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THE RELATIONSHIP BETWEEN FAIR AND EQUITABLE AND INDIRECT APPROPRIATION UNDER THE ECT IN THE LIGHT OF THE EISER V SPAIN AND CHARANNE V SPAIN AWARDS

LA RELACIÓN ENTRE EL ESTÁNDAR DE TRATO JUSTO Y EQUITATIVO Y LA EXPROPIACIÓN INDIRECTA BAJO EL TCE A LA LUZ DE LOS LAUDOS EN LOS CASOS EISER CONTRA ESPAÑA Y CHARANNE CONTRA ESPAÑA

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Abstract

The article discusses the relationship between the Fair and Equitable Treatment (FET) standard and indirect expropriation under the Energy Charter Treaty (ECT), focusing on the cases of Eiser v. Spain and Charanne v. Spain. These cases illustrate the tension between protecting investors and upholding states' regulatory sovereignty.

The FET standard aims to ensure transparency, predictability, and stability for investors, while allowing states to regulate public welfare. In Charanne, the tribunal rejected the indirect expropriation claim, noting that regulatory changes, although affecting profitability, did not deprive investors of ownership rights. The FET claim failed as Spain had not guaranteed regulatory stability.

Conversely, in Eiser, significant regulatory changes that undermined investors' legitimate expectations led the tribunal to find a violation of the FET due to severe financial harm caused by Spain's overhaul of its renewable energy incentives. While there was potential for an indirect expropriation claim, the tribunal focused solely on the FET issue. These decisions underscore the complexities of balancing investor protections with state sovereignty.

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Keywords
Fair and Equitable Treatment (FET9, Indirect Expropriation, Energy Charter Treaty (ECT), Renewable Energy Incentives, Regulatory Sovereignty, Legitimate Expectations, Investment Arbitration, Eiser v Spain, Charanne v Spain, Investor Protections.

Resumen

El artículo analiza la interacción entre el estándar de Trato Justo y Equitativo (FET, por sus siglas en inglés) y la expropiación indirecta bajo el Tratado de la Carta de la Energía (TCE), centrándose en los laudos arbitrales en Eiser contra España y Charanne contra España. Estos casos destacan los retos de equilibrar la protección de los inversores con la soberanía regulatoria de los estados.

El estándar FET, pilar del TCE, busca proteger a los inversores garantizando transparencia, previsibilidad y estabilidad en los entornos regulatorios. Sin embargo, debe coexistir con el derecho del estado a regular para el bienestar público, incluidas las políticas energéticas. El tribunal de Charanne rechazó el reclamo de expropiación indirecta, enfatizando que los cambios regulatorios, aunque disminuyeron la rentabilidad, no privaron a los inversores de la propiedad. De igual manera, el reclamo bajo FET fracasó al no haberse demostrado compromisos específicos de España que garantizaran la inmutabilidad regulatoria.

En contraste, Eiser demostró cómo cambios regulatorios drásticos que socavan expectativas legítimas pueden violar el FET. La sustitución del régimen de incentivos a energías renovables por España causó graves daños financieros, llevando al tribunal a fallar en contra de España bajo el estándar FET.

Estos casos subrayan la relación matizada entre FET y expropiación indirecta, ilustrando la complejidad de mantener la equidad respetando los derechos soberanos.

Palabras clave
Trato Justo y Equitativo (FET); Expropiación Indirecta; Tratado de la Carta de la Energía (TCE); Incentivos a las Energías Renovables; Soberanía Regulatoria, Expectativas Legítimas, Arbitraje de Inversiones, Eiser contra España, Charanne contra España, Protección de los Inversores.

Overview: 1. FET and Right to regulate in the ECT: Framework 2. Indirect Expropiation 3. Spain Enery Reform 4. Charanne BV and Eiser Cases 5. Interplay between FET and Indirect Expropriation. 6. Conclusion.

