

September 2020

Modernizing the Fair and Equitable Treatment Standards in the Energy Charter Treaty

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Recommended Citation

Sydney Thurman-Baldwin, *Modernizing the Fair and Equitable Treatment Standards in the Energy Charter Treaty*, 28 U. Miami Bus. L. Rev. 296 (2020)

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MODERNIZING THE FAIR AND EQUITABLE TREATMENT STANDARDS IN THE ENERGY CHARTER TREATY

Sydney Thurman-Baldwin*

As oil and gas continue to be hot commodities for national economies, the number of international arbitrations in the energy sector has continued to rise in recent years. As the utilization of International Arbitration continues to rise in Energy disputes, so does the invocation of The Energy Charter Treaty (“ECT”). The ECT promotes inter-governmental cooperation with contracting parties in the energy sector through its provisions on investment protection, provisions on trade, transit of energy, energy efficiency, environmental protection and dispute resolution. These provisions are considered to be the cornerstone of the treaty, fostering a ‘level playing field’ for foreign investments in the energy sector and minimizing the non-commercial risks associated with such investments, all pursuant to the Minimum Standards for Investment Protection described in Section 10(1) of the ETC, such as Fair and Equitable Treatment (FET). However, such standards are overbroad and leave room for numerous interpretations. Though likely intended to strengthen the application of FET, overbreadth dampens the effect of the ETC’s FET provision, as it fails to uniformly instruct both parties and tribunals on the parameters of FET under the Treaty and could ultimately hinder the FET provided to foreign investors. This paper seeks to address ways in which Article 10(1) of the ECT, on Fair and Equitable Treatment, can be modified to better protect foreign investments. The first part of this paper will discuss a brief history of this ETC. The second part of this paper will discuss Article 10(1) of the ETC as it pertains to FET and its applicability in practice, by focusing on three recent Spanish cases: (1) Masdar Solar & Wind Cooperatief U.A. v. The

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Kingdom of Spain, ICSID Case No. ARB/14/1; (2) Charanne B.V., Construction Investments S.A.R.L. v Spain, SCC Arbitration No.: 062/2012; and (3) Eisner Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain, ICSID Case No. ARB/13/36. The paper concludes by offering suggestions for modernizing Article 10(1), using the recent Spanish cases as a model.

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As oil and gas continue to be hot commodities for national economies, the number of international arbitrations in the energy sector has continued to rise in recent years. By the end of 2019, ICSID reported that 42% of cases administered by ICSID arose from the energy sector, which was more than any other sector.¹ As the utilization of International Arbitration continues to rise in Energy disputes, so does the invocation of The Energy Charter Treaty (“ECT”)². The ECT was established to provide a multilateral framework for energy cooperation. Pursuant to Article 2 of the Energy Charter Treaty, its purpose is to ‘promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the

¹ International Centre for Settlement of Investment Disputes. 2019. *2019 ICSID Annual Report : Excellence in Investment Dispute Resolution*. Washington, DC: ICSID. © ICSID. <https://openknowledge.worldbank.org/handle/10986/32591> License: CC BY-NC-ND 3.0 IGO. (In the 2019 Fiscal Year, the extractives and energy sectors (collectively “the Energy Sector”) accounted for the largest share of cases, in which 21% involved the oil, gas and mining industry, and 21% involved electric power and other energy sources).

² See, e.g., International Centre for Settlement of Investment Disputes. 2016. *The ICSID Caseload Statistics: Special Focus, European Union*. Washington, DC: ICSID. [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20EU%20\(English\)%20Updated%20June%2013%202016%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20EU%20(English)%20Updated%20June%2013%202016%20Final.pdf). (“ Of the 93 ICSID cases involving an EU member State, 42% were based on the State’s consent to arbitrate in the Energy Charter Treaty (ECT)”).

Treaty.³ The ECT promotes inter-governmental cooperation with contracting parties in the energy sector through its provisions on investment protection, provisions on trade, transit of energy, energy efficiency, environmental protection and dispute resolution⁴. These provisions are considered to be the cornerstone of the treaty, fostering a 'level playing field' for foreign investments in the energy sector and minimizing the non-commercial risks associated with such investments,⁵ all pursuant to the Minimum Standards for Investment Protection described in Section 10(1) of the ETC, such as Fair and Equitable Treatment (FET). However, such standards are overbroad and leave room for numerous interpretations. Though likely intended to strengthen the application of FET, overbreadth dampens the effect of the ETC's FET provision, as it fails to uniformly instruct both parties and tribunals on the parameters of FET under the Treaty and could ultimately hinder the FET provided to foreign investors.

