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ROUND-UP OF ARBITRATIONS IN THE RENEWABLE ENERGY SECTOR: LESSONS FOR PORTUGAL

BALANÇO DAS ARBITRAGENS NO SETOR DAS ENERGIAS RENOVÁVEIS: LIÇÕES PARA PORTUGAL

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Abstract: This article purports to provide an overview of the regulatory incentives enacted in Spain, the Czech Republic and Italy to foster the production of energy from renewable sources, the measures that were subsequently passed to withdraw some or all of those incentives and, finally, the arbitrations against these States that ensued. In their concluding remarks, the authors seek to draw similarities and points of departure in the relevant case law, and from there derive lessons for the regulation of the renewable energy sector in Portugal.

Keywords: international arbitration / energy / renewable energy / protection of foreign investment

Summary: **1.** Introduction; **2.** Chapter 1: Lessons from Spain; *a)* The initial regulatory framework; *b)* The regulatory changes; *c)* The arbitrations that ensued; **3.** Chapter 2: Lessons from the Czech Republic; *a)* The initial regulatory framework; *b)* The regulatory changes; *c)* The arbitrations that ensued; **4.** Chapter 3: Lessons from Italy; *a)* The initial regulatory framework; *b)* The regulatory changes; *c)* The arbitrations that ensued; **5.** Conclusions; *a)* Jurisdictional takeaways; *b)* Substantive takeaways.

Resumo: O presente artigo propõe-se apresentar uma visão global dos incentivos regulatórios aprovados em Espanha, na República Checa e em Itália para promover a produção de energia a partir de fontes renováveis, bem como das medidas que foram subsequentemente aprovadas no sentido de remover uma

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parte ou a totalidade dos mesmos, e, finalmente, as arbitragens que foram depois iniciadas contra os Estados pelos investidores estrangeiros que haviam realizado investimentos nos seus territórios. Nas conclusões, os autores procuram identificar linhas comuns e divergentes na jurisprudência arbitral analisada e delas retirar lições sobre a forma de regulação do setor das renováveis em Portugal.

Palavras-chave: arbitragem internacional / energia / energias renováveis / proteção do investimento estrangeiro

1. Introduction

After the oil crisis of 1979, the pressure on States to diversify their sources of energy in order to meet their consumption demands heightened. Associated with concerns about climate change and the need to comply with the United Nations Framework Convention on Climate Change[2] and the Kyoto Protocol[3], such pressure led the European Union to make renewable energy a priority for the forthcoming years.

Within the context outlined above, on 27 September 2001 the European Parliament and the Council of the European Union passed Directive 2001/77/EC, on the promotion of electricity produced from renewable sources in the internal market, and years later replaced it with Directive 2009/28/CE, of 23 April 2009, which is to this day still in force.

The 2001 Directive provided that Member States should take appropriate steps to encourage greater consumption of electricity produced from renewable energy, and furthermore established specific national indicative targets for the contribution of electricity produced from renewable energy sources to gross electricity consumption by 2010.

2. The United Nations Framework Convention on Climate Change is an international treaty adopted on 9 May 1992, opened for signature at the Earth Summit in Rio de Janeiro from 3 to 14 June 1992, and entered into force on 21 March 1994. The stated objective of this Convention is to “stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”. This framework contains no enforcement mechanisms, rather outlining the ways in which international treaties (called “protocols”) may be negotiated to implement further action towards the Convention’s objective.

3. The Kyoto Protocol to the United Nations Framework Convention on Climate Change was signed on 11 December 1997 and became effective on 16 February 2005. This Protocol establishes limits on States’ greenhouse gas emissions.

The reference values provided for national legislatures to fix their respective national targets were also laid out in this 2001 Directive and greatly varied for each country. By way of example, the reference value for Spain was set at 29,4%, whereas for Italy was set at 25,0% and for Portugal was set at 39,0%.

In 2009, Directive 2009/28/CE established mandatory, rather than indicative, national targets for the overall share of energy from renewable sources in the gross final energy consumption[4], by 2020.

Possibly because of their mandatory nature, most of these targets are now less ambitions than those provided in the 2001 Directive. Notably, Spain's target for the share of energy from renewable sources in gross final consumption by 2020 is 20%, Portugal's is 31% and Italy's is 17%. For the Czech Republic, which was in 2009 still a newly acceded member of the Union, the target is 13%.

As results clear from the above, in 2001 and 2009 the European Union established high-reaching goals and laid the groundwork for a series of diplomas subsequently passed by the Member States' legislatures.

At the national level, diplomas were enacted providing for what the 2009 Directive defines, in Article 2(k), as "support schemes", that is, instruments, schemes or mechanisms that promote the use of energy from renewable sources and which include, notably, investment aid, tax exemptions, reductions or refunds, and, importantly, direct price support schemes such as feed-in tariffs and premium payments.

The enactment of such "schemes" was perceived as decisive in eliciting investment in renewable energy due to the inherent characteristics of the sector: long-term and involving a significant component of sunk cost[5]. But as technology matured and the respective cost (notably of photovoltaic components) started to decline, investing on renewables became increasingly attractive.

The withdrawal initiated in 2010 of some or all of the incentives granted under such support schemes, partly as a result of the global financial crisis and the so-called tariff deficit[6], but also because of increased competitiveness of the renewables industry, starkly modified, in some cases, the regulatory landscape on the basis of which many foreign investors had made significant investments

5. A. Kent, Policy Coherence and the Promotion of Foreign Direct Investment in the Renewable Energy Sector: Lessons from Europe, in L. E. Sachs, L. J. Johnson and J. Coleman (editors), *Yearbook on International Investment Law & Policy 2017*, Oxford University Press, 2019, p. 425: "In other words, once the investment is made, the investor's ability to profit is completely dependent on the host state's intention to respect its part in the deal, a dependency that usually lasts for a very long period". In the decision rendered by the tribunal (International Centre for settlement of Investment Disputes (ICSID) in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l.* v. *Kingdom of Spain*, Case No. ARB/13/36, Final Award, 4 May 2017, para. 98, these inherent characteristics were also expressly noted: "Investment in CSP plants is 'front-end loaded,' with the largest outlays incurred in planning, designing and then constructing the plants prior to their entry into service. The large initial investments in such plants must eventually be recouped from revenues from electrical power sold over a solar plant's service life, plus any subsidies received".

in the renewable energy sector all across Europe.

At this point, the importance of international investment law became clear to those aggrieved investors and to concerned States. Indeed, the substantive standards of protection found in most international investment treaties provide for certain restrictions or limitations to the States' right to regulate and assure foreign investors certain rights and protections. In particular, and by way of example, the fair and equitable treatment standard of protection ("FET") is generally understood to entail a certain guarantee that investors' legitimate expectations at the time of making the investment will not be posteriorly frustrated[7]. Procedurally, the inclusion in treaties of international arbitration as a method for resolving disputes between the investor and the host State has proved decisive in depoliticizing disputes and sheltering investors from perceived protectionist and unreliable court systems.

In some instances, the withdrawal measures undertaken by States were perceived by investors as harmful enough to justify bringing arbitral proceedings against the States which had hosted their investments. Most of such proceedings were brought under the Energy Charter Treaty ("ECT") and focused on (i) the requirement that the host State extend fair and equitable treatment to foreign investors, and (ii) the prohibition on expropriation without adequate compensation.

The present article purports to examine some of the arbitral decisions rendered in the arbitrations initiated by foreign investors against Spain, the Czech Republic and Italy (insofar as these were the States against which most of such arbitrations were brought), with a particular focus on the underlying facts and specific measures that were adopted and subsequently withdrawn, with a view to deriving from them lessons for Portugal. In other words, this article seeks to explore the space that appears reserved to the States' regulatory discretion, as well as the boundaries resulting from international law that circumscribe it.

This article will not address, however, the complex issues concerning the compatibility of the ECT with European Union Law in respect of the so-called intra-European Union disputes, in the wake of the now renowned Achmea Case[8].

In this case, the European Court of Justice ("ECJ") found that the arbitration agreement contained in the bilateral investment treaty concluded between Slovakia and The Netherlands was incompatible with European Union Law. While the ECJ did not specify whether, in its view, the judgement would also be applicable to multilateral treaties to which the EU is a party, such as the ECT, EU Member States diverge with respect to that: 22 EU Member States issued a joint

7. Article 10(1) of the ECT provides, in the relevant part, the following: "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".

8. European Court of Justice (Grand Chamber), Judgment of 6 March 2018, *Slowakische Republik* v. *Achmea B.V.*, Case C-284/16.

statement in January 2019 stating their position that the arbitration agreement contained in the ECT is incompatible with EU Law, while the remaining 6 States issued a separate statement highlighting that the Achmea judgment did not address the issue. As recently as September 2019, the European Commission issued a statement indicating that the EU Member States have agreed on a multilateral treaty to terminate intra-EU bilateral investment treaties and that Member States are to "discuss without undue delay whether any additional steps are necessary to draw all the consequences from the Achmea judgement in relation to the intra-EU application of the Energy Treaty"[9].

Notwithstanding the above, arbitral tribunals have, in the meantime, repeatedly and consistently dismissed States' objections to jurisdiction based on the incompatibility of the ECT with EU Law[10].

2. Chapter 1: Lessons from Spain

a) The initial regulatory framework

To better understand the disputes that have opposed numerous foreign investors to the Kingdom of Spain, one must begin by briefly describing the legal framework that existed in Spain and how it evolved throughout time.

In 1997, the Spanish legislature enacted Law 54/1997, of 27 November, establishing the general regulatory framework for the electricity sector. This Law distinguished between the ordinary and the so-called special regime for electricity production and provided that renewable energy producers falling under the latter category would be remunerated in accordance with the terms set by subsequent regulation, which would nonetheless have the purpose of guaranteeing them "reasonable rates of return"[11].

Those who qualified to benefit from the special regime enjoyed an array of rights that rendered it comparably more favorable. Notably, producers under the special regime would have (i) priority of connection and of discharge of the energy produced into the grid and (ii) the right to receive compensation for the energy injected, as well as the payment of premiums calculated in accordance with the criteria set out in Article 30(4) of this Law. The remaining details of this regime, and the specific compensation due to producers, were to be fleshed out by subsequent diplomas[12].

In the context described above, Royal Decree 661/2007, of 25 May, was enacted to further develop the regulation of the special regime created in 1997. Under this Royal Decree, producers could opt between two remuneration schemes: one

10. See, for instance, ICSID, *Vattenfall AB and others* v. *Federal Republic of Germany*, Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, and, more recently, ICSID, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG* v. *Kingdom of Spain*, Case No. ARB/15/36, Final Award, 6 September 2019.

was a regulated fixed feed-in tariff per unit of production ("FiT"), and the other was a premium for each unit of production, paid on top of the market price secured by the producer on an organized market or freely negotiated.

Under the first possible remuneration scheme, this Royal Decree established three categories of tariffs, pursuant to the working capacity of the plant (lesser the working capacity, higher the compensation). Within each category, the Decree further established a certain rate applicable to the first 25 years of the lifespan of the facility, and a lower, rate applicable thereafter. It is important to stress that these tariffs were based solely on units of energy produced and were envisaged for the entire operational lifespan of the facility.

This Decree contemplated future adjustments to be made to the remuneration due to producers, the first of which would occur in 2010 and subsequently every four years thereafter. However, facilities that had been granted their commissioning certificate before 1 January 2012, were excluded from such revisions[13].

However, and because Royal Decree 661/2007 only applied to facilities registered until 29 September 2008, a decision was made to enact a new Royal Decree specifically for facilities registered after that date.

A year later, Royal Decree 1578/2008 was enacted on 26 September 2008, with the aim of extending the incentives for the production of solar energy to facilities registered after 29 September 2008, although through a different remuneration mechanism than that provided in Royal Decree 661/2007.

Unlike the system of compensation established by Royal Decree 661/2007, which provided for a set remuneration in the context of the feed-in tariff option, the mechanism provided in Royal Decree 1578/2008 envisaged quarterly tenders of slots or quotas of energy. The winner of the tender process would then benefit from a fixed tariff in relation to that energy quota.

