

# The Renewable Energy Arbitrations Under the Energy Charter Treaty

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## 1. Introduction

The energy sector depends on large, upfront investments, which can only be recovered over a long period of time. This is the case of oil and gas, but also of the renewable energy ('RE') sector.<sup>1</sup> In light of the need to address climate change and energy security concerns, numerous States have been incentivizing such long-term investment in the RE sector. This is especially the case of European Union ('EU') Member States given the adoption of EU Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market ('Renewables Directive'),<sup>2</sup> which aimed at ensuring a 12% input of electricity from RE to the EU's gross inland energy consumption by 2010.<sup>3</sup> Under the Renewables Directive, EU Member States were obliged to attain individual targets for the consumption of electricity from RE.<sup>4</sup> Given the significant capital required for investments in the RE sector, many States, especially those in the EU, have enacted legal frameworks, such as feed-in tariffs ('FITs'), to incentivise long-term investment in the renewable energy ('RE') sector.<sup>5</sup> Such investments need the continuity of incentive schemes and protection from government policy changes.

As the favourable subsidies led to enormous investment in RE and an electricity tariffs deficit, coupled with a financial crisis from 2009, many EU States modified or withdrew their initial incentives. Their measures have given rise to an abundance of investor-State arbitrations under the Energy Charter Treaty ('ECT'). As at 30 January 2020, investors in the RE sector have brought under the ECT 40 arbitration proceedings against Spain,<sup>6</sup> 9 against Italy<sup>7</sup> and 7 against the Czech Republic.<sup>8</sup>

The RE ECT arbitrations are landmark in numerous fields: in international investment law and international energy law, as well as EU law, and public international law. They deal (in the form of jurisdictional objection) with the intricacies of whether the ECT applies to intra-EU investments, given that the latter are subject to the specific regulatory framework of the EU. Some Tribunals have addressed this type (or a variation of this) objection even in the aftermath of the landmark judgment of the Court of Justice of the EU ('CJEU') – *Slovak Republic v. Achmea* (2018)<sup>9</sup> - in which the CJEU was faced with a preliminary request by a German domestic court to determine whether Articles 344 and 267 of the Treaty for the Functioning of the European Union ('TFEU') preclude the application of a provision in a bilateral investment treaty ('BIT') between EU Member States under which an investor of a Contracting State may bring arbitral proceedings against the latter State where the BIT was concluded before one of the Contracting States acceded to the EU but the arbitral proceedings are brought after that date. The arbitral tribunals all reject

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<sup>1</sup> A recognition of the special nature of foreign investment in the energy sector: RREEF, para. 240.

<sup>2</sup> Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2007], OJ L283/33.

<sup>3</sup> Ibid.

<sup>4</sup> Renewables Directive, Preamble (5)-(7).

<sup>5</sup> This incentive has also been driven by the need to address climate change and energy security concerns thus leading to the option of diversification from oil and gas (especially from third States).

<sup>6</sup> 'Investment Dispute Settlement Navigator' <<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/197/spain>> accessed on 30 January 2020.

<sup>7</sup> 'Investment Dispute Settlement Navigator': <<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/103/italy/respondent>> accessed on 30 January 2020.

<sup>8</sup> 'Investment Dispute Settlement Navigator': <<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/55/czechia/respondent>> accessed on 30 January 2020.

<sup>9</sup> Case C-284/16, *Slovakische Republik (Slovak Republic) v Achmea BV*, Judgment, 6 March 2018.

this objection in relation to the ECT, despite the position of the CJEU that the TFEU takes precedence over a BIT provision on an arbitration clause. But, crucially these arbitral decisions are landmark in international investment law and international energy law because they clarify the content and function of FET, including legitimate expectations as an aspect of FET, and contextualise and exemplify the challenges a State may face when endeavouring to incentivise the production of electricity from RE sources, especially in order to address climate change concerns, thus experimenting in a new market sector. Given the sheer number of these cases, not all of them can be reviewed here, and the analysis focuses on four of them but taking others into account.

Part 2 examines the regulatory measures that were taken in Spain as an example of the regulatory frameworks some EU Member States have used to incentivize RE, and the type of regulatory changes they have made subsequent to the making of RE investments, which led to arbitral proceedings. Part 3 discusses four landmark arbitrations under the ECT concerning RE against Spain focusing on their findings concerning FET under the ECT. Part 4 discuss how these four cases are landmark for the ECT as a treaty. Part 5 discusses their significance of international investment law, and Part 6 their significance for public international law. Part 7 offers some conclusions.

## **2. State Regulatory Measures in New Energy Fields: Spain's Renewable Energy Experimentation**

This section focuses on the most contentious regulatory developments in Spain's domestic legal order. Numerous arbitrations against Spain stemmed from these measures and in some (but not all) cases the same measures were complained of by the investor. Spain liberalised its power generation industry by Law 54/1997, which created a special regime of remuneration<sup>10</sup> ("Special Regime") entitling producers of electricity from renewable sources to the payment of premiums<sup>11</sup> via a feed-in-tariff ("FIT"). Spain adopted RD 2818/1998 to regulate the Special Regime and the Administrative Registry for Production Facilities under the Special Regime ("RAIPRE") was established.<sup>12</sup> Producers were guaranteed a premium in excess of the market price for RAIPRE-registered facilities.<sup>13</sup> In Spain's case, the EU Renewables Directive required that Spain's individual target for electricity coming from RE was 29.4% by 2010.<sup>14</sup> Since the existing Spanish measures did not result in an increase in RE investment, RD 2818/1998 was abolished and RD 436/2004 was adopted, pursuant to which tariff rates and premiums were fixed for the lifetime of each facility, subject to a reduction after 25 years.<sup>15</sup> The tariffs and premiums were subject to an initial review after two years and every four years thereafter.<sup>16</sup> Further, producers could sell their electricity based on the FIT or on the market at a premium.<sup>17</sup> Spain further revised the regime by RD 661/2007 (May 2007), in order to better address the requirements of the EU Directive.<sup>18</sup> Producers of electricity coming from RE that qualified under the revised Special Regime were granted priority of access in the Spanish electricity transportation and distribution grid.<sup>19</sup> Additionally, the investors were offered the possibility to opt between two incentive schemes: (a) a FIT scheme, entailing the sale of electricity through Spain's electricity grid in exchange for a regulated fixed tariff per each kw/h; or (b) a feed in premium ("FIP") scheme pursuant to which

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<sup>10</sup> Title IV Chapter II Law 54/1997.

<sup>11</sup> Ibid Article 30.4.

<sup>12</sup> Article 9 RD 2818/1998.

<sup>13</sup> Ibid Article 23.

<sup>14</sup> Renewables Directive, Article 3 and Annex.

<sup>15</sup> RD 436/2004, Article 36.2.

<sup>16</sup> Ibid, Article 40.1.

<sup>17</sup> Ibid, Article 22.

<sup>18</sup> Royal Decree 661/2007, of 15<sup>th</sup> of May, by which the activity of electricity production under special regime is regulated, BOE No 126 of 26 May 2007, 22846-22886 (hereinafter 'RD 661/2001'), Preamble paras. (5) and (7).

<sup>19</sup> RD 661/2001, Art 17(e), Annex XI.

for the sale of electricity on the electricity market Spain paid a premium in addition to the market price.<sup>20</sup> The FIT and FIP schemes were applicable for the lifespan of the RE installation<sup>21</sup> and were subject to revisions based on a stable index.<sup>22</sup> Following the adoption of RD 661/2007 and until 2009, Spain ran marketing campaigns for attracting RE investment (by a brochure entitled ‘The sun can be all yours’ issued by the Spanish authorities in order to highlight the incentives provided to foreign investors by RD 661/2007). Within only a few months, by August 2007, Spain had surpassed 85% of its PV target, and the incentives gradually led to an electricity tariff deficit - a shortfall of revenues in the electricity system, when the tariffs for the regulated components of the retail electricity price are set below the corresponding costs borne by the energy companies.

