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IN SEARCH OF LIMITS OF REGULATORY POWERS. ANTIN V. SPAIN (ICSID CASE NO. ARB/13/31)*

Abstract: This submission analyses the award rendered in one of the 'Spanish saga' cases by a tribunal constituted under the Energy Charter Treaty. This group of cases concern renewable energy disputes and relates to the limits of states' sovereign powers to amend their regulatory frameworks. The analysis commences by a short presentation of the relevant factual background of the dispute. It then proceeds to each stage of the arbitral proceedings: jurisdiction, merits and remedies. The submission finishes with a number of conclusions drawn from the award, referring to legal issues that can potentially serve as lessons learned for the future.

Keywords: Energy Charter Treaty, investment arbitration, investor-state arbitration, renewable energy, solar energy, regulatory stability, regulatory powers.

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1. Introduction

The award issued in Antin v. Spain[1] on 15 June 2018 is chronologically the sixth arbitral award issued in the 'Spanish saga'.[2] The saga concerns legal reforms of Spain's renewable energy sector, which resulted in at least 45 cases brought on the basis of the Energy Charter Treaty and/or bilateral investment treaties. Approximately half of them are now concluded, with awards rendered in 23 cases being publicly known at the moment of finalizing this case comment.

2. Facts

In 1997, Spain liberalized its energy market by adopting a new Law on the Electric Sector, ending a previous, state-controlled system.[3] Based on this law, Spain adopted a number of royal decrees aiming to attract foreign investments in its renewable energy sector. This was necessary in order to meet the EU goals rooted in the Kyoto Protocol, as the Spain's indicative target was to reach the level of 29,4% of the electricity being produced from renewable sources by 2010.[4] The Spanish legal framework distinguished

[1] *Antin v. Spain*, ICSID Case No. ARB/13/31, Award (15 June 2018). Spain filed to the ICSID an Application for Annulment of the Award, which was pending as of 9 February 2021. The arbitral tribunal was composed of: Prof. Francisco Orrego Vicuña (claimants' nominee), J. Christopher Thomas QC (respondent's nominee) and Dr. Eduardo Zuleta Jaramillo (presiding arbitrator) – see para. 9.

[2] The chronology refers to the awards, excluding decision on jurisdiction (such as *RREEF v. Spain*, ICSID Case No ARB/13/30, Decision on Jurisdiction (6 June 2016)), which would amend the chronological order if included. Although majority of the cases can be described as the 'Spanish Solar Saga', part of the cases concerns other renewable energies (wind and hydro), which explains the broader term used.

[3] *Antin v. Spain*, *supra* note 2, para. 74.

[4] Ibid., paras. 82-84, 97, Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ L 283, 27.10.2001, p. 33–40), Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, p. 16–62), Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto 10 December 1997.

between the so-called 'Ordinary Regime', applicable to conventional energy power plants, and 'Special Regime', applicable to renewable energy power plants of less than 50MW.[5] The crucial legal act was the Royal Decree 661/2007.[6]

There were two types of retribution for the energy producers under the Special Regime. One option was to sell the produced electricity to the system in exchange for a regulated, fixed tariff, expressed in Euro cents per kilowatt/hour (FIT). Another option was to sell the produced electricity in the electric energy production market, for the price obtained in the organized market or freely negotiated, supplemented by a premium paid by the state, expressed in Euro cents per kilowatt/hour (Premium). The energy producers were entitled to choose between the two options, which were bound for one-year terms.[7]

After the Parliamentary elections held on 20 November 2012, Spain changed its politics. It started adopting a series of measures amending the Special Regime, including the introduction of a new tax (tax on the value of the production of electrical energy – TVPEE). These efforts culminated in 2014, when Spain put in place a new regime for the renewable energy plants. These changes eliminated the old regime, by replacing it with a new regime, which provided for a special payment based on a reasonable rate of return determined by the government, that was to be standardized for all installations regardless of their individual features.[8]