1. FET and Right to regulate in the ECT: Framework

1.1 The ECT object and purpose

The Fair and Equitable Treatment (FET) provision, a cornerstone of the Energy Charter Treaty (ECT), is of immense importance in international investment law[2]. Its primary aim is to safeguard investors' rights and foster stability and predictability in energy investments. The ECT, a collaborative agreement among multiple nations, was established in 1994 to promote investment in the energy sector[3].

The main goal of the FET provision in the ECT, established in Article 10, is to guarantee that investors are treated fairly, equally, and without discrimination by the host states in which they invest. This rule shows that states must offer a consistent and clear regulatory atmosphere encouraging investment while honouring investors' reasonable expectations. Hence, if a State provides definite promises to encourage an investor to make an investment, and the investor trusts in those promises, then the State should not be allowed to break those promises without facing consequences[4].

The FET provision in the ECT serves a dual purpose: firstly, it shields investors from unjust treatment by host countries that could jeopardise their investments, and secondly, it encourages countries to maintain a consistent and reliable legal environment that fosters foreign investment in the energy sector[5]. The FET provision minimises political and regulatory risks by ensuring fair treatment and stimulating increased investment and economic growth[6].

The main goals of the FET provision are to promote certainty in the law, guarantee transparency in regulatory decisions, and prevent host states from unfairly harming investors' interests[7]. This clause covers multiple facets of safeguarding investments, such as access to fair legal procedures, preventing unjust or discriminatory actions, and providing efficient avenues for investors to address breaches of their rights.

In summary, including the FET provision in the ECT is pivotal in establishing a stable and favourable environment for energy investments. It sets clear standards for investor

[2] OECD (2004), 'Fair and Equitable Treatment Standard in International Investment Law', OECD Working Papers on International Investment, No. 2004/03 (OECD Publishing, Paris), 7.
[3] Sai Ma, 'The Energy Charter Treaty: A Commentary' (2021) 36(1) ICSID Review - Foreign Investment Law Journal 244–250, 244.
[4] Biggs, Jack, 'The Scope of Investors' Legitimate Expectations under the FET Standard in the European Renewable Energy Cases' (2021) 36(1) ICSID Review - Foreign Investment Law Journal 99, 100.
[5] Ibid.
[6] Ortino, Federico, 'The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?' (2018) 21(4) Journal of International Economic Law 845-865, 845.
[7] Henckels, Caroline, 'Justifying the Protection of Legitimate Expectations in International Investment Law: Legal Certainty and Arbitrary Conduct' (2023) 38 ICSID Review - Foreign Investment Law Journal 347-358, 351.

treatment and recourse, thereby promoting fairness, equity, and the absence of discrimination. This provision is instrumental in supporting a robust and thriving energy industry.

1.2 The States' right to regulate the regulatory regime framework

As crucial as FET may be, it is also crucial to consider the countries' right to implement their sovereignty and the implications of regulatory changes. Maintaining the equilibrium between states' sovereign regulatory rights and investors' legitimate stability expectations is crucial to international investment law. States have the inherent right to control their domestic matters, including creating laws and regulations that impact foreign investments within their borders[8].

The ECT acknowledges member states' sovereign rights to regulate their domestic energy sectors based on their national laws and policies. This authority to control includes different components, such as creating and enforcing laws, regulations, and policies concerning energy generation, distribution, and usage[9].

In the field of investment law, the growing number of investment treaties and arbitration cases has resulted in limitations on state sovereignty. As a result, multiple issues regarding sovereignty have arisen. Debates about how much investment agreements can limit a state's internal sovereignty have been sparked by disagreements over environmental and public health issues. The idea of the right to regulate has become important in investment law, as it better captures the regulatory aspects of internal sovereignty[10].

