

Renewable energy investment cases against Spain and the quest for regulatory consistency

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1. Introduction

Spain is notoriously the most severally affected state in arbitration proceedings based on the Energy Charter Treaty (ECT), as it is believed to have lost 825 millions euros to date, with an aggregated 10,000 million euros sum being sought.¹ As of May 2020, twenty arbitral decisions have been rendered in what is now referred to as the ‘Spanish renewables saga’, with more than forty-six cases being lodged under that Treaty.²

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¹ C Monforte, ‘España pierde su undécimo arbitraje por el recorte de las renovables’, *El País*, *CincoDías* (11 September 2019) <https://cincodias.elpais.com/cincodias/2019/09/10/companias/1568133422_233643.html>.

² *Charanne B. V. & Construction Investments S.A.R.L. v the Kingdom of Spain*, SCC Arb No 062/2012 (Award 21 January 2016) (‘Charanne’); *Isolux Infrastructure Netherlands B.V. v Spain*, SCC Arb No 2013/153 (Award 17 July 2016) (‘Isolux’); *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v Kingdom of Spain*, ICSID Case No ARB 13/36 (Award 4 May 2017) (‘Eiser’); *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Arb No 2015/063 (Award 15 February 2018) (‘Novenergia’); *Masdar Solar & Wind Cooperatief U.A v Kingdom of Spain*, ICSID Case No ARB 14/1 (Award 16 May 2018) (‘Masdar’); *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) (‘Antin’); *Foresight Luxembourg Solar and al. v Kingdom of Spain*, SCC Arb No 2015/150 (Final Award 14 November 2018) (‘Greentech’); *REEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v Kingdom of Spain*, ICSID Case No ARB 13/30 (Decision on Responsibility and on the Principles of Quantum 30 November 2018) (‘RREEF’); *Cube Infrastructure Fund SICAV and Others v Kingdom of Spain*, ICSID Case No ARB 15/20 (Decision on Jurisdiction, Liability and Partial Decision on Quantum 19 February 2019) (‘Cube Infrastructure’); *NextEra Energy Global Holdings B.V et al v Kingdom of Spain*, ICSID Case No ARB 14/11 (Decision on Jurisdiction, Liability and Quantum Principles 12 March 2019) (‘NextEra’); *9REN Holding S.à.r.l. v Kingdom of Spain*, ICSID Case No ARB 15/15 (Award 31 May 2019) (‘9REN’); *SolEs Badajoz GmbH v*



Spain started to modify its incentive regime on renewable energy in 2010, which led to arbitral claims that by doing so, it violated the Fair and Equitable Treatment ('FET') contained in article 10(1) of the ECT. This article aims at analyzing the interpretation of legitimate expectations provided by the published decisions and highlight, if any, the differences resulting from these awards.

In the context of the ECT, article 10(1) has been understood to cover

'several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment'.³

In general, the concept of legitimate expectations is commonly considered as the 'dominant element' of the FET,⁴ encompassing each of these criteria.⁵

Kingdom of Spain, ICSID Case No ARB 15/38 (Award 31 July 2019) ('*SolEs Badajoz*'); *InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain*, ICSID Case No ARB 14/12 (Award 2 August 2019) ('*InfraRed*'); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, ICSID Case No ARB 15/36 (Award 6 September 2019) ('*OperaFund*'); *Stadtwerke München GmbH, RWE Innogy GmbH and others v Kingdom of Spain*, ICSID Case No ARB 15/1 (Award 2 December 2019) ('*Stadtwerke*'); *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Kingdom of Spain*, ICSID Case No ARB 15/16 (Decision on Jurisdiction, Liability and Directions on Quantum 2 December 2019) ('*Bay Wa r.e.*'); *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain*, ICSID Case No ARB 14/34 (Decision on Jurisdiction, Liability, and Certain Issues on Quantum 30 December 2019) ('*RWE Innogy*'); *Watkins Holding S.à.r.l. and al v Kingdom of Spain*, ICSID Case No ARB 15/44 (Award 21 January 2020) ('*Watkins*'); *The PV Investors v Kingdom of Spain*, PCA Case No 2012-14 (Final Award 28 February 2020) ('*the PV Investors*'); *Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v Kingdom of Spain*, ICSID Case No ARB 15/42 (Decision on Jurisdiction, Liability and Directions on Quantum 9 March 2020) ('*Hydro.Energy*'). For the number of cases registered against Spain, please visit <<http://www.energycharter-treaty.com/cases>>.

³ *Electrabel S.A. v The Republic of Hungary*, ICSID Case No ARB 07/19 (Decision on Jurisdiction, Applicable law and Liability 30 November 2012) para 7.74.

⁴ *Saluka Investments B.V. v The Czech Republic*, UNCITRAL (Partial Award 17 March 2006) para 302. See also, M Paporinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 251.

