School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Eiser Infrastructure Limited & Energia Solar Luxembourg S.À R.I. v. Kingdom of Spain – Award – ICSID Case No. ARB/13/36, May 4, 2017.

Case report by: Francisco Zuluaga Ospina**, Editor Diego Luis Alonso Massa***

Summary: In a decision rendered on May 4, 2017, the International Centre for Settlement of Investment Disputes addressed an issue concerning the changes in the renewable energy regulatory framework of Spain. In 2007, Claimants invested in the renewable energy sector, taking into consideration the special subsidies granted by Respondent in favor of renewable energy producers. After a few years, the regulatory framework was changed due to the deficit of the subsidy regime. In spite of the fact that the Respondent assured Claimants on several times that their investment would not be affected by new regulations, the subsidy regime in which they were registered was abrogated. The new regulatory framework deprived Claimants of all the revenues foreseen under the repealed subsidy regime and subjected them to new taxes and tariffs. Claimants alleged that they have lost the entire value of their investment and that Respondent breached its obligations under the Energy Treaty Charter (ETC).

The Tribunal held Spain liable for breach of Energy Treaty Charter obligations, considering that its new regulations violated the Fair and Equitable Treatment standard under the ETC. Compensation for the damages caused was set in the amount of EUR 128 million.

Main issues: Jurisdiction – Competence of the Arbitral Tribunal; Treaty Obligations – Fair and Equitable Treatment; Damages – Determination of Value of Compensation.

Arbitrators: Professor John R. Crook (President), Dr. Stanimir A. Alexandrov (Appointed by Claimants), and Professor Campbell McLachlan QC (Appointed by Respondent).

Claimant's Counsel: Mrs. Judith Gill QC, Mr. Jeffrey Sullivan, Mrs. Marie Stoyanov, Mrs. Virgina Allan, Mr. Ignacio Madalena, Mrs. Lauren Lindsay, Mrs. Naomi Briercliffe, Mr. Tomasz Hara, Mrs., Lucy Judge, Mrs. Stephanie Hawes, Allen & Overy LLP.

Respondent's Counsel: Mr. Diego Santacruz, Mr. Javier Torres, Mr. Antolín Fernández, Mrs. Mónica Moraleda, Mrs. Elena Oñoro, Mrs. Amaia Rivas, Mr. José Luis Gómara, Mr. Álvaro Navas, Mrs. Ana María Rodríguez, Abogacía General del Estado (Spain's General Attorney Office)

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1. Procedural History

On December 13, 2013, Eiser Infrastructure Limited (EIL) and Energia Solar Luxembourg S. a. r. I. (ESL), (hereinafter jointly referred to as the "Claimants" or "Eiser") instituted arbitral proceedings before the International Centre for Settlement of Investment Disputes ("ICSID") against the Kingdom of Spain ("Spain" or "Respondent"), alleging breaches of the Energy Treaty Charter (ETC) (¶1-6). Claimants argued that the modifications introduced to the economic and regulatory regime applicable to renewable energy projects resulted in the expropriation of the investment, denial of fair and equitable treatment, damages caused by excessive cuts in renewables, and breach of agreed obligations (¶158).

The Hearing on Jurisdiction and the Merits of the Dispute was held in Paris, France, from 15 to 20 February of 2016 (¶73). After the hearing, the Respondent requested the inclusion to the record of additional legal authorities (the "*RREEF Decision*" and the "*Isolux Award*") (¶82). Claimants objected to this request, and the Tribunal rejected it on the ground that Respondent failed to guarantee the confidentiality of the "*Isolux v. Spain"* arbitral award (¶92).

On April 13 of 2017, the Tribunal declared the proceedings closed (¶93).