In the context of the ECT, even though there is no express establishment of this right, there are plenty of articles that acknowledge the right for countries to establish their own internal regulation. However, the most relevant article in this regard is Article 18 that establishes the Sovereignty over Energy Resources:

*"1. The Contracting Parties **recognise state sovereignty and sovereign rights over energy resources**. They reaffirm that these must be exercised in accordance with and subject to the rules of international law.*
*2. Without affecting the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, **the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources**. (…)"[11](bold not in original text).*

[8] Zannoni D, 'The legitimate expectation of regulatory stability under the Energy Charter Treaty' (2020) 33(2) Leiden Journal of International Law 451-466, 452.
[9] Articles 18, 19, 21, 24, 25 and 26 Energy Charter Treaty (ECT) [1994] OJ L 380/1
[10] Levashova, Yulia, The Right of States to Regulate in Their Public Interest and the Right of Investors to Receive Fair and Equitable Treatment (Gilderprint 2018) 29.
[11] ECT (See note 8)

This is very important as it recognises the right of countries and members of the treaty to auto-determine the usage of their energy resources, which implies establishing the regulation that every country deems appropriate regarding the exploration, licensing, exploitation, taxation, and environmental goals, among others.

Article 19[12] emphasizes the authority of states to implement actions needed to safeguard human, animal, and plant well-being, and establishes guidelines for protecting the environment. It acknowledges the authority of countries to establish their own environmental regulations. Article 2 of the ECT explicitly recognises that each contracting party has the right to implement measures to achieve energy-related goals, as long as these measures do not conflict with the treaty's requirements. This clause upholds the idea of regulatory independence, permitting states to implement strategies suited to their individual energy requirements and preferences.

Moreover, Article 21 of the ECT[13], like Article 19, gives countries the authority to determine the taxation of their energy resources. It establishes that nothing in the ECT should create rights or impose obligations regarding taxation, therefore protecting the member countries' freedom to regulate the taxation of energy resources. The scope of the investors' protection.

Article 24[14] offers specific exemptions from the treaty's provisions. This article is important when considering a state's authority to control, as it enables Contracting Parties to implement measures required for different objectives like: a. Ensuring the protection of human, animal, or plant life or health; b. Ensuring the procurement or dispersal of Energy Materials and Products in scenarios of limited availability due to factors beyond the control of the party involved; c. Creating advantages for investors who are indigenous or marginalised individuals or groups, or their investments. This again protects the countries' right to regulate and adds a layer of flexibility in pursuing the objectives listed before that the treaty considers relevant.

From this article, it can be appreciated how the right to regulate plays a big role in the current ECT. Nevertheless, it can be argued that the support for the right to regulate is on the rise and is of the aspects considered in the process of the modernisation of the ECT. Updating the Energy Charter Treaty (ECT) is viewed as a major move towards giving greater importance to the right to regulate[15]. This process seeks to realign the treaty with the changing global energy situation and the growing focus on sustainable development[16]. One important aspect of modernisation is to enhance and clarify the regulations concerning the rights of states to control their domestic energy industries. This involves

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[12] Ibid

[13] Ibid.

[14] Ibid.

[15] Verbeek, Bart-Jaap, 'The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?' (2023) 8(1) Business and Human Rights Journal 97–102, 100.

[16] Energy Charter Treaty Organization, 'Modernisation of the Treaty' (Energy Charter Treaty Organization) https://www.energychartertreaty.org/modernisation-of-the-treaty/ accessed 8 May 2024.

providing clearer definitions for important terms, explicitly acknowledging states' regulatory powers, and incorporating new provisions to prevent these powers from being overly limited by treaty obligations. The modernisation process aims to achieve a more equitable balance between investors' rights and states' rights, both essential for meeting the ECT's goals. This increased focus on the ability to regulate highlights, even including a mention of the right in the newly proposed Article 10[17], indicates how the right to regulate might evolve in the future and its interaction with FET.

2 Indirect Expropriation

As part of the analysis of a subsequent section it is important to address the topic of indirect appropriation in the context of the ECT. This is addressed in the Article 13[18] that establishes:

"*1. Investments of Investors of a Contracting Party in the Area of any other Contracting Party* ***shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation*** *(hereinafter referred to as "Expropriation") except where such Expropriation is:*

(a) for a purpose which is in the public interest;
(b) not discriminatory;
(c) carried out under due process of law; and
(d) accompanied by the payment of prompt, adequate and effective compensation. (…)"(bold not in original text).