⁵ *El Paso Energy v Argentina*, ICSID Case No ARB 03/15 (Award 31 October 2011) para 348; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No ARB 05/16 (Award 29 July 2008) para 609: listing transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust,



Under the ‘legal stability’ approach of legitimate expectations, a State cannot generate legitimate expectations of a stable legal framework of investment incentives and later abruptly reverse such expectations.⁶ Accordingly, legitimate expectations are based on the presumed stability of a given legal framework as well as on representations made explicitly or implicitly by the host State.⁷ On the other hand, the ‘qualifying requirements approach’ of legitimate expectations nevertheless gathers three elements to consider an expectation as legitimate and thus, to be protected by the FET standard: (i) there must have been specific representations or commitments made to the investor by the State, on which the former has relied; (ii) the investors must be aware of the regulatory environment of the host State and (iii) investor’s expectations must be balanced against legitimate activities of host States.⁸ These specific representations may arise by specific commitments to the investors through stabilization clauses, but also through rules not specifically aimed at the investor, though put in place so as to induce the investor’s investment in the host State.⁹ The latter approach contrasts with the former in that hinders far less the State’s ability to enact legislation.

Consequently, the exact content of the commitment of the State must be thoroughly established, as tribunals differ in their interpretation as to whether an explicit commitment of the State towards regulatory stability

idiosyncratic, discriminatory, lacking in due process or procedural propriety and respect of the investor’s reasonable and legitimate expectations; *Técnicas Medioambientales Tecmed S.A. v United Mexican States*, ARB (AF) 00/2 (Award 29 May 2003) para 154. See, *mutatis mutandis*, J Cazala, ‘La protection des attentes légitimes de l’investisseur dans l’arbitrage international’ (2009) 1 *Revue internationale de droit économique* 5, 23.

⁶ *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB 01/8 (Award 12 May 2005) paras 136-137, 275; *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB 01/3 (Award 22 May 2007) paras 264-266. See also, JW Rowley, D Bishop, G Kaiser, *The Guide to Energy Arbitrations* (2015) *Global Arbitration Rev* 67.

⁷ R Kläger, ‘Fair and Equitable Treatment’ in *International Investment Law* (CUP 2011) 164.

⁸ UNCTAD, *Fair and equitable treatment* (2012), UN Doc. UNCTAD/DIAE/IA/2011/5, 68, referring to *Duke Energy v Ecuador*, ICSID Case No ARB 04/19 (Award 18 August 2008) para 340 and *Continental Casualty v Argentina*, ICSID Case No ARB 03/9 (Award 5 September 2008) para 261.

⁹ *ibid.* See also, *Glamis Gold, Ltd. v United States*, UNCITRAL (NAFTA) (Award 8 June 2009) para 627.



must be made,¹⁰ or whether an implied stability commitment is inferred from the FET standard itself. Accordingly, tribunals consider that pending this commitment from the state, changes in the regulatory framework would breach the FET standard solely in the case of a drastic, discriminatory or unreasonable change in the essential features of the legal framework.¹¹ The crucial focus point for arbitral tribunals is therefore to find the right balance between the State's obligation to provide a stable legal framework and the State's right to sovereignly amend the regulatory framework on the other.¹² A tension between these affirmations can be observed in the analysis of the awards rendered in the Spanish renewables saga, as will be demonstrated thereafter. An overview of the relevant domestic legislation of Spain will firstly be provided (paragraph 1), before turning to the interpretation and implementation of legitimate expectations under Article 10(1) of the ECT (paragraph 2).

2. *The Spanish legal framework*

Law 54/1997 of 27 November 1997 on the electric power sector introduced regimes differentiating on the type of generation plants, one for traditional generation plants (the 'Ordinary Regime') and another for generators of electricity from non-consumable renewable energy (the 'Special Regime'). Under the Special Regime, RE generators benefited from a premium above the wholesale market price. Law 54/1997 was completed by Royal Decree ('RD') 436/2004, which specified that the basis of remuneration under the Special Regime was either a premium

¹⁰ *Total S.A. v The Argentine Republic*, ICSID Case No ARB 04/01 (Decision on Liability 27 December 2010) paras 117-118; *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB 05/8 (Award 11 September 2007) paras 331-333.

¹¹ *Impregilo S.p.A. v Argentine Republic*, ICSID Case No ARB 07/17 (Award 21 June 2011) para 291; *Suez and AWG Group v Argentina*, ICSID Case No ARB 03/19 (Decision on Liability 30 July 2010) para 185; *Parkerings-Compagniet AS v Republic of Lithuania* (n 10) 332. See also D Zannoni, 'The Legitimate Expectation of Regulatory Stability under the Energy Charter Treaty' (2020) 33 *Leiden J Intl L* 451, 460.