2. Relevant Facts

Spain has become a world leader in the promotion of solar power. (¶94) Due to the high costs of developing Concentrated Solar Powered Plants ("CSP"), building from multilateral agreements, including the 1992 United Nations Framework Convention on Climate Change, the European Union's Directive 2007/77CE, and the 1997 Kyoto Protocol, the Spanish Government put in place a number of measures with a view to promoting CSP and other sources of renewable energy. In this context, Spain adopted a subsidy policy through the enactment of the 1997 Electricity Law that created Special Regimes for renewable energy producers. (¶97, ¶101). After several unsuccessful decrees, the Spanish Government enacted Royal Decree 661/2007 (hereinafter RD 661/2007) that aimed at lessening regulatory uncertainty and attracting investors to the renewable energy sector (¶109). Spanish authorities expressed that this Decree aimed at maintaining stability and assuring investors that their CSPs would not be affected by potential changes (¶111).

Regarding the Claimants, EIL is a company incorporated under the laws of United Kingdom, serving as the general partner of five limited partnership entities and directly and wholly owns ESL, a company incorporated under the laws of Luxemburg. (¶114) Having its headquarters in

London, Eiser is specialized in asset management, mainly equity and debt instrument related to the generation and distribution of renewal energy. (¶115)

After the enactment of Royal Decree 661/2007, a third party proposed Eiser to invest in a CSP, named the ASTE project, that was on its initial development stages (¶117). After a preliminary due diligence, Eiser identified ASTE as a profitable business, in addition with the stability and predictability that the Royal Decree granted to the renewable energy sector (¶117-118). On August of 2007, Eiser Investment Committee approved the investment in the ASPE project (¶118). Despite Eiser considered several risks arising from any change in the subsidy regime for the energy sector put in place by the Government, the fact that Spain was the renewable energy global leader was a determining factor for the carrying out of the investment (¶119). Thereupon, Eiser acquired 85% of ASTE's shares in October 2007 (¶120).

In the summer of 2008, during the global financial crisis, and in order to fulfill the guarantee requirements demanded by the financial entities providing funding for the ASTE project, Eiser entered into an agreement with Elecnor, a large and established Spanish engineering company, whereby the latter would participate in the ASTE project and provide the needed guarantee, and in return Eiser would take an equity stake in the Dioxipe, a company that was developing a large solar plant (Astexol) in Badajoz, Spain (¶122).

During October of 2008 and March of 2009, Eiser received the required licenses from the Government and concluded an agreement with the grid operator Red Eléctrica to access the electrical grid (¶123). Meanwhile, the Spanish government, concerned by a growing subsidy deficit, enacted Royal Decree Law 6/2009 ("RDL 6/2009"), which introduced a pre-registration process ("RAIPRE") intended to limit the number of projects potentially eligible for the RD 661/2007 regime. Projects entered into the registry had three years to be completed and definitively registered (¶124). Eiser successfully pre-registered three CSPs by November 2009, although the same three CSPs have also been pre-registered under the Special Regime of RD 661/2007 in December 2009 (¶125).

On 2 July 2010, a press release was issued by the Spanish Ministry of Industry, Tourism and Commerce expressing that despite the modifications to RD 661/2007 that were under discussion, the rates under that regime would be kept in place for all existing registered CSPs. (¶130) On 8 December 2010, Royal Decree Law 1614/201085 was promulgated, implementing the July 2010 agreement between operators and the government. Article 4 confirmed that the rate reviews envisaged in RD 661/2007 would not apply to registered CSP plants. Following this decree, banks were prepared to proceed with the financing for ASTE projects (¶131).

On separate resolutions dated 2 February 2011 and 1 March 2011, the Spanish Government accepted the waiver request from Eiser of its right to supply power prior to 1 August 2012 and stated that Eiser's CSPs were subject to the tariffs and subsidies under the RD 661/2007 (¶¶133-134). Then, on 15 April 2011 Eiser and Elecnor closed on the project finance deal with the banks, gathering the amount of capital that was needed for the completion of the project. As of 31 December 2011, Eiser valued its investment in €148,3 million (¶136).