This definition includes the concept of indirect expropriation, specifically when referencing "measures having effect equivalent to nationalisation or expropriation". Under this stipulation, all measures, even though they do not directly harm an investor's physical or "direct" property right, would be considered expropriation as long as they have the same effect. This concept has taken more relevance since direct expropriation is always more uncommon, and the measures taken by countries have shifted in a way that no longer fits that concept[19].

Regarding a more precise definition, one of the cases that are the object of comparison and analysis in this essay, Charanne (Netherlands) & Construction Investments (Luxembourg) v Spain, SCC Case No 062/2012 (hereinafter "Charanne v Spain" or "Charane"), regarding the measure that constitute indirect expropriation establishes:

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[17] Fisher Toby, 'The Modernised Energy Charter Treaty: The New Text' (Kluwer Arbitration Blog, 15 October 2022) https://arbitrationblog.kluwerarbitration.com/2022/10/15/the-modernised-energy-charter-treaty-the-new-text/ accessed 8 May 2024.
[18] ECT (See Note 8)
[19] Christoph Schreuer, "The Concept of Expropriation under the ETC and other Investment Protection Treaties" (2005) 5 TDM, 3 http://www.transnational-dispute-management.com/article.asp?key=596, 3. Accessed on 8 May 2024.

"For a measure to be considered as equivalent to an expropriation**, its effects must be of such a significance that it could be considered that the investor has been deprived, in whole or in part, of its investment**. A simple decrease in the value of the shares constituting the investment cannot constitute an indirect expropriation, unless the loss of value is such that it can be considered equivalent to a deprivation of property. (…)"[20] (bold not in the original text).

This concept allows for a better understanding of the concept of indirect expropriation. The measure must be impactful in exercising the investor's property rights. This means that even if the investor is still formally in possession of the property of the investment, this investment has been affected to the point that the formal circumstances of the property are worthless or unusable.

3 Spain Energy Reform

3.1 Law 54/1997

Law 54/1997, also referred to as the Electricity Sector Act[21] in Spain, represented a significant turning point in the nation's energy sector. Implemented with the intent of opening up the Spanish energy market, this law brought in a complete system that changed the old monopoly-based setup to a more competitive and active setting. The core of this change involved splitting the electricity system into two separate categories: the standard regime and the special regime, which includes renewable energy generation[22].

One of the key parts of Law 54/1997 was Article 30(4)[23], which promised producers working under the special regime a fair return on their investments in the sector. This guarantee offered a major motivation for investors, especially in the growing renewable energy sector. The law set the stage for Spain to become a significant player in the global renewable energy market by providing a stable and appealing return on investment.

The incentives set by Law 54/1997 encouraged innovation and development in the national energy industry and made Spain an appealing location for global investors. The dedication to liberalisation and the advancement of renewable energy sources indicated to investors a positive regulatory environment suitable for enduring investment and growth. This proactive strategy not just gained investments but also aided in the sharing

[20] Charanne (Netherlands) & Construction Investments (Luxembourg) v Spain, SCC Case No 062/2012, Award (21 January 2016) (para 465).
[21] Electricity Sector Act 1997, Law 54/1997, BOE No. 285, 28 November 1997.
[22] (See Note 3) Biggs 104.
[23] Ibid.

of state-of-the-art technologies and knowledge, ultimately boosting Spain's competitiveness in the worldwide energy sector[24].

3.2 Incentives in the RD 661/2007

RD 661/2007[25] was a critical law in the Spanish renewable energy sector, introducing new financial incentives designed specifically for renewable energy producers. This royal decree accompanied and developed the incentives outlined in Article 24 of the Electricity Sector Act. This decree outlined two separate incentive systems for renewable energy producers to choose from. They had to decide between getting a fixed Feed-in Tariff (FiT) for all their electricity production under the regular system or selling electricity on the open market with an additional payment based on certain conditions from the special system. Article 44(1) highlighted this trend by stating that the FiT rate would be adjusted annually to match the inflation rate. Furthermore, Article 36 guaranteed that FiTs would be paid out gradually over a period of 25 years. Producers had to register their facilities to be eligible for both regimes, as stated in Article 17, which also showed Spain's dedication to offering incentives for electricity produced by qualifying facilities[26].

