April 2016

RECENT DEVELOPMENTS IN RENEWABLE ENERGY CLAIMS

Starting in 2013, several investment treaty claims have been filed in the field of renewable energy, more specifically in the field of solar energy, against Spain, Italy, the Czech Republic and other European countries based upon an alleged breach of the Energy Charter Treaty.

There are currently more than 25 treaty claims pending against Spain alone, five against Italy, seven against the Czech Republic and one against Bulgaria. The first one of these cases, *Charanne vs Spain*, was decided at the beginning of 2016.

In the last 10 to 15 years, many states have provided incentives through favorable feed-in tariffs and other subsidies to promote investment in the field of renewable energy. Spain was one of these.

In 2004, with the aim of promoting investment in renewable energy installations, the Spanish Government issued Royal Decree 436/2004, dated 12 March 2004, establishing the methodology for updating and systemizing the legal and financial regime of the electric energy sector production special regime. However, as a consequence of the economic crisis and the need to tackle the ever-growing tariff deficit, these incentives were gradually reduced, first in 2010 and then again in 2013 and 2014, thereby affecting those investments completed during the validity period of the prior subsidy regime.

In 2014, a new regime was introduced which repealed the very favorable tariffs and remuneration regimes established under the old system and created a completely new regime for renewable energies. These changes triggered the initiation of several investment-treaty claims against Spain based upon an alleged breach of the Energy Charter Treaty.

In these cases, claimants have typically argued a breach of fair and equitable treatment and have requested protection from measures equivalent to expropriation without compensation. Spain's defense revolves around its right to regulate the electricity sector, particularly in light of the economic crisis it was suffering. The state has further argued that the regulatory changes did not discriminate against foreign investors and that investors should never reasonably expect the state to guarantee a fixed return on investments.

An important aspect of the cases is the participation of the European Commission as *amicus curiae* on the side of the respondent states which are members of the European Union, including Spain. The position of the European Commission is that European

investors cannot bring claims based upon the Energy Charter Treaty against EU member states based on article 344 of the TFEU.

Charanne vs. Spain is the first award of the more than 25 investment treaty arbitrations filed and pending against Spain. The distinctive feature of this first arbitration is that it was filed at the beginning of 2013, and thus did not challenge the legislative amendments that were brought in 2013/2014. The majority of the Tribunal did not find any breach of the Energy Charter Treaty. The Tribunal's rationale for reaching this decision was as follows:

First, the Tribunal came to the conclusion that a mere decrease in profitability, despite its serious and economic financial consequences, does not amount to an "expropriation", unless the loss of value can be considered equivalent to a deprivation of property.

The majority of the Tribunal also came to the conclusion that there was no breach of the principle of fair and equitable treatment. The tribunal mentioned that in the absence of a specific commitment on the part of the state, an investor cannot expect the regulatory framework to remain unchanged. As a second step, the Tribunal analyzed whether the regulatory framework generated legitimate expectations that this framework would not be modified as it was in 2010. The tribunal held that the expectations must be reasonable and objective and that investors, as part of their due diligence in a highly regulated industry such as energy, must exhaustively analyze the applicable framework before they make their investment.

The Tribunal further went on to analyze whether the modified regulatory framework frustrated the legitimate expectation that the state would not act unreasonably, contrary to public interest or disproportionately. Here, the tribunal compared the maximum lifespan of a solar plant, which is in the Tribunal's view 30 years, with the extension of the application of the original tariffs to the first 30 years of the plant's operation, and came to the conclusion that there was not a breach of legitimate expectations.

A positive aspect of the *Charanne* award for foreign investors is the rejection of the arguments brought by Spain and the European Commission that European investors cannot bring any Energy Charter claims against EU member states. This is important for the viability of all of the pending renewable energy cases against EU member states.

The *Charanne* award illustrates that the success of claims based upon violations of the Energy Charter Treaty in the context of the renewable energy field will not be straight forward. However, investment treaty arbitrations filed later in 2013 and 2014 will have a considerably higher chance of successfully demonstrating violations of the obligations under the Energy Charter Treaty. We will most certainly have to wait a few years for all of these matters to be decided.

The Wolf Theiss Arbitration Team stands ready to assist you in evaluating those matters raised by the *Charanne* award and their applicability to your investments in the field of renewable energy in our region.

About WOLF THEISS

Wolf Theiss is one of the leading law firms in Central, Eastern and Southeastern Europe (CEE/SEE). We have built our reputation on a combination of unrivalled local knowledge and strong international capability. We opened our first office in Vienna over 55 years ago. Our team now brings together over 340 lawyers from a diverse range of backgrounds, working in offices in 13 countries throughout the CEE/SEE region.

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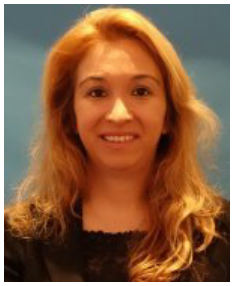

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