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# Fourth award issued declaring Spain liable under ECT in renewable energy case

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In Antin Infrastructure Services Luxembourg Sàrl and another v Kingdom of Spain (ICSID Case No. ARB/13/31), an ICSID tribunal upheld the claimants' claims that Spain had breached the fair and equitable treatment standard in Article 10(1) of the Energy Charter Treaty.

**Speedread**

On 15 June 2018, an ICSID tribunal unanimously held that Spain had breached the fair and equitable treatment standard in Article 10(1) of the Energy Charter Treaty (ECT). It ruled that Spain had breached that standard when it eliminated the "essential characteristics" of the feed-in remuneration regime granted to renewables (including concentrated solar power facilities) and replaced it by a wholly new regime, whose calculation methodology was found not to be based on any "identifiable criteria". The tribunal ordered Spain to pay EUR 112 million, plus interest, as well as 60% of the costs of the proceedings and of the claimants' legal costs.

This is the fourth decision rendered on the merits against Spain in cases brought as a result of the legislative changes it introduced in the renewables framework between 2012 and 2014. It is also the second decision, post Slovak Republic v Achmea BV, C-284/16, ECLI:EU:C:2018:158, where an ICSID tribunal has affirmed jurisdiction and rejected the intra-EU objection raised by Spain.

Finally, this latest decision reflects that ECT investment tribunals in cases against Spain seem to be following similar approaches and formulations of the applicable ECT standards to assess the treaty violations denounced by foreign investors holding interests in the Spanish renewable sector. (Antin Infrastructure Services Luxembourg Sàrl and another v Kingdom of Spain (ICSID Case No. ARB/13/31), 15 June 2018.) (Tribunal: E. Zuleta (President), J. Christopher Thomas (respondent), F. Orrego Vicuña (claimants).)

**Background**

The Energy Charter Treaty (ECT) is a multilateral treaty that contains investment protection provisions that apply to investments in the energy sector (see Practice note, Investment arbitration under the Energy Charter Treaty). It was signed in December 1994 and entered into force with respect to Spain, Luxembourg and The Netherlands (as well as the EU) on 16 April 1998.

Article 10(1) of the ECT provides:

"(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. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. [...] Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

Access to investment arbitration under the ICSID Convention is found in Article 26(4) of the ECT. For further information, see Practice note, Investment arbitration under the Energy Charter Treaty.

**Facts**

**Original Regulatory Regime**

In 1997, in order to incentivize the production of energy from renewable sources, Spain adopted Act 54/1997, which distinguished between an "Ordinary Regime" (conventional sources of energy production) and a "Special Regime" (applicable to electricity production facilities of less than 50 MW using non-consumable renewable energy sources). Spain subsequently specified the economic regime applicable to facilities under the Special Regime in subsequent implementing legislation.

In Antin's case, the relevant regulation was Royal Decree 661/2007 (RD 661/2007), as reinforced by Royal Decree 1614/2010 (RD 1614/2010). RD 661/2007 sought to grant renewable producers stability over time, allowing them to do medium and long-term planning, while obtaining remuneration on production based on clear and transparent feed-in remuneration values. To that end, RD 661/2007 established a feed-in remuneration regime whereby producers, at their option, were entitled to sell the energy produced to either:

- The system in exchange for a regulated tariff, fixed for all the programming periods, and expressed in Euro cents per kWh (Regulated Tariff or Feed-in Tariff).

- The electricity production market (pool), in which case the sale price would be the resulting pool price supplemented by a premium in Euro cents per kWh (Pool Price plus Premium or Feed-in Premium).

Both options applied for the entire operational lifetime of the facility (Article 36, RD 661/2007). In addition, the Pool Price plus Premium was, for technologies such as CSP, subject to lower (Floor) and upper (Cap) thresholds. Additionally, RD 661/2007 offered the following features:

- Final registration with the Administrative Registry of Production Facilities under the Special Regime (RAIPRE) was a necessary condition to be granted the feed-in remuneration regime (Article 14, RD 661/2007). Additionally, one of the CSP facilities in which the claimants invested (the "Andasol-2" CSP plant) was ratione temporis subject to an additional requirement introduced in 2009 by Spain through Royal Decree-Law 6/2009 (RD-L 6/2009). RD-L 6/2009 created an additional pre-registration stage with the Remuneration Pre-allocation Registry. This was a mandatory requirement to be eligible for receiving the feed-in remuneration under RD 661/2007. To qualify for such feed-in remuneration, renewable facilities had a deadline of 36 months to obtain final registration with the RAIPRE and start the sale of energy (Article 4, RD-L 6/2009).

