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SPAIN AND INVESTMENT ARBITRATION: THE RENEWABLE ENERGY EXPLOSION

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TABLE OF CONTENTS

ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government, equivalent to those provided by contemporary investment protection agreements.

CIGI Senior Fellow Armand de Mestral is the lead researcher on the ISA project. Contributors to the project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Céline Lévesque, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman. A conference was held in Ottawa on September 25, 2015. The papers presented at that conference are in the process of being issued as CIGI Papers and will ultimately appear as a collective book.

ABOUT THE AUTHOR

Carmen Otero García-Castrillón is a professor of private international law at the Complutense University of Madrid. She holds a Ph.D. from Complutense University and an LL.M. from the University of Amsterdam. Carmen has held a number of academic positions at the Complutense Faculty of Law and is a sub-director of its legal journal. She has taught and conducted research at Spanish, South American and European universities and is a member of several associations, including the Spanish Teachers Association of International Law and International Relations and the International Association for the Advancement of Teaching and Research of Intellectual Property. She has been responsible for Spanish study within the EUPILLAR Project (European Union Private International Law: Legal Application in Reality; Cross-Border Litigation in Europe: Private International Law Legislative Framework, National Courts and the Court of Justice of the European Union). Carmen's interests are in conflict of laws and jurisdiction, international business law and investment and commercial arbitration, as well as in international trade law. In these fields, she has published books in Spanish and a number of articles in Spanish and English.

ACRONYMS

BIT	bilateral investment treaty
BOE	Boletín Oficial del Estado [Offical Gazette]
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
ECHR	European Court of Human Rights
ECT	Energy Charter Treaty
FADE	Fondo de Titulación del Déficit del Sistema Eléctrico
FITs	feed-in tariffs
FIPs	feed-in premiums
FTA	free trade agreement
ICSID	International Centre for Settlement of Investment Disputes
IPAs	investment protection agreements
RD	Royal Decree [Real Decreto]
RDL	Royal Decree Law [Real Decreto Ley]
STC	Sentencia del Tribunal Constitucional
STS	Sentencia del Tribunal Supremo
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law

EXECUTIVE SUMMARY

The generous Spanish incentive system for investments in the production of electricity from renewable energies, which was established in 2004 and expanded in 2007, attracted foreign and national investors and led to an increase in the production of electricity from renewable energies. However, in the context of a profound economic crisis and the consequent reduction of electricity consumption, the incentives began to cause a tariff deficit (the difference between the regulated tariff collection and the associated real costs) in the electricity system that the Spanish government addressed through progressive cutbacks to the incentives from 2010, up to their elimination in 2013.

The changes in the Spanish incentive regime caused significant losses for both foreign and national investors. As a result, these investors implemented diversified legal strategies to defend their interests. While international investors turned to investment arbitration, national investors could only present their claims before Spanish courts. The result was a potential for differential treatment between national and foreign investors.

This paper examines the incentive regime and the government's changes to it in order to understand the investors' claims and the reasoning that resulted in their rejections, both in national courts and in the only arbitration award issued up to now. The paper concludes with a discussion of the effect of the renewable energies situation on the investment arbitration debate within Spanish civil society.

INTRODUCTION

Spain is a party to a number of investment protection agreements (IPAs).[1] When the agreements were signed, they were aimed at protecting major Spanish companies' investments in emerging or developing economies. However, in recent years, the situation has been turned upside down because Spain has become one of the states against which a great number of arbitrations have been initiated. Foreign investors have resorted to different investment arbitration fora in response to the drastic reduction of public investment incentives that were adopted in 2004 and 2007 to promote the production of electricity from renewable energies.

The public incentives for the production of electricity from renewable energies (biomass, wind, geothermal, hydraulic, maritime and solar technologies) strongly stimulated national and foreign investment because, with the incentives, there were good prospects for obtaining significant profits. When the national situation changed as a consequence of the global economic crisis, and the national economic deficit increased exponentially, in the electricity sector in particular, public authorities could not sustain the established incentives. The economic deficit in the Spanish electricity system was due in large part to the number of incentives that had been given to renewable energy facilities, which were also increasingly improving their competitiveness through technological development. The cuts to the incentives were implemented progressively, albeit in a disorganized way. The regulatory scene became more and more difficult to understand until 2013, when the incentives were completely eliminated and a partially defined exceptional regime to support the production of electricity from renewable energies was introduced. The new regime was far less generous than the previous one.

The result is a mismatched juridical situation, with a number of investor claims before Spanish national courts, as well as before international arbitration tribunals. There was even an attempt to have the European Court of Human Rights (ECHR) adjudicate alleged infringements of fundamental rights arising from Spain's renewable energies measures, but the application was rejected due to its lack of compliance with admissibility criteria. The increasing number of international investment arbitration cases against Spain, which are of major economic relevance, have raised great legal interest. This paper aims to provide an overview of the circumstances that led Spain to become a major defendant in investment arbitration claims. In this context, the paper will also reflect on the parallels between the resulting national court cases and international arbitration proceedings — as of July 2016, only one arbitration award had been given — that have dealt with investors' claims that Spain violated its obligations regarding legal certainty, the protection of legitimate expectations and the proscription against retroactivity. Through a discussion of this ongoing situation, this paper also presents the legal

1 The IPAs are available online: <www.comercio.es/acuerdos>.

scenario of the alleged discrimination between foreign and national investors under the investment arbitration system, in particular between developed democracies.

SPANISH RENEWABLE ENERGIES CONFLICTS

Spanish Law 54/1997[2] on the electricity sector established a system to support the production of electricity from renewable energies that differed from the system that applied to electricity obtained from fossil energy sources. Royal Decree (RD) 2818/1998[3] established the first regime for the production of electricity by facilities supplied by renewable energies. The system was extended by RD 436/2004,[4] and later abrogated by RD 661/2007,[5] which introduced an increasingly rewarding incentive regime for the production of electricity from renewable energies. The 2007 RD fostered national and foreign investments, in particular in the solar photovoltaic and thermoelectric sectors.

The special regime covered the production of electricity in facilities with an installed capacity of less than 50 MW of power that used renewable energies, waste or other means — such as cogeneration — as their primary source, applying a highly efficient and energy-saving technology. The reasons for rewarding this type of production were based on its clear advantages, including the reduction of contaminants and greenhouse gases, which would help Spain comply with its EU and Kyoto Protocol objectives; reduction of environmental impacts, since renewable energies are cleaner and do not generate waste that is difficult and costly to process; increased energy supply security and reduced dependence on foreign energy; the inexhaustible character of renewable energies, due to their natural regeneration or the nature of the source; and savings in primary energy and in electricity transport and distribution, due to the proximity between generation and consumption locations.

European Union Normative Framework

The Treaty on the Functioning of the European Union[6] states that the European Union's energy policy aims to promote energy efficiency and energy savings, together with the development of new and renewable forms of energy.[7] This is also important for reaching the environmental and climate objectives of the European Commission's Europe 2020 Strategy.[8] Directive 2009/28/EC on the promotion of the use of energy from renewable sources establishes an overall policy for the production and promotion of energy from renewable sources in the European Union.[9] The directive imposes on member states obligations of transparency, accountability, programming and the adoption of national systems that support the use of renewable energies but, within the directive's framework, member states are free to implement their own systems. In any case, the directive does not prohibit member states from limiting their incentive programs for the national production of electricity from renewable energies.

The commission has shown an interest in harmonizing national incentive systems by progressively eliminating feed-in tariffs (FITs) that protect renewable energy generation facilities against market price changes and concentrating on feed-in premiums (FIPs) and other assisting instruments, such as quota obligations, that force producers to respond to market prices. Member states are invited to provide these incentives through competitive bidding procedures because these procedures would provide them with information on the different technologies, projects and operators' costs with respect to specific locations. Hence, healthy competition was to be stimulated not only between electricity

2 *Law 54/1997, 27 November, on the electricity sector* (BOE No 285, 35097 (28 November 1997)), online: <https://www.boe.es/diario_boe/txt.php?id=BOE-A-1997-25340>.

3 *Royal Decree [Real Decreto] (RD) 2818/1998, 23 December, on the production of electricity in facilities supplied by renewable energy sources, waste and cogeneration* (BOE No 312, 44077 (30 December 1998)), online: <https://www.boe.es/diario_boe/txt.php?id=BOE-A-1998-30041>.

4 *RD 436/2004, 12 March, on the methodology to actualize and systematize the economic and legal regime of electricity production activity under the special regime* (BOE No 75, 13217 (27 March 2004)), online: <https://www.boe.es/buscar/doc.php?id=BOE-A-2004-5562>.

5 *RD 661/2007, 25 May, on the regulation of the electricity production under the special regime* (BOE No 126, 22846 (26 May 2007)), online: <https://www.boe.es/buscar/doc.php?id=BOE-A-2007-10556>.

