The Spanish Renewables Saga: *Jurisprudence Inconstante*?

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Since early 2019, several new decisions have been handed out in the investment arbitrations brought against Spain under the Energy Charter Treaty ('ECT') concerning the country's legislative reforms in the renewable energy sector. On a few discrete jurisdictional points, while the reasoning occasionally reveals substantive differences, the outcome of the decisions appears fairly consistent. As regards liability, however, some of the most recent decisions have adopted a substantially different approach leading to conflicting outcomes. These different approaches cannot always be explained away by the fact that the cases involve different renewable sector technologies and thus different regulations applicable only to the particular technology at stake. In this article, we briefly discuss the decisions rendered in *Cube*, *BayWa*, *Stadtwerke*, *RWE*, *Watkins*, *PV*, *Hydro* Energy, *Cavalum*, and *STEAG*.[1]

On jurisdiction, all of these decisions rejected Spain's 'intra-EU objection', i.e. that Article 26 of the ECT does not allow claims by investors of one EU state against another EU state. The tribunals unanimously found that there is no legal basis, in the ECT or otherwise, to prevent EU investors from bringing a claim under the ECT against another EU state.[2] A difference as to the applicable law may be noted, however. One view is that EU law is not part of the applicable law and is only relevant as a fact in ECT disputes, apparently even as regards the merits.[3] Another approach is that EU law is not applicable to determine the existence and scope of an ECT tribunal's jurisdiction.[4] While, at the other end of the spectrum, other tribunals suggested that EU law may be relevant both to jurisdiction and the merits of the disputes.[5]

Conversely, these tribunals unanimously accepted Spain's jurisdictional objection

1 Cube Infrastructure Fund Sicav and others v Kingdom of Spain, ICSID Case No ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum (19 February 2019) ('***Cube***'); BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v Kingdom of Spain, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019) ('***BayWa***'); Stadtwerke München GmbH, RWE Innogy GmbH, and others v Kingdom of Spain, ICSID Case No. ARB/15/1, Award (2 December 2019) ('***Stadtwerke***'); RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (30 December 2019) ('***RWE***'); Watkins Holding S.à r.l., Watkins (Ned) B.V., Watkins Spain S.L., Redpier S.L., Northsea Spain S.L., Parque Eólico Marmellar S.L., and Parque Eólico La Boga S.L. v Kingdom of Spain, ICSID Case No. ARB/15/44, Award (21 January 2020) ('***Watkins***'); The PV Investors v Kingdom of Spain, PCA Case No. 2012-14, Preliminary Award on Jurisdiction (13 October 2014) ('***PV jurisdiction***'); The PV Investors v Kingdom of Spain, PCA Case No. 2012-14, Final Award (28 February 2020) ('***PV***'); Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v Kingdom of Spain, ICSID Case No ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020) ('***Hydro Energy***'); Cavalum SGPS, S.A. v Kingdom of Spain, ICSID Case No ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (31 August 2020) ('***Cavalum***'); STEAG GmbH v Kingdom of Spain, ICSID Case No ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum (8 October 2020) ('***STEAG***').

2 *Cube*, paras 118-160; *BayWa*, paras 244-283; *Stadtwerke*, paras 123-146; *RWE*, paras 309-374; *Watkins*, paras 180-226; *PV jurisdiction*, paras 132-207; *Hydro Energy*, paras 446-502; *Cavalum*, paras 301-371; *STEAG*, paras 238-253.

3 *Cube*, para 160.

4 *RWE*, paras 310-318; *Watkins*, para 193; *PV jurisdiction*, para 206; *Hydro Energy*, para 502(1)-(4); *Cavalum*, para 370(4), (9), (14), and (16); *STEAG*, paras 256-277.

5 *BayWa*, paras 280-283; *Stadtwerke*, para 138.