¹² M Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 *ICSID Review* 88, 113. See also *BG Group Plc v The Republic of Argentina*, UNCITRAL (Final Award 24 December 2007) para 298; *Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No ARB 10/7 (Award 8 July 2016) para 423.



payment or a regulated FIT calculated in eurocents per kilowatt-hour (kWh) of electricity produced. At that point, the more efficient the RE plant and the higher the level of production, the greater remuneration and the margin the investor would receive. The most important measure adopted by Spain in relation to the incentive scheme is RD 661/2007 as it ensured that producers under the Special Regime have the choice between (a) sell the electricity to the system at a fixed FIT in eurocents per kWh or (b) sell the electricity on the wholesale market and receive a premium in eurocents per kWh. Moreover, article 44(3) of RD 661/2007 provided for the possibility of revising the rate at which the FIT is granted, whilst mentioning that facilities registered to the RAIPRE (Administrative Register for Production Facilities under the Special Regime) would not be affected.

The incentives created by RD 661/2007 were fruitful and attracted many investors, but the aftermath of the economic and financial crises of 2008 soon created an important tariff deficit. Subsequently, Spain started to amend the Special regime as of 2010: (i) RD 1565/2010 limited to 25 years the possibility to obtain the regulated tariffs provided by the RD 661/2007 for PV investors; (ii) Royal Decree Law ('RDL') 14/2010 limited operating hours of the plants; (iii) Law 2/2011 amended time limits for which the regulated tariff can be received; (iv) RDL 1/2012 removed economic incentives for new PV facilities; (v) Law 15/2012 established a 7% tax on the total value of all the energy fed to the electricity grid and eliminated premium of electricity generated with gas and (vi) RDL 2/2013 eliminated the 'premium' option, leaving investors with either the market price or the fixed rate tariff.

Most importantly, RDL 9/2013 eliminated all fixed tariffs and repealed RD 661/2007. Law 24/2013, which superseded Law 54/1997, eliminated the distinction between the 'Ordinary regime' and the 'Special Regime' and established a 'Specific Regime'. As a result, conventional and RE generators were put on an equal footing thereby depriving renewable installations of the unconditional right of prior grid access and priority of dispatch that existed under the Special Regime. RDL 413/2014 clarified the new regulatory regime based on a 'Specific Payment'. This regulatory regime is further specified with Ministerial Order IET/1045/2014, putting a definite end to the economic incentives provided in RD 661/2007. As a result, the new regime provides for a



‘reasonable rate of return’ calculated by the regulator for a ‘standard’ plant with a fixed initial target rate of return (7.398%).¹³

2. *The application of Article 10(1) of the ECT in Spanish cases*

Seeking clarity in the analysis, the awards in which Spain prevailed will firstly be laid out (2.1.) before chronologically analyzing the decisions in which tribunals concluded to a violation of article 10(1) of the ECT (2.2.).

2.1. *The ‘strict’ interpretation of legitimate expectations: Charanne, Isolux and Stadtwerke*

In *Charanne*, which was the first Spanish case to be rendered in the ‘Spanish renewables saga’, only the 2010 measures were disputed as Claimants did not base their claims on any of the 2013/2014 measures.¹⁴ In assessing whether legitimate expectations of stability of the legal framework existed, the tribunal held that there must be a specific commitment directed at each investor, as

‘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 the power of States to regulate the economy in accordance with the public interest’.¹⁵

Interestingly, the tribunal in *Blusun v Italy* upheld a similar rationale.¹⁶ The tribunal in *Charanne* clarified its position on legitimate

¹³ Interestingly, Spain adopted Royal Decree-Law 17/2019 on 22 November 2019, which abandons the existing reasonable rate of return scheme and provides that, if pending arbitral or judicial proceedings were to be withdrawn, Spain would insure in exchange a 7.398% rate of return until 2031. This rate would also apply for investors who agree to drop their enforcement proceedings.

¹⁴ *Charanne* (n 2) 481.

¹⁵ *ibid* 493.

¹⁶ *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No ARB14/3 (Award 27 December 2016) para 319. See also S Faccio, ‘The assessment of the FET standard between legitimate expectations and economic impact in the Italian solar energy investment case law’ (2020) 71 QIL-Questions Intl L 3-20.



expectations by stating that, even in the absence of a specific commitment of the State, legitimate expectations could be breached, as

‘an investor has the legitimate expectation that, when the State modifies the regulation under which the investor made the investment, it will not do so unreasonably, contrary to the public interest, or in a disproportionate matter’.¹⁷

In this specific case nevertheless, it considered that there was no breach of article 10(1) of the ECT and that

‘the proportionality requirement is fulfilled as long as the modifications ... do not suddenly and unexpectedly eliminate the essential features of the regulatory framework in place’.¹⁸

It can be concluded from that case, however, that the tribunal entertained the possibility of legitimate expectations being breached even in the absence of specific commitments, a reasoning that will be built upon in awards such as *Eiser* and *Novenergia*.

In *Isolux*, Claimants also submitted that Spain guaranteed a stable and predictable legal framework and that the long-term FIT provided for in RD661/2007 constituted a legitimate expectation applicable to their plants. The Tribunal emphasized that investors should perform due diligence before investing in another State in order to crystallize legitimate expectations, as these are inherently based on the legal framework existing at the time of the investment.¹⁹ However, as the Claimants’ investment was made in June 2012 - after the original framework had already been modified through RD 1565/2010 and RDL 14/2010 - the tribunal considered that the 2013/2014 measures did not frustrate the legitimate expectations of the investors.²⁰ In this case, the date of the investment was crucial in determining the non-violation of Article 10(1), absent of other considerations.

