Disputes: International Experience

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Spain & Solar

Pre-2010 – "*The Sun Can Be Yours*"	Post-2010 / Electricity Sector Act 2013
• Electricity Sector Act 1997; Royal Decree 661/2007 • Subsidies and Feed-in tariff (FIT) – fixed electricity rates; option to choose between market price + premium or costs + margin • In 2008: >40% of the world's solar installations, €13bn in renewable energy assets • Investors - venture capital funds (Nextera, Masdar Solar, RREEF etc.) • No system to reduce tariffs when capacity targets were exceeded • By 2014 - cumulative tariff deficit of €30bn	• Cap of number of hours for FIT • Revocation of subsidies and incentives • Revocation of the FIT (Royal Decree 1565/2010) • Heavy dislocation in the renewable energy sector • Additional taxes (e.g. on power generation) • Retroactive changes • 32 arbitration claims under the ECT as of May 2017, with further cases lodged at the SCC and under UNCITRAL

Spain & Solar – *Charannes* (January 2016)

- T-Solar brought an indirect expropriation claim against Spain for breach of ECT:
  - **Art. 13(1)**, as Spain "*caused a brutal economic impact on the profitability of the activity of T-Solar and constitute[d] an expropriation of a substantial part of the value and returns of the[ir] investment*"; and
  - **Arts. 10(1) and 10(12)**, as Spain's actions "*violated the standard of fair and equitable treatment frustrating the legitimate expectations of the Claimants*".
- Jurisdictional objections by Spain dismissed entirely:
  - Fork in the road clause did not fall for consideration;
  - No lifting of the veil mandated here (although acceptable in cases of "*fraud directed at jurisdiction*").
- Substantive claims brought by the Claimants were unsuccessful:
  - Effects were not "*such a significance that it could be considered that the investor has been deprived, in whole or in part, of its investment*"
  - FET: no specific promises or commitments by Spain were communicated to the Claimants, and no such legitimate expectations were created by the "*legal order in force at the time*".
- Claimants should have made a "*diligent analysis of the legal framework for the investment*", as Spanish regulations are subject to change.

Spain & Solar – recent developments

- *Isolux Infrastructure Netherlands B.V. v. Spain* (13 July 2016)
  - SCC arbitration / ECT breach claim
  - Case targeted 2013 measures (not 2010) that made further changes to the renewables landscape
  - Spain succeeded in defending the arbitration, but Award not yet public. Few details available

- *Eiser Infrastructure Limited and Energia Solar Luxembourg v. Spain* (4 May 2017)
  - ICSID arbitration / ECT breach claim
  - Case targeted energy reforms, a 7% tax on power generators' revenues and a reduction in subsidies.
  - Claimants awarded €128m plus interest (out of over €300m claimed). First loss for Spain

- A hearing was held for the *Masdar Solar & Wind Cooperatief U.A. v. Spain* arbitration 8 months ago, meaning a decision is likely to be rendered in the coming months.

Investor-State Disputes

- Protections and guarantees, including right to have recourse to international arbitration, contained in:
  - Investor-State Contracts
  - Bilateral Investment Treaties
  - Multilateral and Regional Investment Treaties – e.g., Energy Charter Treaty
  - National Laws