Modernization of the Energy Charter Treaty's Article 10(1) on Fair and Equitable Treatment would strengthen protection of foreign investments under the Treaty. The first part of this paper will discuss a brief history of this ETC. The second part of this paper will discuss Article 10(1) of the ETC as it pertains to FET and its applicability in practice, by focusing on three recent Spanish cases: (1) *Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain*, ICSID Case No. ARB/14/1; (2) *Charanne B.V., Construction Investments S.A.R.L. v Spain*, SCC Arbitration No.: 062/2012; and (3) *Eisner Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain*, ICSID Case No. ARB/13/36. Third, I will conclude the paper by offering suggestions for modernizing Article 10(1), using the recent Spanish cases as a model.

I. INTRODUCTION

The first international arbitration invoking the ECT, *AES v. Hungary I*, was registered on 25 April 2001, three years after the ECT entered into force.⁶ The first award followed in December 2003, in *Nykomb v. Latvia*.⁷ By 2013, the number of new arbitrations quadrupled from four initiated in

³ Energy Charter Treaty art. 2, Dec. 17, 1994, 34 I.L.M. 373 [hereinafter ECT]

⁴ See generally ECT.

⁵ Kaj Hobér, *Investment Arbitration and the Energy Charter Treaty*, Journal of International Dispute Settlement, Feb. 3, 2010, at 153, 155.

⁶ See *AES Summit Generation Ltd. v. Republic of Hungary (Gr. Brit. v. Hung.)*, ICSID Case No. ARB/01/04, Settlement (Jan. 3, 2002).

⁷ *Nykomb Synergetics Tech. Holding AB v. Latvia*, SCC Case No. 118/2001, Award (Dec. 16, 2003).

2012 to 16, reaching a peak in 2015 with 25 cases.⁸ While this figure fell in 2016, the ECT has remained the most frequently invoked investment agreement in international arbitration cases.⁹ Today, 87 countries and international organizations have signed the ECT, making it the most frequently invoked international investment treaty. It is the only multinational treaty specifically dealing with investment issues in the energy industry.¹⁰

The widespread usage of the ETC highlights the urgency to ensure that the treaty is in fact meeting its intended goals. In January 2017, several experts from the industry, governments, legal circles and academics (in addition to officials from UNCITRAL and UNCTAD) discussed the investment protection standards under the ECT, concluding that some particular issues could benefit from additional clarification.¹¹ One such aspect frequently noted as ripe for modernization and subsequent clarification was the provision on Fair and Equitable Treatment (FET) cited in Article 10(1) of the ETC.¹²

Fair and equitable treatment is the most frequently invoked protection in claims under the investment treaties.¹³ The FET standard varies from case to case and “depends on the interpretation of specific facts for its content”¹⁴ and the full set of circumstances. At its core, FET protects the Parties’ legitimate expectations.¹⁵ It also provides protection against

⁸ Global Arb. Rev., *The Guide to Energy Arbitrations* n.9 (J. William Rowley et al. eds., 2nd ed. 2017) (“As reported by the United Nations Conference on Trade and Development (UNCTAD), and summarized by the Energy Charter Secretariat: International Energy Charter, Investment dispute settlement, latest statistics (updated as of 1 January 2017), available at <http://www.energycharter.org/what-we-do/dispute-settlement/cases-up-to-1-january2017/>.”).

⁹ *Id.*

¹⁰ CRINA BALTAG, *THE ENERGY CHARTER TREATY: THE NOTION OF INVESTOR* (Wolters Kluwer 2012).

¹¹ Energy Charter Secretariat. “Decision of the Energy Charter Conference: Modernization of the Energy Charter Treaty.” energycharter.org, Energy Charter Secretariat, 28 Nov. 2017, www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2017/CCDEC201723.pdf.

¹² *Id.*

¹³ De Brabandere, E. (2017). Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity. *The Journal of World Investment & Trade*, 530–555. <https://doi.org/10.1163/22119000-12340050>.