- With regard to future "revisions" of the Regulated Tariff and the Floor and Cap under the Pool Price plus Premium remuneration option, Article 44(3) of RD 661/2007 provided:

"[...] the revisions to the regulated tariff and the upper and lower limits indicated in this paragraph shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed."

In 2010, this remuneration regime was reinforced for CSP facilities with further measures: an agreement reached between Spain and CSP (and wind) associations (July 2010 Agreement) and Royal Decree 1614/2010 (RD 1614/2010). Based on the July 2010 Agreement, Article 4 of RD 1614/2010 stated:

"For [CSP] facilities that fall under RD 661/2007 [...] revisions of tariffs, premiums and upper and lower limits referred to by article 44.3 of the aforementioned Royal Decree, shall not affect facilities registered definitively in the [RAIPRE] as of 7 May 2009, nor those that were to have been registered in the [Pre-Assignment Registry] under the fourth transitional provision of RDL 6/2009 [...], and that meet the obligation envisaged in its article 4.8, extended until 31 December 2013 for those facilities associated to phase 4 envisaged in the Agreement of the Council of Ministers of 13 November 2009."

**Antin's investments in the Spanish CSP sector**

Construction of the CSP plants in which the claimants invested was completed between 2008 and 2009. Spain did not dispute that both Andasol Plants were qualified to receive Special Regime benefits under RD 661/2007 and RD 1614/2010. They obtained final registration with the RAIPRE

and, in the case of the "Andasol-2" CSP plant (for which RD-L 6/2009 imposed pre-registration obligations), it was also duly registered with the Remuneration Pre-allocation Registry.

The claimants invested in the Andasol Plants between June and August 2011. Previously, between March and June 2011, Antin carried out due diligence that involved assistance by Spanish legal counsel, market analysts, financial advisors, and technical experts. It also met with a number of government officials.

**Disputed Measures**

Antin commenced ICSID arbitration and alleged that various measures taken by Spain between late 2012 and 2014 breached the fair and equitable treatment standard in Article 10(1) of the ECT. It also made other claims under Article 10(1) ECT, including non-impairment by unreasonable or discriminatory measures, and breach of the ECT umbrella clause.

Spain raised four jurisdictional objections to the ICSID tribunal's jurisdiction, including the intra-EU objection.

**Decision**

The ICSID tribunal (comprising E. Zuleta (President), J. Cristopher Thomas (respondent), F. Orrego Vicuña (claimants)) dismissed all but one of Spain's jurisdictional objections and found Spain liable for breach of the FET standard in Article 10(1) of the ECT. It did not consider Antin's other claims under the ECT.

**Jurisdictional objections**

The tribunal dismissed most of Spain's jurisdictional objections, with the exception of the partial objection raised in connection with the tax measure on energy production (TVPEE).

· Intra-EU dispute. The tribunal rejected Spain's objection that the ECT excluded disputes relating to investments made within the EU by investors from other EU member states. It concluded that Article 26 of the ECT, interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT), does not exclude intra-EU disputes. The tribunal followed the previous decisions in the Spanish cases of Charanne BV and Construction Investments SARL v The Kingdom of Spain (Arbitration No: 062/2012) (Charanne) (see Legal update, Majority SCC tribunal rejects ECT renewable energy claims against Spain), Isolux Netherlands, BV v Kingdom of Spain (SCC Case V2013/153) (Isolux) and Eiser Infrastructure Ltd and another v Spain (ICSID Case No. ARB/13/36) (Eiser) (see Legal update, ICSID tribunal orders Spain to pay EUR128 million for changes to renewable energy sector regime). It noted that such a wide exclusion to the scope of the ECT would have to be "express and clear". (Award, paragraph 215).

· Lack of ownership by the claimants of certain "interests". Spain argued that the only assets that qualified as "investments" under the ECT were Antin Termosolar's direct

shareholdings in the Andasol companies and the loans granted by it. It argued that other interests, including those indirectly held by Antin Luxembourg, did not qualify as "investments" because they could only be acted on by the final beneficiaries (here, the limited partners of Antin Luxembourg). The tribunal also dismissed this objection noting that "nothing in the text or context of the ECT [...] supports Spain's position" and that "nowhere [in the text of Article 1(6) ECT] or in the context of the ECT is there a requirement that only the real and ultimate owner or beneficiary may submit claims to arbitration". (Award, paragraph 262).