Presidential elections took place in November 2011 in Spain. A new government was elected, and in his inaugural speech, the President-elect pointed to the accumulated tariff deficit, then amounting to more than €22 billion and called for the structural reforms in the energy sector (¶137). Despite the measures taken by the new Government that suspended new registrations for the Special Regime, Spanish authorities confirmed that Eiser CSPs fell under the RD

611/2007 tariffs and subsidies (¶139). In addition, Eiser was notified that their CSPs had obtained final registration under the Special Regime and had been permitted to operate. (¶¶140-143)

In December 2012, and without any previous discussion with energy producers, the Spanish Parliament enacted Act 15/2012, imposing a 7% tax on the total amount of energy fed into the National Electricity grid. (¶144) According to a February 2013 Eiser Quarterly Review, this measure would reduce nearly 30% of Astexol's net revenues (¶144). Subsequently, Royal Decree 9/2013 was enacted, modifying section 34 of the 1997 Electricity Law, which created the Special Regime for renewables producers, and abrogating RD 661/2007. (¶146) In December 2013, Spain enacted Law 24/2013, which replaced the 1997 Electricity Law, completely removing the Special and Ordinary Regimes. (¶146) Finally, the Royal Decree 413/2014 and the Ministerial Ordinance IET/1045/2014 established a new regulatory framework applicable to existing and new projects, completely abrogating the regime from which Eiser's CSPs benefitted. (¶147)

Under this new regime ASTE CSPs' earnings fell by 66% (¶151). Earnings were not enough for paying the financial costs of the projects, and energy producers had to restructure their debt (¶152). Eiser partners stated that the new regime put in place by the Spanish Government destroyed the value of the investment (¶154).

3. Legal Issues Discussed in the Award: Jurisdiction and the Exception *Intra-EU*

Spain claimed that the Tribunal lacks jurisdiction *ratione personae* because the ETC is not applicable in disputes arising from investments made within the European Union by investors of European Union countries (¶162). In Spain's view, the ETC was signed by the EU (former EEC), to which Luxembourg and Spain are Member States (¶164). Under this perspective, allowing this arbitration to proceed would require the Tribunal to rule on the rights of a European investor within the EU's internal market, matters as to which the European Court of Justice retains exclusive ultimate authority (¶167).

In the Tribunal's view, both the United Kingdom and Luxembourg met the requirements to be considered Contracting Parties, and the Eiser companies also met the requirements to be considered investors of Contracting Parties pursuant to Section 1 of the ETC (¶182). According to the Tribunal, there is no such a thing as an EU investor because the ETC does not make such a differentiation, taking into account that there only exist investors from EU Contracting parties. Moreover, the Tribunal is of the view that treaties must be interpreted in accordance with the principle of good faith, and if the ETC were to provide for an exclusion rule banning investors from EU Member States from bringing claims against other EU Member States, such an exclusion must have been expressly and clearly established in the ETC. The Tribunal concluded that claimants were entitled to sue Spain under the scope of ETC obligations.

3.1.1 Existence of an Investment under the scope of objective criteria in accordance with the ICSID Convention and the ETC

According to Spain, the Tribunal lacked jurisdiction *ratione materiae* because claimants have not furnished any evidence that they had made an investment for which they provided funding and assumed risk for a specific time-span, as required by the ICSID Convention and the ETC. (¶209)

The Tribunal held that even assuming, while without deciding, that the ECT and the ICSID Convention require that an investment possess the characteristics described by Spain, the investment at issue clearly had these characteristics (¶228). The Tribunal then rejected this jurisdictional objection raised by Spain (¶230).

