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A First Look at Eskosol S.p.A. in liquidazione v. Italian Republic: Has Either Party Gained the Upper Hand?

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The ICSID Tribunal in the case *Eskosol S.p.A. in Liquidazione v. Italian Republic (ICSID Case No.ARB/15/50)* has recently issued a Decision on Respondent's Application under Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules). In 2015, Eskosol filed a Request for Arbitration based on Italy's claimed violation of the Energy Charter Treaty (ECT). Italy petitioned the Tribunal to dismiss the entirety of Eskosol's claims based on their manifest lack of legal merit pursuant to Arbitration Rule 41(5).

The Decision of the Tribunal addressed only such preliminary matters as Italy's objections. However, a closer look at it might already show what lies ahead, in the merits stage, and that Italy might have gained, to some extent, an upper hand in the proceedings.

Background

Eskosol (or the company) was established in Italy in 2009 by a Belgian company, Blusun, and four Italian nationals. Following some changes in the company structure and legal nature, Blusun remained the owner of 80% of Eskosol's shares. The company had been constituted in Italy to carry out the planning, development and building of solar photovoltaic power plants and to connect them to the national grid. In Italy, at the time of the launch of Eskosol's project, a system of feed-in tariffs (guaranteed fixed payment) for a duration of 20 years for qualifying photovoltaic power plants projects was in place. Eskosol claims that the Italian Government subsequently adopted two measures (the "*Romani Decree*" and the "*Conto Energia IV*") that have reduced the feed-in tariffs to a point where, Eskosol alleges, the project became economically unviable. Eskosol claimed that it was unable to pay its debt and, as a consequence, it was placed under bankruptcy receivership. Pursuant to Italian law, the Italian bankruptcy receiver is the one who has the power to institute proceedings on behalf of Eskosol.

However, the decision in hand tells in itself only part of the story. Indeed, in 2014, Blusun and its two owners had already started an arbitral proceedings (ICSID case No.ARB/14/3) against Italy for the alleged prejudice suffered by the investment it had made through Eskosol. In that case, Blusun had challenged a number of measures at issue in the Eskosol case, including the *Romani Decree* and the *Conto Energia IV*. The *Blusun* case Award, Tribunal's orders, parties' pleadings and related documents have been covered until now by a confidentiality agreement, with the exception of some excerpts produced by Italy in the *Eskosol* arbitration. Based precisely on those excerpts, it appears that the Tribunal in the *Blusun* case denied the foreign investor's claims on the merits.

Indeed, the Blusun Tribunal found that the measures at issue did not violate the ECT and were not the cause of the failure of the Eskosol project in Italy. Blusun and its two shareholders have recently filed an Application for Annulment of the Award.

The Arbitration Rule 41(5) Standard and the Assessment of the Respondent's Objections

After Eskosol's Request for Arbitration, pursuant to Arbitration Rule 41(5), Italy filed an application to dismiss the entirety of Eskosol's claims based on their manifest lack of legal merit. At first glance, the Tribunal tried to strike a balance between the parties' opposed positions. It stressed that a Rule 41(5) procedure does not have the purpose to address difficult issues of law. Nonetheless, it accepted Italy's position that briefing legal objections at some length was appropriate for any assessment under the Rule 41(5) standard. As such, the Tribunal applied the standard proposed by Italy and its analysis addressed almost all the difficult and unsettled issues of law raised by the Respondent.

Italy presented four different objections under Rule 41(5). Namely, on whether Eskosol could qualify as a national of another Contracting State under Article 25(2) (b) of the ICSID Convention, whether Eskosol was an instrumentality of Blusun and its two owners, on the identity of parties (i.e. that Blusun and Eskosol were the same parties), and on the identity of object and cause of action between the *Blusun* and *Eskosol* cases. Although the Tribunal rejected Italy's objections, in the Decision, the Tribunal might have somehow tipped the scale in favor of Italy.

Concluding Remarks: A Look to the Merits

The *Eskosol* Decision provides a number of clues that may bear decisively on the merits stage. While remaining neutral, the Tribunal has indicated a number of arguments that Italy could have raised in the proceedings such as the doctrines of abuse of rights or that no party should be permitted to benefit from its own wrong.

Most importantly, the Tribunal refers repeatedly to the obvious relevance that the *Blusun* Award has for the *Eskosol* case. Indeed, the Tribunal points out that Italy is free to argue, later in the case, that the conclusions reached by the *Blusun* Tribunal are persuasive and should be followed in the *Eskosol* case. To this end, and should Italy decide to take this course, the Eskosol Tribunal ordered the production of the *Blusun* Award in full. On this point, two considerations are called for. First, as noted, since the *Blusun* case concerned various measures, including (but not limited to) those complained of in the *Eskosol* case, the findings of the *Blusun* Tribunal are certainly relevant to orient the *Eskosol* Tribunal. Second, Italy succeeded in raising the important question of legal consistency and certainty in international investment arbitration. And the Tribunal seems to have fully taken up the problem. Clearly, the specter of two arbitral tribunals issuing contradicting decisions as in the Lauder arbitrations saga looms on the horizon. In the next phase of this arbitration, the *Eskosol* Tribunal will be confronted with issues of systemic importance on the consistency of international investment arbitration.

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This entry was posted on Tuesday, June 13th, 2017 at 12:28 pm and is filed under Energy, Energy Charter Treaty, ICSID, ICSID Arbitration, ICSID Convention, Investment, Investment Arbitration, Investment protection, Investor
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