Arbitrating Energy Disputes: Hot Topics

International Arbitration, Energy and Environmental Commissions

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National Report of Spain

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1. ARBITRATING LONG-TERM CONTRACTS IN THE ENERGY SECTOR

1.1 In your jurisdiction: Is arbitration a widely accepted and used dispute resolution method in the energy sector when long-term contracts are in dispute?

Do you see arbitration clauses in the agreements executed in the development of power plants?

Do you normally include arbitration clauses in EPC and O&M Contracts?

Do banks accept introducing arbitration clauses in credit agreements with the SPV and in the security package?

What are the reasons for choosing arbitration as a preferred dispute resolution method over proceedings before state courts?[1]

1.2 Do parties choose ad hoc or rather institutional arbitration for disputes regarding the revision of long-term contracts? What are the reasons?

1.3 Expertise and Multiple Appointment of Arbitrators

1.3.1 Do arbitrators have the necessary legal, technical and economic expertise to decide on the revision of long-term contracts? Should technical experts be appointed as arbitrators in order to bring the required know-how to the panel?

1.3.2 Multiple appointments of arbitrators: The number of arbitrators having the necessary legal, economic and commercial expertise for these kinds of disputes might be limited in certain jurisdictions. Accordingly, the potential arbitrators are drawn from a smaller or specialized pool of arbitrators. However, Part II, Article 3.1.5 IBA

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[1] Maximum flexibility? That parties can choose arbitrators experienced in the energy sector? That they can choose the venue? That they can agree on confidentiality and privacy? That it is easier to enforce an award in the international context than judgments in foreign jurisdictions? The neutrality of the arbitration proceedings? Any other considerations?

Guidelines on Conflicts of Interest in International Arbitration 2014 ("IBA Guidelines 2014") states: The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties" Further, Part II, Article 3.1.3 IBA Guidelines 2014 states that "The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties." Both provisions are listed in the Orange List of the IBA Guidelines 2014. A potential arbitrator has to disclose any circumstances constituting these two grounds. Have these grounds been used by recalcitrant parties to object to the appointment of an arbitrator?

1.3.3 Does the nationality of arbitrators play a more important role in arbitrations regarding the revision of long-term contracts than in other commercial arbitrations?

1.4 Do parties to long-term contracts favor a settlement over an award in which the arbitral tribunal decides on the revision of the price formulae or even ascertains a new price formula? If so, for which reasons?

1.5 "Price Review Clause" or Price Re-Opener Clauses"

1.5.1 Were (and are) price formulae usually indexed directly or indirectly to alternative competing fuels, e.g. oil, coal products? What are the (historical) reasons for this indexation?

1.5.2 What is the difference between a "Price Review Clause" or a "Price Re-Opener Clause" in contrast to a "loyalty"-or "hardship-clause"? In your jurisdiction: Is the "Price Review Clause" a provision specialis in contrast to a general hardship clause?

1.6 "Trigger events"/Significant Change of Circumstances

1.6.1 Please give examples of a simple[2] and of more complex[3] trigger mechanism.

2 E.g. that the parties agree that the passage of a certain timeframe will automatically trigger the price review.

3 E.g. that the claimant has to prove firstly the occurrence of circumstances beyond the control of either party and secondly that the circumstance results in a significant change to the energy market of the buyer compared to a specified date.

1.6.2 Does any definition of the term "significantly" exist in your jurisdiction? If not, how is the term interpreted if the curial law is that of your jurisdiction?

1.6.3 Please list facts/circumstances that a claimant has to adduce evidence for in order to prove that the circumstances have significantly changed[4]:

1.6.4 Whether the requirement of a significant change of circumstances if fulfilled is a question of law and fact: Do you agree with this statement if the curial law is the substantive law of your jurisdiction and/or if the place of arbitration is in your jurisdiction?

