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International Arbitration in the Renewable Field: Recent Developments in Spain

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I. Abstract

Spain became a leader in the promotion of renewable energies from 1998 to 2012. The remarkable increase in the introduction of generation units producing with renewable energies (mainly solar and wind energies) was based on a generous feed-in-tariff system, together with a premium on top of the electricity price in the market. Those subsidies to renewable energies were paid by electricity consumers and they amounted to a big quantity, almost equal to the distribution costs. In the Spanish electricity system prices are collected by suppliers who, in turn, must pay the costs of the system (production, transport, distribution and other regulatory costs, such as the costs of promoting renewable energies). The system experienced a deficit, since prices paid by consumers were not enough to cover all costs. The deficit aggravated with the financial and economic crisis which started in 2008. The reaction of the Government was to progressively reduce the amount of subsidies to renewable energies. This led to legal disputes. Whereas investors did not succeed at national courts, a number of international arbitration cases have condemned Spain.

II. Introduction

The 1997 Electricity Sector Act liberalised the Spanish electricity sector and laid down the grounds for the creation of a favourable legal framework for renewable energies. From 2004 onwards, Spain was a leader in the promotion of renewable energies, which was based on a generous system of feed-in-tariffs together with premiums awarded to electricity generated by means of renewable energies, mainly wind and solar.[1] Consumers paid those subsidies, which represented one-third of the total costs of electricity supply. The emergence of the

[1] L Agosti and J Padilla, 'Promoción de las energías renovables: La experiencia de España' in B Mosdelle, J Padilla and R Schmalensee (eds), *Electricidad Verde* (Marcial Pons, 2010) 517.

financial and economic crisis in 2007 and the reduced energy consumption following said crisis led to a change in energy policy. From 2008 to 2014, the focus was put on the need to reduce electricity costs. Governmental action was directed by the progressive lowering of energy demand and the need to manage the increasing electricity economic deficit (ie the gap between income and costs within the electricity sector). The new policy tackled this problem by means of reducing the amount of remuneration of network activities (it is the government, which fixes the amount of remuneration that distribution and transport companies get annually) as well as the amount of subsidies renewable energies receive. This reduction of subsidies to renewable energies provoked many legal disputes at national and international levels, which are analysed in this chapter.

After a brief description of the importance of renewable energies in Spain (section III), the paper turns into the kind of support renewable energies had from 1998 to 2012 (section IV). In order to properly understand why and how the support to renewable energies started to decrease, section V is devoted to the so called 'electricity tariff deficit', as an introduction to section VI, where the progressive reduction of the support scheme, as from 2008, is analysed. In July 2013 a further change of the regulatory framework took place, as a prelude of the new Electricity Sector Act 2103 (December), which replaced the 1997 Electricity Sector Act. This is explained in section VII. The reduction of the amount of subsidies led to a number of legal disputes, at both national and international levels, addressed in section VIII. Within a European context, the problems experienced in Spain by investors in renewable energies pushed the introduction of a new provision in the new Renewables Directive about stable support mechanisms (section IX). A concluding evaluation of the legal disputes is contained in section X.

III. Renewable Energy Sources

From 2004 to 2012 there was in Spain a remarkable increase of the use and production of renewable energies, by which Spain became a worldwide leader. The percentage of the share of renewable energies within the overall national energy production in 2018 was 38.5 per cent (hydroelectricity, wind, solar, geothermal, biogas, biomass, biofuels, marine waves and residues). Sources of electricity production in 2018 show the relevance of renewable energies: 13.1 per cent hydroelectricity, 19 per cent wind, 3 per cent photovoltaic, 1.7 per cent solar thermal, and 1.7 per cent the rest of renewable sources.[2] Biofuels are another renewable source

[2] See 'Las Energías Renovables En El Sistema Eléctrico Español 2018, Red Eléctrica De España', available at www.ree.es/es/datos/publicaciones/informe-de-energias-renovables/informe-2018.

of energy, with strong relevance to transport.[3] The promotion of offshore wind energy is very slow, due to the fact that although there are important wind areas, the continental shelf of the Iberian Peninsula and that of the islands is very narrow and is not convenient for the location of wind farms. Some demonstration projects have been located by the Catalan and Canary Islands Governments. In accordance with the 2009 Renewable Directive of the European Union,[4] the Spanish Government approved the Action Plan for Renewable Energies 2011–20 (*Plan de Energías Renovables 2011–2020*).[5] The target for Spain was to have a share of 20 per cent of renewable energies in final energy consumption by 2020, and 10 per cent in transport. Due to the fact that in 2011 renewable energies contributed 11.6 per cent of the final primary energy demand (about half of the 2020 target), the target was put at risk by the decision of the Government to stop supporting new renewable installations in 2012.[6]