6 *Treaty on the Functioning of the European Union*, [2008] OJ C 115/47. An English language consolidated version of the treaty is available online: <eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

7 *Ibid*, art 194(1)(c).

8 EC, Commission, Communication from the Commission, *Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth*, COM(2010) 2020 final (Brussels: European Commission, 2010), online: <ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf>.

9 EC, *Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC*, [2009] OJ, L 140/16 [*Directive 2009/28/EC*], online: <eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0028>.

providers but also between the energy source providers (i.e., solar power, wind power, and so on).[10] This new approach has already been inserted into the European Commission's guidelines on state aid for environmental protection and energy.[11]

Spanish Incentive Regime

The objectives of the incentive regime were to guarantee to the owners of the facilities under the special regime a reasonable return for their investment, as well as to promote their participation in the market and to assign a reasonable portion of the costs of the electricity system to electricity consumers.

The regime was very generous because the various incentives were cumulative. The incentives consisted of the fixed tariff, the FIT, at the introduction of the electricity generated from renewable energy into the network and the additional premium, the FIP, on the price obtained in the market when selling the electricity.[12] Therefore, the owners could opt (for periods of not less than one year) between selling their electricity at a regulated tariff (unique for all the programming periods), directly selling this energy in the daily or due-date markets or selling through bilateral contracts (through which they would receive the agreed-upon price, plus a premium). In the last situation, maximum and minimum amounts were established for the addition of a premium in relation to the daily price in certain technologies. This premium was not added when the market price was high enough to guarantee cost coverage, but was added to the price when the income derived from the market price was too low (FIP with cap and floor prices).

With respect to the installed power objective, RD 661/2007 established a target of 371 MW for photovoltaic solar energy facilities (subgroup b.1.1) and 500 MW for thermoelectric solar power facilities (subgroup b.1.2). However, in fact, installed power in photovoltaic solar technology increased and, in order to provide continuity and meet expectations for investments in this sector, the target was increased by RD 1578/2008.[13] This new objective was to be reset on an annual basis and progressively increased in coordination with the evolution of technology improvements (rather than setting the market limits for this technology on the basis of the total power accumulated annually). These changes had to be accompanied by a new economic regime to stimulate technological evolution and Spanish competitiveness in photovoltaic facilities in the medium and long terms. Photovoltaic facilities registered from September 29, 2008, could only opt for a regulated tariff for up to 25 years. This regime was very favourable for foreign investment, and major projects were initiated in Spain. A similar process took place in other EU member states with different incentives,[14] but the Spanish regime was the most generous.[15]

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10 EC, Commission, Communication from the Commission, *Delivering the internal electricity market and making the most of public intervention*, COM(2013) 7243 final (Brussels: European Commission, 2013), online: <https://ec.europa.eu/energy/sites/ener/files/documents/com_2013_public_intervention_en.pdf>; and an accompanying document, Commission Staff Working Document, *European Commission guidance for the design of renewables support schemes*, SWD (2013) 439 final (Brussels: European Commission, 2013) [*EC Guidance*], online: <https://ec.europa.eu/energy/sites/ener/files/documents/com_2013_public_intervention_swd04_en.pdf>.

11 EC, Commission, Communication from the Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, [2014] OJ, C 200/1, online: <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628(01)>.

12 For a general perspective on the EU member states' use of incentive regimes in the production of energy through renewable sources, see Arne Klein et al, *Evaluation of Different Feed-in Tariff Design Options: Best Practice Paper for the International Feed-In Cooperation* (2010), online: <www.feed-in-cooperation.org/wDefault_7/content/research/index.php>; Mario Ragwitz et al, *Recent Developments of Feed-in Systems in the EU: A Research Paper for the International Feed-In Cooperation* (January 2012) [Ragwitz, *Recent Developments*], online: <www.feed-in-cooperation.org/wDefault_7/content/research/index.php>; Anne Held et al, *Design Features of Support Schemes for Renewable Electricity* (The Netherlands: Ecofys, 2014), online: <https://ec.europa.eu/energy/sites/ener/files/documents/2014_design_features_of_support_schemes.pdf>. The most complete analysis can be found in *EC Guidance*, *supra* note 10.

13 *RD 1578/2008, 26 September, on the payment of the production of electricity by photovoltaic solar technology in facilities established after the final date for payment given by RD 661/2007, 25 May* (BOE No 234, 39117 (27 September 2008)), online: <https://www.boe.es/buscar/doc.php?id=BOE-A-2008-15595>.

14 Nine EU member states in 2009, 18 in 2005 and up to 24 in 2012 used this kind of measure (for example, Germany, Italy, Czech Republic, France, Slovakia). The most used systems were FIT, first, and FIP when the renewable energies were improving their competitiveness. Other states used only FIP (Denmark, Estonia, Finland, the Netherlands and the United Kingdom). See Ragwitz et al, *supra* note 12 at 9–16. See also European Commission, Commission Staff Working Paper, *The Support of Electricity From Renewable Energy Sources*, accompanying document to the *Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources*, COM(2008) 19 final, SEC(2008) 57 (Brussels: European Commission, 2008), online: <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008SC0057>.

15 See Julieta Schallenberg-Rodriguez & Reinhard Haas, "Fixed Feed-in Tariff Versus Premium: A Review of the Current Spanish System" (2012) 16:1 Renewable & Sustainable Energy Rev 293.

Spanish Cutbacks

The generous Spanish incentive system attracted foreign and national investors, which led to an increase in the production of electricity from renewable energies. However, in the context of a profound economic crisis and the consequent reduction of electricity consumption, the incentives began to cause a tariff deficit (the difference between the regulated tariff collection and the associated real costs) in the electricity system, which the Spanish government addressed through its progressive cutbacks.

The first measure was Royal Decree Law (RDL) 6/2009,[16] which explained that the special regime had led to a tariff deficit and that this was causing huge problems, risking not only the financial situation of electricity companies but also the sustainability of the whole sector. The financial security of the investments required to maintain a quality electricity supply was seriously deteriorating. Hence, a payments pre-allocation registry was created to provide information about the projected investment facilities' compliance with the legal requirements, their power volume and their impact on the electricity tariffs and their schedules. Moreover, this RDL established a mechanism to finance the accumulated deficit by transferring collection rights to a fund (Fondo de Titulación del Déficit del Sistema Eléctrico [FADE]) and allocating the ownership of the collection rights that were in the hands of the fund by selling them to third parties through a competitive mechanism.

Under the same reasoning, and relying on the success of the Spanish photovoltaic sector, which was the world's largest photovoltaic market in 2008, RD 1003/2010[17] established a procedure to ensure that facilities were properly accredited before they could opt for the incentives. After September 29, 2008, it was no longer possible for new facilities to access the regime.

Additional cutbacks to the incentive system were introduced by RD 1614/2010,[18] which limited the bonus working hours for thermoelectric and wind technologies, and RDL 14/2010,[19] which reduced certain revenues and cost consignments and adopted consumer protection measures in order to prevent further deficits, beginning in 2013. The limit on bonus working hours was introduced for photovoltaic solar energy producers, implying, in practice, the retroactive elimination of the regulated tariff regime.[20] In addition, producers were assessed a fee for access to the transmission grid on the basis of their activities' incidence in the development of transportation and distribution networks. Later, RDL 1/2012[21] stated that the high development of solar energy revealed an imbalance between production costs and the value of the solar technologies' bonus. Acknowledging that previous cutbacks had not been enough to eliminate the tariff deficit, the RDL cut the incentive regime for facilities under the special regime and suspended the payments' pre-allocation procedure for those facilities that had not yet been registered.[22] Considering the government's leeway with respect to meeting power objectives under the renewable energies Plan 2020,[23] and due to the difficult economic and financial situation, incentives were eliminated at least until the principal threat to the economic sustainability of the electricity system — the tariff deficit — was resolved. Under the new economic scenario, it was

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16 *Royal Decree Law* (RDL) [*Real Decreto Ley*] *6/2009, 30 April, on the adoption of certain measures in the energy sector and the approval of the social bond* (BOE No 111, 39404 (7 May 2009)), online: <https://www.boe.es/buscar/doc.php?id=BOE-A-2009-7581>.

17 *RD 1003/2010, 5 August, on the liquidation of the equivalent premium to the facilities producing electricity from photovoltaic technology under the special regime* (BOE No 190, 68610 (6 August 2010)), online: <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2010-12622>.

18 *RD 1614/2010, 7 December, on the regulation and modification of certain aspects of the production of electricity from solar thermoelectric and wind technologies* (BOE No 298, 101853 (8 December 2010)), online: <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2010-18915>.