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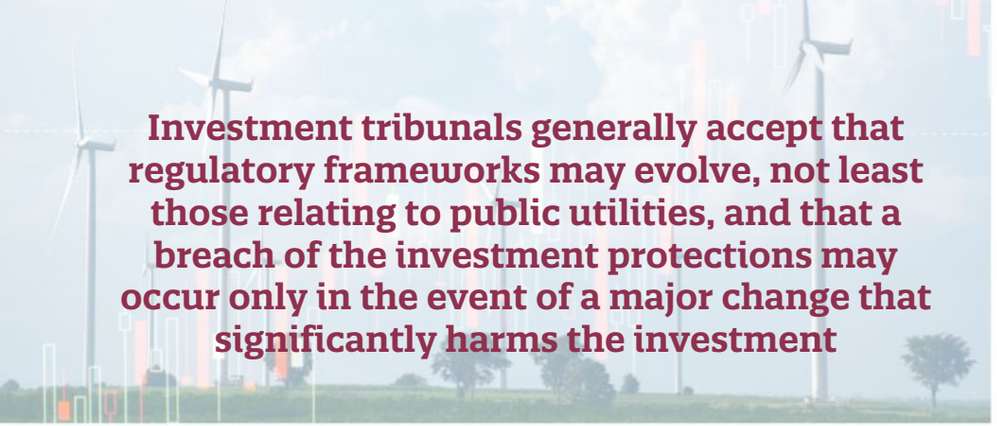
based on the carve-out of taxation measures contained in Article 21 of the ECT, concluding that the relevant measures, which included a tax on the value of electric energy production and/or a levy on the use of continental waters, were in fact taxes for the purposes of Article 21.[6] Unlike other tribunals, the *Stadtwerke* tribunal observed that an alleged requirement that to be a taxation measure under the ECT a tax must be *bona fide* did not appear in the ECT or the ordinary meaning analysed by the tribunal.[7] Customary international law limits states' power to tax in the sense that taxes cannot be confiscatory or discriminatory, but the tribunal had 'no mandate to graft further limitations on the Contracting States' taxation powers that are not reflected in the text of the ECT itself.'[8]

In respect of the merits, *Cube* concerned investments in photovoltaic and hydroelectric electricity generation.[9] The tribunal acknowledged that regulations on the economy may evolve in light of changing circumstances, particularly as regards public utilities.[10] However, it found that through the applicable regulations Spain had committed not to exercise its power to amend the law for a given limited time.[11] Legitimate expectations may arise from a regulatory regime 'provided that the representations are sufficiently clear and unequivocal.'[12] If representations are made that regulations will be maintained for a certain time, the state may not 'significantly alter the fundamental economic basis of investments made in reliance on that representation.'[13] By majority (Professor Tomuschat dissenting), the tribunal found that the move away from a regime based on promised tariffs and premiums, to one based on capped 'reasonable returns' constituted such a fundamental change.[14] Further, the change could not have been anticipated when the claimants made their investments and thus breached the fair and equitable treatment ('FET') standard in Article 10 of the ECT.[15] This conclusion applied to the claimants' investments in the photovoltaic[16] and hydroelectric sectors, even though the investments in the hydro plants were made after some of the regulatory changes had already been introduced.[17]

The claimants in *BayWa* had invested in two wind farms through Spanish companies.[18] The tribunal rejected the expropriation claim because the wind farms were still intact and operating and the claimants retained ultimate control, although the value of the project companies had been impaired.[19] It also denied the umbrella clause claim since Spain had not specifically entered into any obligation with the claimants, with obligations arising under general law falling outside the scope of the umbrella clause in Article 10 of the ECT.[20] As regards the FET standard, the tribunal found that no specific commitment had been given as to the immutability of the tariff regime[21] and there was no acquired right to an unchanged tariff.[22] It thus did not discern a general breach of this standard given that, despite the changes, 'a substantial support system survived.'[23] However, there was a discrete breach of the FET standard insofar as the measures at issue took into account subsidies paid in the past as being excessive and deducted them from future payments, there being no evidence that this was necessary to resolve Spain's tariff deficit problem in the energy sector.[24]