As a result of this modification, the tariff could be lower or higher depending on the specific tender process. The regulated tariff would no longer be set for the facility but would rather depend on the outcome of the bidding process through which the slots or quotas of energy production were assigned[14].

b) The regulatory changes

Most observers pinpoint 2010 as the year in which the regulatory tide started to turn in Spain, with the enactment of Royal Decree Law 1565/2010, of 19 November. This diploma effectively (i) eliminated regulated tariffs for the

13. Article 44.3 of Royal Decree 661/2007, of 25 May.

14. In any case, this Royal Decree does establish some parameters for these tenders. Article 11 establishes a regulated tariff for the first tender (32 cent € x KW/h), and the second paragraph of that Article provides a mathematical formula to determine the successive tariffs, which would be reduced to the extent that the tenders were filled.

photovoltaic facilities falling under the scope of Royal Decree 661/2007 from the 26th year of the facilities' lifespan[15], which would from that year onwards be remunerated solely at market price, and (ii) imposed a series of technical requirements on photovoltaic facilities operating under the tariff regime of Royal Decree 661/2007, the violation of which would result in the application to them of the market price remuneration instead of the regulated tariff.

Following the same trend, Royal Decree-Law 14/2010, of 23 September, was also enacted in 2010 and established (i) an annual limit of remunerated production hours, varying according to the solar zone where the photovoltaic facilities were located[16], and (ii) an obligation on the part of producers to pay fees (of 0.5 euro/MW) for the use of the energy transportation and distribution grid.

In the meantime, Spain held general elections and in December 2011 saw the formation of a new government. In its inaugural speech, newly-elected Prime-Minister Mariano Rajoy stated that "[o]ne further vital structural reform involves our energy system. […] We must remember that Spain faces a major energy problem, in particular in the electricity sector, with an annual deficit in excess of 3 billion euros, and a cumulative tariff debt of more than 22 billion"[17].

Presumably as a result of the shift in the political context, the years that ensued were marked by significant legislative developments in the energy sector. The first measure undertaken by the newly elected government to reduce the tariff deficit was the adoption of Royal Decree Law 1/2012 in January 2012, suspending new registrations for the special regime. The second measure followed shortly thereafter and consisted in the creation, through the adoption of Law 15/2012, of 27 December, of a 7% tax on the total value of electricity produced and injected into the grid ("IVPEE").

However, the transformation of the regulatory framework did not stop there. A year later, Royal Decree-Law 2/2013 of 1 February, suppressed the option provided under Royal Decree 661/2007, of selling the energy at market price with a premium attached. With the entry into force of this diploma, the two options available to producers were (i) the sale of energy at the feed-in tariff that had been previously assigned to them (although subject to certain annual limits and no longer beyond the 25th year of their facilities' lifespan), or (ii) the sale of the energy at market price without any complement or premium.

A much more drastic change to the regulatory landscape came on 12 July 2013, with the enactment of Royal Decree-Law 9/2013. This diploma amended the provisions of Law 54/1997, of 27 November that had created the special regime

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15. But please note that, subsequently, the term of validity of the regulated tariffs that was initially limited to 25 years, was later extended to 28 years through Royal Decree-Law 14/2010, and up to 30 years in Law 2/2011.

16. Beyond such limit, the energy can still be sold and injected into the grid, but at market price.

17. Mariano Rajoy's Inaugural Address before the Congress of Deputies, 19 December 2011, available at www.lamoncloa.gob.es.

and repealed altogether Royal Decrees 661/2007 and 1578/2008 (and with them the fixed feed-in tariff mechanism).

In its place, this diploma established a system providing producers a "specific remuneration" based on the "standard" (rather than actual) costs and returns of so-called "efficient" facilities. In essence, all remuneration for the sale of renewable energy would be determined and valued at market price, and facilities could also be additionally paid a specific compensation calculated with reference to factors such as an estimated 25-year lifespan of facilities, the activity of an efficient and well managed facility, and an estimation of reasonable profitability[18].

Finally, in December 2013 Spain adopted Law 24/2013, which superseded Law 54/1997, of 27 November and completely eliminated the distinction between an ordinary and a special regime for the production of energy from renewable sources.

As has been widely reported, 2013 was the year in which Spain ceased to have a tariff deficit and in 2014 the country reported an electricity surplus valued in €550 million[19]. However, in late 2018, news reports indicated that the Spanish government was expecting a return to the tariff deficit, estimated in €453 million[20], by the end of 2019.

c) The arbitrations that ensued

It is estimated that the Kingdom of Spain has faced in the past years over fifty arbitrations brought under the ECT, in reaction to the series of regulatory measures taken by Spain from 2010 to 2013, pertaining to the remuneration of the energy produced from renewable sources[21].

Because most disputes arose from investments made in the photovoltaic sector, they became known and are still often referred to as the "Spanish solar disputes". Notwithstanding this, that number continues to grow[22] and spreads today beyond

18. The principles and general rules established under Royal Decree-Law 9/2013 were later further developed and materialized in June 2014, through the adoption of Royal Decree 413/2014, which provided additional guidance as to constitutes the reasonable returns of a hypothetical "efficient" plant.

19. See Figura 7-14. Evolución del Déficit de Tarifa en el período 2002 – 2017 [miles de millones de €], available in www.energiaysociedad.es.

20. El déficit de tarifa: la vieja pesadilla del sector eléctrico, *El Mundo*, 11 December 2018, available in www.elmundo.es.

21. C. Baltag, The Notion of Investor under the Energy Charter Treaty: The Latest Developments in the Spanish Solar Disputes, in L. E. Sachs, L. J. Johnson and J. Coleman (editors), *Yearbook on International Investment Law & Policy 2017*, Oxford University Press, 2019, p. 389.

22. Which is chiefly explained by the fact that investors have been prevailing in most cases.

the photovoltaic sector[23].

In two early cases, Charanne and Isolux, Spain prevailed. However, in most reported decisions issued thereafter, investors have succeeded in persuading tribunals that Spain's regulatory changes did breach the ECT. In fact, as of September 2019, Spain is thought to have lost 11 arbitrations relating to its renewable energy reforms[24].

Recently, though, the majority of the tribunal constituted to hear the case *Stadtwerke München GmbH, RWE Innogy GmbH & Others* v. *Kingdom of Spain*[25] ("Stadtwerke"), reached a different outcome, in a 145-page decision that marks "only the third time Spain has defeated one of the 50-off cases it has faced over reforms to its renewable subsidies regime"[26].

The first award publicly reported ensuing from the stream of arbitrations initiated against the Kingdom of Spain was the one rendered in Charanne B.V. and Construction Investments S.a.r.l. v. Kingdom of Spain[27] ("Charanne").

This arbitration was filed on 7 May 2012 by Charanne B.V., a company incorporated under the laws of the Netherlands, and by Construction Investment S.à.r.l., a company incorporated under the laws of Luxembourg. At the time, both companies held shares, of 18,6% and 2,8% respectively, in Grupo T-Solar Global S.A., a limited liability company established under the laws of Spain, which owned, through wholly or mostly-owned subsidiaries, photovoltaic power plants located in Spanish territory[28].

Some of Grupo T-Solar Global S.A.'s power plants were registered before 29 September 2008, and thus benefited from the special remuneration regime provided by Royal Decree 661/2007, and the remaining were registered subsequently, thus benefiting from the remuneration regime provided by Royal Decree 1578/2008.

23. For instance, on 13 September 2019 it was reported that Canepa Green Energy Opportunities I and Canepa Green Energies Opportunities II, a pair of Luxembourg-based renewable energy funds which had invested in a number of wind farms in Spain, had initiated arbitral proceedings against the State under the ECT. The proceedings are currently pending before the ICSID (Case No. ARB/19/4). See Parties tap Sean Murphy to chair claims by Luxembourg-based wind farm investors against Spain, in *Investment Arbitration Reporter*, 13 September 2019, available at: www.iareporter.com.

24. J. Ballantyne, "US court stays bid to enforce solar award against Spain", *Global Arbitration Review*, 19 September 2019, available at: www.globalarbitrationreview.com.

25. ICSID, *Stadtwerke München GmbH, RWE Innogy GmbH & Others* v. *Kingdom of Spain*, Case No. ARB/15/1, Final Award, 2 December 2019.

26. C. Sanderson, "Spain secures rare solar victory", *Global Arbitration Review*, 3 December 2019, available at: www.globalarbitrationreview.com.

27. Stockholm Chamber of Commerce ("SCC"), *Charanne and Construction Investments* v. *Kingdom of Spain*, Case No. V 062/2012, Final Award, 21 January 2016.

28. Shortly after filing the request for arbitration, both companies transferred their shares in Grupo T-Solar Global S.A., as contribution in kind in exchange for a stake in Grupo Isolux Corsán S.A. and Grupo Isolux Corsán Concesiones S.A. As a result of this transfer, they maintained an interest, albeit indirectly, in Grupo T-Solar Global S.A.

In bringing these proceedings, the claimants essentially argued that Spain's unlawful actions occurred in 2010, with the enactment of Royal Decree 1565/2010 and Royal Decree-Law 14/2010[29], and resulted in a reduction of 8,5% in the profitability of the plants registered under Royal Decree 661/2007, and a reduction of 10% in the profitability of the plants registered under Royal Decree 1578/2008[30].

In the claimants' view, such measures retroactively affected the legal and economic assumptions on which they had relied and constituted breaches of the ECT's protections on expropriation, as well as of the State's obligation to provide effective means for asserting claims and enforcing rights with respect to investments, and to accord fair and equitable treatment to investors, which together ultimately resulted in a diminution of their shareholder value.

In a 2-to-1 decision rendered on 21 January 2016, the arbitral tribunal stressed that it had been called upon to decide only on the measures adopted by the Kingdom of Spain in 2010, insofar as the claimants had not formulated any claims in relation to the diplomas enacted in 2012 and 2013. The conclusion reached by the tribunal was that Spain's actions, materialized in the 2010 reforms, did not amount to violations of the ECT[31].

First, the tribunal rejected the claimants' argument on indirect expropriation, stating that for expropriation to occur there would have to be a loss of such magnitude to amount to a deprivation of their property over the shares, which had not been the case.

Second, the tribunal concluded that no violation of Spain's obligation to accord fair and equitable treatment had been found, notably because (i) there had not been any specific commitments on the part of Spain towards the claimants, in relation to the regulatory framework (no stabilization clause nor any statement to the same effect), (ii) absent specific commitments, the existence of a certain regulatory framework cannot, by itself, generate legitimate expectations that it will remain unchanged, and finally because (iii) the 2010 measures were not unreasonable, contrary to the public interest or to the principle of proportionality, nor did they eliminate the essential features of the existing regulation, considering that the operators remained entitled to compensation for the energy produced and

29. Significantly, however, the claimants did not make any claim in relation to subsequent diploma, and namely those enacted in 2013, an omission that proved decisive in the tribunal's decision.

30. *Charanne*, *supra* n. 27, para. 284.

31. In his Dissenting Opinion, co-arbitrator Guido Santiago Tawil disagrees with the majority's findings on the absence of a violation of the FET standard, stating that an investor's legitimate expectations may result not only from specific commitments, but also from the legal order in force when the investment was made, that the 2007 and 2008 diplomas did set a fixed tariff, with a temporal validity of at least 25 years, which was declared, under article 44(3) of Royal Decree 661/2007, as not being impacted by future tariff revisions, and that this, together with other documents issued at the time by the Spanish Government, and the fact that the regime allowed for a short period of time for companies to register and become operational to be able to benefit from it, were sufficient to generate expectations that such regime would not be modified.

to inject it into the grid with priority.

On 3 October 2013, over a year after the Charanne arbitration was initiated, it was time for Isolux Infrastructure Netherlands B.V.[32] ("Isolux") to bring arbitral proceedings against the Kingdom of Spain.

The underlying facts are essentially the same as those in Charanne, and the claimant Isolux was too a shareholder of the company Grupo T-Solar Global S.A. However, the scope of the subject matter brought to the tribunal's adjudication here widened: the claims formulated by Isolux referred not only to the laws enacted in 2010, but also to those enacted in 2012 and 2013.

