The Investment Treaty Arbitration Review

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Chapter 14

THE ENERGY CHARTER TREATY AND THE SPANISH RENEWABLE ENERGY AWARDS

Clifford J Hendel[1]

I INTRODUCTION

Investment arbitration is in its heyday. Once an arcane world known only to a small cadre of elite practitioners, technocrats, policy wonks and academics, investment arbitration today is big business and big news. The heated and highly public debate over the proper role of investor–state dispute settlement mechanisms in the context of the ongoing transatlantic (Transatlantic Trade and Investment Partnership or TTIP) and trans-Pacific (Trans-Pacific Partnership or TPP) multilateral trade negotiations is proof positive of the maturity of investment arbitration.

The Energy Charter Treaty (ECT),[2] a multilateral treaty for the protection of foreign investment and the promotion of international trade and competition in the energy sector, has in recent years attracted a very significant amount of investment claims. Several factors explain this activity, including of course, geopolitical and economic considerations having special impact on investors and investments in the energy sector. But the key factor in the recent prominence of the ECT in investment arbitration is its availability to serve as the substantive basis for investors in the renewable energy sector to challenge regulatory changes recently imposed in a number of ECT member states. The ECT has proven to be the go-to option to challenge regulations having the intent and effect of reducing economic incentives that were accorded to investors in the sector before the financial crisis hit, to ensure an attractive return on their investment.

Spain is now the poster boy of ECT arbitration. Its once very generous incentives in the renewable area (particularly the feed-in tariffs in the photovoltaic sector) have been successively rolled back in recent years. A veritable barrage of ECT arbitral proceedings (more than two dozen as of this writing) has followed.

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2 www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf.

The jurisprudence that will flow from these cases – only one of which has reached an award on the merits as of this writing[3] – is likely to provide important guidance on some key issues of ECT law and practice, particularly involving the scope of the protection against indirect expropriation and the ever slippery borderline between legitimate expectations and host state regulatory power.[4]

The aim of this chapter is to provide overviews of the ECT and its investment protection regime (Section II), of renewable energy claims under the ECT (Section III), and of the background of the Spanish renewable cases (Section IV), and then to discuss the first and (to date) only award on merits that has been issued among these cases (Section V).

The intention of the editor and author is to devote chapters in the 2017 and 2018 editions of this *Law Review* to a discussion of the Spanish renewable awards that will have been issued by then, identifying lessons learned and jurisprudence established. Given the nature of the issues involved, the amounts at stake, the disputants, their advisers and the adjudicators, it can be expected that these awards will play a significant role in the development and clarification of ECT jurisprudence, and of investment arbitration jurisprudence generally.

II THE ECT AND AN OVERVIEW OF ITS INVESTMENT PROTECTION REGIME[5]

The inception and genesis of the ECT dates from the early 1990s. This was the time of the breakdown of the Soviet empire, the reunification of Germany and of a general reconfiguration of East–West relations, both political and commercial. Russia and its Eastern European neighbours were energy rich but investment poor; western Europe was rich but anxious to diversify sources of energy supply (as well as to contribute to, and benefit from, the reconstruction of Eastern Europe and its integration into the fold of the Western economic and political system).

Born to foment this process and establish a commonly accepted foundation for energy cooperation in Europe and Asia, what is today the ECT began in 1991 with a non-binding declaration of principles including guidelines for the negotiation of a subsequent binding treaty.

3 *Charanne B.V. y Construction Investments S.A.R.L. v. El Reino de España*, SCC 062/2012 (www.minetur.gob.es/es-es/gabineteprensa/notasprensa/2016/documents/laudo%20final%20arb%20062-2012.pdf).

4 See generally Catherine Titi, *The Right to Regulate in International Investment Law*, Hart Publishing (Oxford), Studies in International Law, Vol. 10 (2014), and R Dolzer, 'Fair and Equitable Treatment: Today's Contours', 12 *Santa Clara J Int'l Law.* 7 (2014).

5 This section draws on some of the excellent recent literature available on the ECT, notably: S Jagusch, A Sinclair and P Devenish, 'The Energy Charter Treaty: The Range of Disputes and Decisions', *Global Arbitration Review: The Guide to Energy Arbitrations* (general editor J William Rowley QC, editors D Bishop and G Kaiser, 2015) pp. 30–45; K Hober, 'Investment Arbitration and the Energy Charter Treaty', *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), pp. 153–190; and N Eliasson, '10 Years of Energy Charter Treaty Arbitration', keynote speech at conference '10 years of Energy Charter Treaty Arbitration', organised by the Stockholm Chamber of Commerce, Energy Charter Secretariat and ICSID, Stockholm, 9–10 June 2011.