Significantly, RD 661/2007 also included a clause for reassessing the FiT rate in 2010, with an important stipulation that any changes made to the FiT rate would not impact current installations. This protection was clearly stated in Article 44(3), stating that changes to the controlled price and related factors would not affect facilities in operation before January 1 of the second year after the change. A related press statement clarified this position, emphasising that any future changes to tariffs would not interfere with the functioning of current installations. This guarantee increased manufacturers' stability and promoted consistency in the industry, creating a favourable atmosphere for its continued expansion and progress[27].
All these incentives set up a framework that was enticing for investors, with the FiT that offered somewhat of a guaranteed revenue or a premium rate for the sale of renewable energy; this set significant incentives for investors to come to Spain and take advantage of the incentives being offered.

3.3 Changes in the Incentives Regime

Spain saw major changes in its renewable energy laws after implementing RD 661/2007. Subsequent laws and rules, like RD 1578/2008, RD 1614/2010, and RDL

[24] Climate Policy Database, 'General Electricity Law 54/1997' (Climate Policy Database, 8 May 2024) https://climatepolicydatabase.org/policies/general-electricity-law-541997-spain-1997 accessed 8 May 2024.
[25] Spain, Real Decreto 661/2007, de 25 de mayo, por el que se regula la actividad de producción de energía eléctrica en régimen especial, BOE núm. 126, de 26 de mayo de 2007
[26] Ibid. Articles 44, 35, 17.
[27] (See Note 3) Biggs 104.

6/2009, showed the changing focus and difficulties in the renewable energy industry. RD 1578/2008, even though continued proposing a similar to RD 661/2007 in its core, was different in the sense that adjusted the incentives scaling them back[28].

RDL 6/2009 tackled the increasing tariff deficit by limiting eligibility for the incentives program. This was needed since the previously established incentives were too punishing for Spain, which had to cover the difference between the cost for consumers and the actual cost of renewable energy at the premium set previously[29]. At the same time, RD 1614/2010 confirmed Spain's focus on stabilising the market for renewable energy producers and also aiming to reduce the tariff deficit[30]. Despite this circumstance, the facilities that were already registered by that point were protected by these changes. This circumstance will be important in further analysis, specifically for the case of Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. v Kingdom of Spain (hereinafter "Eiser v Spain" or "Eiser")[31].

3.4 Significant changes in the Incentives Regime

Due to an increasing problem with the tariff deficit due to the premiums and FiT offered to investors, Spain started implementing a series of changes to modify the framework and make it more financially viable for the country. Law 15/2012 brought a significant change by introducing a 7 percent tax on every electricity production, changing the financial aspects of renewable energy initiatives. Following that, RDL 2/2013 altered the incentives system even more by removing the special regime and adjusting how inflation rates for Feed-in Tariffs (FiTs) are calculated[32].

Nevertheless, the most influential change occurred with the introduction of RDL 9/2013, which annulled RD 661/2007 and established a new regulatory structure. Producers under this system would be compensated with a combination of the market price for electricity produced and an additional 'special payment' reflecting the operational and initial investment expenses of a typical plant in the industry. This payment system, which is dependent on meeting a specific production level, deviated from the previous FiT structure and applied to both new and current renewable energy plants[33]. These changes in legislation highlight Spain's changing their stance significantly, completely erasing the previous framework and implementing a new one.

[28] Ibid. 105.
[29] Ibid.
[30] Ibid.
[31] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain, ICSID Case No. ARB/13/36 (2017)
[32] (See Note 3) Biggs 104.
[33] Ibid.

This overview of Spain's regime and framework will make it a lot easier to understand the reasoning behind the Charanne and the Eiser case, which has these changes as the main part of the analysis and discussion by the arbitral award.

