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THE ENERGY CHARTER TREATY, INVESTMENT
ARBITRATION AND THE SPANISH SOLAR CRISIS:
A RECIPE FOR DISASTER?

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Abstract

Spain is a world leader in solar energy production and until 2009 operated a feed-in tariff policy that provided solar energy producers with a preferential price for the electricity they fed back into the grid. This policy was scaled back in 2009 when Spain found itself facing severe economic downturn. It has now been repealed entirely. While domestic investors in solar energy had to absorb the resulting loss in profits, foreign investors sought compensation under the Energy Charter Treaty. They alleged that Spain had breached its obligations as a signatory state and commenced arbitral proceedings accordingly.

These arbitral proceedings signal the first time that the Energy Charter Treaty has been used to resolve a dispute over renewable energy investment as well as the first time that the treaty has been used by multiple investors to claim against a host state. The novelty of this situation has tested the efficiency of the established rules and procedures of investment treaty arbitration and has put a spotlight on the issues that arise when multiple investor claims are arbitrated separately. This paper examines the precise nature of those issues, reflects on the evolution of arbitration into the investor-state arena and proposes a number of ways in which the system might be better streamlined to handle multiple-investor claims.

The text of this paper (excluding contents page, abstract, non-substantive footnote and reference list) is 14,940 words

Introduction

When Spain drastically reduced the scale and scope of its economic price support policy (or feed-in tariff scheme) for solar energy producers, it found itself facing numerous legal challenges from foreign investors. These investors alleged that Spain's actions were in breach of the Energy Charter Treaty (ECT).¹ Like many trade treaties, the ECT includes an investment chapter, which provides foreign investors with a number of protections that are enforceable against a host State.² Investors in solar photovoltaic energy (solar PV) took advantage of these protections and commenced arbitration against Spain, seeking full compensation for the loss of their past and future feed-in tariffs. Yet, while their claims stemmed from the same regulatory changes and were based upon comparable legal arguments, they were not consolidated into one legal challenge.

Instead, individual investors or groups of similar investors were left to initiate independent proceedings of their own accord. In keeping with the fundamental principles of arbitration, they were free to choose the rules governing the dispute, select their own arbitrators and determine the level of confidentiality to which the proceedings would adhere.³ They initiated proceedings on such terms and by July 2015 twenty separate solar PV claims were lodged against Spain. With the exception of one group of 15 investors, who jointly commenced proceedings against Spain (*the PV Investors v Spain*), each and every solar investor requested that their claim be heard separately, before a separate tribunal, composed of an entirely unique set of arbitrators.⁴ This differentiation was favoured by Spain too on the basis that it would have "multiple shots" at avoiding liability; but it was not conducive to good law-making. It fragmented this dispute into protracted multiple proceedings, which involved twenty arbitral tribunals and three sets of

¹ Energy Charter Treaty 2080 UNTS 95 (opened for signature 17 December 1994, entered into force 16 April 1998) [ECT], part III.

² Art 26.

³ Christopher Dugan and others *Investor-State Arbitration* (Oxford University Press, 2008) at 212 and 219.

⁴ The first fifteen claimants did consolidate their claims into one joint proceeding under the UNCITRAL Arbitration Rules, but no other investors have followed suit. See *The PV Investors v Spain (Decision on Bifurcation)*, UNCITRAL, 1 March 2013.

arbitral rules. Such fragmentation is not desirable and poses a significant risk to the legitimacy of investment-arbitration.⁵ When multiple related arbitrations are conducted separately and in confidence, without deference to the awards rendered in other tribunals, the risk of inconsistent decisions is considerable.⁶ Inconsistent decisions trouble stakeholders and threaten their ability to rely on past arbitral awards as a form of soft precedent or *jurisprudence constante*.⁷ In the case of the Spanish solar arbitrations, inconsistent decisions risk exacerbating the crisis that has plagued Spain since 2008 and further undermine any potential to clarify states' liability to renewable energy investors under the ECT.⁸

This inconsistency is the central focus of the following paper. It posits that Investment arbitration, as a method of investor-state dispute settlement (ISDS), struggles to effectively resolve treaty disputes between multiple investors and host states, such as the Spanish solar crisis. The resolution of these multi-party disputes requires stability and predictability, neither of which has been prioritised in the evolution of investment treaty arbitration.⁹ Instead, accuracy and party autonomy reign supreme. While this is appropriate in two-party disputes between an investor and a host state, such priorities are at least doubtful in multi-party proceedings, not least because they undermine the rule of law.¹⁰

This paper will argue that the evolution of investment arbitration, through the individualisation of investor claims, has created a system of ISDS that fails to effectively consider multiple investor claims in a way that is consistent and which promotes stability. It will use the Spanish solar crisis as a model to demonstrate that when multiple investor claims are adjudicated concurrently, the risk of inconsistency and regulatory uncertainty grows. It will then examine

⁵ For an example of such inconsistency elsewhere, it is worthwhile to examine the ten arbitral decisions rendered in the wake of Argentina's financial crisis of 2001. A detailed explanation of the outcome can be found in José Alvarez *The Public International Law Regime Governing International Investment* (The Hague, Hague Academy of International Law, 2011) at 76.

⁶ At 86.

⁷ Jeffery P Commission "Precedent in Investment Treaty Arbitration: A Citation Analysis of Developing Jurisprudence" (2007) 24(2) *Journal of International Arbitration* 130-158 at 135-136.

⁸ Christopher Coats "Can it Get Worse for Spain's Solar Policy? It Just Did" (30 June 2015) Forbes Business www.forbes.com.

⁹ Alvarez, above n 5, at 86 and 90.

¹⁰ Gus Van Harten *Investment Treaty Arbitration and Public Law* (1st ed, Oxford University Press, 2007) at 97.

the practical impacts of such an approach and assess how ISDS might be streamlined to better address multiple investor claims. This paper proposes a number of amendments to the rules governing investment treaty arbitration and will focus in particular on those relevant to ECT disputes. It contends that the status quo is ineffective and argues that considerable reform is needed to address the growing number of disputes arising out of regulatory reforms affecting whole industries or business sectors.

Part I of this paper will argue that the history of investment arbitration has failed to give due consideration to rule of law concerns that arise in any investor-state dispute. Part II will provide a background to the Spanish solar arbitrations and examine how the largest ever ECT arbitration came to be. Part III will demonstrate the importance of the Spanish solar crisis as a model for assessing the effectiveness of investment treaty arbitration and will function as the crux of this paper. It will demonstrate the rough and ready style of arbitration that occurs when multiple-investor disputes are arbitrated under the ECT. Finally, Part IV will outline how ISDS might be streamlined to better ensure consistency between decisions, particularly in the context of ECT disputes.

I The Evolution of Investment Treaty Arbitration

The evolution of ISDS has been shaped by a complex web of international investment treaties into a specific and yet decentralised process known as investment treaty arbitration. This section of the paper will examine how investment treaty arbitration came to be, what it provides for investors and states, its shortcomings and why it struggles to address the public law issues that underlie large-scale public regulation disputes.

A The Development of the International Investment Treaty

In international law, there is no governing document of investment treaty arbitration. Instead, a web of bilateral investment treaties (BITs) impose a set of substantive obligations on signatory states, which require them to provide foreign investors with certain legal protections.¹¹ These

¹¹ See United Nations Conference on Trade and Development (UNCTAD) *The Entry Into Force of Bilateral Investment Treaties* (UNCTAD, International Investment Agreements Monitor No 3, 2006/9, 2006).

protections are enforceable among any of the states that sign such treaties, owing to one multilateral investment treaty in particular, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”).¹² If a foreign investor believes such standards of protection have not been upheld, it can bring a claim before an international arbitral tribunal that will issue a binding award. Such tribunals are seen to provide a fair resolution of the dispute, while maintaining a premium on cost-effectiveness and efficiency.¹³

1 *The emergence of foreign direct investment as a challenge to international law*

The birth of this investment arbitration system corresponds with the foreign direct investment (FDI) boom, which began in the 1960s and peaked in 2011.¹⁴ Aided by rapid advances in telecommunications and transportation technology, the total global inflows and outflows of foreign direct investment grew from \$204 billion worldwide in 1990 to over \$1.56 trillion in 2011.¹⁵

Foreign direct investment has now become an integral part of the international economic system and international law has had to adapt its processes accordingly.¹⁶ It has been faced with new and emerging international actors, foreign investors, who demand legal recourse when a sovereign state allegedly fails to fulfill its obligations in respect of their investment.¹⁷ Before the use of BITs, few mechanisms existed to make state promises about the treatment of foreign investment credible.¹⁸ The customary international *Hull rule* held that “no government is entitled

¹² Convention on the Settlement of Investment Disputes between States and Nationals of other States, 575 UNTS 159 (opened for signature 18 March 1965, entered into force 14 October 1966) [ICSID Convention], art 53.

¹³ Alan Redfern and others (2004) *Law and Practice of International Commercial Arbitration* (4th ed, Sweet & Maxwell, London) at 3.

¹⁴ Ayouni Saïef Eddine and Issaoui Fakhri and Brahim Salem *Financial Liberalisation, Foreign Direct Investment (FDI) and Economic Growth: A Panel Dynamic Data Validation* (MPRA Paper No. 56385, 9 June 2014) at 2.

¹⁵ Lisa Sachs and Karl Sauvant *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, Oxford, 2009) at xxviii; UNCTAD “FDI inflows, by region and economy, 1990-2014 annex 1” (24 June 2015) UNCTAD World Investment Report 2015: Annex Tables www.unctad.org.

¹⁶ Dugan, above n 3, at 6.

¹⁷ At 6.

¹⁸ Zachary Elkins and others “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000” in Michael Waibel and others *The Backlash against Investment Arbitration: Perceptions and Reality* (Cambridge University Press, Cambridge, 2006) 369 at 371.

to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefor.” Yet, this rule was not enforceable nor did it provide any affirmative state protection to foreign investors.¹⁹ As a result, such investors had to rely solely on domestic courts, which provided few opportunities for compensation.²⁰ Sovereign immunity and other jurisdictional limitations prevented the enforceability of decisions and issues of bias and procedural irregularity routinely arose in host state courtrooms.²¹

2 *The bilateral investment treaty as a new source of legal protection*

This glaring lack of legal protection forced investors to go looking for answers and they found them in bilateral investment treaties.²² The first BIT made its debut in 1959 and built on the international law principles of “minimum standards of treatment” and “state responsibility” to provide direct protection for foreign investors at international law.²³ Typically, a BIT obliges a host state to accord foreign investors with “fair and equitable treatment” and “full protection and security”, as well as obliging the state to pay “fair and just compensation” in the event of an expropriation of an investor’s assets.²⁴ Since the 1970s, almost all BITs have provided direct recourse for foreign investors to enforce these obligations through international arbitration.²⁵

3 *The expanding scope of international investment arbitration*

International arbitration is a dynamic dispute resolution mechanism that varies depending on legal form and jurisdiction.²⁶ It does, however, have four central defining features. It is an alternative to national courts, is a private mechanism for dispute resolution, is selected and

¹⁹ *Norwegian Shipowners Claims Arbitration (US v Norway)* (1992) 1 *Rep International Arbitration* 307. See, also, Elkins, above n 20, at 372.

²⁰ Asha Kaushal “Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime (2005) 50 (2) *Harvard ILJ* 491 at 498.

²¹ Dugan, above n 3, at 13.

²² For an example of a typical BIT, see the 1994 US Prototype Bilateral Investment Treaty, office of the Chief Counsel for International Commerce [US Propotype BIT].

²³ Treaty for the Promotion and Protection of Investments, Germany-Pakistan (signed on 25 November 1959, registered on 26 March 1963).

²⁴ Jeswald W Salacuse “BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries” (1990) 24(3) *INT’L L* 663 at 667-68; Dugan, above n 3, at 52 and 54.

²⁵ Kaushal, above n 20, at 498.

²⁶ Julian D M Lew, Loukas A Mistelis and Stefan M Lrokk *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) at 1.

controlled by the parties, and results in a final and binding determination of parties' rights and obligations.²⁷

The foundation of modern international arbitration is an agreement by two parties to submit any disputes that arise between them to arbitration.²⁸ Party consent of this nature is usually spelt out in an arbitration clause contained in the main contract or set down in a separate submission to arbitration.²⁹ Yet, in the case of investment treaty disputes, party consent may not be spelt out at all.³⁰ The only indication of a host state's intention to arbitrate with an investor may be what can be inferred from the general arbitration provision contained in a state-state BIT.

Prior to the 1990s, this alone was not sufficient to amount to party consent.³¹ However, during the negotiation of the World Bank's ICSID Convention, it was first recognised that "states could consent to arbitrate further disputes by making an offer to arbitrate in a foreign investment code or law, or by means of a treaty."³² Since then, BITs began to routinely provide for investor-state arbitration with unqualified state consent. The Chad-Italy BIT of 1969 was the first, but the majority of all BITs signed since have included a dispute resolution clause that explicitly authorises investor-state treaty arbitration.³³

The significance of this was not immediately realised and in the formative years of investor-state arbitration, tribunals limited their jurisdiction to those circumstances in which a specific arbitration agreement existed alongside a BIT.³⁴ However, this changed in 1990 when the tribunal in *APPL v Sri Lanka* ruled that it had authority to hear "claims exclusively based on a treaty provision."³⁵ This ruling was to have a snowball effect and very soon tribunals were

²⁷ At 3.

²⁸ Redfern, above n 13, at 5.

²⁹ At 6.

³⁰ Gus Van Harten "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17(1) EJIL 121 at 128-129.

³¹ Andrew Newcombe and Lluís Paradell *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, Netherlands, 2009) at 44.