Isolux Infrastructure Netherlands, B.V., incorporated under the laws of The Netherlands, initiated the arbitration as the majority shareholder of Grupo T-Solar Global S.A ("T-Solar")[33]. At the time, T-Solar controlled T-Solar Global Operating Assets S.L. ("TGOA") through ownership of 51% of its shares, and TGOA was, in turn, the sole shareholder of Tuin Zonne Origen S.L.U. ("TZO"). Together, TZO and TGOA held the controlling stakes in 117 Spanish companies, which owned 34 photovoltaic solar plants in Spain.

In brief, Isolux claimed that Spain had attracted its investment by enacting Royal Decrees 661/2007 and 1578/2008, with the promise of maintaining a long-term feed-in-tariff for the production of energy, but in 2012 introduced a 7% tax on the value of production and, in 2013, entirely dismantled the special regime of remuneration of the energy produced and replaced it with an entirely different set of rules, applicable immediately to all existing facilities.

In Isolux's view, Spain breached its obligations under Article 10 of the ECT by failing to honor the commitments it had made towards Isolux and to accord it fair and equitable treatment. Moreover, such changes to the regulatory landscape had been so fundamental, that they amounted to an indirect expropriation of Isolux's investment, insofar as they had destroyed its economic value, and thus also constituted a violation of Article 13 of the ECT.

In a 2-to-1 decision, the arbitral tribunal concluded that it had not been demonstrated by the claimant that the Kingdom of Spain had breached any of its obligations under the ECT[34].

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32. SCC, *Isolux Netherlands, BV* v. *Kingdom of Spain*, Case V2013/153, Final Award, 17 July 2016.

33. In 29 October 2012, the Claimant acquired 58,8362% in the capital of T-Solar, and in 24 July 2013 acquired an additional 28,5051%, thus becoming the holder of 87,3413% of the share capital of T-Solar.

34. Similarly to Charanne, the co-arbitrator Guido Tawil filed a Dissenting Opinion disagreeing with the majority's findings on the absence of a violation of the FET standard, stating that the legal framework in force at the time an investment is made can generate legitimate expectations on the part of investors, particularly when such general and abstract norms had the specific goal of fostering foreign investment in a certain economic sector, and that although there was indication that there were difficulties in financing the system of remuneration and of the need to adopt reforms, nothing could have led the investors to foresee that Spain would

First, the tribunal addressed claimant's allegation that Spain had breached its duty to "observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party", provided under Article 10(1) of the ECT and also commonly designated "umbrella clause".

In the tribunal's view, the ECT's employment of the expression "entered into" indicates that this provision refers only to specific commitments assumed in relation to the investor, notably in investment contracts concluded with States. As a result, the tribunal reasoned that the general and abstract legal rules contained in Royal Decrees 661/2007 and 1578/2008, which were not expressly designed to seek foreign investment but rather applied indistinctively to national and foreign energy producers, were not susceptible of creating an obligation on the part of Spain towards the investors, the violation of which could be construed as a violation of the umbrella clause[35]. On this ground, the tribunal rejected claimant's claim that Spain had breached this portion of Article 10(1) of the ECT.

Second, and with regards to the alleged violation by Spain of the fair and equitable treatment standard, the tribunal reasoned that (i) first and foremost, the ECT does not create an autonomous obligation on States to encourage and create stable and transparent conditions for the making of investments in their territory, the violation of which would, *per se*, generate rights in favour of investors of another Contracting Party, that (ii) notwithstanding this, the ECT protects an investor's legitimate expectations that a certain regulatory framework will be maintained, which may be derived from both specific commitments addressed to them personally and rules that while not being specifically addressed to them were put in place with the aim to induce foreign investment and on the basis of which they relied[36], and (iii) that the assessment of whether such expectations were legitimate entails an objective analysis of whether the facts of the case could reasonably generate such expectations on a prudent investor, rather than inquiring about what expectations the investor actually had.

In the context of the analysis referenced above, the tribunal found that the expectation that the regulatory regime would be maintained could not be deemed reasonable, and that Isolux already knew, at the time it acquired shares in T-Solar, on 29 October 2012, of circumstances related to the reform of the Spanish electrical system which would have allowed it to anticipate that the 2007 and 2008 Royal Decrees would be revised[37].

altogether eliminate the feed-in tariffs in 2013 without providing for some sort of compensation to those affected by such a measure.

35. In the tribunal's words, "una norma dirigida tanto a inversores nacionales como a inversores extranjeros no puede, en razón de su carácter general, generar obligaciones sólo para com los primeiros, incluso cuando son inversores de una Parte Contratante", in *Isolux*, *supra* n. 33, para. 771.

36. *Isolux*, *supra* n. 33, para. 775.

37. *Isolux*, *supra* n. 33, para. 781: "Lo importante para determinar si las expectativas alegadas por el inversor son razonables es lo que todo inversor prudente tiene que saber del marco regulatório antes de invertir y la información efectiva del inversor que invoca expectativas específicas. En particular, un inversor no puede tener expectativas legitimas generadas por el marco regulatório cuando su información personal le permita prever y anticipar la evolución

On the one hand, the regulatory framework on 29 October 2012 had already been amended several times, which evidenced its unstable nature. Indeed, since their enactment, Royal Decrees 661/2007 and 1565/2008 had already been amended by Royal Decree 1565/2010 and Royal Decree-Law 14/2010. On the other hand, the legality of these successive amendments had already by then been verified by several rulings of the Spanish Supreme Court, some of which the claimant was necessarily familiar with, as some of the cases originated from appeals filed by the claimant's parent company, Isolux Corsan, S.A.

As a result, the tribunal concluded that Isolux failed to establish a violation of the FET standard of protection under Article 10(1) of the ECT, and thus rejected all claims relating to it.

The tribunal also rejected the claim that these measures amounted to an indirect expropriation of the claimant's investment. Resorting to one of the expert reports on record, which used the Internal Rate of Return ("IRR") to measure the expected profitability of the facilities, the tribunal established that the IRR at the time the investment was made was of 6.19%, and that the IRR estimated at the time arbitration was initiated, shortly after the 2013 diplomas were enacted, was of 7.398%.

As a result, the tribunal concluded that the claimant could not argue that an expropriation of its investment occurred since the returns that it expected to receive at the time of investing fell below the estimated profitability of the plants after the supposedly unlawful 2013 diplomas. In order to prove the expropriation, the current IRR would have to be less than 6.19% in a proportion that could be described as "substantial and significant".

Finally, and with regards to the introduction of a 7% tax on the value of electricity production, through the enactment of Law 15/2012, the tribunal noted that Article 21(1) of the ECT[38] contains a carve-out clause which excludes tax measures from the scope of the treaty, and as a result concluded that it lacked jurisdiction to hear the claims deriving from that tax measure.

These two early awards are demonstrative of a certain initial reluctance on the part of tribunals to hold the Kingdom of Spain liable for changes to its regulatory framework, and Charanne in particular has been described as "an outlier because it concerned a set of measures introduced by the state in 2010, while the other cases the state faces relate to a further set of reforms introduced in 2013"[39].

In fact, Charanne and Isolux are in no way representative of a general trend. The first loss for Spain came with the decision rendered on Eiser Infrastructure

desfavorable de este marco regulatório antes de invertir".

38. This provision reads as follows: "Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties."

39. See "Spain Suffers fourth solar loss", *Global Arbitration Review*, 19 June 2018, available at: www.globalarbitrationreview.com.

Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain[40] ("Eiser"), in the context of the arbitral proceedings initiated shortly after Isolux by two foreign investors, in reaction to the very same measures that constituted the subject matter of the earlier award.

In Eiser, the claimants were Eiser Infrastructure Limited ("EIL"), a private limited company incorporated under the laws of the United Kingdom, and Energía Solar Luxembourg S.à r.l. ("ESL"), a private limited company incorporated under the laws of Luxembourg. EIL directly and entirely owned the share capital of ESL, and their investment in Spain, for the purposes of the arbitration, consisted in ELS's shareholding and debt interests in two Spanish companies that, in turn, owned and operated three Concentrated Solar Power ("CSP")[41] plants, with a total installed capacity of 149.7 MW.

The three CSP plants that constitute the subject matter of this dispute all benefited from the special regime provided under Royal Decree 661/2007 and began operating in March and May of 2012. By that time, it was estimated that the claimants had already invested "more than €126 million"[42].

The new remuneration system provided by Royal Decree-Law 9/2013 was particularly harmful to the claimants, to the extent that it used as reference a standard of hypothetical "efficient" plants, while the historical capital costs of the plants "were about 40% higher than the level deemed efficient under the new regime"[43]. As a result, the operating companies' revenues under the new regime fell below the level required to cover the plants' actual financing and operating costs, let alone to provide any return on the investment[44].

In the arbitration, the claimants requested the tribunal to declare that Spain had indirectly expropriated them of their investment in violation of Article 13 of the ECT, and had denied them fair and equitable treatment, subjecting their investment to unreasonable measures and failing to honor the undertakings it had entered into in relation to them, this also violating Article 10 of the ECT.

The tribunal accepted Spain's objection to its jurisdiction to decide claims related to the introduction of the 7% IVPEE in 2012. Here, the tribunal showed

40. *Eiser*, *supra* n. 5.

41. The award describes the way in which these plants operate and clearly distinguishes them from traditional solar plants, insofar as these plants offer greater environmental benefits. The award also refers to the fact that these plants are "large facilities that are expensive to build, requiring large initial capital investments". See *Eiser*, *supra* n. 5, paras. 94-98.

42. *Eiser*, *supra* n. 5, para. 121.

43. *Eiser*, *supra* n. 5, para. 151. As the tribunal itself noted in paragraph 400, Spain "retroactively applied these «one size fits all» standards to existing facilities, like Claimants', that were previously designed, financed and constructed based on the very different regulatory regime of RD 661/2007. No account was taken of existing plants' specific financial and operating characteristics in establishing their remuneration".

44. The award cites Mr. Meissner, founding partner of EIL and also a witness in these proceedings, who reportedly stated at the hearing that the investment that had been made in the plants was of about €125 million, was valued at €4 million at the end of 2014. See *Eiser*, *supra* n. 5, para. 154.

deference to the State's power to tax, described as "a core sovereign power that should not be questioned lightly"[45], and concluded that the claimants had fallen short of demonstrating any improper or abusive use of the power to tax that would allow the tribunal to set aside the ECT's express carve-out clause.

On the merits, the tribunal unanimously found that Spain had breached its obligation to accord fair and equitable treatment to the claimants' investment[46].

The tribunal reasoned that although "investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs"[47], and that investors legitimate expectations must include the possibility of reasonable changes and amendments in the legal framework, Article 10(1) of the ECT does necessarily embrace "an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments"[48].

In light of the standard outlined above, the tribunal found that the legal framework on which the claimants had relied was "replaced with an unprecedented and wholly different regulatory approach, based on wholly different premises" which "washed away the financial underpinnings" of their investments and stripped them "virtually all of the value of their investment"[49].

In the tribunal's view, the fact that the Spanish Supreme Court had upheld the legality of the contested regulatory measures was immaterial, to the extent that "the question of conformity with Spain's Constitution and with the requirements of the ECT are quite separate"[50].

It is significant to note that the tribunal found it necessary to distinguish this case from the previous Charanne case. In the tribunal's view, and although concurring with the Charanne tribunal's understanding of the FET standard, the factual and legal situation presented here is fundamentally different[51].

Indeed, in Charanne, and contrarily to the case in Eiser, the claimants had restricted their claims to the losses resulting from the enactment of Royal Decree 1565/2010 and Royal Decree Law 14/2010, leaving the 2013 and 2014 diplomas out of the scope of those proceedings. As a result, the tribunal reasoned that the measures complained of in Charanne had far less dramatic effects than those at issue in Eiser, and that in a way explained why it departed from the Charanne tribunal on its conclusions.

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45. *Eiser*, *supra* n. 5, para. 270.
46. The tribunal disavowed itself of engaging in the analysis of the remaining claims on account of the principle of judicial economy, insofar as the breach of the FET standard already fully resolves the claimants' claims.
47. *Eiser*, *supra* n. 5, para. 362.
48. *Eiser*, *supra* n. 5, para. 382.
49. *Eiser*, *supra* n. 5, paras. 365 and 389.
50. *Eiser*, *supra* n. 5, paras. 365 and 373.
51. *Eiser*, *supra* n. 5, para. 367: "The factual and legal situation presented here thus differs fundamentally from that addressed in Charanne BV v. Spain".