19 *RDL 14/2010, 23 December, on urgent measures to correct the tariff deficit in the electricity sector* (BOE No 312, 106386 (24 December 2010)), online: <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2010-19757>.

20 The reference values for calculating the payments were expressly established and, in order to guarantee the reasonableness of the payments, the deadline for certain facilities (subgroup b.1.1. — photovoltaic solar energy) was extended from 25 (RD 661/2007, *supra* note 5) to 28 years. Later, *Law 2/2011, 4 March, on economic sustainability* (BOE No 55, 25033 (5 March 2011)), online: <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2011-4117>, extended this period from 28 to 30 years.

21 *RDL 1/2012, 27 March, on the suspension of the pre-allocation payment procedures and the abolition of the economic incentives for new electricity production facilities from cogeneration, renewable energies and waste* (BOE No 24, 8068 (28 January 2012)), online: <https://www.boe.es/buscar/doc.php?id=BOE-A-2012-1310>, provided that the cost of the system had risen to €2 billion in 2010 and that it could rise to €2 billion annually from 2014.

22 The reasons for this decision were the need to hold back the tariff deficit, the existence of sufficient generating capacity to satisfy the demand forecasted for the next few years and, therefore, the absence of a need to continue with the annual rate of implementation of the renewable technologies to reach the objectives established in the Renewable Energies Plan 2020, with respect to which the government enjoyed some leeway: *Plan de Acción Nacional de Energías Renovables de España 2011—2020 (PANER)* [*Spain's National Renewable Energies Action Plan, 2011–2020 (NREAP)*] (2010), Spanish version online: <www.minetur.gob.es/energia/desarrollo/EnergiaRenovable/Documents/20100630_PANER_Espanaversion_final.pdf>.

23 *Ibid*.

necessary to implement a new payment model for these technologies in order to promote the efficient allocation of resources through market mechanisms.

The electricity tariff deficit situation worsened because the income from consumer usage had dropped, due to the lower consumption associated with the economic crisis and the price increases caused by the special regime's increasing incentives. Because raising the consumer price was seen as inadvisable during the economic crisis, the Spanish government opted instead to reduce the system's costs by eliminating FIP incentives (the amount paid to renewable energy producers selling their electricity in the market) through RDL 2/2013.[24] Hence, these producers could only turn to the FIT option, and the annual opportunity to opt for one or the other was suppressed. Due to the extraordinary and urgent need to act, the measure was applied immediately.[25]

Despite all these measures, the Spanish electricity system continued to have an untenable tariff deficit (an accumulated debt of €26,062.51 million in May 2013).[26] The adoption of RDL 9/2013[27] enabled the government to approve a new legal and economic regime for the facilities producing electricity through renewable energy sources. The new regime was based on the producers obtaining the benefits derived from involvement in the market, plus (if necessary) income to compensate for the investment costs that an efficient and well-administered company could not recover from the market. This implied an FIP incentive system, complemented by additional bonuses to guarantee a reasonable profitability. Calculation of the specific bonus would be made on the basis of a standard facility, the income obtained from selling the energy at the production market price, the exploitation costs and the value of the initial investment. The amount would therefore depend on the concept of reasonable profitability, defined as that which will vary based on the average performance of the state's secondary 10-year bond market, applying the appropriate differential. In order to maintain the reasonable profitability principle, these parameters could be reviewed every six years.

This new regime expressly derogated the regime established by RD 661/2007[28] and its modifications. The existing incentive regime was to be applied until all the necessary implementing legislation was adopted. There would be a liquidation settlement for the facilities on the basis of the transition regime and, later, on the basis of the new regime, the facilities would be regularized with (retroactive) effect from this law's entry into force. On the other hand, those facilities that, at the date of the law's entry into force, had the right to benefit from the primary economic regime were given profits before taxes that varied based on the average return of the state bonds in the secondary 10-year bond market, plus 300 basic points, in a system that, again, could be reviewed every six years.

RDL 2/2013[29] implied the retroactive elimination of the generous incentives established in 2004 with an annual option between FIT or FIP. Law 24/2013[30] on the electricity sector confirmed the situation. The law aimed at guaranteeing the electricity supply at the necessary level of quality and with the minimum possible cost to ensure the system's economic and financial sustainability, while allowing for an effective level of competition within the principles of environmental protection in a modern society. The abolished regime was said to have lost its purpose due to the high penetration of the new productive technologies based on renewable energy sources. Hence, the new technologies were treated in a manner similar to other technologies and the difference between the ordinary and special regimes for electricity production disappeared. An exception was that the law allowed for the establishment of a new specific payment regime to stimulate production from renewable energy sources if there was an EU obligation to reach energy objectives or if implementation of a new regime would entail a reduction

24 *RDL 2/2013, 1 February, on urgent measures for the national electricity and financial systems* (BOE No 29, 9072 (2 February 2013)), online: <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-1117>.

25 Article 86 of the Spanish Constitution (SC) [*Constitución Española*], BOE No 311, 29 December 1978, online: <www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx>, allows the government to act in extraordinary circumstances: "1. In case of extraordinary and urgent need, the Government may issue temporary legislative provisions which shall take the form of decree-laws and which may not affect the legal system of the basic State institutions, the rights, duties and freedoms of the citizens contained in Title 1, the system of the Autonomous Communities, or the general electoral law."

26 *RDL 9/2013, 12 July, on the adoption of urgent measures to guarantee the financial stability of the electricity system* (BOE No 167, 52106 (13 July 2013)), online: <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-7705>.

27 *Ibid*.

28 See *RD 661/2007, supra* note 5.

29 *RDL 2/2013, supra* note 24.

30 *Law 24/2013, 26 December on the electricity sector* (BOE No 310, 105198 (27 December 2013)), online: <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-13645>.

of energy costs and external energy dependence. The new regime was implemented by RD 413/2014[31] and the corresponding ministerial order.[32]

The Spanish National Stock Market Commission calculated that the new FIP regime would entail a reduction of approximately €1.7 billion in the regulated income of the overall facilities, although the impact would vary according to the technology and the facility type as well as the already cashed income. The older facilities would experience greater reductions or even lose the specific payments and obtain only the market price. Wind facilities comprised more than one third of the global adjustment; their income was reduced by around €600 million. This was followed by photovoltaic technology, with a reduction of less than €400 million, and, finally, solar-thermoelectric, cogeneration, waste treatment and hydraulic production, with reductions of between €150 million and €200 million each.[33]

To summarize, the Spanish strategy of providing incentives for renewable energies has been chaotic and caused a tremendous regulatory risk. When the cost overruns of the system, the tariff deficit and the extra income for the facilities' owners (whose incentives were calculated when the technologies, in particular photovoltaic and thermosolar, were less competitive) became apparent, successive normative changes took place from 2010 onward that caused significant losses to both foreign and national investors. As a result of these changes, foreign and national investors implemented diverse legal strategies to defend their interests. While international investors were able to turn to investment arbitration, national investors could present their claims only before Spanish courts. Because the facts that led to the claims, whether national or foreign, were the same, the investors experienced equally the consequences of the legislative changes. In both venues, violations of the legal certainty and the legitimate expectations principles were the basic legal arguments against the Spanish administration. This paper surveys the way in which this conflict has been addressed by the Spanish courts. The courts' response to the national investors' claims could be compared to the treatment of foreign investors by arbitration tribunals.

Spanish Supreme Court and Constitutional Court Approaches

Spanish investors cannot resort directly to investment arbitration. Therefore, they turned to national courts for administrative issues to challenge all the normative changes that had reduced, and finally eliminated, the special incentive regime, claiming damages. Additionally, and in parallel, the Spanish Constitutional Court has had to face constitutionality claims regarding the changes to the system.[34] While the first type of case is always initiated by investors and aims at obtaining damages, the second type is initiated by political or administrative authorities, aiming to obtain a declaration of non-constitutionality. Although they have different origins and purposes, both types of cases allege the violation of the legal certainty and legitimate expectations principles that are protected by the Spanish Constitution.[35] In the cases initiated by political or administrative authorities, the violation of the constitutional principle of normative hierarchy was also alleged, with the parties arguing the

31 *RD 413/2014, June 6 on electrical generation by means of renewable, cogeneration and waste facilities* (BOE No 140, 43876 (10 June 2014)), online: <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-6123>.

32 *Ministerial Order IET/1045/2014, 16 June, adopting the remuneration parameters for the facility type applicable to certain energy production facilities from renewable energies, cogeneration and waste* (BOE No 150, 46430 (June 20, 2014)), online: <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-6495>. The exceptional FIP incentives cover the investment costs that an efficient and well-administered company could not recover in the market. In particular, on top of the income from selling energy in the market, the facilities could receive, during their regulatory lives, an additional specific income integrated by an amount for installed power unit covering investment costs that cannot be recovered by each facility type through selling the energy in the market (the so-called "payment for investment") and another amount for the operation covering, if necessary, the difference between the exploitation costs and the revenues for participating in the facility type (the so-called "payment for the operation"). There was a complex classification of facility types on the basis of the technology used, installed power, age of the facility, electricity system and any other segmentation considered necessary to apply the regime. Each facility type had particular payment parameters that would determine its specific payment regime.