1.6.5 According to Articles 5 and 6 of the IBA Rules on the Taking of Evidence in International Arbitration dated 29 May 2010 ("**IBA Rules**") a party may rely on a "Party-Appointed Expert" or the arbitral tribunal may appoint an independent "Tribunal-Appointed Expert". What is the preference in your jurisdiction: Do counsel, parties and arbitrators rather favor Party-Appointed Experts or Tribunal-Appointed Experts?

1.6.6 Is the use/appointment of consultants by the arbitral tribunal regarding the "translation" of a decision into a new price formula possible/desirable?

1.7 If the "Price Review Clause" or the "Price Re-Opener Clause" does not require a trigger event: Under what requirements can a party also request revision/review of the price formula if the curial law is the substantive law of your jurisdiction?

1.8 Confidentiality

[4] E.g. the growing liberalization, the liquidity and transparency in Europe, too much contracted/committed supply; excess of supply of natural gas; that the price of alternative completing fuels, such as oil or other oil products to which the price formulae are usually indexed, has changed etc.

1.8.1 Does a claimant have to substantiate sensitive business secrets in order to prove that the price formula needs adapting? For example, does a claimant have to submit the prices that its customers pay? Does a claimant have to submit what kind of prices the respondent charges to its customers?

1.8.2 Do parties usually agree on a Request to Produce phase according to Article 3 IBA Rules? If a party objects to the production of documents invoking commercial confidentiality: Do arbitral tribunals adopt arrangements to ensure a suitable confidentiality protection (Article 9(4) IBA Rules) or do they rather dismiss a party's request to produce?

1.9 Scope of arbitral tribunal's mandate to revise the price formulae

1.9.1 What are the available remedies in your jurisdiction: Does an arbitral tribunal have the power to amend the contract terms? Does an arbitral tribunal have the power to replace e.g. unreasonable contract terms? Must the arbitral tribunal's power to change/revise the price formula be specifically mentioned in the contract? If not, can arbitrators resort to statutory provisions of the curial law? Or is the power limited to contract interpretation?

1.9.2 If an arbitral tribunal is only mandated to amend an existing price formula, how are the price formulae usually worded? What are the potential risks, but also advantages if an arbitral tribunal has only this limited mandate?

1.9.3 If an arbitral tribunal is mandated to ascertain an entirely new price formula, how is the existing price formula then worded? What are the potential risks, but also advantages if an arbitral tribunal has such a broad mandate? What are the necessary "tools" (see 1.3.1/1.76, 1.7.7 – expert arbitrators, appointed experts, consultants or the like) in order for the arbitral tribunal to draft a new price formula? What parts of the award have "res judicata effect"?

2. ARBITRATING ENERGY DISPUTES UNDER ISDS

2.1 How many BITs has your country signed and how many of them are in force?

Spain has historically signed 89 BITs with 87 countries (Spain has replaced existing BIT's twice, with new BIT's replacing the previous ones with Morocco and Bolivia, which

entered into force in 1997 and 2001 respectively). Out of those 87 countries, Spain had BIT's in force with 74 countries some point. As of today, 72 BIT's are currently in force. Other 2 (entered into with Bolivia and South Africa) were terminated in 2012 and 2013 respectively, although the investments made prior to termination will be covered by these 2 BITs' protection for a sun-set period of 10 years (i.e. until 2022 and 2023 respectively).

2.2 What mechanisms of dispute resolution method does your country favor in its BITs? Do investors have the choice to sue a host state in the state courts and in arbitration? Do investors have to choose between suing the host state either in the state courts or in arbitration (fork-in-the-road provision)?

The most recurrent method of dispute resolution contained in the BITs signed by Spain enables the foreign investor to choose between host state courts litigation and international arbitration. There is also a minority of BITs that depart from this system and demand the investor to resort to the state courts as a step prior to arbitration. The answer may vary from each BIT, but the most frequent approach is the inclusion of a soft or implicit fork-in-the-road provision in the investor-state dispute resolution clause by referring to the different mechanism as alternative ("or"). Typically, there is no explicit fork-in-the-road provision in most of Spain's BIT's.

2.2.1 If investors can choose proceedings before state courts in your jurisdiction: Are there any cases in the last five years in which state courts in your jurisdiction had to decide on claims of (foreign) investors against your state?