The third case in which Spain prevailed referred however to the disputed measures of 2012-2014 with an investment made prior to the first

¹⁷ *Charanne* (n 2) 514.

¹⁸ *ibid* 517.

¹⁹ *Isolux* (n 2) 781.

²⁰ *ibid* 787-788.

‘corrective’ measures of 2010. In assessing whether Spain had respected its obligation to maintain a stable regulatory framework under Article 10(1), the tribunal in *Stadtwerke* held that even though the ‘corrective’ actions undertaken by Spain had ‘unpleasant consequences’ on the investor’s business, the measures adopted did not constitute a failure to provide a stable regulatory system.²¹ In relation to legitimate expectations, the tribunal held that in the absence of a commitment ‘*contractually assumed by a State to freeze its legislation in favor of an investor*’, the assessment of legitimate expectations is to be performed taking into account the overall legal framework at the time of the investment and the investor’s due diligence.²² It is important to stress here that the CSP plants in that case were only registered in April 2012, even though the investment was made at the end of 2009. The Tribunal dismissed the claim that Article 44(3) of RD 661/2007 was a grandfathering clause and held that the investors had no legitimate expectations in relation to the long term FIT, nor that Spain was in breach of any of the other standards included in article 10(1) of the ECT.²³

These three cases had very specific context: in *Charanne*, the disputed measures only concern regulations as of 2010; the investors in *Stadtwerke* were ‘sanctioned’ for the delay of registration at the RAIPRE and the investors in *Isolux* had invested *after* the first modifying measures of RD 661/2007 entered into force. However, both tribunals in *Stadtwerke* and in *Charanne* estimated that legitimate expectations of stability would arise solely in the context of a very specific commitment of the State, thus adopting a ‘strict’ approach to such legitimate expectations.

2.2. *The diverse yet consistent rationale in awards where investors prevailed: a legitimate expectation of ‘consistency’ rather than ‘stability’*

There are significant differences between these awards in their assessment of legitimate expectations; however, they all undertake a similar methodology by (i) assessing whether a specific commitment had been undertaken towards the investor and (ii) if not, whether the change in the

²¹ *Stadtwerke* (n 2) 260.

²² *ibid* 264.

²³ *ibid* 308-318.



legal framework by disputed measures was significant enough to conclude to a disproportionate economic burden on the investor and its investment. In doing so, the tribunals evidently need to delve into the economic and legal content of the disputed measures in relation to the pre-existing framework.

Whilst acknowledging that the FET standard ‘does not give right to regulatory stability *per se*’,²⁴ the *Eiser* tribunal went on to assess to what extent treaty protection, and the FET treatment provided in the ECT, may be engaged and give rise to a right of compensation as a result of the exercise of a State’s acknowledged rights to regulate. The tribunal thus considered that the FET obligation

‘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. ... However, [the 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’.²⁵

The tribunal then concluded that the investors had the legitimate expectation that the original regulatory regime would be maintained. The disproportionate character of the disputed measures was the concluding criteria in *Eiser*, notwithstanding the fact that there was no specific commitment undertaken to the investor. Interestingly, this rationale joins *Charanne* in concluding that in the absence of a specific commitment, investors have the legitimate expectation that the essential features of a given legal framework would not be suddenly and fundamentally changed.²⁶

Two elements are further emphasized in *Eiser* regarding frustration of legitimate expectations: (i) a radical alteration of the regulatory regime leading to (ii) a deprivation of the investment value.²⁷ The latter criterion is however generally used in assessing indirect or creeping expropriation rather than a breach of the FET, although arbitral tribunals have seldom taken into account legitimate expectations in assessing indirect

²⁴ *Eiser* (n 2) 360.

²⁵ *ibid* 382.

²⁶ See the analysis for *Charanne* (n 2) above.

²⁷ *ibid* 364.

expropriation.²⁸ In this case, as in *RREEF* and *Hydro Energy* examined below, the disproportionate aspect of the measure can be assessed through the review of its economic impact on the investor.

Concurring with *Eiser*, the tribunal in *Novenergia* held that the economic impact of the measures was instrumental in determining a breach of the FET. The tribunal considered that documents and representations from the regulator and the Spanish government did, in fact, constitute a ‘bait rather than a deterrent’ to invest in Spain after RD661/2007, which led the investor to believe that there would be no radical changes in the regulatory regime.²⁹ The *Novenergia* tribunal thus assessed whether subsequent legislation by Spain ‘radically altered the essential characteristics of the legislation in a manner that violates the FET standard’,³⁰ before concluding that the measures were unexpected and radical, thus leading to a breach of the FET.³¹ As in *Eiser*, emphasis here is put on the requirement of consistency from the State, rather than on strict stability that would require specific commitments directed at the investor.

