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Investment Arbitrations Against Spain in a Post-Achmea Scenario: A New Hope for Mediation?

Josep Gálvez (Galvez Pascual SLP) · Friday, November 16th, 2018

Introduction

Unquestionably, Spain captures the highest percentage of arbitration procedures for cuts applied to renewable energies, accumulating almost thirty ongoing lawsuits from foreign investors, with claims pending in the ICSID, in the SCC and in the ICC arbitrations. Spain as the respondent was successful in the first two arbitrations, but these were unique cases and not extendable to the other claims. The amount currently set by arbitrators to compensate the four successful claimants is far from the aspirations of Spain which has defended its right to change the premiums for renewables, but also far from the claimants demands whereby they have been awarded less than the amount claimed.

In a nutshell, arbitrators appear to be accepting the cuts the Spanish government introduced in 2011 (among others, limitation of hours, plant life to 25 years, etc.) and endorse the 7% tax on electricity generation. However, other premium cuts, such as those that were subsequently adopted in 2014, are not accepted as these cuts were in breach of '*legitimate investor confidence*' under the Energy Charter Treaty.

The main problem for previous investors who have subsequently become claimants is to project with a high degree of confidence how the awards can be enforced, with Spain trying to use the recent Achmea ruling by the European Court of Justice (***ECJ***). In this sense, the European Commission has informed Spain that Spain cannot pay out any awards in respect of its renewable incentive scheme because that action would constitute illegal state aid. Furthermore, any attempt to enforce an ICSID award against Spain before any EU Member State courts will probably be met by the response that the Achmea judgment renders intra-EU investor-state arbitration illegal under EU law.

Clearly Spain is shielding its position by using the Achmea ruling to avoid enforcement of awards before any EU national court, with Sweden having already suspended the enforcement of Novaenergía's award. However, the arbitral Courts of the ICSID and the Stockholm Chamber of Commerce maintain their competence to rule. Hence, it appears that the arbitrations brought by investment funds against Spain are becoming the foundations for a major conflict between the EU and the international arbitration system, especially the World Bank's ICSID, with a subsequent impact for the claimants who obtain a favourable award.

Whilst the Spanish government continues to avoid the payment of awards by using the Achmea judgement, claimants are also entitled to enforce their award outside of the EU. Some plaintiffs are filing precautionary measures requests before various US Courts to obtain injunction orders over Spanish sovereign assets. However, there is no current confirmation of any Spanish sovereign asset freeze.

Mediation: A New Hope in a Post-Achmea Judgement Era?

Certainly, tension between Spain and international funds and companies that suffered cuts due to their investments in renewables continues to rise. According to the Spanish Government the global figure of 7.5 billion euros has been updated to over 8.2 billion euros, representing nearly a 10% increase in the financial damages sought, and a potential threat to the financial balance of the Spanish electricity system.

The score is dramatic: after four arbitration awards against the country and only two in favour of Spain, the total sums claimed continue to rise day by day. In addition, the awards are also generating a spiralling costs and accruing interest that already exceeds 20 million euros. The Spanish Government appears to view these increases in the amounts claimed because plaintiffs have detected that the awards granted in favour of plaintiffs have been between 30% and 50% of what was initially demanded. The claimants, therefore, increased the amounts being sought.

In this scenario, which is complicated for both Spain and claimants, it is worth considering if the recent change of government in Spain might lead to a change in attitudes towards this subject. Following a vote of no confidence in the Spanish Parliament on 1 June, Spain has a new Prime Minister and a new Socialist government. Although the new government is currently and understandably silent on this matter within the public domain, we are of the view that the government would welcome a solution to significant financial issues that also affects the image and reputation of Spain in the international investment community.

In fact, the fourth ICSID award against Spain was awarded at a time when the new socialist government had replaced the previous conservative government, the award being in favour of the investment fund Antin, which had bought two solar plants in Spain and claimed 238 million euros for the premium cuts approved by the previous cabinet. Spain’s new government is facing a problem that is increasing in scale. It is well known that several law firms and litigation fund managers are considering the possibility of raising new arbitrations given the latest court rulings, the consequences of which could be severe for Spain. But can a Sovereign state allow itself to be put in a position where the time spent trying to defend itself does nothing but increase with more and more arbitration claims being considered?

With the current uncertain scenarios, mediation between investors and the current Spanish government appears to be a viable solution. Exploring the possibilities of an agreement could be well received within the international markets and perceived as a significant success for the new cabinet, improving the reputation of Spain whilst removing the current mentality on all sides of “them vs. us”.

If settlements could be reached that were acceptable to both sides, Pedro Sánchez’s government could achieve a goal of seeing arbitration proceedings against Spain withdrawn whilst simultaneously solving some of the perceived problems mainly created by the previous cabinet. Although the ruling by the Court of Justice of the European Union has invalidated this type of

intra-EU arbitration, this not only supposes a new economic setback for Spain, but also could open a mediation opportunity for all parties involved in this matter. If mediation results in investors receiving return of capital sooner rather than later, and the Spanish government improves its image in the international investment community whilst reducing the time that has to be spent fighting its legal position and also reducing the financial amounts to be paid, then why would mediation not be a possible solution for all sides, rather than each side running the risk of "winner takes all" arbitration? "Casino bankers" was a term used frequently in the aftermath of the 2008 financial crisis, but "Casino speculators" could almost apply to those seeking an "all or nothing" approach rather than exploring the possibility of alternative dispute resolution.

We endorse the idea of mediation, especially when considering the context in which the new Spanish Minister of State for Energy, Mrs. Teresa Ribera has publicly acknowledged the issues for regaining investor confidence in Spain. The new cabinet's strategy indicates that among the measures that will be included, the inclusion of investment guidelines should be facilitated to help build future stable, predictable and competitive scenarios, with special emphasis on green technologies with respect to what will be the needs of the future. In this sense, an energy transition in Spain should probably include open dialogue with affected investors.

Conclusions

Following the ECJ's Achmea judgment, the situation for claimant investors against Spain has become significantly more complex than prior to the Achmea judgement, as even with a favourable award, the chances of obtaining a rapid payment without additional costs are severely hampered.

For investors, enforcement actions outside the EU is also an option, but at the same time costly and involves a prior search for sovereign assets property of the Kingdom of Spain, as was the case in Argentina in 2012, for example. For many investor funds the Internal Rate of Return is used as the relevant benchmark, favouring a quicker solution for return of capital.

A conflict outside of the EU does not present better options for Spain either, as it has been repeatedly losing before international arbitration courts. Accordingly, the Spanish government can no longer continue to accumulate awards against the country, nor procedures that seriously endanger the country's image internationally, with potential consequences for the economy and for the new cabinet.

Therefore, we are of the view that all parties should be encouraged to initiate dialogue through mediation by a third party outside of the arbitration process, as a way that may finally settle the dispute. In this way, for the Spanish government it will mean a clear victory over its predecessor in office, allowing the current government to move forward and carry out the legal reforms of energy transition. For claimants, they will be able to obtain a quicker payment and probably under better conditions than by trying to enforce the award outside the EU or by selling any award to third parties.

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