

# Current arbitration cases under the Energy Charter Treaty

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# Dr. Dörte Fouquet



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- ▶ Studies of Law at the Universities of Marburg and Hamburg
- ▶ 1982 Research assistant, University of Hamburg
- ▶ 1988 Ministry for the Environment and Energy, Hamburg
- ▶ 1991 Liaison office of Hamburg and Schleswig-Holstein to the European Commission in Brussels
- ▶ 1993 Partner at law firm Kuhbier, Brussels
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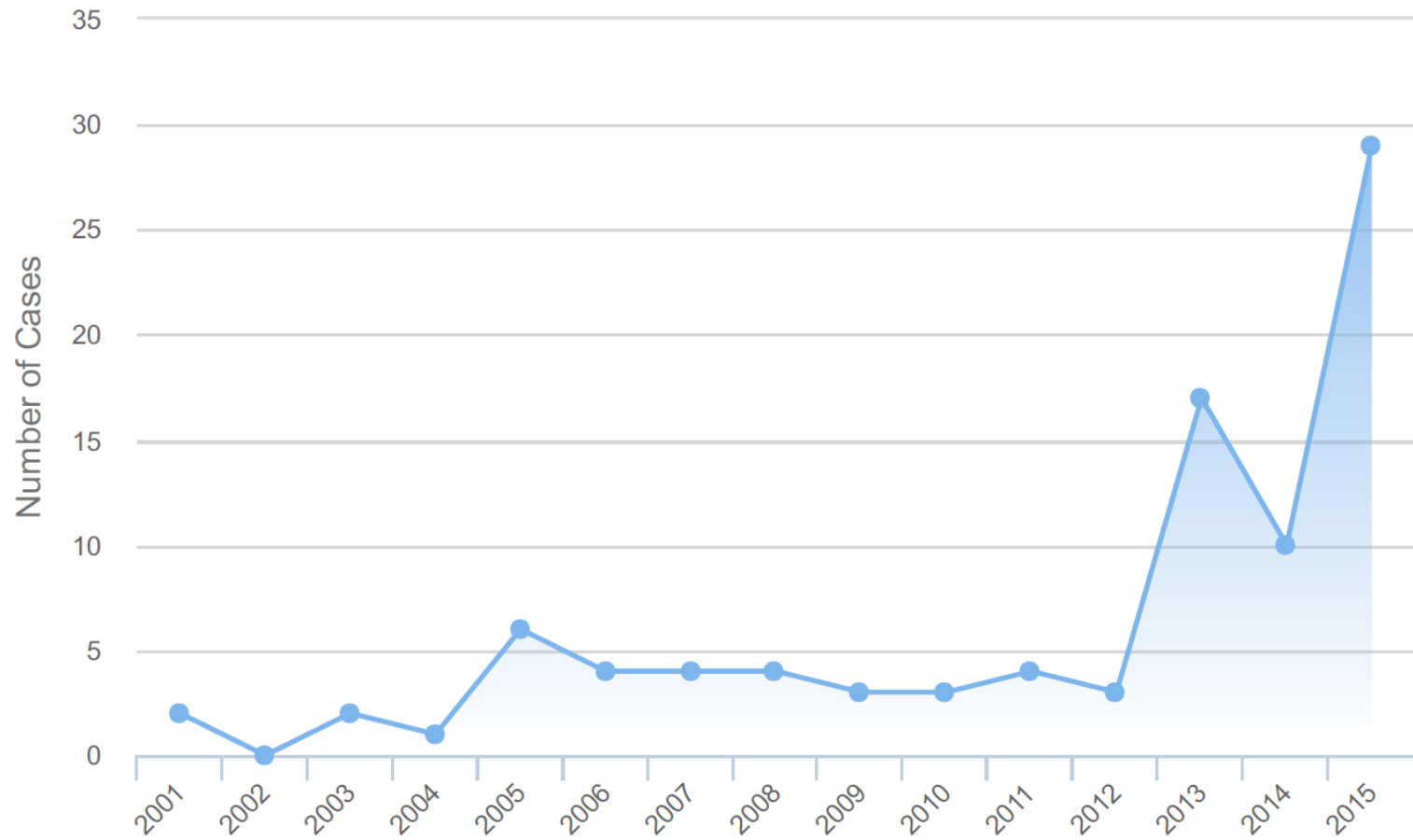
# Agenda

1. The Energy Charter Treaty – current developments
2. Current dispute settlement cases
3. Problem: Intra-EU-Arbitration

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## Number of Investment Dispute Cases per year



# The ECT – current developments (I)

- ▶ **Latest developments of dispute settlement:**
  - Known Investor-State Arbitration Cases under the ECT (Number of Cases Registered per Year, as of November 2015):
    - 2013: 17 Investor-State Arbitration Cases
    - 2014: 10 Investor-State Arbitration Cases
    - 2015: 29 Investor-State Arbitration Cases
      - The frequency with which disputes are brought by investors under the Energy Charter Treaty is increasing.
      - Still, the public discussion concerning the use of Investor/State Dispute Settlement in the US/EU TTIP negotiations has illustrated an increasing “distrust” by some Governments and NGOs of the use of arbitration in resolving Investor/State disputes.
  - In 2015 alone, **16 Investor-State Arbitration Cases** against Spain were registered at ETC.