In conclusion, the tribunal in Eiser found that Spain's enactment of Royal Decree Law 9/2013, Law 24/2013, Royal Decree 413/2014, and the implementation of these regimes through Ministerial Order IET/1045/2014, breached the ECT's fair and equitable standard of treatment, and ordered Spain to pay the claimants €128 million in damages[52].

In Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain[53] ("Masdar"), the claimant contended that through the measures introduced between 2012 and 2014 Spain had dismantled the regime established in Royal Decree 661/2007 and introduced a much less favorable regime, thus breaching its duty to accord investors fair and equitable treatment.

The tribunal concluded that Spain had indeed reneged on commitments made to Masdar in violation of the fair and equitable treatment standard enshrined in the ECT. In its reasoning, the tribunal identified two "schools of thought" in relation to this standard, one evidenced by the majority's decision in Charanne, according to which the FET standard does not create in investors a legitimate expectation of legal stability, unless explicit undertakings are assumed by the State, and the other evidenced by the dissenting opinion in that case, pursuant to which such undertakings may result from legislation that is abstract and general in nature.

However, the tribunal did not take a stance on the issue, insofar as it concluded that it did not need to. There had been specific commitments by the State, in the form of a resolution issued by Spain addressed specifically to each of the three operating companies, confirming that each of the plants qualified under the Royal Decree 661/2007 economic regime for their operational lifetime[54], and those commitments were sufficient to generate legitimate expectations in Masdar that the benefits granted by Royal Decree 661/2007 would remain unaltered. The tribunal ordered Spain to pay damages of €64.5 million, plus pre and post-award compound interest[55].

More recently, on September 2019, another arbitral award determined that Spain's regulatory modifications breached the ECT.

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52. In the meantime, the claimants have applied for recognition and enforcement of the Eiser award before the United States District Court for the Southern District of New York on 19 May 2017 and the Court granted such petition *ex parte* on 27 June 2017. On 24 October 2017, Spain filed a petition to the Court seeking to vacate the prior ruling on the grounds that the Second District had already issued a controlling decision determining the Court's lack of subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act of 1976, in the cases of the recognition of the ICSID award rendered in Micula v. Government of Romania and in Mobil Cerro Negro, Ltd v. Bolivarian Republic of Venezuela. On 13 November 2013, the Court vacated the order it had issued in June granting ex parte recognition to the award, without prejudice to the claimants' right to bring a plenary action in compliance with US legislation on sovereign immunity.

53. ICSID, *Masdar Solar & Wind Cooperatief U.A*. v. *Kingdom of Spain*, Case No. ARB/14/1, Final Award, 16 May 2018.

54. *Masdar*, *supra* n. 54, para. 520.

55. It is important to note, however, that the award is currently under the review of an ICSID annulment committee, pursuant to Spain's request for annulment filed in May 2019.

In the *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG* v. *Kingdom of Spain* ("OperaFund")[56], the two claimants, OperaFund Eco-Invest SICAV PLC, incorporated in Malta, and Schwab Holding AG, incorporated in Switzerland, invested, in July 2008 and April 2009, in two Spanish photovoltaic plants that benefited at the time from the feed-in-tariff provided by Royal Decree 661/2007. As with other investors before them, the Claimants sustained that Spain's regulatory changes breached several substantive standards provided for in the ECT.

Consistently with the findings of previous tribunals, the OperaFund tribunal decided that the 7% tax introduced by the Law 15/2012 was outside the scope of the tribunal's jurisdiction in view of Article 21 of the ECT, insofar as the facts of the case indicated that such measure constituted a "*bona fide*" taxation measure for the purposes of the treaty.

As to the merits, a 2-1 majority concluded that the fair and equitable treatment standard provided in Article 10(1) of the ECT encompassed the protection of the claimants' legitimate expectations and, in that regard, established that the Royal Decree 661/2007 contained an "express stability commitment" on which the Claimants reasonably relied when making their investment. The tribunal's majority pointed specifically to Article 44(3) of the Royal Decree 661/2007, and interpreted it as having the effect of insulating qualifying investments from subsequent regulatory adverse change.

In fact, whether the Royal Decree 661/2007 provided for some sort of stability commitment capable of grounding an investor's legitimate expectations as to its future non-modification is a recurring topic and tribunals have reached different results, even if such differences have not determined necessarily different outcomes. The conclusion reached by the OperaFund tribunal is consistent with the previous findings in the NovEnergia and Antin cases, that shall be analyzed further below, for example. Differently, in Eiser and RREEF, tribunals did not find an express stability commitment in Royal Decree 661/2007.

Another relevant issue addressed by the OperaFund tribunal referred to whether adequate due diligence prior to making the investment was a required element for the creation and protection of legitimate expectations. The tribunal agreed with the Antaris tribunal that the absence of 'real due diligence' on the part of investors would undermine a legitimate expectations claim and concluded that, in the case at hand, claimants did what would be expected under the circumstances by a prudent investor, including reliance on a legal opinion from a law firm.

Up until recently, these decisions seemed to confirm the overall trend that Spanish regulatory reforms had been made in breach of the ECT, notwithstanding the variations in the reasoning adopted by tribunals and the specific circumstances of the cases, which were paramount to whether a particular investor was entitled to compensation.

56. *OperaFund*, *supra* n. 10.

However, in December 2019, the decision of a 2-to-1 majority[57] rendered in Stadtwerke stands at odds with that supposed trend. Notwithstanding the nonexistence of *stare decisis* in international arbitration, this decision may potentially mark a turning point for these arbitrations.

In an arbitration initiated in 2015 by a group of eight German investors that had made a €345 million investment in a solar facility located in Granada – called Andasol 3 Plant[58] – the tribunal was called upon to decide whether the measures undertaken by Spain from 2010 onwards breached the ECT, notably its FET standard of protection.

The tribunal addressed the claimants' allegations one by one and thus started out by clarifying that, in its view, the first part of Article 10(1) of the ECT, where it is stated that States shall "encourage and create stable, equitable, favourable and transparent conditions" for investors is far too general to give rise to substantive rights, the violation of which could amount to an autonomous claim, separate from a claim for breach of the FET standard.

On the alleged violation of the FET standard of protection, which constituted the crux of the case and also where this tribunal's findings truly depart from a certain existing trend, the tribunal started out by laying the specific content of the standard, by reference to the parties' allegations.

As such, the tribunal identified "five obligations" which it considered to constitute the content of the FET standard in the ECT: "(i) the obligation to afford the investor a stable regulatory regime; (ii) the obligation not to frustrate the investor's legitimate and reasonable expectations arising at the time of making the investment; (iii) the obligation to act transparently towards an ECT-protected investor or investment; (iv) the obligation to avoid taking unreasonable, abusive or discriminatory actions; and finally, (v) the obligation to avoid taking disproportionate actions"[59].

The tribunal concluded that it had not been demonstrated that Spain had breached any of these obligations. Without delving into all the nuances of the tribunal's reasoning, for the interest of briefness, the findings on the obligations identified in (i) and (ii) above are worth noting.

On the one hand, the tribunal appears to read into the obligation to afford regulatory stability the notion of good faith, requiring that the investor demonstrate that the State had adopted a certain favorable regime "with the

57. Kaj Hobér, the co-arbitrator appointed by the claimants, filed a Dissenting Opinion stating that he diverged from the tribunal's majority on the merits. In particular, he found that the investors had created reasonable and legitimate expectations on the basis of the regulatory regime as it was in 2007, and that the 2013 reforms and subsequent measures had "fundamentally and radically" changed the 2007 regime, thus meaning that the investors' legitimate expectations had been frustrated.

58. Similarly to the investment underlying the Eiser case, the Andasol 3 Plant used the advanced technology known as concentrated solar power or CSP.

59. *Stadtwerke*, *supra* n. 26, para. 256.

intention to modify it drastically once the desired investment was made"[60]. In its view, that "bait and switch" narrative had not been demonstrated and instead it appeared to the tribunal that this was a case of actions "undertaken with good intentions" resulting in "unintended consequences", "a frequent phenomenon in policy making"[61].

On the other hand, and with regards to the obligation not to frustrate the investor's legitimate and reasonable expectations, the tribunal concluded that the legitimate expectation on the part of the claimants was to earn "a reasonable rate of return"[62], rather than a specific tariff for a specific number of years. In this respect, the tribunal focused on the wording of Law 54/1997, of 27 November, which had established the framework on the basis of which the subsequent Royal Decrees were enacted, and noted that this Law, hierarchically superior to the Royal Decrees, stated that the calculation of the remuneration served the purpose of ensuring "reasonable rates of return".

In any event, the strike of arbitrations against Spain does not seem to have ended. While in 2019 alone, "at least six ECT tribunals have now held Spain liable for the modification of its renewable energy incentives regime"[63], there are multiple cases still pending and some only now being filed. As a result, Spain has recently approved a law which aims to put an end to the pending treaty claims over its renewable energy reform by offering investors economic incentives that can only be accessed to if the cases are dropped[64].

3. Chapter 2: Lessons from the Czech Republic

a) The initial regulatory framework

In 1992, following the conclusion of the 1992 United Nations Framework Convention on Climate Change, the Czech Republic implemented two relevant tax incentives through Act 586/1992 ("Act on Income Tax"). The first exempted renewable energy producers from corporate income tax for the year in which the respective facility entered into operation and the following five calendar years. The second incentive introduced an accelerated depreciation period for tax purposes for certain electrical equipment and components of, *inter alia*, photovoltaic installations.

On 1 May 2004 the Czech Republic became a Member State of the European Union and shortly after, on 31 March 2005, the Act on the Promotion of Energy Production from Renewable Energy Sources, was adopted and entered into force on 1 August 2005 ("Act on Promotion"). This Act introduced new incentives for renewable energy producers through a combination of tariff and non-tariff

60. *Stadtwerke*, *supra* n. 26, para. 258.
61. *Stadtwerke*, *supra* n. 26, para. 260.
62. *Stadtwerke*, *supra* n. 26, para. 267.
63. Spain round-up: an update on new rulings, imminent ones, and new cases, in *Investment Arbitration Reporter*, 8 August 2019, available at: www.iareporter.com.
64. C. Sanderson, "Spain offers incentives to end renewables claims", *Global Arbitration Review*, 22 November 2019, available at: www.globalarbitrationreview.com.

mechanisms.

Indeed, this Act granted renewable energy producers (i) preferential connection of their facilities to the grid for the distribution of electricity, (ii) fixed feed-in tariffs for a period of 15 years and, alternatively, (iii) green bonuses. Also, the feed-in tariff set by the Energy Regulatory Office (the "ERO") in any given year could not be decreased by more than 5% of the value of the feed-in tariff established in the previous year.

In 2009, small amendments to the regime were enacted. The ERO issued Regulation No. 140/2009, providing that feed-in tariffs would be applied throughout an estimated lifetime of plants of 20 years (instead of 15 years), and that the tariffs would increase each year between 2% and 4%, taking into account the inflation price index for industrial producers over the lifetime of the plant.

b) The regulatory changes

The year of 2009 was also marked by the resignation of the then-incumbent Prime Minister Mr. Mirek Topolanek, following a vote of no confidence. In May 2009, a temporary government lead by the new Prime Minister Jan Fischer was sworn in and soon after the Czech media started reporting on the ongoing solar boom in the Czech solar energy sector and on how the ERO was supposedly seeking ways to reduce the burden of solar feed-in tariffs[65].

However, the withdrawal of the incentives to the production of renewable energy in the Czech Republic effectively began a year later, in 2010. In particular, on 17 March 2010 the Czech Parliament adopted Act No. 137/2010, which repealed the provisions of the Act on Promotion pursuant to which the feed-in tariffs could not be lowered by more than 5% per year[66]. Subsequently, Act No. 330/2010 abolished all incentives to photovoltaic plants with an installed output exceeding 30 kWp commissioned after 1 March 2011.