The disputed investments in the *Antin* case consisted of acquisition in 2011 of shareholding participation in two Concentrated Solar Plants (CSP), operating since 2009.[9] CSP is type of plant that produces energy from the sun. These capture sun onto a liquid carrier fluid, which in turn heats a thermo-oil heat transfer fluid inside absorber tubes, which then converts water into steam (by using a steam generator – alternatively, the heat can transferred into a thermal storage system for later use). The produced steam then drives a turbine, which is connected to a generator and produces electricity.[10]

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[5] *Antin v. Spain*, *supra* note 2, para. 74.

[6] Royal Decree 661/2007 of 25 May 2007 regulating the activity of electricity production under the special regime, BOE-A-2007-10556, «BOE» núm. 126, de 26 de mayo de 2007, páginas 22846 a 22886.

[7] Article24(1) of the RD 661/2007, *Antin v. Spain*, *supra* note 2, para. 93.

[8] *Antin v. Spain*, *supra* note 2, paras. 136-152.

[9] Ibid., paras. 70, 110.

[10] Ibid., para. 71.

3. Jurisdiction
3.1. Intra-EU objection

Spain presented four objections to the jurisdiction. First was the intra-EU objection, framed as *ratione personae* in nature. Spain argued that the tribunal lacked jurisdiction because the investors were from the EU member states, which precludes them from falling within the category of investors 'of another Contracting Party' covered by ECT's jurisdictional clause, Article 26.[11]

The tribunal commenced its analysis by reminding those concerned that the ECT must be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of treaties (VCLT).[12] It then interpreted Articles 1(2) and 1(7)(a)(ii) of the ECT, which define 'Contracting Party' and 'Investor'. The ordinary meaning of these provisions and their context convinced the tribunal that the host state (Spain), as well as the home states of the claimants (Luxembourg and the Netherlands) are 'Contracting Parties', whereas the claimants are 'Investors' within the meaning of the ECT. This, in turns, provides the tribunal with jurisdiction.[13]

The tribunal noted that the same objection has been previously rejected in the *Charanne*, *Isolux* and *Eiser* cases.[14] A 'wide exclusion' argued by Spain would have to be express and clear.[15] Moreover, it is not grounded in any specific provision of the ECT.[16]

The tribunal observed that the ordinary meaning of Articles 1(2), 1(3) and 1(10) of the ECT recognizes the existence of a Regional Economic Integration Organisation (REIO), such as the EU, as a possible Contracting Party, the 'Area' of which is also defined in the ECT as areas of its member

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[11] Ibid., paras. 161, 213. The claimants were companies incorporated under the laws of Luxembourg and of the Netherlands, the second being directly and wholly-owned by the first. Both companies were used by a French professional private equity investment fund to carry out investments in the renewable energy sector in Spain – para. 2.

[12] Ibid., paras. 206-207, see also paras. 259, 517.

[13] Ibid., paras. 208-212.

[14] Ibid., para. 214, with reference to: *Charanne v. Spain*, SCC Case No. V 062/2012, Award (21 January 2016), *Isolux v. Spain*, SCC Case V2013/153, Award (12 July 2016) and *Eiser v. Spain*, ICSID Case No ARB/13/36, Award (4 May 2017).

[15] *Antin v. Spain, supra* note 2, para. 215, quoting: *Eiser v. Spain*, ibid., para. 186, in turn quoting *RREEF v. Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (6 June 2016), paras. 84-85.