³² At 44.

³³ Chad-Italy BIT (signed 06 November 1969, entered into force on 06 March 1969). art VII; Jan Paulsson "Arbitration without Privity" (1995) 10(2) ICSID Rev 232 at 233.

³⁴ Van Harten, above n 30, at 123.

³⁵ *Asian Agricultural Products Ltd v Republic of Sri Lanka (Award)* ICSID ARB/87/3, 27 June 1990 at [18] and [38].

routinely interpreting BITs as a “standing offer to arbitrate” that was accepted when an investor filed for arbitration.³⁶

This opened the door for foreign investors to bring claims for compensation whenever a host state’s action caused them quantifiable loss and was in breach of a BIT’s investor protections. It signaled the birth of investment treaty arbitration and enabled BITs to become one of the most enforceable mechanisms of international law.³⁷ It also encouraged their proliferation and in the 1990s, the number of BITs swelled by over 1,500.³⁸ Today there are over 3,250 BITs worldwide and an average of forty new investment treaty claims are lodged with international each year.³⁹

B Issues in Investment Treaty Arbitration

The proliferation of investment treaty arbitration over the last two decades has been piece-meal and ad hoc. Nonetheless, the awards rendered in the 610 known ISDS cases have shaped a specific and unique line of arbitral jurisprudence.⁴⁰ Today, there exists a highly detailed system of investment treaty arbitration, one which covers a complex web of legal relationships, international law treaties and arbitral forums, and which has its own legal issues. In particular, it is mired by five central concerns: confidentiality, consent, limited recourse against awards, narrowly defined parties, and inconsistency.

1 Confidentiality

Confidentiality is a central pillar of commercial arbitration and is one of the main reasons why parties choose to submit a dispute to arbitration.⁴¹ However, it has led to a number of issues in the investor-state context. Unlike other commercial entities, states have sovereign rights and obligations to their citizens. These obligations require states to make decisions in the interests of their nationals and to inform them about the outcome of those decisions.⁴² Public access to

³⁶ Jan Paulsson “Arbitration without Privity” (1995) 10(2) ICSID Rev 232 at 233.

³⁷ Van Harten, above n 30, at 123.

³⁸ UNCTAD *The Entry Into Force of Bilateral Investment Treaties*, above n 11.

³⁹ UNCTAD “Recent Developments in Investor State Dispute Settlement (ISDS)” 1 *IIA Issues Note* at 6.

⁴⁰ Commission, above n 7, at 130-158.

⁴¹ Dugan, above n 3, at 706.

⁴² A T Guzman “Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties (1998) 38 *Virginia Journal of International Law* 639 at 639.

information is widely recognized as a fundamental principle of judicial decision-making in domestic and international courts and yet such access is noticeably absent in ISDS.⁴³

While one should not overstate the level of secrecy that exists in investment treaty arbitration, it is still common practice for the content of submissions and awards to be kept secret whenever either of the disputing parties does not consent to publication.⁴⁴ While the internet has made investment treaty awards much more accessible, public access is about more than how many people “get their hands on the decision”.⁴⁵ Public access requires that the views and arguments of disputing parties and adjudicators are publicly scrutinised, not just their final statements or awards.⁴⁶

While a closed approach may be tolerable for the resolution of commercial disputes, when transplanted into investor-state arbitration it allows the legitimacy of sovereign decisions to be determined with finality and in secret.⁴⁷ There is certainly a place for confidentiality in investor-state arbitration, as it “enables parties to fully present their case”; however, the scope of this right must be better articulated.⁴⁸ As long as the extent of confidentiality over arbitral proceedings remains a “discretionary right”, the scope of which is determined by the parties, the minimum standards of openness expected in public international law are not met.⁴⁹

2 *Consent to arbitration*

Party consent lies at the heart of arbitration.⁵⁰ In a contract-based investor-state arbitration, consent flows from the contract between the parties.⁵¹ However, in treaty-based investment

⁴³ Van Harten, above n 10, at 97.

⁴⁴ Van Harten, above n 10, at 161.

⁴⁵ See, for example, Andrew Newcombe and others “Investment Treaty Arbitration Law: Newly Posted Awards, Decisions and Materials” *italaw* www.italaw.com

⁴⁶ Mabel I Egonu “Investor-State Arbitration Under ICSID: A Case for Presumption Against Confidentiality” (2007) 24(5) *JOIA* 479 at 488.

⁴⁷ Van Harten, above n 10, at 160.

⁴⁸ Dugan, above n 3, at 707; See *UPS v Canada (Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae)* UNCITRAL, 17 October 2001 for an example of one of the first disputes to be made fully open to the public.

⁴⁹ Emmanuel Gaillard and John Savage (eds) *Fouchard Gaillard on International Commercial Arbitration* (Kluwer Law International, The Hague, Netherlands, 2009) at 627-628.

⁵⁰ Paulsson, above n 36, at 233

⁵¹ Van Harten, above n 10, at 63.

arbitration, there is no contract between the parties. Instead, the investment treaty is used as the basis for a host state's consent to arbitrate with foreign investors as a group.⁵²

This interpretation of BITs as a “standing offers to arbitrate”, coupled with a wide interpretation of what qualifies as a protected “investment”, has led to a large number claims that host states could never have foreseen.⁵³ By enabling investors to bring claims against states, without any requirement of individualised consent between the parties, some commentators allege that tribunals have given investors a “blank cheque which may be cashed for an unknown amount at a future, and as yet unknown, date.”⁵⁴ The legitimate extent to which a state can submit itself to a particular mechanism for controlling its own sovereign acts remains an issue of much discussion.⁵⁵

3 *Limited Recourse against Awards*

The limited recourse against awards rendered in investment treaty arbitration is another issue of concern. When compared with domestic legal systems, investment arbitration contains few mechanisms to hold tribunals to account for their interpretation of the applicable law. Because the system has incorporated the enforcement structure of international commercial arbitration, awards are considered to be the equivalent of a final judgment of the court of a contracting party.⁵⁶ This means that international arbitrators have little or no judicial supervision over their interpretation of broadly framed investor protections.⁵⁷

Where domestic adjudicators can be held accountable on matters of law by way of an appeal to the court, no such appeal is possible in investment arbitration. While it is true that investment treaties do subject tribunals to review by domestic courts (or in the case of ICSID arbitration, to review by an ICSID annulment committee), in both instances the grounds for review are very limited.⁵⁸ Domestic courts will only overturn an award where they find a jurisdictional error,

⁵² J G Merillis “The Means of Dispute Settlement” in Malcom D Evans (ed) *International Law* (2nd ed, Oxford University Press, Oxford, 2006) at 542.

⁵³ Paulsson, above n 36, at 233.

⁵⁴ Redfern, above n 13, at 21-22.

⁵⁵ See, for example, Paulsson, above n 36, at 250; Ole Spiermann “Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties” (2004) 20 *Arb Int'l* 179 at 180.

⁵⁶ ICSID Convention, above n 12, art 54.

⁵⁷ Van Harten, above n 10, at 153.

⁵⁸ ICSID Convention, above n 12, art 53-5; Convention on the Recognition and Enforcement of Foreign

procedural impropriety, or serious violation of public policy.⁵⁹ They are not authorised to correct errors of law by tribunals.⁶⁰ Annulment committees too may only intervene on the grounds that a tribunal was not properly constituted, manifestly exceeded its powers, was corrupt, departed from a fundamental rule of procedure, or failed to state the reasons for its award.⁶¹ To the detriment of accountability and consistency, there is no possibility of judicial review to correct errors of law.⁶²

4 *Parties to the arbitration*

International arbitration is fundamentally a bilateral method of dispute resolution, which operates *inter partes* without outside interference. Yet, while party autonomy makes sense in the commercial arbitration context where the sole aim of the process is to develop tailored, workable and “one-off” solutions to contractual disputes, it is often unhelpful when dealing with the regulatory actions of sovereign states.⁶³

Prior to the proliferation of BITs, disputes over sovereign regulatory actions were normally resolved through inter-state diplomacy, or, in extreme cases, were heard before the International Court of Justice (ICJ).⁶⁴ However, investment arbitration has privatised these public international claims. It has given full custody of the process to the investor, who can decide the manner and extent of adjudication, and has redefined the resolution of investor-state disputes as a one-way system of regulatory adjudication.⁶⁵

This obscures a holistic view of the state as a sovereign entity, responsible for the welfare of its citizens and instead focuses the dispute solely on the state’s commercial obligations to a foreign investor.⁶⁶ There are many good reasons why a state might alter its regulatory environment in a way that jeopardises the profitability of foreign investments. Public health, the protection of the

Arbitral Awards 330 UNTS 3 (opened for signature 10 June 1958, entered into force 9 June 1959) [the New York Convention].

⁵⁹ Van Harten, above n 10, at 155.

⁶⁰ *United Mexican States v Metalclad Corporation* (2001) 38 CELR 284, at [50]-[56]; *Attorney General of Canada v SD Myers, Inc* [2004] 3 FCR 368 at [42]-[44].

⁶¹ ICSID Convention, above n 56, art 52.

⁶² Dugan, above n 3, at 700.

⁶³ Van Harten, above n 30, at 129.

⁶⁴ Van Harten, above n 10, at 97.

⁶⁵ At 120.

⁶⁶ Alvarez, above n 5, at 76.

environment and financial security are but a few examples.⁶⁷ Yet, because investment treaty arbitration transplants the commercial model of arbitration into the regulatory sphere, these often fail to gain traction.⁶⁸

5 Consistency

Consistency has always come second to accuracy in international arbitration and many have expressed concern that the three-person arbitral tribunals, established on an ad hoc basis to resolve each investor claim, are not producing consistent international investment law.⁶⁹ Such inconsistency might have traditionally gone unnoticed. However, with the increasing number of publicly available awards, the issue of differential treatment in the same or similar circumstances has been brought into the spotlight.⁷⁰

Such inconsistency fuels criticisms of investment arbitration and emphasises the ad hoc nature of the investment treaty arbitration process.⁷¹ Arbitration lacks a system of binding precedent or stare decisis, meaning tribunals are free to depart from previous decisions. It also lacks an appellate mechanism, and instead employs a ‘flat’ organisational structure with little or no cohesion between arbitral fora or between tribunals adjudicating the same factual dispute.⁷² This means that there are few safeguards to ensure that awards adhere to basic standards of consistency and reliability. It also increases the risk that the interpretation of investor protections might be distorted by a trend of arbitral decisions.⁷³ This issue in particular has become more pronounced in the last decade as arbitration has attempted to address new sorts of claims – those of multiple, or even whole classes of, investors.

C The New Frontier: Resolving Concurrent Claims

⁶⁷ See, for example, Ursula Kriebaum “Privatizing Human Rights: The Interface between International Investment Protection and Human Rights” (2006) 3 *Transnational Dispute Management* 165.

⁶⁸ Van Harten, above n 10, at 57.

⁶⁹ Alvarez, above n 5, at 260.

⁷⁰ Compare, for example, *CMS Gas Transmission Co v Argentina (Award)* ICSID ARB/01/10 (12 May 2005) and *LG&E Energy Corp v Argentina (Decision on Liability)* ICSID ARB/02/1 (3 October 2006).

⁷¹ See, for example, Susan Franck “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing International Law through Inconsistent Decisions” (2005) 73 *Fordham Law Review* 1521.

⁷² Van Harten, above n 10, at 175-184.

⁷³ See, for example, the discussion in *Sempra Energy International v Argentina Republic (Annulment Proceeding)* ICSID ARB/02/16 (29 June 2010) at [208].

Notwithstanding the aforementioned issues, investment arbitration has, for the most part, been able to function effectively as a method of resolving one-off disputes between an investor and a state. However, with the recent spike in the number of multiple proceedings brought against host states, the cracks in investment arbitration, which are briefly outlined above, have begun to seriously threaten its stability as the premier method of adjudicating disputes between multiple investors and states.

1 *What are concurrent claims and why are they different from one off claims?*

Arbitration is, at its roots, a bilateral method of dispute resolution. It was designed to enable tailored solutions to protracted issues between two parties.⁷⁴ Yet, when applied to investor-state disputes, it has been confronted with multiple claims arising from the same event.⁷⁵ Such claims might involve 5 investors or they might involve 5000, but they all share a number of key qualities. They arise out of the same or similar circumstances, involve the same or similar legal relationships, and involve the same or similar issues of law – principally, the legality (or otherwise) of a state’s adjustment to its regulatory landscape.

Whenever multiple claims are alleged against a host state, regardless of the number, there is a fundamental need for consistency between awards.⁷⁶ The same need does not arise in respect of singular claims. In such cases, there is no risk of inconsistent decisions on the same facts and tribunals are free to prioritise accuracy at the expense of consistency.⁷⁷ Yet, whenever multiple investors submit claims against a single host state, the risk of inconsistent decisions is considerable and tribunals must strive to deliver awards that are not only accurate but also consistent with one another. The principal reason for this is that the factual circumstances out of which concurrent claims arise are virtually identical and parties legitimately expect that their claims will be handled in a virtually identical, or at least a very similar, manner.⁷⁸

⁷⁴ Van Harten, above n 10, at 59-60.

⁷⁵ Jamie Shookman “Too Many Forums for Investment Disputes? ICSID Illustrations of Parallel Proceedings and Analysis” 27(4) *Journal of International Arbitration* 361 at 365.

⁷⁶ Gilles Cuniberti “Parallel Litigation and Foreign Investment Dispute Settlement” (2006) 21 *ICSID Rev* 381 at 395.

⁷⁷ Viejo Heiskanen and Sanrine Giroud “Aristotle’s Statistics: Consistency and Accuracy in International Mass Claims” in Arthur Rovine *Contemporary Issues in International Arbitration and Mediation* (Leiden, Brill Publishers, 2015) 109-123 at 110.

