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Squaring the Circle: Reconciling the Conflicting Awards in the Eiser and Isolux Spanish Renewable Cases (Part I)

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In furtherance of European and national policy directives, Spain enacted in the early years of this century a series of decrees to regulate the production of electricity from renewable sources and provide incentives to producers. In particular, by Royal Decree 661/2007, a generous, production-based remuneration subsidy in the form of a feed-in-tariff (FIT) was put in place in order to assure attractive profitability for producers of energy derived from renewable sources.

However, the triple-whammy of great success of the program, Spain's burgeoning "tariff deficit" and the impact of the global financial crisis triggered a series of measures starting in 2010 to 2014, which rolled-back key features of the existing regulation. These culminated in a series of 2012-2014 reforms eliminating the FIT-based "special regime" system and substituting it (including for plants constructed and financed under the prior regulatory regime) for a system that provided a pre-established "reasonable" rate of return based on the assets and costs of a hypothetical efficient plant.

The result: a deluge of arbitration claims filed by foreign investors against Spain. Analogous, although not identical, measures have been implemented in a number of other European jurisdictions, triggering investment arbitration claims against them as well. While the non-Spanish cases are beyond the scope of this post, it is noteworthy to observe the "cross fertilization" evidenced, for example, by the December 27, 2016 ICSID award in the case *Blusun S.A. v Italy*, in which a tribunal (which included one of *Eiser's* co-arbitrators) rejected, citing *Charanne*, the investor's claim of FET violation based on legitimate expectations.

Some three dozen claims against Spain have been filed to date under the Energy Charter Treaty (ECT) arising from the rollback of the renewables regulations. Final awards have been issued in only three cases: *Charanne* (Stockholm Chamber of Commerce, January 2016); *Isolux* (Stockholm Chamber of Commerce, July 2016); and *Eiser* (ICSID, May 2017). Previous blog posts have discussed the *Charanne* and *Eiser* decisions.

In the three cases, and surely in those remaining to be decided, the key issue on the merits involves the application of the concept of "fair and equitable treatment" (FET), and its constituent element: "legitimate expectations." Both *Charanne* and *Isolux* (each by majority decision) rejected the investors' claims, the former arising from reforms implemented in 2010 and the latter from the more significant changes implemented between 2012 and 2014. *Eiser*, on the other hand, found forcefully (and unanimously) for the investors, who challenged the 2012-2014 reforms.

This article does not discuss the numerous jurisdictional objections addressed in the decisions, other than noting that they appear to put an end to the "intra-EU" objection that Spain had raised. Indeed, the tribunals confirmed Spain's argument that the 2012 law which imposed a 7% tax on the value of electric energy production was not enacted in bad faith or in a discriminatory matter, and thus was not subject to review by an ECT panel.

The bulk of the still-pending cases involve challenges to the 2012-2014 regulatory changes. The different outcomes of *Isolux* and *Eiser* have, understandably, created a certain amount of perplexity and consternation. They have triggered observations that the outcomes are ultimately irreconcilable and only explainable (if at all) by subjective and ultimately uncontrollable issues (such as the identity of the participants, strategy or mere fortuity), thereby precluding any real ability to predict outcomes of future cases and adjust one's conduct and expectations accordingly.

The intensity of the reaction in Spain is best exemplified by a curious and defensive press release published by the Spanish Ministry downplaying the finding and relevance of *Eiser* and by the heated and partisan debate taking place in the press on the topic.

