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Royal Decree-Law 17/2019: An Opportunity for Spain to Leave Behind the Renewable Energy Arbitrations?

Pablo Pérez-Salido · Monday, December 30th, 2019

On November 22, 2019, the acting government of Spain passed a long-anticipated legislation in response to more than four dozen of international arbitrations that, since late 2013, have been filed continuously against the country.[1)] The Royal Decree-Law 17/2019 ('RDL 17/2019') is, therefore, an attempt to provide new incentives and more certainty to the renewable energy sector, which has faced significant reforms in the last decade. The Government expects that this legislative measure will translate into a high number of withdrawals of such claims filed by foreign investors against Spain.

The RDL 17/2019 is a modification of the legislation that currently regulates installations that produce energy derived from renewable sources. It provides for urgent measures for the adoption of a remuneration framework that will guarantee, under certain conditions, the remuneration for such installations throughout the next two regulatory periods (2020-2025 and 2026-2031). Previously, the remuneration (via a rate of return) for these renewable installations during the period 2014-2019, was calculated by adding 300 basis points to the price of the Spanish bond payable at ten years. However, the RDL 17/2019 does not use this formula anymore. Instead, it offers, in relation to these installations, the possibility of withdrawal of pending arbitral or judicial proceedings against Spain in exchange for a 7.398% rate of return until 2031. Without such urgent measure, the rate of return for the next period would have dropped from 7.398% to approximately 4.7%.

It has been previously argued on Kluwer Arbitration Blog that only an amicable resolution could finally put an end to these disputes (see here and here). However, this post suggests that, perhaps, in the case of Spain, the RDL 17/2019 could be a turning point to the negative cycle that the country has experienced in this regard recently. Besides this, the blog post also aims to analyze in detail the implications of the RDL 17/2019 for the renewable energy 'arbitration saga.'

Background

In the early 2000s, Spain adopted a set of incentives to attract foreign investors in what was then a flourishing renewable energy sector. Primarily, Spain offered generous incentives guaranteeing a high level of profitability for producers of energy derived from renewable sources. The call for investors was, indeed, a success, and Spain received considerable investments. This was, however, not without substantial aid or subsidies paid by Spain for such installations. However, due to the 2008 financial crisis and Spain's increased public deficit, this promising regime of incentives became practically unsustainable. Consequently, starting in 2011, several legislative measures were put in place to substantially reduce the aid which led to its final elimination in 2013.

Following these legislative measures, a cascade of cases were brought against Spain by investors under the Energy Charter Treaty. To date, and to the best knowledge of the author, there are approximately 45 pending international arbitrations against Spain, seeking damages in excess of EUR 10,000 million. Additionally, as of the date of this post, Spain has lost 10 arbitration proceedings to foreign investors in which approximately a total of EUR 1,700 million in damages were sought, but 'only' EUR 821 million have been granted. In particular, since the first adverse arbitral decision against Spain in *Eiser*, the country has been enduring what now seems to be a constant 'jurisprudence' of arbitral awards rendered in favor of investors. In fact, these losses appear to have provoked a 'domino effect' upon other investors with similar claims that were perhaps waiting to see the result of other ongoing arbitrations. Therefore, it is not surprising that Spain finally decided to undertake an alternative approach, other than defending these numerous and constant arbitrations, in order to stop the 'bleeding' and to try to recover the trust of foreign investors toward its renewable energy sector.

At issue remains, however, whether the legislative reform contained in the RDL 17/2019 would be capable of changing the current tendency. Despite certain challenges examined herein, this legislative measure could be a game-changer for both the foreign investors and Spain. Particularly, those investors that have obtained a favorable arbitral award against Spain, but that are still undergoing timely and costly enforcement proceedings and searching for Spanish assets outside of the European Union, could find the provisions found in the RDL 17/2019 rather advantageous to them (mainly due to implications of *Achmea*).[2)] This situation, however, has not prevented the filing of new claims against Spain (the latest, on October 4, 2019),[3)] and the interest stemming from the unfavorable awards against Spain continues growing each day that passes without payment. Consequently, in light of the above-mentioned, both the affected investors and the Spanish government could benefit from the legislative reform as an alternative approach capable of reaching a satisfactory and cost-effective solution to the numerous disputes that have ensued.

About the RDL 17/2019

The Royal Decree-Law 661/2007 regulates the remuneration framework for renewable energy installations. For the present regulatory period (2014-2019), such installations have enjoyed a 7.398% rate of return in relation to the initial investments. However, on December 31, 2019, the regulatory period will come to an end and the new rate would have dropped significantly as mentioned before (approximately to 4.7%) but for the measure adopted in the RDL 17/2019. This circumstance could have provoked a situation of great financial stress for the investors and would have likely resulted in the filing of additional claims against Spain.

In December 2018, there was an attempt by the Government to pass a law which included similar measures. However, the national elections and the consequent dissolution of Congress prevented it from moving forward. Seeking to act swiftly, and arguing a situation of emergency, the acting Government passed the RDL 17/2019 without having to go first through Congress (which at the time was still dissolved until the formation of the new Government).[4)]

The RDL 17/2019, *First General Disposition*, provides that (translation by the author): "it is necessary to update certain remuneration parameters for renewable installations under a special regime before the beginning of the next regulatory period [January 1, 2020]". Specifically, it stipulates that "it is necessary to update the value of the rate of return applicable for the upcoming regulatory periods [2020-2025, and 2026-2031]… in order to provide certainty to the regime". The *Second General Disposition* further provides that this update is 'urgent' since "the absence of the [update] will cause great uncertainty around the future profitability of these installations," which could ultimately impair the financing of new projects and stop the materialization of new investments that are otherwise necessary to accomplish Spain's ambitious agenda for an ecologically-friendly transition, for a lack of a better term, by 2030 (see here, in Spanish).

In essence, the RDL 17/2019 introduces an amendment to the Law of the Electricity Sector 24/2013 – which governs the renewable installations and their remuneration regime set forth in the Royal Decree-Law 9/2013 ('RDL 9/2013') – by providing that the value used to measure the rate of return of such renewable installations will not be reviewed until 2031. In other words, Spain guarantees for these renewable installations a rate of return of 7.398% during the next two regulatory periods. This rate is superior to the rate that would have been applicable during the period 2020-2025, while also avoiding any potential uncertainty for the 2026-2031 period. However, this incentive of a twelve-year guarantee shall only apply to those investors that agree to abandon their claims against Spain by September 30, 2020. Additionally, those investors in the process of enforcing their arbitral awards can also benefit from this incentive as long as they renounce all the enforcement actions.

Challenges

There are, however, two main challenges with regard to this legislative measure. First, perhaps these incentives might fall too short and fail to persuade foreign investors to withdraw their claims. When making their assessment of the situation, it is possible that some investors affected by the 2013 cuts, and with pending arbitrations or enforcement actions, may conclude that it is of greater benefit to receive a lower rate during the period 2020-2025 and the amount in an arbitral award (whether to be granted or already granted), rather than to accept a fixed 7.389% rate for the next twelve years.

Second, the deadline of September 30, 2020, as mandated in the RDL 17/2019 for investors to withdraw either their pending arbitrations or their enforcement proceedings, could be seen as too short and not realistic from a practical perspective. Can, in fact, this deadline, if perceived as an ultimatum, jeopardize a potential amicable resolution of some of these disputes? Only time will tell.

Despite these challenges, the incentives set forth in the RDL 17/2019 could be a game-changer and effectively persuade a large number of foreign investors to withdraw their pending actions against Spain. By doing so, investors would be the primary beneficiaries of a significant remuneration regime until 2031.

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References

?1 *See* Clifford J. Hendel & María Antonia Pérez, *'The Past, Present and Possible Future of the Spanish Renewable Energy Arbitration Saga,'* New York State Bar Association, International Section, Vol. 31, No. 1 (2018).

?2 To the author's best knowledge, none of the awards against Spain have been enforced as of yet.

?3 *VM Solar Jerez GmbH and others v. Kingdom of Spain* (ICSID Case No. ARB/19/30).

?4 Under Article 86 of the Spanish Constitution, the Government can pass royal decree-laws in the case of extraordinary and urgent necessity as long as it does not affect the institutions of the State, and the rights, obligations, and freedoms of the citizens under Title I of the Constitution. The situation or urgency, nevertheless, needs to be proven by the Government and the adopted measure must be a reasonable and adjusted response to such an emergency.

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