⁷⁸ Heiskanen and Giroud, above n 77, at 112.

2 *The conventional response of investment arbitration to concurrent claims*

Despite the fundamental importance of consistency when resolving concurrent claims, arbitral tribunals routinely contradict the approach of other tribunals to legal principle and deliver conflicting decisions on the same or a closely related issue.⁷⁹ This differential treatment “highlights the lack of consistency of the legal order,” and where serious and repeated “may jeopardise investment arbitration’s legitimacy and credibility.”⁸⁰

The majority of all similar investment treaty claims are handled separately by different tribunals with little or no consolidation.⁸¹ Fundamental arbitral procedure dictates that, unless the parties agree otherwise, claims arising from the same general investment relationship and based on the same or related legal arguments ought to be brought before separate tribunals.⁸² In other words, arbitral rules set out that the claims of multiple investors are to be treated separately, in much the same way as any other investor’s claim.

Yet, when multiple investor claims proceed without consolidation, the risk of inconsistency between awards grows considerably. The awards rendered in the wake of Argentina’s financial crisis in the early 2000s are one example of this.⁸³ In that instance, a total of 10 arbitral decisions were issued - by tribunals in *CMS*, *Enron*, *LG&E*, *Sempra*, *BG*, *National Grid*, *Continental Casualty* and by annulment committees in *CMS*, *Enron* and *Sempra*.⁸⁴ These decisions contain troubling inconsistencies in terms of fact-finding, logic and the law.⁸⁵ All but one of these cases

⁷⁹ Shookman, above n 75, at 371.

⁸⁰ Cuniberti, above n 76, at 395.

⁸¹ Catherine Yannaca-Small “Improving the System of Investor-State Dispute Settlement” in OECD *International Investment Perspectives* (OECD Publishing, 2006) 184 at 198.

⁸² Campbell McLachlan and others *International Investment Arbitration: Substantive Principles* (1st ed, Oxford University Press, Oxford, 2008) at 88.

⁸³ Alvarez, above n 5, at 261-263.

⁸⁴ *CMS Gas Transmission Company v Argentina (Award)* ICSID ARB/01/8, 12 May 2005; *Enron v Argentine Republic (Award)* ICSID ARB/01/3, 22 May 2007; *LG&E Capital Corp and LG&E International Inc. v Argentine Republic (Decision on Liability)* ICSID ARB/02/1, 3 October 2006; *Sempra Energy International v Argentine Republic (Award)* ICSID ARB/02/16, 28 September 2007; *BG Group Plc v Argentine Republic (Final Award)* UNCITRAL, 24 December 2007; *National Grid Plc v Argentine Republic (Award)* UNCITRAL, 3 November 2008; *Continental Casualty Co. v Argentine Republic (Award)* ICSID ARB/03/9, 5 September 2008; *CMS Gas Transmission Company v Argentine Republic (Annulment Proceeding)* ICSID ARB/01/8, 25 September 2007; *Enron v Argentine Republic (Annulment Proceeding)* ICSID ARB/01/3, 30 July 2010; and *Sempra Energy International v Argentine Republic (Annulment Proceeding)* ICSID ARB/02/16, 29 June 2010.

⁸⁵ Alvarez, above n 5, at 263.

involved a foreign investor in a now privatised public utility and all but two involved the United States-Argentina BIT. Furthermore, in all of these decisions, the principal defence was the same: that the measures under challenge were a “necessary and excusable response to a serious economic and political crisis.”⁸⁶ Yet despite these similarities, and despite the fact that Argentina was found liable by all of the original panels that addressed these claims, substantial inconsistencies among the cases have emerged over time. Not least as later tribunals reconsidered the merits of Argentina’s defence and as annulment committees revisited the original decisions.⁸⁷ In particular, the tribunals reached differing conclusions with respect to the governing law of the dispute; the interpretations of the relevant BIT guarantees; and most significantly, on whether Argentina had a valid defence of necessity.⁸⁸

In spite of repeated consideration by distinguished groups of arbitrators, these inconsistencies remain unresolved. They suggest that ISDS does not produce the stable and predictable “rules of the road” that some had anticipated and they also reflect poorly on the effectiveness of arbitration as a means of resolving investor-state disputes.⁸⁹

After all, consistency and predictability are underlying values in all judicial systems, particularly those addressing large-scale public interest issues.⁹⁰ While the flexibility of tribunals to deviate from past decisions is part of what makes investment arbitration successful, this flexibility must be balanced against the need for investors and states to be confident that the actions they take will be handled by tribunals in a predictable and consistent manner. In the condemning language of one prominent commentator, “any system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness.”⁹¹

⁸⁶ See Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, United States-Argentina (signed 14 November 1991, entered into force on 20 October 1994).

⁸⁷ Alvarez, above n 5, at 263.

⁸⁸ Compare, for example, *Sempra Energy International v Argentina (Award)* ICSID ARB/02/16, 28 September 2007 at [376]-[378]; *LG&E*, above n 70, at [257]-[258]; and *Enron v Argentina (Annulment Proceeding)* ICSID ARB/01/3, 30 July 2010 at [368]-[395].

⁸⁹ Alvarez, above n 5, at 352.

⁹⁰ Gus Van Harten *Investment Treaty Arbitration and Public Law* (1st ed, Oxford University Press, Oxford, 2007) at 175-184.

⁹¹ Nigel Blackaby, of Freshfields Bruckhaus Deringer, quoted in MD Goldhaber “Wanted: A World Investment Court” (2004) 3 *Transnational Dispute Management* 1 at 2.

3 *Novel approaches to parallel claims in investment arbitration*

Over the last decade, the need for greater cohesion and uniformity between separate arbitral decisions has begun to resonate with stakeholders. They have developed a number of arbitral innovations aimed at improving consistency.⁹² For instance, arbitral rules have begun to include consolidation and joinder provisions, it has become good practice to appoint the same arbitrators to hear separate cases on similar facts, and a representative has been permitted to bring a consolidated claim on behalf of thousands of investors.⁹³

Outside of the investment context, international arbitration has also developed a number of unique solutions to address multi-party arbitral disputes. Most notably, special tribunals have been created to deal with multiple disputes arising out of a single crisis event.⁹⁴ Such tribunals are free to shape arbitral procedures according to the characteristics of a specific dispute and they have proven to be particularly effective in resolving disputes arising out of major crises.⁹⁵ The Iran-US Claims Tribunal (created in 1981 following the Iranian revolution) and the United Nations Compensation Commission (created in 1990 following the Iraqi invasion of Kuwait) are two significant examples.⁹⁶

Although tribunals of this nature require political willpower and significant resources, making them an unlikely fit for investment treaty arbitration, they demonstrate the importance of developing innovative ways to tailor arbitral procedure to multi-party disputes. At present, little or no such tailoring occurs in investment treaty arbitration and the problem of inconsistency continues to proliferate.

⁹² See, for example, Aurélie Antoniotti “The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules” (2006) 21(2) *ICSID Review* 427-448.

⁹³ See, for example, United Nations Commission on International Trade Law *UNCITRAL Arbitration Rules (15 August 2010)* (UNCITRAL Secretariat, Vienna, 2010) [UNCITRAL Rules], art 17(4); International Centre for Settlement of Investment Disputes *Rules of Procedure for Arbitration Proceedings in Convention, Regulations and Rules* (ICSID, Washington, 2003) [ICSID Rules], r 18; and, *Abaclat and others v the Argentine Republic (Jurisdiction and Admissibility)* ICSID ARB/07/5, 4 August 2011.

⁹⁴ Gabrielle Kauffman-Kohler “Consolidation of Proceedings in Investment Arbitration: How can multiple proceedings arising out of the same or related situations be handled efficiently” (2006) 21(1) *ICSID Review* 59 at 74.

⁹⁵ At 74.

⁹⁶ For more information on the Iran-US Claims Tribunal, see www.iusct.net; for more information on the United Nations Compensation Commission, see www.uncc.ch.

As will be outlined in Part III and IV, the current method of resolving investor-state disputes (particularly those arising out of the Energy Charter Treaty) is inefficient and has failed to effectively resolve the Spanish solar crisis. It requires intervention at a policy level in order to ensure consistency is maintained between decisions and to safeguard the legitimacy of investment arbitration itself.

II Understanding the Spanish Solar Crisis

In order to fully understand how multiple claims against a host state are handled by investment arbitration, this paper will critically examine the processes employed in the currently pending Spanish solar arbitrations. These arbitrations stem from a sector-wide investor crisis and involve upwards of 90 claimant investors. This section of the paper will provide an overview of the factual circumstances surrounding the Spanish solar crisis and will establish how it led to the largest ever investment arbitration under the ECT. In particular, it will provide a background to Spain's solar PV investment profile, will look at the causes and effects of the solar boom and subsequent crisis, and will outline the basis of foreign investors' claims against Spain.

A Solar PV Investment in Spain

1 The renewable energy targets of the European Union

The European Union (EU) boasts one of the strongest reputations for renewable energy production and consumption in the world. It holds 40% of the world's renewable energy patents and 44% of the world's renewable electricity capacity (excluding hydropower).⁹⁷ To a large extent, this impressive record can be attributed to a legislative climate that is, and has been for some time, favourable for renewable energy investment.⁹⁸ The latest EU energy target commits the union to meeting 20% of its energy needs from renewable energy sources by 2020.⁹⁹ It also

⁹⁷ Cécile Kerebel "Renewable Energy" (1 March 2015) European Parliament www.europarl.europa.eu.

⁹⁸ Lean Kitzing and others "Renewable energy policies in Europe: Converging or Diverging?" (2012) 51 Energy Policy 192 at 192; Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 115/47 (signed 13 December 2007, came into force 1 December 2009) [TFEU], art 194.

⁹⁹ Directive 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77 and 2003/30 [2009] OJ L 140, recital 13.

commits all member states to legally binding national targets for 2020 renewable energy production.

2 *Spain's Feed-in Tariff policy*

For some time, Spain has embraced the EU's renewable energy targets and since the Electric Power Act of 1997, Spain has been operating a Feed-in Tariff (FiT) policy.¹⁰⁰ Under this policy, consumers are charged an additional fee for energy consumption, which is then paid to renewable energy producers at a rate determined according to the technology they use or the size of their operation.¹⁰¹ In other words, renewable energy electricity plants receive a preferential price for the electricity they feed into the grid. This Act established a system which could be annually revised and which successfully encouraged stable but low levels of renewable energy deployment. Because of the significant levels of solar radiation in Spain, the scheme was targeted exclusively at producers in the Solar PV sector.

For the first seven years of its operation, the Spanish FiT programme functioned adequately; however, many policymakers believed it could be improved. In 2004, Royal Decree 436/2004 was passed which amended the Spanish FiT scheme, introducing an aggregate target of 150 megawatts (MW) of solar PV production, setting price support levels as a percentage of the average electricity tariff, and establishing a system of four yearly rather than annual review. Overall, this new regulation led to more favourable treatment for both large and small solar operations. It further liberalised energy markets and had a significant positive impact on both domestic and foreign investment in Solar PV. However, it failed to introduce best-practice FiT design elements, such as the digressive FiT rate in place in Germany, and also caused a strong rise in household electricity prices.¹⁰²

In order to ameliorate the pressures on households, the Spanish government amended the scheme a second time, in June 2007, by Royal Decree 661/2007. This regulation de-linked the FiT rate from the average electricity tariff and obliged Solar PV installations to accept a standard fixed

¹⁰⁰ Spanish Royal Decree 2818/1998.

¹⁰¹ Toby Couture and others *A Policymaker's Guide to Feed-in Tariff Policy Decision* (NREL, Colorado, 2010) at V.

¹⁰² Anne Held and others *Feed-In Systems in Germany, Spain and Slovenia: A Comparison* (Karlsruhe, Fraunhofer Publishing, 2007) at 29.

FiT rate. In an effort to foster investment in larger-scale Solar PV facilities, which were considered cheaper per unit (those in the 100kW/h – 10MW/h bracket), it also increased the tariffs awarded to such projects by as much as 82 percent. This amendment made Spain’s feed-in tariffs the most generous in Europe and such generosity did not go un-noticed.

By 2008, Spain was hosting half of the world’s new solar energy installations by wattage and companies from all over Europe and the United States were flocking to Spain. Within the space of a year, the number of annual solar PV installations rose five-fold, from 544 megawatts to 2708 megawatts.¹⁰³ Unfortunately, this growth was beyond anything the Spanish government had foreseen and happened to coincide with general economic downturn caused by the banking crisis that hit Spain in 2008. The Spanish Government found itself confronted with a growing feed-in tariff deficit that it was in no position to pay.

B The Causes and Effects of the Spanish Solar Crisis

1 The crux of the crisis

The dominant factors behind Spain’s solar boom are well known. FiT rates were too high, they were provided at a time when technology costs were decreasing, and they were not designed to account for changes in technology costs.¹⁰⁴ According to Spanish public officials, the tariffs were intended to provide developers with an internal rate of rate return of between 5 and 9 percent, but, in actuality, provided between 10 to 15 percent returns to many investors.¹⁰⁵

All of these factors worked to create a Solar PV market so lucrative that, between June and September 2008, nearly 500MW of solar energy capacity (enough to power 375,000 Californian households for a year) was installed every month. This exponential growth caused a corresponding growth in the costs of the FiT scheme and total subsidies payable to PV generators skyrocketed from 194 million euros in 2007 to 2.6 billion euros in 2009.¹⁰⁶ The Spanish

¹⁰³ Pablo Del Rio and Pere Mir-Artigues *A Cautionary Tale: Spain’s Solar PV Investment Bubble* (Institute for Sustainable Development, Winnipeg, 2014) at 7.