¹⁴ *Biwater Gauff v. Tanzania (Gr. Brit. v. Tanz.)*, ICSID Case No. ARB/05/22, Award, ¶ 593 (July 24, 2008) (quoting PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 625 (Oxford University Press, 1995)).

¹⁵ United Nations Treaty on Trade and Development. “Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II.” unctad.org, United Nations, 2012, unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf. 90.

procedural impropriety, denial of justice and discrimination.¹⁶ States' measures and actions are assessed objectively.¹⁷ Subjective unilateral expectations of individual investors and findings of bad faith are both irrelevant to tribunal determination.¹⁸ Generally, the application of FET in International Law is fact-specific and requires an in-depth factual analysis to assess applicable standards of the contracting parties.¹⁹ Though most BITs provide for FET, some leave the standard wholly undefined²⁰, while others relate FET to the minimum standards of treatment under customary international law.²¹ A strong FET provision prevents inconsistent administrative acts.²² The overbroad nature of the Energy Charter Treaty's FET provision is problematic because the exact scope and meaning of Fair and Equitable Treatment as it applies to the Treaty are absent. Such void leaves room for diminished application and subsequent violation.

II. FAIR AND EQUITABLE TREATMENT UNDER THE ECT

The use of the term "fair and equitable treatment" is not one-size-fits all. Instead, the legal result is largely dependent on the facts of each case as they apply to the governing treaty.²³ As such, there is extensive debate

¹⁶ *Id.*

¹⁷ *American Manufacturing & Trading, Inc. (AMT) (US) v. Republic of Zaire*, ICSID case No. ARB/93/1 Award, 21 February, 1997, reprinted in 36 *International Legal Materials* 1531 (1997).

¹⁸ *Id.*

¹⁹ Cf. T. Wälde, *Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues*, *Transnational Dispute Management* 1 (2004), <http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article224bhtm>.

²⁰ See, e.g., United States-Argentina BIT, Arg.-U.S., art. 2(2)(a), Nov. 14, 1991, S. TREATY Doc. No 103-2.

²¹ See, e.g., North American Free Trade Agreement, art. 1105(1), Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 605, 639-40 (entered into force Jan 1, 1994) ("Each Party shall accord to investments of another Party Treatment in accordance with international law, including fair and equitable treatment."). Of note, this provision was amended in 2001, when the NAFTA Free Trade Commission, acting under NAFTA Article 1131, issued a binding interpretation of NAFTA Article 1105(1). *Id.* The binding interpretation specifically highlighted that (1) the customary international law minimum standard of treatment of aliens is the minimum standard of treatment to be afforded to foreign investors and (2) the concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond what is required by customary international law minimum standard treatment of aliens.

²² See *PSEG Global Inc. v. Republic of Turkey (U.S. v. Turk.)*, ICSID Case No. ARB/02/5, Award, ¶¶ 247, 248 (Jan. 19, 2007).

²³ Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 1999 *Brit. Y.B. Int'l L.* 122, 127.

surrounding the interpretation of FET and how the provision should be considered in the ECT. The ECT guarantees fair and equitable treatment (FET) to protected investments.²⁴ However, arbitral tribunals have repeatedly stressed that a judgment of what is fair and equitable cannot be reached in the abstract. Instead, FET standards are dependent on the language of their binding treaties and the specifics of the case.²⁵

In accordance with the language of Article 10(1), tribunals considering the ECT's FET protection have recognized a litany of components, such as contracting parties' obligations to: act consistently and transparently²⁶; comply with due process²⁷; and, for state actors, ensure stable and equitable conditions.²⁸ However, some tribunals have found that a FET breach is only valid if the state's acts or omissions are 'manifestly unfair or unreasonable, such as would shock, or at least surprise a sense of juridical propriety.'²⁹ The latter is a much broader interpretation of FET. Such inconsistent application amongst tribunal interpretations of the ECTs FET standards serves to dilute the provision's purpose.

²⁴ See ECT, *supra* note 3, at art. 10(1).