33 Comisión Nacional de los Mercados y la Competencia, *Report of the Markets and Competition National Commission on the Ministerial Order Proposal*, ENER/37/2014/EE (3 April 2014) at 8.

34 *Sentencia del Tribunal Constitucional* (STC) 96/2014, 12 June (BOE No 162, 99 (4 July 2014)) [STC 96/2014]; STCs 109/2014, 26 June (BOE No 177, 139 (22 July 2014)) and 110/2014, 26 June (BOE No 177, 150 (22 July 1914)); STC 48/2015, 5 March (BOE No 85, 191 (12 April 2015)); STCs 105/2015, 28 May (BOE No 159, 55643 (4 July 2015)) and 106/2015, 28 May (BOE No 159, 55651 (4 July 2015)); STC 270/2015, 17 December (BOE No 19, 6370 (22 January 2016)) [STC 270/2015]; STC 19/2016, 4 February (BOE No 57, 18530 (7 March 2015)); STCs 29/2016, 18 February (BOE No 71, 21753 (23 March 2016)) and 30/2016, 18 February (BOE No 71, 21767 (23 March 2016)); and STC 42/16, 3 March (BOE No 85, 25049 (8 April 2016)).

35 SC, *supra* note 25, art 9(3): "The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition of arbitrary action on the part of the latter."

infringement of articles 10 (promotion, protection and treatment of investments) and 13 (expropriation) of the Energy Charter Treaty[36] (ECT) as a superior normative instrument since Spanish reception of international law corresponds to a monist system.[37] However, international norms are not parameters of constitutionality and the Constitutional Court could not evaluate the eventual infringement of those rules by the internal laws — and, therefore, the violation of the normative hierarchy constitutional principle — since the claim did not include any reasoning on the substantive incompatibility between the ECT articles referred to above and the national provisions supposedly infringing them.[38]

The Spanish Supreme Court has already been called upon to decide a number of cases concerning the incentive regime.[39] Up to now, its pronouncements have dealt with the reductions to the incentive regime and have recently covered its suppression through RDs 1578/2008[40] and 1614/2010;[41] RDLs 14/2010,[42] 1/2012[43] and 2/2013;[44] and Law 2/2011.[45] Moreover, the Spanish Constitutional Court has faced a number of constitutionality claims regarding the norms implementing the incentive regime changes, in particular RDLs 14/2010 and 9/2013.[46] The Spanish Council of State[47] expressed its agreement with the Supreme Court jurisprudence on the norms introducing the incentive reductions (RDs 1578/2008 and 1614/2010 and RDL 14/2010) and, while acknowledging the difference between reduction and elimination, considered that the court's reasoning could equally be extended to the elimination of the incentive regime (RDLs 1/2012 and 2/2013).

Despite the parties' claims, the Supreme Court has considered it unnecessary to present preliminary questions before the Court of Justice of the European Union (CJEU) about either the interpretation of Directive 2009/28/EC on the promotion of the use of energy from renewable sources,[48] or the interpretation of the ECT[49] and its Protocol on Energy Efficiency and Related Environmental Aspects,[50] on the basis that the questions were misguided and the court had no doubt about the issues. The court also responded negatively to the possibility of presenting a preliminary question regarding the EU principles of legal certainty and the protection of legitimate expectations,[51] on the basis that the reduction of the incentives did not affect these principles because the remunerative system could not be permanently immune to normative changes and the sustainability of the electricity system justified the changes. In any case, the Supreme Court decisions rely on CJEU case law for the interpretation of the legal certainty principle and its corollary, the protection of legitimate expectations principle, as much as on Spanish jurisprudence. In this regard, the CJEU has stated that "the principle of legal certainty does not require that there be no legislative amendment, requiring as it does, rather, that the legislature

36 *Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95; 34 ILM 360 (entered into force 16 April 1998).

37 SC, *supra* note 25, art 96.

38 On this issue, STC 270/2015, *supra* note 34, includes a dissenting opinion signed by three magistrates. They regretted the missed opportunity to reflect on the control of constitutionality (according to the legality principle of SC article 9) based on the contradiction with an international obligation. International treaty norms creating Spanish obligations can be parameters for abstract constitutionality control of a national legal norm. The magistrates argued that the national rules infringe the legitimate expectations principle established not only in the constitution (as a dimension of the legal certainty principle) but also in the ECT.

39 *Sentencia del Tribunal Supremo* (STS) 2320/2012, 12 April; STS 4253/2012, 19 June; STS 4594/2012, 26 June; STS 3365/2013, 25 June. This jurisprudence is reported in STS 1/2014, 13 January; STS 1284/2014, 3 April; STS 117/2013, 15 July; STS 1720/2015, 20 April; STSs 261/2014, 262/2015, 20 April; STS 4785/2015, 16 November; STS 5379/2015, 9 December; STSs 5373, 5374/2015, 10 December; STSs 5478, 5479/2015, 11 December; STS 5495/2015, 15 December; STSs 5552, 5486, 5492, 5493/2015, 16 December; STSs 10, 67, 69, 72/2016, 21 January.

40 *RD 1578/2008, supra* note 13.

41 *RD 1614/2010, supra* note 18.

42 *RDL 14/2010, supra* note 19.

43 *RDL 1/2012, supra* note 21.

44 *RDL 2/2013, supra* note 24.

45 *Law 2/2011, supra* note 20.

46 *RDL 9/2013, supra* note 26.

47 Council of State, *Opinion on the ante-project of the law on the electricity sector*, CE-D-2013-937 (12 September 2013), online: <boe.es/buscar/doc.php?id=CE-D-2013-937>.

48 *Directive 2009/28/EC, supra* note 9 at 16–62.

49 *ECT, supra* note 36.

50 *Ibid*.

51 The question would have been: "Should the legitimate expectations principle be interpreted since it is opposed to a modification in the remuneration scheme of a renewable energies plant once the investment for its construction has already been made and it has been recognized for a specific remuneration during a specified number of years?"

take account of the particular situations of traders and provide, where appropriate, adaptations to the application of the new legal rules."[52]

In the view of the Supreme Court, the reasonable profitability principle applies to the full life of the facility but does not guarantee that, throughout the entire period, the investments will attain reasonable profitability. The changes in the regime are not considered to be prejudicial to the reasonable profitability principle. The court has stated, in any case, that the stability and predictability of the energy regulatory framework need to be respected in order to promote the development of technologies for the production of energy from renewable sources, to make them more efficient, to generate economic and labour opportunities and to guarantee the security of investments.

As to the principle of the security and protection of legitimate expectations,[53] the Supreme Court has stated that the principle has not been infringed, for the following reasons: the FIT is only one of the incentive measures adopted by public authorities and its evaluation has to be done jointly; the facilities' owners do not have an unchangeable right to the unaltered maintenance of the economic regime establishing their remuneration when they have opted not to go to the market (a possibility that is always open to them); the elimination of the entrepreneurial risk is counterbalanced with the possibility of the measures being altered when there is a change in circumstances, and this is a factor that the owners knew or should have known; the incentive regime rests on a series of implicit bases that any diligent operator could not ignore, such as the fact that the incentive measures cannot be considered perpetual or unlimited in time (for example, the premium after 25 years implicitly referred to the useful life of the facility); and the incentive regime responded to an estimation of electric power objectives for renewable sources. Under this reasoning, the Supreme Court stated that legal certainty is not in conflict with a modification of the legal regime, even if, from the protection of investments perspective, stability of the regulatory framework for economic activity is desirable. Interpreting legal certainty as a curb to normative modifications is particularly inappropriate in a sector such as renewable energy that, due to its innovative character, requires adaptations that parallel the evolution of general economic circumstances and the technological and economic characteristics of the activity. Adjustments and corrections introduced by the government are, therefore, not contrary to the legal certainty principle.

The Supreme Court considered that the legitimate expectations of the investors were not infringed either, since the limitation of an initially established payment/incentive regime for all renewable energies was predictable, in particular with the economic crisis experienced since 2007. The introduction of certain changes in the regulatory system was a reasonable measure to mitigate its excess costs.