To address this, Spain took numerous regulatory measures. RD 1578/2008 was enacted to administer PV investors that registered after the RD 661/2007 regime closed. In 2009, it passed RDL 6/2009<sup>23</sup> in order to gradually reduce the tariffs deficit throughout 2009-2012 and ultimately to eradicate it by 2013.<sup>24</sup> It introduced a Pre-Assignment Registry<sup>25</sup> with which PV plants had to register to receive RD 661/2007 tariffs. RD 1614/2010 was also enacted and provided that the ‘revision of tariffs, premiums [...] referred to in Article 44.3 of [RD 661/2007] shall not affect those facilities definitively registered in [the RAIPRE as] of 7 May 2009, or those that shall have been registered in the [Pre-Assignment Registry]’.<sup>26</sup>

As the tariff deficit did not decrease, Spain enacted more drastic measures in 2010 by three consecutive acts: RD 1565/2010,<sup>27</sup> RD 1614/2010<sup>28</sup> and RDL 14/2010<sup>29</sup> (the ‘2010 RE Measures’). Between 2012 and 2014 Spain enacted several measures that withdrew the entire Special Regime: RDL 1/2012<sup>30</sup>, Law 15/2012<sup>31</sup> RDL 2/13<sup>32</sup> RDL 9/2013<sup>33</sup> and Law 24/2013<sup>34</sup> (‘2012-2013 RE Measures’). RDL 9/2013 repealed RD 661/2007 thus abolishing the Special Regime, and Law 24/2013 removed all remaining aspects of the Special Regime. A new regime was established by virtue of RD 413/2014 and Order IET/1045/2014 from the Ministry of Industry, Energy and Tourism. The idea behind it was the limited but reasonable return. The FIT and premium options were replaced by a Special Payment,<sup>35</sup> which was activated upon a plant reaching a preset production threshold. Remuneration was capped at the amount that would be received by a

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<sup>20</sup> Art 24 (1), RD 661/2001.

<sup>21</sup> Art 36, RD 661/2001.

<sup>22</sup> Art 44 (1), RD 661/2001.

<sup>23</sup> Royal Decree-Law 6/2009 of 30<sup>th</sup> of April, laying down specific measures taken in the energy market and approved the special rate, BOE No 111, of 7 May 2009, 39404-39419 (‘RDL 6/2009’).

<sup>24</sup> Ibid, Article 3(1)-(3).

<sup>25</sup> Article 4, RDL 6/2009.

<sup>26</sup> Article 4, RD 1614/2010.

<sup>27</sup> Royal Decree 1565/2010, of 19<sup>th</sup> of November, which regulates and amends certain aspects related to the activity of production of electricity under the special regime, BOE No 283, of 23 November 2010, 97428-97446 (‘RD 1565/2010’).

<sup>28</sup> Royal Decree 1614/2010, of 7<sup>th</sup> December, which regulates and amends certain issues related to the activity of generation of electricity from solar thermal and wind technologies, BOE No 298, 8 December 2010, 101853-101859 (‘RD1614/2010’).

<sup>29</sup> Royal Decree-Law 14/2010, of 23<sup>rd</sup> of December, setting emergency measures for the correction of the tariff deficit in the electricity market, BOE No 312, 24 December 2010, 106386-06394 (‘RDL 14/2010’).

<sup>30</sup> Royal Decree-Law 1/2012, of 27<sup>th</sup> of January, which proceeds to the suspension of the procedures for pre-allocation of remuneration and to the elimination of economic incentives for new installations producing electricity from cogeneration, renewable energy sources and waste, BOE No 24, 28 January 2012, 8068-8072 (‘RDL 1/2012’).

<sup>31</sup> Law 15/2012, of 27<sup>th</sup> of December, on tax measures for energy sustainability, BOE No 312, 28 December 2012, 8808-88096 (‘Law 15/2012’).

<sup>32</sup> Royal Decree-Law 2/2013, of 1<sup>st</sup> of February, on urgent measures in the electricity system and the financial sector, BOE No 29, 2 February 2013, 9072-9077 (‘RDL 2/2013’).

<sup>33</sup> Royal Decree-Law 9/2013, of 12<sup>th</sup> of July, by which emergency measures are adopted to ensure the financial stability of the electrical system, BOE No 167, 13 July 2013, 52106-52147 (‘RDL 9/2013’).

<sup>34</sup> Law 24/2013, of 26<sup>th</sup> of December, regulating the Electricity Sector, BOE No 310, 27 December 2013, 105198-105294 (‘Law 24/2013’).

<sup>35</sup> Amended Article 30(4), RD 661/2007.

‘standard installation’ with an operational life of 25 years. Finally, tariff payments received prior to the entry into force of the new regime were counted towards the total remuneration that an installation would receive over its pre-determined operational life.

### 3. Landmark Arbitral Awards Concerning the Protection of RE Investment under FET

The following sections discuss four cases under the ECT in the field of RE focusing on the claims concerning the breach of FET under ECT Article 10(1), and explains how their reasoning makes them landmark: *Charanne v. Spain* (Section 3.1); *Eiser v. Spain* (Section 3.2); *Masdar v. Spain* (Section 3.3); *RREEF v. Spain* (Section 3.4).

#### 3.1 *Charanne v. Spain* (2016)

In 2009, Charanne BV, a Dutch company, and Construction Investments S.à.r.l., a Luxembourg company (collectively, ‘Charanne’) became shareholders of Grupo T-Solar Global S.A, a Spanish company involved in production and sale of electricity from PV plants (solar energy).<sup>36</sup> Because Charanne’s investments occurred over an extended period of time, some of its plants fell within RD 661/2007 and others were governed by RD 1578/2008. Charanne commenced arbitration proceedings against Spain under ECT Article 26, based on the Stockholm Chamber of Commerce (SCC) Arbitration Rules. The Tribunal found in favour of the host ECT Contracting Party. *Charanne v. Spain* was the first in a series of cases against Spain (and other ECT Contracting Parties) and has influenced the reasoning (in favour or against) of numerous subsequent tribunals dealing with RE claims under the ECT.

Charanne argued that it invested in Spain relying on the special regime of RD 661/2007 and RD 1578/2008 and, in particular, the right to receive concrete and revised regulated tariffs applicable to the entire net production of electricity facility in operation, which allowed the producer to calculate compensation with a high degree of certainty. These rules have been directed to a limited group of investors and constituted ‘specific commitments’ by Spain.<sup>37</sup> Further, it argued that ‘in addition to legislation the Government of Spain promoted investment in this sector through various publicity [...] which announced that returns on investment in the photovoltaic sector could reach up to 15%, and [...] that there were two types of regulated tariffs, one for the first 25 years and another for a period thereafter.’<sup>38</sup> Charanne’s complaint focused only on the 2010 amendments by Spain (and excluded the 2013 amendments). Spain contended that its measures were reasonable and predictable, and that FET does not mean ‘that a legal system should be frozen, as the obligation of [FET] is not equivalent to a stabilisation clause and States can continue to legislate to respond to changing circumstances’, but that the State is prohibited from ‘acting in inequitable and unreasonable manner when legislating’.<sup>39</sup> It argued that legitimate expectations only arise where a State makes a specific commitment, but that in the present case there was no stabilization clause in the bilateral relationship between Charanne and Spain,<sup>40</sup> and its advertising could not give rise to legitimate expectations because it lacked the requisite specificity.<sup>41</sup>

In relation to Charanne’s argument that Spain violated Article 10(1) by subjecting its

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<sup>36</sup> *Charanne and Construction Investments v. Spain* (Awaed) SCC Case No. V 062/2012, 21 January 2016 (*‘Charanne v. Spain’*), paras. 143-144.

<sup>37</sup> *Ibid*, para. 297.

<sup>38</sup> *Ibid*, para. 299.

<sup>39</sup> *Ibid*, para. 355 (citing *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 08 October 2009; *El Paso v. Argentina*; *Saluka v. Czech Republic*; *Parkerings Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007; *Electrabel v. Hungary*; *Continental v. Argentina*).

<sup>40</sup> *Charanne v. Spain*, paras. 357-360.

<sup>41</sup> *Ibid*, paras. 361-363.

investment to ‘regulatory instability and lack of clarity’,<sup>42</sup> the Tribunal pronounced that it could not find that there was a breach of FET. This was because it would be required to examine all measures in their whole, but in the case before it, it could not analyse the 2013 measures.<sup>43</sup> In relation to Charanne’s argument on legitimate expectations, the Tribunal pronounced that the legitimate expectations of the investor is a ‘relevant factor’ for analysing whether Spain’s 2010 measures violated ‘other obligations’ in ECT Article 10(1),<sup>44</sup> and that legitimate expectations are based on the principle of good faith under customary international law (‘CIL’).<sup>45</sup> The Tribunal then based its analysis on the twofold approach taken by UNCTAD’s Study on Fair and Equitable Treatment (2012), pursuant to which legitimate expectations of investors may arise: (a) by *specific commitments* personally made to the investor; or (b) ‘rules that are *not specifically addressed to a particular investor* but which are put in place with a specific aim to induce foreign investment and on which the foreign investor relied in making his investment’ may also give rise to legitimate expectations.<sup>46</sup>

