

Spanish renewable energy policy – who will win the match between Spain and its renewable energy investors?

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In the last few months of 2018, several Energy Charter Treaty (ECT) decisions were rendered against Spain. This article considers the battle so far between Spain and its investors and considers several further ECT decisions which are expected to be rendered in 2019.

Spain has faced many investment treaty claims based on the Energy Charter treaty (ECT) and various bilateral investment treaties (BITs) for the withdrawal of its support measures for the production of renewable energy. This article discusses decisions rendered particularly in the second half of 2018 and looks ahead to expected decisions in 2019. For more information on investment treatment arbitration generally under the ECT see *Practice note, Investment arbitration under the Energy Charter Treaty*.

In November 2018, the ECT tribunal (SCC) in *Greentech Energy Systems A/S and others v Spain* (SCC Arbitration V 2015/150), seated in Stockholm, Sweden, rendered its final award. It declared, by a majority, Spain's liability for breach of the Fair and Equitable Treatment (FET) standard of Article 10(1) of the ECT and awarded EUR 39 million damages as compensation (out of the EUR 58 million claimed), plus interest, costs of the arbitration proceedings and part of the reasonable legal costs incurred by the claimants.

Also in November 2018, ICSID's website reported a relevant development in the case of *RREEF Infrastructure (G.P.) Limited and another (ICSID Case No. ARB/13/30)*. On November 30, 2018, the *RREEF* tribunal issued a decision on responsibility and principles of *quantum*, which included a partial dissent by one of the arbitrators, R. Volterra. Although the *RREEF* decision remains unpublished as of this date, it must have included a finding of Spain's liability in light of the fact that it reached the damages assessment stage.

The cases of *Greentech* and *RREEF* have marked a "set" against Spain in its account of ECT renewables cases. This first "set" has ended up with a 6-2 result in favour of the renewable energy foreign investors, following the path first initiated with the decisions in *Eiser* (2017) and *Novenergia, Masdar and Antin* (2018) (see *Legal updates, ICSID tribunal orders Spain to pay EUR128 million for changes to renewable energy sector regime, Fourth award issued declaring Spain liable under ECT in renewable energy case, and ICSID tribunal finds Spain breached ECT*). Spain prevailed in the first two games, albeit under very fact-specific circumstances (*Charanne* and *Isolux* (both 2016)), (for details of the *Charanne* decision see *Legal update, Majority SCC tribunal rejects ECT renewable energy claims against Spain*), with Professor Tawil's respective dissents). Besides, the *Greentech* and *RREEF* decisions constitute additional post-*Achmea* ECT decisions rendered in Spanish cases (to be added to *Masdar* and *Antin*), where the tribunals' jurisdiction was affirmed, despite Spain's efforts to "reprise" its intra-EU objection in light of the *Achmea* CJEU judgment of March 2018 (in *Achmea* the European Court of Justice (ECJ) held that investor state dispute settlement (ISDS) provisions such as those contained in the Germany-Slovakia BIT were incompatible with EU law. For further details of the *Achmea* decision see *Legal update, ECJ: Arbitration clause in intra-EU BIT incompatible with EU law*).

Moreover, on 15 and 16 January 2019, different groups of EU member states issued up to three declarations reflecting their understanding on the impact of the *Achmea* decision in intra-EU BITs and the ECT. In particular, Hungary issued a unilateral declaration (16 January 2019); Finland, Sweden, Luxembourg, Malta and Slovenia issued a separate declaration (16 January 2019), and the remaining EU member states issued a joint declaration (15 January 2019). Aside from the fact that all member states have undertaken to terminate intra-EU BITs by 6 December 2019, with respect to the *Achmea* effect on ECT claims, the different declarations issued by the EU member states have expressed dissimilar views. In any event, under international law, this declaration should not have any binding force over international arbitral tribunals (for example ICSID) constituted under the ECT. In the case of national courts, the investors are still entitled to rely on one of the principles of any democracy, which is the separation of powers and therefore claim that the judiciary applies the law, including international treaties such as the ECT and ICSID Convention. For further information, see *Legal update EU member states issue declaration recognising consequences of Achmea*.

The prevailing investors in Spanish ECT cases have brought petitions to confirm the different ECT awards before US Courts in Washington DC. In the meantime, Spain has also resorted to a range of post- award remedies:

- Annulment by an ICSID *ad hoc* committee (*Eiser*).
- ICSID supplementary proceedings (*Masdar*) (already decided by a yet-unpublished decision rendered by the Masdar tribunal on November 29, 2018).
- ICSID rectification proceedings (*Antin*).
- Set-aside proceedings before the Swedish courts (*Novenergia* – non-ICSID case).

Decisions settling these claims and further developments regarding enforcement proceedings will come to light during 2019 and beyond.

Numerous disputes are still pending against Spain under the ECT. In some of the ongoing cases, even though the hearings took place more than one year ago, the decisions have not been rendered yet. Pending cases include *NextEra Energy Global Holdings B.V. and another (ICSID Case No. ARB/14/11)*, *InfraRed Environmental Infrastructure GP Limited and others (ICSID Case No. ARB/14/12)*, *RWE Innogy GmbH and another (ICSID Case No. ARB/14/34)*, *Stadtwerke München GmbH and others (ICSID Case No. ARB/15/1)*, *9REN Holding S.à r.l. (ICSID Case No. ARB/15/15)*, or *Cube Infrastructure Fund SICAV and others (ICSID Case No. ARB/15/20)*. As indicated above, our view is that these cases should not be affected, **in any manner**, by the January 2019 member states' declarations.

Finally, further ECT cases against Spain are expected. The last months of 2018 have seen a number of new ECT cases registered by ICSID. The last three are:

- *European Solar Farms A/S (ICSID Case No. ARB/18/45)*.
- *EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L. (ICSID Case No. ARB/18/42)*.
- *Itochu Corporation (ICSID Case No. ARB/18/25)*.

On 28 December 2018, the Spanish Council of Ministers released a draft bill that deals with current arbitration proceedings and attempts to deter new investors from bringing new claims. In our view, however, the current proposal from the Spanish government does not provide any incentive not to initiate or pursue new ECT arbitrations. Rather, the current circumstances may give rise to a new "wave" of claims brought against the state by other renewable investors. Thus, we anticipate further ECT claims during 2019.

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