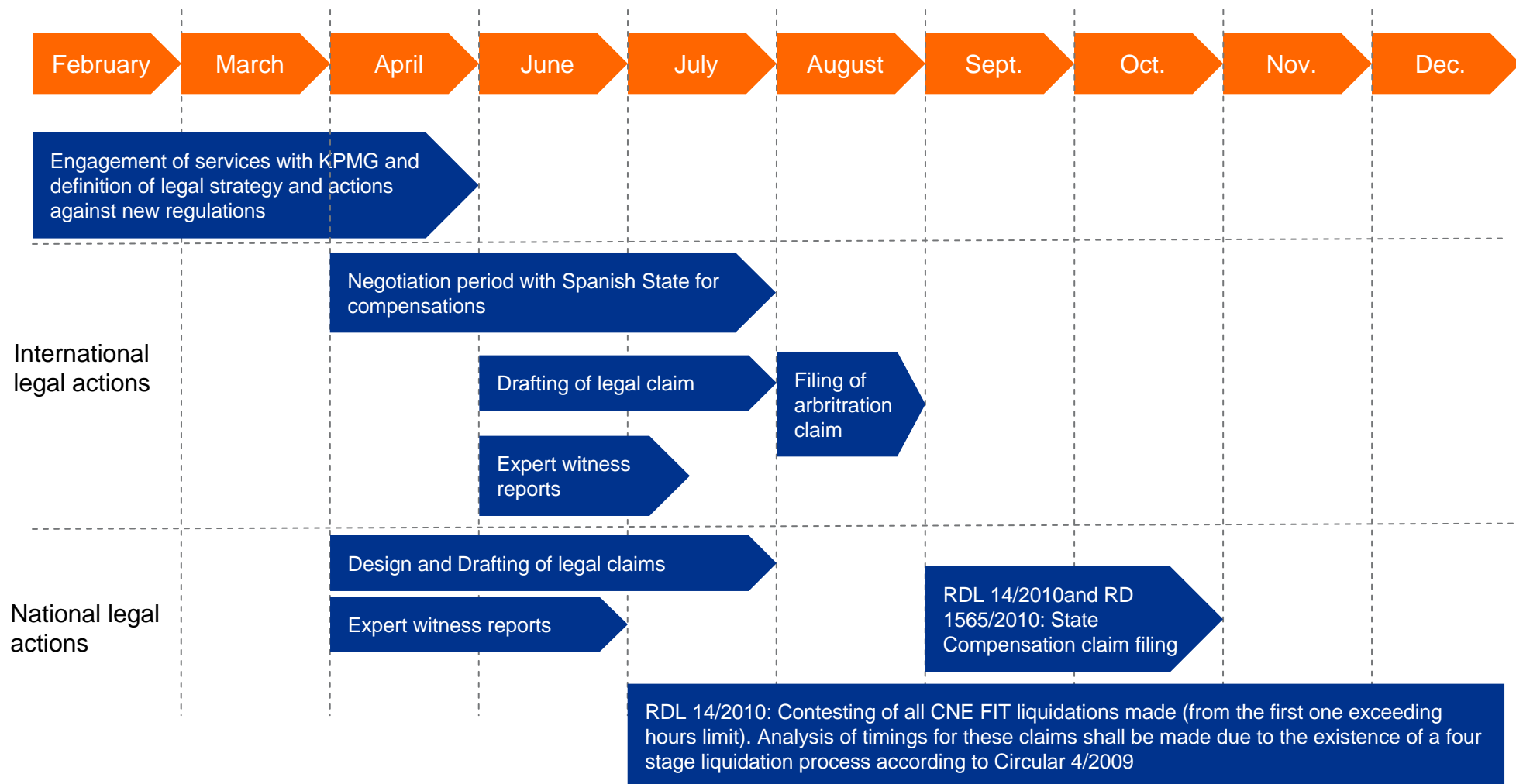
#### Bilateral investments protection (BIP)

- Additionally to foreign investment protection under ECT, in general terms, certain foreign investors could have protection under bilateral investment protection treaties signed by Spain. In fact, Spain has signed more than 50 of these treaties.
- Normally, these treaties refer to ICSID arbitration rules and again they are not compatible with national legal actions.
- Depending on the investment structure this alternative could not be available (mostly depending on shareholding and its nationality).
- This kind of BIPs have been signed with countries such as China, certain South-american countries, etc.



# Brief description of legal actions available for foreign investors against RD 1565/2010 and RDL 14/2010

## Tentative timings



# Brief description of legal actions available for foreign investors against RD 1565/2010 and RDL 14/2010

## Fees and services

### KPMG fees and services

- Should you be interested in further details on our advise regarding the above-described actions, please contact us.
- We have proposed to all ASIF members and related entities special fees for national legal actions due to existing scale economies.
- Our professional fees for the advise on the international legal actions described in this document can only be estimated on individual basis, depending on the country of origin, investment structure, type of PV plant, kind of claim, etc. Therefore, should any investor be interested in this kind of service, we should be contacted for this purpose.
- Finally, it should be noted that ICSID arbitration costs could be substantial, thus, if required we could provide you with an estimate in this regard.

# Contact person

If you require further information and/or  
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