Recent developments in solar energy sector across Europe

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Introduction

Many EU member states have passed laws in recent years to encourage solar energy investment. However, solar energy may have become a victim of its own success. According to certain industry experts, certain subsidies and tariffs may have been overly generous, particularly given the decrease over the past few years in the cost of producing photovoltaic panels. As a result, several European countries – including Bulgaria, the Czech Republic, Greece, Italy, Romania and Spain – are backtracking and modifying their solar energy laws. However, these changes may contravene applicable bilateral investment treaties or the Energy Charter Treaty, giving rise to claims by investors.

Drive for use of renewable energy

The European Union's drive for renewable energy is motivated by the desire to:

- reduce fossil fuel dependency (including oil and gas from Russia);
- increase energy security; and
- diversify energy resources.

In 2009 the European Union issued a directive setting the goal that by 2020, at least 20% of energy consumed in the European Union shall be from renewable sources.(1)

In conjunction with this directive and the drive towards renewable energy, many EU member states have passed laws to encourage sector investment, including in the solar energy sector. In particular, many countries offered subsidies or proposed a feed-in tariff system, whereby solar energy investors could sign long-term contracts under which the market operator would commit to purchasing all of the energy that the investor produced at an above-market rate. As a result of such measures, investment flowed in and many countries witnessed a significant increase in their photovoltaic capacity. For instance, Greece's photovoltaic capacity increased from 620 megawatts (MW) in 2011 to 2,600MW in September 2013.(2) Italy's solar energy regulations resulted in an increase in subsidies from €750 million in 2010 to €6.7 billion in 2013. Conversely, investors have invested over €50 billion in the Italian renewable energy sector in the past five years.(3)

Solar energy – a victim of its own success

According to some industry experts, certain subsidies and tariffs may have been overly generous, particularly given the recent decrease in production costs of photovoltaic panels.(4) In early October 2014 the European Commission noted that certain countries faced high electricity tariff deficits.(5) As a result, several European countries have modified or are modifying their solar energy laws. According to one press report, the Italian government indicated that the changes were "necessary to combat the 'excessive investments' into the solar and wind energy sectors".(6)

Recent changes

The recent changes to solar energy laws have often involved fiscal changes and tariff and subsidy cuts. Often, the only alternative to such cuts is to drastically increase the electricity end price for consumers, which governments are reluctant or unable to do.(7)

In Italy, under Law 116 (which came into effect in August 2014), owners of photovoltaic plants with a capacity of over 200 kilowatt-peak were required by November 2014 to choose between partial deferral of the payment of subsidies or a cut in subsidies (the amount of which would depend in part on the capacity of the plant), with a possible extension of their subsidies from 20 to 24 years. Plant owners will also be required to pay a 5% general system charge to cover the administrative costs of the solar energy measures.(8) The cuts and additional charges took effect in January 2015.

Bulgaria amended its Renewable Energy Act in December 2013 by imposing a 20% fee on income from wind and solar power installations, effective as of January 2014. It also limited the volume of electricity purchased at feed-in tariff rates. Whereas the national electricity company was previously required to purchase the entire volume of electricity produced via renewable energy technology at applicable feed-in tariff rates, it is now required to purchase only an amount specified by the State Energy and Water Regulatory Commission. Any additional renewable energy produced must be purchased at the price at which the national electric company sells electricity to end suppliers or distribution companies. These measures led to a decrease in investment in the solar energy sector in 2014.(9)

While Bulgaria's Constitutional Court invalidated the 20% fee in August 2014, the ruling has not had retroactive effect and solar (and wind) energy producers will not be reimbursed payments made since January 2014. The other part of the law that limits the volume that the national electricity company is required to purchase at feed-in tariff rates, remains in force.

On March 30 2014 Greece enacted a law(10) that retroactively cut solar feed-in tariffs by approximately 30%. Under the new measures, solar energy producers were required to contribute approximately 35% of their 2013 income (by issuing a credit invoice) to the market operator within two months of the law's entry into force. Unless and until the solar energy producer does so, the market operator is not required to compensate that producer for energy produced following the entry into force of the new law.

Further, under the new law renewable energy providers are required to pay a solidarity tax on their now reduced 2013 income.(11) After the expiration of the extended term of the power purchase agreements, any energy will be sold at market conditions and prices.