The ECT itself, the only binding multilateral instrument dealing with inter-governmental cooperation in the energy sector, was signed in December 1994 and entered into effect in April 1998.[6]

The cornerstones of the ECT are its investment protection regime and dispute settlement system.[7]

Insofar as investment protection is concerned, the ECT's critical provisions are the Article 13 protection against undue and uncompensated expropriation and the Article 10(1) guaranty of fair and equitable treatment (FET), particularly in the context of adverse regulatory measures.

i Protection against direct or indirect expropriation under the ECT

Reflecting the position under customary international law and the provisions typically included in bilateral investment treaties, the ECT does not *per se* prohibit expropriation (whether 'direct', by transfer of legal title, or 'indirect' by measures short of transfer of legal title, but having the essentially equivalent effect of extinguishing the titleholder's benefit of his or her property). Instead, the ECT subjects to a series of conditions a host state's right to expropriate the property of investments made in that state by ECT investors. Article 13(1) provides as follows:

> *Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.*

6 As of this writing, 52 states have signed the Energy Charter Treaty. All EU states are individual signatories, but the Treaty has also been signed collectively by the EU and Euratom so the total number of parties to the Treaty is 54 although five of these states have not ratified the Treaty yet. The Russian Federation is one of the states that has signed but not ratified the treaty; it has, however, accepted its provisional application. See www.energycharter.org/process/frequently-asked-questions.

7 As of this writing there have been 88 investment arbitration cases under the ECT up to the end of 2015; 50 per cent of these arbitrations are pending while at least nine cases were settled amicably by the parties through mediation or negotiation (W von Kumberg and M Cover in 'The Energy Charter Treaty and ADR in the Context of Investor/State and Other Disputes', Energy Charter Secretariat, (2016), p. 3). See: www.energycharter.org/fileadmin/DocumentsMedia/Occasional/ECT_and_ADR_in_context_of_Investor-State_and_other_Disputes.pdf. As of this writing, some 17 per cent of the ICSID arbitrations filed to date relate to the electric power and other energy sector, with approximately half of these (8.8 per cent of ICSID arbitrations in all) being based on the ECT. For details, see ICSID, 'The ICSID Caseload – Statistics (issue 2016-1)', p. 12: https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf.

> *Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the 'Valuation Date'). Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.*

ii Guaranty of fair and equitable treatment under the ECT

The ECT's FET protection, again following customary international law and investment treaty practice (but with arguably greater specificity and broader reach), is included along with other key ECT protections in Article 10(1), which provides as follows:

> *Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*

A critical element of the FET analysis, which in general involves a very fact-specific assessment of government-investor conduct and relations, is the extent to which legitimate investor expectations with respect to the host country's maintenance of a stable and predictable business and legal environment have (or have not) been respected.[8] This is surely to be the core issue and principal bone of contention in the Spanish renewables cases, as we shall see below.

iii Dispute settlement under the ECT

Article 26(1) of the ECT deals with the resolution of disputes between 'Investors' of a 'Contracting Party' relating to 'Investments' effected by such 'Investors' in the 'Area' of another 'Contracting Party' (as such terms are defined in the ECT). If amicable resolution of a dispute is not reached within three months of the investor's having requested the same, the investor is entitled to choose to submit the dispute to one of the following fora: the national courts or administrative tribunals of the contracting party; the forum previously agreed by the parties; or international arbitration. In this latter case, the investor may choose among ICSID arbitration (where both states have ratified the ICSID Convention),[9] *ad hoc* arbitration under the UNCITRAL Arbitration Rules or arbitral proceedings under the Arbitration Institute

8 Legitimate expectations have been referred to as 'the central pillar in the understanding and application of the FET standard', Dolzer, footnote 4, *supra*.

9 If one but not both of the host state and investor's state have not ratified the ICSID Convention, the investor may elect arbitration under the ICSID Additional Facility Rules.

of the Stockholm Chamber of Commerce. ICSID tends to be the predominant choice, and concentrates the large majority of the Spanish renewables cases (as will be seen in the table below). Interestingly, though, the first four Spanish claimants opted for UNCITRAL and the Stockholm Chamber of Commerce (SCC) proceedings, not ICSID.

The reference to the SCC serves as clear evidence of the ECT's initial genesis and early days as an East–West instrument, when Europe was divided and Scandinavia often acted as a neutral buffer. Over the subsequent decades the ECT has evolved; or, more accurately, the world in which, and the sector to which, the ECT applies has evolved. As the Spanish renewables cases attest, the ECT is no longer merely or essentially an East–West (host–investor) investor protection treaty but rather a true multilateral, multidirectional investor protection treaty with very significant West–West or intra-EU applications as well.