3.1.2 Claims by Shareholders are not allowed

In Spain's view, shareholders' claims for alleged damages suffered by companies in which they have invested (described by Respondent as "reflective losses") are barred by public international law. It also urges that the ICSID Convention Article 25 allows ICSID arbitration only of claims arising "directly" out of an investment (¶¶234, 235) Under this scope, Spain contended that the alleged investment of the Claimants would not affect the facilities and plants, credits of any kind of the Spanish companies that own the Plants, the alleged rights granted by RD 661/2007 to the Spanish companies that own the Plants or the revenues of any other nature of the Spanish companies that own the Plants. (¶238) These rights belong to the Spanish companies that hold the CSPs, and Eiser is only a shareholder of these companies, which means that it is only entitled to claim the loss of value of its shares.

Eiser refers to the definition of investment established in the ETC according to which an investment "means every kind of asset, owned or controlled directly or indirectly by an Investor […]." This means that under the ECT's definition, Eiser's investments encompass both their rights to ownership of their shares and their indirect rights in the assets of the Spanish operating companies (¶242).

The Tribunal held that investors can bring claims for reduction of value of their shareholdings on account of conduct alleged to violate the ECT (¶245). Also, the Tribunal found that the basis of Eiser's claim was the loss of value of its own investment; in other words, the Tribunal rejected the objection raised by Respondent because it found that Eiser's claim was admissible as it concerned the loss of value of the companies in which it had an interest or investment. (¶¶246-247)

3.1.3 Lack of Jurisdiction over Tax Measures

Spain alleged that it never gave its consent to arbitrate tax measures under the ETC. Article 21 of the ETC establishes that Article 10 does not create any obligation regarding tax measures, which means that Spain has not consented to arbitrate, under the arbitration clause contained in Article 26, disputes falling outside the scope of Section III of the ETC, including Article 10 (¶254). Furthermore, Spain argued that the tax measure at issue was enacted by the Parliament following pre-established legal and constitutional proceedings and was a *bona fide* measure of general application (¶255).

Moreover, the Tribunal recalls the conception of "bona fide taxation" utilized by the tribunal in *Yukos Universal v. Russia*, a case much discussed by both Parties. In a case involving the allegedly abusive enforcement of taxation measures, the tribunal there found that, "the carve-out of [ECT] Article 21(1) can apply only to bona fide taxation actions, i.e., actions that are motivated by the purpose of raising general revenue for the State." (¶268) In this connection, the Tribunal noted that Claimants did not provide enough evidence to support the suggestion that the tax measures were enacted with the purpose and knowledge of breaching ETC obligations (¶269). Because the power of enacting tax measures belongs to the State core sovereign powers, and Claimants were not able to demonstrate a systematic action by Spain aimed at destroying Eiser's investments, the Tribunal found that it did not have jurisdiction to rule upon tax measures (¶¶270-272).

3.1.4 Eiser did not observe the proceedings provided for in the ETC requiring the previous consideration of the issue by Tax Authorities.

Spain argued that Eiser did not follow the proceeding provided for in Article 21 of the ETC. This Article stablishes that in the event of a claim for expropriation caused by taxation measures, the investor must first have recourse to national tax authorities of the Contracting Party to determine whether the taxation measure amounted to an expropriation or was of a discriminatory nature (¶¶274-275). Claimants first responded that Law 15/2012 does not involve a bona fide tax, so that Article 21(5)(b) does not apply. However, if the Article applies, Claimants contend that they have complied with it, in that on 11 October 2012, they and other investors raised the issue of the 7% tax with the Ministry of Finance and Public Administrations, the Spanish Competent Tax Authority. Claimants finally contended that any referral would be futile, and that investment jurisprudence confirms that in such a case, they "need not comply with the requirement, which is procedural in nature (¶278)".

The Tribunal found that the first communication mentioned by Eiser did not address the ETC or the risk of any expropriation measure; thus, it could not be considered a proper notification of the fact that that the taxation measure at issued was deemed an expropriation (¶286). Further, the letter that was sent to the President did not fulfill the requirement that such a communication should be addressed to the highest Tax Authority of the Contracting Party (¶288). On the basis of the above considerations, the Tribunal concluded that Eiser did not comply with the ETC requirements (¶290). The Tribunal thus confirmed that it was not necessary for it to decide Claimants' expropriation claim, as the case could be appropriately resolved on another basis. Accordingly, it was not necessary for it to take the action indicated by Article 21(5)(b)(i) (¶¶297-298).

