DISPUTE RESOLUTION AND INDUSTRIALS, MANUFACTURING & TRADE SECTOR
ALERT

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Lessons from the Spanish solar energy investment disputes for Namibia's green hydrogen initiatives

Namibia, along with several other African countries, is actively courting investors to invest in green hydrogen projects. With Namibia's very favourable solar conditions there are enormous economic opportunities for it to develop into a major global export hub for green hydrogen and Power to X products (PtX), such as ammonia and methanol, to Europe, Asia, America and even South Africa.

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In courting investors to invest in the green hydrogen economy, it is important that governments give careful consideration when negotiating and concluding investment agreements (in the form of concessions, implementation agreements or otherwise) to the full suite of long term risk with these types of investments. This is particularly important for new industries such as green hydrogen where there is still so much unknown – where governments must have the regulatory space to adapt and vary policies, laws and regulations in the future without major backlash from investors. With the world's eyes firmly on green hydrogen, the time to focus on the development of entire value chains from green hydrogen and PtX products is now. For that, significant capital investments will be required in infrastructure projects in the form of deep-water ports, rail, renewal electricity installations, electrolysers and desalination plants to enable exports and ensure end-user access to green hydrogen or PtX products.

Namibia must be a first mover in developing into a hub for green hydrogen and PtX products and, as such, securing investments into these export infrastructure projects will be imperative to secure offtake markets in Europe, Asia, and potentially South Africa and other Africa countries (as demand in those regions increases over time). However, as with any investment decision into major infrastructure projects where significant capital resources will be deployed into a host state, investors (and their funders) will, as part of the negotiation of the financial and commercial terms and conditions with the state or state-owned entities for such investment, maximise their potential guarantees and legal recourse against the state in the event of a potential future "*default event*" by the host state.

INVESTMENT PROTECTION FOR INVESTMENTS

In addition, investors will ensure their investments are structured in such a manner to maximise investment protection through bilateral investment treaties (BITs) or multilateral investment treaties that are valid and enforceable. Namibia has several valid and enforceable BITs with European countries such as Germany, Switzerland, France, Finland, Austria, Spain and the Netherlands. Coincidentally (or not), most of the potential investors in Namibia's future green hydrogen economy are from these jurisdictions.

Lessons from the Spanish solar energy investment disputes for Namibia's green hydrogen initiatives

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> The current Namibian BITs provides no balancing of rights and obligations between investors and the Namibian Government, and these BITs by themselves should be considered a major risk to Namibia should a future dispute ensue between Namibia and a green hydrogen investor.

It is important to note that these BITs (which are old general treaties) provide investors with a broad range of investment guarantees in the form of (i) guarantees against the unlawful expropriation or nationalisation of an investment, (ii) guarantees for the investor and/or its investment to be treated fairly and equitable, and (iii) free transfer of capital. The most important guarantee for investors is consent to investor state dispute settlement in the form of investor-state arbitration. The current Namibian BITs provides no balancing of rights and obligations between investors and the Namibian Government, and these BITs by themselves should be considered a major risk to Namibia should a future dispute ensue between Namibia and a green hydrogen investor.

UNDERSTANDING THE FULL EXPOSURE RISK

For countries such as Namibia, when embarking upon major investment drives for investment in green hydrogen projects it is important to be cognisant of the full investment risk exposure, and for them to take lessons from countries that went all-in during the start of the renewable energy revolution and got burnt. The renewable energy cases against countries such as Spain are a good example of lessons learnt for African states such as Namibia. It is imperative to clearly understand and appreciate the future consequence of any commitments, guarantees and/or undertakings that a government makes during the negotiation and conclusion of investment agreements (i.e. implementation agreements and concessions) or in the form of policy and legislative statements to entice investors to make investments. This is not to say that these commitments must not be made by the host state but that states must be cognisant of all permutations, particularly with future social, economic or political events and for these commitments not to unreasonable impede the sovereign right of the state to, amongst others, regulate in the public interest.