There are not relevant domestic cases in this regard. The reason is because the juridical persons having legal standing in investment-related disputes before national courts are the owners of power facilities, which normally are special purpose vehicle companies incorporated under the laws of Spain and not the foreign investor or shareholders themselves. They therefore appear in domestic courts as local companies. In this regard, international standards foreseen in international treaties such as BIT's or the Energy Charter Treaty are not at stake in domestic proceedings.

2.2.2 If so, were the decisions in favor of the country/host state or were they in favor of the investor?

As mentioned, there is no relevant practice of foreign investor litigation in domestic courts. As a general estimate, it can be mentioned that litigation against public authorities is dealt with by a specific branch of the Judiciary: administrative courts. A general estimation for the record of cases in administrative courts is around 85% of wins for public authorities against a 15% of wins for private parties.

This fact may be relevant for foreign investors to opt for international arbitration instead of domestic litigation as far as they can affirm standing for international arbitration.

2.2.3 Has your country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and nationals of other States (1968) (the ICSID Convention)? If not, does your state intend to accede to/ratify the ICSID Convention soon?

Spain signed the ICSID Convention on March 21, 1994, which was deposited to ratification on August 18, 1994, and entered into force for Spain on September 17, 1994.

2.3 If an investor can choose (only) arbitration as dispute resolution method:

2.3.1 If an investor can choose arbitration as dispute resolution method, are there conditions attached to it, such as a requirement to resort to state courts for a certain period of time or a requirement to attempt to arrive at amicable settlement within a certain period of time?

Practically all BITs signed by Spain call the investor and the host state for a cooling-off period prior to arbitration, during which they are supposed to reach an amicable settlement of the dispute within a certain period of time, typically ranging from 3 to 6 months.

In very few cases, such as the cases of the BIT Spain-Argentina or the BIT Spain-Uruguay, the investor is also required to bring its claim before state courts and only if its remedy sought is not granted within an 18-month period it can initiate an international arbitration. Even so, the practical implementation of this procedural requirement has been excluded in some precedents alleging the most favor nation clause contained in the aforementioned BITs (see in particular *Emilio Maffezini v. Spain* ICSID case). We consider that the *Maffezini* doctrine is currently under revision. In fact, the debate was reedited with the expropriation of Repsol in Argentina (with Repsol not going to litigation in Argentinian courts before resorting to international arbitration). However, the issue was never decided as the parties reached a settlement.

2.3.2 If an investor can choose not only ICSID, but also other institutional rules such as SCC, ICC or ad hoc proceedings, or between various institutions in case the ICSID Convention is not signed/ratified by your country, which advantages or disadvantages do investors take into consideration in choosing between these arbitration rules?

The advantages and disadvantages between opting for SCC, ICC or ad hoc arbitration proceedings (most commonly, under UNCITRAL Arbitration Rules) must always be assessed on a case-by-case basis.

Compared to ICSID arbitration, the main advantage of SCC, ICC or ad hoc UNCITRAL arbitration proceedings would be a less strict jurisdictional test, i.e., the SCC, ICC and UNCITRAL Arbitration Rules do not contain any additional jurisdictional test as the one

included in Article 25 of ICSID Convention (the so-called "double-barreled test"). This may in turn result in lighter jurisdictional scrutiny by non-ICSID arbitral tribunals, preventing the host state from raising additional or more complex jurisdictional objections. We understand that this difference is attenuating under the current investment arbitration practice.

On the contrary, the main disadvantage of SCC, ICC or ad hoc UNCITRAL arbitration proceedings lies with the fact that they are not delocalized arbitrations. Therefore, any non-ICSID award would be under judicial scrutiny, typically by the national courts of the seat of the arbitration, under annulment proceedings.

Arbitration costs and confidentiality may be other factors for selecting between ICSID or non-ICSID arbitration, depending on the different options available.

2.4 Is your country a member state of the ECT? If not, has your country signed, but never (or not yet) ratified the ECT? If so, has your country exempted the ECT's provisional application prior to its ratification?

