RECENT INVESTMENT CASES AGAINST EU MEMBER STATES: EUROPE'S GREEN ENERGY POLICIES UNDER THREAT?

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Abstract
As a consequence of rising environmental concerns, a substantial number of EU member states undertook various programs aimed at subsidizing the renewable energy sector and promoting related foreign (and domestic) investment. During the 2010s, several renewable energy programs were replaced by less favourable legal regimes. These changes led to foreign investors suing the relevant countries, through the controversial investor-state dispute settlement (ISDS) mechanism reserved solely for foreign investors. The costly nature of ISDS proceedings (such as legal fees and large arbitral awards) could cause a discouraging effect among member states considering similar renewable energy programs. This research thus aimed to examine whether such concerns have potential merit, whether the cases result in a downturn for renewable promotion in the EU. The method for doing so was through investigating two ISDS cases, followed by an analysis of the two affected countries' stance towards renewable energy before, during and after the ISDS process, and briefly discussing what lessons for other states could be found in the rulings. The research's finding was that a clear discouraging effect could not be established in either cases, and that it is unlikely that ISDS will negatively affect renewable energy promotion.

Key words*: investment, ISDS, solar, renewables, arbitration*

Introduction

The issue of foreign investment protection has always been relevant in the past decades, but since the 1990s, its importance has skyrocketed. Given the interconnectedness of the global economy, the extreme proliferation of BITs (Bilateral Investment Treaties), usually with the very same or similar content, the field of investment protection has grown to gigantic proportions as a result. In the process, it has acquired its own distinctive legal nature, its own concepts, standards and mechanisms. Chief of these is the ISDS (Investor-State Dispute Settlement), a unique method of dispute resolution that involves the use of ad hoc international arbitration tribunals. Despite its popularity among the involved parties, ISDS has come under heavy scrutiny in the past two decades, due to its perceived inadequacies, such as its costly nature, supposed bias towards foreign investors (only they can initiate claims, and the arbitrators operate in a for-profit scheme), lack of transparency and lack of consistency. In this article, it wouldn't make sense to describe all of the system's criticisms at length, and so the focus will be narrow.

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In particular, ISDS has great potential to conflict with sustainable development, environmental regulations and green energy. This article will focus on the latter. To be specific, due to rising environmental concerns, a substantial number of EU member states undertook various programs after the turn of the millennium, aimed at subsidizing the renewable energy sector and incentivizing related foreign (and domestic) investment. Such national measures were supported by EU-level policies, like the first Renewable Energy Directive (2009/28/EC). During the 2010s, some of these renewable energy programs ended or were replaced by other legal regimes. However, these changes also led to foreign investors suing several countries, using the abovementioned ISDS mechanism. The foreign investors cited breaches of the fair and equitable treatment standard and frustration of legitimate expectations, among other claims. The already mentioned issues with ISDS could cause a discouraging effect among member states considering similar renewable energy programs, as they might consider it simpler to just not adopt such promotive programs in the first place, and thus evade the ISDS consequences. This article thus aims to examine whether such concerns about these ISDS cases have potential merit, and whether it is possible that ISDS could cause a downturn in the incentivization of green energy within the EU.

Results and discussion

Before we begin discussion of the individual cases, it is imperative to note a few common elements. Each case concerns the issue of solar energy, that is to say, its subsidization. In both cases, these subsidization programs were undertaken between 2003 and 2007. Furthermore, the basis of the two disputes is the Energy Charter Treaty (ECT). The ECT is a multilateral treaty that was signed in 1994 and entered into force in 1998. Its primary aim was to promote cooperation in the field of energy by various provisions concerning a wide range of topics, from investment protection (which is the relevant section for this article), to various trade and transit provisions. It also has more than fifty members. (Sussman, 2008 p. 1) The ECT's importance is heightened by the fact that like with many other treaties containing investment provisions, it practically becomes a compulsory applicable law (both with regards to the jurisdiction and the substance of the case) in ISDS cases based around it. The only notable exception to this is that when it comes to jurisdiction, the ICSID Convention also has to be considered. (Tietje, 2008 pp. 5-7) Furthermore, it should be noted that both cases are centrally based on the same paragraph of the same article of the ECT, Article 10(1). (<https://www.energychartertreaty.org/provisions/part-iii-investment-promotion-and protection/article-10-promotion-protection-and-treatment-of-investments/>)

This paragraph establishes a number of different principles when it comes to the treatment of foreign investments, such as fair and equitable treatment, or protection against discrimination. (Hobér, 2010) In the cases, it will be this unique take on the fair and equitable treatment (FET) standard that will play a major role. And so, it will provide the central focus of the following analysis as well. And with that, let us begin the case examinations.