4 Charanne BV and Eiser Cases

This section will present a brief summary of both of these arbitral awards and the main reasoning behind them, allowing more free discussion of the interplay and relation between FET and Indirect Expropriation in the next section.

4.1 Charanne Case

The Charanne case, was between Charanne B.V. from the Netherlands and Construction Investments S.a.r.I. from Luxembourg, who both had important stakes in T-Solar Global S.A., a well-known Spanish solar power plant. The core of the disagreement arose from a set of energy changes introduced by the Spanish authorities that directly affected the renewable energy industry. Claimants believed the reforms negatively impacted their Spanish solar power sector investments, leading them to pursue legal action[34].

At the core of the claimants' argument was the assertion that the actions of the Spanish government breached the terms of the Energy Charter Treaty (ECT)[35], a global accord aimed at promoting collaboration and investment in the energy industry across various countries. More precisely, the plaintiffs accused violations of the ECT's rules on fair and equitable treatment and the ban on expropriation. These measures aim to protect the rights of overseas investors and guarantee they receive fair treatment without unfair bias from the countries they invest in.

4.1.1 Regarding Indirect Expropriation

The claimants argued that the 2010 Regulations had a significant negative effect on the economic worth of their investment, essentially amounting to an indirect confiscation of its value and profits, even though their ownership rights were not affected. Yet, the Tribunal did not agree with this claim, highlighting that the idea of expropriation always involves taking away property. Therefore, according to international law, establishing indirect expropriation requires showing a substantial effect on the property that, if claimed to be a decrease in worth, must be proportional to a loss or termination of the investment. If the claimants had invested in TSolar shares instead of receiving profits from PV

[34] (See note 19) Charanne Case (para 4-9).
[35] Ibid. (para 78-85).

installations, any actions taken must have fully or partially stripped the claimants of their rights as TSolar shareholders to be considered indirect expropriation[36].

While examining the issue, the Tribunal found that the main focus of the claimants' complaint was a decrease in the profitability of the PV installations, which resulted in a drop in the worth of their shares in TSolar. The Tribunal emphasised that, even with the regulatory actions, the claimants still held their ownership in TSolar, and TSolar remained operational and profitable. While the investments' profitability was affected, the Tribunal determined that it did not amount to expropriation since it did not completely strip the claimants of their ownership rights. Additionally, the Tribunal pointed out that a simple decrease in the worth of stocks does not qualify as an indirect expropriation according to international law[37].

As pointed out previously, the tribunal did not consider the actions of Spain amounted to indirect expropriation. The claimant's particular circumstances prevented them from having a stronger case for indirect expropriation. The fact that they were owners of shares instead of being directly affected added to the fact that formally, their property rights have not been diminished, and finally, the financial impact of the change of the regulation was not significant, resulting in a very weak case for indirect appropriation.

4.1.2 Regarding FET

The claimants argued that developing the unique regulatory framework for renewable energy led to uncertainty and regulatory vagueness, violating Article 10(1) of the Energy Charter Treaty (ECT). Furthermore, they argued that Spain's behaviour gave them a reason to believe that the regulatory framework would not be altered, even without a formal agreement with Spain to support this belief[38].

Nevertheless, the Tribunal's examination was restricted by the allegations made by the claimants themselves, preventing evaluation of later regulations and focusing solely on the 2010 Regulations. In this limited context, the Tribunal could not assess the changes in the regulatory framework and, therefore, could not determine if Spain violated its duty to maintain regulatory stability as required by Article 10(1) of the ECT. The Tribunal noted that the claimants did not mention any uncertainty or challenge in comprehending the 2010 Regulations[39].

When discussing the claimants' valid expectations, the Tribunal referred to the principle of good faith in customary international law, highlighting that a state cannot encourage investments, create legitimate expectations, and then go back on the promises that led to those expectations. Nevertheless, the tribunal estimated that Spain’s actions

[36] Ibid. (para 460-465)
[37] Ibid.
[38] (See note 19) Charanne Case (para 479-480)
[39] Ibid. (para 480-485)

did not amount to a violation to the FET, mainly because: a) A State is entitled to maintain a reasonable degree of regulatory flexibility; b) FET does not guarantee the law will be frozen over time; c) There can't be a legitimate expectation of stability if no specific commitment was made by the State to the Investor[40].