²⁵ *ADC Affiliate Ltd. v. Republic of Hungary (Cyprus v. Hung.)*, ICSID Case No. ARB/03/16, Award, ¶ 44 (Oct. 2, 2006); *Petrobart Ltd. v. Kyrgyz Republic*, SCC Arb. No. 126/2003, Final Award (2005); *Noble Ventures v. Romania (U.S. v. Rom.)*, ICSID Case No. ARB/01/11, Award, ¶ 181 (Oct. 12, 2005); *MTD Equity Sdn. Bhd. v. Republic of Chile (Malay. v. Chile)*, ICSID Case No. ARB/01/7, Award, ¶ 109 (May 25, 2004); *Mondev Int'l Ltd. v. United States (Can. v. U.S.)*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 118 (Oct. 11, 2002); *Waste Management v. Mexico (U.S. v. Mex.)*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 99 (Apr. 30, 2004) (cited in *GAMI Investments v. Mexico (U.S. v. Mex.)*, UNCITRAL, Award, ¶ 96 (Nov. 15, 2004)); *CME Czech Republic B.V. v. Czech Republic (Neth. v. Czech)*, UNCITRAL, Partial Award, ¶336 (Sept. 13, 2001).

²⁶ *Electrabel S.A. v. Republic of Hungary (Belg. v. Hung.)*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law, and Liability, ¶ 7.74 (Nov. 30, 2012); ("Stressing that 'the reference to transparency can be read to indicate an obligation to be forthcoming with information about intended changes in policy and regulations that may significant affect investments, so that the investor can adequately plan its investment and, if needed, engage the host State in dialogue about protecting its legitimate expectations'"); see also *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania (Greece v. Alb.)*, ICSID Case No. ARB/11/24, Award, ¶ 616 (Mar. 30, 2015); *Plama Consortium Ltd. v. Republic of Bulgaria (Cyprus v. Bulg.)*, ICSID Case No. ARB/03/24, Award, ¶ 178 (Aug. 27, 2008); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Arb. No. V (064/2008), Partial Award on Jurisdiction and Liability, ¶¶ 183-84 (2008).

²⁷ *Mamidoil*, ICSID Case No. ARB/11/24 at ¶ 613; *Electrabel*, ICSID Case No. ARB/07/19 at ¶ 7.74.

²⁸ *Electrabel*, ICSID Case No. ARB/07/19 at ¶ 7.74.

²⁹ *AES Corporation v. Republic of Kazakhstan (U.S. v. Kaz.)*, ICSID Case No. ARB/10/16, Award, ¶ 314 (Nov. 1, 2013).

a. *FET under the ECT: In Theory*

Article 10 of the ECT provides a complex provision on FET that also incorporates constant protection and security, the prohibition of unreasonable or discriminatory measures to treatment required by international law, and to the observance of contractual obligations. Specifically, Article 10(1) provides that:

*'[e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favorable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party. treatment.'*³⁰

i. FET in the language of the ECT

In theory, the Energy Charter Treaty (ECT), like most bilateral investment treaties (BITs), commands Fair and Equitable Treatment (FET). However, Article 10(1) of the ECT embeds the standard of FET into a complex provision that also refers to constant protection and security, the prohibition of unreasonable or discriminatory measures to treatment required by international law, and to the observance of contractual obligations. The first sentence of Article 10(1) is a general statement regarding the favorable investment climate that contracting parties are to maintain for investments protected by the ECT, while the next sentence of Article 10(1) explains that such favorable conditions 'shall include a commitment to accord at all times to Investments of Investors ...fair and equitable treatment'. A provision that separately provides for FET and for treatment required by international law suggests

³⁰ ECT, *supra* note 2, at art. 10(1), (emphasis added).

that the provision is not to be reasonably interpreted as meaning that FET is the same as the treatment required by international law as it makes the second sentence redundant. Arbitral practice has suggested FET to mean good faith, protection of legitimate expectations, due process, proportionality, etc.³¹

ii. FET in International Law: VCLT and ICSD

There is no doctrine of precedent in international arbitration law. While arbitral tribunals may in general seek to act consistently with each other, in the end each tribunal must exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and respondent State.³² The VCLT and The Convention on the Settlement of Investment Disputes (“ICSID”) are two key International Legal texts tribunals use to guide and interpret the FET standard.³³

The VCLT has become customary international law and provides basic rules to guide Tribunals in the treaty interpretation. Further, the VCLT “ha[s] also been repeatedly accepted by investment arbitration tribunals as constituting rules of interpretation which are binding on them in the interpretations of investment treaties, whether by virtue of being directly binding on the parties to the BIT as treaty rules, or as customary international law.”³⁴

The rules for interpreting treaties, including investment treaties, are set out in article 31 of the 1969 Vienna Convention on the Law of Treaties.³⁹ Article 31(1) of the Vienna Convention provides:

