Recent Developments in Solar Investment Arbitration Disputes: Czech Republic and Italy Enjoy Their First Victories, While Spain Seeks to Annul First Defeat

Over the past four years, three European States have been hit with a wave of investment claims from solar power investors alleging violations of the Energy Charter Treaty (“ECT”) and Bilateral Investment Treaties (“BIT”).

The Czech Republic and Italy have now prevailed in their first solar cases in which an award has been issued. Spain, after initially succeeding in two cases, has been found liable for breaches of the fair and equitable treatment standard but it is seeking to annul the adverse award.

***

The Czech Republic recently won the first of seven investment treaty cases brought by investors over reforms to the country’s solar power sector introduced in 2011 (the “Wirtgen and JSW Solar” case). In an award by a 2 to 1 majority, dated October 11, 2017, an ICSID tribunal held that a tax on the electricity output of solar power plants did not violate legitimate expectations of investors and was reasonable, proportionate and non-arbitrary under the Czech Republic-Germany BIT. The remaining six UNCITRAL cases pending against the Czech Republic are based on the same controversial State measures. Although the Wirtgen and JSW Solar case does not constitute a binding precedent, this award may well prove influential, as the remaining tribunals deliberate on their decisions.

In 2016, Spain managed to prevail in two solar cases under the ECT (the first brought by Charanne B.V. and Construction Investments S.à.r.l., and the second brought by Isolux Netherlands B.V.), of almost 30 claims now pending against it. In the second case the SCC tribunal found that at the time investment was made (2012), the investor could not have had “legitimate expectations” that the regulatory framework would remain unchanged.

After obtaining these two positive results, however, Spain was recently found liable in its third solar case. In an award dated May 4, 2017, an ICSID tribunal unanimously determined that Spain had “crossed the line” and violated its obligations under the ECT to accord foreign investors fair and equitable treatment by upending a series of financial incentives...
in the renewable energy sector that had been offered under Spain’s 2007 legislation. The Tribunal found that, starting from 2008, Spain began gradually dismantling this favourable regime and eventually deprived the investor-claimants (Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l.) of their €126 million investment in the construction of three thermo-solar plants in Spain.

In May 2017, the claimants sought enforcement of the award in the United States District Court for the Southern District of New York, and quickly obtained an order granting enforcement. However, Spain filed a motion to vacate the Order, alleging, inter alia, that it was an “impermissible attempt” to circumvent the U.S. Foreign Sovereign Immunities Act of 1976. On November 13, 2017, the Southern District granted the motion and vacated the Order. Moreover, Spain has also challenged the award itself, seeking annulment on the grounds of alleged due process failings. The ICSID ad-hoc committee on annulment was constituted on October 23, 2017.

Finally, Italy won the first of nine proceedings (the “Blusun S.A.” case) started by several foreign energy companies under the ECT. These claims were brought following reforms to the Italian power sector that reduced feed-in tariffs available to solar investors. [Despite Italy’s withdrawal from the ECT of January 1, 2016, the “sunset clause” provides investors with a twenty year window to bring claims relating to investments made before January 2016.] Blusun S.A. filed for annulment of the unfavourable ICSID award in May 2017. It differs from the other eight claimants in that it founded its claim on an earlier, non-retroactive version of the controversial reforms passed in 2013. The other claims against Italy were brought in quick succession following a similar 2014 reform, which did have retroactive effect.

***

Although these first awards tend to suggest that investors face an upward battle in successfully bringing claims against host States, it is too soon to identify any significant trend. Indeed, there is a large number of pending cases to be decided in the near future, which will shed further light on this issue and, in particular, on the nature of State measures that are perceived to be unlawful under investment treaties.