In a similar line of reasoning, the Spanish Constitutional Court[54] established that the normative changes introduced by RDL 9/2013[55] could not be challenged on the basis of the legitimate expectations principle because the principle does not absolutely protect regulatory stability or immutability, in particular in the context of economic difficulties and the deficit increase experienced in the electricity sector. The legal certainty principle and its corollary, the legitimate expectations principle, do not entail the claimants' right to maintenance of the existing regulation for an economic sector at a particular moment. Regulatory stability is compatible with normative changes when the changes are foreseeable and clearly in the general public interest. This was the situation at issue; although the measures were adopted as emergency measures, in the existing circumstances, they could not be considered unforeseeable by a reasonable, diligent and prudent operator. The norms are clear regarding the situations affected and the legal effects; hence, there is no uncertainty as to their scope. In addition, the energy sector, as with several others, is subject to intense administrative intervention due to its significance to the general public interest. The need to protect the general public interest when circumstances change makes it

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52 *Plantanol GmbH & Co KG*, C-201/08, [2009] ECR I-08343 at para 49, online: <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CJ0201>. The court stated:

[T]he general principles of legal certainty and the protection of legitimate expectations do not in principle preclude a Member State, with regard to a product such as the one at issue in the main proceedings, from withdrawing, before the expiry date initially laid down in the national rules, a tax exemption scheme which applied to such products. In any event, such a withdrawal does not require the presence of exceptional circumstances. However, it is for the national court to consider, in the context of an overall assessment in the specific case, whether those principles have been respected in the main proceedings by taking account of all relevant circumstances relating to the case (*ibid* at para 68).

53 SC, s*upra* note 25, art 9(3).

54 STC 270/2015, s*upra* note 34.

55 *RDL 9/2013, supra* note 26.

unfeasible to assert the permanency and unalterability of the rules. The legal certainty and legitimate expectations principles do not allow the enshrinement of rights under the existing rules and, obviously, cannot impede the introduction of sudden legislative changes in emergency cases.

In a dissenting opinion,[56] three magistrates of the Constitutional Court, although agreeing with the final conclusion of the court's decision, stated that they would have wished to see the legitimate expectations issue analyzed in a more detailed way, in particular considering the existence of numerous investment arbitration proceedings against Spain alleging the infringement of this principle. The same desire for a wider and more reflexive analysis was expressed with respect to fair and equitable treatment accorded in the ECT. Despite the "partially different meaning"[57] this treatment may assume in international economic and investment law when applied by international courts, it is understood to be included in the constitutional legitimate expectations principle. In this regard, the dissenting magistrates emphasized the careful arguments provided in the Supreme Court decisions.

In the dissenting magistrates' view, the essential elements of the legitimate expectations analysis in the case are the following: the evaluation of the incentive system as a whole (tariffs are only a part of it); whether the advantages of avoiding market risks implied in the regulated tariffs regime is counterbalanced by the regulatory risk derived from the sudden need to react in certain circumstances in order to address superior public interests; investors' diligence in analyzing the implicit conditions of these kinds of public incentives; and the influence that achieving the targeted objectives should have on the incentive regime.

For a well-founded reasoning that could have led to a solid constitutional doctrine on the legitimate expectations principle, it would have been necessary to develop the constitutional meaning of legitimate expectations as an integral element of the principles of legal certainty and the interdiction against retroactivity of restrictive norms, together with the principle of the responsibility of public authorities and the prohibition against their arbitrary actions; and, in accordance with the resulting standards, to proceed to a meticulous analysis of the contested norms, adequately balancing all the concurrent elements. In this regard, the CJEU has dealt with legitimate expectations and, therefore, its approach can serve as a guide. The elements that should be balanced are the following: the legitimate expectations of interested parties must derive from concrete acts that objectively create such expectations and that provide specific, unconditional and coherent guarantees in accordance with the applicable law; economic operators cannot have legitimate expectations in the continuation of a situation that is subject to the discretionary exercise of power by public authorities, in particular in areas that require constant adaptation to economic circumstances or that respond to exceptional or transitory situations, as well as to the need to act in the general public interest; the unpredictability of the normative changes that led to the eventual frustration of the legitimate expectations of a prudent operator when taking into account the market or economic sector circumstances; and the normative changes must take into consideration the specific situations of those economic operators and provide adaptations that minimize, compensate or rebalance the frustrated legitimate expectations through substitute measures proportionate to the stated objectives.

Another argument used was that the prohibition against arbitrary action by public authorities[58] had been breached. The Supreme Court rejected this argument, holding that the government's changed course of action did not constitute a reversal contrary to the public interest. Rather, the course of action was aimed at avoiding the negative impact of previous decisions on the sustainability of the electricity production system. Along similar lines, the Spanish Constitutional Court dismissed the unconstitutionality claims regarding the violation of article 86 of the SC because the constitutional requirement of an extraordinary and urgent need for government action through an RDL was explicit and reasoned and the adopted measures were directly connected to the difficult situation that had to be faced.[59]

Finally, the Supreme Court did not see any violation of the principle under which rules that restrict rights cannot have retroactive effect. The forbidden retroactivity principle does not apply to norms

56 STC 270/2015, s*upra* note 34.
57 *Ibid.*
58 SC, s*upra* note 25, art 9(3).
59 STC 96/2014, s*upra* note 34.

that do not alter or revisit what has already happened (legal effects that have already occurred are not annulled) but have an immediate effect, although this may entail having an effect on an ongoing situation. Because the effects of the modifications are to take place in the future, the modifications do not fall within the forbidden retroactivity principle. The prohibition would apply, for example, if the new norms obliged the parties to return already received amounts, but it does not apply when the new norms establish that the payments will cease in 30 years. A similar reasoning has been applied by the Constitutional Court.[60] The interdiction against retroactivity in strict terms only applies to consolidated rights. Therefore, this prohibition applies to regulations that affect confirmed relationships and exhausted situations. In these cases, retroactivity could only be admitted in exceptional cases of qualified need on the basis of the common good. The strict principle does not apply to pending, future, conditional and expected rights. In those cases, the interdiction against retroactivity does not impede the adoption of rules that affect an ongoing situation only prospectively.

To summarize, both the Supreme and the Constitutional Courts, in their respective spheres of action, have considered that the cuts to the incentives do not entail any violation of the constitutional principles of legal certainty, legitimate expectations and the prohibition of retroactivity. They have ruled that the cuts respond to a public interest duly justified by the legislator and, in particular, that the cuts constituted the public authorities' reaction to the renewable energies technology evolution (rapid increase of competitiveness) and were required to fight the tariff deficit and guarantee sustainability of the electricity system. Therefore, the measures could not be considered an arbitrary use of public power.

SPAIN AND INVESTMENT ARBITRATION: PRESENT SITUATION

Spain has actively participated in the international framework of investment arbitration. It is a member of a large number of bilateral investment treaties (BITs) and also of the International Centre for Settlement of Investment Disputes (ICSID) and the ECT, as well as of the Permanent Court of Arbitration in The Hague. Until recently, the number of cases against Spain has been very limited.[61]

European Union Normative Framework

It is well known that the European Union has assumed competence for the regulation of foreign relations regarding investments. Therefore, beyond complying with already existing agreements, Spain is no longer free to enter into such agreements on its own.

The new EU competence in this field has begun to be exercised recently with the signing of an EU-Canada free trade agreement (FTA),[62] which includes a full chapter on investment protection. However, the introduction of a parallel chapter in the negotiations of the Transatlantic Trade and Investment Partnership (TTIP),[63] an EU-US FTA, has caused a complex social debate and has led the European Commission to work on a proposal for an "investment court system" that has replaced the initially agreed-upon text within CETA.[64] The social and political movements against investment arbitration may have an influence on the ratification of CETA by the European Union and by the national parliaments of its member states.[65] However, despite a certain amount of social opposition and the present litigious situation, the Spanish government has not expressed any concern regarding the incorporation of this

60 STC 270/2015, *supra* note 34.

61 ICSID arbitrations: *Maffezini v Spain*, Award, 13 November 2000, ICSID Case No ARB/97/7, online: Italaw <www.italaw.com/cases/641>; and *Inversión y Gestión de Bienes v Spain*, Award, 14 August 2015, ICSID Case No ARB/12/17.

62 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union [and its Member States...]* (29 February 2016) [*CETA*], online: European Commission <trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>. Translation of the legal text of the English version of CETA into French and all other EU official treaty languages is under way.

63 As of September 1, 2016, the TTIP is under negotiation. For more information, see online: <ec.europa.eu/trade/policy/in-focus/ttip/>.

64 EC, Commission, News Release, "CETA: EU and Canada agree on new approach on investment in trade agreement" (29 February 2016), online: <trade.ec.europa.eu/doclib/press/index.cfm?id=1468>. The amendment to the agreement suggests a move from the current ad hoc arbitration system to a permanent and institutionalized dispute settlement tribunal. The members of the tribunal will no longer be appointed by the investor and the state involved in a dispute but will instead be appointed in advance by the parties to the agreement. An appeal system comparable to that found in domestic legal systems will be in place, meaning that decisions will be checked for legal correctness and reversed when an error arises.