In *Masdar*, the tribunal recalled that the FET standard provides the investor with the confidence that the legal framework in which it made its investment will not be subject to ‘unreasonable or unjustified modification’, and that such framework will also not be subject to modification in a ‘manner contrary to specific commitments made to the investor’.³² However, the *Masdar* facts seem to differ from other renewable cases, as in this case the Spanish Ministry of Industry had sent letters to the investors specifically mentioning that they will benefit from the economic regime set by RD 661/2007 for the operating life of the plants.³³ Accordingly, the tribunal here decided that there was a specific commitment of the State through these letters and that it was evidently frustrated with the adoption of the disputed measures.

²⁸ *Azurix Corp. v The Argentine Republic*, ICSID Case No ARB 01/12 (Award 14 July 2006) paras 322, 377, considering that the standard of proof for indirect expropriation is higher than for a violation of the FET.

²⁹ *Novenergia* (n 2) 674.

³⁰ *ibid* 682.

³¹ *ibid* 695.

³² *Masdar* (n 2) 484.

³³ *ibid* 518-520. These ‘insurances’ have been later criticized, as they appear to have been given *after* the making of the investment and not before, and thus could not generate legitimate expectations.



The tribunal in *Antin* agreed with its predecessors that the FET standard comprises an obligation to afford fundamental stability in the ‘essential characteristics of the legal regime relied upon by the investors in making long term investments’.³⁴ Whilst emphasizing that legitimate expectations cannot arise from subjective considerations absent of an affirmative action of the State, the tribunal recalled Article 44(3) of RD 661/2001 and concluded that given the details and precision set forth in the Royal Decrees, such commitments falls ‘squarely into the type of State conduct that was intended to, and did, give rise to legitimate expectations of the Claimants’.³⁵ The Specific Regime established by the disputed measures was considered arbitrary and not based on identifiable criteria, as the tribunal concluded that the reasonable rate of return provided by this new regime appeared to ‘depend on governmental discretion’.³⁶ In *Antin* however, the language used in RD 661/2007 was considered specific enough to generate legitimate expectations of stability of the legal framework.

The *Greentech* tribunal recalled - as in *Eiser* and *Novenergia* - that the FET standard in the ECT protects investors from a radical or fundamental change in the legal or regulatory framework under which investments are made.³⁷ Differentiating from the other cases, the tribunal did not consider that the investors had a legitimate expectation to receive the FIT provided in RD 661/2007 nor that article 44(3) of this RD was constitutive of an implied stabilization clause, but rather that the legitimate expectation of the claimants was merely that the regulatory framework would not be ‘fundamentally and abruptly changed, depriving them of a significant part of their projected revenues, as opposed to merely modified’.³⁸ After recalling that the new support scheme was applied retrospectively to PV facilities, such as those of the Claimants, the tribunal concluded that the Specific Regime introduced as of Law 24/2013 was a fundamental change to the regulatory framework and thus, constituted a breach of the FET standard.³⁹

In the same vein, the tribunal in *RREEF* held that

³⁴ *Antin* (n 2) 532.

³⁵ *ibid* 552.

³⁶ *ibid* 558.

³⁷ *Greentech* (n 2) 357.

³⁸ *ibid* 377.

³⁹ *ibid* 389.

‘the obligation to create a stable environment certainly excludes any unpredictable radical transformation in the conditions of the investments’,⁴⁰

whereas no representations made by Spain

‘can 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 ... RD 1614/2010’.⁴¹

The tribunal concluded that the State acted in an unreasonable manner as the Specific Regime contained retroactive provisions.⁴² Interestingly, it is only through the calculation of the financial damage sustained by the Claimant that the tribunal is able to determine a violation of proportionality and reasonableness.⁴³ Indeed, the tribunal insisted that investors were not immune from any changes of the legal framework, but that solely a disproportional change in the regime applicable to the investment would be irregular.⁴⁴ Accordingly, the tribunal reminded that compensation in the form of damages could only arise through the assessment of the specific financial aspect of this case, as

‘it is only to the extent that the modifications would have exceeded the limits of what is reasonable that compensation would be due and should be calculated’.⁴⁵

In *NextEra*, the tribunal considered that Claimants ‘could not have had the expectation that the RD 661/2007 regime was frozen and could not be changed’.⁴⁶ Reiterating the *Eiser* and *Novenergia* rationale, it however considered, ‘in light of the assurances that they were given by Spain’ in the form of statements and forecasts on which their investment was based, that

⁴⁰ *RREEF* (n 2) 315.

⁴¹ *ibid* 321.

⁴² *ibid* 600.

⁴³ *ibid* 472.

⁴⁴ *ibid* 515, thus following the ‘qualifying requirements’ approach of legitimate expectations.

⁴⁵ *ibid*.

⁴⁶ *NextEra* (n 2) 591, also following the ‘qualifying requirements’ approach.