Spain signed the ECT on December 17, 1994, which was ratified on December 11, 1997, and entered into force for Spain on April 16, 1998.

2.4.1 If your country is not a member state to the ECT or has recently withdrawn from the ECT: What are the reasons?

Spain is currently a contracting state to the ECT.

2.4.2 According to Article 26 ECT an investor can choose arbitration either under (i) the ICSID Convention, (ii) the ICSID's Additional Facility Rules, (iii) under the arbitration rules of the SCC or (iv) ad hoc arbitration under the UNCITRAL Arbitration Rules. Do investors in your jurisdiction have any preference? If so, for what reasons?

It is quite difficult to establish any preference among investors because the particularities of each case may determine the most suitable solution. However, there are certain aspects to be into account when it comes to choosing a proper arbitration fora.

Firstly, non-ICSID arbitrations have a more pronounced domestic influence. In this sense, any ICSID award, unlike non-ICSID awards, can only be subjected to an annulment proceeding before an ICSID ad hoc committee, not before the state courts of the seat of arbitration.

On the other hand, we must consider the jurisdictional requisites involved. An ICSID claimant must comply with not only the jurisdictional requirements set out in any relevant treaty but also the jurisdictional requirements of the ICSID Convention itself (so-called double-barreled test). This may give rise to less exhaustive jurisdictional analysis by the arbitral tribunal within a non-ICSID arbitration.

In addition, the confidentiality of the proceedings may be an issue. Whereas ICSID maintains a public list of pending and concluded cases on its website that allows any interested person to know not only the very existence of the dispute and the parties thereto but also the subject matter thereof and the development of the proceedings, the Arbitration Institute of the SCC, for instance, is traditionally known for its confidentiality.

As a matter of fact, the current ongoing investment cases against Spain are mostly brought before ICSID. We understand that this is influenced by the delocalized character of ICSID arbitration, so that any ICSID award will not be subject to review by national courts.

2.4.3 Has your country declared a reservation under Article 26(3)(b)(i) ECT? If the answer is in the negative: Are there cases in which an investor has sued your country in parallel before the state courts and in arbitration? Did the parallel proceedings result in conflicting decisions?

Spain has declared a reservation under Article 26(3)(i) ECT contained in the Annex ID to the ECT.

2.5 What are the key features in relation to the concept of "Investor" and "Investment" in your country's BITs? Is a "denial of benefits" clause usual in your country's BITs?

Ratione personae, when defining the concept of investor the vast majority of the BITs signed by Spain use the combination of nationality, domicile and usual place of residence as connecting factors in the case of natural persons, with a higher preference for nationality. As regards juridical persons, the prevailing criterion is the place of incorporation. Additionally, the consideration of local companies incorporated under the host state's law as investors is exclusively recognized in 5 BITs out of 74 (Spain-Costa Rica, Spain-Bolivia, Spain-Ucrania, Spain-Mexico, Spain-Panama and Spain-Ukraine).

Ratione materiae, practically all the Spain BITs provide for a broad and non-exhaustive definition according to which every kind of assets owned by a contracting party in the host state's territory are to be considered an investment, in line with international investment arbitration practice.

With respect to the presence of denial of benefits clauses, they are widely included in Spain BITs.

2.6 In light of the EU position on this matter: Is your country planning on withdrawing from the BITs signed in the past? If this is the case: What are the motives for doing so?

We do not have knowledge of Spain withdrawing from any of the BITs signed in the past.

2.7 In the context of the intra-EU treaties conflict: How is this issue affecting the commercial relationships between your State and others when it comes to choosing an effective dispute resolution mechanism?

In some cases, the EC has alleged that the provisions of the BITs and the ECT are not applicable to intra-EU disputes, i.e. disputes between an EU member state and a national of another EU member state, although this argument has been constantly rejected in several arbitrations up to date (in particular, *Electrabel v. Hungary* and *AES v. Hungary* ICSID cases or *Eureko v. Slovakia* UNCITRAL case). In addition, the state aid EU law may conflate with decisions contained in awards rendered by international arbitral tribunals.