III RENEWABLE ENERGY CLAIMS UNDER THE ECT[10]

Just as energy and natural resources generally – because of factors such as the long-term nature of the energy business and the inherent unpredictability of energy supply, demand and price – have proven to be fertile ground for international commercial arbitration, so too have energy and natural resources been dominant drivers of investment disputes, thanks largely to the ECT and the market liberalisations introduced in ECT member states during the 1980s and 1990s.

The subsector of renewable energy shares with the broader area of energy and natural resources generally the long-term, costly and inherently international business structure that makes international arbitration the preferred (if not only) mode of dispute resolution for most energy-related disputes of an international nature. But the renewable sector has one further characteristic that makes it and the ECT (and investment arbitration) the perfect couple; that characteristic is the fact that heavy upfront costs required for investments in the still unprofitable renewables sector prompted governments worldwide to enact support schemes of various types to incentivise investment and give effect to commitments made to reduce greenhouse emissions and promote clean energy. This support typically involved long-term calculations based on assumptions and expectations deriving from the regulatory regime, including the incentive schemes themselves.

As noted above, international law in general, and in particular the ECT, provides two principal protections that imply regulatory stability and that could be used to seek damages for regulatory instability: FET protections (in particular, legitimate expectations) and protection against undue and uncompensated expropriation.

10 This section draws on recent literature on the general topic, notably: C A Patrizia, J R Profalzer, S W Cooper and I V Timofeyev, 'Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty', *Global Arbitration Review: The Guide to Energy Arbitrations* (general editor J William Rowley QC, editors D Bishop and G Kaiser, 2015) pp. 73–83; J Tirado, 'Renewable Energy Claims under the Energy Charter Treaty', *Oil, Gas & Energy Law Intelligence* (*OGEL*), Vol. 13, No. 13, March 2015, pp. 1–22; J Talus, 'Renewable Energy Disputes in Europe and Beyond: An Overview of Current Cases', TDM 3 (2015) (www.transnational-dispute-management.com/article.asp?key=2215); and 'The protection of legitimate expectations and regulatory changes in the Spanish case', *Spain Arbitration Review*, No. 21 (2014), pp. 113–132.

i Legitimate expectations in the context of FET

There is no universally applicable standard under the ECT or general international law and practice to determine when an investor's expectation deserves treaty protection and when it does not. The inquiry will be a fact-specific analysis to determine whether a measure – here, the modification or elimination of an existing incentive regime – has (or has not) been enacted with sufficient consistency, transparency and reasonableness so as not to run afoul of the treaty's FET protection.

As stated by Dolzer:

> *Inconsistent conduct by the host state confuses the investor, stands in the way of proper planning, and is not conductive to an investment-friendly climate. Not surprisingly, arbitral tribunals have confirmed that inconsistency of conduct by the host state, as regards the investor's obligations, is not compatible with the requirement of FET.*[11]

ECT and investment law jurisprudence reflects the existence of two prevailing approaches to determining when investor expectations are reasonable enough to warrant treaty protection.

Under the stricter approach, such expectations must be based on clear and concrete assurances from the host state to the investor regarding the specific business or relationship. Inevitably, this is a particularly fact-specific exercise: the clearer, more explicit and more specific the representation, commitment, assurance or promise in question, the stronger will be the investor's case; the more ambiguous, implicit and general (otherwise stated, the more 'political' and less 'contractual' or 'semi-contractual'), the weaker the case will be.

Under a more flexible or permissive approach, sufficient basis to accord investor expectations with treaty protection can be found in assurances provided in generally applicable laws and in the very legal and regulatory framework existing in the host state at the time of the investment.

At the core, the issue in these cases involves a balancing of the host state's right to regulate. While FET requires protection of legitimate expectations and the essential economic balance of the original deal, it does not and cannot tie the host state's hands. FET requirements cannot imply 'the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life [...] No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.'[12]

As stated by Dolzer:

> *Consistency may not be required under circumstances in which the host state had convincing reason to change course. As regards its legislative power, the host state will, in principle, have the right to pursue its interests in the light of the new circumstances, but not ignore the interests of the investor who had earlier adjusted his conduct to the previous course required by the host state. The power to regulate operates within the limits of rights conferred upon the investor. Correspondingly, it will have to be assumed that the reversing of a position in a dramatic manner*

11 Footnote 4, *supra*.

12 See *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB05/13, Award (noting that an investment treaty cannot be used 'as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework').