First, the Tribunal rejected the Claimant’s argument that RD 661/2007 and RD 1578/2008 ‘may constitute or be equivalent to a specific commitment’ directed to a specific limited group of investors, including Charanne.<sup>47</sup> For the Tribunal, the fact that they were directed to a limited group of investors ‘does not make them [...] commitments specifically directed at each investor. The rules at issue do not lose the *general nature that characterizes any law or regulation by their specific scope*. To convert a regulatory standard into a specific commitment of the state, *by the limited character of the persons who may be affected*, would constitute an *excessive limitation on power of states to regulate the economy in accordance with the public interest*’.<sup>48</sup>

Second, the Tribunal considered whether the legal framework (RD 661/2007 and RD 1578/2008) at the date of investment could *in itself* create legitimate expectations.<sup>49</sup> The Tribunal considered that legitimate expectations are not subjective beliefs of investors, but objectively ‘reasonable in the particular case with relevance to representations possibly made by the host State to induce the investment’.<sup>50</sup> The Tribunal considered that Spain’s campaign documents could not generate Charanne’s legitimate expectations that the RE economic incentives would remain unchanged,<sup>51</sup> because the documents lacked specificity and did not contain language indicating that the tariffs were frozen.<sup>52</sup> Further, basing its reasoning on that of *Electrabel v. Hungary* (that ‘subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment’),<sup>53</sup> it pronounced that ‘in the absence of a specific commitment, an investor cannot have a legitimate expectation that existing rules will not be modified’.<sup>54</sup> It also recognized (basing itself on the reasoning of other tribunals)<sup>55</sup> that the investors would have to have exercised a sufficient degree of due diligence regarding Spain’s legal framework prior to making the investment,<sup>56</sup> and it should be established that following such due diligence the investors could not ‘reasonably foresee’ that the regulation could be amended.<sup>57</sup>

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<sup>42</sup> Ibid, paras. 479-480.

<sup>43</sup> Ibid, para. 484.

<sup>44</sup> Ibid, para. 486.

<sup>45</sup> Ibid, para. 486.

<sup>46</sup> Ibid, para. 489 (emphasis added).

<sup>47</sup> Ibid, para. 493.

<sup>48</sup> Ibid, para. 493 (emphasis added).

<sup>49</sup> Ibid, para. 494.

<sup>50</sup> Ibid, para. 495.

<sup>51</sup> Ibid, paras. 496-504.

<sup>52</sup> Ibid, para. 497.

<sup>53</sup> It also took into account *CMS v. Argentina* and that of *El Paso v. Argentina*.

<sup>54</sup> *Charanne v. Spain*, para. 499-503.

<sup>55</sup> Ibid, para. 505. *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL Award, 12 November 2010, para. 287.

<sup>56</sup> *Charanne v. Spain*, para. 505.

<sup>57</sup> Ibid, para. 505.

The Tribunal found that Charanne could have reasonably foreseen that the Spanish RE legal regime was not immutable (and thus rejected the argument of legitimate expectations),<sup>58</sup> given the 2005 and 2006 decisions of the Spanish Supreme Court which had pronounced that investors had no ‘frozen right’ to receive economic incentives indeterminably.<sup>59</sup> The Tribunal acknowledged that these Supreme Court decisions related to different rules than the ones invoked by the Claimant. However, it considered these decisions relevant, because they ‘establish the principle that national law allowed to provide, within the framework of the [Law 54/1997 of 27 November on the Electricity Sector], changes to an economic system to encourage the generation of renewable energy as it was established with RD 661/2007 and RD 1578/2008.’ Rather, it found that the Claimant could have undertaken an analysis of the legal framework of its investment in Spanish law and could have understood that there was a possibility that the regulations adopted in 2007 and 2008 could be amended<sup>60</sup> and ‘that is the level of care that would be expected of a foreign investor in a highly regulated as the energy sector, where a preliminary and comprehensive legal framework applicable to the sector analysis is essential to proceed with the investment’.<sup>61</sup>

Additionally, the Tribunal did not accept that ‘the registration to the RAIPRE gave generators an acquired right to the perception of the tariff’.<sup>62</sup> This was because ‘the RAIPRE was simply an administrative requirement to be able to sell energy and did not imply that the registered facilities had an acquired right to a determined compensation.’<sup>63</sup> It thus concluded that these were not specific commitments by Spain to the investor.<sup>64</sup>

Finally, the Tribunal considered whether by amending the regulatory framework (RD 661/2007 and RD 1578/2008) the 2010 rules by themselves violated FET,<sup>65</sup> because the legitimate expectations of the investor were frustrated by the host State’s unreasonably, disproportionately and against the public interest.<sup>66</sup> The Tribunal considered that ‘an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest.’<sup>67</sup> In this respect, the Tribunal found that a legislative change is proportionate if it is ‘not capricious or unnecessary and [does] not amount to suddenly and unpredictably eliminate the essential characteristics of the existing regulatory framework’.<sup>68</sup> Because the 2010 amendments did not eliminate the ‘essential characteristics’ of the Special Regime (‘in particular the existence of a guaranteed tariff throughout the life of the facility’),<sup>69</sup> they were proportionate, they were based on rational economic considerations they were rational and not arbitrary;<sup>70</sup> and were not contrary to public interest, as Spain implemented the amendments with the sole purpose of limiting its electricity tariffs deficit.<sup>71</sup> For this reason, Tribunal found that the 2010 amendment did not violate the ECT [FET through the spectrum of legitimate expectations].<sup>72</sup>

Arbitrator Guido Santiago Tawil dissented arguing that ‘the system implemented by RD 661/07 and 1578/08 was not aimed at an indeterminate “generality” or an imprecise or indefinite collective, but rather at a limited number of potential recipients, who had sufficient capital for investing in the industry in question and that [Spain] considered it useful for stimulation and to do

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<sup>58</sup> Ibid, para. 511.

<sup>59</sup> Ibid, para. 506.

<sup>60</sup> Ibid, para. 507.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid, para. 509.

<sup>63</sup> Ibid, para. 510.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid, para. 512.

<sup>66</sup> Ibid, paras. 514-515.

<sup>67</sup> Ibid, para. 514.

<sup>68</sup> Ibid, para. 517.

<sup>69</sup> Ibid, para. 539.

<sup>70</sup> Ibid, paras. 533-534.

<sup>71</sup> Ibid, para. 535.

<sup>72</sup> Ibid, para. 539.

it, avoiding having to use its own resources'.<sup>73</sup> '[W]hen an investor complies with all the requirements established by the legislation in force to be granted a specific and particular benefit, its subsequent ignorance by the host State of the investment violates a legitimate expectation. [S]pain was empowered to modify or remove the promotional regime [...]. Nevertheless, if the modification of the benefit granted to those who have invested according to this special regime [...] caused *damage without adequate compensation* it would violate the legitimate expectations created and, consequently, [FET] protected in [ECT Article 10].'<sup>74</sup>

The Tribunal's approach in *Charanne* is noteworthy for the following reasons. First, it is framed around the concept of legitimate expectations, and takes a very wide approach to legitimate expectations under FET: it does not distinguish between legislative and administrative actions, and considers that the investor under FET has the legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest. Second, it introduces a very high due diligence threshold for the investor to have acquired legitimate expectations from a regulatory regime existing at the time that the investment is made, including that the investor should have knowledge of the domestic courts case law, even in relation to cases that do not concern the same regulatory measures on which the investor would rely to make the investment. It then explains this high threshold by reference to the 'highly regulated as the energy sector, where a preliminary and comprehensive legal framework applicable to the sector analysis is essential to proceed with the investment'.<sup>75</sup> Third, it considers that regulations that do not eliminate the essential characteristics of the investment, are not unreasonable, disproportionate and are taken for reasons of public interest do not violate legitimate expectations in the FET standard of the ECT. Fourth, it does not engage in the interpretation of the ECT in order to address all the above issues, but seems to rely more on the reasoning of other investment arbitrations, implicitly suggesting that FET and legitimate expectations have a meaning developed by international investment tribunals.<sup>76</sup>

### 3.2 *Eiser v. Spain (2017)*

In December 2013, Eiser Infrastructure Limited, an UK company, and Solar Energy Luxembourg S.à.r.l., a Luxembourg company (collectively, 'Eiser') invested in a Spanish CSP facility (solar energy) in 2007 which began operating in 2012,<sup>77</sup> and brought ICSID proceedings against Spain. The Tribunal found in favour of the investor, which was awarded damages of €128 million.<sup>78</sup>

*Eiser v Spain* concerned the 2012-2014 RE Measures (in other words, not the same measures that *Charanne* concerned). The Tribunal limited its analysis to the breach of FET, and did not consider Eiser's claims about expropriation and other ECT violations.<sup>79</sup> Eiser argued that in order to invest it relied on RD 661/2007, which contained a stabilization clause (Article 44(3)),<sup>80</sup> and that the drastic changes of this regime by the Spanish government violated Eiser's legitimate expectations.<sup>81</sup> Spain rejected that Eiser was denied FET and that the ECT had been violated,<sup>82</sup> since Eiser's expectations were not legitimate, given that Eiser could not reasonably anticipate that RD 661/2007 would be frozen, in the absence of a stabilization clause and of any specific

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<sup>73</sup> Ibid, para. 8.