[16] *Antin v. Spain, supra* note 2, para. 217.

states. This means that claims can be brought against the EU. [17] Area is therefore defined depending on who is the respondent – an EU member state, or the EU itself.[18] Therefore, separate ratifications of the ECT result in the simultaneous existence of Spain, the Netherlands, Luxembourg and the EU as the Contracting States, each having its own obligations under the ECT. The EU's consent to arbitration under the ECT 'does not supersede or eliminate the specific consent granted by each sovereign EU Member State that is also a Contracting Party to the ECT.'[19]

In their argument, Spain relied on the incompatibility of the ECT with the EU law. It argued that whereas the UE law is part of the applicable law, it does not allow a mechanism for a dispute resolution between the EU member states and the EU investors other than that provided in the EU treaties.[20] These arguments were in line with the reasoning of the Court of Justice of the European Union in the *Achmea* judgment, issued just over three months ahead of date of issuance of the award in the *Antin* case.[21]

The tribunal disagreed, articulating that: (i) its jurisdiction is derived from the express terms of a treaty which binds the states, (ii) the EU is itself a party to this treaty, (iii) each EU member state itself granted its consent to arbitrate claims against it, and finally (iv) nothing in the text, context, purpose and object of the treaty suggests that reference to 'rules and principles of international law' should include the EU law in a manner undermining 'the prior consents to submit to arbitration under the ECT given by each of the EU Member States and the EU itself'.[22] The obligation stemming from Article 32 of the VCLT to interpret the treaties in good faith requires that 'a formal warning, or an express exclusion or a reserve' should have been given if one was to accept Spain's position.[23]

The tribunal shortly referred to the argument concerning Article 344 of the TFEU, noting that 'the different concepts of substantive protections under EU law, which would apply to the merits of a dispute brought under EU law, should not be confused with the jurisdiction of the Tribunal.'[24]

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[17] Ibid., para. 218.

[18] Ibid., para. 220, quoting *PV Investors v. Spain*, PCA Caso No. 2012-14, Preliminary Award on Jurisdiction, paras. 179-180.

[19] *Antin v. Spain, supra* note 2, paras. 219, 221.

[20] Ibid., para. 223.

[21] C-284/15, *Achmea*, ECLI:EU:C:2018:158.

[22] *Antin v. Spain, supra* note 2, paras. 224, 226.

[23] Ibid., para. 225, quoting *Eiser v. Spain*, *supra* note 14, para. 186.

[24] *Antin v. Spain, supra* note 2, para. 228.

After the *Achmea* judgement was issued, Spain applied to re-open the proceedings and include it in the record. The tribunal dismissed this motion. In the award, it simply noted that Spain's application to reopen the proceedings was denied. [25]

3.2. Shareholders' claims

A second jurisdictional objection was framed as *ratione materiae*. Spain argued that the only assets that qualified as 'investments' within the meaning of Article 1(6) of the ECT were direct shareholdings in the local companies and the loans granted to them.[26] According to Spain, any other indirect interests, such as assets owned by the local companies (including ownership of the CSP plants) did not qualify as 'investments' and should be excluded from the jurisdiction of the tribunal.[27] Spain argued, moreover, that indirect ownership of assets under Article 1(6) of the ECT is to be interpreted as referring exclusively to the final beneficiary.[28]

The tribunal disagreed. It noted that the claimants are direct and indirect shareholders of the local companies and as such, they claim 'damages caused to the value of their shareholding interests' in the local companies.[29] As such, these claims are within the jurisdiction, as investment treaties allow claims for 'reflective losses' by shareholders.[30]

It observed that Article 1(6) of the ECT establishes that an investment must be either owned or controlled by an investor, directly or indirectly.[31] Nothing in the text or context of the ECT contains a requirement that only the real and ultimate beneficiary may be a party to arbitration.[32] The tribunal did not consider the preparatory works, relied upon by Spain, as

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[25] Ibid., para. 58.

[26] In this case, one investor owned 100% of the shares of the second investor, which in turn owned 45% of all available shares in two local companies, each owning and operating a CSP power plant. The same structure applied to debt interests for loans granted to the local companies. See: ibid., para. 261.

[27] Ibid., paras. 255, 268.

[28] Ibid., para. 237. In this case, both claimants were owned by a third entity – a French professional private equity investment fund – see: ibid., para. 2.