> *with serious negative effects upon the investor will be consistent with FET only in the presence of serious exceptional reasons, compelling the host state to reverse its previous decision and to require the investor to re-adapt its business.*[13]

As stated by Patrizia et al.:[14]

> *The Spanish [...] renewable energy arbitrations are likely to focus on whether the host state acted with consistency, transparency and reasonableness in modifying (or eliminating) the existing incentive regime, and, above all, whether investors had reasonable and legitimate expectations that were breached as a result of the state's actions [...] While the existing arbitral decisions on claims asserted under the ECT do not provide clear guidance, arbitral decisions applying other investment treaties indicate that tribunals will examine the specific circumstances of each case when considering whether the investor's expectations were reasonable under the FET standard. The tribunals in the renewable energy cases pending against Spain [...] will likely consider, on a case-by-case basis, the conduct of the state as a whole, including whether the state made any specific assurances to investors and the reason for, and form of, the changes in legal framework, as well as any other circumstances surrounding the investment. Balancing the state's and investors' interests, the tribunals will then assess whether investors have stated a cognisable claim that their legitimate expectations were breached by the changes in the state's incentive regime, in violation of the ECT's guarantee of fair and equitable treatment.*

ii Indirect expropriation

Investors in ECT renewable cases challenging rollbacks of incentive schemes are likely to supplement their FET claim with a claim that the host state act constitutes an indirect or creeping expropriation, such as to render the investment or enterprise substantially unviable or worthless. In the renewables area, the claim would be that the reduction or elimination of incentives has deprived the investor of the use and enjoyment of its investment to such an extent as to be tantamount to an expropriation. As with the FET legitimate expectations analysis, one can readily see that this analysis is of a very highly fact-specific nature.[15]

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13 Footnote 4, *supra*.

14 Patrizia et al., op cit, footnote 10 *supra*, pp. 78–79.

15 The one known published ECT award addressing indirect expropriation (prior to the Spanish *Charanne* decision discussed below) narrowly construed the concept of indirect expropriation, holding that Latvia's last-minute reduction by nearly two-thirds of an agreed eight-year cogeneration tariff did not constitute indirect expropriation because the state did not take actual possession of the company or its assets or interfere with the shareholders' management or other rights. *Nykomb Synergetics Technology Holding AB (Sweden). v. Latvia*, SCC Case No. 118/2001, Award. This award has been roundly criticised; see R A Nathanson, 'The Revocation of Clean-Energy Investment Economic Support Systems as Indirect Expropriation Post-Nykomb: A Spanish Case Analysis', 98 *Iowa L. Rev.* 863 (2013).

IV THE BACKGROUND OF THE SPANISH RENEWABLES CASES AND THE CASELOAD PENDING AS OF THIS WRITING[16]

Until recently, Spain had been on the receiving end of only two investment arbitrations, the historic *Maffezini*[17] case involving a FET claim under the Spain–Argentina bilateral investment treaty and a recent claim brought by the Venezuelan Inversión y Gestión de Bienes, IGB, SL and IGB18 Las Rozas, SL,[18] involving a failed real estate development in suburban Madrid.

Times have changed. Spain's decision to be a world leader in clean energy led to the promulgation of an array of support schemes (feed-in tariffs, tax incentives, soft loans, loan guarantees, etc.), which attracted foreign investors and foreign investment in droves. But the resulting large and growing electricity sector 'tariff deficit' (i.e., the shortfall in tariff revenues versus the cost of generating and delivering power) was deemed unsustainable. In recent years, the Spanish government (actually, the Spanish governments, of both left and right) have promulgated no fewer than three laws, seven Royal Decree-Laws and seven Royal Decrees with the intent and effect of modifying, reducing or removing some of the subsidies and other incentives in place when much of this investment in alternative energy was made, or indirectly affecting the remuneration of renewable energy plants (by the creation of new taxes, the imposition of limits on the deductibility of interest, modification in the rate revision regime, etc.).

The most controversial (and revenue-saving) of these measures is a series of enactments in 2013–2014. These measures provide for compensating plants on the basis of a 'reasonable return' calculated according to installed capacity investment costs and operation and maintenance costs (rather than according to production), and using as the benchmark for 'reasonable return' a margin over the average yield of 10-year Spanish Treasury bonds.

Local investors have challenged the measures in the Spanish courts. By and large, their claims have been or are considered very likely to be rejected, on the basis of the argument (fairly well-established in Spanish Constitutional jurisprudence) that regulatory changes are valid so long as investors receive a reasonable return on their investment and are not required to return amounts already received.

But international investors have turned to the ECT, filing more than two dozen cases against Spain.