THE SPANISH EXPERIENCE

A brief discussion of the Spanish renewable energy experience is important to highlight this point.

In 2009 Spain adopted a policy or programme under its renewable energy programme called "*the sun can be yours*", which provided solar energy investors with a preferential price structure for the electricity fed back into the national grid.

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This programme incited and promoted several investors to invest in Spain's renewable energy sector based on the commitments and promises made by the Spanish Government through policies and regulations on the electricity feed-in tariff.

Pursuant to the investments by several investors in solar energy facilities, Spain experienced a severe economic downturn, and as a consequence had little choice (within its policy and regulatory space as a sovereign state) to scale back on the feed-in tariff provided to the investors, and then to eventually repeal it in its entirety.

As a consequence of the change in policy and regulations to the feed-in tariff, several investors brought legal proceedings against Spain. Some initiated these proceedings in the Spanish domestic courts, while others initiated investment arbitrations under the terms of the Energy Charter Treaty (ECT). The ECT is a multilateral international legal framework for energy co-operation among member states designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and the sovereign right of states over energy sources. As with many investment treaties, the ECT includes provisions for the protection of foreign investments (i.e. guarantees against unlawful expropriation and fair and equitable treatment) enforceable against a host state.

In invoking the provisions of the ECT, the investors alleged that Spain violated its obligations under the terms of the ECT through Spain's amendment of the feed-in tariff regulations and eventual repealing of the regulations. The basis for the claims were, amongst other things, that the regulatory change retroactively affected the legal and economic regimes established by previous regulations that the investors had relied upon in carrying out their investments. The investors sought full compensation for the loss of their past and future feed-in tariffs. There have been conflicting decisions by investment arbitration tribunals hearing these investment disputes. Some of the these are:

- In *Charanne and Construction Investments v Spain*, (published in 2016), relating to an investor that owned photovoltaic installations in Spain, it was contended by the investor during the arbitral proceedings that the evolution of the special regulatory framework created instability and a lack of clarity which violated the investor's legitimate expectations, contrary to Article 10(1) of the ECT. In this matter the tribunal dismissed both claims of the investor, and ruled in favour of Spain.

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- In *Eiser v Spain* the tribunal found in favour of the investors of three concentrated solar plants. Unlike the finding by the tribunal in *Charanne*, the investors' counsel contended that a set of later regulations from 2012 to 2014 had breached their rights under the ECT, significantly devaluing their investments and forcing their Spanish subsidiaries into debt restructuring negotiations.
- In *Isolux v Spain*, a case involving the same counsel and co-arbitrators as *Charanne*, the claimant disputed the 2012–2014 regulations. The investor contended that Spain enticed it to invest in its renewal energy sector based on the promise of maintaining a long-term feed-in tariff for the production of photovoltaic energy under a special regulatory regime, and that deciding to later abolish the feed-in tariff constituted a breach of article 10 of the ECT. Similar to Charanne, the tribunal found in favour of Spain.
- In *Novenergia v Spain* (2018), the arbitral tribunal ordered Spain to pay EUR 53 million to a Luxembourg based fund that invested in photovoltaic solar plants based the promise of maintaining a long-term feed-in tariff for the production of photovoltaic energy under a special regulatory regime during 2012–2014.

PLANNING FOR FUTURE SCENARIOS

For countries such as Namibia it will be important that in developing policies and regulations (incentives, etc) for the green hydrogen sector that it is mindful not to expose the country to unforeseen future risk. Its current old generation BITs is its biggest future risk. The investment of significant capital in major green hydrogen project will require Namibia to provide several financial, commercial and sovereign guarantees, indemnities, commitments and undertakings to investors and their funders. To mitigate against unforeseen risk relating to green hydrogen projects it will be important to do a detailed analysis and assessment of the total future exposure for the people of Namibia. If not the future cost of such projects, as opposed to being a blessing, can become a curse. Like with all things in life, the honeymoon does not last forever, so it's important to plan for the scenario where the investor and state are embroiled in a dispute.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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