‘the regime would not be changed in a way that would undermine the security that Claimants had in respect of the economic regime set out in RD 661/2007’.⁴⁷

Accordingly, the changes ‘went beyond anything that might have been reasonably expected by Claimants’ and constituted a breach of their legitimate expectation in a similar fashion than the above cases.⁴⁸

In *SolEs Badajoz*, the tribunal agreed with its predecessors that the FET standard necessarily embraced an obligation to provide fundamental stability and maintain the ‘essential characteristics of the legal regime’ on which investors relied upon.⁴⁹ The tribunal considered that the measures enacted in 2010 did reduce Claimants’ revenue but did not modify the basic features of the Special regime.⁵⁰ However, the tribunal held that Spain violated Claimant’s legitimate expectations through the 2012/2014 measures, as these measures were disproportional in the sense that they were suddenly implemented and ‘unexpectedly removed the essential features of the Regime’ in place when the Claimant invested (i.e. the FIT).⁵¹ The tribunal also considered that the measures were disproportional in the severity of their economic impact on the investment,⁵² thus adopting a ‘mixed’ approach between fundamental stability of the legal regime and economic deprivation of the disputed measures.

The tribunal in *InfraRed* distinguished between legitimate expectations of stability and those of consistency of the legal framework.⁵³ It considered that in the absence of legitimate expectations of stability generated through specific commitments of the State, article 10(1) of the ECT gives rise to legitimate expectations of stability of the legal regime on which the investor has based its investment upon.⁵⁴ The tribunal went on

⁴⁷ *ibid* 591-599; in this case, the final registration of the plants with the RAIPRE occurred during 2013.

⁴⁸ *ibid* 599.

⁴⁹ *SolEs Badajoz* (n 2) 315.

⁵⁰ *ibid* 450, recalling *Charanne* (n 2), *Eiser* (n 2) and *Novenergi* (n 2).

⁵¹ *SolEs Badajoz* (n 2) 462.

⁵² *ibid*.

⁵³ *InfraRed* (n 2) 343-368.

⁵⁴ *ibid* 366: ‘a legitimate expectation of stability (i.e. immutability) can only arise in the presence of a specific commitment tendered directly to the investor or industry sector at issue’; 368: ‘an expectation of consistency, i.e., that the regulatory framework will not be radically or fundamentally changed may arise even in the absence of such a specific commitment, depending on the facts ... A valid public policy purpose does not

to conclude that there was, in fact, documents communicated by Spain that would establish specific commitments to not modify certain aspects of RD 661/2007 through exchange of letters, RD 1614/2010 and resolutions directed at the CSP sector.⁵⁵ The tribunal thus found that Spain specifically committed that future revisions of the value, among others, of the regulated tariff would not affect CSP plants registered on the RAIPRE.⁵⁶ Accordingly, Spain was in breach of article 10(1) of the ECT as a result of the disputed measures.

The tribunal in *OperaFund* found that Article 44(3) of RD 661/2007 was tantamount to a stabilisation clause,⁵⁷ while emphasizing on the importance of the registration at the RAIPRE, as they concluded that ‘the formal registration led to the investors entitlement to receive the benefits under RD 661/2007’.⁵⁸ The conclusion of the tribunal in *9REN* is rather similar, as it also considered that the legitimate expectations of the investor consisted in benefiting from the 25 years FIT, as it ‘stands to reason that investors would (and did) require such a guarantee before committing to the very large, upfront costs of RE projects’.⁵⁹ The tribunal in *Cube Infrastructure* concurred with the *SolEs* reasoning that the measures enacted prior to 2013 were not constitutive of a breach of the FET standard. However, a change in the ‘regulatory paradigm’ occurred with the adoption of the Specific Regime that constituted a breach of article 10(1).⁶⁰ In both of these cases, it was the legitimate expectation to not radically and disproportionately modify the legal framework that generated Spain’s responsibility.

In *BayWa r.e.*, the tribunal applied what it named as the ‘*Blusun dictum*’ in order to assess the FET violation,⁶¹ which also resonates with the conclusion in *InfraRed*:⁶²

automatically foreclose a finding of breach of the FET standard since – in the balancing exercise that tribunals are called upon to carry out – the consideration of a legitimate legislative objective may be outweighed by the radical nature of the changes to the legislative framework at issue’.

⁵⁵ *ibid* 410.

⁵⁶ *ibid* 451-453.

⁵⁷ *OperaFund* (n 2) 485.

⁵⁸ *ibid* 483.

⁵⁹ *9REN* (n 2) 273.

⁶⁰ *Cube Infrastructure* (n 2) 473.

⁶¹ See (n 16).

⁶² See (n 54).