The table below reflects the status of the cases as of this writing (early March 2016) and as best the author is able to ascertain from publicly available sources; note, however, that while information is ample and accessible for cases filed with ICSID, information on UNCITRAL and SCC cases is much scantier and may be less reliable.[19]

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16 This section draws on the sources above, and on A H Ali, 'In the Eye of the Storm: Spain's Nexus to Investment Disputes', *Spain Arbitration Review*, No. 18 (2013), pp. 5–36.

17 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7.

18 *Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v. Kingdom of Spain*, ICSID Case No. ARB/12/17.

19 The press has identified unconfirmed SCC cases that are not included in the table. See L Peterson and Z William, 'Spain update: more claims surface in Stockholm and at ICSID,

	Claimants	*Arbitral institution*	*Registration date*	*Ref.*
1	The PV Investors (Denmark, Germany, Ireland, Luxembourg, Netherlands, United Kingdom)	UNCITRAL (Rules)	November 2011	
2	1. Charanne, BV (The Netherlands); 2. Construction Investments, SÀRL (Luxembourg)	SCC	2013 (Concluded: award 21 January 2016)	062/2012
3	Isolux Infrastructure, BV (The Netherlands)	SCC	2013	
4	CSP Equity Investment, SÀRL (Luxembourg)	SCC	June 2013	
5	1. RREEF Infrastructure (GP) Limited (Jersey); 2. RREEF Pan-European Infrastructure Two Lux, SÀRL (Luxembourg)	ICSID	22 November 2013	ARB/13/30
6	1. Antin Energia Termosolar, BV (The Netherlands); 2. Antin Infrastructure Services Luxembourg, SÀRL (Luxembourg)	ICSID	22 November 2013	ARB/13/31
7	1. Eiser Infrastructure Limited (UK); 2. Energia Solar Luxembourg, SÀRL (Luxembourg)	ICSID	23 December 2013	ARB/13/36
8	Masdar Solar & Wind Cooperatief, UA (The Netherlands)	ICSID	11 February 2014	ARB/14/1
9	1. NextEra Energy Global Holdings, BV (The Netherlands); 2. NextEra Energy Spain Holdings, BV (The Netherlands)	ICSID	23 May 2014	ARB/14/11
10	InfraRed Environmental Infrastructure GP Limited (UK)	ICSID	3 June 2014	ARB/14/12
11	Renergy, SÀRL (Luxembourg)	ICSID	1 August 2014	ARB/14/18
12	1. RWE Innogy, GmbH (Germany); 2. RWE Innogy Aersa, SAU (Spain)	ICSID	23 December 2014	ARB/14/34
13	1. Stadtwerke München, GmbH (Germany); 2. RWE Innogy, GmbH (Germany); 3. RheinEnergie AG (Germany); 4. AS 3 Beteiligungs, GmbH (Germany); 5. Ferrostaal Industrial Projects, GmbH (Germany); 6. Ferranda, GmbH (Germany); 7. Andasol Fonds, GmbH & Co KG (Germany); 8. Andasol 3 Kraftwerks, GmbH (Germany); 9. Marquesado Solar SL (Spain)	ICSID	7 January 2015	ARB/15/1
14	STEAG, GmbH (Germany)	ICSID	21 January 2015	ARB/15/4
15	9REN Holding, SÀRL (Luxembourg)	ICSID	21 April 2015	ARB/15/15
16	1. BayWa r.e. Renewable Energy, GmbH (Germany); 2. BayWa r.e. Asset Holding, GmbH (Germany)	ICSID	8 May 2015	ARB/15/16
17	1. Cube Infrastructure Fund SICAV (Luxembourg); 2. Cube Energy SCA (Luxembourg); 3. Cube Infrastructure Managers SA (Luxembourg); 4. Demeter 2 FPCI (France); 5. Demeter Partners SA (France)	ICSID	1 June 2015	ARB/15/20

and several new tribunals are finalized', IA Reporter, 3 March 2016 (www.iareporter.com/articles/spain-update-more-claims-surface-in-stockholm-and-at-icsid-and-several-new-tribunals-are-finalized).