3.1.5 Cooling Off Period

Spain alleged that the Claimants did not comply with the negotiations and cooling off period set out in article 26 of the ETC, and that because of these breaches the Tribunal lacks jurisdiction. Eiser sent two letters to the Spanish President in April and May 2013 requesting to initiate negotiations due to possible breaches of the country's obligations; Eiser argued that, in spite of the letters, it has never received responses to its requests for negotiations (¶301).

The Tribunal found that Claimants' April, May, and July 2013 notifications and requests for negotiations, and their observance of the subsequent three-month cooling-off period before filing their request for arbitration, satisfied ECT Article 26(2).

Consequently, the Tribunal rejected Respondent's sixth jurisdictional objection (¶320).

3.2 Merits

3.2.1 Spain's new defense

On November 27, 2015, Spain introduced a completely new defense concerning the claims on the merits. Spain alleged that the Claimants' CSPs had an installed capacity exceeding 50 Megawatts ("MW"), which was higher than the capacity permitted for CSPs under the Special

Regime. Spain considered that under these circumstances, it was not legitimate for the Claimants to assume that their CSPs would be registered under the Special Regime (¶328).

Claimants contended that Spain should be estopped from raising its new defense, as the plants at issue had been registered with the RAIPRE, had received official documents confirming their registration and their eligibility for the RD 661/2007 regime, and had received remuneration under the regime. Further, the three plants had been inspected by the competent regulatory authorities and found to have installed capacity at or below 50 MW (¶331) The Tribunal found that pursuant to Spanish law, the CSPs' power was in accordance with the maximum power permitted by RD 661/2007 (¶339). The Tribunal also found persuasive that the Spanish regulatory authorities, after carrying out inspections during 2013 and 2014 in the power plants, considered that the CSPs complied with the legal requirements for the Special Regime. (¶342) Consequently, the Tribunal rejected Spain's new defense. (¶345)

3.2.2 Procedural Economy

Claimants advanced four distinct claims under the ECT: expropriation, denial of fair and equitable treatment (FET), impairment by unreasonable measures, and failure to honor undertakings entered into with Claimants' investments (¶352). Although the Tribunal has considered each of the above, it determined that the claim concerning denial of fair and equitable treatment provided the most appropriate legal context for assessing the complex factual situation presented before it. Thus, it addressed only the denial of fair and equitable treatment claim (¶356).

3.2.3 Fair and Equitable Treatment

The Claimants argued that the purpose of FET standard is to warrant stable and transparent conditions for investments, especially in the energy sector, which is a capital-intensive sector (¶357). In the claimant's view, Spain adopted dramatic modifications that frustrated Claimant's legitimate expectations created under the Special Regime and the Royal Decree 661/2007. Claimants contended that their legitimate expectations came from Spain's energy regulations, the special regime, and "road shows" promoting solar investment in the Spanish territory (¶358).

Spain argued that claimant's expectations were not legitimate, thus, not protected under the ETC. It was not reasonable to expect that the Special Regime created by RD 661/2007 would remain unchanged. Further, it contended that Spain had made no promises or commitments in this regard, and that Spanish law provides no stabilization clause freezing regulatory regimes (¶359). In addition, Respondent alleged that statements made by Spanish authorities concerning the pre-registry of the CSPs, and the registration under the Special Regime were not concessions granted by Spain, but rather these were statements of an informative nature only, with no legal effect whatsoever. Consequently, Respondent argued that these were not binding (¶360). Finally, Spain alleged that Claimants were only entitled to a reasonable return, which the new regime provided and that Claimants would have received the legislatively determined reasonable return if they had properly designed and financed their plants (¶361).