[29] Ibid., para. 270.

[30] Ibid., para. 271.

[31] Ibid., para. 260.

[32] Ibid., paras. 262, 266.

supporting different interpretation. First, it noted that Article 1(6) of the ECT leaves no obscurity or ambiguity which requires reference to subsidiary means of interpretation in accordance with Article 32 of the VCLT.[33] Second, it noted that the definition of 'indirect ownership' discussed during the ECT negotiations was not included in the final text. This suggests that the text was considered as 'sufficiently clear' on this matter. Thus, the conclusion would not be altered even if subsidiary means of interpretation were to be applied.[34]

3.3. Tax measures

Spain succeeded on its third objection to jurisdiction, also of *ratione materiae* character, according to which taxation measures were outside of the scope of jurisdiction.

The tribunal commenced its analysis by determining whether the TVPEE 'is a taxation measure which falls under the carve-out to the ECT provided for' in Article21(1) of the ECT.[35] It agreed that there is a three-elements test regarding characteristics of a tax under international law, according to which a tax (i) must be laid-down by law, (ii) impose an obligation on a class of people and (iii) this obligation must involve paying money to the state for public purposes. All these elements were met by the TVPEE.[36]

The tribunal accepted that it is entitled to assess an additional element, i.e. whether the TVPEE was a *bona fide* taxation measure. This conclusion was based on the application of 'the general principle of good faith', which forms part of international law applicable pursuant to Article 26(6) of the ECT, according to which parties are not allowed to abuse their rights.[37] The tribunal noted, however, that if the above three elements of

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[33] Ibid., paras. 263-264. The award refers to 'Article 6(1)', which most probably is a typo and the intended reference was continuously to Article 1(6).

[34] Ibid., para. 265.

[35] Ibid., para. 311.

[36] Ibid., para. 313.

[37] Ibid., para. 316, quoting: *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 107, in turn quoting: Lauterpacht, *Development of International Law by the International Court*, 164.

the test are met, it is very likely that the tax-exemption clause will apply and the burden of proof of lack of good faith lies on the claimants.[38]

The tribunal acknowledged that it was entitled to assess whether the abuse of rights materialized by adopting the TVPEE 'with the precise aim of abusing [Spain's] rights under the ECT, by strategically creating' the TVPEE 'to curtail the investors' alleged rights under the Treaty, in a manner that abusively sought to employ the taxation exclusion'. This 'high threshold of proof' was not met by the claimants.[39] The evidence presented was not 'even a close call' that the TVPEE was part of a 'scheme' to deprive the claimants of their rights while precluding the tribunal from examining the measure by virtue of Article 21 of the ECT.[40] Thus, the tribunal decided that the TVPEE was not merely 'labelled' as a taxation measure.[41] The tribunal confirmed this reasoning by contrasting facts of the case with the 'extraordinary circumstances' found in the *Yukos* case. The tribunal found a 'strong contrast' between the facts of the two cases. Here, the law introducing the TVPTVPEE was 'designed with a general public purpose, rather than with the aim of employing a tax for the entirely unrelated purpose of destroying the Claimants' investments'.[42]

3.4. Cooling-off period

Spain's fourth objection was that the three months cooling-off period was not observed. In this case, the claimants sent two notices of dispute, on 26 April 2013 and 30 July 2013. Naturally, they predated part of the legislative measures, which culminated in 2014. Spain argued that the disputed measures which were not covered by the notices are outside of the scope of jurisdiction or, alternatively, inadmissible.[43]

The tribunal dismissed the objection and considered that all the measures formed part of a 'single, on-going dispute'.[44] First, the tribunal noted the 'inseparable relationship' between the measures included in the

[38] *Antin v. Spain, supra* note 2, para. 314.
[39] Ibid., para. 317.
[40] Ibid., para. 319.
[41] Ibid., para. 320.
[42] Ibid., para. 322, quoting: *Yukos v. Russia*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award (18 July 2014), paras. 1404, 1407.
[43] *Antin v. Spain, supra* note 2, paras. 341-348.
[44] Ibid., paras. 353, 357-358.

