ICSID tribunal orders Spain to pay €41m to German solar power plant investor (SolEs Badajoz GmbH v Kingdom of Spain)

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Arbitration analysis: Clifford J Hendel, founding partner of Hendel IDR, discusses the practical implications of the significant International Centre for the Settlement of Investment Disputes (ICSID) award rendered in SolEs Badajoz GmbH v Kingdom of Spain, following allegations by the claimant that amendments to Spain's renewable energy incentive scheme breached the Energy Charter Treaty (ECT).

SolEs Badajoz GmbH v Kingdom of Spain, ICSID Case No ARB/15/38, award delivered on 31 July 2019

What are the practical implications of the award?

The finding of liability for Spain's radical, 'second wave' alteration of its renewable regulatory framework in 2013 is hardly surprising—to the author's best knowledge, some ten or 11 cases in succession have been decided similarly, and not a single case to date has come to a contrary conclusion.

This notwithstanding, Spain has not paid under any of the awards. Instead, it has systematically brought annulment actions in the appropriate fora. To date, none of the annulment actions have been decided, but decisions in a number of the cases (especially in the ICSID case won by the investor in *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À.R.L. v Kingdom of Spain,* ICSID Case No ARB/13/36) are expected soon (see Spain seeks to annul €128m award over energy subsidies (Eiser v Spain))

What is interesting about the *SolEs* case are the evolving approaches taken by the parties, and the tribunals, as to the evolving developments—currently being arbitrated under a variety of institutional rules (mostly ICSID, but also Stockholm Chamber of Commerce (SCC) and the United Nations Commission on International Trade Law (UNCITRAL)), with annulment or enforcement actions being litigated in a variety of jurisdictions (principally, in the US), and with critical issues pending final resolution in the European courts—particularly in the area of intra-EU investor-state dispute settlement (ISDS), and the increasingly contentious and creative approach to quantum.

The tribunal appears to have laid down a novel marker providing support, even in the event that, ultimately, the Court of the Justice concludes that *Slovak Republic v Achmea BV*, Case C-284/16 applies to the ECT, for an ECT-based argument to deny the intra-EU objection to jurisdiction nonetheless.

Regarding the assessment of quantum, increasingly (along with the *Achmea*-related arguments) the principal bone of contention in these cases, the award ascribes importance to the fact that Spain's experts had advocated for a high discount rate on grounds that the original regime should have been considered to have a high risk of being revoked, and the new regime should have actually been considered beneficial to the investor, whereas the tribunal concluded that the new regime was in fact riskier, since under it, Spain could freely adjust the feed-in tariffs (FITs), which constituted the core remuneration of the prior regime.

Interestingly, the award contains two paragraphs expressing the concurring view of Spain's appointed arbitrator on this question, in which he regretted that Spain had not offered—and indicated that he 'would have welcomed'—evidence which might have allowed the tribunal to accept the investor's general approach to liability and quantum without necessarily accepting that the initial regime would have remained in place 'as is' for the full expected term, thus allowing for application of a higher discount rate than defended by the investor.

The tribunal's award suggests that future cases in this long-running saga, now five years on and with no end in sight, can be expected to continue to focus on enforcement issues in light of evolving jurisprudence involving *Achmea*, and on quantification of damages, including perhaps on the basis of the suggestion made in the cited paragraphs of the *SolEs* award.

The Spanish renewables saga continues to be a kind of Rubik's Cube of evolving legal and commercial strategies, playing out on a global stage like a form of three-dimensional chess.

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What was the background to the dispute?

The dispute is one of many (nearly four dozen, of which only about a dozen have reached award) brought by international investors against Spain for alleged violations of their legitimate expectations when Spain first revised, and later radically altered, its framework for subsidising renewable energies.

In response to EU requirements to significantly boost the proportion of energy produced from renewable sources, Spain established a particularly generous system of FITs for photovoltaic (PV) and other sources of renewable energy in the early 2000s. The 'perfect storm' created, on the one hand, by the unexpectedly high take-up by investors and, on the other, by the financial crisis that began in 2008, obliged Spain—among other EU Member States—to take measures to reduce the exploding 'tariff deficit'.

A first set of measures, implemented in 2010 and including a 7% tax on energy producers, was modest in scope. Precisely for this reason, they did not achieve the desired financial consequences. A second set of measures, implemented in 2013 and 2014, changed the regulatory regime in a much more radical way.

In this case, the investment vehicle of a German fund which acquired two existing Spanish PV plants in 2010 brought an ICSID arbitration claim in 2015 against Spain under the ECT, challenging both sets of measures.

What issues were before the tribunal?

In summary form, the issues before the tribunal involved:

- whether EU law barred the tribunal from having jurisdiction
- whether the ECT precludes intra-EU (here, Germany-Spain) arbitration
- whether specific commitments on the part of the state are required to create legitimate expectations if not:
    - whether the first and/or second set of disputed measures were sufficiently disproportionate to defeat legitimate expectations, and, if so, what damages ensue in such event

What did the tribunal decide (on jurisdiction, liability, quantum and cost)?

The tribunal decided that:

- the ECT did not preclude intra-EU arbitration
- legitimate expectations could arise from provisions of law or regulations or statements made for the purpose of inducing investment from a particular class of investors (rather than requiring specific commitments to a specific investor)
- the first set of measures did not violate the claimant's legitimate expectations since they were modest and proportionate and did not eliminate the essential features of the regulatory regime (and the 7% tax was covered by the ECT's tax carve-out in the absence of demonstrated lack of good faith)
- the second set of measures, eliminating the FIT-based remuneration scheme and substituting it (including for existing plants) with a regime guaranteeing a 'reasonable' rate of return, violated the claimant's legitimate expectations
- damages of nearly €41m, essentially what the investor was seeking in respect of the second set of measures, were required to compensate for the violation, and
- Spain should bear the entire costs of the proceeding while each party should bear its own legal costs incurred

What did the tribunal decide on the intra-EU dispute objection to jurisdiction?

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The tribunal shared the sentiment of tribunals facing the issue to date, that there is no implicit exception in the ECT for intra-EU disputes.

The tribunal rejected (as other tribunals have) Spain's argument that it lacked jurisdiction on the grounds of the March 2018 decision of the Court of Justice in the *Achmea* case, which held (departing here from the opinion of the Advocate General) that intra-EU investor-state arbitration on the basis of a bilateral investment treaty (BIT) violated EU law since arbitral tribunals are not courts of EU Member States and thus are not entitled to submit preliminary questions of EU law to the Court of Justice and are thus not subject to its control.

Interestingly, the tribunal acknowledged that under Article 26 of the ECT, a tribunal cannot be excluded from considering EU treaties in its decision and that the reasoning of the Court of Justice in *Achmea* could indeed apply to the ECT (rather than only to BITs). This is a matter which the Court of Justice has yet to clarify—the EU Commission and the vast majority of EU Member States being, however, fully onboard with the proposition that *Achmea* should apply to ECT cases as well as BIT cases. However, under Article 16 of the ECT, the tribunal is obliged in the case of conflict between the ECT and EU law to provide the more favourable regime for investors (ie, the ISDS system contemplated by the ECT).

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