Statdwerke related to the claimants' investment in an electrical generation plant using technology known as concentrated solar power or thermosolar.[25] The tribunal rejected a claim that Spain had failed to provide stable, equitable, favourable, and transparent conditions for investors, finding that the relevant sentence of Article 10(1) of the ECT was 'far too general to create enforceable definite rights of investors against Contracting Parties.'[26] As to the FET standard, the

6 *Cube*, paras 221-233; *BayWa*, paras 297-314; *Stadtwerke*, paras 161-176; *RWE*, paras 384-393; *Watkins*, paras 266-274; *Hydro Energy*, paras 503-522; *Cavalum*, para 372-396. Only the *Hydro Energy* and *Cavalum* tribunals held that they had jurisdiction over tax-related measures as regards the expropriation claim under Article 13 of the ECT. See *Hydro Energy*, para 522; *Cavalum*, para 396; *STEAG*, paras 316-334. No tax carve-out objection was raised in the *PV* matter.
7 *Stadtwerke*, para 167.
8 Ibid, para 170.
9 *Cube*, para 234.
10 Ibid, para 305.
11 Ibid, para 400.
12 Ibid, para 388.
13 Ibid, para 412.
14 Ibid, para 427.
15 Ibid, para 428. All other claims were dismissed. Ibid, paras 544-545.
16 Ibid, para 432.
17 Ibid, paras 435-442.
18 *BayWa*, para 62.
19 Ibid, para 430.
20 Ibid, paras 442-455.
21 Ibid, paras 465-466.
22 Ibid, para 490.
23 Ibid, para 590. The tribunal was reinforced in this conclusion by the fact that the subsidies regime in question was arguably state aid but had not been notified in accordance with EU law, which gave the subsidies added vulnerability.
24 Ibid, paras 495-496.
25 *Stadtwerke*, paras 79-80.
26 Ibid, paras 192-198.



Investment tribunals generally accept that regulatory frameworks may evolve, not least those relating to public utilities, and that a breach of the investment protections may occur only in the event of a major change that significantly harms the investment

tribunal found no evidence that Spain had an ulterior motive for the reforms; its sole purpose was to address the deficit in the electricity system.[27] Furthermore, Spain had never given a commitment not to modify the renewable energy regulatory framework.[28] According to the tribunal, the FET standard did not 'protect the investor from any and all changes' to the legislation.[29] And here the tribunal concluded that no guarantee of stable remuneration had been given.[30] The tribunal also found that Spain had not failed to act transparently,[31] reasonably,[32] or proportionally, finding in this latter respect that the burden on the claimants was proportionate to the aim and purpose of the contested measures.[33] For these reasons, the tribunal rejected the claims under the FET standard[34] and the ECT provision forbidding unreasonable measures.[35] The *Statdwerke* Tribunal also rejected the umbrella clause claim based on the fact that the claimants had not entered into any contractual or contractual-like arrangements with Spain.[36]

The investment in *RWE* related to four hydroelectric plants and 16 wind farms.[37] As to the FET standard, the tribunal found that, while the state has the right to change its laws to meet evolving public needs, there may be a breach if 'there has been some form of total and unreasonable change to, or subversion of, the legal regime.'[38] It is important to consider whether the change is proportional —in light of what is necessary,— the burden placed on the investors, and whether the state took into account that burden in its decision-making process.[39] The tribunal rejected the claimants' position that they had a legitimate expectation that the regulations on which they relied to invest would remain substantially unchanged.[40] However, it concluded that the claimants bore an excessive and disproportionate burden from the measures addressing the tariff deficit, based on the considerably reduced post-measures return to be obtained from the investments in certain wind plants and one hydro plant.[41] In the context of a case where the respondent had promoted investments in a particular sector by reference to a favourable remuneration regime, that burden was considered unfair and inequitable.[42] The tribunal also regarded as a breach of the FET standard the requirement to repay sums already paid under regulations that were later changed.[43]