Further to this, and on the realm of taxation, Act No. 346/2010 repealed the tax exemption and the accelerated depreciation period guaranteed by the Act on Income Tax and, finally, Act No. 402/2010, of 14 December 2010, established a levy on revenues generated by photovoltaic power plants (the "Solar Levy"), in the amount of 26% and 28% of the payments due to solar energy producers under the feed-in tariff and green bonus systems, respectively[67].

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65. The tribunal in Photovoltaic Knof even referred to a quote by Mr. Josef Fiřt, the then head of the Energy Regulatory Office, who then reportedly stated that "[t]he solar electricity feed-in tariff has gone in some instances economically beyond the limit as the distributors are forced to enhance power lines, which makes electricity more expensive for consumers", in Permanent Court of Arbitration (PCA), *Photovoltaik Knopf Betriebs-GmbH* v. *Czech Republic*, Case No. 2014-21, Final Award, 15 May 2019, para. 156.

66. Notwithstanding, that amendment applied only to those plants connected to the grid after 1 January 2011.

67. The Solar Levy originally applied from 1 January 2011 to 31 December 2013, to rev-

In 2012, Act No. 165/2012 essentially dismantled the entire regime by repealing the Act on Promotion as of 1 January 2013. The practical implications were manifold. First, this diploma effectively terminated all existing contracts between renewable energy producers and the grid operators that provided for the payment of feed-in tariffs or green bonuses as of 31 December 2012. Producers who intended to maintain entitlement to the feed-in-tariffs were compelled to enter into non-negotiable supply contracts with "mandatory purchasers" chosen by the Czech Ministry of Industry and Trade. The tariffs were not, however, affected. Second, this new Act imposed on producers entitled to feed-in tariffs the duty to pay the "negative electricity hourly price", to the mandatory purchasers, whenever the price of electricity on the daily market had a negative value (i.e. when the grid was experiencing a surplus). Third and finally, it introduced certain recycling fees for the disposal of photovoltaic panels.

These measures naturally caused a stir amongst investors and were quickly followed by challenges before the national courts. On 15 May 2012 the Czech Constitutional Court nonetheless upheld the solar levy and the abolition of the income tax provisions, which had been challenged before it by a group of investors. In its decision, the Czech Constitutional Court found that these measures did not violate the Constitution so long as Czech law provided for mechanisms to mitigate any strangling effects.

Finally, on 13 September 2013 Act No. 310/2013 extended the Solar Levy beyond 31 December 2013, reduced the levy's rate to 10% for payments made under the feed-in tariff system and to 11% for payments made under the green bonus system, and cancelled all incentives for electricity generated by solar power plants put into operation after 1 January 2014.

c) The arbitrations that ensued

Antaris GmbH and Dr. Michael Göde v. The Czech Republic[68] ("Antaris") was the first of a tide of cases brought against the Czech Republic against the backdrop of the withdrawal of incentives to renewable energy producers.

This arbitration was brought on 8 May 2013, by Antaris GmbH and Dr. Michael Göde. Antaris GmbH was a company incorporated under the laws of Germany and Dr. Michael Göde a German national. Antaris GmbH was owned by Göde Holding GmbH & Co. KG, which was, in turn, owned by Dr. Michael Göde. Indirectly, both claimants held shares in six special purpose vehicle companies incorporated in the Czech Republic: FVE Úsilné s.r.o., FVE Mozolov s.r.o., FVE Stříbro s.r.o., FVE Holýšov I s.r.o., TCS Taurus Service s.r.o., and FVE Osečná s.r.o. At the time these proceedings were brought, each of these companies owned photovoltaic plants in the Czech Republic and had benefitted from the

enues generated by photovoltaic power plants put into operation between 1 January 2009 and 31 December 2010, but was later extended beyond 31 December 2013, at the decreased rates of 10% and 11%, by Act No. 310/2013.

68. PCA, *Antaris Solar GmbH and Dr. Michael Göde* v. *Czech Republic*, Case No. 2014-01, Final Award, 2 May 2018.

incentives enacted up until 2010.

In the context of this arbitration, the claimants submitted that the Czech Republic had breached its obligations under the ECT and the bilateral investment treaty concluded between Germany and Slovakia, by repealing incentives that had been enacted to attract investors to invest in photovoltaic energy generation, against guarantees that had been given.

On the merits, the claimants submitted that the progressive dismantling of the incentives (i) constituted unfair and inequitable treatment, and (ii) was implemented through unreasonable and arbitrary measures which impaired the maintenance, use, enjoyment and disposal of the claimants' investments.

The Czech Republic objected to the tribunal's jurisdiction on the grounds that the creation and subsequent extension of the Solar Levy constituted a taxation measure and was thus excluded from the tribunal's jurisdiction under Article 21 of the ECT (the so-called tax carve-out provision).

On the merits, the Czech Republic submitted that the measures did not violate the ECT nor the bilateral treaty, insofar as (i) the Czech Republic never made a stabilization commitment towards the Claimants, (ii) did not otherwise violate any legitimate expectations, and (iii) the measures were reasonably tailored to achieve appropriate and rational state objectives.

In its decision on jurisdiction, the tribunal took the view that, in order to ascertain whether a putative tax measure qualifies under Article 21 of the ECT, a two-step analysis is required: a characterization of the measure under domestic law, followed by the application of Article 21's carve-out.

As such, the Tribunal accepted that, considering that the ECT does not itself provide an express international definition of tax measures, the measure must qualify as a tax in nature and substance by the domestic law of the host State for Article 21 of the ECT to apply. In determining if the Solar Levy constituted a tax measure, the tribunal considered decisions rendered by the Czech courts on the matter and attributed them "substantial weight"[69]. It then concluded, similarly to what had been found by the Czech Supreme Administrative Court in 2014, that the Solar Levy did not constitute a tax in substance but was rather a reduction of a subsidy (the feed-in tariff), as a matter of Czech law.

In the tribunal's view, although "one purpose of the Solar Levy was to raise revenue of the State budget (as one of the sources to cover the cost of subsidies to solar investors)", it was structured in a way that covered "only a certain class of solar energy producers", it was "calculated as a percentage of the FiT", and was, importantly, collected by withholding of the amounts of the feed-in tariffs that were due to producers. Together, these factors led the tribunal to conclude that the principal purpose of the Solar Levy was in fact to reduce the tariffs for

69. *Antaris, supra* n. 62, para. 242.

certain investors, and not to collect revenue for the State[70]. As a result of the above, the tribunal concluded that it had jurisdiction to hear claims in relation to the Solar Levy.

However, and albeit siding with the claimants on jurisdiction, the tribunal ultimately dismissed the claimants' case on the merits.

In addressing the alleged breach of the FET standard, the tribunal stated clearly that there is no requirement that there be an express stabilization provision for the investor to claim a legitimate expectation that a certain regime would remain unchanged, and further accepted that promises or representations to investors may be inferred from domestic legislation and official statements, even if they do not have legal force.

However, it also found that, in the absence of a stabilization clause, changes to the law were not prevented by the fair and equitable treatment standard if they did not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and did not modify the regulatory framework relied upon by the investor at the time of its investment outside an acceptable margin of change.

In light of the above, the tribunal rejected the claim that the State's conduct had been arbitrary and unreasonable. The tribunal accepted that the State had the rational objective of reducing excessive profits and sheltering consumers from excessive electricity price rises, and that its actions were not arbitrary or irrational. There was an appropriate correlation between the Respondent's objectives and the measures it took[71].

As a result of the above, the arbitral tribunal, in a 2-to-1 decision, concluded that the Czech Republic had not breached its obligation to accord fair and equitable treatment to the claimant's investment and consequently dismissed all claims[72].

Antaris represents the first arbitral award rendered in the aftermath of a series of arbitral proceedings initiated on 8 May 2013 against the Czech Republic[73]. A year later came a new wave of arbitral awards, the decision rendered in Photovoltaik

70. *Antaris, supra* n. 62, para. 250.

71. *Antaris, supra* n. 62, para 444.

72. Co-arbitrator Gary Born filed a Dissenting Opinion, disagreeing with the majority's conclusion that the Czech Republic did not breach its fair and equitable treatment and non-impairment obligations under the Treaties, stating that: "In my view, the evidentiary record shows that the Czech Republic enacted legislation that provided specific and unambiguous guarantees to investors in the renewable energy sector and that these commitments guaranteed that specified minimum tariffs would be payable for electricity produced by renewable energy sources for a period of 15 years. The Claimants relied on these specified tariffs in making substantial investments in the Czech Republic but, thereafter, despite its statutory guarantees, the Czech Republic adopted the Solar Levy, which materially reduced the tariffs that would be paid to certain renewable energy sources, including the Claimants' plants".

73. On 8 May 2013, about ten different foreign investors jointly filed a request for arbitration. Their respective claims were then split into six different arbitrations.

Knopf Betriebs-GmbH v. Czech Republic[74] ("Photovoltaik Knof") being one of them.

The dispute in Photovoltaik Knof arises out of an investment that Photovoltaik Knopf Betriebs-GmbH, a company incorporated under the laws of Germany and the claimant in the arbitration, had made in the photovoltaic sector in the Czech Republic.

The claimant had invested in the Czech solar sector on 10 August 2010, through the acquisition of the shares of FVE Kněžmost s.r.o., a Czech limited liability company. Through the same transaction, the claimant acquired a plot of land in the Czech Republic and FVE Kněžmost s.r.o. entered into an engineering, procurement and construction contract with a German company, for the construction of a EUR 2,900/kWp plant with a capacity of 1026 kWp. In December 2010, the plant began operating with a capacity of MW 0.999, supplying electricity to the grid as of 12 January 2011.

In initiating this arbitration against the Czech Republic, the claimant argued that the State's introduction of the Solar Levy, as well as the withdrawal of all tax incentives, violated its duty to provide a stable and predictable legal framework, as well as the claimant's legitimate expectations, in addition to being unreasonable and non-transparent measures. On this basis, the claimant sought compensatory relief in the amount of no less than CZK 61.3 million. The Czech Republic, on the other hand, requested that the tribunal declare itself without jurisdiction and, in any case, that all claims be dismissed as meritless.

On the one hand, the tribunal held that it had jurisdiction to adjudicate the claims, including those arising from the creation and extension of the Solar Levy[75], but with the exclusion of those relating to the withdrawal of the exemption from income tax and the shortening of the depreciation period, insofar as these latter two constituted taxation measures within the meaning of Article 21 of the ECT and were, as such, outside the scope of the tribunal's jurisdiction.

On the other hand, the tribunal dismissed all claims on the merits. In doing so, the tribunal laid the path for finding whether an FET standard violation occurred.

First, the Tribunal found that the State "did not expressly undertake any agreed stabilization commitment, be it contractual, legislative, individual or otherwise,

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74. PCA, *Photovoltaik Knopf Betriebs-GmbH* v. *Czech Republic*, Case No. 2014-21, Final Award, 15 May 2019.

75. The tribunal found that the Czech Republic had failed to discharge its burden of proving that the Solar Levy was a taxation measure under the ECT. The tribunal weighted the fact that it is called levy, and not tax, that it had not been considered a tax for double taxation purposes by the Czech Supreme Administrative Court in the past, that the Czech Republic itself, through its Ministry of Finance, had argued before Czech courts that the Solar Levy was not a tax, and finally that statements made at the time of its enactment evidence that its main objective was to reduce the feed-in tariffs payable and not the general raising of state revenue. See *Photovoltaik Knopf, supra* n. 68, paras. 235-257.

vis-à-vis the Claimant's investment"[76].

Second, the tribunal acknowledged that an obligation to provide a stable and predictable legal framework for foreign investment nevertheless exists as part of the FET standard[77]. This obligation, as the tribunal puts it, must be considered objectively but "does not require the demonstration of any reliance on the host State's conduct on the part of the foreign investor"[78]. This said, this obligation is "not absolute and must not be interpreted overly broadly"[79]. What this obligation entails, however, is that the "fundamental features" of the legal framework must not be repealed – as they were not in the case. The tribunal notes that the claimant still received a stable feed-in tariff and the plant in fact received a full payback before the promised 15 years[80].

Finally, and as to the allegation that the claimant's legitimate expectations had been violated[81], the tribunal found that the State did not give any assurances as to regulatory stability. In fact, it appears that the claimant relied mostly on the advice of the banker who brokered the financing of its investment, rather than on statements made by State officials. The tribunal also found that the claimant did not rely on any assurance and that any such reliance would have been unreasonable, as there had been several indications that the legal regime could change at the time the investment was made[82]. In the absence of these elements, the tribunal concluded that no legitimate expectations had been breached.