³¹ See Hobér, *supra* note 3, at 153-90 (quoting MTD, Equity Sdn. Bhd. v Republic of Chile (Malay. v. Chile), ICSID Case No ARB/01/7, Award (May 25, 2004)). See also CMS Gas Transmission Comp. v. Argentine Republic (U.S. v. Arg.), ICSID Case No. ARB/01/8, Award (May 12, 2005); *Waste Management*, ICSID Case No. ARB (AF)/00/3; *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States (Spain v. Mex.)*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003); *Metalclad Corp. v. United Mexican States (U.S. v. Mex.)*, ICSID Case No. ARB (AF)/97/1, Award (Aug. 30, 2000); *Azinian v. United Mexican States (U.S. v. Mex.)*, ICSID Case No. ARB (AF)/97/2, Award (Nov. 1, 1999).

³² *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (Switz. v. Phil.)*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 97 (Jan. 29, 2004).

³³ IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT LAW* (Oxford University Press, 2008).

³⁴ *Azurix Corp. v. Argentine Republic (U.S. v. Arg.)*, ICSID Case No. ARB 01/12, Award, ¶ 360 (July 14, 2006) (“The Tribunal confirmed that the BIT should be interpreted in accordance with the VCLT”).

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.³⁵

Various tribunals have agreed that the ordinary meaning of “fair” and “equitable” is “just”, “even-handed”, “unbiased”, “legitimate”³⁶. However, as one tribunal has noted, these definitions do not take one very far because they replace “fair” and “equitable” with terms of almost equal vagueness.³⁷

Experts also look to Article 42(1) of the ICSID Convention due to its references on “applicable law in the field of ICSID arbitral disputes”³⁸. Art. 42(1) of the ICSID Convention provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.⁴¹

The expression “and such rules of international law as may be applicable” in Art. 42(1) of the ICSID Convention gives Tribunals the choice to use any interpretation supported by international law. This discretion becomes overbroad when the treaty in question, as is the case with the ECT, fails to provide which international law rules may be applicable.

b. FET under the ECT: In Practice

In practice, compliance with the FET provision outlined in Article 10(1) of the ECT is difficult to measure. Courts are reluctant to rule on the basis of Article 10(1) even when the dispute is centered around a lack of Fair and Equitable Treatment³⁹. Even tribunals that do rule on the basis of a lack of Fair and Equitable Treatment treat the ETC’s FET provision in different ways. On Fair and Equitable Treatment, the Arbitral Tribunal

³⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, <https://www.refworld.org/docid/3ae6b3a10.html> (accessed Jan. 26, 2020).

³⁶ Siemens A.G. v. Argentine Republic (Ger. v. Arg.), ICSID Case No. ARB/02/8, Award, ¶ 290 (Feb. 6, 2007); Saluka Investments B.V. v. Czech Republic (Neth. v. Czech), UNICTRAL, Partial Award, ¶ 297 (Mar. 17, 2006); *Azurix Corp.*, ICSID Case No. ARB 01/12 at ¶ 360.

³⁷ *Saluka Investments*, UNICTRAL at ¶ 297..

³⁸ TUDOR, *supra* note 23, at 9

³⁹ See *Nykomb*, SCC Case No. 118/2001; see also *Mohammad Ammar Al-Bahloul*, SCC Arb. No. V (064/2008) at ¶¶ 183-84. But see *Petrobart Ltd.*, SCC Arb. No. 126/2003 at 45, 82.

in *Petrobart v. The Kyrgyz Republic* suggested that FET was an overarching principle that embraced all standards mentioned in the article and “[did] not find it necessary to analyze the Kyrgyz Republic’s action in relation to the various specific elements in Article 10(1) of the Treaty.”⁴⁰ Instead, the tribunal noted that Article 10, “in its entirety is intended to ensure fair and equitable treatments of investments.” Other Tribunals, as was the case in *Mohammad Ammar Al-Bhloul v. Republic of Tajikistan* (SCC Case No. V064/2008), completely ignore the purposes and objectives of the ECT, even though the Vienna Convention of the Law of Treaties (VCLT) mandates that the treaties be interpreted in good faith in accordance with the ordinary meaning of the terms of their context and in light of the treaty’s object and purpose⁴¹. In *Mohammad Ammar Al-Bhloul*, the Tribunal instead opted to rely on various non-ECT case law and concluded that the provision on Fair and Equitable Treatment simply meant that a host State is obliged to act “in an open matter and consistent with commitments it has undertaken”⁴². Three recent cases involving the Kingdom of Spain, (1) *Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain*; (2) *Charanne B.V., Construction Investments S.A.R.L. v Spain*; and (3) *Eisner Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain*⁴³, further highlight the various treatment tribunals give to the FET provision of the ECT and the Charter’s need to define FET.

