EUROPE IS currently experiencing a boom in activity with respect to international disputes relating to renewable energy projects. Spain has been sued 15 times before international tribunals, the Czech Republic six times and Italy once. All these cases are still pending. The great majority of these claims have been filed under the Energy Charter Treaty of 1994 (the “ECT”).

There is increased activity amongst potential claimants. Additional investment treaty claims relating to the renewable energy sector are likely to be asserted in the near future not only against these three countries but also against other European countries including Bulgaria, Romania and the Slovak Republic.

There is also greater involvement on the part of litigation funders, attracted by the significant amounts of compensation potentially obtainable in these cases. Such increased funding provides access to potential claimants that — by reason of insolvency or otherwise — might be unable to pursue an Energy Charter Treaty claim.

Potential respondent states are becoming more active as they appear to be taking measures in anticipation of these disputes — although some of the measures taken, such as Italy’s recent notice of withdrawal from the Energy Charter Treaty, might have little or no impact on potential claims.

Focusing on the countries that have been sued thus far under the ECT in view of renewable energy disputes, this article (a) sets out the background to these disputes; (b) explains why the Energy Charter Treaty has become such a popular choice and (c) discusses what to expect in the near future.

A boom in investments...

With a view to reducing greenhouse gas emissions, during the first decade of this century, numerous European countries — including Bulgaria, the Czech Republic, Italy, Romania, the Slovak Republic and Spain — introduced incentives to attract investment in their renewable energy sectors. Such incentives were necessary, as investment in the renewable sector was not economically viable due to the relatively high costs of production.

Many of these incentives took the form of payments against the amount of energy injected by a producer into the electrical grid, the so-called feed-in tariffs (“FiTs”). In general, with a view to catering for the long-term financial needs of the underlying projects, these FiTs were guaranteed for a number of years.

More specifically, at the beginning of 2006, the Czech Republic introduced an incentive scheme for all renewable energy sources. The scheme envisaged the payment of a 15-year guaranteed FiT set higher than market rates for electricity.

In 2007, Spain enacted RD 661/2007 providing for a FiT set as a fixed price per kilowatt (“kW”) per hour of energy fed into the grid. The FiT was guaranteed for the lifetime of qualifying power plants and, in general, set at a higher level than the market price for electricity.

From 2007, Italy has made available incentives to producers of solar PV energy under a scheme known as Conto Energia. The principal incentive in this scheme took the form of a guaranteed FiT per kW of energy produced for a 20-year period, paid on top of the market price received by the producer. These incentives led to booming levels of investment in renewable energy power projects. In Spain’s solar PV sector, for example, nearly 500 MW of capacity were installed each month between June and September 2008.¹

...to a boom in disputes

Following the global economic crisis in 2008, several European countries enacted measures concerning their renewable energy incentive regimes. For example, in 2008, Spain reduced the duration of support for new solar PV plants to 25 years. In 2010, the FiT applicable to PV power plants already connected to the grid was also adjusted. The Spanish PV


² Ibid.
industry considered that this measure was "retroactive".2

Other measures followed. For example, under RD 413/2014 of 2014 the return on investments in renewable energy sources became linked to the average interest rate for a 10-year public bond. Under this Royal Decree, for the period June 2013 to June 2019, it appears that the pre-tax return on investment would be 7.4 per cent.

Elsewhere, on 1 January 2011, the Czech Republic introduced a 26 per cent levy on the FiT guaranteed to existing solar electricity plants.

In Italy, between 2010 and 2013, the incentives set out in the Conto Energia scheme were reduced. Although these reductions had an impact on the broader PV sector, they did not affect the level of FiT that was guaranteed to power plants that were already connected to the national grid. However, in 2014, Act 116/2014 reduced the FiT levels guaranteed to PV power plants that were already connected to the national grid.

As discussed previously, the measures taken by the governments of the Czech Republic, Italy and Spain led to numerous arbitral proceedings.

The growing popularity of the ECT

It is not difficult to see why most of the on-going arbitrations against these three countries have been commenced under the Energy Charter Treaty. Indeed, a recent report by the United Nations Conference on for Trade and Development (“UNCTAD”), noted that the Energy Charter Treaty has surpassed the North American Free Trade Agreement (“NAFTA”) and the most invoked international investment agreement.3

The safeguards accorded by the ECT are significant in terms of scope and level of protection. The Energy Charter Treaty protects every kind of energy-related asset, owned or controlled directly or indirectly by a qualifying investor. Such assets, “Investments” under the Energy Charter Treaty include the following broad categories: (1) all types of property and property rights; (2) locally incorporated companies, shares, stocks, other forms of equity participation, bonds, and debt; (3) claims to money; (4) amounts derived from or associated with a qualifying investment; and (5) any right conferred by law or contract.

Under the ECT, host States oblige themselves to accord fair and equitable treatment (“FET”) to all kinds of assets. The FET standard is the protection most often successfully advanced by investors seeking redress against a host state under investment treaties. Numerous arbitral tribunals have determined that the FET standard contains the obligation on the part of the host state to protect an investor’s legitimate expectations and provide a stable legal environment. Accordingly, there is little wonder that reports on ECT arbitrations commenced against Spain, the Czech Republic and Italy suggest that they are based upon alleged violations of the FET standard.

In addition, amongst other safeguards, the ECT prohibits a host State from discriminating, enacting unreasonable measures and, in general, expropriating protected assets. The applicability of the ECT depends on the nationality or place of residence of the entity or individual that owns or controls directly or indirectly assets in the territory of the host state. In principle, the ECT protects the assets of nationals of States that are parties to the ECT (an “Investor” under the ECT).4 There are situations in which local companies are able to seek compensation against its own State. This includes, for example, locally established companies under foreign ownership or control. In some specific circumstances, investors not under foreign ownership or control and investors from non-parties to the ECT may benefit from the protections of the ECT.

The procedural features of the ECT are attractive, too; under the ECT, an investor can pursue international arbitration directly against a host State before the International Centre for Settlement of Investment Disputes (“ICSID”) (if applicable); under the Arbitration Institute of Stockholm Chamber of Commerce Rules (“SCC”) or the Rules of the United Nations Commission on International Trade Law (“UNCITRAL”). In many cases, a resulting award is enforceable against the assets of a host State (subject to immunity issues) under the robust enforcement regime of the ICSID Convention and the New York Convention. In some circumstances, consortiums of claimants may be able to commence a single arbitration against a host State.

The potential impact of future claims

In addition to potential claims against European countries, some potentially significant developments in respect of the ECT are expected in the near future. Some tribunals may render awards in respect of the on-going ECT cases mentioned above within 2015. These decisions may not only provide guidance on the construction of the ECT but also give an indication of the amounts of compensation that arbitral may grant in cases involving FiTs. The latter aspect may have an impact on the availability of litigation funding.

Developments in Italy are expected, too. A number of investors challenged before the Italian Court the constitutionality of a number of measures on the PV sector passed by the Italian Government. The outcome of such challenges — which are pending — may determine whether further international arbitrations against Italy are instituted. A decision, which might not be final, is expected by the end of May 2015. Further, as mentioned above, it appears that Italy has given notice of its intention to withdraw from the ECT. This decision may have been influenced by the prospect of potential claims. This measure, however, is inconsequential to the claims that Italy might face. Under a “sunset” provision in the ECT, the protections of this treaty continue to apply to existing investments for 20 years as of the date when withdrawal becomes effective.

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1 The World Investment Report 2015.

2 As of today, in total, there are 54 parties that have signed or acceded to the ECT: 52 countries, the EU and EURATOM.