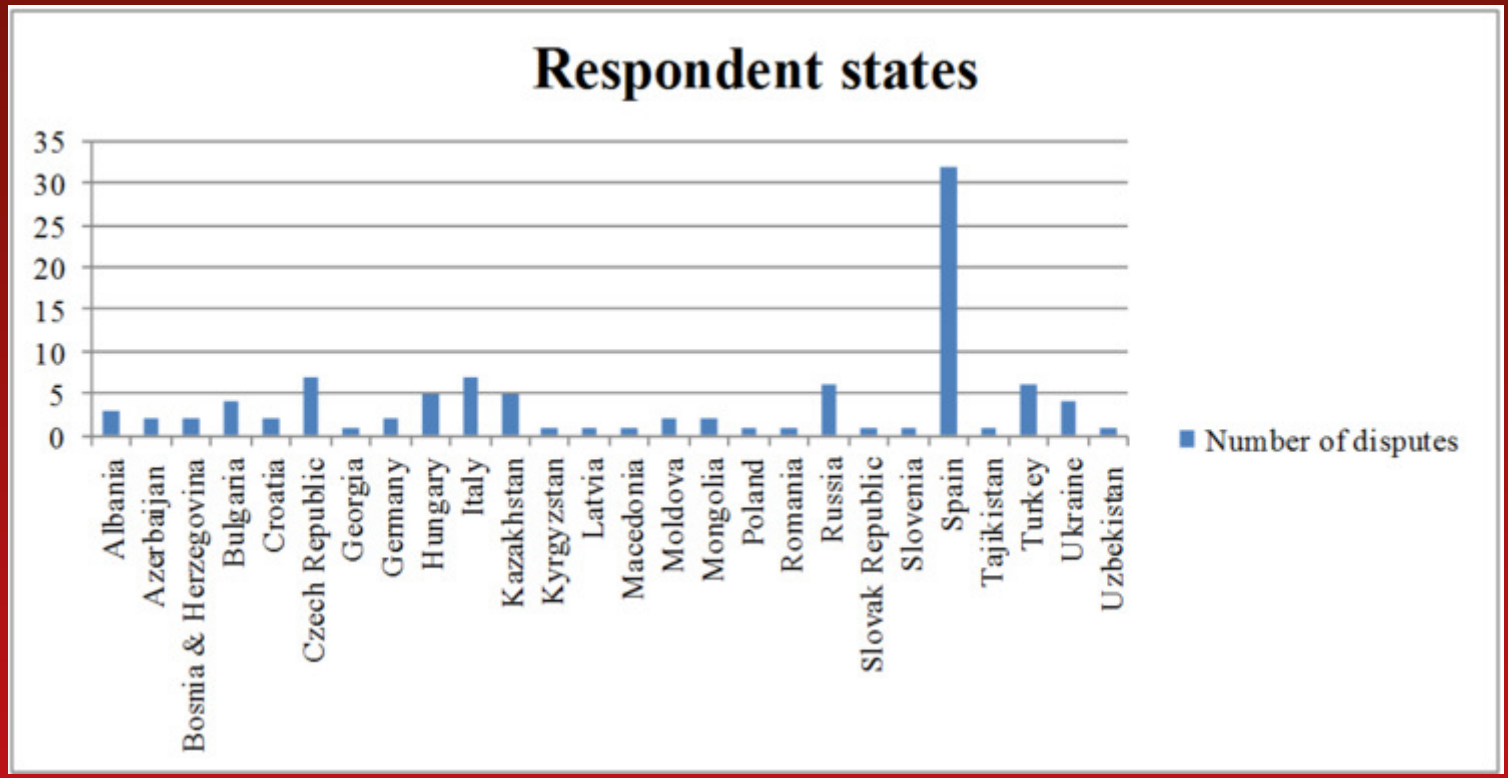
- An international arbitration claim may be brought under rules of various institutions such as International Centre for Investment Disputes (ICSID), Stockholm Chamber of Commerce (SCC), International Chamber of Commerce (ICC)… or *ad hoc* under UNCITRAL rules.

- 36% decided in favour of the State, 27% decided in favour of the investor, 24% settled, 10% discontinued and 3% other (no damages etc.).

The Energy Charter Treaty (ECT)

- Provides a multilateral framework for energy trade, transit and investment
- Aims to promote energy security through the operation of more open and competitive energy markets.
- Signed or acceded to by 52 states, the European Union and Euratom.
- Not limited to particular sources of energy
- Provides substantive protections for investors
- Contains a chapter on resolution of disputes between investors and Host States:
  - Either local courts or international arbitration (ICSID, SCC, UNCITRAL)

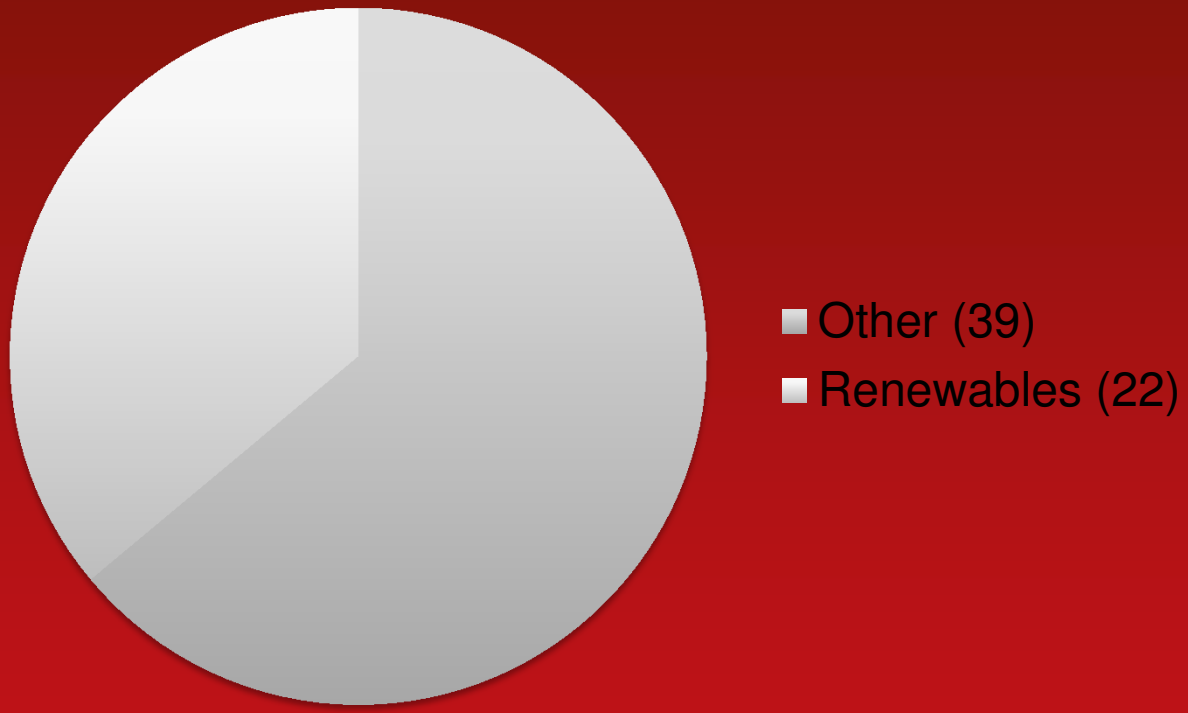
The Energy Charter Treaty (ECT) – cont'd