¹⁰⁴ At 14.

¹⁰⁵ At 12.

¹⁰⁶ International Energy Agency *Energy Policies of IEA Countries: Spain – Executive Summary* (Paris, International Energy Agency, 2015) at 10.

Government was unable to meet these rising costs and by 2009 had accumulated a huge tariff deficit equivalent to almost 3% of Spanish GDP.¹⁰⁷

Perhaps Spain could have withstood this solar boom had it not been for the financial crisis, which began in 2007 and deepened in 2008. This crisis hastened the end of Spain's expansive fiscal cycle and had major repercussions for Spain's energy market. While the crisis was largely one of private indebtedness, it saw sovereign debt in Spain rise from 40% of GDP in 2007 to more than 100% of GDP in the first six months of 2013.¹⁰⁸ In response to this deteriorating fiscal position, the Spanish government saw the gradual removal of all FiTs as its only option.¹⁰⁹

2 *The Government's response*

As soon as the true scale of the solar boom became evident, the Spanish government took a number of steps to regress from its commitments to Solar PV producers. Within the space of three years, it passed various amendments and legislative decrees (namely Royal Decree 1565/2010, Royal Decree 14/2010 and Royal Decree 9/2013), which collectively re-classified PV installations into new categories, introduced capacity quotas, retroactively reduced tariffs levels to near zero, implemented a cap on operating hours and imposed a moratorium on new projects.¹¹⁰ All of these reforms had the effect of grinding the Spanish solar market to a halt.¹¹¹

Yet this was not the end of the regulatory changes. On 12 July 2013, the Spanish Government approved a package of urgent legislative measures aimed at eliminating the Spanish electricity deficit. The adoption of Royal Decree 15/2012 and Royal Decree 2/2014 effectively abolished the feed-in tariff system, replacing it with a backdated remuneration scheme which paid energy producers on the basis of their installed capacity and exploitation costs, not their electricity production.¹¹²

¹⁰⁷ Banco de España "Financial Accounts, Debt of the non-financial sectors as % of GDP" (1 April 2013)

Banco de España <http://www.bde.es>.

¹⁰⁸ Celia Olivet and Pia Enberhardt *Profiting from Crisis* (Transnational Institute and Corporate Europe Observatory, Amsterdam, 2014) at 27.

¹⁰⁹ Ioannis Glinavos "Solar Eclipse: Investment Treaty Arbitration and Spain's Photovoltaic Troubles" (2015) Social Science Research Network 1 at 4.

¹¹⁰ At 4-5.

¹¹¹ Del Rio and Mir-Artigues, above n 103, at 18.

¹¹² Glinavos, above n 109, at 5.

Throughout the regulatory changes, the Spanish Government maintained that all cuts to FiTs were necessary in order to reduce its electricity tariff deficit, as well as to meet the requests of the EU for stringent cuts to the public budget. Defending the reforms, José Manuel Soria, the Minister for Industry, Energy and Tourism stated, “if we did nothing, the only two alternatives would [have] either be[en] bankruptcy of the system or an increase of the price to consumers of more than 40 percent.”¹¹³

3 *Kick-back from domestic investors*

Unsurprisingly, Solar PV investors were highly critical of Spain’s actions and demanded compensation for their losses. For domestic investors, many of whom had switched their livelihoods to Solar PV and faced financial ruin as a result of the FiT cuts, this meant bringing claims before the domestic courts of Spain.

In 2011, fourteen domestic producers filed a suit against the Spanish government, hoping to pave the way for the estimated 30,000 Spanish households who had invested in solar PV.¹¹⁴ Yet, their claim was unsuccessful. In a ruling handed down in January 2014, the Supreme Court of Spain held that domestic producers “do not have a right...for the economic regime that regulates the retributions they receive not to be changed.”¹¹⁵ In short, they are subject to all the regulatory decisions of their democratic government.

4 *Foreign investors commence international arbitral proceedings*

Perhaps not surprisingly, given the extensive investor protections outlined in Part I, the position in respect of Spain’s liability to foreign solar PV investors has proven to be very different. Thanks to the Energy Charter Treaty, foreign investors have the mandate to bypass the domestic courts and directly challenge the Spanish government’s actions before international arbitral tribunals.¹¹⁶ Like other investment treaties, the ECT contains enforceable investment protection provisions and provides investors from signatory states with recourse to investment arbitration whenever their investment in another signatory state is threatened. As of 2015, almost every

¹¹³ Suzanne Daley “Spain’s Solar Pullback Threatens Pocketbooks” (5 January 2014) New York Times www.nytimes.com.

¹¹⁴ El País “Supreme Court Backs Cuts to the Solar Power Producers’ Earnings” (21 January 2014) El País www.elpais.com

¹¹⁵ Above n 114.

¹¹⁶ ECT, above n 1, art 26.

foreign investor present in Spain had taken the opportunity to initiate arbitral proceedings under the ECT.

Although the precise number of foreign investors who have submitted claims against Spain is unknown, as of July 2015, twenty separate cases were publicly registered with the ECT Secretariat.¹¹⁷ All are currently pending. These cases collectively involve over ninety foreign investors, who each demand full compensation for their losses, alleging that the revocation of FiTs was contrary to article 10 (fair and equitable treatment) and article 13 (expropriation) of the ECT. Although confidentiality measures have precluded the publication of precise details regarding the investors' claims, one claimant publicly requests 60 million euros for each year until the dispute is resolved, while another claimant, on behalf of a group of 14 investors known as the *PV investors*, requests between 600 million euros and 2 billion euros in damages.¹¹⁸ The Spanish solar arbitrations provide insightful and highly relevant insight into the way in which multiple related claims against a single host state are resolved through investment arbitration.

III Adjudicating Multiple Investor Claims: The Spanish Solar Arbitrations

This section of the paper will focus on the Spanish solar crisis as a case study of concurrent claims. It will examine how various arbitral tribunals have dealt with the claims of over ninety foreign investors in the Spanish solar market. In particular, it will examine the nature of the investors' claims under the ECT, how they are being handled procedurally, what safeguards exist to ensure consistency between awards, and (as these disputes are still pending) whether such consistency is likely to occur in practice.

A The Unique Nature of the Spanish Solar Investors' Claims

1 The similarities between the claims of foreign investors in Spanish Solar PV

It is no longer uncommon for investor crises to be adjudicated through multiple investment arbitrations against a host state. Yet, the Spanish solar crisis is unique in its potential for

¹¹⁷ Energy Charter Secretariat "Investor-State Dispute Settlement Cases" (16 June 2015) Energy Charter Treaty www.encharter.org

¹¹⁸ José Luis Iriarte and Lupicinio Rodríguez "The Increasing Number and Methods of Arbitration Claims Brought Against Spain for its Renewable Energy Measures" (29 May 2014) Lexology www.lexology.com

collaborative arbitration. Almost all national crises that have led to arbitral claims in the past, and which have subsequently become fodder for academic debate on inconsistency, have involved multiple BITs and contractual agreements, investors from various different sectors, claims of markedly different scales, and a host of different legal arguments.¹¹⁹ The same cannot be said for the Spanish solar crisis. In fact, it represents as perfect an example as could be found of a homogenous arbitral dispute between multiple investors and a host state.¹²⁰

Firstly, the claim is based almost entirely on obligations enshrined in one investment treaty, the Energy Charter Treaty. The fact that all investor claims are based on the same legal standards enshrined in the ECT links the investors' claims in a way that would not be possible under separate BITs. Even where two BITs contain the same investment protections, the interpretations of those protections may legitimately differ due to the context and purpose of the specific BITs. The same differentiation does not occur in claims under the ECT, not least because it is a multilateral investment treaty with a common objective – the liberalisation of trade and investment in the European energy market.

Secondly, the Spanish solar arbitrations involve investments in only one sector, Solar PV. Though there are different types of solar PV investment, foreign investors almost exclusively invested in larger solar parks, those in the 100kW/h – 10MW/h bracket, which were deemed more profitable.¹²¹ The investors are also of a very similar type. While some renewable energy developers have brought claims, particularly in the last twelve months, the majority of claims are brought by private equity funds based in Western Europe.¹²² Among them are Dutch pension funds, the Deutsche Bank, insurance companies and other financial institutions.¹²³

Thirdly, the investors' claims concern investments that were made at a similar time. The time an investment is made can have considerable implications on the outcome of an arbitral dispute.¹²⁴

¹¹⁹ Alvarez, above n 5, at 86 and 90.

¹²⁰ Iriarte and Rodriguez, above n 118.

¹²¹ Begoña Barba de Alba “Las Renovables Cruzan el Charco Con Capital Riesgo” (25 October 2012) Cinco Dias www.cinco dias.com.

¹²² Olivet and Enberhardt, above n 108, at 31.

¹²³ At 32.

¹²⁴ UNCTAD *Fair and Equitable Treatment: Series on Issues in International Investment Agreements II* (UNCTAD, Geneva, 2012) at 71.

Therefore, it is worth noting that almost all foreign investment in Spain occurred between 2009 and 2012.¹²⁵ During this period, disquiet about solar subsidies was already widespread and the Spanish government had already begun cutting back FiTs. The investors that took advantage of the initial 2004 and 2007 subsidies were mostly national companies that built large-scale solar installations, which they later sold to foreign investors at auction.¹²⁶

Fourthly, and finally, the investors invoke the same causes of action arising out of the Energy Charter Treaty and object to the same state measures. They all dispute the validity of Spain's energy reforms between 2009 and 2013 and invoke the same investor protections contained in the ECT. Article 10 of the ECT includes provisions relating to investment climate, fair and equitable treatment, protection and security, and freedom from discrimination.¹²⁷ It sets a minimum standard for assessing violations of these promises. Article 13 of the ECT is more specific, providing that an investment "shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation."¹²⁸ The solar PV investors all invoke both articles 10 and 13, contending that unstable investment conditions and changes to energy policy amounted to unfair and inequitable treatment on the part of the Spanish government.¹²⁹ They also suggest that the revocation of FiTs amounted to an indirect expropriation of their assets, on the basis that it resulted in a loss of expected profits.¹³⁰

2 *The untapped potential for consolidated resolution*

These four similarities make the Spanish solar crisis the perfect candidate for collaborative arbitral resolution. Consolidating the various claims into one, at least on the matters of law, would enable a single tribunal to deliver a cohesive and consistent decision in respect of Spain's liability to investors for the revocation of FiTs. It has the potential to mitigate the risk of inconsistency, avoid excessive duplication, keep costs low, and ensure equality between

¹²⁵ Glinavos, above n 109, at 5.

¹²⁶ Olivet and Enberhardt, above n 108, at 29.

¹²⁷ ECT, above n 1, art 10.

¹²⁸ Art 13.

¹²⁹ Glinavos, above n 109, at 8.

¹³⁰ Rachel Nathanson "The Revocation of Clean-Energy Investment Economic-Support Systems as Indirect Expropriation Post – Nykomb: A Spanish Case Analysis" (2013) 98 *Iowa Law Review* 863 at 901.

investors.¹³¹ Yet, achieving such consolidation in the current ad hoc system of arbitration is extremely difficult.

Interestingly, the first investor claim provided hope for a consistent and cohesive arbitral outcome. In 2011, sixteen investors, who owned nearly a third of the installed power in Spain, banded together to bring a consolidated claim for 600 million euros. Their claim was brought under the ad hoc UNCITRAL arbitration rules and, while it still pending, the tribunal has since agreed to hear the claims together.¹³²

The second claim was filed in 2012 by two parent companies, Charanne and Construction Investments, under the rules of the Stockholm Chamber of Commerce.¹³³ This claim unsettled the previously organised and clear *PV Investors v Spain* claim and instigated a new, separate procedural track under the SSC. This followed a different process and was to proceed at a different speed. It was further controversial as while the claimant companies were registered in the Netherlands and Luxembourg, they were ‘mailbox companies’ owned by Spanish businessmen.¹³⁴ Following this case, two subsequent claims were registered under the rules of the SSC.

By 2013, it became apparent that there was not going to be a consolidated or cohesive award handed down in respect of the Spanish solar crisis. By that time, four further claims had emerged, this time under the rules of ICSID. Over the next two years, the number of ICSID cases initiated against Spain jumped to sixteen and that number is still growing. While some commentators were initially hopeful that a common arbitral panel might nevertheless be established, or that the same arbitrators might be asked to sit on each of the tribunals, neither has occurred.¹³⁵ As either option would require the consent of the respondent state and the collaboration of all consenting claimants, it has proven to be too difficult a task.¹³⁶

¹³¹ Alvarez, above n 5, at 398-399.

¹³² *The PV Investors*, above n 4.

¹³³ IA Reporter “Spain round-up: twin Energy Charter claims moving at different speeds” 18 June 2013 Investment Arbitration Reporter <http://www.iareporter.com>.

¹³⁴ Olivet and Enberhardt, above n 108, at 30.

¹³⁵ Sebastian Perry and Kryiaki Karadelis “Sun rises on Czech energy claims” (19 February 2014) Global Arbitration Review www.globalarbitrationreview.com.

¹³⁶ Andrew Steingruber *Consent in International Arbitration* (Oxford University Press, Oxford, 2012) at [10.65].

Instead, the twenty separate cases have been publicly lodged with the ECT secretariat under a host of different arbitral rules and with entirely different tribunals tasked with resolving each case.¹³⁷ While it is not the intention of this paper to negate the right of a foreign investor to bring a claim independently of other investors, it is worth highlighting that despite the remarkable similarity between the Solar PV investors' claims, they are proceeding separately at the expense of expediency and consistency.