65 On the issue of the respective competences of the European Union and of its member states to sign an FTA, including an investment chapter (in this case, with Singapore), a CJEU opinion is presently pending (Opinion 2/2015).

issue into the agreements.[66] Investment arbitration is accepted, and there is no discussion regarding whether it should be abandoned among developed democracies with proper legal and judicial systems.

Renewable Energy Arbitration Cases

As has been seen, national courts provide no opportunity to protect Spanish investments in renewable energies. Hence, foreign investors have turned to international investment arbitration against Spain. Foreign subsidiaries of Spanish companies have also initiated arbitration procedures against Spain. In most cases, they have done so under the ECT, relying on the alleged infringement of the fair and equitable treatment of foreign investors as much as on the prohibition of expropriation and measures having equivalent effect without fair compensation. The ECT allows resorting to ICSID, the United Nations Commission on International Trade Law (UNCITRAL) Rules and the Arbitration Institute of the Stockholm Chamber of Commerce.

As of June 1, 2016, 22 cases had been presented before ICSID[67] and three before the Stockholm Chamber of Commerce, while one is being conducted in an ad hoc arbitration under the UNCITRAL Rules. The following table presents the basic data on the cases,[68] the majority of which are still pending.

Table 1: Arbitration Cases Against Spain on Renewable Energy

UNCITRAL			
INVESTOR	DATE	ARBITRATORS	LAW FIRM
PV Investors	17/11/2011 ECT	Gabrielle Kaufmann-Kohler (pres), Charles Brower, Bernardo Sepúlveda-Amor	Allen & Overy (J. Gill, QC, J. Sullivan) — Spain: Herbert Smith Freehills (E. Soler Tappa, C. Leathley)
STOCKHOLM CHAMBER OF COMMERCE			
INVESTOR	DATE	ARBITRATORS	LAW FIRM
Charanne B.V. (The Netherlands) & Construction Investments S.A.R.L. (Luxembourg) --- Two Spanish entrepreneurs control a Spanish company through them (Isolux Corsan group[69])	2013 ECT — AWARD 21/01/16[70]	Alexis Mourre (pres), Guido Tawil, Claus von Wobeser	Bird & Bird; Shearman & Sterling; Sterling LLP (Latham Watkins from May 2014) — Spain: Herbert Smith Freehills

66 The Spanish position is expressed in a technical document to which the national press had access: "Spain is confident on the possibility to sign and provisionally apply the agreement in the issues under EU competence aiming to have it entered into force as soon as possible (before 2017). This would be economically and commercially beneficial for both parties." *El País* (16 May 2016).

67 A list of ICSID arbitrations against Spain can be found online: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rntly=ST127>.

68 Information about the cases in this table may also be found on the United Nations Conference on Trade and Development (UNCTAD) website: <investmentpolicyhub.unctad.org/ISDS/FilterByCaseName>.

69 Charanne v Spain, Award, 21 January 2016, Case No 062/2012 (ECT, Stockholm Chamber of Commerce) at para 408 [Ch*aranne*].

70 *Ibid.*

Isolux Infrastructure Netherlands B.V. (participation by a Canadian fund) (subsidiary of the Spanish company Isolux)	ECT	Yves Derains (pres), Guido S. Tawil, Claus von Wobeser	Bird & Bird — Government Legal Service
Abengoa CSP Equity Investment S.à.r.l. (Luxemburg subsidiary of a Spanish company)	June 2013 ECT	Unknown	Cuatrecasas Gonçalves Pereira — Government Legal Service
ICSID			
INVESTOR	DATE	ARBITRATORS	LAW FIRM
RREEF Infrastructure (G.P.) Limited (British) & RREEF Pan-European Infrastructure Two Lux S.à.r.l (Luxemburg)	22/11/13 ARB/13/30 ECT	Alain Pellet (pres), Robert Volterra, Pedro Nikken	Allen & Overy — Government Legal Service
Antin Infrastructure Services Luxembourg S.à.r.l (Luxembourg) & Antin Energia Termosolar B.V. (Dutch)	22/11/13 ARB/13/31 ECT	Francisco Orrego Vicuña (investor), J. Christopher Thomas (Spain)	Allen & Overy — Government Legal Service
EISER Infrastructure Limited (Britsh) & Energia Solar Luxembourg S.à.r.l (Luxemburg)	23/12/13 ARB/13/36 ECT	John R. Crook (pres), Stanimir A. Alexandrov, Campbell Alan McLachlan	Allen & Overy — Government Legal Service
Masdar Solar & Wind Coo-peratief UA (Dutch)	11/02/14 ARB/14/01 ECT	John Beechey (pres), Gary B. Born, Brigitte Stern	Allen & Overy — Government Legal Service
NextEra Energy Global Holdings B.V. (Dutch), NextEra Energy Spain Holdings B.V. (Dutch)	23/05/14 ARB 14/11 ECT	Donald M. McRae (pres), L. Yves Fortier, Laurence Boisson de Chazournes	Skadden, Arps, Slate, Meagher & Flom — Government Legal Service
InfraRed Environmental Infrastructure G.P. Limited and others (UK)	3/06/14 ARB 14/12 ECT	Stephen L. Drymer (pres), William W. Park, Pierre-Marie Dupuy	Cuatrecasas Gonçalves Pereira — Government Legal Service

RENERGY S.à r.l. (Luxembourg)	1/08/14 ARB/14/18 ECT	Bruno Simma (pres), Christoph H. Schreuer, Philippe Sands	Cuatrecasas Gonçalves Pereira — Government Legal Service
RWE Innogy GmbH (German), RWE Innogy Aersa S.A.U. (Spanish)	23/12/14 ARB/14/34 ECT	Samuel Wordsworth (pres), Judd L. Kessler, Anna Joubin-Bret	Allen & Overy — Government Legal Service
Stadtwerke München GmbH, RWE Innogy GmbH, RheinEnergie AG, AS 3 Beteiligungs GmbH, Ferrostaal Industrial Projects GmbH, Ferranda GmbH, Andasol Fonds GmbH & Co. KG, Andasol 3 Kraftwerks GmbH (Germans), Marquesado Solar S.L. (Spanish)	7/01/15 ARB/15/1 ECT	Jeswald W. Salacuse (pres), Kaj Hober, Zachary Douglas	Allen & Overy — Government Legal Service
STEAG GmbH (German)	21/01/15 ARB/15/4 ECT		Clifford Chance — Government Legal Service
9REN Holding S.a.r.l (Luxembourg)	21/04/15 ARB/15/15 ECT	Ian Binnie (pres), David R. Haigh, V.V. Veeder	King & Spalding; Gomez-Acebo & Pombo — Government Legal Service
BayWa r.e. renewable energy GmbH (German), BayWa r.e. Asset Holding GmbH (German)	8/05/15 ARB/15/16 ECT	James R. Crawford (pres), Horacio A. Grigera Naón, Loretta Malintoppi	Cuatrecasas Gonçalves Pereira — Government Legal Service
Cube Infrastructure Fund SICAV, Cube Energy S.C.A., Cube Infrastructure Managers S.A. (Luxembourg), Demeter 2 FPCI, Demeter Partners S.A. (French)	1/06/15 ARB/15/20 ECT	Vaughan Lowe (pres), James Spigelman, Christian Tomuschat	King & Spalding; Gómez-Acebo & Pombo — Government Legal Service
Mathias Kruck, Ralf Hofmann, Frank Schumm, Joachim Kruck, Peter Flachsmann, Rolf Schumm, Karsten Reiss, Jürgen Reiss (Germans)	4/6/15 ARB/15/23 ECT	Vaughan Lowe (pres), Gary B. Born, Zachary Douglas	King & Spalding; Gómez-Acebo & Pombo — Government Legal Service