notices of dispute and measures implemented later in time. Second, it added that the dispute related to Spain's failure to honour its commitments under the specified royal decrees and – because subsequent measures constituted additional changes to that framework – they were related to the notified dispute. Third, since Spain did not react to the notices of disputes (except to request to re-submit them in Spanish, which the investors did), any such additional notifications would have been futile anyways.[45]

4. Merits

The tribunal's analysis focused exclusively on the Fair and Equitable Treatment (FET) claim. The tribunal did not analyse other standards relied upon by the claimants, i.e. unreasonable and discriminatory treatment and umbrella clauses. The claimants did not allege expropriation.[46]

The tribunal looked at the ordinary meaning of the words 'fair' and 'equitable' and added that they cannot be interpreted as isolated from the context, object and purpose of the ECT.[47] Having looked at Article 2 of the ECT, the tribunal noted that the purposes stated in this provision emphasizes the ECT's role in providing a legal framework that promotes long-term cooperation, 'suggesting that the ECT is conceived as enhancing the stability required for such cooperation'.[48] The tribunal concluded that Article 2 of the ECT refers to legal framework 'that is stable, transparent, and compliant with international legal standards.' [49] It then added that the stability of the legal regime is reinforced in Article 10(1) of the ECT, which uses 'shall' and therefore is not merely a suggestion or a recommendation, but an obligation to 'create stable, equitable, favourable and transparent conditions'.[50] In fact, in the tribunal's view, the 'stability of the conditions' is a '*leitmotiv* in the text of the ECT'.[51]

The tribunal observed that the obligation of stability neither cancels nor 'extremely limits' the states' regulatory powers. The limits on the

[45] Ibid., paras. 352-354.
[46] Ibid., para. 360.
[47] Ibid., para. 518.
[48] Ibid., para. 520, with reference to *Eiser v. Spain*, *supra* note 14, para. 378.
[49] *Antin v. Spain, supra* note 2, para. 523.
[50] Ibid, paras. 524-525.
[51] Ibid., para. 526.

regulatory powers imposed by the ECT are higher than under the minimum standard of international law, as the ECT provides for specific obligations on that issue.[52] These limits do not, however, prevent states from amending their legislations, provided that the given state does not 'suddenly and unexpectedly eliminate the essential features of the regulatory framework in place'. [53] The tribunal interpreted Article 10(1) of the ECT as containing an 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'. This allows for evolution of the legal frameworks and for exercising states' regulatory powers to adapt the legal frameworks to the changing circumstances in the public interest. It prohibits, however, radical alterations – understood as stripping the legal framework of its key features – applicable to existing investments made in reliance on this legal framework.[54]

The tribunal understood the interrelation between the FET and the obligation to provide stable legal framework as that 'within the context' of the ECT, these 'concepts are associated in a manner that merits their joined assessment' and 'it seems undisputed that the ECT's FET standard includes the obligation to provide a stable and predictable legal framework for investments'.[55]

Based on the above, the tribunal focused on the protection of legitimate expectations. First, it confirmed that the legitimate expectations cannot be analysed in abstract or based on subjective beliefs. Rather, they must be based on an objective standard and must be assessed on a case-by-case basis.[56] Second, the legitimate expectations are to be assessed as of the moment of making the investment. Attention must be paid to circumstances existing at that time and 'information that the investor had or should reasonably have had, had it acted with the requisite degree of diligence (considering its expertise)', without the benefit of hindsight.[57] Third, an 'affirmative action' from the state is needed for legitimate expectations to arise. This is not limited to specific commitments, but may happen 'in the form of representations made by the host State, for example, with respect