Finally, Romania enacted a measure in December 2013 which reduced the number of green certificates awarded to renewable energy producers for projects completed after January 1 2014. In Romania, renewable energy providers traditionally receive a certain number of green certificates per MW of energy produced for a 15-year period following the commissioning of the plant. Under the amended system, photovoltaic projects completed after January 1 2014 will receive only three green certificates per MW, instead of six.(12)

These recent legislative changes come on the heels of earlier significant changes to the solar energy laws in other European countries (eg, Spain and the Czech Republic). Since 2008, Spain has passed a series of measures resulting primarily in tariff and subsidy cuts and a 7% tax on the sale of electricity, applying to both existing and future projects.(13) Similarly, in 2011 the Czech Republic imposed a levy on electricity generated from solar power plants.(14)

Legal repercussions

Changes to the legal and regulatory frameworks of certain states may not only discourage future investment, but also give rise to legal proceedings by foreign investors. These changes could contravene domestic law, EU law (including EU Directive 2009/28/EC), any applicable bilateral investment treaties (BITs) and the Energy Charter Treaty. Investors may have BIT or Energy Charter Treaty claims for, for instance:

- expropriation;
- breach of contract; and
- failure to grant their investments fair and equitable treatment.

They may thus be able to claim specific performance of original contractual agreements or obtain monetary damages.

Certain states are already facing legal action by foreign investors as a result of changes to their solar energy laws. In 2013 foreign investors from Cyprus, Germany, the Netherlands and the United Kingdom initiated at least seven arbitration proceedings against the Czech Republic. The cuts in tariffs and subsidies and the imposition of a 7% tax also led to the initiation of a litany of arbitration proceedings against Spain in 2013 and 2014.(15) It has also been reported that arbitration proceedings were initiated in 2014 against Romania and Italy in connection with the changes to their solar energy laws.(16)

International arbitration proceedings

The European Commission has sought leave to intervene as *amicus curiae* (an interested party) in arbitrations relating to the renewable energy sector. In July 2014 the commission sought leave to intervene in six of the arbitrations against the Czech Republic.(17) The commission also sought, but was denied, leave to intervene in two of the arbitrations against Spain.(18)

In one such recent *amicus curiae* submission,(19) the commission contended that the exemptions from the payment of certain charges on the consumption of electricity that were in turn used to support the production of renewable energy amounted to a form of state aid that violated Article 107(1) of the

Treaty on the Functioning of the European Union.(20) It has also been reported that the commission has argued in at least two arbitrations that EU investors cannot rely on the Energy Charter Treaty to bring claims against EU member states, one of which has nevertheless resulted in an award in favour of the claimant.(21)

Comment

Investors in EU countries suffering from the effects of these recent legislative changes should consider carefully whether they have recourse under the relevant legislative framework. Parties seeking to invest in European solar energy should equally study the legal and regulatory framework of the country in question, including whether the Energy Charter Treaty or any BIT would govern their envisaged investment project and what protections it would afford. Given the commission's efforts to discourage reliance on intra-EU BITs (and possibly the Energy Charter Treaty, as applied to an investment by an EU investor in a different member state), potential EU investors wishing to invest in other EU countries should consider investing through a non-EU structure. Conversely, states envisaging changes to their solar energy laws should study carefully the possible legal repercussions, including the risk of violating international treaty obligations and of thereby triggering legal proceedings as a result of such changes.

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Endnotes

(1) EU Directive on the Promotion of the Use of Energy from Renewable Sources (2009/28/EC, April 23 2009).

(2) "Electricity Tariff Deficit: Temporary or Permanent Problem in the EU?", EU Commission Economic Paper 534, October 2014, at 33.

(3) "Italy's Planned Solar Subsidy Cuts Risk Scaring Off Investors", June 23 2014.

(4) "Spain's Solar Pullback Threatens Pocketbooks", January 5 2014 and "Old Energy is Doing Everything It Can to Stop the Rise of Solar", September 28 2014.

(5) "European Commission Report Point to Electricity Tariff Deficit in Bulgaria", October 3 2014.

(6) "Solar PV Sector in Italy Mulling Legal Options after FiT Cuts", September 22 2014.

(7) In early October 2014 Bulgaria increased energy prices for consumers by approximately10%. "European Commission Report Point to Electricity Tariff Deficit in Bulgaria", October 3 2014.