IV. National Support to Renewable Energies

In implementing the 2009 RES Directive, Spain chose a system which combined priority dispatch and priority connection and access to the grid.[7] Additionally, electricity legislation included a subsidy scheme in the form of both a feed-in-tariff system and a premium.[8]

The Electricity Sector Act of 1997[9] marked a turning point in the promotion of renewable energies for electricity generation purposes. It dealt with the so-called 'special generating regime',[10] when carried out in installations where the installed capacity does not exceed 50 MW, including cogeneration (provided they involve high-energy performance) or renewable energies.

Producers under the special regime benefited from public subsidies, in two ways: a feed-in tariff; and a premium.[11] A particular feed-in tariff scheme was envisaged for producers subject to the special regime; remuneration was also guaranteed with an additional premium over and above the prices paid for electricity generated from ordinary sources. These subsidies

[3] See I del Guayo, 'Biofuels: EU Law and Policy' in DN Zillman, C Redgwell, YO Omorogbe, and LK Barrera-Hernández (eds), *Beyond the Carbon Economy: Energy Law in Transition* (Oxford University Press, 2008) 265.
[4] 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) [hereinafter 2009 Renewables or RES Directive].
[5] Available at www.idae.es/tecnologias/energias-renovables/plan-de-energias-renovables-2011-2020.
[6] I González Ríos, *Régimen Jurídico-Administrativo de las Energías Renovables y de la Eficiencia Energética* (Aranzadi, 2011).
[7] Art 26 of the 2013 ESA.
[8] LM Cazorla, 'El régimen tarifario de las energías renovables' in F Becker, LM Cazorla and J Martínez-Simancas (eds), *Tratado de Energías Renovables* (Aranzadi, 2010) 119.
[9] Act no 54, of the 27th November, 1997, of the Electricity Sector (BOE no 285 of the 28 November 1997).
[10] Arts 27–31 of the 1997 ESA as modified several times.
[11] Art 25 of the 1997 ESA.

were considered to be a diversification and security cost of the electricity system and financed by electricity consumers.

The Government managed to lay down a stable and attractive framework for companies investing in renewable energies by means of a Royal Decree passed in 2004,[12] which not only linked the premium to the average price of kWh in the pool, but also fixed high percentages for premiums. In the light of this Royal Decree and a set of other norms, much renewable generation was installed, particularly installations working with wind and solar photovoltaic.

V. The Electricity Tariff Deficit (1998–2013)***

In order to understand the reduction of subsidies in favour of renewable energies between 2010 and 2016, there is the need to explain what the electricity deficit is and how it was addressed by the 2013 Electricity Sector Act (2013 ESA[13]).

A key element addressed by the reform of the 2013 ESA was the accumulation between 2002 and 2012 of annual imbalances between revenues and costs of the electricity system and consequently the emergence of a structural deficit. The bad financial situation of the deficit could endanger the proper functioning of transport and distribution activities.

Although the Spanish electricity sector was liberalised in 1997, there are regulated tariffs paid by domestic and small commercial customers. In fixing tariffs, government has not been cost-oriented and kept electricity prices artificially low, the result being that there was a cumulative deficit as a result of the difference between regulated tariffs and the cost that should be paid by a customer in the liberalised market. In other words, electricity producers were forced to sell electricity at regulated prices which did not cover costs. The economic deficit was, therefore, the cumulative difference between what it costs companies to generate electricity and what they are allowed to charge for it. The deficit reached overwhelming levels. Among the costs of the electricity system not covered by regulated prices were subsidies to renewable energies. Consequently, Spanish governments from 2008 onwards reduced subsidies to existing renewable installations and suppressed subsidies to new installations.

The deficit was caused by the tariff fixed by the Government, and paid by around 16 million small consumers, and which was not high enough to cover the actual costs of electricity generation and supply. This imbalance reached the point where the accumulated debt of the electricity system was EUR 26 billion. The structural deficit reached EUR 10 billion annually

[12] RD No 436 of 12 March 2004.