In *Watkins*, the claimants had invested in Spanish companies holding 8 wind farms.[44] The tribunal found that Spain had 'offered investors a fixed guaranteed return and not just a reasonable return.'[45] Spain was thus not entitled to deprive the claimants of those rights, which had been guaranteed to continue over the entire operational life of the farms.[46] There was a 'stabilisation commitment' in the regulations to attract investments.[47] The decision concluded that Spain reneged on this commitment by continuously changing its legislation, 'whittling away' entitlements relied upon by the claimants to make their investment and otherwise failing to provide a stable and predictable regulatory regime, which amounted to a frustration of the claimants' legitimate expectations and a breach of the FET standard.[48] Unlike other tribunals, the *Watkins* Tribunal also found there was a breach of the transparency requirement in Article 10(1) of the ECT, essentially because Spain's regulatory changes destroyed the claimants' investment when there was no urgent need for the changes, without providing an explanation of the underlying reasons, and because the new regime that was adopted was unpredictable.[49]

In *PV* the investments concerned photovoltaic installations.[50] The tribunal found that stability is not 'a stand-alone or absolute requirement under the ECT' but rather a requirement intertwined with the FET standard.[51] It also found that states must be accorded a margin of appreciation in the exercise of their regulatory powers, which is however not unlimited.[52] As regards Spain's regulatory framework, the tribunal observed that the 'cardinal principle' as regards tariffs applicable to the production of electricity from renewable sources was 'reasonable profitability or the guarantee of a reasonable rate of return for investors.'[53]

27 Ibid, paras 258-260.
28 Ibid, para 261.
29 Ibid, para 264.
30 Ibid, para 308.
31 Ibid, paras 309-315.
32 Ibid, paras 316-322.
33 Ibid, paras 323-355.
34 Ibid, para 356.
35 Ibid, paras 363-364.
36 Ibid, paras 379-384.
37 *RWE*, para 190.
38 Ibid, paras 451.
39 Ibid, para 462.
40 Ibid, para 549.
41 Ibid, paras 589, 599.
42 Ibid, paras 599-600.
43 Ibid, para 621. The tribunal rejected other claims (ibid, para 748), including the umbrella clause claim for lack of a specific consensual obligation assumed by the respondent *vis-à-vis* the claimants. Ibid, paras 676-680.
44 *Watkins*, para 134.
45 Ibid, para 503.
46 Ibid, para 509.
47 Ibid, paras 526-528.
48 Ibid, paras 538, 569-570.
49 Ibid, para 593. The *Watkins* tribunal also found that Spain's measures were unreasonable and disproportionate. Ibid, paras 595-603.
50 *PV*, para 181.
51 Ibid, para 567.
52 Ibid, para 583.
53 Ibid, para 596.

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At the time claimants had made their investment, there was a specific provision preventing changes to the tariffs applicable to existing installations during their lifetime.[54] Yet, given that challenges to prior changes to the regulations had been rejected by Spanish courts, it was not reasonable for investors to expect that no regulatory changes would ever occur.[55] This led the tribunal to reject the claimants' primary claim that they had an immutable right to a fixed tariff.[56] However, the tribunal granted the alternative claim that Spain's changes to the applicable regulatory framework did not guarantee a reasonable return on the claimants' investments, albeit only in respect of those claimant entities whose after-tax rate of return was below 7% in the actual scenario.[57]