* based on (non-exhaustive) information provided on the ECT website, last accessed on 5 May 2017

The ECT & Renewable Energy Disputes

- Investor-State Arbitrations commenced under the ECT*



* based on (non-exhaustive) information provided on the ECT website, last accessed on 26 January 2015

Investors protected under the Treaties

- Wording specific to each treaty, but usually jurisdiction *ratione personae* requires:
  - The individual investor to be a "*national*" of the Home State, and
  - The company to be "*constituted under the laws of the Home State*" and/or "*constituted under the laws of the Host State and controlled directly or indirectly by a national of the Home State*"
- The chain of eligible investors provides rooms for maneuver on the nationality requirement
  - Look at the list of BITs entered into by the Host State and find an "*investor*" in the shareholding chain that is a national of a country that has entered into a BIT with the Host State (but there are limits to how far removed a claimant can be)
- Indirectly held investments
- Companies incorporated abroad but (beneficially) owned by nationals

Substantive protections under investment treaties

Most treaties would contain the following guarantees:

- Fair and equitable treatment
  - Stability of the legal framework (although not a guarantee against all and any legislative changes)
  - Protection of legitimate and reasonable expectations
- National treatment
- Most-favoured nation treatment (MFN)
  - Treatment not less favourable than the one accorded to investors of third countries
- Full security and protection
- Prohibition of arbitrary, discriminatory or unreasonable measures which would impair the management, use and enjoyment or disposal of investment
- Undertaking to observe existing obligations to investors (e.g., existing contracts)
- Fund transfers

Substantive protections under investment treaties – cont'd

- Expropriation
  - Right of the State to expropriate if:
    - Public purpose
    - No discrimination
    - Due process
    - Payment of prompt, adequate and effective compensation (usually equivalent to fair market value of the investment)

- Expropriations can be indirect: situations when the property title formally remains with the investor, but the effect of the measure is equivalent to expropriation

  - Key factor: substantial deprivation of the value of the investment
  - Renewable energy projects: the effect of the measures may have rendered the projects so uneconomical that the investors may be entitled to allege expropriation

Fair and Equitable Treatment

- Fair and Equitable Treatment
  - Stability of the legal framework (although not a guarantee against all and any legislative changes)
  - Protection of legitimate and reasonable expectations
- ECT – Article 10(1):

  "*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.* […]"

Legitimate Expectations

- *National Grid v Argentina:*

"*The standard protects the reasonable expectations of the investor at the time it made the investment and which were based on representations, commitments or specific conditions offered by the State concerned. This, treatment by the State should not affect the basic expectations that were taken into account by the foreign investor to make the investment.*"

- *EDF v Romania:*

"*The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectations would be neither legitimate nor reasonable.*"

Defences to Claims

- State of Necessity
  - If the measure is the only means for the State to safeguard its essential interest
  - Economic crisis in Argentina: inconsistent decisions by Tribunals
  - Issue of non-contribution by the State
- Treaty Provisions – e.g., under Article 24 of the ECT member States can adopt measures:
  - necessary to protect human, animal or plant life or health;
  - essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply;
  - necessary for the protection of its essential security interests;
  - necessary for the maintenance of public order.