[52] Ibid., para. 530.
[53] Ibid., para. 531.
[54] Ibid., para. 532, with reference to *Eiser v. Spain*, *supra* note 14, para. 382 and *Charanne v. Spain, supra* note 14, para. 517.
[55] *Antin v. Spain, supra* note 2, para. 533.
[56] Ibid., para. 536.
[57] Ibid., para. 537.

to certain features of a regulation aimed at encouraging investments in a specific sector'.[58]

Based on these general comments, the tribunal decided that 'through the compensation system offered in RD 661/2007, Spain sought to encourage further investments in its RE sector to meet the targeted growth in certain technologies, including CSP systems'.[59] The tribunal referred to publicly available reports and press releases of state authorities, as well as express references to the principles of stability and predictability included in the preambles of the royal decrees.[60] The tribunal underlined that the preamble of RD 1614/2010[61] (one of the elements of the Special Regime) recognised that 'the stability and predictability of the regime were key to attaining Spain's policy goals regarding RE technologies and further provides that any changes to the regime must ensure the legal security of the investments.' [62] The tribunal underlined that the reasoning of an administrative act expressed in its preamble 'exposes the motives' of state's actions. It concluded that 'the stability of the regulatory regime for investments in the RE sector was thus the *leitmotiv* of Spain's acts at the time of the Claimants' investment.' [63]

The tribunal recognized that the legitimate expectations do not entail to expect that the legislative framework would be frozen and do not equate to immutability of the legal framework.[64] The tribunal referred to the test applied in the *Charanne* case and concluded that Spain altered the 'essential features' of the framework relied on by the investor.[65]

Spain's position that the only possible legitimate expectation was of a 'reasonable return' (which, as Spain argued, was maintained in the new regime) was rejected. In the tribunal's view, 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

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[58] Ibid., para. 538.

[59] Ibid., para. 540.

[60] Ibid., paras. 541-546.

[61] Royal Decree 1614/2010 of 7 December 2010, regulating and modifying certain issues related to the production of energy from CSP and wind sources, «BOE» núm. 298, de 8 de diciembre de 2010, páginas 101853 a 101859, BOE-A-2010-18915.

[62] Ibid., para. 547.

[63] Ibid., para. 548.

[64] Ibid., para. 555.

[65] Ibid., paras. 556-557, relying on *Charanne v. Spain*, *supra* note 14, paras. 513-514, 517, 539.

identifiable criteria'. As a result, the question is not whether the new regime provides a 'reasonable return', but how this 'reasonable return' is calculated.[66]

The key question was the manner in which Spain determined the 'reasonable return' under the new regime, i.e. whether this (i) was done based on 'identifiable criteria' and (ii) in a form consistent with the representations on stability, historically made by Spain to attract investments. The tribunal concluded that 'the new methodology was not based on any identifiable criteria.' It further stated that the new regime '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 [...]'.[67] This conclusion was much based on evidence, in particular, (i) witness testimony of an official who 'conveyed that the 3% adjustment is simply what he considered to be an appropriate spread', (ii) inability to present any studies supporting parameters used to determine features of a standard installation under the new regime, and (iii) no 'identifiable set of criteria' for the revision of the remuneration under the new regime, scheduled each 3 and 6 years.[68]

Spain argued that the Special Regime caused the tariff deficit, which had to be reduced by the new regime. Based on the evidence on the record, the tribunal concluded that the FIT regime for CSP plants did not play a significant role in the accumulation of the tariff deficit. Therefore, 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.[69]

Building upon the considerations described above, the tribunal decided that Spain violated Article 10(1) of the ECT.[70] It failed to explain, however, whether this resulted from violation of legitimate expectations as an element of the FET, or rather from violation of the obligation to provide stable regulatory framework, which it identified as a separate obligation included in Article 10(1) of the ECT (subsequently considered jointly with the FET).

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[66] *Antin v. Spain, supra* note 2, para. 562.

[67] Ibid., para. 568.

[68] Ibid., paras. 564-566.

[69] Ibid., paras. 569-572.

