Case Summary[1]

Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain
ICSID Case No. ARB/13/36

I. Procedure

The case is based on the Energy Charter Treaty (ECT) and was initiated by the two claimants Eiser Infrastructure Limited, a limited liability company incorporated under the laws of the United Kingdom, and Solar Energy Luxembourg S.à.r.I., a limited liability company (société à responsabilité limitée), both incorporated under the laws of Luxembourg.
The case was registered on 23 December 2013 with the Secretary General of the International Centre for Settlement of Investment Disputes (ICSID) requesting for the institution of arbitration proceedings.
On 4 May 2017, the Tribunal awarded the Claimants compensation amounting to EUR 128 million.

II. Factual background

The dispute concerned regulatory changes by Spain in the national renewable energy scheme.
In 2001, the European Community adopted Directive 2001/77/CE[2] on the promotion of electricity produced from renewable energy sources. The Directive required the Members States to set national targets for future consumption of renewable energy. Based on Law 54/1997 and a series of secondary legislation (Royal Decrees), Spain installed a regulatory regime for the promotion of renewable energy sources (RES). It established a system of premiums and feed-in tariffs in order to provide a reasonable rate of return for investments in RES. The remuneration was based on the quantity of electricity generated. The regime also granted RES generators priority dispatch over conventional generation. This support scheme led to investments exceeding governmental expectations resulting in a tariff deficit due to increased regulated costs, including costs of support for RES.[3]
Under these circumstances, the claimants acquired shares in concentrated solar power (CPS) plants from 2007 on.
In order to stabilize costs and revenues in the electricity sector, Spain conducted a comprehensive electricity market reform in 2013, which replaced the regulatory regime of Law 54/1997.[4] The new system was introduced by Law 24/2013. The reform replaced the existing feed-in tariff system with a remuneration guaranteeing a yearly rate of return, which is calculated with respect to a standardised or hypothetical efficient and well-managed facility. Remuneration is based on installed capacity, in contrast to electricity generated as under the 1997 regime. Moreover, the new system limited the support schemes for RES to existing plants. It also introduced a new tax on

[1] Source: www.unctad.org.
[2] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283
[3] European Commission, Electricity Tariff Deficit: Temporary or Permanent Problem in the EU?, Economic Papers 534, October 2014, p. 27 et seq.
[4] International Energy Agency, Energy Policies of IEA Countries, Spain, 2015 Review, p. 128 et seq.

electricity generation.
Due to historical capital costs and operational costs, the CSP in the present case did not meet the hypothetical efficiency standards. Consequently, the 2013 regime generated lower revenues as compared to projected revenues under the 1997 regime.
The claimants submitted that the Spanish measures of the electricity sector reform of 2013 violated the obligations under the ECT.

III. Award

The Tribunal held that the reform of 2013 adopted a new remuneration system that deprived the claimants of their investments. In doing so, Spain violated the standard of fair and equitable treatment (FET). Article 10(1) first sentence ECT reads: “Each 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.”

1. Procedural Issues

The Tribunal rejected the argument put forward by Spain that the Tribunal lacked jurisdiction ratione personae as the present case constituted an intra-EU dispute involving investors originating from EU Member States.
The Tribunal also confirmed that the purchase of shares corresponds to an investment under the ICSID convention.
Further, in the Tribunal’s assessment, the claimants’ status as minority shareholders did not preclude them from submitting a claim under the ICSID convention.

2. Merits

The Tribunal held that Spain introduced a new system of regulating RES, which violated the FET standard under Article 10(1) ECT.
The Tribunal first acknowledged that the FET standard does not guarantee a right to regulatory stability per se. It reaffirmed that the state had a right to regulate and investors had to expect legislative change. According to the Tribunal, the existing tariff deficit in the Spanish electricity sector constituted a legitimate public policy issue, which may justify new legislation as appropriate measures initiated by the Spanish authorities.
However, the Tribunal stressed that investors entertain legitimate expectations with respect to Article 10(1) TCE. In the present case, the FET standard as stipulated in Article 10(1) TCE conveys the claimants’ expectation that Spain would not change its regulatory regime drastically and abruptly and hereby depriving the claimants of the value and benefit of their investment.
The Tribunal considers the 2013 reform such a substantial change. By introducing the 2013 regime, Spain violated Article 10(1) TCE by breaching the claimants’ legitimate expectations based on the 1997 regime. In particular, the Tribunal criticized the introduction of hypothetical rather than actual factors and the absolute levels of return.