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Eiser Infrastructure v. Spain: Could the tide be turning in favor of photovoltaic foreign investors in Spain?

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A previous post analyzed the application of the fair and equitable treatment ("FET") and legitimate expectations in the recent award in *Eiser Infrastructure Ltd. v. Spain* (ICSID Case No. ARB/13/36), the first ICSID case to reach a final award related to the measures Spain applied to roll-back certain incentives and benefits offered to promote investment in the Concentrated Solar Power ("CSP") sector. Following up on said post, this one provides some comments on what changed since the award in *Charanne B.V. and Construction Investments S.A.R.L v. Kingdom of Spain*, which was the first [reported] award relating to Spain's measures described above. The *Eiser* award is certainly significant and it has great potential to impact future awards in the at least 29 Energy Charter Treaty ("ECT") arbitrations left against Spain for the same measures in the CSP sector.

So, what changed since *Charanne*?

Many are probably wondering what changed since the claims filed by *Charanne* and *Isolux* seeking compensation for the measures that modified Spain's CSP regime. In fact, the tribunal in *Eiser* did refer to the facts in *Charanne* to explain their way to the award (¶367 *et seq*.).

In particular, the *Charanne* case was based on two pieces of legislation passed by the Spanish government to attract foreign investment in the CSP sector: Royal Decrees ("RD") 661/2007 and 1578/2008; and two pieces of legislation that affected the feed-in tariff regime and other aspects of the CSP framework: RD 1565/2010 and Royal Decree-Law ("RDL") 14/2010. These regulations eliminated the feed-in tariffs for solar power plants starting from their 26th year of functioning, limited the working hours of said plants, and imposed fees for the use of transportation and distribution networks (¶367). However, the tribunal indicated that the measures at stake in *Charanne* "had far less dramatic effects than those at issue here" (¶368).

In *Charanne*, the majority found that the essential characteristics and guarantees provided by the RDs 661/2007 and 1578/2008 were not eliminated by the 2010 measures (¶518). Charanne's argument was that the reduction of the benefits to only until the 26th year of operation of the plant would deprive them of all the benefits they had, because the lifetime of CSP plants were between 35 and 50 years (¶523), however, the majority found that Charanne did not submit sufficient evidence to support such allegation (¶522). Moreover, it noted that given the technology available at the time of the construction of the plants, their operation lifetime could not exceed 30 years; and despite this objective benchmark, the majority also noted that even Charanne provided in their lease contracts, terms of 25 years, with some contracts establishing 30 years, and only two contracts providing for more than 30 years (¶527).

Based on this reasoning, the tribunal found that the RDs 661/2007 and 1578/2008, as well as other documents (like promotion documents), could not constitute an essential element of their expectations, as investors, that they would be able to operate the CSP plants for periods of 35 to 50 years (¶529). Therefore, the majority concluded that the 2010 measures—although they implemented adjustments and adaptations—did not eliminate the main characteristics of the regulatory framework, because the investors retained their right to feed-in tariffs and their priority right to sell the totality of their production in the system; and so, as a matter of international law, Charanne's legitimate expectations were not breached (¶533).

Going back to *Eiser*, this case was built on regulations affecting RDs 661/2007 and 1578/2008 that differ a great deal from RD 1565/2010 and RDL 14/2010 (the ones at stake in *Charanne*), to know: RDL 9/2013, RD 413/2014, and Ministerial Order IET/1045/2014. The tribunal in *Eiser* indicated that *Charanne* "addressed much less sweeping changes to the photovoltaic regulatory regime, changes that produced far less drastic economic consequences for the *Charanne* claimants" (¶369). The tribunal found a drastic and abrupt modification of the legal framework upon which Eiser's investment depended. So, although Article 10(1) of the ECT did not grant Eiser the right to expect an immutable legal regime, they did have the legitimate expectation that the measures would not destroy the value of their investment, and that was the result of the 2013-2014 measures (¶387).

The tribunal found that RDL 9/2013 completely derogated the regime of RD 661/2007, significantly reducing the financial back-up of Eiser. It stated that the new system was based on totally different circumstances, employing a new and never tested normative approach with the purpose of significantly reducing the subsidies granted to the existing solar plants (¶¶390-391).

In particular, the new regime, besides derogating RD 661/2007, it uses a hypothetical *standard plant* to calculate the profit of pre-existing plants that were built and installed relying on RD 661/2007. Therefore, the tribunal found that the new *standard plants* do not take into account the real characteristics of the plants installed in the early times of RD 661/2007. The RDL 9/2013 retroactively established standards of design and investment that were supposed to be incorporated by Eiser and other operators, which were early investors under the regime of RD 661/2007 (¶¶413-414).

All this sufficed to establish that Spain breached the FET standard by implementing RDL 9/2013, RD 413/2014, and Ministerial Order IET/1045/2014, which eliminated RDs 661/2007 and 1578/2008, two pieces of legislation completely different and that where the core of Eiser's (and many other investors) investment in the Spanish CSP sector.

What can we expect from now on?

The Spanish government is right in asserting that *Eiser* award cannot be deemed binding since that is not the rule in investment arbitration, and "[e]ach arbitration is different, both in the information considered and the arguments advanced." Moreover, it is true that the tribunal in *Eiser* recognized that Spain did face a heavy tariff deficit that needed to be addressed. However, and even when the claims Spain is sustaining are related to the same CSP regime, one cannot bypass the fact that the claimants in *Charanne* framed their claims very narrowly, targeting only RD 1565/2010 and RDL

14/2010, two measures very different from RDL 9/2013, RD 413/2014, and Ministerial Order IET/1045/2014 (at issue in *Eiser*) in respect to their effects.

It is worth mentioning the other case won by Spain last year, the *Isolux* case. While here the claimants did challenge 2013 measures, it is reported[1] that the claims related to the implementation of a 7% tax on power generators' revenues and a reduction in subsidies for renewable energy producers. However, it is hard to know whether the *Isolux* award will ever play a role in the future cases against Spain, considering that in *Eiser*, the tribunal rejected Spain's request to include said award as legal authority, due to its confidential nature (¶¶89-92).

Therefore, we must acknowledge two very important realities separating *Charanne* (and possibly *Isolux*) from *Eiser*: (i) Both cases dealt with different sets of regulatory measures; and more importantly (ii) the regulatory measures analyzed in *Eiser* had a far wider reach and more negative effect on the investor, since they completely eliminated the legal and regulatory framework relied upon by most investors to make their investments in the Spanish CSP sector. In addition, both tribunals in *Charanne* and *Isolux* rendered the award by majority, while the *Eiser* tribunal was unanimous. This last characteristic, while not a key issue for practical matters, it is worth mentioning.

As indicated at the beginning of this post, more awards are yet to come, and these forthcoming awards will continue to define the landscape of the Spanish investment arbitration saga, similar to the situation with Argentina in the 2000s.

[1] The award has not been published.

This entry was posted on Tuesday, June 20th, 2017 at 2:34 pm and is filed under Energy Charter Treaty, Fair and Equitable Treatment, Spain
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