· Cooling-off period. The tribunal rejected Spain's objection that the tribunal lacked jurisdiction or, in the alternative, that the claims were inadmissible, because some of the disputed measures were not submitted for negotiation by Antin under the cooling-off provision set out in Article 26 of the ECT. The tribunal noted the "inseparable relationship" between the measures included in the "trigger letters" sent by Antin and subsequent measures that were implemented. It also remarked that the entire dispute was due to Spain's failure to honour its commitments under RD 661/2007 and RD 1614/2010 and that, since the subsequent measures constituted additional changes to that framework, they were indeed related to the notified dispute. The tribunal also reasoned that, since Spain had not replied to the trigger letters sent by the claimants (except to request that they be submitted in Spanish, which Antin did), Spain could not claim that the ECT cooling-off period be exhausted for each measure, particularly when its lack of response suggested that additional notifications would have been futile. In summary, the tribunal found that all the measures formed part of a "single, on-going dispute". (Award, paragraphs 353-358).

· Tax carve-out (TVPEE). Spain prevailed in its objection that the tribunal had no jurisdiction to hear the claims that related to the 7% TVPEE in light of the "tax carve-out" in Article 21 of the ECT. (Award, paragraphs 311-323).

**Merits**

**The tribunal only dealt with the FET claim submitted by the claimants**

First, the tribunal noted that in Article 10(1), the ECT sets forth the state's obligation to encourage and create stable conditions. Based on the text and context of the ECT, the tribunal followed the reasoning in Charanne and Eiser, and noted that the specific obligation of stability does not eliminate the state's regulatory powers, nor does it prevent contracting states from amending existing regulations, provided that the state does not "suddenly and unexpectedly eliminate the essential features of the regulatory framework in place" (Award, paragraph 531). Therefore, Article 10(1) results in the obligation to afford "fundamental stability" with regard to the "essential characteristics of the legal regime relied upon by the investors in making long-term investments". (Award, paragraph 532).

Second, the tribunal found that the stability of the regulatory regime set forth under RD 661/2007 was "the leitmotiv of Spain's acts at the time of the claimants' investment" and that Spain emphasised such stability in order to attract investment in the renewable sector. Article 44(3) of

RD 661/2007 and Article 4 of RD 1614/2010 reflect Spain's commitment to ensuring the stability and predictability of the existing economic regime. Additionally, the tribunal found unpersuasive Spain's argument that registration with the RAIPRE was "simply an administrative requirement" with no further legal consequences: it noted that given the precision and detail exhibited in the various royal decrees, Spain's conduct "falls squarely" into the type of acts intended to give rise (and actually giving rise) to investors' legitimate expectations with regard to the fundamental stability of the regulation (Award, paragraphs 536-554)

Third, turning to the Charanne test on the FET standard (that is, when making use of its regulatory powers the state cannot alter the "essential features" of the framework relied on by the investor), the tribunal concluded:

"Thus, whether the Tribunal were to adopt the opinion of the Charanne tribunal regarding the essential features of the RD 661/2007, regime, or whether it was to consider that only the FIT system was the key feature of the regime, it would necessarily conclude that Spain breached its obligations under Article 10(1) of the ECT by eliminating those features through RDL 9/2013 and Law 24/2013."(Award, paragraph 560.)

Fourth, the tribunal rejected Spain's argument that the only legitimate expectation the claimants could have had was that the New Regime would provide a "reasonable return", which Spain argued it did. The tribunal reasoned that to comply with the stability and predictability requirements under the ECT "the methodology for determining the payment due to CSP installations must be based on identifiable criteria." As expressed by the tribunal (Award, paragraph 562):

"[c]onsidering the Parties' respective contentions and the terms of the ECT as explained above, the issue at hand is not whether the New Regime provides a "reasonable return", but rather how such "reasonable return" is determined."

Therefore, the key question referred to the manner in which Spain determined the "reasonable return" under the New Regime: that is, whether this was done based on "identifiable criteria" and in a form aligned with the representations on stability previously made by Spain to induce investments. Having analysed the evidence before it, including the testimony from the manager of the solar department of Spain's renewables agency (IDAE), the tribunal concluded that "the new methodology was not based on any identifiable criteria." It further stated that "[w]hat Spain labels a "reasonable rate of return seemingly depends on governmental discretion," which "is in plain contrast with the relative precision of the Original Regime [...] [that] provided for objective and identifiable criteria for determining the remuneration due to CSP plants [...]". (Award, paragraphs 561-568).