B Explaining the Unconsolidated Approach to Multiple Claims under the ECT

The Spanish solar crises is the single largest event ever arbitrated under the ECT and the first instance in which the ECT has been invoked by multiple investors that have suffered damage arising from the same diplomatic, historic or other event.¹³⁸ The way in which their claims are progressing has raised important questions about how multiple claims against a host state ought to be dealt with under the ECT.

1 Introduction to the Energy Charter Treaty

The ECT opened for signature on 17 December 1994, came into force on 16 April 1998, and now has fifty-three state parties.¹³⁹ It was originally envisaged as a purely European agreement that would facilitate greater energy cooperation between Western European States on the one hand, and those of Eastern Europe and the former Soviet Union on the other.¹⁴⁰ The post-socialist states wanted greater access to investment capital from EU sources, which would enable them to expand their energy resource industries both domestically and for export.¹⁴¹ The EU member states wanted greater access to energy resources from their Eastern neighbours, in order that they might reduce their dependence on Middle Eastern oil.¹⁴² Yet, this initial European focus was seen by other states (particularly the USA) as protectionist and as monopolising access to Eastern

¹³⁷ Energy Charter Secretariat "Investor-State Dispute Settlement Cases" (16 June 2015) Energy Charter Treaty www.encharter.org.

¹³⁸ Energy Charter Secretariat, above n 137.

¹³⁹ Campbell McLachlan and others *International Investment Arbitration: Substantive Principles* (1st ed, Oxford University Press, Oxford, 2008) at 88.

¹⁴⁰ Peter Muchlinski "The Energy Charter Treaty: Towards a New International order for Trade and Investment or a Case of History Repeating Itself" in Thomas Walde *The Energy Charter Treaty: An East-west Gateway for Investment and Trade* (1st ed, Kluwer Law International, 1996) 205-225 at 205.

¹⁴¹ At 205.

¹⁴² Julia Dore "Negotiating the Energy Charter Treaty" in Thomas Walde *The Energy Charter Treaty: An East-west Gateway for Investment and Trade* (1st ed, Kluwer Law International, 1996) 137- 153 at 139.

European energy sources. In response to these criticisms and intensive US lobbying, the European Charter initiative was thus expanded in 1991 and the US and other non-EU OECD members were invited to participate.¹⁴³

While the participation of the USA was warmly welcomed by many countries due to the importance of both the US energy industry and the USA as a trade partner, this participation was short-lived.¹⁴⁴ In 1994, the USA refused to ratify the Energy Charter Treaty on the basis that that “current text... does not measure up to the standard expected by US investors.”¹⁴⁵ US negotiators had advocated loudly for stronger investor protections at the pre-investment stage as well as more relaxed rules around discriminatory trade practices, but when neither approach was adopted (largely to keep Russia within the process), it chose to continue participating in the Treaty as an observer state only.¹⁴⁶

Thus, the ECT progressed without the USA and a basic, but extensive set of investor protections was drafted. The final investment promotion and protection regime (Part III) guarantees national treatment or mutual non-discrimination between all contracting parties, and further includes other protections common to BITs, such as fair and equitable treatment (FET) and protection from expropriation. In addition, it contains a number of novel protections such as a promise to treat investors no less favourably than the standard required by international law and a requirement to observe all obligations made to investors (i.e. an umbrella clause).¹⁴⁷ Article 10 also makes it clear that Contracting Parties are not merely forbidden from taking unreasonable actions to harm foreign investors and their investments; they are affirmatively obligated to create the conditions necessary for those investments to exist and to thrive.¹⁴⁸ Despite being vaguely worded, it has been argued that these provisions represent the most extensive protection that is possible to negotiate in a multilateral instrument.¹⁴⁹

¹⁴³ At 140.

¹⁴⁴ At 144.

¹⁴⁵ Muchlinsi, above n 140, at 207.

¹⁴⁶ Dore, above n 142, at 150.

¹⁴⁷ Emmanuel Gaillard and Mark McNeill “The Energy Charter Treaty” in Katia Yannaca-Small (eds) *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, Oxford, 2010) 37-62 at 46.

¹⁴⁸ At 46.

¹⁴⁹ Dore, above n 142, at 139; Matthew Happold and Thomas Roe “The Energy Charter Treaty” in Tarcisio Gazzini and Eric De Brabandere (eds.) *International Investment Law: Sources of Rights and Obligations* (Martinus Nijhoff Publishers, Boston, 2012) 69-97 at 96.

2 *Introduction to arbitration under the ECT*

Part III of the ECT sets out the obligations undertaken by Contracting Parties to investors of other Contracting Parties, while Article 26 of Part V outlines how disputes between investors and States in respect of Part III are to be settled.¹⁵⁰ Article 26 provides for the submission of disputes to arbitration. In particular, it gives eligible investors the flexibility to bring an arbitral claim to ICSID, to the arbitration institute of the SSC or under the ad hoc arbitration rules of UNCITRAL.¹⁵¹ This ‘cafeteria’ style of arbitration affords investors a wide choice of arbitral forum and is often rejected on the basis that it encourages ‘forum shopping.’ Its use in this context can be explained by a desire to please the large number of opposing parties involved in the ECT and also by the need to create a dispute settlement provision which Russia would agree to.¹⁵² In any case, the scope of investor choice between these institutions and rules has had a significant impact on investors’ claims.¹⁵³

Like many investment treaties, the ECT also contains a three-month waiting period for amicable settlement, but thereafter leaves it open to the claimant to choose whether to submit a dispute to the courts of the Contracting Party, to engage a previously agreed dispute settlement procedure or to initiate arbitration in one of the forums listed above.¹⁵⁴ More often than not, after the expiration of the waiting period, aggrieved investors will submit a dispute directly to arbitration, usually through ICSID.¹⁵⁵

The powers of an arbitral tribunal constituted pursuant to Article 26 are largely delineated by the applicable rules (the ICSID Convention, the Additional Facility Rules, the SSC arbitral rules or the UNCITRAL arbitration rules), but broadly speaking, investment arbitration offers a better chance for investors to gain compensation than any of the alternative methods of recourse.¹⁵⁶ The ECT places no limits on an arbitral tribunal’s powers to make interim orders or orders for

¹⁵⁰ Happold and Roe, above n 149, at 70; Dugan, above n 3, at 52 and 63.

¹⁵¹ Paulsson, above n 36, at 250; ECT, above n 1, art 26.

¹⁵² Dore, above n 142, at 147.

¹⁵³ Gaillard and McNeill, above n 147, at 50.

¹⁵⁴ ECT, above n 1, art 26.

¹⁵⁵ Happold and Roe, above n 149, at 95.

¹⁵⁶ Gaillard and McNeill, above n 147, at 50.

provisional measures, expressly confirms an arbitral tribunal's power to award interest, and does not generally limit the tribunal to awards for monetary damages and restitution of property.¹⁵⁷

3 *How are multiple claims addressed in the ECT?*

The ECT provides little in the way of guidance when it comes to multiple investor claims. It simply prescribes arbitration as a legitimate mechanism for the settlement of investor-state disputes, leaving the rest to the given forum chosen by the parties.¹⁵⁸ As a result there are no procedural provisions requiring or encouraging consistency. In particular, there is no clause prescribing, encouraging or even allowing the consolidation of multiple investor claims. Any consolidation must be authorised by the rules of the respective arbitral forum or derived from general arbitral practice.¹⁵⁹

This is consistent with the generally accepted view that “a BIT is only a vehicle for some type of arbitration, whose legal nature is not in principle affected or determined by the BIT.”¹⁶⁰ Yet, as will be outlined below, such deference to the very same rules as other arbitration proceedings risks an over-reliance on traditional procedure and creates the false impression that “investment arbitration [is not]...so far apart from international commercial arbitration.”¹⁶¹

4 *Adjudicating multiple proceedings under ICSID*

As the largest arbitral institution in the world, and the most common forum employed in both the Spanish solar arbitrations and ECT arbitrations more generally, ICSID has a considerable influence on how multiple claims proceed under the ECT.

The ICSID Convention is the central guiding document of ICSID. While it puts a premium on accuracy, it says little about multiple claims or the importance of consistency between similar decisions.¹⁶² There is no provision outlining whether cases arising out of the same factual

¹⁵⁷ Happold and Roe, above n 149, at 95.

¹⁵⁸ ECT, above n 1, art 26.

¹⁵⁹ Happold and Roe, above n 149, at 94 and 97.

¹⁶⁰ Georgios Petrochilos *Procedural Law in International Arbitration* (Oxford University Press, Oxford, 2004) at [6.56].

¹⁶¹ Hanno Wehland *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (Oxford University Press, Oxford, 2013) at 5.12.

¹⁶² Heiskanen and Giroud, above n 77, at 111.

scenario or those involving similar legal issues can or should be consolidated.¹⁶³ Prior to the latest review of the ICSID rules in 2006, a number of proposals were put forward for greater participation of third parties and streamlined provisional measures, yet no consolidation or joinder provisions gained any traction.¹⁶⁴ If consolidation is to occur at all under ICSID, it must rest on Article 44 of the ICSID Convention, which authorises tribunals to fill procedural gaps not covered by the Convention or any of the ICSID arbitration rules.¹⁶⁵ This lack of direct engagement with the issue of multiple investor claims can perhaps be explained by the fact that the ICSID Convention may be amended only if all Contracting States ratify the amendment, something which has never happened in the history of the Convention.¹⁶⁶

The ICSID Convention is supplemented by various regulations and rules. These include the ICSID Arbitration Rules, which outline procedures for the conduct of an arbitration proceeding from the constitution of the tribunal to the preparation of its award.¹⁶⁷ Like the ICSID Convention, the rules are silent on multiple claims; however Rule 19 does authorise tribunals to “make orders required for the conduct of the proceeding.”¹⁶⁸ While this rule does not leave any room for improvisation by an arbitral tribunal, it has been interpreted as permissive of voluntary consolidation in a number of ICSID cases.¹⁶⁹

In *Suez v Argentina*, the tribunal accepted, relying on Article 44 of the ICSID Convention, that it could hear the claims of five different investors jointly, provided that this was the wish of the parties.¹⁷⁰ Likewise, in *Abaclat v Argentina*, the tribunal accepted that Article 44 of the Convention and Rule 19 of the ICSID Arbitration Rules permitted it to make unique procedural arrangements when confronted with a mass claim brought by a large number of investors.¹⁷¹ The

¹⁶³ At 111.

¹⁶⁴ Antonietti, above n 92, at 447.

¹⁶⁵ ICSID Convention, above n 12, art 53.

¹⁶⁶ Art 66.

¹⁶⁷ International Centre for Settlement of Investment Disputes “Rules of Procedure for Arbitration Proceedings” in *Convention, Regulations and Rules* (ICSID, Washington, 2003) [ICSID Rules].

¹⁶⁸ ICSID Rules, above n 167, r 19.

¹⁶⁹ Berk Demirkil “Does an Investment Treaty Tribunal need Special Consent for Mass Claims” (2013) 2(3) *CJICL* 612 at 632.

¹⁷⁰ *Suez and others v Argentine Republic (Decision on Jurisdiction)* ICSID ARB/03/17, 16 May 2006 at [17].

¹⁷¹ *Abaclat and others v the Argentine Republic (Decision on Jurisdiction and Admissibility)* ICSID ARB/07/5, 4 August 2011 at [522].

tribunal called this process, “filling the gaps left by the ICSID Convention and Arbitration Rules.”¹⁷² It is also worth noting that, independent of the Convention and the Arbitration Rules, the ICSID secretariat has developed a practice of recommending that the same arbitrators be appointed in cases raising similar issues. The Secretariat justifies this practice as an attempt to reach “in practice a result that is as close to consolidation as possible.”¹⁷³

Despite the lack of explicit provisions regarding multiple claims, a number of practical mechanisms do exist to permit voluntary, ad hoc consolidation under ICSID. Yet, while such practices go some way to reducing the risk of inconsistency, inconsistent decisions continue to occur and the majority of ICSID claims proceed individually (as evident by the Spanish solar arbitrations). There is no legal mechanism encouraging, incentivising or obliging similar investors to bring claims arising out of the same factual circumstances before one arbitral tribunal.

5 *Adjudicating multiple proceedings under UNCITRAL*

Unlike ICSID, UNCITRAL is not a formalised arbitral institution but rather a comprehensive set of rules to be followed in ad hoc arbitration.¹⁷⁴ The UNCITRAL Arbitration rules set the parameters within which proceedings must operate. They were last revised in 2010 and now include a joinder provision in Article 17(4), which allows one or more third persons to be joined in the arbitration, provided this does not prejudice any other party and provided they are party to the same arbitration agreement.¹⁷⁵ While this provision may offer assistance in respect of some investment treaty claims, much will depend on how the phrase “arbitration agreement” is interpreted. If it is interpreted narrowly, as the agreement between a specific investor and a host State to arbitrate, it will offer little help in the case of concurrent claims. However, if interpreted broadly as the investment treaty itself, then perhaps similar claimants invoking BIT provisions could make use of this provision to join their claims. In any case, aside from Article 17(4), there are no UNCITRAL provisions promoting consistency between multiple claims, nor any general provisions on consolidation.

¹⁷² At [522].

¹⁷³ Bernard Hanotiau *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (Kluwer Law International, The Hague, 2005) at [419].

¹⁷⁴ David D Caron and Lee M Caplan *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed, Oxford University Press, Oxford, 2013) at 57.

¹⁷⁵ UNCITRAL Rules, above n 93, art 17(4).

