Renewable Energy Reforms in Europe: Growing Threats to International Investors

With a view to increasing the production of clean energy, a number of countries—including Spain, the Czech Republic, Italy, Romania, and Bulgaria—introduced incentives to entice companies to invest in their renewable energy sector. In many cases, these incentives took the form of a feed-in tariff (“FiT”), this is, a guaranteed electricity purchase price set higher than market rates. Many companies and individuals made investments in reliance on the stability of the incentives offered by the states. After the advent of the global financial crisis, Spain, the Czech Republic, Italy, Romania, and Bulgaria began to roll back these incentives, including by reducing FiTs.

Spain
In 2010, the Spanish Government enacted measures that retrospectively reduced the FiTs in the solar energy sector. The same year, it enacted measures that substantially cut some incentives granted to wind generation. Subsequently, the Spanish Government adopted further measures affecting the renewable energy sector; for example, it imposed a limit on the FiT of 25 years, and also imposed an annual cap on the number of hours of electricity the investors could sell at the above-market rates. By way of a reform enacted in July 2013, the Spanish Government abrogated the FiT system altogether. To become fully operational, the reform of July 2013 required the passing of specific regulations. These regulations, which were approved on June 6, 2014, entail that qualifying producers of renewable energy shall receive a return on their investment consisting of a "reasonable" rate. This rate has been fixed at 7.4 percent as at June 6, 2014. In general, this rate is significantly lower than the level of return originally set out within the abrogated FiT framework. The Spanish Government has indicated that under this new framework, the amount of incentives paid to renewable, co-generation and waste energy sources is to be cut in 2014 by approximately Euro 1.7 billion.

Czech Republic
Elsewhere, in 2011, the Czech Government amended the Act on Promotion of Electricity Production from Renewable Sources, introducing a new levy on electricity generated from solar power plants put into operation in 2009 and 2010. The levy imposed is 26 percent of the FiT.

Italy
Similarly, from 2011, the Italian Government has implemented a number of measures that have affected the renewable energy sector, including reductions in FiTs and the end of incentives granted to photovoltaic plants situated in agricultural land.

Romania
In June 2013, the Romanian Government published an emergency ordinance which amended the law on Renewable Energy Sources. The amendments, which included the suspension of Green Certificates to hydro, wind, and solar technologies and exclusion of some photovoltaic plants from the Romanian Government support scheme, have significantly cut the incentives offered to renewable energy producers in the country.

Bulgaria
Most recently in January 2014, a 20 percent tax on income from solar and wind plants was imposed in Bulgaria, effectively reducing the amount of the FiT available to producers of renewable energy.
International Investors may be Entitled to Redress

International investors that invested in Spain, the Czech Republic, Italy, Romania, and Bulgaria and that might have been affected by governmental measures may be entitled to obtain redress (including potentially significant compensation) under some international instruments, in particular the Energy Charter Treaty (the “ECT”) and relevant bilateral investment treaties (“BITs”).

The ECT

The ECT is a multilateral investment treaty that establishes a legal framework for investment and energy trade. Among other things, it allows investors to file arbitration claims directly against member states for violations of their protections under the ECT. Some of the protections in the ECT include the obligation on the host state to accord fair and equitable treatment (“FET”) and full protection to investments, the prohibition to discriminate, and, in general, to expropriate. In particular, a number of arbitral tribunals have concluded that the FET protection contains the obligation on the part of the state to protect an investor's legitimate expectations and provide a stable legal environment.

BITs

Similarly to the ECT, BITs also allow investors to bring claims directly against a state for breach of various guarantees, including FET, full protection and security, and freedom from discriminatory treatment.

Current Claims

Thus far, investors have commenced 10 arbitrations against Spain alleging violations of the protections set out in the ECT. The first claim was filed by a group of 88 investors at the end of 2011. It is anticipated that additional claims will be filed as a result of the recent approval of the regulations implementing the reform of July 2013 (mentioned above).

In 2013, seven arbitrations under the ECT and a number of BITs were commenced against the Czech Republic. The claimants argue that a number of measures taken by the Czech Republic, including the 26 percent levy on FiT mentioned above, would violate a number of substantive protections in the ECT and BITs concluded by the Czech Republic with Cyprus, Germany, Luxemburg, the Netherlands, and the United Kingdom.

On 21 February 2014, the International Centre for Settlement of Investment Disputes (“ICSID”) registered the first known claim filed against Italy for alleged violations of the protections in the ECT. The claimants are investors in the photovoltaic solar sector in Italy.

Future Claims

The treaty claims discussed above show that under the ECT and applicable BITs, investors have meaningful protections against reforms that may have harmed their investment in the renewable sector. Accordingly, investors that might be affected by the reforms in Spain, the Czech Republic, Italy, Romania, or Bulgaria should consider the possibility of bringing a claim under the ECT or a relevant BIT.

Winston & Strawn’s attorneys have substantial experience representing parties in arbitrations under the ECT and in both commercial and investment treaty arbitration including in relation to measures imposed on the renewable energy sector.

For more information, please contact:

International Arbitration
Joe Tirado (jtirado@winston.com)

Energy
Jerry Bloom (jbloom@winston.com)