<sup>74</sup> Ibid, para. 12.

<sup>75</sup> Ibid.

<sup>76</sup> See wider discussion on FET in chapter XX by Schill.

<sup>77</sup> *Eiser v. Spain*, paras. 1-2, 120-121.

<sup>78</sup> Ibid, para. 486.

<sup>79</sup> Ibid, para. 352.

<sup>80</sup> Ibid, para. 357.

<sup>81</sup> Ibid, para. 358.

<sup>82</sup> Ibid, para. 350.

commitments undertaken by Spain.<sup>83</sup> Further, Eiser – according to Spain – failed to exercise sufficient due diligence.<sup>84</sup>

The Tribunal found that the FET obligation under the ECT did not bar Spain from making appropriate changes to the regulatory regime of RD 661/2007, and so RD 661/2007 did not give immutable economic rights to investors.<sup>85</sup> However, Spain’s ECT FET obligation protects investors from ‘a *fundamental change* to the regulatory regime in a manner that does not take account of the circumstances of existing investments made in reliance on the prior regime’,<sup>86</sup> and ‘against *the total and unreasonable change* that they experienced here’.<sup>87</sup>

The Tribunal expressly distinguished the legal and factual situation in the case before it from that in *Charanne v Spain*. It noted that the challenged ‘measures in *Charanne* had far less dramatic economic effects’ as compared to the measures challenged in *Eiser*.<sup>88</sup> The Tribunal agreed with *Charanne v. Spain* ‘an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest.’<sup>89</sup> However, the Tribunal implied that this is not a matter of legitimate expectations, but rather about the violation of the FET standard as such.<sup>90</sup> Further, while the Tribunal agreed with *Charanne v. Spain* that combating the tariff deficit was ‘a legitimate public policy problem’, and did not question the appropriateness of Spanish authorities adopting reasonable measures to address this situation, it considered that in doing so Spain had to act in a way that would respect its ECT obligation to provide FET.<sup>91</sup>

Contrary to *Charanne v. Spain*, the Tribunal in *Eiser v. Spain* interpreted the ECT in order to determine the content of FET under that treaty explicitly by relying on Article 31 of the Vienna Convention on the Law of Treaties (‘VCLT’).<sup>92</sup> It found that in its context (especially the first sentence of ECT Article 10(1)) and in light of the object and purpose of the ECT, the FET obligation in ECT Article 10(1) second sentence

‘necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This does not mean that regulatory regimes cannot evolve. Surely they can. [...] However, the Article 10(1) obligation to accord [FET] means that *regulatory regimes cannot be radically altered* as applied to existing investments *in ways that deprive investors who invested in reliance on those regimes of their investment’s value*.’<sup>93</sup>

On the basis of this reasoning, the Tribunal found that Spain’s measures were contrary to ECT’s FET standard, because by its 2012-2014 measures, Spain abolished the initial legal regime under which Eiser’s investment was made and replaced it with a ‘new and untested regulatory approach, all intended to significantly reduce subsidies to existing plants’,<sup>94</sup> which retroactively applied a ‘one size fits all’ approach to installations built under the very different legal framework of RD 661/2007,<sup>95</sup> and which reduced Eiser’s incomes by 66% compared to those expected by

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<sup>83</sup> Ibid, para. 359.

<sup>84</sup> Ibid, para. 360.

<sup>85</sup> *Eiser*, para. 363.

<sup>86</sup> Ibid, para. 363 (emphasis added).

<sup>87</sup> Ibid (emphasis added).

<sup>88</sup> Ibid, paras. 368-370.

<sup>89</sup> *Charanne v. Spain*, para. 514; *Eiser v. Spain*, para. 370.

<sup>90</sup> *Eiser v. Spain*, para. 370 (‘whether viewed as basis for reasonable expectations, or as a statement of a State’s obligations under the ECT, the principle remains the same’).

<sup>91</sup> Ibid, para. 371.

<sup>92</sup> Ibid, paras. 375-384.

<sup>93</sup> Ibid, para. 382 (emphasis added). See also *ibid*, para. 387.

<sup>94</sup> Ibid, para. 391.

<sup>95</sup> Ibid, para. 400.



Eiser under the initial framework.<sup>96</sup> The Tribunal concluded that the abolition of the existing regime and its replacement with a completely different regime deprived Eiser of ‘essentially all of the value of their investment’, and that Spain violated its FET obligation under ECT Article 10(1).<sup>97</sup>

The analysis in *Eiser v. Spain* may be considered landmark (especially in the context of earlier renewables arbitrations under the ECT) for the following reasons. First, in *Eiser v. Spain*, the doctrine of legitimate expectations does not have a prominent place. The Tribunal rather focuses more generally on the scope of regulatory stability under FET in the ECT.<sup>98</sup> While earlier investment arbitrations (outside the ECT) have reasoned that legitimate expectations is the ‘dominant element’ of FET,<sup>99</sup> *Eiser v. Spain* overtakes such an assumption. Second, methodologically its reasoning is based on the interpretation of the ECT (contrary to *Charanne v. Spain* for instance which hardly touches on the ECT’s interpretation). Third, some of the 2013-2014 measures complained of were executive power measures (e.g. Royal Decree 413/2014 and Ministry implementing order IET/1045/2014), which would normally be subject to the doctrine of legitimate expectations, according to some scholars, including one of the arbitrators in this case (Professor McLachlan).<sup>100</sup> The fact that the Tribunal was unconcerned with the doctrine of legitimate expectations in this case might imply that the Tribunal did not consider the measures complained of as falling within the scope of administrative action to which the legitimate expectations doctrine applies: it considered them legislative - rather than administrative - measures,<sup>101</sup> and did not see merit in addressing legislative measures through this doctrine. Fourth, in *Eiser v. Spain*, the Tribunal placed emphasis on the effects of Spain’s measures on the investment (besides the degree of change of the regime that initially applied when the investment was made). While the fact that the investment is deprived in total or in a significant part of its value constitutes indirect expropriation is accepted,<sup>102</sup> *Eiser v. Spain* introduced this as condition for identifying a breach of FET standard.

### 3.3 *Masdar v. Spain (2018)*

Masdar Solar & Wind Cooperatief U.A. (‘Masdar’), a Danish company, invested in three CSP plants in Spain (solar energy): for the first CSP plant the investment was made in 2008, while for the remaining two in July 2009.<sup>103</sup> Masdar initiated ICSID arbitration against Spain claiming that the latter’s measures between 2012 and 2014 violated FET under ECT Article 10(1).<sup>104</sup> The tribunal decided in favour of Masdar and awarded full reparation.<sup>105</sup> Masdar argued that by repealing the Special Regime by virtue of RD661/2007, Spain removed the stability that was promised on the basis of which Masdar made its investments, and violated FET under ECT Article 10(1). Spain relied on *Charanne* to argue that general legislation, or press releases and others, cannot create legitimate expectations for investors.

The Tribunal pronounced that ‘the purpose of [FET] is to ensure that an investor may be confident that (i) the legal framework in which the investment has been made will not be subject to unreasonable or unjustified modification; and (ii) the legal framework will not be subject to

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<sup>96</sup> Ibid, para. 389.

<sup>97</sup> Ibid, para. 418.

<sup>98</sup> Ibid, para. 387.

<sup>99</sup> *Saluka Investments B.V. v. The Czech Republic, Partial Award*, UNCITRAL, 17 March 2006, para. 302.

<sup>100</sup> C. McLachlan, L. Shore, M. Weininger, *International Investment Arbitration* (2<sup>nd</sup> ed, 2017), pp. 309-314.

<sup>101</sup> Ibid, at 309-314.

<sup>102</sup> M. Scherer, *International Arbitration in the Energy Sector* (2018), paras. 10.29, 10.64; ‘Expropriation UNCTAD Series on Issues in International Investment Agreements II’ (2012), [http://unctad.org/en/Docs/unctaddiaeia2011d7\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf).

<sup>103</sup> *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, Award, ICSID Case No. ARB/14/1, 16 May 2018 (‘*Masdar v. Spain*’), para. 343.

<sup>104</sup> The tribunal was composed of Beechey, Born and Stern.