As a result, in the context of an intra-EU dispute, investors might tend to fix the seat of arbitration outside the EU in order to reduce the level of involvement of the EU, not only by the EC but also of national EU states courts, in the arbitration proceedings. This result can be achieved either by initiating ICSID arbitration, where no choice of seat of arbitration is necessary, or non-ICSID arbitration, where the agreement of the parties must be reached.

2.7.1 What approach would you take when seeking enforcement of a favorable award resulting from an intra-EU dispute? Would you counsel to seek enforcement in the courts of an EU member state or outside the EU? Have your national courts ever ruled on this issue?

In principle, an adequate solution might be seeking enforcement outside the EU, wherever the host state may have attachable assets (e.g. in the United States of American, as in *Micula v. Romania* ICSID case), in order to minimize confrontation between EU law and investment treaty law at the national courts' level.

As far as Spanish courts are concerned, they have never ruled in enforcement proceedings concerning an award rendered in an intra-EU controversy.

2.8 Does your country have a history of voluntary compliance with adverse investment treaty awards?

At the time of writing, the only investment case in which an award has been rendered against Spain is *Emilio Maffezzini v. Spain*. In that case, an ICSID arbitral tribunal found Spain liable for breaches of Article 3(1) (non-impairment of investments) and 4(1) (fair and equitable treatment) of the Argentina-Spain BIT of 1991.

Spain was ordered to pay ESP 57,641,265.28 plus interest to the claimant investor. Payment was made voluntarily by Spain some months later: this was done by forwarding the award to SODIGA, a venture capital company founded by the Regional Government of Galicia, whose actions were attributed to the state under international law as breaches of the BIT. SODIGA included the amount of the award in its budget and made payment to the Argentinean investor.

2.9 To what extent have local courts been supportive of investment treaty arbitration?

As of today, Spanish national courts have hardly encountered with situations arising out of investment-related proceedings although there are some experiences worth remarking as Spain is increasingly acquiring experience in investment arbitration.

In this aspect, in 2009 the claimant in the *Sempra Energy International v. Argentina* ICSID case attempted to obtained provisional measures to secure payment of a $128 million award plus interest in its favor in several jurisdictions while a request for the annulment of that award (submitted by Argentina) was pending before an ad hoc committee. On July 31, 2009 the Court of First No. 83 of Madrid denied jurisdiction to hear the claimant's request on provisional measures. An appeal against this decision was ultimately dismissed by the Provincial Court of Madrid on July 22, 2010, after the award had been set aside in its entirety by a decision of the ad hoc committee.

In another case, on March 6, 2013 the Court of First Instance No. 101 of Madrid granted leave for enforcement against the Republic of Chile for an award rendered in *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* ICSID case without requesting the submission of any previous *exequatur* for the award, as provided for by Article 54(1) of the ICSID Convention. The Court of First Instance finally ordered the seizure of Chilean assets in Spain worth more than 3 million euros.

3. ARBITRATING DISPUTES IN CONNECTION WITH RENEWABLE ENERGIES (WIND, SOLAR, WATER)

3.1 Legal Framework

3.1.1 What is the legal framework for renewable energies in your jurisdiction? Can investors take advantage of certain incentives such e.g. premium tariffs, very low taxes on power generators' revenues, subsidies for renewable energy producers, etc.?

From a legal standpoint, the electricity market in Spain has been traditionally divided into two regimes: the "Special Regime", firstly categorized by the 1994 Electric Power Act, and the Ordinary Regime. The Special Regime is chiefly linked to facilities using renewable sources of energy. The Ordinary Regime, on the contrary, to conventional and non-renewable generation facilities.

In order to increase renewable installed capacity, Spain put in place from 1997 to 2013 a feed-in remuneration scheme for facilities pertaining to the Special Regime, whereby producers could collect either (i) a regulated tariff irrespective of pool electricity price fluctuations (tariff option) or (ii) the pool electricity price plus a premium (premium option), in exchange for the net amount of electric power produced during the entire lifespan of the renewable facilities.