In the end, the remaining claims were equally dismissed, and the tribunal ultimately ordered the claimant to pay EUR 49,180.98 to the Czech Republic for the costs of the arbitration.

As can be derived from the examples above, the Czech Republic has managed to assert the validity of its conduct under international law and, as recently reported, the "has prevailed in six of the seven treaty arbitrations launched against it in 2013 in response to measures enacted in the solar power sector"[83].

76. See *Photovoltaik Knopf, supra* n. 68, para. 482.

77. See *Photovoltaik Knopf, supra* n. 68, para. 483: "While there is a certain overlap between the two, this obligation is legally distinct from the protection of an investor's legitimate expectations".

78. See *Photovoltaik Knopf, supra* n. 68, para. 484.

79. See *Photovoltaik Knopf, supra* n. 68, para. 486.

80. See *Photovoltaik Knopf, supra* n. 68, paras. 487 and 490.

81. See *Photovoltaik Knopf, supra* n. 68, para. 496: "The Parties essentially agree on the applicable test in this case to establish whether there has been a violation of an investor's legitimate expectations, namely: (a) whether the Respondent gave an assurance as to regulatory stability; (b) whether the Claimant effectively relied on such assurance; (c) whether this reliance was reasonable, taking into account the prevailing social and economic circumstances in the energy sector and at the time; (d) whether the Respondent violated the Claimant's legitimate expectations, bearing in mind that de *minimis* violations do not meet the necessary threshold for treaty violations. This test is consistent with the elements considered by other international tribunals".

82. See *Photovoltaik Knopf, supra* n. 68, para. 460: "Mr. Knopf was aware that the Czech authorities had given some warnings in March 2010 that the regime would be changed".

83. C. Sanderson, "Four more solar wins for Czech Republic", *Global Arbitration Review*, 17 May 2019, available at: www.globalarbitrationreview.com.

4. Chapter 3: Lessons from Italy

a) The initial regulatory framework

In 2003, Italy adopted a regulatory framework aimed at fostering investment in the renewable energy sector and thus complying with both the Kyoto Protocol and with EU Directives fixing a national indicative renewable energy target of 25,0%.

The so-called Energy Account regime was launched by Legislative Decree 387/2003, of 29 December, and implemented a two-fold system under which operators (i) could be granted long-term tariff premiums for the energy they generated, that accrued in addition to the marked prices they received and (ii) could enter into short-term minimum guaranteed price contracts for the sale of the energy they produced in plants with a capacity under 1MW.

The first part of this regime was effected from 2005-2012 through a series of five Energy Accounts (*Conto Energia*) enacted through ministerial decrees. These ministerial decrees expressly provided that the tariff premiums, once granted, would be paid throughout a twenty-year period commencing from the date of a photovoltaic plant's entry into operation.

When a photovoltaic operator qualified for receiving incentives under the Energy Account framework, it first received a letter from the *Gestore dei Servizi Energetici* ("GSE")[84], confirming its right to a specific tariff. Afterwards, the photovoltaic operator would enter into a contract with the GSE, and such contract would set forth the applicable Energy Account, the specific tariff rate that the operator would receive and its respective duration. These contracts became effective on the date the photovoltaic facility entered into operation.

The five Energy Accounts in force from 2005 to 2012 were the following:

- "Energy Account I", enacted on 28 July 2005 and later amended in 2006, provided incentive tariffs to photovoltaic plants with a capacity below 1 MW, that entered into operation after 30 September 2005[85].

- "Energy Account II", enacted on 19 February 2007, afforded an increased capacity threshold and allowed facilities with over 1 MW of capacity to also apply for incentive tariffs[86]. Under this Energy Account, the tariff rate varied

84. The GSE was the State-owned company responsible for paying the incentives to electricity producers.

85. Photovoltaic facilities receiving authorization under this Energy Account in 2005 and 2006 received tariff premiums within the following ranges: €0.445 per kWh for plants between 1 kW and 20 kW, €0.460 per kWh for plants between 20 kW and 50 kW, and €0.490 per kWh for plants between 50 kW and 1 MW. Those plants qualifying after 2006 received slightly lower rates.

86. Article 16(1) of this Decree contained a transitory provision in relation to Energy Account I, providing that they would continue to apply exclusively to photovoltaic plants that

depending on factors such as the facility's nominal capacity and size, as well as the date of entry into operation[87].

- "Energy Account III", enacted on 6 August 2010, provided incentive tariffs to solar plants that entered into operation by 31 December 2013 and provided tariff premiums ranging from €0.251 per kWh to €0.362 per kWh. The benefits of this Account were only available to new plants up until the threshold of 3,000 MW in cumulative installed capacity was reached[88].

- The applicability of this Energy Account was, however, subsequently limited by the so-called Romani Decree, of 3 March 2011, to solar plants commencing operations before 31 May 2011 (instead of the original cut-off date of 31 December 2013).

- "Energy Account IV", enacted on 5 May 2011, applied to photovoltaic plants entering into operation between 31 May 2011 and 31 December 2016 and established caps on the total program costs for each semester, precluding the approval of benefits to further photovoltaic facilities once the threshold had been reached.

- Finally, "Energy Account V", enacted on 5 July 2012, applied to photovoltaic plants starting operation after 26 August 2012[89]. One of the innovative features of this Energy Account was the establishment of an annual administrative fee, payable by producers receiving incentive tariffs pursuant to any of the Energy Accounts, to cover GSE's management, audit and control costs. This fee was fixed at €0.00005 per kWh and could be collected through an offset against the payments due by the GSE to the producers.

- Energy Account V also provided that it would cease to apply within 30 days of Italy reaching a total annual cost of € 6.7 billion with the photovoltaic incentives. That limit was reached on 6 June 2013 and consequently the tariffs provided for under this Energy Account became unavailable to new photovoltaic facilities after 6 July 2013.

The second part of the regime launched in 2003 was the so-called *retiro dedicato* regime, pursuant to which the operators of plants with a capacity under 1 MW had the right to sell electricity to the GSE at a minimum guaranteed price or

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have already acquired, by 2006, the right to the incentive rates established by that 2005 decree.

87. Facilities entering into operation prior to 31 December 2008 received a slightly higher rate than those entered into operation in 2009. The period of eligibility for Energy Account II was later extended by the so-called *Salva Alcoa* Decree, which enabled plants built by 31 December 2010 and entering into operation by 30 June 2011 to benefit from these incentives.

88. Although facilities that had entered into operation within fourteen months of the date when such threshold was reached would nonetheless benefit from the tariffs.

89. This Energy Account provided for a somewhat altered structure of incentive tariffs. Plants up to 1MW in capacity could qualify for an all-inclusive tariff, consisting of the price of the electricity, the value of the incentive premium, plus a further specific tariff for self-consumed energy. Plants over 1MW received a fluctuating amount based on the difference, if positive, between the all-inclusive tariff and the hourly zonal price.

at market wholesale price, whichever was higher. This regime was designed to ensure a minimum remuneration to smaller facilities, regardless of the trends in market prices, since those facilities were assumed to have higher operating costs[90].

Producers qualifying under this regime entered into minimum price contracts with the GSE subject to the duration of one year and automatic renewals. The minimum prices were successively updated throughout the years by different resolutions, until being altogether repealed in 2014.

However, this system of incentives became very costly. That is notably demonstrated by the fact that the "three-year €6.7 billion scheme approved in June 2012 was completely exhausted by July 2013"[91], which then resulted in the discontinuation of Energy Account V.

As a result, in August 2011 Italy extended to renewable energy producers a corporate tax that up until then applied only to traditional energy producers and was commonly referred to as the Robin Hood tax. Producers with an annual gross income over €10 million and taxable income over €1 million became subject to this 38% tax over the company's annual gross income[92].

b) The regulatory changes

On 23 December 2013, Italy attempted to reshape the incentives previously enacted and sought to do so on a voluntary basis. Indeed, Italy enacted Law Decree No. 145/2013, referred to as the *Destionazione Italia*, offering producers two possible alternatives to freely chose from: either continue receiving the Energy Account tariffs for the remainder of their twenty-year duration, but foreclosing any possibility of receiving additional incentives thereafter, or accept reductions to those tariffs but in return having their duration extended in seven additional years.

Furthermore, this Law Decree provided that facilities over 100 kWh in capacity that were receiving Energy Account tariffs would be excluded from the minimum price scheme and as such only plants with a capacity over 100 kWh could still obtain both.

90. Please note that plants eligible for the tariff regime could also qualify to benefit from this minimum price scheme, as they were not mutually exclusive.

91. C. A. Patrizia, J. R. Profaizer, S. W. Cooper and I. V. Timofeyev, "Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty", *Global Arbitration Review*, available at: www.globalarbitrationreview.com. See also ICSID, *Belenergia S.A.* v. *Italian Republic*, Case No. ARB/15/40, Final Award, 6 August 2019, para. 121.

92. On 11 February 2015, the Italian Constitutional Court determined the abolition of this tax, but the effects of this decision were *ex nunc*, rather from the date of the extension, and producers were thus never reimbursed for the sums previously paid.

Possibly because this 2013 attempt did not prove sufficiently effective, in 2014 came the measures that truly modified the regulatory landscape applicable to the production of energy from renewable sources in Italy.

The *Spalma Incentivi* Legislative Decree No. 91 of 24 June 2014 applied an overall reduction to feed-in tariffs enjoyed by photovoltaic plants with a nominal power above 200kW, irrespective of any GSE Conventions already in force, with effect as of 1 January 2015.

In sum, the *Spalma Incentivi* provided photovoltaic plant owners with three options: the first option entailed an extension in the duration of the incentives from 20 to 24 years, while reducing the feed-in tariffs proportionally to the photovoltaic plant's lifetime; the second option kept the original twenty-year duration of the incentives but varied the feed-in tariffs over time (the tariff rate would be reduced between 2015 and 2019 and then increased in subsequent years); finally, the third option entailed a reduction in 6% to 8% of the incentives, according to the photovoltaic plant's nominal capacity. In the absence of a choice by the photovoltaic plant owner, the third option applied.

The *Spalma Incentivi* also repealed and replaced the administrative fee created by Energy Account V to cover GSE's management, audit and control costs, and created a new annual fee based solely on the plant's capacity, instead of the output of energy. The new fee ranged from €1.20 per kW to €2.20 per kW.

Subsequently, and in what relates exclusively to the minimum price scheme, AEEG[93] Resolution No. 618/2013/R/EFR was enacted on 19 December 2013 and established a minimum guaranteed price of €38.9 per MWh.

Finally, on 23 October 2014, AEEG Resolution 522/2014/R/EEL re-introduced an annual administrative fee, due by photovoltaic energy producers, that had been previously enacted but shortly after repealed by Italian courts, and was intended to cover the imbalance costs of distributing the electricity, allegedly attributable to the operators' discrepancies in planning the amount injected into the grid[94].

c) The arbitrations that ensued

Among the investors affected by Italy's rollback on the incentives to the production of renewable energy were Danish investor Greentech Energy Systems A/S ("Greentech"), NovEnergia II Energy & Environment SICAR

93. AEEG stands for *Autorità per l'Energia Elettrica ed il Gas*.

94. This measure essentially imposed on renewable energy producers an obligation which had been since 2006 imposed on non-renewable energy producers. Indeed, non-renewable energy producers were required to project the amount of electricity they anticipated they would inject into the grid, which then enabled Terna, the Italian grid operator, to balance electricity supply and demand. Producers deviating from their injection schedules were required to pay the imbalance costs.

("NovEnergia") and NovEnergia II Italian Portfolio SA ("NIP"), the latter two incorporated in Luxembourg.

From 2008 to 2013, these entities invested in several Italian companies owning a total of 134 photovoltaic plants in Italy. Between 2010 and 2013, "NIP and NovEnergia, invested in 52 PV plants in Italy. As for Greentech, a 2011 merger gave the company ownership over 75 Italian PV plants, and the company later acquired (by January 2015) ownership of 7 more"[95]. All of these facilities either benefitted from tariffs provided under the *Conto Energia* scheme and/or the minimum guaranteed prices.