***** The bulk part of the text of this section is taken from I del Guayo, 'Energy Law in Spain' in M Roggenkamp, C Redgwell, A Ronne and I del Guayo, *Energy Law in Europe*, 3rd edn (Oxford University Press, 2016) 973.

[13] Act no 24, of the 26th December 2013, of the Electricity Sector (BOE no 310, of the 27th December 2017).

and not correcting this imbalance would have introduced a risk of bankruptcy in the electricity system.

From 2008 to 2013 electricity regulation was dominated by legislative and regulatory measures directed to address and mitigate the pernicious consequences of the increasing electricity economic deficit, accelerated as from July 2007, by a lowering of energy demand due to the economic crisis. In the Spanish electricity system prices are collected by suppliers who, in turn, must pay the costs of the system (production, transport, distribution and other regulatory costs, such as the costs of promoting renewable energies). The system experienced a deficit, since prices paid by consumers were not enough to cover all costs. The deficit aggravated with the financial and economic crisis which started in 2008, due to a lower demand which, in turn, lowered the total quantity collected to cover all costs. Several norms were passed by Parliament to tackle this thorny problem, and in December 2013 a whole new Electricity Act was passed by Parliament to replace the existing one passed in 1997. The debate was focused on which costs should be borne by the electricity tariff: electricity companies associated in UNESA (the association of electricity companies) were of the opinion that there were many policy costs borne by the tariff (such as the costs of promoting renewable energies) and the tariff was not high enough to cover all them. The options were either to increase the tariff up to unaffordable levels for most small consumers or to lower the number and/or quantity of costs to be included in the tariff.

In accordance with the 2013 Electricity Act, the deficit was to be covered by electricity companies, the renewable energies sector and by the state budget (one-third of the total amount, each). First, the Government reduced the remuneration of regulated electricity companies (transport and distribution). Second, there was a substantial reduction of the amount of subsidies in favour of the renewable sector. Third, some costs borne by the electricity tariff (such as the extra costs of supplying electricity to the extra-peninsular systems) were to be financed by the state budget.

VI. The Progressive Reduction of the Support Scheme in the Period 2008–2013

Spanish electricity policy from 2008 to 2013 was dominated by legislative and regulatory measures directed towards fighting and mitigating the pernicious consequences of an increasing electricity deficit, accelerated as from the entry into force of Royal Decree No 661/2007 of 25 May (Royal Decree regulating the special system for the production of electricity). The Spanish economic crisis, encompassing a recession, a crisis in the financial system and its institutions, and, as a result, a drastic reduction of energy demand, aggravated the electricity deficit. Tariffs (or prices) paid by end consumers must be enough to cover all

the costs of the electricity system, such as transport and distribution costs. Tariffs became insufficient to cover all costs. Subsidies for renewable energies were among the costs of the electricity system currently not covered by tariffs.

All those circumstances led the Government to pass a successive number of legislative measures directed, among other objectives, towards reducing the subsidies paid to existing installations generating electricity from renewable sources and suppressing subsidies to new installations. Main decisions adopted between 2010 and 2013 were the following:

(a) Royal Decree-law[14] (hereafter RDL) No 14 of 23 December 2010 limited the number of hours produced by solar photovoltaic installations to be subsidized yearly; a Registry for the Allocation of Retribution was created, which meant that only renewable installations registered in said Registry will get subsidies, and the Government toughened the conditions to have access to the Registry.

(b) RDL No 1 of 27 January 2012 suspended the procedures for the allocation of retribution, and suppressed economic incentives for new installations of electricity production from cogeneration, renewable energy sources (wind, solar, and other renewable technologies), and waste. In practice, under the scope of the special regime, this measure meant that the construction of new installations came to a stop. The measure did not affect existing projects pre-approved by the government, ie those installations already registered on the Registry for the Allocation of Retribution. The decision came as a surprise to the renewable energies sector.

(c) Act No 15 of 27 December 2012 introduced a new tax on electricity generation, affecting also installations producing electricity with renewable energy sources.

(d) Act No 17 of 27 December 2012 established a number of budget contributions directed to finance costs of the electricity system, linked to the promotion of renewable energy sources in a quantity equivalent to the yearly tax collection from Act No 15 of 27 December 2012, as well as 90 per cent of income collected as a result of the tender of emissions rights of greenhouse effect gases.