	Claimants	*Arbitral institution*	*Registration date*	*Ref.*
18	1. Mathias Kruck (Germany); 2. Ralf Hofmann (Germany); 3. Frank Schumm (Germany); 4. Joachim Kruck (Germany); 5. Peter Flachsmann (Germany); 6. Rolf Schumm (Germany); 7. Karsten Reiss (Germany); 8. Jürgen Reiss (Germany)	ICSID	4 June 2015	ARB/15/23
19	1. KS Invest GmbH (Germany); 2. TLS Invest GmbH (Germany)	ICSID	16 June 2015	ARB/15/25
20	JGC Corporation (Japan)	ICSID	22 June 2015	ARB/15/27
21	Cavalum SGPS, SA (Portugal)	ICSID	4 August 2015	ARB/15/34
22	1. E.ON SE; 2. E.ON Finanzanlagen, GmbH (Germany); 3. E.ON Iberia Holding, GmbH (Germany)	ICSID	10 August 2015	ARB/15/35
23	1. OperaFund Eco-Invest SICAV PLC (Malta); 2. Schwab Holding, AG (Switzerland)	ICSID	11 August 2015	ARB/15/36
24	Soles Badajoz, GmbH (Germany)	ICSID	24 August 2015	ARB/15/38
25	1. Hydro Energy1 SÀRL (Luxembourg); 2. Hydroxana Sweden AB (Sweden)	ICSID	19 October 2015	ARB/15/42
26	1. Watkins Holdings SÀRL (Luxembourg); 2. Watkins (Ned) BV (The Netherlands); 3. Watkins Spain, SL (Spain); 4. Redpier, SL (Spain); 5. Northsea Spain SL (Spain); 6. Parque Eólico Marmellar, SL (Spain); 7. Parque Eólico La Boga, SL (Spain)	ICSID	4 November 2015	ARB/15/44
27	1. Landesbank Baden-Württemberg (Germany); 2. HSH Nordbank AG (Germany); 3. Landesbank Hessen-Thüringen Gironzentrale (Germany); 4. Norddeutsche Landesbank-Girozentrale (Germany)	ICSID	12 November 2015	ARB/15/45
28	1. Eurus Energy Holdings Corp (Japan); 2. Eurus Energy Europe BV	ICSID	1 March 2016	ARB/16/4

Needless to say, each of these cases (as well as any that may follow) is unique. The measures challenged are multifold, and while they share common elements, no two are identical. They affect various renewable energy subsectors (photovoltaic, thermosolar, wind, etc.), each with its own distinguishing characteristics.

In any event, rarely, if ever, have so many cases of a generally similar nature, raising generally similar issues under international investment law been cued up for decision over such a short time. It can be expected that in the coming two or three years, as these cases reach the decision stage, the vexing issues of indirect expropriation and (especially) legitimate expectations under the rubric of FET will be amply developed, debated and (perhaps) clarified, with consequent effects going beyond renewables and beyond the ECT and impacting the future of investment arbitration generally.

V ROUND ONE: A MITIGATED, SPLIT DECISION VICTORY FOR SPAIN IN 'CHARANNE'

On 21 January 2016, the first final award in a Spanish renewable energy case was handed down in *Charanne*.

The case involved a challenge to a series of pieces of legislation enacted in 2010 brought by Dutch and Luxembourg indirect shareholders of a Spanish entity that (via separate vehicles) owns and operates a number of photovoltaic plants producing and selling electric energy in Spain. The challenged legislation (Royal Decree 1565/2010 of 19 November 2010 and Royal Decree-Law 14/2010 of 23 December 2010) modified a special regime for solar energy producers that was set up in 2007 and 2008. The changes *inter alia*, eliminated the feed-in tariff contemplated by the special regime after 25 years and for the remainder of the useful life of the plants in question and capped the amount of operating hours that could be subject to the regime (and its regulated tariff) during a three-year period (although extending from 25 to 30 years the entitlement period of the feed-in tariff).

i Jurisdictional issues

Various jurisdictional objections were raised by Spain and rejected by the arbitral tribunal:

a Spain's fork-in-the-road objection (Article 26(3)(b)(i) of the ECT), which was based on the facts that (1) the entity in which the claimants were indirect shareholders and the special purpose vehicles had brought suit in Spain's Supreme Court challenging the norms and (2) affiliates of the entity had brought a claim before the European Court of Human Rights, was rejected, the tribunal concluding that the 'triple identity' test necessary to trigger the fork-in-the-road was not satisfied, as the entities involved in the various proceedings were different (mere membership in a common group being insufficient to establish sufficient identity).

b Spain's assertion that the tribunal should conclude that the claimants should not be recognised as investors under Article 1.7 of the ECT since they were owned and controlled by nationals of Spain was rejected; the tribunal stating that in the absence of evidence of fraud that might permit a lifting of the corporate veil, the language of the ECT was clear to the effect that due establishment under the laws of a contracting party is sufficient to merit treatment as an investor.