The *Hydro Energy* investment involved 33 'small-hydro' facilities.[58] Concerning the FET standard,[59] the tribunal found that stability was part of the investor's legitimate expectation that the legal framework would not change arbitrarily and that commitments would be observed. However, the state maintained its right to regulate and therefore only changes that to some degree involve the 'subversion of the legal regime' would be protected under the ECT.[60] To the tribunal, a permissible change must be related to a rational policy and be proportional, i.e. its implementation must be appropriately tailored to its pursuit, taking into account the effects of the intended change on the affected rights and interests.[61] Having said this, the tribunal stated that the analysis on reasonableness cannot be used as 'an open-ended mandate to second-guess the host State's policies.'[62] The tribunal concluded that the claimant did not receive any specific commitments that the regime would not change.[63] To rely on a legitimate expectation, the investor would need to show that it had conducted a due diligence regarding, for example, the applicable law and the prospects of a change of the regulatory framework, and whether official statements on which it relied could reasonably be attributed to the State.[64] Failure to do so could be interpreted as knowledge that regulatory risk existed.[65] On the facts, the tribunal concluded that Spain breached the FET obligation of stability of the overall legal framework[66] and that the investors had a legitimate expectation of a reasonable rate of return on their investments.[67] Furhter, past remuneration could not be taken into account when determining a reasonable rate of return for the future.[68] To the tribunal, 'removing subsidies for the future on the basis that reasonable returns have been made in the past' would be a breach of the FET.[69] Consequently, the tribunal gave directions to the parties to agree on a reasonable rate of return and ancillary matters before issuing an award on damages.

The *Cavalum* investment involved 10 PV plants.[70] The tribunal opined that Article 10(1) of the ECT contained a separate obligation to 'create stable, equitable, favourable and transparent conditions' for investments but that 'stability and transparency are also part of the FET standard itself.'[71] The tribunal further stated that legitimate expectations are the 'dominant or most important component of investor-State FET treaty standard,'[72] and that the obligation of stability is linked to the investor's legitimate expectations that 'the legal framework will not be arbitrarily changed and that commitments will be observed', therefore protecting investors against 'radical or fundamental change' in the regulatory system.[73] To the tribunal, 'proportionality is part of the reasonableness standard' and of the FET standard,[74] and the state has a 'margin of appreciation' to amend its laws and regulations.[75] As regards legitimate expectations, 'there must be a promise, assurance or representation of a specific character.'[76] For the majority, the renewables Spanish legislation could be amended or replaced provided that the change was within the scope of Law 54/1997 (the '1997 Electricity Law'), which established an overarching framework for the regulation of the sector. In addition, the tribunal opined that several related Supreme Court decisions and the fact that RD 661/2007 had replaced the earlier regulatory regime had 'put the

54 Ibid, paras 598-612.
55 Ibid.
56 Ibid, paras 620-640.
57 Ibid, paras 847-850.
58 *Hydro Energy*, paras 62, 67, 69. 'Small-hydro' facilities are hydropower plants with an installed capacity of up to 50 MW (Ibid, para 75).
59 The tribunal rejected the expropriation claim (Ibid, paras 523-538).
60 Ibid, para 553.
61 Ibid, paras 574, 676.
62 Ibid, para 570.
63 Ibid, para 596.
64 Ibid, paras 599-601.
65 Ibid, paras 616-617.
66 Ibid, para 682.
67 Ibid, para 695.
68 Ibid, para 697.
69 Ibid, para 694.
70 *Cavalum*, paras 84, 91.
71 Ibid, paras 402, 403.
72 Ibid, para 404.
73 Ibid, para 406.
74 Ibid, para 414.
75 Ibid, para 419.
76 Ibid, para 431.

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Claimant's legal advisers on notice that the Special Regime was not immune from change."[77] The tribunal also explained that an investor 'making an investment in a highly regulated sector has the burden of performing its own due diligence."[78] The tribunal found no specific commitments giving rise to a legitimate expectation that the incentive scheme could not change, reasoning that, while the claimant had no vested right to 'the maintenance of the remuneration framework,"[79] it had a right to a 'reasonable rate of return' under the regulatory regime of 2013/2014, with reference to the cost of money on capital markets,[80] to which the 1997 Electricity Law and subsequent legislation referred. The tribunal therefore considered that the claimant's legitimate expectations had been infringed 'to the extent that [they] did not provide a reasonable rate of return to the claimant'[81], and that the stability obligation under the ECT had been breached to the same extent. The expropriation claim was dismissed.[82]