(e) RDL No 29 of 28 December 2012 established that subsidies to facilities of the special generation regimen will not be applicable if, as a result of an inspection, there was evidence that the construction of a renewables installation provisionally registered within the Registry for the Allocation of Remuneration is not fully completed at the time of the expiration

[14] RDLs are approved by the Government, but enjoy the same rank as a parliamentary act. According to Art 86 of the Spanish Constitution, the Government is allowed to promulgate an RDL only in cases of urgent and extraordinary necessity, subject to retrospective Parliamentary scrutiny. RDLs cannot affect the basic institutions of the state, the rights and freedoms of its citizens, the distribution of authority between the state and the autonomous communities, or the electoral law.

of the deadline to definitively register said installation within the Registry; for these purposes, it will be considered that the installation is fully complete if it has all the elements, equipment, and infrastructure needed for producing energy and feeding it into the electricity system, and the characteristics of which correspond to the approved implementation project; this measure was addressed to fight some fraud which had been identified; in summary, there was a stricter control on the rules applying to the construction of the installation and the moment at which the subsidy starts being paid.

(f) Finally, RDL No 9 of 9 July 2013 introduced a new remuneration system for renewable energies, linked to investment and not to production; this new system was later included within the 2013 ESA, passed at the end of 2013.[15] The reform of July 2013 had a clear retroactive effect.

VII. The New Support Scheme of the 2013 Electricity Sector Act

A few months after the RDL No 9 of 9 July 2013, the 2013 ESA entered into force. It incorporated the reforms anticipated by RDL No 9 of 9 July 2013. The distinction between two systems of generation (ordinary and special) is terminated, and the 2013 ESA provides for a single legal framework for electricity generation. By unifying the pre-existing two systems, the 2013 ESA intended to make financial support to renewable installations an exceptional situation. The 2013 ESA states that, as an exception, the Government may establish a specific compensation arrangement to encourage production from renewable energy sources, cogeneration of high efficiency, and waste, if there is an obligation of energy objectives derived from policies or other standards of EU law or where its introduction involves a reduction of energy cost and external energy dependency.[16] The support, additional to the remuneration obtained from the sale of energy at market prices, will be composed of two terms: (a) term per unit of installed power, covering, as appropriate, the investment costs of a standard (or type) installation, of those costs which are not recovered from the sale of energy; and (b) a term linked to operation costs, covering, as appropriate, the difference between operating costs and revenues from participation in the market of production of such standard installation.

For the calculation of the specific remuneration, the following criteria shall be considered, for a standard installation, throughout their regulatory useful life, and in reference to the activity carried out by an efficient and well-managed company:

[15] I del Guayo, 'Seguridad jurídica y cambios regulatorios (a propósito del Real Decreto-ley núm. 1/2012, de 27 de enero, de suspensión de los procedimientos de preasignación de retribución y de supresión de las primas para nuevas instalaciones de producción de energía eléctrica mediante fuentes de energía renovables)' (2012) 156 *Revista Española de Derecho Administrativo* 217.
[16] Art 14(7) of the 2013 ESA.

(a) the standard income from the sale of the generated energy at market prices;

(b) the standard operational costs; and

(c) the standard value of the initial investment.

This means that under no circumstances shall costs or investments resulting from particular rules or administrative acts not applied throughout the Spanish territory be taken into account. This provision is intended to exclude from the calculation of the remuneration those costs which are the result of exigencies imposed upon generating companies by the autonomous communities. It is assumed that the companies operating in the territory of those autonomous communities will have to bear the extra cost. By means of this provision the central Government is indirectly fighting against those autonomous communities which, using their legitimate competences, are subjecting the generation of electricity (or its transport and/or distribution) to a particular territorial tax or to any other regulatory cost which does not exist in other autonomous communities. In the same way, when fixing the remuneration for renewable energies, the Government must only take into account those costs and investments directly linked to the activity of electricity production.

The fixed remuneration must not exceed the minimum level required to cover the costs of allowing the renewable installation to compete in the market with other generation technologies, while maintaining a reasonable return by reference to the standard installation, applicable in each case.