c Spain's assertion that permitting the tribunal to resolve the dispute would be contrary to Spanish public policy and the principle of equality established in Article 14 of the Spanish Constitution was rather summarily rejected by the tribunal, on grounds that the provision in question did not relate to non-Spanish tribunals and that Spanish public policy could not limit the jurisdiction of a tribunal established pursuant to a treaty to which Spain was party.

d Finally, Spain's assertion that the dispute was an intra-EU dispute, with no diversity of territory, was rejected, with the tribunal considering that individual states should not be deemed to have lost their character as EU Member States merely by virtue of being part of the EU's economic integration regime.

ii Merits

The focus of the merits portion of the case and the award was on the claims that the 2010 rollback of the incentives initially created in 2007/2008 constituted a violation of the ECT's protections against undue expropriation and its guaranty of FET (legitimate expectations).

Indirect expropriation

The tribunal dismissed the indirect expropriation claim rather readily, noting that to constitute an indirect expropriation meriting protection under the ECT, the effect of the challenged host state measure must be tantamount to an effective taking of all or part of the investment of such magnitude as to destroy its value and be the equivalent of the deprivation of title of the investment. Since what claimants actually complained of was simply a reduction in profitability of their indirect holding and thus in the value of their shares in the company owning the assets in question, the tribunal rejected the indirect expropriation claim. While the version of the award (published by the Spanish Ministry of Industry, Energy and Tourism on its website)[20] redacts the percentage reduction of profitability of the photovoltaic plants in question, the drafting suggests that the reduction was relatively modest in percentage terms and in any event did not leave the plants operating at a loss. In any case, given the tribunal's emphasis that inherent in the concept of expropriation is the loss of property, even a severe reduction in profitability would not be sufficient to constitute indirect expropriation.

Legitimate expropriations

The tribunal acted by a majority over a partial written dissent on the FET issue. The majority took a fairly strict view as to the source of legitimate expectations meritorious of protection under the ECT. The majority concluded that claimants had not received specific commitments as to the stability of the regulatory regime; that regulations aimed at a limited number of investors are general in nature and thus cannot be understood as specific commitments sufficient to generate legitimate expectations; that investors cannot expect an existing regulatory framework to remain unchanged in the absence of a specific commitment to this effect; and that, objectively viewed, the likelihood of regulatory change of the special regime's initial contours was reasonably foreseeable at the time of the investment.

The majority stated, in particular, (unofficial translation by the author from the Spanish original) as follows:

> *493. Although RD 661/2007 and 1578/2008 were directed to a limited group of investors, this does not convert them into commitments specifically directed to each of them. The norms in issue do not lose, by reason of their specific reach, the general nature that characterises any legislative or regulatory measure. To convert a regulatory norm, because of the limited character of those to which it could be applied, into a specific commitment by the state towards each one of them, would constitute an excessive limitation on the ability of states to regulate the economy in the public interest.*
> *494. On the basis of the foregoing, the tribunal concludes that there did not exist a specific commitment by Spain towards the claimants [...]*
> *499. In the view of the tribunal, an investor cannot have a legitimate expectation in the absence of a specific commitment that the existing regulation will not be modified.*

In this regard, the majority noted that Spanish law and jurisprudence predating the investment specifically permitted Spain to modify its solar regulations; that the Spanish promotional documents inducing foreign investment were not sufficiently specific to create legitimate expectations; and that registration of the plants on an administrative register was merely an administrative requirement and not a guarantee of a specific return.

20 Footnote 3, *supra*.

The partial dissenting opinion

The partial dissenting opinion,[21] while agreeing as a general legal matter that legitimate expectations as to regulatory stability are not created by general legislation, would have found that the Spanish state's actions in connection with the special regime (including the direction of the special regime to a select and limited group of potential recipients) created objectively legitimate expectations as to the maintenance of its initial contours sufficient to merit protection under the ECT against changes of the sort implemented in 2010.

Thus, for the dissenting opinion, legitimate expectations need not necessarily be derived only from specific commitments or conditions, but can also be grounded in appropriate circumstances of the host state's legal regime at the time of the investment.