<sup>105</sup> Considering that granting restitution would materially affect Spain’s legislative authority, the tribunal decided to grant reparation through monetary compensation: EUR 64.5 million plus pre- and post-award compound interest.

modification in a manner contrary to specific commitments made to the investor'.<sup>106</sup> A State is free to amend its legislation absent explicit undertaking directly extended to investors.<sup>107</sup> It then proceeded to determine which kind of specific commitments can give rise to legitimate expectations, and acknowledged the existence of two schools of thought: (a) the one that considers that 'specific commitments' can arise from general statements in general laws and regulations; and (b) the one pursuant to which 'specific commitments' have to be specific.<sup>108</sup>

Under the first school of thought, which finds support (and was expressly mentioned by the Tribunal) in the UNCTAD Study on legitimate expectations,<sup>109</sup> 'specific commitments' can arise from any representations comprised in general legislation in force at the date of the investment,<sup>110</sup> provided that such legislation was enacted with the purpose of attracting investment.<sup>111</sup> In this case, 'the investor must demonstrate that it has exercised appropriate due diligence and that it has familiarised itself with the existing laws'.<sup>112</sup> In the case before it, the Tribunal considered that Masdar carried out a thorough and sufficient due diligence,<sup>113</sup> and 'that *it believed* that it had a legitimate expectation that the laws would not be modified, as they included stabilisation clauses'.<sup>114</sup> In this respect, the Tribunal introduces a subjective criterion for assessing the investor's due diligence. Further, the Tribunal found that both RD 661/2007 and RD 1614/2010, on which Masdar had relied,<sup>115</sup> contained a 'stabilisation clause' pursuant to which the revision of the FIT scheme would not affect the installations registered with the Special Regime Registry. This 'stabilisation clause' prohibited Spain from passing any legislation modifying the legal regime relied upon by the investors.<sup>116</sup>

Then, the Tribunal proceeded to assess how the second school of thought would find application in the present case. According to the Tribunal, the second school of thought rejects the idea that specific commitments can arise from general regulations: a limitation on legislative power can only derive from constitutional requirements or *jus cogens* rules within the internal order.<sup>117</sup> Further, specific commitment cannot arise from political announcements, such as press releases and others.<sup>118</sup> Based on *El Paso v. Argentina*, the Tribunal considered that a higher degree of specificity is necessary as to the addressee or regarding the object and purpose of specific commitments.<sup>119</sup> It noted that *Charanne v. Spain* considered that a law addressed to a limited group of persons was not a 'specific commitment' towards each and every one of those persons,<sup>120</sup> and it rejected any reliance on reports, press releases and brochures aimed at attracting investors as a 'possible legal basis for legitimate expectations'.<sup>121</sup> It also noted that *Charanne v. Spain* considered that the investor's registration with RAIPRE was simply and administrative formality,<sup>122</sup> but rejected the assessment of *Charanne v. Spain*: it found that registration with RAIPRE is 'a very specific unilateral offer from the State, which an investor would be deemed to have accepted, once it had fulfilled the substantial condition of construction of the plant and the formal condition of

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<sup>106</sup> *Masdar v. Spain*, para. 484.

<sup>107</sup> *Ibid*, para. 488.

<sup>108</sup> *Ibid*, para. 490.

<sup>109</sup> *Ibid*, paras. 491-493.

<sup>110</sup> *Ibid*, para. 491.

<sup>111</sup> *Ibid*, paras. 491-493.

<sup>112</sup> *Ibid*, para. 494.

<sup>113</sup> *Ibid*, para. 498.

<sup>114</sup> *Ibid*, para. 499 (emphasis added).

<sup>115</sup> *Ibid*, para. 502 quoting RD 1614/2010, art. 4.

<sup>116</sup> *Masdar v. Spain*, para. 503.

<sup>117</sup> *Ibid*, para. 504.

<sup>118</sup> *Ibid*, para. 507.

<sup>119</sup> *Ibid*, para. 505.

<sup>120</sup> *Ibid*, para. 508 quoting *Charanne v. Spain*, 493.

<sup>121</sup> *Masdar v. Spain*, para. 508 quoting *Charanne v. Spain*, para. 497.

<sup>122</sup> *Masdar v. Spain*, para. 508 quoting *Charanne v. Spain*, paras. 509-510.

registration within the prescribed ‘window’.<sup>123</sup> The Spanish authorities issued three separate resolutions confirming in explicit terms that each of Masdar’s plants had duly registered and were guaranteed to benefit from the Special Regime.<sup>124</sup> For the Tribunal, these documents were ‘a specific commitment’<sup>125</sup> that created legitimate expectations that the benefits granted under the Special Regime would remain unchanged. By withdrawing the Special Regime, Spain breached its FET obligations under ECT Article 10(1).<sup>126</sup>

The Tribunal focused its analysis on legitimate expectations as an aspect of FET in ECT Article 10(1). It held that only specific commitments give rise to legitimate expectations. These specific commitments can either be made through legislation containing a ‘stabilisation clause’ or through specific governmental representations. In its analysis of both options it seems to depart from established views: it introduces a subjective understanding of the investor’s ‘due diligence’ in case of commitments through legislation, and as a separate matter widens the understanding of ‘specific commitments’. It did not choose between any of these schools of thought, but found that on both of these bases Spain’s measures established legitimate expectations which were defeated by Spain’s regulatory changes.

### 3.4 RREEF v. Spain

RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.L (‘RREEF’) invested in wind farms and CSP plants. Contrary to earlier cases, *RREEF v. Spain* concerned not only solar energy, but also wind energy. However, the analysis here focuses on CSP plants, where RREEF succeeded in its claim on two grounds.

The Tribunal’s reasoning was based on the premise that ‘States enjoy a margin of appreciation in public international law and the exercise of such a power of appreciation must be more particularly recognized when States apply the ECT’,<sup>127</sup> but that ‘such a margin of appreciation is not without limits’:<sup>128</sup> it can only be exercised in so far as the State Party does not violate the ECT.<sup>129</sup> The Tribunal found that ‘while it is not expressly mentioned in Article 10(1), [...] respect for the legitimate expectations of the investor is implied by this provision and is part of the FET standard.’<sup>130</sup> It further explained that not all expectations are ‘legitimate’, and only legitimate expectations are protected under FET. ‘Whilst an “expectation” is subjective, whether or not it is “legitimate” must be objectively assessed. [I]t is necessary, therefore, to assess, first, what are the expectations of an investor and, second, whether those expectations are legitimate. The frustration of a legitimate expectation establishes a wrongful act by the State.’<sup>131</sup>

The Tribunal recognized that because ‘States are in charge of the general interest and, as such, enjoy a margin of appreciation in the field of economic regulations, [...] the threshold of proof as to the legitimacy of any expectation is high and only measures taken in clear violation of the FET will be declared unlawful and entail the responsibility of the State.’<sup>132</sup> It concurred with *Eiser*, that ‘the obligation to create a stable environment’ in ECT Article 10(1) first sentence, which is the context of FET in the second sentences, ‘excludes any unpredictable radical transformation in the conditions of the investments.’<sup>133</sup> It also relied on *Blusun v. Italy*, which had acknowledged that the

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<sup>123</sup> *Masdar v. Spain*, para. 512.

<sup>124</sup> *Ibid*, paras. 516-517.

<sup>125</sup> *Ibid*, para. 520.

<sup>126</sup> *Ibid*, para. 521-522.

<sup>127</sup> *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l v Spain*, ICSID Case No ARB/13/30, Decision on Responsibility and on the Principles of Quantum dated 30 November 2018, para. 242.

<sup>128</sup> *Ibid*, para. 243.

<sup>129</sup> *Ibid*.

<sup>130</sup> *Ibid*, para. 260.

<sup>131</sup> *Ibid*, para. 261 (emphasis added).

<sup>132</sup> *Ibid*, para. 262.

<sup>133</sup> *Ibid*, paras. 314-317.

FET obligation in the ECT sets a high threshold (when read in the context of the first sentence of ECT Article 10(1)), taking also into account earlier arbitral awards outside the ECT, which established the threshold of *total alteration* of the entire legal setup for foreign investments.<sup>134</sup>

In light of this reasoning, the Tribunal considered that RD 661/2007 on which RREEF relied to make its investment contained a ‘stability clause’ providing for the immutability of the conditions of the investment (Article 44(3)),<sup>135</sup> but that its provisions and the provisions RD 1614/2010 show that adjustments were envisaged.<sup>136</sup> As a separate matter, none of the representations invoked by the Claimants could be considered as firm pledges not to change the conditions of the investments in such a way as to neutralize the clear possibility of modification resulting from Articles 4 and 5 of RD 1614/2010.<sup>137</sup> The Tribunal thus considered that these were no specific commitments of immutability.