i. Charanne B.V., Construction Investments S.A.R.L. v Spain

The Tribunal in *Charanne* found that a change in regulatory regime was within the powers of the host state and that there was not a sufficient legitimate expectation created by Spain such that it would be considered unfair to the investor, *Construction Investments*⁴⁴. A state’s changing of regimes can be overridden if the investor holds legitimate expectations that were generated as a specific commitment towards the investor⁴⁵. The tribunal found that there was not a substantial commitment that incentives

⁴⁰ *Petrobart Ltd.*, SCC Arb. No. 126/2003 at 82.

⁴¹ *Mohammad Ammar Al-Bahloul*, SCC Arb. No. V (064/2008).

⁴² *Id.* at ¶¶ 175-79

⁴³ *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (Neth. v. Spain), ICSID Case No. ARB/14/1, Award (May 16, 2018); *Eiser Infrastructure Ltd. v. Spain* (Gr. Brit. v. Spain), ICSID Case No. ARB/13/36, Award (May 4, 2017); *Charanne B.V. v. Spain*, SCC Arb. No.: 062/2012, Award (Jan. 21, 2016) ¶

⁴⁴ *Charanne B.V.*, SCC Arb. No. 062/2012, Award (Jan. 21, 2016) at ¶ 539.

⁴⁵ *Id.* at ¶ 489-490.

to renewable energy could not be altered, therefore causing the case to fall short of meeting the Tribunal's FET standards.⁴⁶

To come to this determination, the tribunal considered an investor's legitimate expectations to be 'a relevant factor' to the determination of FET, derived from good faith principles under customary international law.⁴⁷ The decision in *Charanne* came down to two different schools of thought. The majority in that case held that only specific commitments can give rise to legitimate expectations while the dissent argued that, if investors were relying on general law as the source for their legitimate expectations, they would have to prove that they had undertaken sufficient due diligence to understand the legal system.⁴⁸

The majority reasoned that 'a State cannot induce an investor to make an investment generating legitimate expectations, to later ignore the commitments that had generated such expectations'.⁴⁹ Ultimately, the tribunal found in favor of the state on the basis that the State had a right to change the incentives on basis of sovereign right and used other standards of FET rather than framing its analysis on Article 10(1) of the ECT.⁵⁰

ii. Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain

In *Masdar*, the tribunal at the International Centre for Settlement of Investment Disputes (ICSID) found Spain to be in breach of the fair and equitable treatment (FET) standards under Article 10(1) of the Energy Charter Treaty (ECT).⁵¹ Masdar, a Dutch company constituted in the Netherlands, contended that, by a series of disputed measures introduced between 2012 and 2014, Spain abolished its Royal Decree 661 of 2007 ("RD661/2007") regime, which stimulated investment in the renewable energy sector, and introduced a much less favorable regime, which applied to those installations commissioned under the RD661/2007 regime alike.⁵² Under RD661/2007, renewable energy generators would benefit from a premium set by the Spanish government above the wholesale market price.⁵³

Basing its argument off of *Charanne*, Masdar argued that the enactment of the disputed measures led to the dismantling of the regime under RD661/2007 and that the stability promised was the basis of which

⁴⁶ *Id.* at ¶ 492-499.

⁴⁷ *Id.* at ¶ 486.

⁴⁸ *See Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Masdar Solar & Wind Cooperatief U.A.*, ICSID Case No. ARB/14/1.

⁵² *Id.* at ¶ 288-291.

⁵³ *Id.* at ¶ 454-460.