Finally, the tribunal rejected Spain's suggestion that the incentives offered under the Original Regime caused the tariff deficit that the new regime was intending to address. The tribunal noted that the evidence put forward by the claimants' experts demonstrated that the feed-in regime for

CSP plants did not play a significant role in the accumulation of the tariff deficit. Therefore, the tribunal concluded that the tariff deficit argument could not justify the elimination of the essential characteristics of RD 661/2007 and its replacement by a wholly new regime, not based on any identifiable criteria (Award, paragraphs 569-573).

**Damages**

The tribunal agreed with Antin that the discounted-cash flow (DCF) method was appropriate in this case. It essentially followed the damages estimate submitted by Antin's experts, with the following corrections:

- It rejected the claim for "historic losses" (those that occurred prior to June 2014) because the tribunal had established that the FET violation occurred when the original regime was eliminated in June 2014.

- It rejected the claim for a "tax gross up" for lack of evidence on the record proving the type and amount of taxes that may be due on the compensation award.

- The operational lifespan of the Andasol Plants should be limited to 25 years (instead of the 40 years requested by the claimants).

These deductions resulted in an award of EUR 112 million, plus interest. The tribunal also ordered Spain to pay 60% of the costs of the proceedings and 60% of the legal costs incurred by the claimants.

**Comment**

This is the fourth award declaring Spain's liability under the FET standard of the ECT. While Spain prevailed in the first cases (Charanne, which only addressed Spain's 2010 measures in the PV sector, and Isolux), Antin follows the path of the subsequent cases decided against Spain's interests on the merits. This route started with Eiser and continued with the string of cases in Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain (SCC Case No. 2015/063) and Masdar Solar and Wind Cooperatief UA v Kingdom of Spain (ICSID Case No. ARB/14/1) (Masdar) (see Legal update, ICSID tribunal finds Spain breached ECT).

Also noteworthy is that following the decision in Masdar, Antin is the second post- Slovak Republic v Achmea BV, C-284/16, ECLI:EU:C:2018 (Achmea) ECT decision against Spain where an ICSID tribunal has affirmed jurisdiction and rejected the intra-EU objection raised by Spain. Similar to the situation in Masdar, the Antin tribunal also dismissed Spain's application, following the Achmea decision, to have the ICSID arbitration proceedings reopened under Rule 38(2) of the ICSID Arbitration Rules. While the Masdar tribunal found ultimately that the Achmea decision did not apply to the ECT context and had no bearing upon the case, the Antin tribunal rejected the intra-EU objection and noted that it had denied Spain's application to reopen the proceedings.

Although the content of the procedural decision in Antin (Procedural Order No. 10, 16 April 2018) is not public, in light of the basis on which Spain requested the proceedings' re-opening (under Rule 38(2) of the ICSID Arbitration Rules), the Antin tribunal should have concluded that the Achmea decision did not constitute a decisive factor for the case, or that there was no vital need for clarification on this point.

The same can be said mutatis mutandis with regard to the European Commission's decision C(2017)7384, dated 10 November 2017, regarding the Spanish state aid framework for renewable sources (see Legal update, EU Commission adopts decision prohibiting Spain from paying out award in Spanish renewable energy cases), whose incorporation into the record was rejected by the Antin tribunal on two occasions, the first time even before the proceedings were closed (Antin, paragraphs 51-53, 56-58), again similar to what was previously decided in Masdar (Masdar, paragraphs 79-80, 669-671).

Although the Eiser, Novenergia, Masdar, and Antin awards do not constitute binding precedents for other investment tribunals called to decide on the wave of cases brought against Spain, investment tribunals regularly refer to decisions rendered in previous cases, particularly when they arise out of factually and legally similar disputes, as is the case in the Spanish ECT cases. In effect, Antin is no exception to this situation, as shown by its application of the Charanne and Eiser formulation of the FET standard.

More decisions are yet to come in the short and medium term (the Energy Charter's website lists 34 ECT pending cases against Spain). Reports made public on 26 June 2018 have actually updated Spain's own estimates of the total amount claimed as damages in the ECT renewable arbitrations it faces, which now total more than EUR 8.2 billion.

**Case**

Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v Kingdom of Spain (ICSID Case No. ARB/13/31) (15 June 2018) (Tribunal: E. Zuleta (President), J. Christopher Thomas (respondent), F. Orrego Vicuña (claimants)).