STEAG concerned an investment in a concentrated solar power plant in June 2012.[83] The tribunal opined that, with respect to the fair and equitable treatment standard,[84] legitimate expectations must be established in objective terms, exist at the time the investment is made and be based on an act (*conducta positiva*) of the state.[85] While the tribunal did not rule out that general laws may give rise to legitimate expectations or crystallize specific commitments,[86] it did not find it necessary to decide on the issue since it concluded that registration of the investment in the Administrative Registry for Production Installations under the Special Regime constituted a specific commitment that RD 661/2007 would be applied to the investment.[87] For the majority of the tribunal, the legal effect of that registration had to be assessed against the legal framework under which it was issued to determine whether legitimate expectations were created under that regime.[88] The tribunal also confirmed that the scope of the legitimate expectations must be assessed in light of the due diligence performed by the investor prior to making the investment.[89] The tribunal concluded that, at a minimum, the claimant had a legitimate expectation that registration, in combination with RD 661/2007 and RD 1614/2010, constituted a specific commitment that three elements of the legal framework (tariffs, premiums, and upper and lower limits for changes to that option) would remain stable for the lifetime of the facility.[90] However, this did not mean that Spain guaranteed the immutability of the entire RD 661/2007.[91]

As rightly noted by the *PV* tribunal, the decisions discussed above show 'that tribunals have taken a variety of approaches in deciding whether Spain is to be held liable for its conduct in relation to the RE reforms."[92] The divergent approaches may be explained by differences in the facts and measures involved (including the different technologies used in the renewables sector, which has an impact on the specific applicable regulations), the way the claims were formulated, and the evidence presented in each case.[93] But these aspects are probably not enough to justify all the differences.[94]

Investment tribunals generally accept that regulatory frameworks may evolve, not least those relating to public utilities, and that a breach of the investment protections may occur only in the event of a major change that significantly harms the investment (with a proportionality analysis between the aims of the measure and the burden on the investor sometimes being conducted as an additional element).[95] However, there are inconsistent approaches, for example, as to whether and how general regulations may give rise to a specific commitment not to change regulations favourable to the investors. Related specifically to the Spanish renewables cases but potentially of more general application, there are also different views as to the precise relationship between a standard contained in a general regulation on how investments will be remunerated and a provision on the same topic that is more specific but lower down the legislative hierarchy. These diverging views may have resulted in some cases in findings of liability accompanied by damages that are much lower than those claimed by investors. Yet inconsistent outcomes, even relating to the same factual matrix, are of course not a new phenomenon in investment arbitration. In fact, at this point, the inconsistencies in the Spanish renewables saga may surprise only a few.

77 Ibid, para 538.
78 Ibid, para 444.
79 Ibid, para 533.
80 Ibid, para 657(7).
81 Ibid, para 642.
82 Ibid, para 654.
83 *STEAG*, paras 150-151.
84 The tribunal rejected the full protection and security and expropriation claims and found it unnecessary to examine the umbrella clause claim.
85 Ibid, para 503.
86 Ibid, para 508.
87 Ibid, paras 509-512.
88 Ibid, para 513.
89 Ibid, paras 523-532.
90 Ibid, paras 533-537, 576, 594.
91 Ibid, para 594.
92 *PV*, para 553.
93 See ibid, para 554.
94 This was apparently accepted by the *PV* tribunal. See *ibid*, para 555 ('It is not entirely unsurprising, and indeed to some extent to be expected in a system based on *ad hoc* adjudication, that arbitral tribunals may assess relevant circumstances in different ways.').
95 Other emerging consensus that may be identified from the decisions analysed here relate to the intra-EU and taxation measures carve-out jurisdictional objections, as noted above, and to the fact that umbrella clauses only apply to specific commitments assumed by the host state in contracts or similar instruments.