In conclusion, in the present case, the tribunal sided with Spain, the 3 facts mentioned in the previous paragraph, are very compelling in regards to FET, added with the fact that the review of the change of regulatory changes was limited up until 2010 it swung the balance in favour of Spain, mainly because the claimants were no able to show the expectation and commitments that Spain had generated through their legislation and that the changes were so significant that amounted to a violation of the FET.

4.2 Eiser Case

In the Eiser case, Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. brought an arbitration claim against the Kingdom of Spain under the Energy Charter Treaty (ECT). The dispute arose from Spain's regulatory changes affecting renewable energy investments, particularly in the solar photovoltaic sector. Claimants argued that these changes, including reductions in feed-in tariffs and adjustments to regulatory frameworks, violated protections under the ECT, such as fair and equitable treatment and protection against expropriation[41]. After implementing the new framework, the earnings of the claimants' project dropped by 66%[42], which prompted the allegations and claims regarding both FET and indirect expropriation.

4.2.1 Regarding Indirect Expropriation

Regarding the expropriation claim, the Eiser case is a lost opportunity. The claimants argued that the tax of 7% that was implemented by Spain eroded all the earnings on their project and, therefore, lost all the value. Sadly, the tribunal decided not to look further into this case regarding the arguments of indirect expropriation, explaining that there was enough evidence to decide the case under FET[43], solving the dispute instead of analysing the circumstances of the case.

Returning to the two points discussed regarding indirect expropriation, two elements were considered: a. the property right; b. that the damage was so great that practically nullifies those property rights. In the case on Eiser, contrary to Charanne, they were direct investors in the project that was being affected by the regulatory changes. Additionally, as

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[40] Ibid. (para 499-510)

[41] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain, ICSID Case No. ARB/13/36 (2017) (para144- 156).

[42] Ibid. (para 151).

[43] Ibid. (para 297-298).

calculated in the arbitral award, the damages to the investment done by the claimants were superior to the value of the investment made.

This circumstance changes the analysis regarding indirect expropriation since, in this case, the investment has lost all of its value. According to the claimants, since the new tax is applied to renewable energy eroded all the possible profits possible for the project, and according to the criteria set in Charanne, the measure being implemented, even though it did not affect the property right, made the investment worthless. It was an opportunity to analyze and set clearer criteria regarding indirect expropriation, but since the FET violation was considered enough, there was no further analysis.

4.2.2 Regarding FET

In the Eiser case, the claimants argued that Spain's drastic modifications to its energy regulations, frustrated their legitimate expectations and violated the fair and equitable treatment (FET) standard under the Energy Charter Treaty (ECT). Claimants asserted that Spain's energy regulations, coupled with promotional efforts encouraging solar investment, had created legitimate expectations of stability and transparency for their investments in the capital-intensive energy sector. Spain countered that the claimants' expectations were not legitimate, as the regulatory framework was subject to change and Spain had made no binding commitments to maintain the status quo. Additionally, Spain argued that the new regulatory regime aimed to address the tariff and subsidy crisis and provide a reasonable return to investors.

For this, there is also an interesting comparison to be made, with the 3 elements pointed out in the Charanne award: a) A State is entitled to maintain a reasonable degree of regulatory flexibility; b) FET does not guarantee the law will be frozen over time; c) There cannot be a legitimate expectation of stability if no specific commitment was made by the State to the Investor. Regarding the first, maintaining regulatory flexibility. In this case, as regulation post-2010, was able to be taken into account. This proves to be vital since through later regulation the previous regime was totally erased and replaced with a new one. This was considered to exceeded “regulatory flexibility” and changed the whole framework completely[44]. This could be viewed as a bait a switch with the investor flocking to a jurisdiction lured by incentives and then completely erasing them.