‘1) was there a specific commitment of intangibility; (2) absent a specific commitment, did the Claimants entertain a legitimate expectation that subsidies would not be reduced during the lifetime of the project; (...) (4) were the changes of 2013-14 disproportionate to the legitimate aim of the legislative amendments; and (5) did they have due regard to the reasonable reliance interests of recipients who had committed substantial resources on the basis of the earlier regime’.⁶³

The tribunal then considered that the clawback provisions in the Specific Regime were excessive and inconsistent with the principle of stability enshrined in Article 10(1).⁶⁴

The *RWE Innogy* tribunal followed the *Blusun* analysis undertaken in *BayWa r.e.* Consistently with the previous decisions, it held that

‘the absence of a specific commitment does not mean that the fact that an investor has invested by reference to a given tariff regime ceases to be a relevant factor in applying the FET standard under Article 10(1)’

and that the State must take into account impacts on investors in its decision making process.⁶⁵ In this case, where investments were made over a 12-year period dating as far back as 2001, the tribunal decided that there was no specific commitment undertaken towards the Claimants in relation to legitimate expectations. However, the change in the regulatory regime was disproportionate, as the Claimants bore an excessive burden by the disputed measures, especially through the clawback provision in RD 9/2013.⁶⁶

In *Watkins*, the tribunal thoroughly assessed Spain’s conduct in relation to its FET obligations by analysing whether (i) there was a breach of legitimate expectations (ii) Spain failed to provide a stable and predictable legal framework (iii) Spain conduct was transparent (iv) Spain acted in an arbitrary and discriminatory way (v) actions were disproportionate.⁶⁷ The *Watkins* tribunal also considered that article 44(3) of RD 661/2007 constituted a stabilization commitment from Spain to maintain

⁶³ *BayWa r.e* (n 2) 463.

⁶⁴ *ibid* 495 ff.

⁶⁵ *RWE Innogy* (n 2) 462.

⁶⁶ *ibid* 584.

⁶⁷ *Watkins* (n 2) 514.

the original FIT that was later frustrated by the Specific Regime.⁶⁸ Moreover, the tribunal concluded that legitimate expectations were violated and that Spain failed to justify a rational policy goal as the tariff deficit existed before the development of wind farms in Spain.⁶⁹

The recent *PV Investors* award recalled, as did other cases, that the object and purpose of the ECT was to realize a balance between the sovereign rights of the State over energy resources and the creation of a climate favorable to the flow of investments on the basis of market principles.⁷⁰ The tribunal then agreed with Spain that Article 44(3) of RD 661/2007 could not be interpreted as a stabilization commitment.⁷¹ Indeed, the tribunal cited technological and economic circumstances in the renewables sector to conclude that an expectation of an unchanged FIT could not 'have been reasonable'.⁷² However, the tribunal finally concluded that Spain violated Article 10(1) of the ECT by not providing a reasonable rate of return to the investors with the Specific Regime through analysis of the economic situation of the investor.⁷³

The recent *Hydro Energy* decision on liability follows the *RREEF* and *InfraRed* decisions on several aspects. In this case, the tribunal also held that investors have the legitimate expectations that the 'legal framework will not be arbitrarily changed and that commitments will be observed'.⁷⁴ Following *InfraRed*, *Bay Wa.Re* and *RWE Innogy*, the tribunal recalled the *Blusun* dictum that once subsidies are lawfully granted, their modifications shall not be disproportional nor radical.⁷⁵ Interestingly, the tribunal in this case concluded that Claimants (one of which is also a Claimant in the *PV Investor* case) deliberately avoided to seek legal advice regarding the possibility for the existing legal framework to be modified, and

⁶⁸ *ibid* 526, 563.

⁶⁹ *ibid* 604.

⁷⁰ *PV Investors* (n 2) 570.

⁷¹ *ibid* 596.

⁷² *ibid*.

⁷³ *ibid* 623-639.

⁷⁴ *Hydro Energy* (n 2) 553.

⁷⁵ *ibid* 568. The tribunal concluded, in para 590, that 'changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment 'outside of the acceptable margin of change'.



that there was a clear lack of due diligence on their part.⁷⁶ Nevertheless, the tribunal went on to mention that it did not mean that the Claimants had no protected rights, and that in this case the change to the regulatory framework was disproportionate and radical, and therefore breached the obligation of stability (or ‘legitimate expectation of stability’) stemming from article 10(1) of the ECT.⁷⁷ Moreover, and following the tribunal in *RREEF*, the tribunal considered that the conclusion that the measure was disproportionate evidently necessitated to calculate the economic impact on the Claimants regarding the newly applicable reasonable rate of return. Accordingly, Spain is not yet found in breach of article 10(1) as the Parties failed to agree on a method to calculate the economic difference between the previous and the new rate of return for the plants.⁷⁸

3. Concluding remarks

As a result of the above analysis, it is safe to conclude that many elements were consistently taken into account by the tribunals to assess whether legitimate expectations had arisen in the Spanish context, despite different findings.

Firstly, tribunals generally assessed whether Spain had undertaken specific commitments towards the investors in order to found an obligation of stability of the legal framework, later frustrated by the adoption of the 2012/2014 measures: (i) in several awards, the existence of a commitment arising out of State legislation and officials’ representations was confirmed;⁷⁹ (ii) in others, the wording of Article 44(3) of RD 661/2007 was considered a stabilisation clause, therefore holding the State to a strict obligation of stability of the legal framework.⁸⁰ Interestingly, the tribunal in *Stadtwerke* went as far as to mention the need for a contractualised obligation for stability.⁸¹

⁷⁶ *ibid* 617-629.