[70] Ibid., para. 573.

5. Compensation

The tribunal observed that neither Article 10 of the ECT nor any other provision provides for a standard of compensation for violation of ECT.[71] It noted that compensation is regulated only with respect to lawful expropriation, in Article 13 of the ECT.[72] Therefore, the standard for compensation 'should be based on international law', as expressed in the Permanent Court of International Justice judgement in the *Chorzów Factory* case and in Article 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles).[73] The tribunal considered these 'as reflecting the international law rules that are to be applied', entitling the claimants to full reparation for damages caused by the breach of the ECT, aimed at removing all the consequences of the wrongful act.[74]

The claimants requested restitution (together with compensation for all losses suffered before restitution) or, alternatively, compensation.[75] Requested restitution was to consist in 'withdrawing all the harmful laws and regulations complained of […] and placing Claimants under the same legal and regulatory framework that existed at the time they made the investments'. [76]

The request for restitution was made rather half-hearted, and the claimants 'merely devoted two paragraphs' of their memorial to this issue, which was not 'fully discussed' in the subsequent pleadings.[77] The tribunal referred to Article 35 of the ILC Articles and considered the restitution 'disproportional to its interference with the sovereignty of the State compared to monetary compensation.'[78] The tribunal underlined the state's right to 'exercise its sovereign power to amend its regulations to respond to changing circumstances in the public interest to the extent that any such amendments are consistent with the assurances on the stability of the regulatory framework provided by the State and required by the

[71] Ibid., para. 659.
[72] Ibid., para. 660.
[73] Ibid., paras. 662-663, *Case Concerning the Factory at Chorzów (Germany v. Poland)* (Merits) PCIJ Rep Series A No 17 (13 September 1928) 47.
[74] *Antin v. Spain, supra* note 2, para. 664.
[75] Ibid., paras. 574, 631.
[76] Ibid., para. 632.
[77] Ibid., para. 634.
[78] Ibid., para. 636.

ECT.'[79] Non-observance of these commitments triggers the obligation to pay compensation for damages.[80]

The tribunal then moved to calculation of compensation. It observed that 'there are no right or wrong valuation methods', but different methods may be appropriate in the specific circumstances of the particular case. It added that the Discounted Cash Flow (DCF) method 'is one of the most commonly used methods to value businesses and companies'.[81]

The tribunal decided to dismiss Spain's objection to DCF's applicability to 'business concerns having a short performance record and subject to several variables that are difficult to forecast.'[82] First, five years of operation of the power plants in question were enough to allow assumptions of the future cash flows and to dismiss the objection that the DCF should not be applied to projects 'that are not in operation or at very early stages of operation and therefore lack a suitable track record of their performance.' Second, power plants – both conventional and renewable – have a 'relatively simple business', i.e. producing electricity. The demand for electricity and its long-run value can be analysed and modelled in detail, on the basis of available data.

The tribunal observed that the DCF forecast has many variables and some of these, such as inflation or interest rates, may be difficult to predict for a long term. However, this applies to any forecast, and as such it does not preclude the DCF's application.

The tribunal introduced some corrections to the experts' calculations.[83] First, it rejected the claim for 'historic losses' (for period prior to June 2014) as a consequence of its finding that the FET violation occurred in June 2014.[84] Second, 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 awarded compensation.[85] Third, it reduced the operational life-time of the plants to 25 years (instead of the 40 years applied in the calculations), noting that the claimants did not meet the burden of proof on that issue.[86]

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79 Ibid., para. 637.
80 Ibid., para. 637, with reference to *Eiser v. Spain*, *supra* note 14, para. 425.
81 Ibid., para. 688.
82 Ibid., para. 689, see also paras. 654, 675, 688, 691.
83 Ibid., para. 724.
84 Ibid., para. 667.
85 Ibid., para. 673.
86 Ibid., paras. 707, 713.