Interestingly, during working group discussions prior to the 2010 revision of the UNCITRAL Arbitration Rules, some delegations expressed support for the inclusion of a consolidation provision similar to that contained in the rules of the International Criminal Court.¹⁷⁶ They did so on the basis that consolidation was seen to be more efficient and more conducive of consistent awards. While their proposal gained traction and the UNCITRAL Secretariat prepared a draft provision, it was ultimately rejected. Concerns regarding the applicability of such a provision in non-administered arbitrations were cited as the prevailing reason for this outcome.¹⁷⁷ In other words, the consolidation provision was considered unworkable due to the *ad hoc* nature of the rules.

Turning to the Spanish Solar arbitrations, it is interesting to note that the only consolidated claim of the crisis, *PV Investors v Spain*, was brought under the UNCITRAL Rules.¹⁷⁸ Clearly, despite no explicit provisions in respect of consolidation, UNCITRAL tribunals are prepared to accept the voluntary consolidation of claims when all parties to the dispute agree.

6 *Adjudicating multiple proceedings in SSC arbitrations*

Of the arbitral fora prescribed in the ECT, the SSC Arbitration Rules are the most explicit in their recognition of consolidation. Since 2007, these rules have provided, in Article 11 that:¹⁷⁹

Upon the submission of a Request for Arbitration concerning a legal relationship in respect of which an arbitration between the same parties is already pending under these Rules, the Board may, at the request of a party, decide to include the claims contained in the Request for Arbitration in the pending proceedings. Such decision will only be made after consulting the parties and the Arbitral Tribunal.

While this article is explicit, it is not particularly conducive to the consolidation of concurrent claims. Instead, it is targeted at parallel proceedings involving the same parties, ruling out consolidation where the parties' claims are virtually identical but not the same. Of the three

¹⁷⁶ Caron and Caplan, above n 174, at 58.

¹⁷⁷ At 58.

¹⁷⁸ *The PV Investors*, above n 4.

¹⁷⁹ The Arbitration Institute of the Stockholm Chamber of Commerce *SSC Rules (1 January 2007)* (Stockholm, SSC Secretariat, 2010), art 11.

Spanish solar claims proceeding in accordance with the SSC Arbitration rules, none have been consolidated.

7 *Relevance to Spanish solar arbitration*

Given the wording of the various arbitration rules and procedures mentioned above, it is hardly surprising that the Spanish solar arbitrations have largely proceeded in a separate and isolated manner. Without any provision incentivising, encouraging or even outlining the option of consolidation, claimants will almost always opt to bring their own independent claim against a host state. Notwithstanding that a consolidated approach may bring a more efficient and consistent resolution, parties are unlikely to work together unless encouraged and unless specific procedures exist to ensure that investors do not open themselves up to revealing information to their competitors when bringing a consolidated claim.¹⁸⁰

C Implications of an Individualised Approach to Multiple ECT Claims

1 *Benefits of an individualised approach*

The individualised approach to adjudicating claims of multiple investors under the ECT ensures that the confidential and autonomous features of arbitration, which often appeal to investors, are safeguarded.¹⁸¹ It ensures that every investor has the full opportunity to pursue their claim and that the risk of disclosing commercially sensitive information to competitors is negligible or nil.

As stated by the tribunal in the NAFTA dispute of *Corn Products International*:¹⁸²

“...the parties should not have to calculate which items of information, evidence, documents and arguments they can share with their competitors and which ones they cannot share. The tribunal hearing the claims should not have to require separate procedures to accommodate the competitive sensitivity of the evidence and submissions of the different claimants. Under such circumstances, a consolidation order cannot be in the interests of fair and efficient resolution of the claims. Two tribunals can handle two separate cases more fairly and efficiently than one tribunal where the two claimants are direct and major competitors, and the claims raise issues of competitive and commercial sensitivity.

¹⁸⁰ See, for example, *Corn Products International Inc v United Mexican States* ICSID ARB (AF)/04/1, and *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc v Mexico*, ICSID ARB (AF)/04/5 [*Corn Products*] (*Order of the Consolidation Tribunal*), 20 May 2005 at [8].

¹⁸¹ Dugan, above n 3, at 202.

¹⁸² *Corn Products*, above n 180, at [9].

In support of such an approach is the reality that an unconsolidated approach to multiple claims works in most cases. The majority of arbitral decisions do tend to follow past decisions and in the uncommon instance when the sheer number of claimants makes separate arbitration impossible, perhaps the ability of tribunals to fill the gaps in Arbitral rules and allow a mass claim arbitration to proceed is sufficient. After all, the Tribunal in *Abaclat* was prepared to accept that when “claimants have homogenous rights of compensation for a homogenous damage caused to them by potential homogenous breaches by [a host state] of homogenous obligations”, their claims may be brought by a single representative entity.¹⁸³

2 *Costs of an unconsolidated approach*

Yet, while the decision in *Abaclat* represents an innovative and encouraging example of mass claim arbitration under ICSID, it was only able to occur because of full claimant consent, because of the homogeneity of claims and because, at the outset, a single entity emerged that was able to represent the large number of claimants.¹⁸⁴ Interestingly, Argentina objection to this “unprecedented mass action” was not considered a barrier to the tribunal’s jurisdiction.¹⁸⁵ In any case, the consolidation of claims under current rules and institutions is severely limited and remains in an infant stage.

Moreover, although the majority of multiple proceedings do reach consistent decisions, those that do not are glaringly obvious, undermine the rule of law and threaten the legitimacy of investment arbitration. When, in 2001, tribunals delivered inconsistent awards in the cases of *CME* and *Lauder* it reflected poorly on investment arbitration as a method of fair and effective dispute resolution.¹⁸⁶ These two awards arose out of a dispute relating to broadcasting licenses, which had been revoked by the Czech Media Council. The former was filed by Mr Lauder, a shareholder of CME, and the later by the parent company. Although these two cases arose out of the same circumstances and involved the same legal issues, the tribunals reached opposite

¹⁸³ *Abaclat*, above n 171, at [541] – [543].

¹⁸⁴ Demirkil, above n 169, at 624-625.

¹⁸⁵ *Abaclat*, above n 171, at [471].

¹⁸⁶ *CME Czech Republic BV v Czech Republic (Partial Award)* UNCITRAL, ILC 61 (2001); *Lauder v Czech Republic (Final Award)* UNCITRAL, ILC 205 (2001).

conclusions. The former tribunal awarded no compensation for lack of proof of causation, while the latter awarded compensation amount to approximately USD 270 million.¹⁸⁷

Another prominent example of inconsistency concerns two awards issued in the wake of the Argentine Financial Crisis. These cases were discussed with brevity in Part I, but it is worth reflecting once again on these decisions. The claims of investors in both *LG&E and CMS* were identical in all material respects and in both instances Argentina invoked the fundamental international law defence of necessity.¹⁸⁸ These similarities notwithstanding, the Tribunal in *CMS* placed the burden of proving necessity on the host state and ultimately rejected the defence, whereas the Tribunal in *LG&E* took the opposite approach and found the defence to be made out.¹⁸⁹ This inconsistency is all the more surprising given that Judge Francisco Rezek sat on both tribunals.

Both of these examples demonstrate the difficulty of maintaining consistency between concurrent multiple claims. In both instances, separate tribunals faced with same issues failed to take a consistent approach to the law and produced conflicting decisions. Whether an inconsistent outcome is likely to occur in respect of the Spanish solar arbitrations is of critical relevance to the present discussion.

3 *Implications in the Spanish solar arbitrations*

As the investors' claims against Spain are all currently pending, is it impossible to determine the precise effect that an individualised approach will have on the outcome of this dispute. Nevertheless, it is logical to expect that without a consolidated decision on matters of legal principle, separate and confidential tribunals will inevitably take differing views on the application of the investor protections contained in the ECT.¹⁹⁰

These protections have never before been interpreted in the context of renewable energy investment and the only previous arbitration to address whether the revocation of economic-

¹⁸⁷ See, for example, Frank Spoorenberg and Jorge E Vinuales "Conflicting Decisions in International Arbitration" (2009) 8 *The Law and Practice of International Courts and Tribunals* 91 at 98.

¹⁸⁸ *LG&E*, above n 70, at [257]; *CMS Gas Transmission Company*, above n 70, at [353] and [357].

¹⁸⁹ *LG&E*, above n 70, at [258]; *CMS Gas Transmission Company*, above n 70, at [359].

¹⁹⁰ Nathanson, above n 130, at 890.

price supports amounted to expropriation, *Nykomb v Latvia*, was heavily criticised for disregarding internationally recognised expropriation reasoning methods (the sole-effects and mixed-effects doctrines).¹⁹¹ There is very little direction for tribunals on the approach to follow or on the appropriate standard that ought to be met.

Tribunals have wide discretion and it is entirely possible that they will draw opposite conclusions in virtually identical situations. For example, one tribunal may find that Spain breached its duty to accord investors with “fair and equitable treatment” when it reneged on its promise to provide a stable, welcoming environment for solar PV investment. Such a conclusion is entirely plausible given that an increasing number of tribunals have recognised that “fair and equitable treatment” can include the “legitimate business expectations of investors”.¹⁹² Another tribunal may find that while Spain breached its obligations, its actions were defensible in light of an economic crisis so severe that austerity became an “essential security interest of the state”.¹⁹³ While some tribunals have taken a narrow view of the “necessity defence” in the past, economic crises have been accepted as legitimate justification for a BIT breach.¹⁹⁴

What these examples demonstrate is that inconsistent awards are a very real possibility in the Spanish solar arbitrations. In fact, even if all twenty tribunals were to decide consistently in favour of the solar PV investors, it is still likely that they would adopt differing approaches on the issue of the appropriate remedy.¹⁹⁵ In either case, inconsistency has (at the very least) the potential to anger disputing parties and confuse the public.

Legal uncertainty such as outlined above, is also of particular concern to current and future renewable energy investors in ECT Member states, as well as to the governments of such states (particularly those already employing FiT policies). Governments must be able to know the

¹⁹¹ *Nykomb Synergetics Technology Holding AB v The Republic of Latvia (Award)* SSC 118/2001, 16 December 2003 at [4.3.1]; Nathanson, above n 130, at 888-889.

¹⁹² *Occidental v Ecuador (Award)* LCIA UN 3467, 1 July 2004 at [183]; *Enron v Argentina (Award)* ICSID ARB/01/3, 22 May 2007 at [260]; *CMS Gas Transmission Company*, above n 70, at [276]. See also McLachlan, above n 139, at [7.99].

¹⁹³ *Continental Casualty Co. v Argentine Republic (Award)* ICSID ARB/03/9, 5 September 2008 at [199].

¹⁹⁴ *LG&E*, above n 70, at [251].

¹⁹⁵ Joshua Simmons “Valuation in Investor-State Arbitration: Towards a More Exact Science” (2012) 30 *Berkeley J Intl Law* 196 at 197-198.

extent to which they can regulate to encourage the production of renewable energy (as required under EU law) without that regulation amounting to an enforceable promise.¹⁹⁶ Investors too must be able to know when weight should be placed on promises of government support and to what extent. Without such predictability, investment disputes over feed-in tariffs will continue, creating market uncertainty and reducing both the likelihood of future investment in solar PV and the likelihood of future governmental support.

Although such public policy considerations do weigh in to the interpretations by arbitral tribunals of the appropriate balance between legitimate regulation in the public interest and unfair and inequitable treatment or expropriation, they are often under-weighted. For the most part, this is due to the lack of guidance in respect of what kinds of state conduct are considered acceptable and when. While the ECT is relatively specific in terms of the protections it provides to investors, it is silent on when a breach of such protections may be justified. Tribunals must turn to customary international law principles, such as “necessity” and “state responsibility” in order to determine the scope of legitimate public action.¹⁹⁷ These principles are easily discounted relative to the explicit treaty rights of investors under the ECT. In the not dissimilar Argentine fiscal crisis cases, the tribunals struggled to determine the scope of Argentina’s defence of necessity and drew wildly different conclusions on the extent to which the “public interest” element of Argentina’s actions could be considered.¹⁹⁸ It is likely that the same struggle will occur in the Spanish solar crisis and that public interest considerations will be discounted relative to the enshrined treaty rights of solar PV investors.

IV Reforming Arbitration to Better Respond to Multiple Claims

The final section of this paper will engage in a normative analysis of how investment arbitration procedures might be amended to better handle multiple claims arising out of the same or similar factual circumstances. As in any normative exercise, the plausible policy options are extensive and cannot all be adequately examined. As a result, three have been chosen, which are the most

¹⁹⁶ Nathanson, above n 130, at 904-905.

¹⁹⁷ *Draft Articles on Responsibility of States for Internationally Wrongful Acts* [2001] vol II, pt 2 YILCA 31 at 80.

¹⁹⁸ Compare, for example, *Sempra Energy International*, above n 88, at [376]-[378]; *LG&E*, above n 70, at [257]-[258]; and *Enron*, above n 88, at [368]-[395]. See also Alvarez, above n 5, at 274-5.

relevant to the Spanish Solar crisis and also the most easily implemented – greater consolidation of claims, the use of test cases and preliminary rulings.

A Greater Consolidation

Greater consolidation of related claims may offer an effective way to ensure that multiple investor disputes are resolved more effectively and consistently. But is consolidation beneficial, possible and practicable in cases like as the Spanish solar crisis?