The 2013 ESA then goes into further detail and states the following: the reasonable profitability should be, before taxes, around the average yield (ie monetary return) within the last 10 years of the state bonds, to which an appropriate differential (to be determined by government) will be applied. Exceptionally, said remuneration may add an incentive to investment and execution within a given time, whenever the installation involves a significant reduction of costs in the non-peninsular territories (the Canary and Balearic Islands and Ceuta and Melilla in Africa; for these areas specific provisions may still be passed in favour of renewable installations).

By means of Royal Decree No 413 of 6 June 2014, and Ministerial Order No IET/1045 of 16 June 2014, the Spanish Government passed detailed rules developing the general framework for the promotion of renewables of the 2013 ESA. In particular, the remarkable long 2014 Ministerial Order fixes the standard costs of types of installations, and said standards are used by the Government to fix the amount each of the existing installations should get, once the actual costs of the installations are compared with the standard costs of the Ministerial Order. These norms are a clear example of how the Spanish Government´s current electricity

policy is mainly directed to reducing supply costs borne by the regulated tariff, so that the paramount electricity deficit can be ended. That means, among other things, eliminating the cost of promoting the use of renewable energies. It seems clear that in the future Spain will be limiting aid to renewable energies to a minimum, it will extract said cost from the calculation of tariffs, and, when necessary, aid will be covered by the state budget.

VIII. National and International Legal Disputes over the Modification of National Support

Constant changes of the regulatory framework for renewable energies and in particular of subsidies created a remarkable conflict atmosphere between investors and the Government. Under the 1998–2010 support framework, huge quantities were invested in photovoltaic plants, as well as in other renewable plants, not only by Spanish companies and individuals, but also by foreign investors. Since changes were included within Royal Decrees passed by the Government, incumbents appealed to the Supreme Court against those governmental norms passed to develop the above referred parliamentary Acts, as well as other new governmental norms related to subsidies for renewable energies. Applicants' main arguments were the retroactive character of the norms which had been prohibited by the Spanish Constitution, that they were violating the legal principle of protecting legitimate expectations, and that, in summary, they were in opposition to the constitutional principle of legal or juridical certainty. It was also argued that the decrease of subsidies was against the legal principle of reasonable remuneration contained in the 2013 ESA.

Around 40 decisions of the Spanish Supreme Court have constantly repeated that there is not a retroactive application of the new scheme (only a *lato sensu* retroactivity). The Supreme Court rejected the applicants' arguments: one of the last Decisions on the issue, which summarises the content of previous ones, is of 18 March 2015.[17] In particular, the Court refutes the retroactive character of the changes, since they are simple regulatory changes for future generation. It denies a violation of the legal provision of reasonable remuneration by the 1997 ESA, and finds no arguments to support the opinion that legitimate expectations are being frustrated, since it concerns a regulated sector, and companies only suffer the consequences of regulatory risks. There is not a violation neither of the legal provision of reasonable remuneration of the 1997 ESA, nor of the core principle of legal certainty. An underlying idea of all those decisions is that the Government's conducting of the issue is bad, leading to poor

[17] ECLI: ES:TS:2015:965.

regulation, but bad regulation is not necessarily an illegal regulation (in the sense of a violation of the Rule of Law).

In addition, several complaints were submitted against the Kingdom of Spain in international arbitration institutions, since some foreign investors were of the opinion that by reducing subsidies to renewable energies, Spain had not fulfilled its international obligations (both bilateral investment agreements and the Energy Charter Treaty (ECT)). Under the ECT, investors are given the option to submit their disputes several international institutions.

There were two initial decisions issued by the Institute of Arbitration of the Stockholm Chamber of Commerce, favourable to the position of Spain. The first one was issued on 21 January 2016. In *Charanne BV and Construction Investments v Spain*,[18] the Institute of Arbitration of the Stockholm Chamber of Commerce found that the provisions of the ECT on the protection of investment have not been trespassed by Spain. This decision did only analyse the reforms which took place in 2010. Although remuneration has been seriously affected, there no expropriation. Nor is there violation of the principle of regulatory stability. Applicants did not give evidence of legitimate expectations having been created. There is also no retroactivity.[19] With the Decision taken on *Isolux Infrastructure Netherlands, BV v Spain* of 16 July 2016,[20] the Institute also issued a favorable Decision towards Spain.

By contrast, in means of a third Decision of the Institute of Arbitration of the Stockholm Chamber of Commerce on 15 February 2018 (*Novenergia*[21]), Spain was found guilty of having violated Article 10(1) of the ECT.

