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FIRST SUCCESSFUL INVESTMENT TREATY CLAIM OVER SUBSIDY CUTS TO RENEWABLE ENERGY INVESTMENTS

Since 2013, several investment treaty claims have been filed in the field of renewable energy against European member states based upon alleged breach of the Energy Charter Treaty.

These claims arise from certain changes to the renewable energy support schemes in these countries, which have effectively reduced the anticipated level of feed-in-tariffs or green certificate subsidies. As alleged by the investors, these changes have detrimentally impacted their reasonable expectations for a return on their investments. There are currently 33 such claims against Spain (two cases concluded), 1 case against Italy (one case concluded), 6 cases against the Czech Republic and 1 case against Bulgaria. Cases against other countries are also rumored to be in the pipeline.

In these cases, claimants have typically argued a breach of fair and equitable treatment and the protection from measures equivalent to expropriation without compensation. The states' defense has been grounded on its right to regulate the energy sector as it deems necessary (particularly following the economic crisis) and given that these regulatory changes did not discriminate against foreign investors. Therefore, the states argue, these investors should not expect that the state guarantees a fixed return on their investments.

In a unanimous ICSID award dated 4 May 2017, a tribunal composed of John Crook, Stanimir Alexandrov and Campbell McLachlan ruled that Spain failed to accord fair and equitable treatment to Eiser Infrastructure and its subsidiary Energia Solar Luxembourg and ordered the state to pay damages in the amount of EUR 128 million plus interest thereon.

The award came 18 months after the decision in *Charanne I*, where the claims of the investor concerning breach of the fair and equitable treatment principle and the protection from measures equivalent to expropriation without compensation were rejected.

The key difference between these two cases is that *Charanne I* addressed only those measures introduced by Spain in 2010 and not those introduced in 2013-2014, which were much more controversial. Already in *Charanne I*, the dissenting arbitrator, Guido Santiago Tawil, argued that the Spanish state's actions in connection with the special regime created objectively legitimate expectations as to the maintenance of the regulatory framework sufficient to merit protection under the Energy Charter Treaty. This

dissenting view was rejected by the majority on the grounds that the subsequent changes to the legislation did not breach the principle of fair and equitable treatment as long as they were made fairly, consistently and predictably, while taking into account the circumstances of the investment. As the *Eiser* award is not public it is not possible to assess how the split decision in *Charanne* may have impacted the majority view of the tribunal in *Eiser*. According to a press release issued by the Spanish state in relation to the *Eiser* decision, the tribunal did not question the state's right to take "appropriate regulatory measures" to deal with the issue of tariff deficit.

The *Charanne I* and *Eiser* awards provide some preliminary evidence that the "battle" over changes to renewable energy subsidy schemes will not be as straight-forward as some investors and states may have hoped. Each case is unique and the measures challenged are multifold. While they share common elements, they are not identical. Since the assessment under fair and equitable treatment is both fact and measure specific, it is highly likely that we will witness controversial interpretations in the future, with diverging outcomes.

Another important aspect of the awards rendered by the tribunals in both *Charanne I* and *Eiser* is the rejection of the legal premise of the European Commission that European investors cannot bring energy charter claims against EU member states because of the conflict with the EU legal order. This is an important holding for all those pending claims filed under the Energy Charter Treaty against EU member states, in particular taking into account the current discussions and uncertainties related to the future survival of intra-EU bilateral investment protection treaties ("BIT").

About WOLF THEISS

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