Eiser and Energía Solar v. Spain

The first case to be examined is *Eiser and Energia Solar v. Spain*. (<https://www.italaw.com/cases/5721>) In this case, the foreign investors were of Luxembourg and the United Kingdom. The case originated from 2013, but its background stretches all the way back to 2007. This was when Spain (the host state) decided to incentivize foreign investments in the renewable energy sector, and therefore created a tariff regime that practically guaranteed profitability for producers choosing renewable energy as their method of choice. As this regime was very favorable to foreign investment, the foreign investors involved in the case decided to open three plants that used renewable energy in Spain. However, this was not to last. Due to the global economic crisis, and various other factors such as increasing costs, Spain ultimately

decided to do away with the tariff system. And so, between 2012 and 2014, the regime was removed and replaced with a new one. This new system sought to guarantee a sort of reasonable return to the investors, and was based on an alternate method of tariff calculation compared to the previous one. Spain also decided to extend the applicability of these reforms to existing investments. The foreign investors who initiated the proceedings claimed heavy financial losses as a result, including operating their plants at a clear loss.

Thus, the case came to be in 2013, with the main legal dispute centering around Article 10(1) of the Energy Charter Treaty that we already discussed above. When interpreting the facts of the case, the tribunal notably found that not only Spain completely eliminated the previously favorable tariff regime, it also applied the new rules under a "one size fits all" approach, not taking into account that existing plants and other facilities were constructed and operated under a very different regime. The tribunal in this case also noted that while it's true that investment treaties do afford the ability to change legislative schemes to the host states as a rule of thumb (barring specific obligations and guarantees given to the particular foreign investor), it is also true that Article 10(1) of the ECT imposed an obligation on the host states that demanded a certain degree of circumspection when it comes to changing the legal framework so thoroughly. In the tribunal's view, Spain failed to meet this obligation, and thus awarded the foreign investors 128 million euros plus interest, in 2017.

This case could be considered a prime example of an ISDS case that would prompt the host state to not further engage in renewable energy subsidies, as well as serving as a warning to others who intend to do the same. However, it should be noted that the tribunal took a somewhat measured approach here, and did not condemn Spain's actions wholesale, rather, the lack was found in Spain's application of the new regime (one size fits all), instead of the regime in itself. Another facet of their decision was evidently the staggering loss of profitability, which they themselves highlighted in the award.

Blusun v. Italy

Blusun v. Italy (<https://www.italaw.com/cases/5739>) also concerned a tariff scheme. In this particular case, Italy had adopted a feed-in tariff mechanism in a 2003 decree, aimed to promote investments in the renewable energy sector. As a consequence of this scheme, the foreign investors (Belgian, French and German when concerning the specific claimants) undertook a solar energy project in Puglia, starting from 2008-2009. However, shortly after this, a slew of regulatory changes occurred, including alterations in the Puglia regional law, and a new decree in 2011 that aimed to repeal and replace the earlier 2003 decree. This decree was less favorable to private actors in the solar energy field, and this was made known to the government at the time (as undisputed by both claimants and the respondent). Another decree followed in 2012, concerning the use of agricultural land for renewable energy. Overall, the investment lost significant value due to these regulatory changes, and as the only route to potential viability was radical overhauls to the project, it was abandoned.

As such, an ISDS case was brought against Italy by the abovementioned foreign investors, in 2014. As was already mentioned, the basis of the dispute was once more the Energy Charter Treaty, particularly Article 10(1). However, in this case, the tribunal decided to place a heavier emphasis on the paragraph's caveat that host states are allowed to change their regulatory framework, only noting that any such changes should not be disproportionate to the aims of the amendment. In this particular scenario, the tribunal found that Italy's changes were neither disproportionate nor unfair to the foreign investments, and were in line with the regulatory objectives Italy sought to achieve, and thus the regulatory changes failed to meet the level necessary for them to constitute a violation of Article 10(1). The tribunal further highlighted that

the only exception under this would be if the host state undertook specific obligations towards the investors, which didn't happen in this case.