In this regard, shortly after the *Eiser* award was issued, and noting its series of particularly strong critiques of Spain's position and arguments, a number of articles appeared in the local press ascribing the negative result in the case to various errors attributed to Spain. See for example: an article by M. Jiménez entitled "*Así perdió España el arbitraje de las renovables*", appearing in El País on May 18, 2017 (mentioning the "*weak arguments*" presented by Spain, the lack of credibility of its experts, a last-minute and entirely unconvincing jurisdictional challenge and the failure of the Government to respond to cooling-off letters sent by the investors, and concluding that Spain's defense strategy "*led it to a dead-end*"); a blog entry by J. Fernández-Villaverde entitled "*¿Tenemos los abogados del estado que necesitamos?*" published on May 18, 2017 in the Spanish legal blog ¿Hay Derecho? (criticizing the Ministry's decision to proceed without external counsel, and stating that Spain's counsel was "*outlawyered*" and this could be attributed to Spain's assertedly "*deficient system of selection of our body of elite functionaries*"); and a blog entry published in the same outlet on May 28, 2017 by S. Alvarez Royo-Villanova entitled "*La regulación de las energías renovables: incompetencia y prepotencia (a nuestra costa*)".

In the author's view, these matters – while surely contributing to the forcefulness of the *Eiser* award and the multitude of sharp criticisms it contained – were very unlikely to have determined the result itself. For a more fulsome and balanced view of *Eiser* in the context of *Charanne*, see I.Iruretagoiena Agirrezabalaga, "*A propósito del primer laudo condenatorio para España en el marco de las disputas relativas a los 'recortes' en el ámbito de las energías renovables*", Diario La Ley, No. 9.013, Sección Tribuna, July 4, 2017.

Indisputably, each investor and each investment is different, and every case will be presented and defended differently, by different counsel, with different experts, for decision by different panels of arbitrators, presided by different chairs, under the auspices of one or another arbitral institution. Each of these essentially subjective factors will weigh, to some extent, on the ultimate decisions reached.

But a close review of the voluminous awards in *Eiser* (some 175 pages in all) and *Isolux* (some 225 pages in all) suggests that they may not be as irreconcilable as the press headlines would suggest; rather, they can be understood to apply a similar (or, at least, substantially similar) conceptual framework to very different investors and investments…..or at least, to investors and investments that were viewed quite differently by the respective tribunals.

Thus, what today might appear, on first impression, as fundamentally irreconcilable may –with the passage of time and the accumulation of further awards– be revealed as quite the opposite.

Common Ground….and Slippery Ground?

As a preliminary matter, it is useful to note two points of common ground among all three cases decided to date. Firstly, FET (under the ECT or other treaty) does not give an investor the right to regulatory stability. As indicated in *Eiser* (paragraph 362), citing *Micula v Romania*:

"*[T]he fair and equitable treatment standard does not give a right to regulatory stability per se. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability. The question presented here is to what extent treaty protections, and in particular, the obligation to accord investors fair and equitable treatment under the ECT, may be engaged and give rise to a right to compensation as a result of the exercise of a State's acknowledged right to regulate.*"

Secondly, the seal of approval as a matter of national law of the Spanish Supreme Court on the series of regulatory changes (including the repeal of RD 661/2007 and establishment of the new framework for existing renewable plants) is not dispositive of claims brought under the ECT or other investments protection treaties.

As held in *Isolux* (paragraph 793, translation by the author),"*[T]he rulings of the Spanish Supreme Court do not bind this Arbitral Tribunal, which must decide the matter exclusively on the basis of the ECT and international law*." Along the same lines, *Eiser* states (paragraph 373) that "*the question of conformity with Spain's Constitution and with the requirements of the ECT are quite separate*" and thus the Supreme Court's upholding of the validity of the changes "*is not a sufficient response to Claimants' claims, which also must be tested against the obligations Respondent assumed by becoming a party to the ECT*."

As will be seen in Part II of this article, the common, indisputable, black-and-white issue among the tribunals is the understanding that national law and jurisprudence cannot trump international law or bind panels interpreting or applying it. A separate issue is whether, how and to what extent national law and jurisprudence might play a role (albeit indirect) in the FET/legitimate expectations analysis of international tribunals.

Having briefly set out the backdrop to this saga, the objective of this two-part post and some common (and perhaps not so common) grounds about the various Spanish awards to date, Part II will enter into a little more detail about the cases, the holdings and lessons which can be learned from them.

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