Instead, it considered that the Claimants can prevail themselves of an acquired right to a general regime guaranteeing the *essential advantages* they could reasonably expect when they made their investments.<sup>138</sup> And that ‘[t]he importance of *the extent of the alterations* suffered by the Claimants *to the conditions of their investments* must therefore be *assessed taking into account the global balance of costs and benefits which they could reasonably expect compared with that which can be expected on the basis of the ulterior modifications*.’<sup>139</sup> Relying on the Tribunal’s reasoning in *Eiser v. Spain*, in relation to this assessment the question is whether or not the Respondent exercised its legislative power unfairly, unreasonably or inequitably, which in turn ‘depends (i) on the scope and content of the legitimate expectations of the Claimants [...] and (ii) on whether or not the changes can be held as being reasonable and proportionate’.<sup>140</sup> In this respect, the Tribunal focused exclusively on ‘whether the challenged modifications introduced after 2012 constitute “a drastic and radical change” [...] affecting unexpectedly the conditions of the investments’.<sup>141</sup>

Looking at the domestic regulatory regime at the time when the investment was made, the Tribunal considered that ‘the guarantee of “reasonable return” [...] was the main [and only] *specific commitment* [to] the investors in the Special Regime,’ giving rise to a legitimate expectation.<sup>142</sup> However, it found that ‘such *expectation* did not include a guarantee to have the legal regime in place unchanged until the end of the operation of the plants, but it did include to have *any modifications reasonable and equitable* [even if it entails a lesser return for the Claimants, unless the new regime deprives the Claimants of a reasonable return according to the cost of money in the capital market]<sup>143</sup>’.

Whether such a legitimate expectation was violated can *only be assessed by way of a global view of the situation that resulted from the modifications introduced by the Respondent after the date of the investment*.<sup>144</sup> More specifically, the Tribunal explained that the State’s measures have to be reasonable and proportionate. It set out the cumulative criteria by which to assess reasonableness (legitimacy of the measures’ purpose; necessity in the sense of a social need; and suitability in the sense of making it possible to achieve the legitimate purpose)<sup>145</sup> and proportionality (i.e. that the regulation must be closely adjusted to the attainment of its legitimate objective, interfering as little as possible with the effective exercise of the affected rights).<sup>146</sup> However, the Tribunal found that in the case before

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<sup>134</sup> Ibid. para. 317.

<sup>135</sup> Ibid., para. 318.

<sup>136</sup> Ibid, para. 319.

<sup>137</sup> Ibid, paras. 321 and 390.

<sup>138</sup> Ibid, para. 322.

<sup>139</sup> Ibid (emphasis added).

<sup>140</sup> Ibid, paras. 323-324.

<sup>141</sup> Ibid, para. 379.

<sup>142</sup> Ibid, paras. 384, 386.

<sup>143</sup> Ibid, para. 517.

<sup>144</sup> Ibid, paras. 399 and 467.

<sup>145</sup> Ibid, para. 464.

<sup>146</sup> Ibid, para. 465.

it ‘the determination of a violation of the principles of proportionality and reasonableness is inseparable from an assessment of the damages – if any – endured by the Claimants as a consequence of the measures taken by the Respondent.’<sup>147</sup> The Tribunal considered that RREEFF ‘can only get compensation to the extent that such decrease is below the threshold of a reasonable return’.<sup>148</sup> It concluded that ‘with respect to [the] CSP Plants, the Respondent is in breach of its obligation to insure a reasonable return to the Claimants’ investment [...].’<sup>149</sup>

Arbitrator Volterra dissented<sup>150</sup> focusing on the fact that Spain initially endeavoured to attract investments and subsequently owing to the financial crisis it faced it changed the regulatory regime affecting the investors. He implied that RREEFF had a legitimate expectation of regulatory stability, in contrast with the view of the majority.

The reasoning in *RREEFF v. Spain* sets a high threshold for establishing legitimate expectations, but did not address the investor’s due diligence. As a separate matter, it considered that general regulatory measures could give rise to specific commitments and by implication legitimate expectations that such commitments cannot be altered totally, unreasonably and disproportionately. It considered that RREEFF was only entitled to legitimately expect that it would receive a reasonable return on its investment, not that the regulatory framework would remain unchanged.

#### **4. The Significance of the ‘Renewables Investment Arbitrations’ for the Energy Charter Treaty**

The significance of ECT investment arbitrations in the RE sector are significant for the ECT for numerous reasons. First, they may have clarified (or muddled) the content of FET under the ECT (Section 4.1). Second, they may have used different methodology in order to arrive to their determinations. It is important to understand for instance whether they relied on the CIL rules on treaty interpretation when interpreting the content of ECT Article 10(1) (Section 4.2). Third, they raise a wider question about the role of ECT arbitration tribunals for the interpretation of ECT and whether they are concerned with legal consistency among their findings. This is significant in order to encourage States and investors to continue to believe in ECT arbitral proceedings and to use them (Section 4.3).

##### **4.1 The Content of FET under the ECT**

The central issue in the cases against Spain was the extent to which the host ECT Contracting Party may exercise its right to regulate without violating FET under ECT Article 10(1). All decisions accepted that an ECT Contracting Party has a right to regulate, including by modifying its domestic legislation, with a view to addressing a tariff deficit and overcoming financial difficulties. In *Charanne v. Spain*,<sup>151</sup> *Eiser v. Spain*,<sup>152</sup> and *Masdar v. Spain*<sup>153</sup> (as well as in numerous other RE cases under the ECT, such as *RREEFF v. Spain*,<sup>154</sup> *Antin v. Spain*,<sup>155</sup> *Novenergia v. Spain*,<sup>156</sup>

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<sup>147</sup> Ibid, para. 475.

<sup>148</sup> Ibid, para. 523.

<sup>149</sup> Ibid, para. 600.

<sup>150</sup> Partially Dissenting Opinion of Professor Robert Volterra to the Decision on Responsibility and the Principles of Quantum in respect of ICSID Case No. ARB/13/30 dated 30 November 2018.

<sup>151</sup> *Charanne v. Spain*, paras. 500 and 536

<sup>152</sup> *Eiser v. Spain*, para. 371

<sup>153</sup> *Masdar v. Spain*, para. 484

<sup>154</sup> *RREEFF Infrastructure (G.P.) Limited and RREEFF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (Award) ICSID Case No. ARB/13/30, 11 December 2019, para. 242-243.

<sup>155</sup> *Antin Infrastructure Services Luxembourg S.à r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, para. 555.

<sup>156</sup> *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain* (Award) SCC Case No. 2015/063, 15 February 2018, paras. 657-658.

and *Blusun v. Italy*<sup>157</sup>), the Tribunals explained that the host State retains some regulatory autonomy, while being an ECT Contracting Party. They all assessed whether the host ECT Contracting Party's regulatory measures exceeded or not its regulatory autonomy and were thus consistent or inconsistent with the FET requirement under the ECT. However, their reasoning bears some differences, including about the content of FET under ECT Article 10(1), which may need further clarification in order to ensure predictability for the investors. These are discussed in Section 3 above, but some of them are highlighted below.

In *Charanne v. Spain*, the Tribunal considered whether legitimate expectations had been established for the investor on the basis of the presence of the specific commitments. In that context, investors must comply with their due diligence obligations in order to be able to claim the protection of their legitimate expectations, and the Tribunal adopted a very high threshold for assessing due diligence, which was justified by reference to the highly regulated nature of the particular market in which the investment was made, and which required the investor to be familiar with domestic case law on legislation beyond the one specifically relied on by the investor. Yet, in *Masdar v. Spain*, in relation to this approach, the Tribunal seems to introduce some level of subjectivity when assessing due diligence (on the basis of the belief of the investor).

Additionally, in *Charanne v. Spain*, the Tribunal, when considering whether by amending the regulatory framework the new regulatory regime violated FET,<sup>158</sup> it assessed whether the legitimate expectations of the investor were frustrated by the host State's unreasonably, disproportionately and against the public interest.<sup>159</sup> In contrast, in *Eiser*, the Tribunal was unconcerned with determining whether legitimate expectations had been established. It adopted a broad interpretation of the stability requirement in FET under ECT Article 10(1): the 'obligation to accord [FET] necessarily embraces the obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments.' When assessing whether legal stability, as required under FET in ECT Article 10(1), had been violated, it focused on the impact of the regulatory change on the investors.