Overall, we can see that this case while similar to Spain's, was marked by a fundamentally different resolution. While it would be easy to chalk it up to the inconsistency of arbitral tribunals, it has to be noted that Italy's actions were indeed more circumspect and nuanced than Spain's brute force reforms, which as the tribunal itself noted, highly influenced the outcome.

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Conclusion

With the two cases successfully analyzed, it is time to extrapolate on the perceived effects of these cases. In general, we can observe that in one case, the host state lost, but in the other, it emerged victorious. However, even a victorious ISDS case takes time, money and resources from the host state. As a result, it would still be worthwhile to examine just how the involved countries reacted. Besides them, it would also be necessary to briefly discuss in general terms whether a discouraging effect in other EU member states could potentially result from these cases or not.

So, the first country to be examined is Spain. The dispute began in 2013 and ended in 2017, with Spain's defeat. Thus, let us see how solar energy's legal environment developed in the country during this period and afterwards. The first aspect we can clearly observe is that during this period of time, Spain followed a very hostile course of action against solar energy. Very shortly after the *Eiser* case began in the earnest (as was briefly referenced previously), Spain introduced a new law that scrapped the previous tariff system completely, and replaced it with a much less favorable system that forced solar energy to compete with other energy producers on equal terms, among other aspects. (Renewable Energy World 1, 2015) This was followed by the country's infamous "sun tax", that further disincentivized the use of solar energy, and caused it significant issues with the rest of the EU. (Renewable Energy World 2, 2015). Thus, we can easily consider that the ongoing *Eiser* case (if it proved a contributing factor) did provoke the Spanish government into pursuing a harsher policy against solar energy, perhaps in an effort to avoid further cases brought against it due to favorable regulatory environments being changed to less favorable ones. Nevertheless, it is questionable whether this tactic was sensible, and whether the avoidance of costly ISDS cases really acted as a contributing factor. In fact, a year after Spain lost the case, it changed tack significantly with regards to solar energy, with the new government aiming to repeal the sun tax and create a less hostile environment for solar energy. This culminated in a series of new regulations that moved Spain back towards its original stance of non-hostility. (PVEurope, 2018) Overall, we can conclude that while *Eiser* possibly had a negative short-term effect while it was ongoing, the case's conclusion not only did not discourage Spanish incentivization of renewables, but whether coincidentally or not, it led to a bigger embrace of subsidies.

Next up to be discussed is Italy. In Italy's case, despite the country's seemingly well-informed approach to renewable energy, it perhaps came as a surprise that it decided to withdraw from the Energy Charter Treaty in late 2014, early 2015. (De Luca, 2015) However, it should be noted that

this withdrawal didn't cause any trouble to pending ISDS cases, and thanks to the ECT's clauses, it can be applied to even future cases, provided the investments were made during a time when the Energy Charter Treaty was applicable. On the other hand, despite Italy's decision in this matter, it is undisputable that solar energy in Italy continued growing through the years of the case, and so far, has shown no signs of stopping since its conclusion. (Eni School Energy & Environment, 2016) Furthermore, there were no significant policy turns. Thus, it can be clearly stated that the ISDS case didn't discourage or influence Italy, perhaps only with regards to its decision to withdraw from the ECT.

In conclusion, we can see that in the two involved states, we can show some signs of stagnation or minor discouragement to different levels, but we cannot fully state that a true discouraging effect took place as a result of the ISDS arbitrations, save perhaps for Spain, and even in that case, the process reversed rather soon. And if there are no clear indicators for this in the affected states, then it is likely that the same would be true for other EU members. In order for a discouraging mechanism to be effective cross-border, it is my opinion that it necessarily has to be sufficiently grave. While Spain has been trounced in ISDS, Italy's example shows to the other member states that it is possible to evade this problem if proper circumspection is followed. Regardless, it would be worthwhile to revisit this topic once a few more years have passed, with perhaps more solar energy-related cases to draw upon, and with a larger period of time to examine in general.

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