A number of Decisions have been issued by the International Centre for the Settlement of Investment Disputes (ICSID), whereby Spain has lost several international arbitration proceedings over cuts to renewable energy subsidies. As opposed to the Stockholm decisions, which dealt with solar PV energy and changes made in 2010 and 2011, the ICSID case deals with thermal-solar and the radical changes of 2013.

The award of 4 May 2017 was in favour of the British company Eiser Infrastructure Limited and its subsidiary, Energia Solar Luxembourg (*Eiser Infrastructure Limited and Energia Solar Luxembourg S.À .R.I v Kingdom of Spain*)

[18] SCC Case no 062/2012.
[19] See A De Luca, 'Lodo favorevole alla Spagna a conclusion del primo degli investiment arbitrations sorti da impianti fotovoltaici: un precedente rilevante?' (2016) *Diritto del Commercio Internazionale* 250; and I del Guayo, 'La Carta Internacional de la Energía en 2015 y las energías renovables. A propósito del Laudo de 21 de enero de 2016' (2016) 47 *Cuadernos de Energía* 50.
[20] SCC Case No 153/2013.
[21] SCC Case No 063/2015.

. The ICSID considered the Spanish Government's actions to be a violation of Article 10 of the ECT, thus depriving the company of fair and equitable treatment.[22] Other cases already decided against Spain are the following ones: *Masdar Solar & Wind Cooperatief UA* v *Spain* of 16 July 2018,[23] and *Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v Spain* of 15 June 2018.[24] The Stockholm Chamber of Commerce issued the *Foresight Luxembourg Solar 1 SÁR., et al v Spain* of 14 November 2018.[25] By these decisions, the Kingdom of Spain has been condemned to provide substantial compensation to the relevant companies which had invested in the field of renewable energies. There are dozens of further cases pending at the ICSID. On the one hand, several decisions have been taken against Spain by the ICSID. These are: *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v Kingdom of Spain* of 31 May 2019;[26] *9Ren Holding SARL v Kingdom of Spian* of 31 May 2019;[27] *Cube Infrastructure Fund SICAV and others v Kingdom of Spain* of 15 July 2019;[28] *SolEs Badajoz GmbH v Kingdom of Spain* of 31 July 2019;[29] *InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain* of 2 August 2019;[30] *BayWare Renewable Energy GmbH and BayWare Asset Holding GmbH v Spain* of 2 December 2019;[31] and *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain ICSID* of 11 December 2019.[32] In one case, however, the ICSID has rejected the claimants' claims: *Stadtwerke München GmbH and others v Kingdom of Spain* of 2 December 2019.[33]

On 22 November 2019, the Spanish Government passed Royal Decree law no 17/2019,[34] Royal Decree laws have the rank of a Parliamentary Act, are adopted by the Government in cases of urgency and must be validated by Parliament afterwards. Among other provisions, Royal Decree law 17/2019 offers a deal to foreign companies, which have submitted a case against in Spain at international arbitration tribunals, based on the changes the Spanish Government has introduced into the support schemes in favour of renewable

[22] ICSID Case No ARB/13/36.
[23] ICSID Case No ARB/14/1.
[24] ICSID Case No ARB/13/31.
[25] SCC Case No 2015/150.
[26] ICSID Case No ARB/14/11.
[27] ICSID Case No ARB/15/15.
[28] ICSID Case No ARB/15/20.
[29] ICSID Case No ARB/15/38.
[30] ICSID Case No ARB/14/12.
[31] ICSID Case No ARB/15/16.
[32] ICSID Case No ARB/13/30.
[33] ICSID Case No ARB/15/1.
[34] Spanish Official Bulletin no 282, of 23 November 2019.

energies. The Royal Decree law guarantees to investors a stable remuneration of the investment made in renewable installations in Spain, whenever they desist of the arbitration proceedings. This was done in view of the continuous awards in favour of investors at international arbitration institutions, such as ICSID. The objective is to facilitate a non-contentious settlement of the disputes between Spain and foreign investors related to the lowering between 2007 and 2012 of the subsidies to support renewable energies. It is expected that an increasing number of companies, wishing to continue business in Spain, accept the Governmental offer. However, it is to be seen whether the Government succeeds in this endeavour.