## **4.2 Methodology for Determining the Meaning and Content of FET under ECT Article 10(1)**

The methodology of the tribunals seems to differ. *Eiser v. Spain* focuses on the interpretation of the ECT and expressly relies on the CIL rules on treaty interpretation.<sup>160</sup> However, *Charanne v. Spain* does not rely on treaty interpretation rules when determining the content of FET in ECT Article 10(1), but rather on the 2012 UNCTAD Study, and international case law outside the ECT. Additionally, in *Masdar v. Spain* the Claimant had lengthily argued that the FET standard in the ECT is special comparing to bilateral investment treaties ("BITs") and other multilateral treaties that protect investors, because it is a treaty that specifically protects investments in the energy sector requiring more stability are reflected in numerous ECT provisions, including its Article 2 setting out the ECT's purpose.<sup>161</sup> However, the Tribunal in *Masdar v. Spain* did not rely on treaty interpretation, except through a passing reference to the general rule on treaty interpretation.<sup>162</sup>

## **4.3 The Role of Investment Arbitration in the Interpretation of the ECT**

The ECT differs from BITs in that it is a multilateral treaty, which establishes the jurisdiction

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<sup>157</sup> *Blusun S.A., Jean-Pierre Lecorier and Michael Stein v. Italian Republic* (Award) ICSID Case No. ARB/14/3, 27 December 2016.

<sup>158</sup> *Ibid*, para. 512.

<sup>159</sup> *Ibid*, paras. 514-515.

<sup>160</sup> See analysis in Section 3.2 above.

<sup>161</sup> *Masdar v. Spain*, paras. 391-398. A similar approach was taken in *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain* (Award) SCC Case No. 2015/063, 15 February 2018, para. 654.

<sup>162</sup> *Ibid*, para. 483.



of *ad hoc* arbitral tribunals for the resolution of disputes between investors and ECT Contracting Parties. Although in investment treaty arbitration there is no binding jurisprudential precedent or *stare decisis*,<sup>163</sup> against such a background, the need for consistency in the interpretation of the ECT is greater than in relation to the interpretation of similar provisions in different BITs: the interpretation by an arbitral tribunal in relation to a case against one ECT Contracting Party is influential for the interpretation of the same treaty vis-à-vis other ECT Contracting Parties.<sup>164</sup> In fact, the decisions of arbitral tribunals which have been given jurisdiction under the ECT upon the consent of the ECT Contracting Parties may be relied upon as a supplementary means of interpretation reflected in the rule of Article 32 of the Vienna Convention on the Law of Treaties ('VCLT').

Further, legal inconsistency among decisions that interpret and apply the same treaty provisions raises a 'legitimacy crisis' for investment treaty arbitration,<sup>165</sup> because legal inconsistency gives the impression of bias and may discourage addressees from accepting the results of the arbitral awards. The wider perception of failings of the current investment treaty arbitration regime is shown by the termination of BITs by numerous States and the denunciation (or suggestions that denunciation may follow) of the ICSID Convention, and the proposals for an international investment court,<sup>166</sup> for an appeal stage in investment arbitration,<sup>167</sup> or for preliminary rulings in investment arbitration.<sup>168</sup>

In the RE cases under the ECT, Tribunals frequently relied on previous decisions to support their own reasoning or distinguished their reasoning from previous awards: (a) awards on disputes concerning the ECT; and (b) awards on disputes concerning other investment treaties. For instance, in *Charanne v. Spain*, the Tribunal based its reasoning on that of *Electrabel v. Hungary* - that 'subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment' - and pronounced that 'in the absence of a specific commitment, an investor cannot have a legitimate expectation that existing rules will not be modified'.<sup>169</sup>

In *Eiser v. Spain*, the Tribunal took a different approach in its reasoning to that of the Tribunal in *Charanne v. Spain*, and it expressly distinguished the legal and factual situation before it from that in *Charanne v. Spain*. While the Tribunal agreed with *Charanne v. Spain* that combating the tariff deficit was 'a legitimate public policy problem', it noted that the challenged 'measures in *Charanne v. Spain* had far less dramatic economic effects' as compared to the measures challenged in *Eiser v. Spain*.<sup>170</sup> In *Masdar v. Spain*, the Tribunal considered that it was not bound by *Charanne's* reasoning, because of the different legal framework the Tribunal in *Masdar* had to consider,<sup>171</sup> and contrary to *Charanne v. Spain*, the Tribunal considered the registration with the Special Registry requirement

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<sup>163</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/6, 29 January 2004, para. 97; *Gas Natural SDG, SA v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction (17 June 2005), para.52; *Garanti Koza LLP v. Turkmenistan*, Decision on Jurisdiction, 3 July 2013, ICSID Case No. ARB/11/20, para. 149. A. Rigo Sureda, Precedent in Investment Treaty Arbitration, in C. Binder, U. Kriebaum, A. Reinisch, and S. Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009), pp. 830-842.

<sup>164</sup> For criticisms against investment arbitration generally, see also: G. Van Harten, *Investment Treaty Arbitration and Public Law* (2007), pp. 152-184.

<sup>165</sup> S. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions, 73 *Fordham LR* (2005) 1521.

<sup>166</sup> European Commission, Recommendation for a Council Decision, authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes (13 September 2017), COM(2017) 493 final.

<sup>167</sup> G. Bottini, Present and Future of ICSID Annulment: The Path to an Appellate Body?, 31 *ICSID Review—Foreign Investment Law Journal* (2016), 712, 725-727; M. Feldman, Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power, 32 *ICSID Review—Foreign Investment Law Journal* (2017), 528-544.

<sup>168</sup> C.H. Schreuer, Preliminary Rulings in Investment Arbitration, TDM 3 (2008), [www.transnational-dispute-management.com/article.asp?key=1238](http://www.transnational-dispute-management.com/article.asp?key=1238).

<sup>169</sup> *Charanne v. Spain*, para. 499-503.

<sup>170</sup> *Eiser v. Spain*, paras. 368-370.

<sup>171</sup> *Masdar v. Spain*, para. 511.

‘a very specific unilateral offer from the State’.<sup>172</sup> In *RREEF*, the Tribunal concurred with *Eiser v. Spain*, that ‘the obligation to create a stable environment’ in ECT Article 10(1) first sentence ‘excludes any unpredictable radical transformation in the conditions of the investments,’<sup>173</sup> and with *Blusun v. Italy*.<sup>174</sup>

Further, while in *Masdar v. Spain* the Tribunal found that the two regulations on which the investor had relied to make the investment (RD 661/2007 and RD 1614/2010) contained a ‘stabilisation clause’ that prohibited Spain from passing any legislation modifying the legal regime relied upon by the investors,<sup>175</sup> in *RREEF v. Spain* the Tribunal reached the opposite conclusion vis-à-vis these domestic regulations on the basis of their provisions. It considered that although these regulations contained a stabilization clause they also foresaw that some adjustments may be made, and thus were not specific commitments. This aspect of *RREEF v. Spain* is important since it has expressly been addressed (and contested) by subsequent arbitral tribunals in other RE arbitrations against Spain under the ECT<sup>176</sup> – albeit not on the basis of a clear method of interpreting domestic regulations, which is the crucial matter here, but rather by focusing on the overall reasoning of *RREEF v. Spain*. In this respect, this line of reasoning of tribunals subsequent to *RREEF v. Spain* has given rise to criticism and dissents.<sup>177</sup>

These arbitrations highlight the need for consistency in the interpretation of the ECT, which is a multilateral treaty, interpreted by *ad hoc* arbitral tribunals instead of one tribunal that would set a consistent jurisprudence over time. The same is needed in relation to the assessment of facts, including domestic regulations, which are identical for arbitral tribunals, in order to establish whether legitimate expectations under the ECT have been established. The reliance on a consistent methodology in relation to both these issues is necessary. This does not mean that all pronouncements by arbitrations will be identical; in fact, each tribunal should engage with and decide on the basis of the arguments and facts before it. However, the express ‘awareness’ and ‘deference’ to other decisions under the ECT (and other treaties) has the potential to bring about greater consistency in the interpretation of the FET standard within the ECT (and beyond). In turn, such consistency will likely assist investors in understanding their rights and ECT Contracting Parties in complying with their obligations. Although inconsistency has not been completely avoided, Tribunals have been transparent about their differences from other Tribunals showing mostly – albeit not only – that such differences are due to the differences of fact.<sup>178</sup> To be sure, it is not argued here that arbitral tribunals should engage with the reasoning of other arbitral tribunals over and beyond the arguments made before them by the parties to the dispute.<sup>179</sup> But, recognising that arbitral pronouncements do not take place in a vacuum and may have wider implications for the interpretation and clarity of the ECT is a positive development.

## 5. The Significance of the ‘Renewables Investment Arbitrations’ under the ECT for International Investment Law

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<sup>172</sup> *Masdar v. Spain*, para. 512.

<sup>173</sup> *Ibid.*, paras. 314-317.

<sup>174</sup> *Ibid.*, para. 317.

<sup>175</sup> *Masdar v. Spain*, para. 503.

<sup>176</sup> *Watkins Holdings S.à r.l. and others v. Kingdom of Spain* (Award), ICSID Case No. ARB/15/44, 21 January 2020, paras. 500-502.