In essence, these investors claimed they were induced to invest by Italian legislation, and notably by the *Conto Energia* decrees providing for incentive tariffs (feeds added to the market price) lasting for twenty-year periods counted as of each plant's connection to the grid and execution of an agreement with the GSE.

They also claimed their expectations were frustrated when Italy implemented a series of measures that diminished the value of their investment and culminated in the *Spalma Incentivi* Legislative Decree.

As a result, these investors resorted to arbitration and on 7 July 2015 initiated arbitral proceedings against Italy for breaching Article 10(1) of the ECT by (i) according their investment unfair and inequitable treatment, (ii) failing to observe the obligations entered into with respect to their investment and (iii) unlawfully impairing their investments through unreasonable measures. The claimants thus requested that Italy be ordered to pay damages in the amount of €25.06 million.

In *Greentech Energy Systems A/S, et al* v. *Italian Republic*[96] ("Greentech"), the tribunal found that it had jurisdiction with respect to all claims, except for those concerning Italy's extension of the Robin Hood tax to renewable energy producers, which the tribunal deemed to fall outside the scope of its jurisdiction pursuant to the carve-out provision contained in Article 21 of the ECT.

On this issue, the tribunal noted that the claimants' grievance lied not on the measure itself, but on the fact that the Italian Constitutional Court's decision that stroke it down only applied prospectively (*ex nunc*), rather than retroactively (*ex tunc*). In that vein, the tribunal concluded that any award of compensatory damages on these grounds would amount to imposing on Italy obligations "with respect to Taxation Measures", which is expressly barred from doing by Article 21 of the ECT.

However, the tribunal concluded that Italy's imposition of a new administrative

95. In now-public Energy Charter Treaty award (Greentech v Italy), Park-chaired tribunal finds that Achmea ruling does not preclude tribunal's jurisdiction, but Sacerdoti dissents on liability, in *Investment Arbitration Reporter*, 13 January 2019, available at: www.iareporter.com.

96 SCC, *Greentech Energy Systems A/S, et al* v. *Italian Republic*, Case No. V 2015/095, Final Award, 23 December 2018.

fee under Energy Account V did not constitute a taxation measure for the purpose of the ECT, insofar as it was established specifically to cover the GSE's costs of managing the programs from which the producers benefited, which suggests reciprocity and sets it apart from a tax. As a result, the tribunal affirmed its jurisdiction to decide the claims asserted in relation to it. The same reasoning was applied in affirming jurisdiction over the later imposition of a fee for imbalance costs.

On the merits, a majority of the tribunal found that the tariff reduction implemented with the enactment of the 2014 *Spalma Incentivi* Legislative Decree (i) undermined the claimants' legitimate expectations and failed to treat their investment transparently and consistently, thus breaching the fair and equitable treatment standard of protection, and also that it (ii) violated the impairment and umbrella clauses contained in Article 10(1) of the ECT.

First, the tribunal held that, at the time of their investment, the claimants "had been led to believe, reasonably, that the incentive tariffs would remain the same as promised in the *Conto Energia* decrees, GSE letters and GSE Agreements throughout a twenty-year period"[97]. The specificity of these assurances, the tribunal reasoned, bears the hallmarks of an agreement.

In the present case, "nothing alerted the Claimants that they would need to accept changes of the magnitude imposed by the *Spalma-incentivi* Decree"[98]. As a result of the above, the assurances previously given were breached and Italy should fairly compensate the claimants.

Although the claimants' success on the merits of their FET claim exempted the tribunal from addressing other grounds for the relief sought, the tribunal nonetheless did so.

As such, the majority also found that Italy violated the duty not to impair in any way the investors' investment, provided under Article 10(1) of the ECT. In the present case, the conclusion reached was that the tariff reduction was an "unreasonable measure", the negative impact of which was "in the Tribunal majority's view, significant in terms of the quantum of damages attributable to the measure"[99].

Finally, the tribunal also found that the ECT's umbrella clause was breached, insofar as the Conto Energia Decrees, the GSE letters and the GSE agreements, taken as a whole, amounted to obligations "entered into with" the specific producers, that were then breached by Italy with the enactment of the *Spalma Incentivi* Legislative Decree.

As a result of the above, the tribunal majority awarded the claimants damages for Italy's breaches of the ECT in the amount of €11.9 million, plus interest.

97. *Greentech, supra* n. 90, para. 447.
98. *Greentech, supra* n. 90, para. 448.
99. *Greentech, supra* n. 90, paras. 461-462.

On 7 August 2015, shortly after the Greentech proceedings were initiated, Belenergia S.A. ("Belenergia"), a company incorporated under the laws of Luxembourg, filed for arbitration against the Italian Republic before the ICSID[100].

In brief, Belenergia claimed that it established its investment in Italy on the basis of "conventions" signed with GSE, the State-owned regulatory agency.

Between 2011 and 2013, Belenergia invested in ten special purpose vehicles owning and operating photovoltaic plants in Italy. All benefitted from different Energy Accounts, under contracts signed before or after the investment was made. In addition, most of the plants also benefitted from the "minimum guaranteed price" scheme under which GSE directly purchased the electricity generated by the plants for a guaranteed price.

According to the claimants, the underpinnings of its investment were unexpectedly withdrawn when the remuneration scheme from which it benefitted started to be progressively reduced, until being fully discontinued in 2013.

When the *Spalma Incentivi* Legislative Decree entered into force, Belenergia's invested companies failed to make an express choice for any of the three new alternative regimes and were thus automatically were deemed to have opted for the third, which entailed a reduction in 6% to 8% of the incentives, proportionally to the plant's nominal power.

In its final decision, however, the tribunal concluded that Italy had not breached any of its obligations under the ECT, notably its obligation to accord fair and equitable treatment to investors.

In essence, the tribunal adopted a more restrictive understanding of the FET standard, according to which the investor's legitimate expectations can only be derived from specific commitments made by the State, and concluded that the GSE Conventions on feed-in tariffs did not constitute specific commitments addressed to Belenergia. In addition, the tribunal found that the amount and duration of the feed-in tariffs, set forth in Italian legislation, were not directly addressed at Belenergia and could not be construed as stabilization clauses.

Finally, and similarly to the tribunal's reasoning in the Isolux award, the tribunal noted that the evolution in the regulatory framework in Italy meant that any prudent investor would have anticipated the changes that occurred. Indeed, the 6% to 8% reduction to feed-in tariffs adopted in the *Spalma Incentivi* Decree should not have been surprising "in light of Italy's previous significant reductions of incentives to new plants entering into operation before Belenergia first invested in Italy in September 2011"[101].

100. *Belenergia*, *supra* n. 85. The ICSID is an international arbitration institution established in 1966 under the auspices of the World Bank, for legal dispute resolution and conciliation between international investors.

101. *Belenergia, supra* n. 85, para. 594.

According to news reports, this case in only "one of around a dozen ECT claims brought against Italy following a 2014 parliamentary decree that reduced state incentives in the renewable energy sector"[102]. Perhaps as a consequence of these arbitrations Italy decided to withdraw from the ECT and such withdrawal took effect from 1 January 2016.

In sum, in the case of Italy it is indeed striking to observe that two different tribunals, analyzing the same set of legislative measures and their impact on shareholding investments made within the same period, reached different conclusions as to the State's liability under international investment law.

5. Conclusions

The main takeaways that may be derived from the arbitral cases referenced in the previous chapters will be divided into two groups: one is jurisdictional and the other is substantive. In other words, the former will deal with the scope of tribunals' powers in adjudicating these disputes, and the latter will deal with the types of conduct that have led tribunals to hold States liable for the losses resulting to foreign investors from the States' regulatory action, and that consequently should be avoided.

a) Jurisdictional takeaways:

The main takeaway from the cases analyzed above is that States have been generally successful in avoiding liability under the ECT for taxation measures, in light of the ECT's carve-out provision in Article 21(1).

Indeed, Article 21(1) of the ECT provides that "[e]xcept as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties". The definition of taxation measure provided under Article 21(7) of the ECT, is wide, insofar as "there shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation".

The ECT's protections with respect to Taxation Measures are fundamentally restricted to the substantive provisions on expropriation and disputes in this respect must therefore, be referred to the tax authorities of the host State, under Article 21(5) of the ECT.

102. C. Sanderson, "Italy defeats solar claim as Spain faces another", *Global Arbitration Review*, 7 August 2019, available at: www.globalarbitrationreview.com.

This provision has been successively invoked by States in the context of the arbitrations initiated against them, to object to the tribunals' jurisdiction to address the lawfulness of their taxation measures. That argument was (successfully) raised by Spain in Isolux, Eiser, Masdar and Stadtwerke, and also by the Czech Republic in Antaris (albeit unsuccessfully).

Zeroing in on the example of Spain, the creation of a tax on the value of electricity production at a rate of 7% through Law 15/2012 of 27 December gave rise to numerous claims from aggrieved investors. It was the first measure of a newly-elected government which openly declared the reduction of the tariff deficit as one of the main goals for the legislature. However, Spain's position has been, consistently, that measures such as that have been intentionally and expressly excluded from the realm of the ECT by its drafters, and tribunals have indeed found that they lack jurisdiction to hear investors' claims in relation to that tax.

Tribunals have undertaken the effort to substantiate the notion of "taxation measure" for the purposes of the ECT. In Stadtwerke, the tribunal expressly stated that for a tax to be a taxation measure under the ECT there had to be "1) a compulsory payment obligation, 2) imposed by government according to the Contracting Party's law, 3) on a defined class of persons and 4) that generates governmental revenues for a public purpose"[103].

The case law emerging from the arbitrations initiated against Spain is in this regard coherent and consistently finds that the levy imposed by Law 15/2012 fits within the notion of taxation measure under the ECT and thus warrants the application of Article 21 of the ECT.

Notwithstanding the above, it also follows from arbitral case law that tribunals may be more demanding and require that the measure be legitimate, as in created and applied in good faith. While tribunals tend to give some deference to the characterization made by the State according to its internal law, Tribunals may not simply accept such characterization, but rather autonomously determine whether a certain measure falls within the notion of taxation for the purposes of the ECT by looking into whether its underlying purpose relates to the collection of revenue or constitutes, rather, a disguised way of reducing subsidies.

Indeed, that discussion assumed particular relevance in Antaris, where the claimants argued that Article 21's carve-out only applied to taxation measures that had been imposed in good faith by States[104], which they purported had not been the case, and even cited the decision rendered in Yukos Universal Limited (Isle of Man) v. The Russian Federation, where an arbitral tribunal had identified an implicit exception in Article 21 that rendered it inapplicable to tax measures that had not been adopted in good faith[105].

103. *Stadtwerke*, *supra* n. 26, para. 166.

104. *Antaris,* supra n. 62, para. 180.

105. PCA, *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation*, Case No. 2005-4/AA 227, Final Award, 18 July 2014, para. 1430.

In Antaris, the tribunal undertook a careful analysis of the features of the so-called Solar Levy, and ultimately concluded that its purpose was in fact to reduce the feed-in tariff that had been granted to some investors, rather than to collect revenue for the State, something that was further evidenced by the way in which the levy was calculated and collected. The Tribunal also took into consideration the fact that the Czech Supreme Court had previously ruled that, under domestic law, the Solar Levy did not qualify as a tax measure.

The tribunal in Stadtwerke, although acknowledging that the good faith requirement "appears nowhere in the ECT or in the «ordinary meanings» that the Tribunal has gleaned from various dictionaries"[106], then ultimately engaged in that analysis and concluded that the 7% levy "was a legitimate and bona fide exercise of governmental power"[107].

In brief, in regulating the renewable energy sector through taxation, Portugal's legislature should be mindful that, despite the ECT's carve-out provision, its measures may still be subject to scrutiny by an arbitral tribunal, aside from being obviously challengeable in other fora, on the basis of legal instruments other than the ECT.

A second jurisdictional takeaway from these cases is that arbitral tribunals have consistently rejected the States' objections to their jurisdiction premised on the argument that Article 26 of the ECT, providing investors with arbitration as a method for resolving disputes against Contracting States, is inapplicable to intra-EU disputes or is in some way incompatible with EU law, the so-called 'Achmea objection'.