6. Analysis

The Spanish saga cases are worth to be looked at for many reasons. One is that they concern virtually the same legal issues that are decided by arbitral tribunals composed of different individuals almost each time. In this sense, the relevant legal issues have been (and continue to be) decided by almost all arbitrators having a track-record in investor-state arbitrations. This makes the Spanish saga cases a *sui generis* 'laboratory' of (or lens to look at) the whole investor-state dispute settlement mechanism.

Three important conclusions can be presented from the *Antin* case with respect to jurisdiction.

First, the award is in line with all the other awards that confirm jurisdiction in intra-EU disputes based on the ECT. The tribunal was unimpressed by the *Achmea* judgement rendered only 3 months prior to rendering the award. However, in the light of the applicable rules of procedure, in particular, Rule 38(2) of the ICSID Arbitration Rules, the tribunal could have explained more precisely why the *Achmea* judgement did not constitute a decisive factor for the case, or that there was no vital need for clarification on this point. The tribunal's approach is different than, for example, that in the *Masdar* case, where the tribunal analysed the issue and decided that the *Achmea* decision did not apply to the ECT context and had no bearing upon the case.[87]

Second, the award confirms that the ECT (and investment treaties more broadly) contain no requirement that a claim must be brought by the ultimate beneficiary. This allows for a legitimate corporate structuring, as long as there is no abuse of rights, for example, by creating the corporate structure once the dispute has already arisen or become foreseeable.

Third, it is within the scope of the tribunals' scope of jurisdiction to analyse whether a tax measure falls within the internationally recognized definition of a tax, and if so – whether the tax was adopted in good faith. The tribunal confirmed that state measures designed to destroy a particular investment, even if labelled as a tax, would be an abuse of right and as such, would not be covered by the taxation carve-out. However, the burden of proof and the threshold are high and can be met only in extraordinary circumstances, such as in the *Yukos* case.

[87] Ibid., paras. 56-58, *Masdar v. Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018), paras. 678-682.

The decision on merits in the *Antin* case was much driven by the tribunal's understanding of the evidence on the record, i.e. that on a number of occasions, the respondent emphasized the stability of the legal framework specifically designed to encourage foreign investment. In this context, it is worth noting the special attention paid by the tribunal toward preambles of domestic regulations that it considered as exposing the motives of state's actions (such as stability of the regulatory framework in this case). Within this line, the tribunal would probably pay similar attention to reasoning behind regulations adopted, for example, in Poland, which do not have preambles, but have written motives justifying their adoption.

The tribunal acknowledged that the regulatory framework is not frozen in time, but the ECT protects the legitimate expectations that it will not be stripped-of its essential features. Despite that, the award suggests that the tribunal did not reject the theoretical possibility that the tariff deficit (if proven) could be a reason justifying elimination of even the essential characteristics of the Special Regime. The tribunal seems to be open to accept that such a public concern could justify more drastic changes in the regulatory framework, which could still be in line with the ECT if the new regime was based on objective criteria, not governmental discretion.

The tribunal's criticism of the new regime does not concern amendment of the regulatory framework itself, which could be based on the approach of standard installations, but the fact that it is not based on identifiable criteria. This appears to be much influenced by the witness testimony of the Spanish official, who appears to confirm that he determined the new levels of incentives based on his own assessment, with no studies being conducted in the decision making process.[88]

The *Antin* case also allows for two relevant conclusions from the perspective of remedies.

First, the award confirms that remedies other than compensation are available in investor-state arbitration. Even though in the circumstances of this case restitution was considered disproportionate, it may be an appropriate remedy in cases concerning non-legislative violations of investment treaties.

Second, it confirms the applicability of the DCF method to calculate compensation in renewable energy disputes. Unless other circumstances

[88] *Antin v. Spain, supra* note 2, paras. 564-568.

preclude applicability of this method, power plants are ‘relatively simple businesses’ allowing for assumptions necessary for the DCF.

Bibliography

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