1 The advantages and disadvantages of consolidation

Greater consolidation of concurrent arbitral proceedings is often considered to be the most attractive option when dealing with the issue of inconsistency.¹⁹⁹ It can be understood as the joining of two or more separate proceedings into one arbitration conducted by consolidated tribunal.²⁰⁰ Consolidation is not a new idea - it already occurs on an ad-hoc basis in investment arbitration, is well-known in domestic arbitration and, when compared with other reform proposals, is less dramatic or expensive.²⁰¹ It can save time, reduce costs and has the added benefit of requiring states to defend themselves in only one proceeding.²⁰²

These advantages notwithstanding, requiring foreign investors to collaborate entails a marked departure from the fundamental principle of party autonomy and may cause a considerable number of practical difficulties (not least surrounding commercially sensitive information).²⁰³ If greater consolidation of investor claims is to occur, a balance must be struck between the right of a foreign investor to have its individual claim heard and the desire for a more consistent, more efficient arbitral process.²⁰⁴ The North American Free Trade Agreement (NAFTA) strikes a modest balance between these competing interests and is a useful model for ECT reform.²⁰⁵

¹⁹⁹ Kenneth Vandavelde *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, Oxford, 2010) at 454-455.

²⁰⁰ Mariel Dimsey *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International publishing, The Hague, 2008) at 125.

²⁰¹ Dimsey, above n 200, at 133-135.

²⁰² Christina Knahr “Consolidation of Proceedings in International Investment Arbitration” in Christian Koller and others (eds) *Investment and Commercial Arbitration: Similarities and Divergences* (Eleven International Publishing, The Netherlands, 2010) at 4.

²⁰³ Vandavelde, above n 199, at 456.

²⁰⁴ Dimsey, above n 200, at 126.

²⁰⁵ North American Free Trade Agreement 32 ILM 289, 605 (opened for signature 17 December 1992, entered into force 01 January 1994) [NAFTA].

2 Consolidation under NAFTA

Article 1126 of NAFTA permits arbitral tribunals to “assume jurisdiction over, and hear and determine together” the claims of multiple foreign investors.²⁰⁶ It permits consolidation where two or more claims submitted to arbitration “have a question of law or fact in common”, where consolidation is “in the interests of fair and efficient resolution of claims”, and where consolidation is requested by one or both of the disputing parties.²⁰⁷

These requirements have put tight limits on the scope of consolidation under NAFTA, yet article 1126 remains the most prominent consolidation provision in investor-state arbitration and also the most relevant in practice.²⁰⁸ It has been invoked on a number of occasions, but not without difficulty. In particular, tribunals have reached differing conclusions on what is in the interests of fair and efficient resolution of claims.²⁰⁹

In *Corn Products v Mexico (Corn Products)*, the tribunal held that the consolidation of two soft drink manufacturers’ claims against Mexico was not consistent with this requirement.²¹⁰ It concluded that the “direct and major competition between the claimants” would inhibit their ability to work together and share information. They further concluded that complex and slow proceedings were likely to result due to the parties’ desire to protect the confidentiality of sensitive information.²¹¹

By contrast, in *Canfor, Tembec and Terminal Forest v United States (Softwood Lumber)*, the tribunal held that the consolidation of the claims of four lumber companies was “in the interests of the fair and efficient resolution of claims.”²¹² This was in spite of the fact that the investors wanted their claims to remain separate and were reluctant to co-operate.²¹³ The tribunal also held that the consent of investors to consolidation could be derived from their general consent to

²⁰⁶ NAFTA, above n 205, art 1126.

²⁰⁷ Art 1126.

²⁰⁸ Knahr, above n 202, at 8.

²⁰⁹ At 8.

²¹⁰ *Corn Products*, above n 180, at [9].

²¹¹ At [8].

²¹² *Canfor Corp v United States, Tembec et al v United States, and Terminal Forest Products Ltd v United States UNCITRAL (Order of the Consolidation Tribunal)*, 7 September 2005 at [221].

²¹³ Knahr, above n 202, at 9.

arbitrate under Section B of NAFTA Chapter 11.²¹⁴ Interestingly, the tribunal interpreted Chapter 11 as a package deal, which included the possibility that consolidation might be ordered if the provisions of Article 1126 were met.²¹⁵ This implied consent on the part of an investor can be likened to a state's standing offer to arbitrate, which is derived from a general arbitration provision in a BIT.²¹⁶

3 *Applicability of Article 1126 to ECT disputes*

While the application of article 1126 has been inconsistent, it appears to strike a good balance between party autonomy and the need for compulsory consolidation in some circumstances. By requiring "fairness and efficiency", it puts a necessary boundary on tribunal discretion. By authorising tribunals to act only when consolidation is "desired by one or both of the parties," it ensures that party autonomy remains central to the enquiry.²¹⁷ Yet, would such a provision function effectively if incorporated into the ECT and would it have encouraged consolidation in the case of the Spanish solar arbitrations?

In answering these questions, it is first helpful to point out a number of similarities between the ECT and NAFTA. Both are multilateral agreements, both regulate trade and investment, and both contain similar investor protections that are enforceable through arbitration.²¹⁸ A number of points of difference are also of interest. Where NAFTA has tri-partisan membership, the ECT has 51 member states. Where NAFTA applies to all inter-state investments, the ECT is focused solely on investments in the energy sector. Both the wide membership and the narrow focus of the ECT make it a fertile breeding ground for concurrent claims against a host State.²¹⁹ It would appear to be a prime candidate for consolidated proceedings.

4 *Incorporating a consolidation provision in practice*

The desirability of consolidation notwithstanding, the ECT contains no reference to consolidation and the likelihood of incorporating such a reference today is very slim. Unlike NAFTA, which has been continuously revised over the past two decades (particularly in respect

²¹⁴ *Canfor Corp*, above n 212, at [79].

²¹⁵ Knahr, above n 202, at 9.

²¹⁶ Dugan, above n 6, at 221-222.

²¹⁷ Dimsey, above n 200, at 135.

²¹⁸ NAFTA, above n 205, chapter 11; ECT, above n 1, art 26.

²¹⁹ Happold and Roe, above n 149, at 75 and 96.

of the rules of origin), the ECT has remained almost entirely intact since coming into effect in 1998.²²⁰ This rigidity can largely be attributed to the requirement of unanimity between contracting parties before any amendment is made. This standard is guaranteed by Article 36(1) of the ECT and has resulted in a static agreement that “marks the high watermark of investor protection.”²²¹ Today it is virtually impossible to envisage that consensus could ever be reached in respect of an amendment that grafts a consolidation provision onto the ECT.²²² The same can be said for the ICSID Convention, which governs the procedural elements of many ECT disputes and provides for the enforceability of most arbitral awards.²²³ Like the ECT, the ICSID Convention requires consensus for amendment and experience has shown this to be “unlikely to the point of impossibility”.²²⁴

In light of the rigidity of both the ECT and the ICSID Convention, inclusion of a consolidation provision into the subsidiary ICSID Arbitration Rules and UNCITRAL Arbitration may provide the next best alternative.²²⁵ Amendments to the ICSID Arbitration Rules in 2006 brought about significant changes to arbitral practice under ICSID, including a number of new transparency provisions.²²⁶ Amendments to the UNCITRAL Arbitration Rules in 2010 also succeeded in introducing a number of new provisions, particularly in respect of multi-party arbitration, procedural efficiency and interim measures.²²⁷ While neither of these arbitration rules precludes consolidation, an explicit provision would help to legitimise and encourage the practice in appropriate circumstances.²²⁸ In the past, proposals to introduce consolidation have failed to gain the necessary support from the respective governing bodies. Yet, as the need to streamline concurrent claims becomes more and more apparent, such proposals are likely to gain the

²²⁰ The only amendment to the ECT occurred concurrently with its inception in April 1998. See Energy Charter Secretariat “The Trade Amendment of the Energy Charter Treaty: Explained to Decision-makers of Ratifying Countries” (24 April 1998) <http://www.energycharter.org/>.

²²¹ ECT, above n 1, art 36; Happold and Roe, above n 149, at 75 and 96.

²²² At 96.

²²³ ICSID Convention, above n 12, Chapter IV.

²²⁴ Diana Marie Wick “The Counter-Productivity of ICSID Denunciation and Proposals for Change” (2012) 11(2) *JIBL* 239 at 287; Kate Supnik “Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law” (2009) 59 *Duke LJ* 343 at 366-367.

²²⁵ United Nations Conference on Trade and Development *Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD, Geneva, 2014) at 112-3.

²²⁶ ICSID Rules, above n 93.

²²⁷ UNCITRAL Rules, above n 93.

²²⁸ Knahr, above n 202, at 18; UNCTAD, above n 225, at 113.

necessary traction. Provided the written vote of the administrative councils can be obtained, new amendments providing for consolidation could be immediately effective.²²⁹

5 *Greater consolidation in the Spanish solar arbitrations*

The Spanish solar arbitrations are a prime candidate for consolidated proceedings. Nevertheless, it remains to be seen whether article 1126 (or an equivalent) would have enabled effective consolidation on the facts. To answer this question, it must be determined whether the parties would have invoked the provision, whether there is a question of fact or law in common, and whether consolidation is in the interest of the “fair and efficient resolution of claims.”²³⁰

The first two criteria are likely to be easily satisfied, at least to some extent. Even on the off chance that Spain does not invoke the provision to avoid defending 20 fragmented claims, many of the claimants would likely have invoked the provision in the interests of efficiency, cost-cutting and clarity.²³¹ Unlike the soft drink industry discussed in *Corn products*, the solar PV sector is not fiercely competitive internally (its main competition is with fossil fuel energy producers), and agreeable collaboration between investors is foreseeable.²³² This notwithstanding, it is still doubtful whether all investors would have agreed to collaborate. As it stands, the claimant investors have brought claims before three separate arbitral institutions, making it highly unforeseeable that they would have all agreed to collaborate and bring a claim simply before ICSID or an alternative institution. Nevertheless, even if only those investors which brought their claims before ICSID (over two-thirds of claimants) had agreed to collaborate, this would still have had considerable positive net effects in terms of consistency and cost-cutting.

Of further interest, all foreign investors that have claimed against Spain do so in respect of the same amendments to the feed-in tariff policy, invoke the same provisions of the ECT (either Articles 10, 12, 13 or a combination of the three), and bring claims in respect of very similar

²²⁹ Antonietti, above n 92, at 431-443

²³⁰ NAFTA, above n 205, art 1126.

²³¹ See *The PV Investors*, above n 4.; UNCTAD “Recent Developments in Investor State Dispute Settlement (ISDS)” 1 *IIA Issues Note* 1 at 6 and 8.

²³² Knahr, above n 202, at 15; Vandavelde, above n 199, at 456.

investments (namely capital investments in large solar parks between 10-100MW in capacity).²³³ As in *Softwood Lumber*, which was consolidated under NAFTA, there are questions of law and fact in common.²³⁴

Yet, just as in both *Softwood Lumber* and *Corn Products*, satisfying the final criterion of “fairness and efficiency” is inherently difficult. On the one hand, allowing the claims to proceed individually guarantees that every investor’s claim is heard and that all commercially sensitive information remains confidential.²³⁵ Yet on the other, consolidation ensures that like solar PV investors are treated alike and that Spain is bound to a consistent position in respect of energy regulation.²³⁶ Consolidation may also make for a more efficient process. Spain would only have to defend its actions before one consolidated tribunal and investors could make use of joint representation to cut legal costs and save time.²³⁷

Overall, if Article 1126 or an equivalent were applicable, it would improve the likelihood of consolidation in the case of the Spanish solar arbitrations and would consequently reduce the likelihood of inconsistency between awards.

B The Temporary Suspension of Proceedings, Preliminary Rulings and Test Cases

An alternative means of promoting consistency could involve the use of test cases or preliminary rulings. Such mechanisms would provide guidance to tribunals while preserving their independence. While a temporary suspension of proceedings would be required for such mechanisms to function effectively, this may in fact assist in ensuring the prompt and final resolutions of disputes. The following section will examine whether the suspension of proceedings is practical and appropriate in investment treaty arbitration.

1 The advantages and disadvantages of staying proceedings

The suspension of proceedings is not completely unknown to investment arbitration. In fact, “the power of a tribunal to stay proceedings to await the outcome of a related dispute in another

²³³ Glinavos, above n 109, at 6-7.

²³⁴ *Canfor Corp*, above n 212, at [79] and [221].

²³⁵ *Corn Products*, above n 180, at [8-9].

²³⁶ Vanderveelde, above n 199, at 455.

²³⁷ Olivet and Enberhardt, above n 108, at 28.

forum” is well established.²³⁸ In *SGS v Philippines*, an ICSID tribunal decided to stay proceedings pending the outcome of litigation before the domestic courts of the home state.²³⁹ The investor’s claim was dependent upon the finding of a breach of contract by the domestic court and it was thus in the interests of efficiency and consistency to stay proceedings.²⁴⁰

Outside of the investment context, the tribunal in the *MOX Plant* arbitration decided that the risk of European competence over a dispute between the United Kingdom and Ireland (over the construction of a plutonium plant on the Irish Sea) justified a stay of proceedings pending a hearing by the European Court of Justice.²⁴¹ Likewise, international tribunals have on numerous occasions recognised that they have discretion to stay their proceedings if there is another tribunal seized of the matter.²⁴² Ordinarily, they will do so when it is both in the interests of the parties and the ends of justice to defer to said tribunal.²⁴³ By way of an example, the tribunal in *SPP v Egypt* decided to stay the exercise of its jurisdiction pending a decision by a parallel ICC arbitration.²⁴⁴ While international tribunals have confined the scope of this discretion to concurrent arbitrations brought by identical claimants under the same treaty, there is potential for a broader approach in the case of investment arbitration.²⁴⁵

At present, this potential has not been realised.²⁴⁶ In the controversial *CME & Lauder* cases, the tribunals took a strict view of the requirement of identical claimants and specifically rejected an argument by the Czech Republic that one of the cases be deferred on the basis that the economic identity of the claimant parties was the same.²⁴⁷ As a result, two conflicting awards were delivered, which have since becoming infamous as examples of the danger of concurrent proceedings. Adopting a broader definition of the identity of parties may offer considerable

²³⁸ Wehland, above n 161, at 7.03.