The Tribunal found that in the absence of specific explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs (¶362). However, the Tribunal was of the view that

Respondent's obligation under the ECT to afford investors fair and equitable treatment does protect investors from a fundamental change to the regulatory regime in a manner that does not take account of the circumstances of existing investments made in reliance on the prior regime (¶363). Despite the tariff and subsidies crisis that Spain was suffering, it was reasonable for the Spanish Government to adopt measures to overcome that situation; however, the Tribunal held that due to Spain's commitments under the ETC, the measures adopted by it must be in full conformity with ETC obligations, including FET standard (¶371).

Considering the purpose of the ETC as set out in Article 2 of the treaty, the Tribunal concluded that the FET standard established in Article 10 necessarily required the Contracting Parties to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments (¶382). Consequently, the Tribunal rejected Respondent's argument and held that the new system was based on quite different assumptions, and utilized a new and untested regulatory approach, all intended to significantly reduce subsidies to existing plants. In addition, the new measures were based in hypothetical operative costs, financing costs, and production capacity, setting aside the real financing and operating specifications of the existing CSPs. (¶¶391-400) The Tribunal also found that no scientific studies had been carried out in order to support the new regulatory framework; further, a study cited in the National Renewables Plan which was said to project that 77% of the cost of concentrated solar plants would involve external financing was merely the work of a consultant and not part of the above-mentioned Plan (¶¶404-406).

The Tribunal found Respondent liable for breach of the treaty due to the measures adopted, which deprived the Claimants of the whole value of their investment (¶418).

3.3. Damages

The Tribunal found that article 31 of the Articles on Responsibility of States for Internationally Wrongful Acts accurately shows the standard of reparation that had to be applied in the case at hand (¶424). Also, the Tribunal held that the Claimants' approach for determining its damages – assessing the reduction of the fair market value of its investment by calculating the present value of cash flows said to have been lost on account of the disputed measures – offered an appropriate means to determine the amount of reparation due in the circumstances of that case (¶441).

Claimants requested EUR 196 million in compensation for future discounted cash flows after June of 2014. This amount includes EUR 68 million attributable to the estimated 40-year service life of the CSPs. However, the Tribunal rejected this claim, considering that the Claimants were not able to prove that CSPs have such a service life. Thus, the amount due was established by the Tribunal in EUR 128 million, based on a 25-year lifespan. (¶461)

3.4. Interest

Even if the ECT does not directly address the question of interest for breaches of Article 10(1), Article 13(1) dealing with compensation due to expropriation establishes that interest must be paid according to commercial standards. The Tribunal held that from 20 June 2014 to the date of the award, Respondent must pay interest at the rate of 2.07%, compounded monthly. Further, the Tribunal awards interest from the date of the Award to the date of payment at the rate of 2.50%, compounded monthly.

3.5 Costs

The Tribunal concluded that it is fair overall for each Party to bear its own legal and other expenses and its respective equal share of "the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre." (¶485).

4. Award

The Arbitral Tribunal held that:

(a) It has jurisdiction under the ECT and the ICSID Convention over Claimants' claims, except that it sustains Respondent's preliminary objections with respect to the claim that Respondent's taxation measures, in particular the 7% tax on the value electric energy production created by Law 15/2012, violate the ECT.

(b) Respondent has violated Article 10(1) of the ECT by failing to accord fair and equitable treatment to Claimants. In view of this decision, the Tribunal need not consider the other claims raised by Claimants concerning the violation of the ECT.

(c) On account of Respondent's violation of the ECT, Claimants are awarded, and Respondent shall pay, €128 million as damages.

(d) Respondent shall pay interest on the sum awarded in (c) above from 20 June 2014 the date of this Award at the rate of 2.07%, compounded monthly, and interest from the date of the Award to the date of payment at the rate of 2.50%, compounded monthly.

(e) Each Party shall bear its legal and other expenses and its respective equal share of "the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre."