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The increasing number and methods of arbitration claims brought against Spain for its renewable energy measures

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Traditionally Spain has very rarely been the defendant in international investment protection disputes. Really, arbitration claims in this area were limited to a couple of cases and a small number of parties. However this has changed dramatically over the last few years as arbitration has proliferated, and continues to do so, with actions brought by foreign investors against the Kingdom of Spain heading to arbitration to challenge the laws that have been passed in the renewable energy sector.

Roughly a decade ago Spain began a concerted policy to support the development of renewable energies (wind, solar, thermal, etc.). This commitment to the production and consumption of clean energy had, in principle, some very positive objectives. Firstly, it involved energy production from domestic sources which, for a country like Spain that has always been dependent on imported energy, was crucial in securing a certain level of energy independence. Secondly, it was a good way to contribute to the research and development of certain technologies in which certain Spanish companies had begun to excel. And finally, there were the ever important environmental objectives of combatting such problems as global warming and dwindling fossil fuels.

However, a key problem was that the implementation of these renewable and clean energy sources inevitably required a huge economic investment with only very long term expected returns. In the face of this challenge the Spanish authorities offered very favorable conditions in order to encourage potential investors, in particular through bonuses which greatly incentivized investment in this sector. An example of the laws designed to protect and attract such investment is Royal Decree 661/2007 of the 25th of May on a special regime for the regulation of electricity production. Many domestic and foreign investors were drawn to the attractive opportunities and invested in Spanish renewable energy, in many cases borrowing heavily to do so. Obviously, given the nature of the industry, the amount of investment, and the debt taken on, it was imperative that these incentives be maintained over a long period of time.

The economic crisis that broke out in 2008 disrupted all these efforts. The urgent need of the Spanish Tax Administration to raise more money and the enormous growth of the energy sector's tariff deficit forced the Government to take various measures such as reducing the amortization period, introducing new taxes, abolishing or reducing bonuses, increasing tariffs etc., which seriously and negatively affected the investments in renewable energy.

Different investors, alleging enormous legal uncertainty generated by the policy changes as well as the retrospective nature of the new laws proceeded to challenge them in the Spanish courts. But the Spanish Supreme Court rejected their claims on the basis that they had

assumed a regulatory risk, that these investors were highly sophisticated, and that they had had access to quality technical and legal advice.

For its part, the Spanish legislature has continued reforming the system to this day with a maelstrom of incomprehensible laws, introducing rules that have further deteriorated the initial legal landscape that brought increased investments in green energy in the first place[1], despite the fact that entrepreneurs, starting with the Spanish, have continuously insisted on the need for a clear, secure and stable legal framework. Different foreign States have even notified the Spanish authorities, more or less officially, of their distress and concern regarding what remains of the commercial interests of their nationals.

As for the foreign investments, the practices followed by the Spanish authorities could certainly be considered indirect expropriations insomuch as they comprise acts attributable to the public authorities that cause a significant depreciation in the value of investments. Alternatively they could even be regarded as "creeping expropriations" since they have been brought about through a succession of laws and favorable judicial decisions which have been slowly and progressively undervaluing investments.

For these reasons ever more foreign investors have been bringing actions against the Kingdom of Spain, tending to cite the Energy Charter Treaty made in Lisbon on the 17th of December, 1994 (published in the Spanish State Bulletin on the 17th of May, 1995). But in some cases their claims may also be covered by the Agreements for the Promotion and Reciprocal Protection of Investments that our country has signed over the years, as well as the provisions of the Washington Convention of the 18th of March, 1965, on the resolution of investment disputes between States and nationals of other States, which set up the ICSID (published in the State Bulletin on the 13th of September, 1994).

The Energy Charter Treaty regulates the promotion and protection of investments in great detail, with the underlying principle that it acts as a 'floor' for protection that does not prevent the Parties from agreeing or adopting other more favorable international conventions or laws for the benefit of their investors or investments. In this manner fair and equitable treatment is guaranteed, as is complete security and protection, so that no Member State can adopt unreasonable or discriminatory measures which harm the management, maintenance, use, enjoyment or disposal of investments. National treatment is also guaranteed, including compensation for losses due to armed conflict, riots or other such events. Crucially, the transfer of payments related to the investment (initial capital, returns, contract payments, remuneration of expatriated staff, liquidation of the investment etc.) is assured, as are dispute settlement payments, and those payments arising from expropriation compensation.

Article 10.1 is particularly important for these purposes. It expressly states that "Each Contracting Party shall observe any obligations it has entered into with an investor or an investment of an investor of any other Contracting Party".

The Treaty places special emphasis on the fact that investments shall not be subject to nationalization, expropriation or measures having equivalent effect, except where such expropriation is for a purpose within the public interest, where the expropriation is not discriminatory, where due process of law is observed and where prompt, adequate and effective compensation is paid. The amount of compensation must be equivalent to the fair market value of the expropriated investment immediately before the expropriation or notice of the intention to expropriate if this would affect the value of the investment. The investor has the right to request a court or other competent authority review the case, payment and valuation.

The Energy Charter Treaty also regulates the settlement of disputes in detail. As is typical for these types of Conventions there is a specific article dedicated to the differences between the signatory States, but this is not an issue that concerns us now. What is important for us here are disputes between an investor and the Member State where that investment was made. It is provided that the parties to a dispute will try to resolve it amicably within a period of three months, and after this period the investor will be able to choose from three causes of action: a) sue through the courts or administrative tribunals of the State involved in the dispute; b) begin the method of dispute resolution previously agreed upon by the Parties; or c) bring an arbitration claim. If the investor opts for this last option he will have three forums in which to bring the claim: a) the

International Centre for Settlement of Investment Disputes (ICSID arbitration) provided both the State of the investor and the State receiving the investment are parties to the Washington Convention of the 18th of March 1965 (although if one of the countries is not party to the Convention you may apply to the ICSID Secretariat to use the Additional Mechanism procedures); b) arbitration before a single international arbitrator or an *ad hoc* arbitration tribunal established under the UNCITRAL Arbitration Rules; or c) arbitration proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce.

Of these three arbitral forums it is the third that was the least prevalent in Spain until the onset of the current problems. Spanish companies, especially the larger ones, have some experience of going to ICSID arbitration to protect their interests against States that have acted against their investments, an issue that has occurred with some frequency in Latin America, and *ad hoc* arbitration under the UNCITRAL Rules has been primarily used by our companies in commercial litigation, but not so much in investment disputes. Whereas it is true that Spanish companies already had some important background in proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce, it is only now that this has really come to the fore thanks to the problems emerging with renewable energy. We must remember that this institution used to perform an important role in trade relations with socialist Eastern European states, and nowadays it continues to occupy an important position in investment and energy dispute arbitration (also when the interests involved are linked to the former Eastern Bloc countries). The parties that usually turn to the Arbitration Institute of the Stockholm Chamber of Commerce do so because they prefer to maintain the confidentiality of the proceedings. Its Regulations contain flexible and adaptable rules that can fit the particular nature of each case, together with the regulation of arbitration proceedings offered by the so-called "Expedited SCC Rules" which set down a faster and simpler procedure which is highly suited to small claims. Furthermore, the arbitral decisions of the Stockholm Chamber of Commerce are recognized and enforced by the New York Convention of the 10th of June, 1958 (published in the State Bulletin on the 11th of July, 1997 and rectified on the 17th of October, 1986) which in Spain has effect *erga omnes*.

The various parties who have brought claims against the Kingdom of Spain for allegedly being harmed by the legislative reforms on renewable energy have used all the options afforded to them by the Energy Charter. According to the data currently available, there are four claims before the ICSID, three in Stockholm before the Arbitration Institute of the Chamber of Commerce, and one, the earliest in time, in New York in *ad hoc* proceedings in accordance with the UNCITRAL Rules. And these cases will only be the start of an avalanche of claims challenging the stubbornness of the Spanish authorities and their lack of clear objectives.

We must also remember that the Energy Charter provides that awards on the merits will be decided according to the articles of the Treaty itself and the applicable rules of international law. These rulings, which may include an award of interest, shall be final and binding on the parties. In the case of awards concerning government measures (or measures of lower level political bodies), the State shall have the option to pay monetary damages in lieu of any other remedy, and Member States should implement the awards without delay taking all measures necessary for their effective implementation in their territory.

But on top of all this we must point out a new phenomenon. Very recently various news and media outlets have published news of foreign associations of minority shareholders in Spanish companies that are preparing to sue Spain for the cuts to wind energy. It appears they intend to start *ad hoc* arbitration proceedings under the UNCITRAL Rules. In this sense, they would act as foreign investors who have had the value of their investment seriously compromised by the actions of the Spanish authorities. It will be very interesting to observe how these cases develop, especially with regard to whether or not foreign associations of minority shareholders in our big energy companies are entitled to bring such investment arbitration proceedings.

The answer to this question is certainly not obvious. Some recent Agreements for the Promotion and Reciprocal Protection of Investments signed by Spain contain provisions like the following: "where a Contracting Party expropriates the assets of a company duly incorporated under the laws in force in any part of its own territory, and where the company is participated in by investors from another Contracting Party, the provisions

of this Article shall apply in order to assure the prompt, adequate and effective compensation for the other Contracting Party's investors who are owners of those shares". A provision of this type may protect the aforementioned claims of foreign minority shareholder associations. Moreover in this area, Article 13.3 of the Energy Charter Treaty establishes that "for the avoidance of doubt, expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its area in which an investor of any other Contracting Party has an investment, including through the ownership of shares." In any case, regardless of the application of this provision we have a very interesting problem whose resolution must be keenly observed.

This recent phenomenon aside, the fact is that a very considerable number of arbitration claims have been brought against Spain for its renewable energy laws. By way of illustration, in the ICSID Spain has been a defendant as frequently as some disreputable central Asian republics. Furthermore, it is reasonably foreseeable that the number of claims will increase in the coming years which will certainly adversely affect the image of "Brand Spain".

FOR MORE INFORMATION

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