Masdar made its investments.⁵⁴ Spain countered this argument by stating that stabilization, offered in provisions or otherwise, cannot create legitimate expectations for investors.⁵⁵

While the tribunal in *Masdar* ultimately found that the investor had undertaken the due diligence necessary to understand the legal system and bring a claim of legitimate expectations based on general law, this finding was only based on Article 10(1) after exhausting other schools of thought.⁵⁶ Again, citing *Charanne*, the tribunal found that a specific commitment existed in the form of a resolution issued by Spain and addressed specifically to each of the operating companies.⁵⁷ The existence of specific commitments between contracting parties and general commitments, which both gave rise to legitimate expectations, caused the tribunal to avoid ruling with either school of thought referenced in *Charanne*.⁵⁸

The tribunal in *Masdar* ultimately affirmed that a state is in fact at undisputed liberty to amend its legislation and that FET could not include economic and legal stability.⁵⁹ Further, foreign investors could not legitimately expect such stability from the terms of the contract unless the terms were explicitly and directly extended to investors.⁶⁰ However, the tribunal in *Masdar* only considered the FET standards of Article 10(1) of the ECT after noting the existence of specific and general commitments and coming to a roadblock on how to reach its decision.⁶¹ Rather than utilizing Article 10(1) of the ECT for its intended purpose, the tribunal in *Masdar* only consulted the ETC's provision on FET after exhausting other options.

iii. *Eisner Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain*

The tribunal in *Eisner Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain*⁶² found in favor of the investor on legitimate expectations and fair and equitable treatment standards. In the decision, the tribunal reiterated that a state has full regulatory powers, so long as the state's powers do not abrogate its fair and equitable treatment obligations

⁵⁴ *Id.* at ¶¶ 348-350, 501-503.

⁵⁵ *Id.* at ¶¶ 469-472, 479.

⁵⁶ *Id.* at ¶¶ 508-522.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at ¶¶ 481-522.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Eisner Infrastructure Ltd.*, ICSID Case No. ARB/13/36.

towards investors⁶³. Thus, any changes made should take into account the circumstances of existing investments made in reliance on the prior regime.

In *Eisner*, the tribunal accepted that the regulatory change was so radical and fundamental that it affected the financial fundamentals of the investors and far surpassed the benefits envisioned at the time of the investment.⁶⁴ The ECT was found to protect investors against total and unreasonable changes.⁶⁵ While states are allowed to make changes, the changes should not disrupt the fundamental stability and essential characteristics of the legal regime relied upon by investors in making long-term investments in the state. The tribunal in *Eisner* applies Article 10(1) directly to the fair and equitable treatment claims, noting that “[the ECT] Article 10(1) obligation to accord investors fair and equitable treatment provides the most appropriate legal context for assessing the complex factual situation presented.”⁶⁶ The tribunal further notes that a host state should avoid radical amendments on key characteristics of the investment that were relied upon by investors, as such radical changes could constitute a breach of the FET standards.⁶⁷

III. CONCLUSION

While alternative sources to interpret FET standards can be derived from common sources of international law, such as the VCLT and the ICSID Convention, modernizing Article 10(1) of the ECT to include definitive language on FET under the Treaty would prove useful to arbitration tribunals and contracting parties. A definition of what constitutes FET under the Treaty would minimize confusion, increase tribunals’ willingness to interpret FET under the guise of the Treaty and yield a more consistent interpretation of FET as it relates to the ECT. Only through proper interpretation can the ECT truly serve its purpose of ‘promot[ing] long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter’⁶⁸.

The three recent cases involving the Kingdom of Spain, (1) *Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain*; (2) *Charanne B.V., Construction Investments S.A.R.L. v Spain*; and (3) *Eisner*

⁶³ *Id.* at ¶ 362.

⁶⁴ *Id.* at ¶ 43-452.

⁶⁵ *Id.* at ¶ 363.

⁶⁶ *Id.* at 441-452.

⁶⁷ *Id.*

⁶⁸ ECT, *supra* note 1, at art. 10(1)

*Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain*⁶⁹, all shared a similar thread that could be utilized to modernize the ETC and provide a more robust definition of FET. The concepts and conflicts in the three Spanish cases reflect recent trends in Energy Arbitrations under the ECT and boil down to three key aspects regarding Fair and Equitable Treatment. *First*, all three tribunals support the notion that in general, states have the sovereign right to make changes to their regulatory regime.⁷⁰ *Second*, in their opinions, each of the three tribunals noted that this sovereign right to make regulatory changes could breach FET standards toward investors if there was a legitimate expectation created by the state that the regulatory regime would not change.⁷¹ *Third*, the tribunals in all three cases weighed whether there was a fundamental change in the regime to analyze whether there was substantial disparity in the investor's legitimate expectations.⁷² However, the three tribunals differed in what constituted a legitimate expectation. In *Charanne* and *Masdar*, the tribunals looked at whether there was a specific commitment towards the investor that the legislation would not be changed, as only then could an investor have a legitimate expectation that the regulatory regime would not change. The opinions also touched on stability and transparency.⁷³ In *Eisner*, the tribunal focused less on specific commitments and more on the general commitment of states to avoid radical amendments on key characteristics of the investment that were relied upon by investors, as radical changes were enough to constitute a breach of FET standards.⁷⁴