KS Invest GmbH, TLS Invest GmbH (German)	16/6/15 ARB/15/25 ECT	Bruno Simma (pres), Gary B. Born, Daniel Bethlehem	King & Spalding — Government Legal Service
JGC Corporation (Japanese)	22/06/15 ARB/15/27 ECT	Hi-Taek Shin (pres), Rudolf Dolzer, Mónica Pinto	Cuatrecasas, Gonçalves Pereira; Nagashima Ohno & Tsunematsu — Government Legal Service
Cavalum SGPS, S.A. (Portuguese)	10/08/15 ARB/15/34 ECT	Lawrence Collins (pres), David R. Haigh, Daniel Bethlehem	King & Spalding — Government Legal Service
E.ON SE, E.ON Finanzanlagen GmbH, E.ON Iberia Holding GmbH (Germans)	10/08/15 ARB/15/35 ECT	Mark A. Kantor (pres), Francisco Orrego Vicuña, Laurence Boisson de Chazournes	Luther Rechtsanwalts-gesellschaft mbH — Government Legal Service
OperaFund Eco-Invest SICAV PLC (Maltese), Schwab Holding AG (Swiss)	11/08/15 ARB/15/36 ECT	Karl-Heinz Böckstiegel (pres), August Reinisch, Philippe Sands	Cuatrecasas, Gonçalves Pereira — Government Legal Service
SolEs Badajoz GmbH (German)	24/08/15 ARB/15/38 ECT	Joan E. Donoghue (pres), Stanimir A. Alexandrov, Anna Joubin-Bret	Orrick Herrington & Sutcliffe; Perez-Llorca — Government Legal Service
Hydro Energy 1 S.à r.l. (Luxembourg) and Hydroxana Sweden AB (Sweden)	19/10/15 ARB/15/42 ECT	Lawrence Collins (pres), Peter Rees, Rolf Knieper	Cuatrecasas, Gonçalves Pereira; Three Crowns — Government Legal Service
Eurus Energy Holdings Corporation (Japanese) & Eurus Energy Europe B.V. (Dutch)	1/03/2016 ARB/16/4 ECT	James R. Crawford (pres), Oscar M. Garibaldi, Andrea Giardina	Freshfields Bruckhaus Deringer — Government Legal Service

It is interesting to note that many of the claimants in Spanish arbitrations are companies established in the European Union. The compatibility of BITs with EU law in intra-EU cases has been very much an open question. In 2015, the European Commission asked member states (specifically, Austria, the Netherlands, Romania, Slovakia and Sweden) to terminate their intra-EU BITs).[71] But not until very recently has the CJEU been asked to weigh in on the compatibility of intra-EU BITs and EU law.[72] It should be noted that, in contrast to the situation with BITs, the European Union, along with its member states, is a party to the ECT, under which most of the arbitrations against Spain are initiated. As the situation stands, in addition to the Spanish allegations in this realm denying the jurisdiction of the arbitral tribunal, the European Commission presented an *amicus curiae* brief in the Charanne B.V. and Construction Investments S.A.R.L. arbitration.[73] The award found the brief "very useful" and gave it "the most careful consideration,"[74] providing a detailed analysis.[75] The tribunal had to resolve whether, within the dispute, the claimants could be considered investors from their respective states or from the European Union. In this regard, the tribunal concluded that, because states and the European Union are both equally parties to the ECT, the decision on the claimant's origin depended on the content of the claim and on the entity against which it was filed. The panel concluded that, on this basis, the dispute conformed to the ECT jurisdiction criteria. In addition, it established that the ECT does not contain any "implicit disconnection clause for intra-EU relationships."[76] What is clear in any case is that it is not for the arbitration tribunal to determine the compatibility of the ECT dispute settlement mechanism with EU law.[77]

Charanne B.V. and Construction Investments S.A.R.L. Award

Charanne B.V. and Construction Investments S.A.R.L are companies based in the Netherlands and Luxemburg, respectively, that jointly hold the Spanish company Grupo T-Solar Global S.A. They initiated arbitration proceedings against Spain under the ECT before the Arbitration Institute of the Stockholm Chamber of Commerce on May 7, 2012. The award was released on January 21, 2016,[78] the first of the arbitrations to be decided on Spanish renewable energies incentives cuts. The claimants alleged Spanish violations of ECT articles 10 and 13[79] through RD 1565/2010[80] and RDL 14/2010,[81] expressly excluding RDL 9/2013[82] from the scope of their action.

Arbitral jurisdiction was discussed on a different basis.[83] First, Spain alleged that the *electa una via* clause[84] applied since the claimants had already presented two demands before Spanish national courts (and another one before an international court, the ECHR). However, the claims before Spanish courts were presented by Grupo T-Solar Global S.A. Although belonging to the same group — they were shareholders — the arbitration claimants were different legal entities and, therefore, the assertion was not accepted. For the identity of parties requirement to be met, it would have to be proven that the claimants held decision-making power within Grupo T-Solar Global S.A.[85] Spain also argued that, piercing the corporate veil, it was clear that the Luxembourg and Netherlands companies were owned

71 EC, Commission, Press Release, "Commission asks Member States to terminate their intra-EU bilateral investment treaties" (18 June 2015), online: <europa.eu/rapid/press-release_IP-15-5198_en.htm>.

72 In May 2016, the German Federal Court of Justice [*Bundesgerichtshof*] requested that the CJEU give a ruling on the validity of arbitration agreements in BITs between member states. Information on the case (*Achema (Eureko) v Slovakia*) can be found in "Intra-EU BITs Before the Court of Justice of the EU" (24 May 2015) (blog), online: Global Investment Protection <www.globalinvestmentprotection.com/index.php/intra-eu-bits-before-the-court-of-justice-of-the-eu/>.

73 *Charanne, supra* note 69. This case is discussed in more detail below.

74 *Ibid* at para 425.

75 *Ibid* at paras 424–450.

76 *Ibid* at para 433.

77 *Ibid* at para 440 et seq.

78 *Ibid*. The award, in Spanish, is available online: <www.energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/34-charanne-the-netherlands-and-construction-investments-luxembourg-v-spain/> and an English translation can be found online at: <www.minetur.gob.es/es-es/gabineteprensa/notasprensa/2013/documents/laudo%20final%20arbritaje%20en%20ingles.pdf>.

79 *ECT, supra* note 36.

80 *RD 1565/2010, 19 November, which regulates and modifies certain aspects pertaining to the electrical energy production activity under a special regime* (BOE No 283, 97428 (23 November 2010)).

81 *RDL 14/2010, supra* note 19.

82 *RDL 9/2013, supra* note 26.

83 On a related issue, the tribunal discussed the fact that the investors and the defendant country, apart from being within the special application criteria of the ECT, were also parties to an economically integrated area that, in itself, was a party to the ECT. The issue will not be addressed here because it is of peripheral relevance for the purpose of this paper: *Charanne*, *supra* note 69 at paras 424–50.

84 ECT, *supra* note 36, art 26.

85 *Charanne*, *supra* note 69 at paras 405-406, 408.

by Spanish nationals and, therefore, they could not be considered investors according to the ECT.[86] It is undisputed that the notion of "investor" applies to legal persons organized in accordance with the law applicable in an ECT contracting party. Piercing the corporate veil and ignoring the investor's legal personality is conceivable in the event of a jurisdictional fraud; however, fraud would have to be proven.[87] Finally, Spain also argued there is discrimination between Spanish investors within the country and Spanish investors who own foreign companies, because only the latter have access to investment arbitration.

Equality and non-discrimination on the basis of national constitutions and international conventions in the investment arbitration landscape have been widely discussed by civil society activists. Together with other arguments, these discussions have helped to support the idea of restricting the use of investment arbitration to countries with developed or trustworthy judicial systems. However, it seemed clear that within this arbitration procedure — and any other — the discrimination argument could not, and did not, succeed because jurisdiction was established on the basis of the investment treaty,[88] which in itself would be the basis of the alleged discrimination.

Regarding the prohibition against indirect expropriation,[89] the arbitration tribunal noted first that the investment made by the claimants consisted of their indirect stake in the company Grupo T-Solar S.A.; hence, the protected investments were not the expected returns, but the shares.[90] It was undisputed that the shares' ownership had not been affected. The dispute concerned the decrease in the shares' value due to the reduced profitability of the company. To become an expropriation, the shares' loss of value "has to be so large that it equals a deprivation of property": in other words, "its effects have to be so significant that it can be considered that the investor has been deprived, in full or in part, of its investment."[91] A mere decrease in the value of the shares can only qualify as an indirect expropriation "if the loss of value is such that it could be considered equivalent to a deprivation of property," and this was not the case when the estimated loss was 10 percent.[92]

Regarding the obligations for the promotion, protection and treatment of investments,[93] the main discussion focused on fair and equitable treatment and the violation of the complainants' rights through the retroactive application of the Spanish legislative measures. As to fair and equitable treatment, which includes the duty to create a stable, equitable, favourable and transparent environment for member states' investors, the arbitration tribunal had to consider whether the changes to the regulatory framework (up to 2010) amounted to the frustration of the investors' legitimate expectations. In this regard, based on the good faith principle under customary international law and referring to a 2012 UNCTAD study on fair and equitable treatment,[94] the tribunal analyzed whether Spain had launched an investment promotion campaign that provided specific commitments to the claimants or created the legitimate expectations that the normative system would not be changed. It was clear to the tribunal that the regulations establishing the incentive regime could not be considered specific commitments to the claimants because, despite having a specific scope of application, the subject of which was the targets, the regulations did not lose their general character of regulatory measures.[95] However, in the

86 ECT, *supra* note 36, art 1.7.

87 *Charanne*, *supra* note 69 at paras 414-415, 417. Citing the *Yukos* award (*Yukos Universal Ltd (Isle of Man) v Russia*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, PCA Case No AA 227 (ECT, UNCITRAL), online: Italaw <www.italaw.com/sites/default/files/case-documents/ita0910.pdf>) at para 415, the tribunal stated that it "knows of no general principle of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a contracting party" (*Ibid* at para 417).