The most relevant paragraphs of the dissenting opinion depict the fault line separating the two views:

> *5. My disagreement with the majority lies in the fact that, in my opinion, the creation of legitimate expectations in an investor is not limited solely to the existence of a 'specific commitment' – either contractual in nature or founded in statements or specific conditions declared by the receiving State – but it can also derive from, or be based on, the legal system in force at the time of the investment.*
> *6. In the present case, the policy outline in the special regime put into place by the Kingdom of Spain through RD 661/07 and 1578/08, establishing a 'Feed In Tariff' (FIT) to remain in force – at a minimum – for 25 years, and in relation to which Spain had declared that it would not be affected by future tariff reviews, together with related documents issued contemporaneously by the Spanish government, serve to interpret the context and the purpose of the regulatory measures – which, in my view, appear to be enough for the Claimants to decide to carry out the investment in photovoltaic plants even if each representation, by itself, may not have had the full effect to generate a legitimate expectation. Therefore, pursuant to the declarations under RD 661/07 and 1578/08, the Claimants could have 'objectively' believed that the tariff regime established under each law would remain unaltered.*
> *10. Once the Claimants made the investment, complying with all the existing requirements of the rules governing the granting of the expected benefit (in this case, the FIT), it does not appear to be recognised as legally acceptable in the receiving State to modify or eliminate them without some legal consequence.*
> *12. In short, when an investor complies with all the established requirements of the current legislation in order to be entitled to an expected and determinable benefit, subsequent disregard on the part of the State receiving the investment violates a legitimate expectation. The Kingdom of Spain was authorised to amend or eliminate the established promotion regime. No risk of freezing, petrification or immutability of the economic framework existed. Nevertheless, if the modification of the benefit granted to someone who had already invested as a result of this special regime – establishing, in this case, a limited number of production hours and years with right to tariffs – caused harm without providing compensation, it would violate the legitimate expectations created and thus the fair and equitable treatment protected by Article 10 of the ECT.*[22]

21 www.minetur.gob.es/es-es/gabineteprensa/notasprensa/2016/documents/opini%C3%B3n%20disidente%20prof.%20tawil.pdf.

22 Unofficial translation provided to Oil Gas Energy Mining Infrastructure Dispute Management (OGEMID) by McDermott Will & Emery Rechtsanwälte Steuerberater LLP.

Retroactivity
The tribunal, finally (without dissent) rejected the claim that the modified regime created by the 2010 regulations applied retroactively.

On initial analysis, the *Charanne* award triggers three observations.

First, it would seem to indicate that for the critical issue of FET and legitimate expectations, the battle is served: the existence of a terse, respectful but forceful dissenting opinion on the point highlights the centrality and difficulty of the issue of the degree of specificity required to constitute a commitment sufficient to generate legitimate expectations deserving of treaty protection.

Second, the award's repeated mention of its being limited to the case at hand, and to the 2010 regulations that it challenged, makes clear the fact-specific and measure-specific nature of the legitimate expectations exercise. Since the vast majority of the Spanish renewable energy cases involve challenges of post-2010 regulatory measures, the impact of the split decision in this first battle remains very much to be seen.

Third, it will be interesting to follow developments involving ongoing treaty negotiations, both multilateral and bilateral, in the field of investment protection.

Of particular interest in the multilateral area are TPP (signed by the 12 TPP countries in October 2015 and pending ratification) and TTIP (under discussion, with the EU having proposed a number of significant measures aimed at recalibrating what some consider an investor–state dispute settlement (ISDS) system gone awry). The TPP has been referred to as 'a mix of the old and the new [...] crafted to anticipate and meet many of the concerns traditionally expressed in relation to ISDS provisions in earlier investment treaties'.[23] FET, and in particular legitimate expectations, have received special attention. The TPP provides, for example, in Article 9.6(4) that 'the mere fact that a party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is a loss or damage to the covered investment as a result'. It further provides, in Article 9.6(5) (as in the EU's draft TTIP text) that mere failure to issue, review or maintain a subsidy or grant does not constitute a breach of the minimum standard of treatment.

Of particular interest as regards bilateral treaties is the recently revised Canada-EU Comprehensive Economic and Trade Agreement (CETA), released on 29 February 2016. The CETA's investment chapter tracks the EU's TTIP draft and includes a number of significant changes, including a stronger host state right to regulate and a closed list of measures that could give rise to a violation of FET.[24]

One can perhaps anticipate a variety of results, difficult to reconcile, in the upcoming awards.

23 W Miles, K Beale, P Barnett, 'Investor–state dispute settlement under the recently concluded Trans-Pacific Partnership', IBA Arbitration Newsletter, Vol. 21, No. 1 (February 2016), p. 25.

24 See 'Canada agrees to the EU proposal on an international investment court', 4 March 2016 (http://ehoganlovells.com/rv/ff0025e1125925b2e87312247b40a7474f112f13).

VI CONCLUSION

By the time that the 2017 and 2018 editions of this text go to print, it is expected that quite a few of the pending Spanish renewable cases will have reached the decision stage.

It is the author's and editor's intent to address the jurisprudence established by those decisions in the upcoming editions of this work, building on the background and first-published award summarily discussed above.

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