# The ECT – current developments (II)

- ▶ **Main issue:** Cuts to renewable energy promotion schemes
- ▶ Latest Investment Dispute Settlement Cases:
  - **Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Spain; Case registered on 1 March 2016;** Subject matter: Legal reforms affecting the renewable energy sector.
  - **Eskosol S.p.A. in liquidazione v. Italy; Case registered on 22 December 2015;** Subject matter: Legal reforms affecting the renewable energy sector.
  - **Landesbank Baden-Württemberg and others v. Spain; Case registered on 12 November 2015;** Subject matter: Legal reforms affecting the renewable energy sector.
  - **Watkins Holdings S.à r.l. and others v. Spain; Case registered on 4 November 2015;** Subject matter: Legal reforms affecting the renewable energy sector.



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# Current Cases: Charanne vs. Spain (I)

- ▶ Charanne (the Netherlands) and Construction Investments (Luxembourg) v. Spain
  - Subject matter: Legal reforms affecting the renewable energy sector.
  - 21 January 2016: Award.
- ▶ **First award** rendered regarding the multitude of claims against Spain because of cuts to renewable energy scheme
- ▶ The Award addresses several currently controversial issues:
  - Jurisdiction: Nationality of Investors (because companies are subsidiaries of Spanish company Isolux Corsan) – tribunal does not see a problem because investment vehicle was foreign registered regardless of Spanish final investor
  - Intra-EU-Arbitration: Tribunal upholds jurisdiction and contradicts argumentation of EU Commission (ECT fully compatible with EU law)

## Current Cases: Charanne vs. Spain (II)

- ▶ **But: Main importance of the Award** concerns the assessment of the reduction of Spanish feed-in-tariffs/EE-promotion scheme
  
- ▶ Major question: Do FiT's create legitimate expectations of the investor within the sense of Article 10 (1) ECT?
  - The majority of the arbitral tribunal (Alexis Mourre and Claus von Wobeser) says no: Specific agreements (including a stabilisation clauses) or concrete commitments with the host State would be required
  - Dissenting Opinion by Guido Tawil argues that legally guaranteed feed-in tariffs are sufficient to raise legitimate expectations

## Current Cases: Charanne vs. Spain (III)

- ▶ **What is the impact of the decision on other cases and on investments in renewable energies?**
  - A multitude of arbitral claims against cuts of FiTs is pending (inter alia, against Italy, Czech Republic, Bulgaria, and Spain)
  - At first sight, the decision has a massively negative impact
- ▶ **But several issues might argue for a limited impact of the award:**
  - The award concerns only (relatively) minor legislative action in 2010 (between 2011 and 2014 Spain introduced more important cuts)
  - The legislative procedure in Spain was very transparent compared to other countries
  - Argumentation of the majority regarding the stabilisation clause appears somewhat outdated (impact and lawfulness of such clauses has been discussed for decades)
  - Dissenting Opinion shows a clear understanding of the functioning of FiTs
- ▶ **The upshot: There is still hope for investors!**

# Current Cases: Vattenfall AB (Sweden) et al v. Germany

- ▶ Case registered on 31.05.2012.
- ▶ Subject matter: Nuclear power plant; accelerated phase-out of nuclear energy as result of the amendment to the German Atomic Energy Act in 2011.
- ▶ Status of proceeding: Pending.
- ▶ Concerns of Vattenfall:
  - Lost of three-digit-million investments by the immediate withdrawel of the operating licence for the power plants Krümmel and Brunsbüttel
  - Krümmel is the only “new” plant which was shut down immediately
  - Fall in value of the residual electricity volume
- ▶ On the same grounds, a constitutional claim has been lodged by Vattenfall before the German BVerfG

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# Current Problem: Intra-EU-Arbitration

- ▶ Fundamental discussion concerning the legitimacy of ECT-based arbitral claims by European companies against EU Member States
- ▶ **Two diametrically opposed perspectives:**
  - **EU law perspective:** Principle of primacy of EU law; EU law „overrules“ any other existing obligations of EU Member States concerning EU issues (such as the ECT or intra-EU-BITs); EU competence for investment law since Lisbon Treaty 2009
  - **International law perspective:** EU law is not different from other international law; existing obligations have to be respected; conflicts have to be resolved by treaty interpretation

# Practical impact of controversy

- ▶ **EU Commission attempts to hinder and obstruct investment treaty claims by European investors**
  - Submission of amicus-curiea in several cases (AES vs. Hungary; Electrabel vs. Hungary; Micula vs. Romania, Antin vs. Spain, Eiser vs. Spain etc.)
    - Arguments (inter alia): EU as claimant, implicit dislocation, non-enforceability
  - Suggestions that enforcement constitutes illegal state aid
- ▶ Arbitral tribunals reject jurisdictional arguments and opt for harmonised treaty interpretation (no violation of BIT or ECT if and to the extent state aid exists)
- ▶ **Considerable uncertainty among European investors**
  - Is it still recommendable to invest using an European investment vehicle?
  - Uncertainty is contrary to Commission's intention to promote investment throughout the EU



Thank you very much  
for your attention.

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