²³⁹ *SGS Société Générale de Surveillance SA v Republic of the Philippines (Objections to Jurisdiction)*, ICSID ARB/02/6, 29 January 2004 at [173] and [176].

²⁴⁰ At [175].

²⁴¹ *Mox Plant Arbitration (Ireland v United Kingdom) (Award)* (2003) 126 *ILR* 310 at [20]-[28]; Campbell McLachlan *Lis Pendens in International Law* (Martinus Nijhoff Publishers, Boston, 2009) at 337.

²⁴² McLachlan, above n 241, at 287.

²⁴³ McLachlan, above n 241, at 287.

²⁴⁴ *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt (Decision on Objections to Jurisdiction)* ICSID ARB/84/03, 27 November 1985.

²⁴⁵ McLachlan, above n 241, at 291 and 297.

²⁴⁶ Wehland, above n 161, at 7.23.

²⁴⁷ *CME Czech Republic BV*, above n 186, at 355.

advantages for tribunals tasked with resolving multiple-investor disputes.²⁴⁸ In particular, it may provide tribunals with helpful guidance on the applicable law and also ensure that investor protections are interpreted consistently between tribunals.²⁴⁹ Unlike consolidation, it would achieve these ends without interfering with the right of an investor to be heard independently.²⁵⁰ It is submitted that wherever claimants are in privity of interest with each other or base their claims on the same investor protections in the same factual scenario, there is sufficient *identity of parties* to justify a stay of proceedings.²⁵¹

While there is no doctrine of *stare decisis* or binding precedent at international law, there are many reasons why proceedings that have been stayed pending the outcome of a test case or preliminary ruling would follow the approach of a prior tribunal.²⁵² Thanks to the system of *jurisprudence constante*, which has evolved in investment arbitration, tribunals are now generally expected to give due consideration to relevant decisions and justify any divergence in their approach.²⁵³ This expectation is likely to be all the more apparent where a test case or preliminary ruling has been given.²⁵⁴

Yet, the temporary suspension of proceedings has disadvantages too. Not only does it increase the time it takes for a tribunal to issue an award, it also puts considerable pressure on the tribunal tasked with resolving the test case or preliminary ruling to approach the legal standards correctly. If the tribunal makes a poor decision, it is likely that the consequences will be compounded when the suspended proceedings are resumed.²⁵⁵ The way in which a test case or preliminary ruling procedure is implemented is central to its success or failure.

2 *Staying proceedings pending resolution of a test case*

The most straightforward method of suspending proceedings pending a test case involves greater use of the international law principle of comity, which calls on international forums “to defer,

²⁴⁸ McLachlan, above n 241, at 297.

²⁴⁹ Wehland, above n 161, at 7.28.

²⁵⁰ Vanderveelde, above n 199, at 455.

²⁵¹ McLachlan, above n 241, at 297.

²⁵² Wehland, above n 161, at 7.24.

²⁵³ Commission, above n 7, at 146-149.

²⁵⁴ Robert L Henry “Jurisprudence Constante and Stare Decisis Contrasted” (1929) 15(1) *American Bar Association Journal* 11 at 11.

²⁵⁵ Vanderveelde, above n 199, at 455.

when appropriate, to other courts and to treat their procedures and decisions with courtesy and respect.”²⁵⁶ Consistent with this principle, arbitral tribunals already have the power to stay proceedings awaiting the outcome of a related dispute in another forum, usually for purposes of justice and efficiency.²⁵⁷

Extending this principle to allow tribunals to halt proceedings in anticipation of a related arbitral award (involving different claimants but near-identical factual and legal issues) would require few structural changes.²⁵⁸ Article 15(1) of the UNCITRAL Arbitration Rules, Article 19 of the ICSID Arbitration Rules, and Article 44 of the ICSID Convention already provide the impetus for tribunals to “make orders required for the conduct of the proceeding” and to “fill the gaps” in arbitral rules and agreements.²⁵⁹ A further provision is required, but it need not be problematic. Inclusion of a simple provision in the arbitral rules, which provides for the elevation of a particular factual circumstance to the position of a test case (with the consent of the parties) and which gives tribunals the discretion to order the temporary suspension of related proceedings, would be sufficient.

3 *Staying proceedings pending a preliminary ruling*

A more radical option would be to adopt a model based on the European Union’s preliminary reference system.²⁶⁰ Under Article 234 of the Treaty on the Function of the European Union, a national court may ask the European Court of Justice (CJEU) for a preliminary ruling on a matter of European Union law.²⁶¹ The outcome of this ruling is then binding on their final decision. This instrument has been effective in securing coherence and uniformity of European Union law. It has also been recognised as a potential template for other areas of international law.²⁶²

²⁵⁶ James Crawford *Brownlie’s Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 28.

²⁵⁷ *SGS Société Générale de Surveillance SA*, above n 239, at [173]; Wehland, above n 161, at 7.03.

²⁵⁸ Dimsey, above n 200, at 141.

²⁵⁹ ICSID Rules, above n 93, r 18; UNCITRAL Rules, above n 93, art 15(1). See also *SGS Société Générale de Surveillance SA*, above n 239, at [173].

²⁶⁰ August Reinisch “The Issues Raised by Parallel Proceedings and Possible Solutions” in Michael Waibel and others *The Backlash against Investment Arbitration* (Kluwer Law International, The Netherlands, 2010) 113 at 119.

²⁶¹ TFEU, above n 98, art 234.

²⁶² Reinisch, above n 260, at 113-126 at 119.

Adapted to investment arbitration, a preliminary rulings procedure could provide helpful guidance to tribunals faced with novel issues of treaty application or confronted with conflicting previous decisions.²⁶³ While a mechanism of this kind would require the establishment of a central and permanent body, no further changes to the basic functioning of investment treaty arbitration would be required.²⁶⁴ Unlike an appeals system, preliminary rulings would not obstruct the finality of awards. This means that Article 53 of the ICSID Convention could remain intact.²⁶⁵ As a matter of procedure, the body tasked with giving rulings would intervene prior to the resolution of a dispute, providing guidance on matters of law, but leaving the final resolution to the tribunal appointed by the parties.²⁶⁶ Of course, the central question when considering the plausibility of preliminary rulings is who will be entrusted with delivering them? In the horizontal system of investment treaty arbitration, identifying an appropriate body or organ is inherently difficult; however it is possible that recourse could be had to the Permanent Court of Arbitration or that a new body which is fit-for-purpose could be established and provided with authority under the various Arbitration Rules.

While it is inevitable that tribunals would need to suspend their proceedings pending a preliminary ruling (thereby increasing the time and costs of the process), this may help rather than hinder the prompt resolution of multiple investor disputes.²⁶⁷ When claims proceed concurrently, all foreign investors must bring evidence in support of all elements of their claims. A preliminary ruling would resolve many of the broader issues of interpretation and procedure prior to a tribunal hearing, thereby enabling tribunals to focus on the specific facts of the dispute. The guidance received through the preliminary ruling would also provide reassurance that a uniform interpretation of the relevant investor protections was being applied.²⁶⁸ Although the details of a preliminary rulings mechanism require further discussion, the concept certainly offers considerable potential as a means for avoiding fragmentation in multiple investor disputes.

²⁶³ Christopher Schreuer “Preliminary Rulings in Investment Arbitration” in Karl P. Sauvant and Michael Chiswick-Patterson (eds) *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) at 207-211 at 208.

²⁶⁴ Wehland, above n 161, at 7.07.

²⁶⁵ Schreuer, above n 263, at 211.

²⁶⁶ At 211.

²⁶⁷ At 209.

²⁶⁸ At 211.

4 *A stay of proceedings in the Spanish solar crisis*

Regardless of which mechanism is adopted, implementing a suspension of proceedings in the Spanish solar arbitrations has the potential to add clarity and consistency to the dispute settlement process. While it may increase the time between the submission of claims and the rendering of final awards, it is likely to ensure that the Spanish Government and foreign solar investors alike are sent a consistent message. A consistent message would ensure that investors in Spanish renewable energy have some degree of market certainty and would provide the Spanish Government (and the governments of other ECT states) with clarity on when a withdrawal of support for solar investors will trigger the protections contained in the ECT.²⁶⁹

If the test case procedure is adopted, it is likely that a clearer position in respect of Spain's liability to investors will become evident sooner than under the current model. Likewise, if the more dramatic preliminary rulings procedure is implemented, and *all* claims currently lodged against Spain are temporarily suspended, the outcome of the preliminary ruling is likely to resolve a number of novel questions currently plaguing the Spanish solar arbitrations.²⁷⁰ In either case, investment tribunals will have a persuasive guideline to follow when determining the validity of solar investors' claims. As a result, they will be far less likely to produce awards that are inconsistent with those rendered in separate, related proceedings.²⁷¹

C Other Options for Reform

There are many different ways in which investment arbitration could evolve to better accommodate the claims of multiple investors against a host State. While consolidation and test cases offer possible application to the Spanish solar crisis and present interesting and viable options for energy disputes, it is not the author's intention to advocate for either reform. Rather, the author wishes to highlight the need for arbitral discourse to think creatively and quickly about the ways in which Investment Treaty Arbitration can evolve to better resolve sector-wide disputes between investors and states.

²⁶⁹ Nathanson, above n 130, at 902-904.

²⁷⁰ Nathanson, above n 130, at 902.

²⁷¹ Glinavos, above n 109, at 15.

V Conclusion

Behind all of the complexities of the Spanish solar arbitrations, and putting aside the economic, political and social dimensions of the solar crisis, it is clear that investment arbitration is failing to efficiently resolve this investor-state dispute. While the tribunals tasked with adjudicating the matter have yet to deliver a single award, it is possible to predict with some certainty that when they do they will not render their awards consistently. Over twenty tribunals have been vested with jurisdiction and not one of those tribunals is composed of the same set of arbitrators.²⁷² In addition, as dictated by the relevant arbitration rules, not one of those tribunals is required to consider the decisions of any others, nor required to decide consistently with previous relevant decisions.²⁷³ Instead, each tribunal is free to deliver its own decision based almost entirely on the primary applicable law - in this case, the Energy Charter Treaty. This degree of flexibility has profound implications for the parties as it fragments the regulatory dispute and greatly reduces the likelihood that like claims will be treated alike.

There are many historical reasons why the system of investment arbitration has evolved in this way, without due consideration for consistency or the rule of law, and there are also many reasons why this omission has been difficult to correct in the investment treaty context.²⁷⁴ Multilateral Conventions (such as ICSID and the ECT) are notoriously difficult to amend and any amendments that have been made to arbitration rules to date (such as the ICSID Amendments of 2006) have been limited to incremental process improvements, while ignoring the possibility of more systemic changes.

The difficulties of amendment notwithstanding, crises such as the Argentine fiscal crisis of 2001 and the Spanish solar crisis discussed in this paper highlight why significant reform is required. The way in which investment arbitration currently tackles sector-wide treaty disputes is inadequate and results in ongoing tensions and unclear outcomes. Because of the history of international arbitration as a bilateral method of dispute resolution, foreign investors from states that are party to an investment treaty (such as the Energy Charter Treaty) may bring

²⁷² Energy Charter Secretariat, above n 117.

²⁷³ Henry, above n 254 at 11.

²⁷⁴ Wick, above n 224 at 287

individualised claims against a signatory state whenever their regulatory actions cause financial loss. While this is appropriate when state actions affect only one foreign investor, such individualisation leads to unnecessary fragmentation when regulatory changes affect investors more generally. It may be in the best interests of each investor to have their claim heard separately, as it allows them to protect confidential information from competitors, and may even be in the interests of a defendant State, as it allows them re-work their case and build a stronger defence in later proceedings. However, individualisation is not in the interests of the effective resolution of a multi-party dispute nor the development of a consistent arbitral jurisprudence. Whenever disputes with significant factual and legal similarities are adjudicated concurrently, there is an unnecessary risk of inconsistency as well as an unwarranted duplication of argument. This not only increases costs for the parties but can also lead to conflicting decisions.

While acknowledging that claims may sometimes need to retain a degree of individuality, it is imperative that new and innovative ways to resolve multiple investor disputes are developed. Consistent and reliable outcomes are of fundamental importance in such a context and a more refined, collaborative approach would not only ensure that a clear and consistent body of arbitral jurisprudence was developing, but would also better enable states to plan their regulatory actions and accurately predict the consequences of those actions. For investors too, more collaborative arbitration would ensure greater regularity and provide assurance of equitable treatment, which would subsequently work to minimise re-litigation and annulment proceedings.

The solutions proposed in this paper are not dramatic or system wide. Instead, they are targeted towards the Energy Charter Treaty and towards disputes involving difficult public interest issues and a large number of investors. Disputes of this nature have rarely been heard by international tribunals, but investors are slowly realising the potential for recourse in such circumstances. They are invoking BITs in new ways but the system is not yet responding with a tailored approach. It is imperative that new rules of the road are developed, rules which promote or even require consolidation or which permit tribunals to stay proceedings pending the conclusion of a test case or a preliminary ruling. If implemented carefully and contextually, such reforms could prove highly effective in enabling disputes such as the Spanish solar crisis to be resolved more quickly and consistently.

Of course, these solutions are but some of the possibilities. The scope for arbitral reform in this area is considerable, yet it is not the central focus of this paper. Rather, it simply attempts to shine a light on the antiquated way in which disputes of this nature are being handled at present. Disputes over regulatory reforms, which affect multiple investors and the public interest, need modern and effective methods of resolution. Accepting this and the concessions it involves for the traditional practice of arbitration is the first step towards a better system of ISDS.

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