This legal framework was first envisaged by 1997 Electric Power Act and developed subsequently by Royal Decree 2818/1998, Royal Decree 436/2004 and Royal Decree 661/2007, consolidating certain benefits vested in renewable producers and investors, such as the possibility to produce electric energy by choosing annually between the tariff option and the premium option, the priority access to transmission and distribution grid, the energy priority dispatch, etc.

In 2010, Spain introduced some restrictions to the feed-in remuneration scheme, mainly by limiting the total number of remunerable operating hours per year. In 2012, Spain introduced a 7% levy on any power generation.

In 2013, Spain gradually dismantled the feed-in remuneration scheme until it was completely replaced with a new one embedded in the 2013 New Electric Power Act and implemented by Royal Decree 413/2014 and Ministerial Order IET/1045/2014, whereby producers are entitled to receive a specific remuneration which caps the return on investment at a certain rate and is dependent on a large list of remuneration parameters

subject to changes every 3 and 6 years. The main two remuneration parameters considered are: (i) remuneration to investment –aimed at offsetting the facilities' investment costs- and (ii) remuneration to operation –aimed at offsetting the facilities' operating costs-, eligible only for a pre-determined regulatory lifespan of the renewable facilities.

3.1.2 Has such legal framework been amended recently? If so, has it been ameliorated for investors or deteriorated?

With effect from 2013, Spain has changed the basis of its national renewable regulatory framework. As a result, renewable producers are granted a remuneration substantially lower and more unsteady in upcoming years compared to that of the previous feed-in remuneration scheme.

3.1.3 May different legal frameworks applicable to renewable energy facilities coexist within your jurisdiction? What is the criterion to benefit from one or other?

Spain has provided for certain specialties applicable to each renewable technology (PV, CSP, wind, etc.) within the Special Regime regulation but nowadays it is not possible for renewable producers to benefit from different remuneration regimes, because the 2013 specific remuneration scheme has completely superseded the former feed-in scheme. In this sense, since the moment of its enactment the new regime has become binding on all existing facilities.

For new facilities, from 2015 on (as there has been a moratorium from January 2012 until late 2015), the remuneration regime is defined by specific tender procedures conducted by means of auctions opened by the Government from time to time. As of today, there has been only one tender procedure for a total of 700MW between wind (500MW) and biomass (200MW) facilities.

3.1.4 If your jurisdiction grants an incentive scheme for renewable energies: Has your country notified it to the European Commission under Article 108(3) TFEU so that it can be assessed under the State aid legislation?

According to public information available, in late 2014 Spain might have notified the specific remuneration scheme in force to the EC under Article 108(3) TFEU.

3.1.5 If the answer is in the positive: Has the European Commission issued any decision on your current or former national incentive scheme? On what grounds was its ruling based?

Allegedly, EC could have started a preliminary investigation into the current renewable incentive scheme in Spain, at least for 2013-onwards. For the moment, no formal

investigation proceedings has been initiated, therefore, EC has not still issued a decision on the issue.

3.2 Law-making process

3.2.1 By what means may the renewable sector exert an influence on the law-making process in your country? Does the renewable sector hold a fluent relation with the national energy authorities of your country? What about foreign investors?

Renewable producers in Spain are grouped in business associations in charge of defending the common interests and holding a dialogue with the national authorities on regulatory issues. There exist a sectorial (APPA - Renewable Energy Producers Association) and several technology-related associations (e.g. Protermosolar – Association for thermosolar producers; AEE – Wind Business Association; Anpier – Photovoltaic Producers National Association; etc.), having a say in the public hearing proceedings before the Electricity Advisory Council, a body dependent on the Spanish National Markets and Competition Commission that provides suggestions on pieces of legislation subject to enactment by the government.

3.2.2 Has any renewable subsector recently or in the past reached any sort of agreement(s) with your State on a particular issue concerning the applicable legal framework?