(8) "Italy Adopts Decree-Law with Significant Retroactive FiT Cuts, New Taxes for Self-Consumed Solar Electricity", September 8 2014.

(9) In the first half of 2014, newly installed photovoltaic capacity in Bulgaria represented 1.18MW, by contrast with 843MW in 2012. "Bulgarian Constitutional Court hands down victory to solar industry", August 7 2014 and "Important Amendments to the Renewable Energy Act, effective from January 1 2014", January 7 2014.

(10) "Electricity Tariff Deficit: Temporary or Permanent Problem in the EU?", EU Commission Economic Paper 534, October 2014, at 34.

(11) "Greece Amends Retroactive FIT Cuts; leaves solar PV sector divided," *PV Magazine*, March 28 2014.

(12) "Romania Halves Certificates for Solar PV Starting January 2014", December 31 2013.

(13) "Foreign Investment Arbitral Claims Continue to Pile Up on Spain, As Government Turns Screws on Energy Sector", Fabricio Fortese, December 5 2013; "Old Energy is Doing Everything It Can to Stop the Rise of Solar", September 28 2014; "38% of Spain's July Electricity Demand was Met by Wind and Solar Power", August 15 2014; "Spain Approves Bill to Retroactively Cap Solar Investment Returns", June 24 2014; and "Spain's Solar Pullback Threatens Pocketbooks", January 5 2014.

(14) "Sun Rises on Czech Energy Claims", Global Arbitration Review, February 19 2014; "Recent Developments in Investor-State Dispute Settlement", United Nations Conference on Trade and Development (UNCTAD) Issue April 1 2014.

(15) Seven of the suits are International Centre for Settlement of Investment Disputes (ICSID) proceedings: *RREEF Infrastructure (GP) Limited v Kingdom of Spain* (ICSID Case ARB/13/30); *Antin Infrastructure Services Luxembourg Sàrl v Kingdom of Spain* (ICSID Case ARB/13/31); *Eiser Infrastructure Limited v Kingdom of Spain* (ICSID Case ARB/13/36); *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain* (ICSID Case ARB/14/1); *NextEra Energy Global Holdings BV v Kingdom of Spain* (ICSID Case ARB/14/11); *InfraRed Environmental Infrastructure GP Limited v Kingdom of Spain* (ICSID Case ARB/14/12); and *RENERGY Sàrl v Kingdom of Spain* (ICSID Case ARB/14/18). At least two of the suits are Stockholm Chamber of Commerce arbitrations; involving Energy Charter Treaty claims and several of the suits are *ad hoc* United Nations Commission on International Trade Law proceedings. See also "Sun Rises on Czech Energy Claims," February 19 2014 and "Recent

Developments in Investor-State Dispute Settlement," United Nations Conference on Trade and Development Issue 1, April 2014.

(16) "The Miculas are back," Global Arbitration Review, November 21 2014; "Recent Developments in Investor-State Dispute Settlement," United Nations Conference on Trade and Development Issue 1, April 2014, at 5; and "Italy risks claims over solar subsidies," Global Arbitration Review, December 8 2014.

(17) "Brussels' Latest Intervention Casts Shadow Over Investment Treaty Arbitrations Brought by Jilted Solar Energy Investors," Luke Eric Peterson, September 8 2014.

(18) "Intra-EU Treaty Claims Controversy: New Decisions and Developments in Claims Brought by EU Investors vs. Spain and Hungary," Luke Eric Peterson, December 24 2014 (referring to decisions rendered in December 2014: *Antin Infrastructure Services Luxembourg v Spain* and *Eiser Infrastructure v Spain*).

(19) In PCA case *US Steel Global Holdings v Slovak Republic*.

(20) That article provides in relevant part that "any aid granted by a Member State… which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

(21) "Brussels' Latest Intervention Casts Shadow Over Investment Treaty Arbitrations Brought by Jilted Solar Energy Investors," Luke Eric Peterson, September 8 2014; "Investigation: In Recent Briefs, European Commission Casts Doubt on Application of Energy Charter Treaty to Any Intra-EU BIT," Luke Eric Peterson, September 8 2014; "Intra-EU Treaty Claims Controversy: New Decisions and Developments in Claims Brought by EU Investors vs. Spain and Hungary," Luke Eric Peterson, December 24 2014 (referring to *EDF v Hungary*, December 4 2014).