The second element, in the Eiser case is not in play, since it was already shown in previous section, and pointed out in the paragraph above, it is clear that even though there was no expectation of the framework to be frozen, the regime and regulation cannot be completely erased and replaced with new ones. Finally, the third element regarding the commitment, the claimants had various factors that established this specificity. The first one was that they were part of the registry[45] established by Spain to grant incentives to

[44] (See note 40) Eiser case (para 391-400).
[45] (See note 40) Eiser case (para 125).

investors. Additionally, a press release was issued by Spain in which they declared that the incentives for already registered investors would be kept[46].

5 Interplay between FET and Indirect Expropriation

Considering the role of both concepts in both of the cases (Charanne and Eiser), it is clear that these concepts are intertwined and have many connection points. In this section, we overview the similarities and differences or both, to appreciate the relationship between them and how they interplay with each other.

5.1 Similarities between FET and Indirect Expropriation

The main goal of both indirect expropriation and the fair and equitable treatment (FET) standard is to **protect investors** from government actions that may harm their investments. Both expropriation and maintaining stable and transparent investment conditions help reduce risks of government intervention in the economy by protecting property rights and ensuring a secure environment for investment.

Second, in investment arbitration cases, **investors often use indirect expropriation and the FET standard together** to dispute government actions seen as harmful to their investments. Potential actions might involve alterations in regulatory guidelines, revisiting contract terms, or capricious behavior by government authorities. Investors could claim that such actions constitute a form of indirect taking when they greatly reduce their investment's worth or accuse the government of breaching the FET standard due to the perceived unfairness or injustice of its actions. Investors use these protections to seek redress for government actions that destabilize and make their investments less predictable.

Lastly, investors dealing with both indirect expropriation and violations of the FET standard often are **looking for similar remedies, in the form of compensation**. If investors can show that the government has done something wrong, they may receive money to make up for the harm caused by the government's actions. This compensation seeks to return the investor to the position they would have been in if the wrongful conduct had not taken place, offering a sense of justice and remedy for the damage caused to their investment.

5.2 Differences between FET and Indirect Expropriation

A significant contrast between indirect expropriation and the fair and equitable treatment (FET) standard **is found in their scope**. Indirect expropriation usually refers to

[46] Ibid. (para 130)

government actions or rules that, although they do not directly take over property, greatly disrupt or reduce the worth of an investment. On the other hand, the FET standard covers a wider range of government actions that may affect investment, going beyond confiscation to encompass unjust or prejudicial treatment by the government.

The second differentiating factor comes from **the criteria used to evaluate indirect expropriation claims compared to breaches of the FET standard**. Proving indirect expropriation typically involves showing that the government's actions led to the loss of economic value or usefulness of the investor's investment. On the other hand, the FET standard assesses how fair and reasonable the government treats the investor. This evaluation takes into account different elements like openness, consistency of legal structure, and procedural equity, instead of just concentrating on the investment's economic effects.

The **way compensation is given varies between instances of indirect expropriation and violations of fair and equitable treatment**. Compensation for indirect expropriation is commonly calculated according to the expropriated investment's fair market value to reimburse the investor to their pre-expropriation financial status. Alternatively, in cases involving Foreign Equity Transactions (FET), compensation may be awarded for financial losses caused by the government's failure to offer just and reasonable treatment. This reimbursement may cover various harms caused by the actions of the government, demonstrating the larger factors involved in claims of fair and equitable treatment.

6. Conclusion

In conclusion, although indirect expropriation and the fair and equitable treatment (FET) standard both aim to safeguard investors' concerns, they differ in terms of their scope and criteria for evaluation. Indirect expropriation refers to actions that greatly impact the value of an investment, whereas the FET standard covers a wider range of government actions, such as arbitrary treatment. While indirect expropriation looks at the economic consequences, the FET standard assesses the equity of government behavior. Compensation for indirect expropriation is determined by the fair market value, while violations of the FET can lead to compensation for losses caused by unjust treatment. It is crucial to comprehend these likenesses and variations when dealing with international investment law to guarantee adequate protection for investors in changing regulatory environments.

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