88 *Ibid* at para 420.

89 ECT, *supra* note 36, art 13.

90 *Charanne*, *supra* note 69 at paras 458-59.

91 *Ibid* at paras 464-65.

92 *Ibid* at paras 465-66.

93 ECT, *supra* note 36, art 10. For the purposes of this paper, the issue of the alleged violations of the effective means for the assertion of claims has peripheral relevance and, therefore, will not be discussed: *Charanne*, *supra* note 69 at paras 468–74.

94 UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II* (New York: UN, 2012), online: <unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf>. The study established that "an investor may derive legitimate expectations either from (a) specific commitments addressed to it personally, for example in the form of a stabilization clause, or (b) rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment" (*Ibid* at 69).

95 *Charanne*, *supra* note 69 at paras 490–93.

dissenting opinion, Guido Santiago Tawil considered that the regulations were aimed at a limited number of recipients, that is, the pool of potential interested investors.[96]

Legitimate expectations, under international law, have to be based on an objective data analysis and must be reasonable in the specific circumstances. Analyzing the relevant data (documents) and considering that states maintain their regulatory capacity when circumstances change (along this line, there was clear and well-established Spanish jurisprudence), the tribunal concluded that the claimants could not have reasonably expected that the incentives (tariffs in particular) would remain unchanged unless there had been a specific commitment. Normative modifications in changed circumstances were foreseeable.[97] However, the dissenting arbitrator considered that the absence of a state-specific commitment toward the claimants did not preclude the existence of legitimate expectations on the maintenance of the tariffs. The expectations would derive from the legal system in force at the time of the investment, together with other documents issued contemporaneously by the Spanish government because they "appear to be determining factors for the Claimants to decide to carry out the investment."[98]

When the regulations were changed, the protection of legitimate expectations principle required these changes to be proportionate. The majority of the arbitration tribunal considered that "the proportionality requirement is fulfilled as long as the modifications are not random or unnecessary and…they do not suddenly and unexpectedly eliminate the essential features of the regulatory framework in place."[99] The tribunal found the Spanish arguments convincing because, overall, the 2010 regulations "implemented adjustments and adaptations that did not eliminate the essential characteristics of the existing regulatory framework," could not "be deemed as irrational" and were not "contrary to the public interest."[100] The claimants had not provided any evidence to the contrary. Therefore, "no legitimate expectation whatsoever under international law could have been defeated."[101]

As to retroactivity and the companies' claims that their vested rights had been violated, the arbitration tribunal perceived this argument as "a mere rewording of the argument that the State could not alter in any way the regulatory framework from which the Claimants' plants benefited" and stated that "it is undisputed that the 2010 regulations applied immediately, from their entry into force, to the plants already in operation, and that they did not apply retroactively to previous time periods…. [T]here is no principle of international law preventing a State from adopting regulatory measures with immediate effect on ongoing situations."[102]

Although in *Charanne* the Spanish government's views prevailed, outcomes could vary in the pending cases. Beyond the obvious fact that they are different arbitrations, it has to be recalled that RDL 9/2013[103] was expressly excluded from *Charanne*. Further, the dissenting opinion clearly shows a different understanding and interpretation of the legitimate expectations requirement. It seems clear that, within the international investment legal framework, states retain the ability to modify their legal systems (in the words of the dissenting arbitrator, "no vested right to the continuance of a specific general legal regime exists, nor does a legitimate expectation regarding the stability of laws and regulations"[104]) but are obliged to compensate investors when changes in the legal environment unjustifiably, and without adequate compensation, prejudice the investment — that is, if they affect investors' vested rights or legitimate expectations.[105] However, diverse interpretations remain regarding when those changes affect legitimate expectations. Although it is agreed that the legitimate expectations test is to be based on objective data, its interpretation may lead to opposing conclusions.

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96 *Charanne v Spain*, Award, 21 January 2016, Case No 062/2012 (ECT, Stockholm Chamber of Commerce), Tawil, dissenting, at para 8 [*Charanne* Dissent].
97 *Charanne*, *supra* note 69 at paras 495–511. For a non-modification expectation to reasonably exist, the arbitral tribunal would require a specific commitment. The tribunal included citations to several ECT awards based on this reasoning.
98 *Charanne* Dissent, *supra* note 96 at paras 5-6.
99 *Charanne*, *supra* note 69 at para 517.
100 *Ibid* at para 527.
101 *Ibid* at paras 533-35.
102 *Ibid* at paras 546-48.
103 *RDL 9/2013, supra* note 26.
104 *Charanne* Dissent, *supra* note 96 at para 11.
105 *Ibid.*

CONCLUSIONS

The resolution of the pending arbitration cases is of extraordinary interest, not only for the economic consequences of the rulings but also for the evaluation of the legitimacy of Spanish normative measures reducing, from 2010 up to their elimination in 2013, the incentives for the production of electricity on by means of renewable energies that had been established in 2004 and 2007. Whether on the basis of the Spanish constitution or on the basis of the ECT — or a BIT — the decisions will establish whether the normative changes entail an indirect expropriation or a violation of the legal certainty principle and its corollary, the protection of legitimate expectations. The Spanish government maintains that it had the authority to modify the regulations under the circumstances.

Looking at the Spanish jurisprudence and the first arbitral award that has been released, it seems that the understanding of the rules and principles under the ECT is not far from that of the Spanish Constitutional and Supreme Courts regarding prohibition of the retroactive effect of the rights-restricting norms and compliance with the legal certainty and legitimate expectations principles. In this regard, it is interesting to note that Spanish jurisprudence follows CJEU case law.

Although it is most improbable that in future cases Spanish courts will evaluate the situation differently, in the investment arbitration scenario, the situation could be quite different. The reasons lie, first, in the different contexts of the cases and the autonomy of each arbitration tribunal and, second, in the different understanding and interpretation of the legitimate expectations test criteria (the criteria themselves are well established). Although the existence of this understanding provides for legal certainty in any investment dispute, it does not — and probably cannot — guarantee a consistent evaluation of the circumstances in investment arbitration proceedings, as the dissenting opinion in *Charanne* shows. With the renewable energies arbitration "explosion," there is still much to be seen.

As to the effect of the renewable energies situation in the investment arbitration debate within Spanish civil society, three aspects are significant. The first is the differential treatment (discrimination) of national and foreign investors. Although Spanish investors have suffered the same consequences of the normative reforms as foreign investors, they do not have access to arbitration. Foreign investors, even those owned by Spanish nationals or companies, do have the arbitration option. In this regard, and on the basis of material equality, the Spanish ombudsman has recommended that the energy ministry adopt the necessary measures so that Spanish citizens are not treated less favourably than foreigners.[106] Second, states' attorneys have been forced to develop their expertise in investment arbitration, an area in which they had little previous experience. In this regard, a particularly sensitive issue is that numerous Spanish state attorneys have been hired by major law firms to defend investors' interests in at least 12 cases, with the attorneys thereby leaving aside, at least temporarily, their primary professional commitment to the Spanish administration.[107] This leads to the third issue: the concentration of big business around investment arbitration. Only a few law firms are involved in the defence of all the cases and some arbitrators sit on various panels. All this generates a social reaction against investment arbitration that might be reinforced if and when any of the extremely expensive pending arbitrations result in rulings against Spain on facts that, up to now, have not resulted in compensation for any national investor.

At this time, however, there is no well-developed academic or political discussion in Spain regarding whether investment arbitration should be abandoned, at least not among developed democracies with proper legal and judicial systems. Investment arbitration continues to receive governmental support, although the legality of intra-EU cases is under question and awaits the response of the CJEU.

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106 Recommendation to the Spanish energy ministry, May 16, 2014, that was rejected by the ministry: "Discriminación de los inversores españoles en su acceso al arbitraje internacional, ante la modificación del régimen retributivo de la energía fotovoltaica," online: <www.defensordelpueblo.es/resoluciones/discriminacion-de-los-inversores-espanoles-en-su-acceso-al-arbitraje-internacional-ante-la-modificacion-del-regimen-retributivo-de-la-energia-fotovoltaica-2/>.

107 Rafael Méndez, "Abogados del Estado pleitean contra España fichados por fondos 'verdes'," *El País*, 5 July 2015. (Interestingly, a number of Spanish state attorneys and their teams were trained in Canada.)

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