English Example

Solar Century Holdings v Secretary of State for Energy and Climate Change
(Queen's Bench Division (Administrative Court), 7 November 2014)

- Claimant applied for judicial review of a policy change by the secretary of state which resulted in the premature closure of a levy supported scheme.
- Original scheme had become too expensive as a result of unforeseen growth in the sector and a 2015 Order gave effect to the decision to close scheme early.
- Administrative Court:
  - Policy statements did not create any form of assurance;
  - No legitimate expectation: no operator could have expected the system to last until 2017 irrespective of financial implications for departmental spending;
  - Even if there was legitimate expectation – countervailing public interest of budgetary discipline. A balancing exercise between a harm to a relatively small number of generators against the saving on cost of fuel to consumers and businesses. A fair procedure was adopted.

English Example

Solar Century Holdings v Secretary of State for Energy and Climate Change (Court of Appeal (Civil Division), 1 March 2016)

- The Appellants argued that:
  - Early closure of the scheme was contrary to the legitimate expectation;
  - The 2015 order closing the scheme was *ultra vires*; and
  - Deadline to satisfy various criteria to benefit from grace period was retrospective.
- The Appeal was dismissed:
  - Government was entitled to re-formulate policy when rational grounds existed for doing so, unless past conduct would lead this to bean abuse of power;
  - Language used was wide enough to enable the curtailment of its period of operation
  - Grace period provisions were not objectionable on the ground of retrospectivity since they did not involve the modification of any accrued entitlement

Other Renewables Claims

- *Amlyn Holding B.V. v. Republic of Croatia* (2016)
  - The claim relates to Amlyn's investment in a biomass power plant.
  - Amlyn contends that several State measures delayed and frustrated their plant projects.
- So far, seven claims have been registered against Italy, seven against the Czech Republic and four against Bulgaria.
- GAR reported on 4 May 2017 that Belgian company Blusun sought to annul an Award against Italy, and that a tribunal was constituted in a case involving *Silver Ridge Power*
- Disputes against Spain, the Czech Republic and Italy primarily relate to changes in tariffs applicable to solar power generation, as well as the suppression of other investment incentives, such as:
  - Limiting the hours solar installations can benefit from tariffs (Spain).
  - Implementing a retrospective "solar tax" on revenue (Czech Republic).
  - A moratorium on grid connection (Bulgaria).

Conclusion

- Regulatory Certainty is Key
- Potential solutions for the States:
  - Linking tariffs to levels of deployment
  - Limiting budgets for a particular technology
  - Reducing tariffs on a more regular basis
  - Reviewing eligibility criteria
- Do not provide unconditional assurances
- Avoid retroactive changes

Selected examples of our team's experience – Investor-State Disputes

- Acting for a Cypriot investor in energy power plants in ICSID proceedings commenced under the Energy Charter Treaty against Turkey
- Advising a major telecommunications company in a multi-billion dollar investment treaty arbitration against the government of Algeria.
- Representing a Central Eastern European State in a bilateral investment treaty dispute under the UNCITRAL Rules
- Advising an investor in a mining dispute under the NAFTA
- Representing a constructions investor in a bilateral investment treaty dispute against an Eastern European State under the SCC Rules
- Advising a mining investor in a dispute against an Eastern European State
- Representing the Republic of Ecuador in a multi-billion ICSID *Occidental Petroleum* arbitration
- Represented two instrumentalities of a sovereign in an ICC arbitration against the instrumentality of another sovereign that sought to control, in perpetuity, 35% of the electrical energy produced by the respondent, counter-petitioner sovereign
- Representing investors in three ICSID arbitrations under the Spain-Venezuela Bilateral Investment Treaty

Selected examples of our team's experience – energy and mining arbitrations

- Acting for a Jersey investor in an LCIA dispute against a Macedonian investor over a loan agreement related to construction of steam and gas power station
- Represented a client in an LCIA arbiration dispute in relation to an oil services operation in Libya
- Represented a Brazilian oil extraction company in an LCIA arbitration dispute with a US oil extraction equipment supplier concerning an alleged breach of teaming agreement
- Represent the Respondent in an LCIA arbitration dispute over the sale and purchase of South African coal
- Represented a Canadian oil extraction corporation against a large Russian oil conglomerate in an ICC arbitration concerning an oil field in Kazakhstan
- Represented a client in an LCIA arbitration for a Swiss company in relation to the sale of electro-voltaic copper cathodes to Turkey
- Represented a Russian high net worth individual in two consolidated multibillion dollar LCIA disputes arising out of certain long term aluminium sale and electricity supply contracts
- Represented a Ukrainian high net worth individual in a dispute relating to an iron ore business in Ukraine, before an arbitral tribunal constituted under the LCIA rules and the English High Court
- Represented a client in UNCITRAL proceedings in a dispute over the sale and purchase of a Columbian coal mine

Thank you

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