Providing a stable legal and business environment has been identified in several decisions as an essential element of fair and equitable treatment.⁷⁵ Though what a State must do to meet this requirement is not

⁶⁹ *Masdar Solar & Wind Cooperatief U.A.*, ICSID Case No. ARB/14/1; *Eiser Infrastructure Ltd.*, ICSID Case No. ARB/13/36; *Charanne B.V.*, SCC Arb. No.: 062/2012.

⁷⁰ *Masdar Solar & Wind Cooperatief U.A.*, ICSID Case No. ARB/14/1; *Eiser Infrastructure Ltd.*, ICSID Case No. ARB/13/36; *Charanne B.V.*, SCC Arb. No.: 062/2012.

⁷¹ *Masdar Solar & Wind Cooperatief U.A.*, ICSID Case No. ARB/14/1; *Eiser Infrastructure Ltd.*, ICSID Case No. ARB/13/36; *Charanne B.V.*, SCC Arb. No.: 062/2012.

⁷² *Masdar Solar & Wind Cooperatief U.A.*, ICSID Case No. ARB/14/1; *Eiser Infrastructure Ltd.*, ICSID Case No. ARB/13/36; *Charanne B.V.*, SCC Arb. No.: 062/2012.

⁷³ *Masdar Solar & Wind Cooperatief U.A.*, ICSID Case No. ARB/14/1; *Charanne B.V.*, SCC Arb. No.: 062/2012; see also *Saluka Investments*, UNICTRAL at ¶ 305.

⁷⁴ *Eiser Infrastructure Ltd.*, ICSID Case No. ARB/13/36; *CMS Gas Transmission Comp.*, ICSID Case No. ARB/01/8 at ¶ 276.

⁷⁵ *Masdar Solar & Wind Cooperatief U.A.*, ICSID Case No. ARB/14/1; *Occidental Petroleum Corp. v. Republic of Ecuador (U.S. v. Ecuador)*, ICSID Case No. ARB/06/11, Award, ¶ 183 (Oct. 5, 2012); *PSEG Global Inc.*, ICSID Case No. ARB/02/5 at ¶ 253; *LG&E Energy Corp v. Argentine Republic (U.S. v. Arg.)*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 124-5 (Oct. 3, 2006); *Saluka Investments*, UNICTRAL at ¶ 303; *CMS Gas Transmission Comp.*, ICSID Case No. ARB/01/8 at ¶¶ 274-6; *Enron Creditors*

fully specified under the ECT, transparency and predictability for investors was a major part of all of the Spanish decisions and is referenced in many Energy disputes as an integral part component of FET analyses.⁷⁶ Although investors cannot reasonably expect that the circumstances at the time the investment to be frozen in time and entirely unchanged, “fair and equitable treatment is inseparable from stability and predictability” and should undoubtedly be weighed in the consideration of FET under ECT. For the foregoing reasons, the Energy Charter Treaty should modernize to define FET as it pertains to Article 10(1) of the ECT to include stability, transparency and legitimate expectations based on commitments in this definition in an open-ended list of FET obligations.

Recovery Corp. v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction, ¶ 260 (Aug. 2, 2004).

⁷⁶ *Masdar Solar & Wind Cooperatief U.A.*, ICSID Case No. ARB/14/1; *Occidental Petroleum Corp.*, ICSID Case No. ARB/06/11 at ¶ 185; *Siemens A.G.*, ICSID Case No. ARB/02/8 at ¶ 297; *GAMI Investments*, UNCITRAL at ¶ 88; *Tecnicas Medioambientales Tecmed S.A.*, ICSID Case No. ARB (AF)/00/2 at ¶ 154; *Metalclad Corp.*, ICSID Case No. ARB (AF)/97/1 at ¶ 99.