IX. Towards a Support Scheme Compatible with a Competitive Market Economy in a European Union Context

The case of renewable energies in the EU illustrates the interaction between technology and legal innovation. Actually, the content of the 2018 EU Renewables Directive[35] is rooted in the decrease of technological costs due to innovation. The decarbonisation of the energy systems opens to renewable energies the key role in the future energy mix. In the past 15 years the EU has become a worldwide leader in the field of renewable energies. Germany, Denmark and Spain have had remarkable importance in this trend. From the beginning, EU law on renewable energies assumed that the only way to promote the use of renewable energies was some kind of governmental support. This could have the form of feed-in-tariffs and/or premiums, which, in turn, were often recovered from prices paid by electricity customers. This created an atmosphere in which the promotion of renewable was nothing but an exemption (a huge one) of free market. Although these subsidies were similar to subsidies for more traditional energy sources and they might have been needed early in the development of renewables, the assumption that subsidies are necessary is no longer valid. On the contrary, it is clear now that support schemes or renewables must be aligned with competition among energy producers and suppliers.

When the process to create an internal market for electricity started in the EU, little consideration was made to renewable energies within EU law. They gained momentum when the first renewable energies Directive was passed in 2001[36] and reached its climax with the 2009 RES Directive.[37] This Directive became a good instrument to foster at EU level the use

[35] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328/82.
[36] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 382/82.
[37] 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 140/16.

of renewable energies for electricity generation purposes. It addressed the problems this kind of energy was experiencing at that time. After some years of application, it became clear that several changes were needed in the text of the 2009 Directive. This explains why the European Commission drafted a new Directive, as a key component of the so-called 2016 Winter Package.

Several of the changes of the 2018 RES Directive are related to support schemes, either to guarantee that they are stable, or to impose upon Member States the obligation to choose a scheme that is compatible with a competitive market economy. The rapid decrease of costs associated with renewable installations and the maturity of technology (solar and wind, mainly) operate towards the suppression of any governmental subsidy that gives renewable energies a privileged position. Amidst the governmental rhetoric of some governments that back the 2015 Paris Agreement but increase the use of, for example, national coal, some sort of support schemes in favor of renewable energies is not only acceptable but also desirable. The 2018 RES Directive tackles this problem with an express call to support schemes compatible with market-based law (Article 4). It also contains a new and explicit reference to the need for stable support frameworks whose change is subject to foreseeable procedures (Article 6). The directive indicates that legal innovation must continue to track technology innovation including changes in cost of technology, as well as market conditions that may allow innovations in the way government support schemes relate to the market.[38]

X. Conclusion. Conflicting Outcomes: Spanish Courts and International Arbitration Institutions

The Spanish Supreme Court has issued dozens of decisions by which it denies that the Spanish Government has violated the Rule of Law by lowering the support which electricity producers by means of renewable energies are to be paid. There is neither a violation of the principle of protection of legitimate expectations, nor a retroactive application of the lowered remuneration. The Court examines whether the lowering of the subsidies has violated the Electricity Act, which states that remuneration must comply with principle of 'sensible remuneration'. It finds that even though remuneration has been lowered it is still sensible. Some decisions of the Institute of Arbitration of the Stockholm Chamber of Commerce are of the same opinion. In the light of the ECT they also find that an expropriation has not taken place

[38] The content of this section is an update of my chapter, 'Support for Renewable Energies and the Creation of a Truly Competitive Electricity Market: The Case of the European Union' in D Zillman, L Godden, L Paddock, and M Roggenkamp, *Innovation in Energy Law and Technology: Dynamic Solutions for Energy Transitions* (Oxford University Press, 2018) 305.

and that the protection of investment has not been violated. Those decisions of the Institute state that there are no reasons to think that the decisions of the Spanish Supreme Court are wrong, thus showing its willingness not to revoke what has been decided at national level.

Prior to liberalisation private companies operating a public service had the financial guarantee of the public contract signed with the relevant public administration, for the provision of a public service. That had a twofold meaning: on the other hand, if the responsible public power decided to change the conditions under which the contract is to be executed, then the private company had the right to be compensated, whenever said change had a negative impact on the financial situation of the company; on the other hand, although the private company had to provide the service and at its own risk, there were certain extraordinary circumstances under which the public administration would also help with financial aid to the private contract; in ordinary contract law, those negative circumstances would have to be borne by the private company, too. After liberalisation, a number of services which were considered to be public service, enjoy no longer that character. The main consequence is that companies which operate in the relevant liberalised sector do not operate under a contractual formula. The former guarantee based on a contract between the private company and the public administration has been substituted by a guarantee contained in the liberalising act. Under this liberalised regime, private companies do not have the right to be compensated whenever the public administration changes the contract, since there is no contract in place. Compensation, if any, will be subject to the general conditions under which companies are to be compensated as a consequence of the change of existing regulation. In other words, the former *contractual risk* has been substituted by a *regulatory risk*. The problem lies in that the options to be compensated as a consequence of changes of regulation are much more limited than the options to be compensated as a consequence of a change of the contract.