As indicated above, this matter is outside the scope of this article and, therefore, we will simply note that it remains to be seen how the Achmea decision will impact the decisions from national courts called to decide on requests for the annulment of arbitral awards brought by the losing States[108], particularly where the arbitrations were seated in Member States to the EU. Finally, it also remains unclear whether, at the enforcement stage, compliance by the States with the awards rendered may lead to the imposition of sanctions by European institutions, notably on the grounds that such payments constitute illegal State aid. That implication has certainly been made by Spain in Eiser[109] and echoes a legitimate concern on the part of States.

Portugal, much like Spain, the Czech Republic and Italy, is among the 22 EU Member States that have issued on 15 January 2019 a joint political declaration

106. *Stadtwerke*, *supra* n. 26, para.167.

107. *Stadtwerke*, *supra* n. 26, para.174.

108. With the exception of awards rendered in arbitrations conducted under the auspices of the ICSID Convention, which provides for its own annulment process autonomous and independent from state courts.

109. See *Eiser*, *supra* n. 5, para. 173: "Respondent's Rejoinder concludes its discussion of this objection by observing that European authorities might regard any monetary award by the Tribunal in favor of the Claimants as impermissible state aid, implying that payment of such an award by Spain would be contrary to European law".

affirming that the effects of the European Court of Justice's decision in Achmea apply to intra-EU investment disputes under the ECT as well as under intra-EU bilateral investment agreements.

In light of the above, and despite the generalized rejection of such argument as a jurisdictional objection by international arbitral tribunals, it is only natural that such argument be raised at whatever stage possible, should any arbitrations be brought against Portugal in the future by European investors in relation to alleged breaches of such multilateral or bilateral investment treaties.

b) Substantive takeaways:

The selected substantive takeaways from these arbitrations will focus on the two main arguments raised by investors and on the basis of which some States have been found liable: on the one hand, the argument that the States' measures affected the investment in such an adverse way that they constituted indirect expropriation under the ECT, and, on the other, the argument that the States' actions breached the ECT's fair and equitable treatment standard of protection.

The claims of indirect expropriation were raised and ultimately dismissed by the tribunals in Charanne and Isolux. In both cases, tribunals looked at the magnitude of the impact of the legislative measures on the investors' profits and unanimously concluded that such impact would have to amount to a deprivation of property, to constitute indirect expropriation under the ECT.

In Charanne, the tribunal noted that the 2010 measures in Spain had resulted in a reduction ranging from 8,5% to 10% in the profitability of the plants and ultimately concluded that such reduction was not sufficiently destructive of the investment's value so as to amount to indirect expropriation and consequently warrant the imposition of adequate compensation by Spain.

Similarly, in Isolux the tribunal looked at the internal rate of return of the investment to measure the expected profitability of the facilities and strikingly concluded that the internal rate of return of the investor at the time the arbitration was brought (estimated at 6,4%) was actually higher than the one that existed when the investor made the investment (estimated at 6,19%)[110], and thus there had not been a deprivation of the value of the investment[111].

The lesson to be derived from the case law outlined above is that the threshold for expropriation is indeed very high, and a demonstration that indirect expropriation has occurred will necessarily require a demonstration that the decrease in value of a certain investment (frequently a decrease in value of shares), is so significant

110. Which was explained notably by the fact that while reducing the incentives some of the decrees extended their duration, as well as by the fact that the most significant impacts in Spain were caused by the IVPEE tax, introduced by Law No. 15/2012, which the Isolux did not consider here as it found that they fell outside the scope of its jurisdiction.

111. *Isolux*, *supra* n. 33, paras. 837-854.

that it almost equates to a total disposal of that investment. As such, States have been generally successful in rejecting liability under the ECT on these grounds.

The same cannot be said about the FET standard, which constitutes a rather vaguely worded, but most often invoked standard of protection.

With respect to FET claims, tribunals generally look first into whether there were any "specific commitments" of regulatory stability undertaken by the State in relation to investors, notably in the form of stabilization clauses inserted in investment contracts.

Such was the case in Photovoltaik Knof, where the tribunal eventually concluded that the Czech Republic "did not expressly undertake any agreed stabilization commitment, be it contractual, legislative, individual or otherwise, vis-à-vis the Claimant's investment"[112].

In the absence of a specific stabilization commitment, tribunals seem consistent in declaring that the FET standard does not "give a right to regulatory stability *per se*" and that, absent a specific undertaking or stabilization clause, "investors must expect that the legislation will change"[113] [114].

Notwithstanding the above, the ECT does protect, on the one hand, an investor's legitimate expectations by reference to the moment when the investment was made[115]. Whether investors' expectations are legitimate or not constitutes, however, the crux of the matter.

The tribunal in Antaris, adopted a more permissive view of the standard, finding that legitimate expectations may be derived not only from specific undertakings addressed by the State to the investor in question, but also from domestic legislation and official statements, even if they do not have legal force and are not individually addressed to the investor. In the same vein, the tribunal in Isolux found that the expectations may be derived from both specific commitments addressed to the investors personally, as well as from rules that, while not being specifically addressed to them, were put in place with the aim of inducing their investment[116]. A similar approach was taken by the OperaFund tribunal,

112. In truth, it can be argued that such analysis may be undertaken both from the perspective of a possible breach of the FET standard, as well as from the perspective of a possible violation of the umbrella clause provided in Article 10(1) of the ECT, as the tribunal in Isolux in fact did.

113. See *Eiser*, *supra* n. 5, para. 362.

114. See also *Isolux*, *supra* n. 33, para. 764: "[…] el Tribunal Arbitral no encuentra en éste Artículo una obligación autónoma para las Partes Contratantes de fomentar y crear condiciones estables y transparentes para la realización de inversiones en su território cuya violación *per se* generaría derechos a favor de los inversores de otra Parte Contratante".

115. In this context, one of the critical elements is therefore the determination of the relevant moment when the investment is considered to be made, as that will then serve as reference to determine the investors' actual expectation and their legitimacy.

116. In addition, in Masdar the tribunal found that there had been specific commitments by the State, in the form of a resolution issued by Spain addressed specifically to each of the three operating companies, confirming that each of the plants qualified under the Royal Decree

which considered that the Royal Decree 661/2007 itself contained an express commitment of stability.

However, the tribunal in Charanne and Belenergia adopted a more restrictive view, holding that the investor's legitimate expectations can only be derived from specific commitments made by the State to the investors. On this basis, the tribunal in Belenergia concluded that the Italian laws setting forth the tariff rates and their duration, as well as the letters from the GSE, stating the applicable feed-in tariffs, did not constitute commitments addressed specifically to Belenergia and could thus not ground a breach of the FET[117]. Tribunal in Stadtwerke similarly noted that "an investor cannot reasonably rely on PowerPoint presentations from Spanish agencies with no regulatory powers to base their expectations in relation to the legal regime … Legitimate expectations must be grounded in the law and not based upon promotional literature about what the law says"[118].

In determining whether expectations of regulatory stability are legitimate, tribunals have also weighted significantly whether regulatory changes were foreseeable by the investor at the time of making the investment. As stated by the tribunal in Isolux, if the changes were foreseeable at the time of making the investment (either by investors in general or by the investor in question who, because of his personal situation, disposed of specific elements to foresee them), then the expectations that the regulatory landscape would remain unchanged are not legitimate.

In this respect, some tribunals, as was the case in Stadtwerke, have found that for an expectation to be reasonable, "it must also arise from a rigorous due diligence process carried out by the investor"[119].

It is also worth noting that successive legislative amendments have been perceived as an indication that the regime may continue to change in the future. In fact, the tribunal in Belenergia noted that the *Spalma Incentivi* Decree should not have been surprising to investors "in light of Italy's previous significant reductions of incentives to new plants entering into operation before Belenergia first invested in Italy"[120]. Similarly, the tribunal in Stadtwerke stated that "the regulatory history of RD 661/2007 should have put the Claimants on notice that future modifications were likely"[121].

Moreover, it appears that the ECT enshrines an obligation of fundamental legal stability and protects investors, on the other hand, against radical changes to the

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661/2007 economic regime for their operational lifetime , and those commitments were sufficient to generate legitimate expectations in Masdar that the benefits granted by Royal Decree 661/2007 would remain unaltered.

117. Remarkably, however, the tribunal in Greentech found that the specificity of the assurances in the Italian *Conto Energia* decrees, GSE letters and GSE Agreements throughout a twenty-year period, had the hallmarks of an agreement, see *Greentech, supra* n. 90, para. 448.

118. *Stadtwerke*, *supra* n. 26, para. 287.

119. *Stadtwerke*, *supra* n. 26, para. 264.

120. *Belenergia, supra* n. 85, para. 594.

121. *Stadtwerke*, *supra* n. 26, para. 261.

regulatory regime on the basis of which they made their investments.

According to the tribunal in Eiser, "Article 10(1)'s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments". In other words, it means that "regulatory regimes cannot be radically altered" and "replaced with an unprecedented and wholly different regulatory approach, based on wholly different premises", applied to existing investments in ways that deprive investors who invested in reliance on those regimes "of their investment's value"[122].

Following an analogous reasoning, the tribunal in Photovoltaik Knof stated that the "fundamental features" of the legal framework could not be repealed and eventually concluded that the Czech Republic had not done so[123].

Finally, the FET standard protects investors from unreasonable, disproportionate and discriminatory measures. By way of example, in Antaris the tribunal acknowledged that the FET protects investors against arbitrary or unreasonable behavior, but eventually concluded that the Czech Republic had the rational objective of reducing excessive profits and sheltering consumers from excessive electricity price rises, and that its actions were not arbitrary or irrational.

In sum, the lessons for Portugal and elsewhere may well be that investors cannot have the expectation that the law will not change and that, even if they have such overarching expectation, it will generally not be deemed legitimate and, thus, protected by the FET standard. In the absence of a stabilization clause, changes to the regulatory framework are compatible with the fair and equitable treatment standard, but only if they do not exceed the exercise of the host State's normal regulatory power in the pursuit of a public interest and do not fundamentally modify the regulatory framework relied upon by the investor at the time of its investment, outside an acceptable margin of change and regulatory risk. Much depends, therefore, on exactly how incentives were originally configured and offered to investors and how they are subsequently modified.

As a final note, it must be stressed that that despite significant technological advancements in recent years, it is sensible to expect that the magnitude of investment required in the renewable energy sector cannot be left to the workings of market forces alone. Energy transition will need private investment if it is to become a reality.

In order to tackle the issue of climate change and notably achieving the 1.5ºC target established by the Paris Agreement[124], there needs to be policy coherence

122. See *Eiser*, *supra* n. 5, para. 382. In the same vein, the tribunal also stated, in paragraph 387 of the award, that although the claimants "could not reasonably expect that there would be no change whatsoever in the RD 661/2007 regime over three or four decades […] Article 10(1) of the ECT entitled them to expect that Spain would not drastically and abruptly revise the regime, on which their investment depended, in a way that destroyed its value".

123. See *Photovoltaik Knof*, *supra* n. 68, para. 600.

124. The Paris Agreement is an international agreement signed in 2016 within the United

and foreign direct investment. International arbitration has been, for decades, one of the most significant legal tools offered by public international law to that undertaking. Despite the current environment of skepticism and distrustfulness, it remains unparalleled and its opponents should be prudent not to altogether dismantle it without offering investors an alternative avenue to substitute it with. Without legal certainty and stability, together with efficient and neutral dispute settlement mechanisms, the risk of investments increases, thus increasing also the costs and the returns required by investors.

In light of the above, the analysis of the takeaways of recent arbitral case law in the renewable energy sector is timely and hopefully provides enlightenment and guidance on the States' use of their regulatory powers, as well as on what those seeking to invest in the sector should expect.

As more arbitral awards from these renewable energy disputes become available, and new proceedings appear on the horizon, it is expected that the boundaries of host States' regulatory powers become increasingly clear, all the while the intersection of the ECT with EU law, and the future of the ECT itself, is still, regrettably, clouded by uncertainty.

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Nations Framework Convention on Climate Change ("UNFCCC"), establishing the long-term goal to limit the increase in global average temperature to 1.5 °C.