⁷⁷ *ibid* 682.

⁷⁸ *ibid* 697, 717.

⁷⁹ *Cube Infrastructure* (n 2) 388-401; *NextEra* (n 2) 584-590; *Novenergia* (n 2) 666-669; *SolEs Badajoz* (n 2) 423.

⁸⁰ *OperaFund* (n 2) 485, *Antin* (n 2) 552. Whereas this claim was dismissed in *The PV Investors* (n 2) 596.

⁸¹ *Stadtwerke* (n 2) 264.

Secondly, tribunals consistently held that a failure in performing due diligence by claimants did not impact the State's obligation to consistency in its legal framework, which will be breached through disproportional measures. Tribunals only held that failure to perform due diligence would mean that there is no obligation to strict stability.⁸²

Thirdly, the timing of the investments is critical in ascertaining legitimate expectations: it is essential to pinpoint the specific moment in the regulatory framework where the investment was made (prior to RD 61/2007; between RD 61/2007 and the 2010 measures; after the 2010 measures);

Fourthly, the type of renewable investment is also an important criterion differentiating the cases. As mentioned in *Antin*,

‘the CSP and PV sectors were different since the former produces more electricity using less subsidies than the latter, which explained the retroactive changes affecting PV facilities’.⁸³

Moreover, the impact of the measures on small-hydro also differentiates from the PV sector.

Fifthly, the time of registration at the RAIPRE is also a critical assessment as in *Antin*, *Masdar*, *Novenergia* and *OperaFund*, the registration at the RAIPRE was not only a formal requirement to benefit from the Special Regime, but was considered as an actual basis of legitimate expectations.⁸⁴

Accordingly, and despite the fact that only three cases out of twenty published decisions decided in favor of Spain, tribunals did in fact follow a consistent approach regarding legitimate expectations claims. Indeed, tribunals focused on (i) establishing a specific commitment from the State, which would crystallize into a strict obligation of stability of the legal framework; (ii), in the absence of such a commitment, article 10(1) of the ECT was interpreted to bestow upon the State an obligation of consistency of the legal framework, that would generate a legitimate expectation for the investor; (iii) the tribunals would then assess whether the modification of the legal framework was radical or disproportionate in order to find a breach of article 10(1).

⁸² *Hydro Energy* (n 2) 617-630; *Isolux* (n 2) 781.

⁸³ *Antin* (n 2) 127.

⁸⁴ *OperaFund* (n 2) 483-485.



It is true that tribunals differed in their interpretation of what constitute a specific commitment from the State (in *NextEra*, article 44(3) of RD 661/2007 is considered a stabilisation clause, which is not the case in other awards). It is however generally recognized that State officials' representations ground legitimate expectation claims irrespective of stabilisation clauses,⁸⁵ as indeed they contribute to establish that a State committed to provide a specific framework. Another interesting aspect of these awards relates to the assessment of the disproportional character of the measures by tribunals. Indeed, some tribunals, such as *Watkins*, do consider the measures adopted by Spain to reduce its tariff deficit to be disproportionate *per se*, whereas other tribunals do not consider the measures to be disproportionate, but rather their effects. As such, these tribunals, as in *RREEF*, *Hydro Energy* or even in *Eiser*, had to assess the economic loss of the investors to establish a breach of Spain's obligation to grant a reasonable rate of return under RD 661/2007.⁸⁶ As mentioned in *Hydro Energy*, compensation of a breach of an international obligation must stem from a damage thoroughly assessed, even when the assessment of this damage itself is the root of the violation.⁸⁷

Finally, there is some consistency between these Spanish cases and the Italian side of renewable energy arbitration under the ECT. Indeed, tribunals have consistently mentioned and followed the *Blusun* approach in assessing the existence and frustration of legitimate expectations of stability and/or consistency.⁸⁸ Accordingly, it appears that despite different interpretations justified by the very facts of each case, there is consistency in the interpretation of article 10(1) in the cases of this 'Spanish renewables saga'.

⁸⁵ See, *inter alia*, S Hamamoto, 'Protection of the Investor's Legitimate Expectations: Intersection of a Treaty Obligation and a General Principle of Law', in W Shan, J Su (eds), *China and International Investment Law, Twenty Years of ICSID Membership* (Brill 2014) 141, 148-156, 166-168; M Potestà (n 12); JE Neuhaus, 'The Enforceability of Legislative Stabilization Clauses' in DD Caron, S Schill, AC Smutny EE Triantafyllou (eds), *Inside International Arbitration* (OUP 2015) 318, 326.

⁸⁶ See also Concurring and Dissenting Opinion of M Charles, N Brower in *PV Investors* (n 2).

⁸⁷ *Hydro Energy* (n 2) 682-690.

⁸⁸ *Bay Wa.Re* (n 2) 463; *RWE Innogy* (n 2) 462.