In the last few years and prior to the dismantling of the feed-in remuneration scheme put in place from 1997 to 2013, there have been certain approaches between the renewable sector and the Spanish government in order to establish assurances and understandings in relation to the stability and remuneration of the applicable legal framework. These agreements has taken place in the form of *bis-à-bis* obligations with several renewable sectors or investors and in the form of pieces of administrative regulation, such as Royal Decree 1614/2010 for wind and concentrated solar power technologies. From 2013 onwards, the lack of transparency regarding the renewable sector law-making process in Spain has unluckily increased.

3.2.3 If the answer is affirmative: What are the agreed-upon terms of such agreement(s)? How is/are that/those agreement(s) regarded from a legal perspective (an administrative act, a bilateral contract, etc.)?

The agreed-upon terms have revolved around the guarantees granted by the Spanish government relative to the applicable legal framework to existing producers and investors and the specific sacrifices accepted by the renewable industry in return. The legal nature of those agreements may vary from administrative acts to bilateral contracts or declarations depending on the obligations arising from them and the parties involved.

3.3 Development objectives

3.3.1 What policy instruments has your country implemented to meet the EU's binding 2020 renewable energy targets in the last few years (renewable action plans, incentive programs to increase installed capacity, etc.)? Will your country presumably comply with these objectives going forward?

Public policies incentivizing electricity production from renewable sources has been constant in Spain since at least 1981. They were considered state policy and followed by governments of all political inclinations in a country highly dependent upon imports of fossil fuels to meet its energy demand.

Undoubtedly, Spain found the perfect formula when it passed Royal Decree 436/2004, shortly after enhanced through the enactment of Royal Decree 661/2007, under which the vast majority of national and foreign producers and investors developed their projects in the context of a feed-in remuneration scheme. As a consequence, Spain took over the world's leadership in terms of wind installed capacity and witnessed remarkable proliferation of underdeveloped renewable technologies at the time, such as concentrated solar power.

In this context, Spain has approved renowned National Renewable Energy Plans (NREP) through the Institute for Diversification and Saving of Energy (IDAE) in the last few decades (the NREP 2000, 2005-2010 and 2011-2020). The main goal of these NREPs have consisted in the fulfillment of: (i) the 12% of contribution of renewable sources to Spanish gross consumption for 2010 contained in the 1997 Electric Power Action and (ii) EU's binding 2020 renewable energy targets (20% cut in greenhouse gas emissions from 1990 levels, 20% of energy from renewables and 20% improvement in energy efficiency), among other priorities.

As a result of the changes introduced in the applicable legal framework from 2010 to 2013 and the domestic and international litigation initiated by producers and investors against Spain, the issue whether our country will presumably comply with EU's binding 2020 renewable energy targets or not has been called into question. It is extremely difficult to predict the final outcome now but several institutions, such as the European Environment Agency Report or the 2020 RES scenarios for Europe, have already echoed of a worrying standstill in renewable capacity growth. For its part, the European Commission has fixed the renewable energy share of Spain in 2014 at a 15.8% in its last report, pointing out that a stable framework will be needed to keep up with 2020 objectives.

3.3.2 What kind of initiatives have been taken by your national energy authorities in order to foster the proliferation of renewable energy within your country? In contrast, what kind of restrictions have been put in place to restrict the installed capacity within your country's borders?

Spain has undertaken in the last decades a massive campaign in order to foster renewable energy within its borders and seize its natural resources. The promotion has taken place both in a national and a worldwide context endorsed by the Spanish Ministry of Industry and Energy, IDAE (through NERPS, road-shows, presentations to investors, etc.), ICO (National Credit Institution) and political parties' representations. All these actions gave rise to the definition of a regulatory framework from 1997 to 2013 that provided renewable producers and investors with a stable feed-in remuneration scheme and the consolidation of certain prerogatives vested in them.