<sup>177</sup> Dissent on Liability and Quantum by Professor Ruiz Fabri, *Watkins Holdings S.à r.l. and others v. Kingdom of Spain* (Award), ICSID Case No. ARB/15/44, 21 January 2020, paras. 11-12.

<sup>178</sup> *Watkins Holdings S.à r.l. and others v. Kingdom of Spain* (Award), ICSID Case No. ARB/15/44, 21 January 2020, paras. 499-504.

<sup>179</sup> See also Dissent on Liability and Quantum by Professor Ruiz Fabri, *Watkins Holdings S.à r.l. and others v. Kingdom of Spain* (Award), ICSID Case No. ARB/15/44, 21 January 2020, para. 4.



The RE arbitrations under the ECT concretize a shift away from earlier cases, outside the ECT – for instance under NAFTA<sup>180</sup> or BITs – where investment arbitration tribunals took very strict – if not unworkable - approach to the host State’s right to regulate. For instance, *Tecmed v. Mexico* (2003) concerned a claim brought against Mexico under the Mexico-Spain BIT, which included the FET standard. The Tribunal found that:

“The foreign investor expects the host State to act in a consistent manner, *free from ambiguity and totally transparently* in its relations with the foreign investor, *so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.* Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.”<sup>181</sup>

Although this formulation of legitimate expectations has been adopted by subsequent tribunals in relation to claims under a variety of BITs,<sup>182</sup> authors<sup>183</sup> and subsequent investment arbitration tribunals and ad hoc annulment committees<sup>184</sup> have criticized this approach for imposing unbearable and impractical burdens on the host State, and have departed from it. In *Charanne v. Spain*, *Eiser v. Spain*, and *Masdar v. Spain* (as well as in numerous other RE cases under the ECT, such as *RREEF v. Spain*, *Antin v. Spain*, *Novenergia v. Spain*, and *Blusum v. Italy*),<sup>185</sup> the Tribunals explained that the host State retains some regulatory autonomy, while being an ECT Contracting Party, and did not establish the high threshold suggested in *Tecmed v. Mexico*.

It could be argued that this departure has to do with the interpretation of the ECT. This could be argued to some extent in relation to *Eiser v. Spain* where the Tribunal focused on the interpretation of the ECT. However, given that some decisions examined here - *Charanne v. Spain* and *Masdar v. Spain* - did not place emphasis on the interpretation of the ECT, the departure of the RE cases from earlier cases outside the ECT could also be explained as confirming a more balanced (and narrower) determination of the content of the FET standard generally by arbitration tribunals (irrespective of the treaty being interpreted) in the aftermath of *Tecmed v. Mexico*.

More generally about the content of FET, however, it cannot be argued that the reasoning of the Tribunals discussed here (but also in other RE ECT cases) introduce one consistent methodology for making the application of FET more predictable for ECT Contracting Parties and for investors. It may be argued that this is simply the inherent character of FET under any treaty, and not only the ECT: ‘it is impossible to tie it to a definition [...] only such a flexible concept can be adapted to such diversity of factual situations arising in the context of the international law of foreign investment’.<sup>186</sup> However, it is also significant to take note of the fact

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<sup>180</sup> *Metalclad Corporation v. The United Mexican States* (Award) ICSID Case No. ARB(AF)/97/1, 30 August 2000.

<sup>181</sup> *Técnicas Medioambientales Tecmed S.A v Mexico* (Award), ICSID Case No ARB(AF)/00/2 (2003), para. 154.

<sup>182</sup> See *Occidental Exploration and Production Co v Ecuador* (Award), LCIA Case No UN3467, (UNCITRAL, 2004, Orrego Vicuña, Brower, Sweeney), para. 185; *CMS Gas Transmission Co v Argentina* (Award) ICSID Case No ARB/01/8, (2005) (Orrego Vicuña, Lalonde, Rezek), para. 279.

<sup>183</sup> Z. Douglas, *Nothing If Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex*, 22 *Arbitration International* (2006) 27 at 28.

<sup>184</sup> See also different criticism by *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Decision on Annulment, ICSID Case No. ARB/01/7, 21 March 2007, paras. 67-68; *Bivater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, 24 July 2008, para. 600; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, 31 October 2011, para. 343.

<sup>185</sup> See also Section 4.1 above.

<sup>186</sup> I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008), p. 237.

that in the context of RE arbitrations under the ECT discussed here only one decision bases its reasoning on the CIL rules on treaty interpretation (along with other arbitral decisions), and that decision does not specifically deal with the legitimate expectations aspect of the FET standard in ECT Article 10(1) but frames its analysis within regulatory stability under the FET standard in ECT Article 10(1). Further, all RE arbitration decisions under the ECT cross-refer to each other and other arbitral decisions under the ECT and outside it. This ‘dialogue’ or ‘awareness’ may offer some layer of legal consistency as to the interpretation of the FET standard more generally in different treaties. However, by not demonstrably adopting a methodology based on treaty interpretation, Tribunals in RE cases under the ECT do not overcome the criticism raised against FET that it is a tool that allows arbitrators to make decisions without being bound by the ECT’s normative background.

## 6. The Significance of the ‘Renewables Investment Arbitrations’ under the ECT for Public International Law

In 2018, the International Court of Justice (‘ICJ’) pronounced in its Judgement on *Bolivia v. Chile* that

‘references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. *It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.*’<sup>187</sup>

In this way, the ICJ rejected Bolivia’s claim that Chile’s representations through its multiple declarations and statements over the years gave rise to “the expectation of restoring” Bolivia’s sovereign access to the sea, and Chile’s refusal to engage in further negotiations with Bolivia ‘frustrates Bolivia’s legitimate expectations’. Bolivia had argued in this respect that the principle of legitimate expectations has been widely applied in investment arbitration.<sup>188</sup> On the other hand, Chile had argued that there is no evidence that such a rule of international law exists.<sup>189</sup>

In the pleadings, the parties referred to some arbitral decisions concerning legitimate expectations, including one on RE under the ECT. In its written pleadings, Chile cited *Blusun v. Italy* (2016)<sup>190</sup> (one of the ICJ Judges was an arbitrator in *Blusun v. Italy*)<sup>191</sup> along with numerous other arbitral decisions outside the ECT to support the argument that legitimate expectations are not ‘norms in their own right’.<sup>192</sup> In the passage of *Blusun v. Italy* cited by Chile, the Tribunal in *Blusun v. Italy* was implicitly supporting the reasoning of the Tribunal in *Charanne v. Spain* by addressing a criticism by Counsel for Blusun targeted against *Charanne v. Spain*.<sup>193</sup> Further, none of the RE cases under the ECT provide any support for the argument that a principle of legitimate expectations exists in general international law and applies to inter-State relationships.

## 7. Conclusions

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<sup>187</sup> *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, I.C.J. Reports 2018, p. 507, para. 162 (emphasis added).

<sup>188</sup> Ibid, para. 160.

<sup>189</sup> Ibid, para. 161.

<sup>190</sup> *Blusun S.A., Jean-Pierre Lecorquier and Michael Stein v. Italian Republic* (Award) ICSID Case No. ARB/14/3, 27 December 2016, para. 371.

<sup>191</sup> Judge James Crawford was president, and the other two members were Alexandrov and Dupuy.

<sup>192</sup> Rejoinder of Chile, 15 September 2017, Vol. 1, available at: <https://www.icj-cij.org/files/case-related/153/153-20170915-WRI-01-00-EN.pdf>, p. 25, fn 96.

<sup>193</sup> See *Blusun v. Italy*, paras. 370-371.

RE arbitrations under the ECT are landmark not so much because they further clarify the content and function of FET, including legitimate expectations, but rather because they confirm a shift in arbitral decisions away from the unworkable thresholds of earlier decisions that considered that FET allowed for regulatory change under very exceptional circumstances. The host State retains regulatory powers but legitimate expectations – in case of specific commitments – have to be respected or FET in general may be violated if there is a total and unreasonable change of the regulatory regime at the time of making the investment. Crucially, these arbitrations show the need for legal consistency in the interpretation of the ECT, and that investment tribunals show awareness of other ECT arbitrations and deference to the need for consistency – even when they take a different view, they explain this (usually by reference to the difference of facts before them). Finally, although they deal with legitimate expectations, they do not provide evidence that a principle of legitimate expectations exists in inter-State relationships, and although the cases on which this contribution has focused on have not been relied upon by States in inter-State disputes, one of the RE ECT arbitral decisions has been cited by one of the parties to the dispute in *Bolivia v. Chile* (2018) before the ICJ. Placing these arbitrations against the wider background of energy security concerns and climate change objectives, these cases exemplify the challenges a State may face in its effort to encourage investment in a new market - power generation from RE.