Considering the radical changes introduced between 2010 and 2013 in the remuneration of renewable producers, there is the need to find a further explanation of the position of the Spanish Supreme Court. The series of decisions of the Court must be understood against the backdrop of the so called ‘electricity tariff deficit’. The Spanish electricity system was close to collapse and the Government justified the lowering of the remuneration by the need to reduce or to put an end to the deficit. In is in this context that the decisions of the Court must be understood. Although it is not expressed with these exact words, the decisions are based on the following idea: in ordinary circumstances the Court would be ready to accept the arguments of the applicants and consequently to impose upon the Government the need to compensate them or even to bring things to where they were before the legal changes. However, taking into

account the extraordinary circumstances of the electricity deficit, the Court is bound to accept that the Governmental decision to lower remuneration to renewable producers is not illegal. It is true that when there is a crisis (such as the crisis of the Spanish electricity system due to the deficit) then the ordinary law cannot be applied. There are some doubts as to whether this is the optimal way for courts to approach the problem. It is clear that Courts are not asked to evaluate governmental energy policies, but the decision to tackle the electricity deficit in a way which excludes any compensation should be in the hand of Parliaments. In any case, the situation created by the decisions of the Supreme Court on this issue should not be used as a pattern for future disputes in other areas, since they were issued in extraordinary circumstances.

The jurisprudence issued by the Spanish Supreme Court about the conflict on support to renewable energies brings into the debate an old challenge. There is the need for a better design of the relationship between the competences of the Regulator (in wide terms, including both the Government and the sectorial agency) and the Courts. The better the regulatory framework is designed, the less the judiciary will be asked to decide. It is obvious that it is for courts to have the final word about the respect to the Rule of Law, and that regulatory decisions must be subject to the scrutiny of Courts. It is also clear that in most cases, the problems about which the Spanish Supreme Court was asked to decide, involved a great deal of energy policy. If the regulatory procedures were well designed (which means that they create among incumbents a sense of confidence on the rationality and fairness of the regulatory decision), then the Supreme Court would not be asked to take a position on matters which do not belong to the realm of legality, but rather to the realm of energy policy and the discretion in the exercise of regulatory powers.

The decisions of the Spanish Supreme Court are in clear contrast with decisions of international arbitration institutions, in particular the ICSID. For the Spanish Supreme Court there is nothing illegal in the lowering of subsidies, and companies do not have the right to be compensated. They must bear the regulatory risk. On the contrary, the ISCD thinks that Article 10 of the ECT, under which each contracting party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for investors of other contracting parties to make investments in its area. Such conditions shall include a commitment to accord at all times to investments of investors of other contracting parties fair and equitable treatment. Since investors from third countries can submit their claims under the ECT to international arbitration institutions, but Spanish investors cannot, a clear

discriminatory situation has emerged. This has been partially solved by the judgment of the European Court of Justice in *Achmea*.[39]

The need of a stable framework is of paramount relevance for the future of renewable energies in the EU. It surpasses the interest of Member States insofar the violation of the principles of stability and predictability of regulation endangers the accomplishment of the EU in the field of renewable energies. Consequently, stability of national support has an EU dimension. That is why Article 6(1) of the revised 2018 Renewable Directive states that without prejudice to adaptations necessary to comply with state aid rules, Member States shall ensure that the level of, and the conditions attached to, the support granted to renewable energy projects are not revised in a way that negatively impacts the rights conferred thereunder and the economics of supported projects.

[39] Judgment of 6 March 2018, Case C-284/16, EU:C:2018:158. See further DC Suciu, 'Renewable Energy Arbitration against Spain in the light of Court of Justice of the European Union Judgment in Achmea case' (2019) 37 *Revista Electrónica de Estudios Internacionales* 1.