In April 2009, Spain passed Royal Decree-Law 6/2009 and introduced the so-called "Remuneration Pre-allocation Register". This Register permitted to monitor the amount of energy capacity under development/construction for the different renewable technologies and to coordinate such amount with the renewable objectives foreseen in the NERP 2005-2010. The second objective was to guarantee the applicability of the feed-in remuneration scheme of Royal Decree 661/2007 to those renewable projects under development/construction that complied with the substantial requirements set out in Royal Decree-Law 6/2009 and applied for pre-registration within a limited period of time.

Later on, in January 2012 Spain enacted Royal Decree-Law 1/2012, whereby a moratorium to the installed capacity was imposed on new renewable producers and the pre-allocation procedures of Royal Decree-Law 6/2009 were suppressed. Recently last year, our country has raised this moratorium by calling a public tender offer to have new renewable capacity installed.

3.4 Grandfathering policy

3.4.1 Is there any grandfathering regulation or clause included in your jurisdiction's legal framework for renewable energies that prevents existing investors from any retroactive changes in the regulatory paradigm in the future?

The specific remuneration scheme in place in Spain will be subject to regulatory changes each semi-regulatory period of 3 years and each regulatory period of 6 years. Thus, the rate of return granted to producers and investors may vary upwards or downwards applying retroactively to existing renewable facilities. These main characters of the current regulatory paradigm might be badly aligned with a grandfathering policy in the future.

3.4.2 If a regulation or clause of this sort exists: How does national case law construe it? Is it applicable to every regulatory aspect or exclusively to particular ones?

In the wave of the hefty domestic litigation concerning latest regulatory changes, the Spanish Supreme Court has repeatedly settled that national producers do not have an enduring right to an unaltered remuneration regime because no legal obstacle exist for the government, in the exercise of its regulatory authority, to modify the remuneration scheme provided that a reasonable profitability –established unilaterally by the state- is preserved (e.g. Spanish Supreme Court Judgments of December 3, 2009 and December 9, 2009). Therefore, no grandfathering policy has been respected from the national case law's perspective as consolidated situations in the past have been overlooked.

3.4.3 Has your country ever undergone a profound change in the legal framework for renewable energies, recently or in the past?

As mentioned before, Spain has implemented a profound change of the renewable regulatory paradigm in the last years.

3.4.4 If the answer is positive: What were the alleged reasons by the national authorities leading to those changes? Were acquired rights respected by the new regulatory legislation? What kind of transitional rules were enacted?

The principal reason given by national authorities to support its regulatory changes resides in defraying the public expenditure and, in particular, tackling the enormous tariff deficit generated within the electricity system over the years.

The origin of tariff deficit has to do with the fact that the generation of electricity is just one part of the electricity system. Other segments include the transmission of electricity along a national network, the distribution of electricity in regional and municipal networks, and the sale of electricity to households and small businesses. Most of these activities remain highly regulated, with tariffs that, by law, should cover the costs of the underlying operations. While Spanish legislation requires the government to set retail consumer tariffs that recover regulated costs including the costs of generation, Spain has consistently set retail consumer tariffs that recover less than the total costs. The result is an annual tariff deficit, which has grown over time.

3.5 Dispute resolution

3.5.1 Are there any pending claims before either the state courts or arbitral tribunals for changes in the legal framework regarding investor incentives in the renewable energy sector?

At the time of writing, the number of claims filed and pending before the Spanish Supreme Court by national renewable producers and associations seeking to set aside the regulatory reform implemented by Royal Decree 413/2014 and Ministerial Order IET/1045/2014 totals roughly 350.

On an international level, dozens of foreign investors have started arbitration proceedings under the ECT against Spain for the renewable incentive cutbacks. As of today, at least 23 investment cases have been filed before ICSID, 4 before the Arbitration Institute of the SCC and 1 under UNCITRAL Rules of Arbitration, which means that Spain is nowadays one the world's most-sued states concerning investment disputes.

3.5.2 Are there any final decisions of your state courts approving/disapproving of changes in the legal framework regarding investor incentives in the renewable energy sector?

Spanish state courts have endorsed with their judgments the changes introduced in the renewable regulatory paradigm so far on grounds already commented.

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