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## **INVESTMENT ARBITRATION, QUO VADIS?**

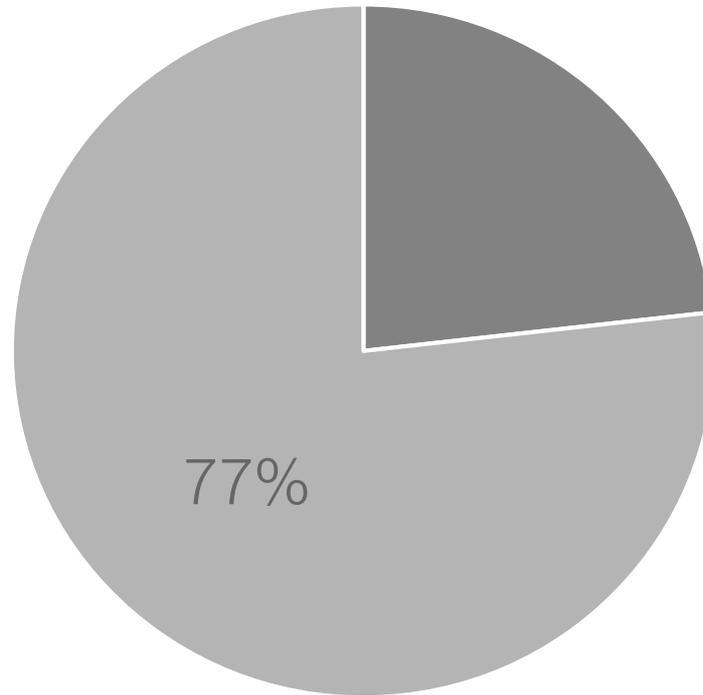
### **REVIEW OF LANDMARK CASES IN 2017-2018: THE FET STANDARD**

*Fifth International Conference for a Euro-Mediterranean Community of International Arbitration*

Noradèle RADJAI

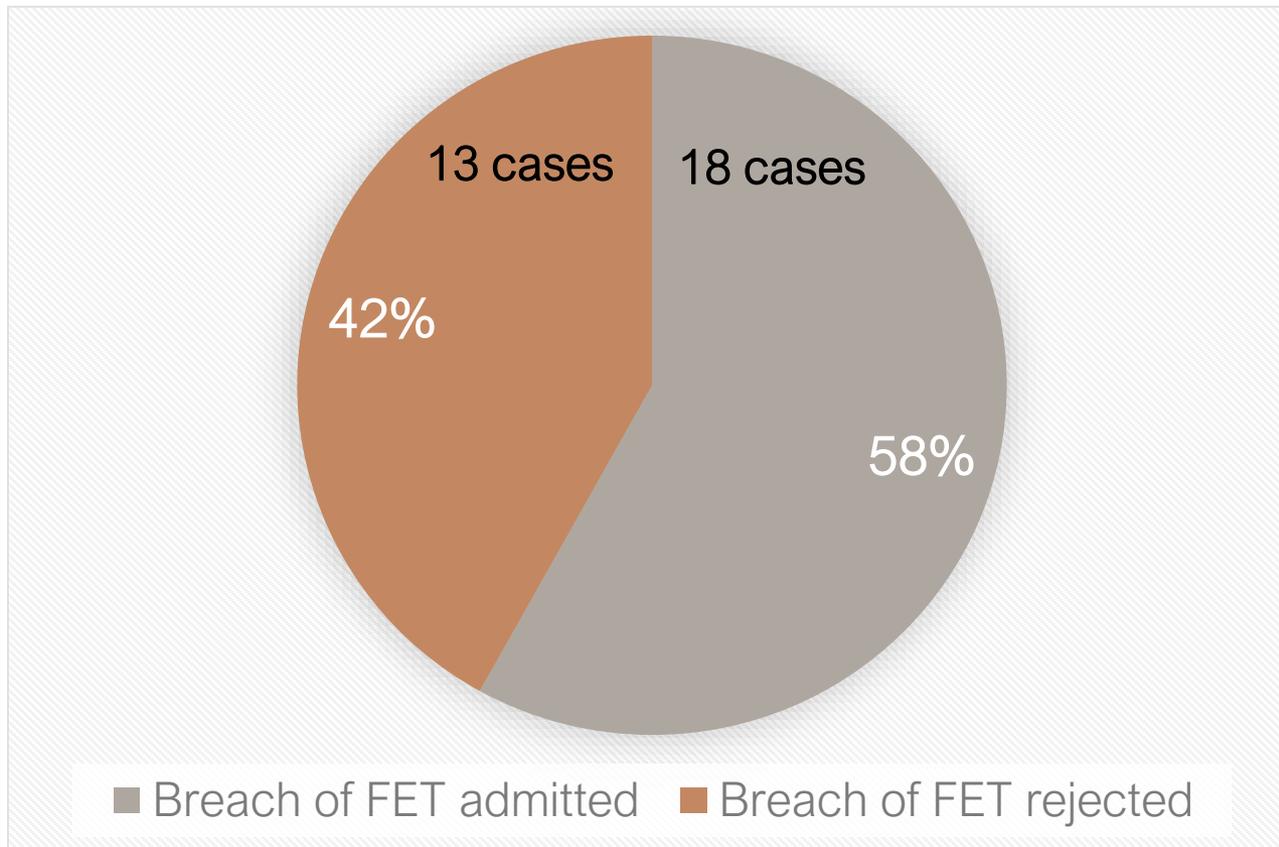
Madrid, 20 November 2018

## FET breach alleged in most cases decided in 2017/2018



■ 43 out of 56 cases alleged a breach of FET

## FET breach admitted for over half of the cases



**JKX OIL v. UKRAINE**

SCC (February 2017)

**KONTINENTAL v. GABONESE REPUBLIC**

PCA (early 2017)

**CERVIN v. COSTA RICA**

ICSID Case No. ARB/13/2 (7 March 2017)

**EISER v. SPAIN**

ICSID Case No. ARB/13/36 (4 May 2017)

**TEINVER v. ARGENTINA**

ICSID Case No. ARB/09/1 (21 July 2017)

**VALORES MUNDIALES v. VENEZUELA**

ICSID Case No. ARB/13/11 (25 July 2017)

**MYTILINEOS v. SERBIA (II)**

PCA Case No. 2014-30 (August 2017)

**LONGREEF v. VENEZUELA**

ICSID Case No. ARB/11/5 (6 November 2017)

**NATLAND v. CZECH REPUBLIC**

PCA Case No. 2013-35 (20 December 2017)

**UAB v. LATVIA**

ICSID Case No. ARB/12/33 (22 December 2017)

**NOVENERGIA v. SPAIN**

SCC Case 2015/063 (15 February 2018)

**MASDAR v. SPAIN**

ICSID Case No. ARB/14/1 (17 May 2018)

**OLIN v. LIBYA**

ICC Case No. 20355/MCP (25 May 2018)

**ANTIN v. SPAIN**

ICSID Case No. ARB/13/31 (15 June 2018)

**CITY-STATE v. UKRAINE**

ICSID Case No. ARB/14/9 (26 July 2018)

**CHEVRON v. ECUADOR (II)**

PCA Case No. 2009-23 (30 August 2018)

**UNIÓN FENOSA v. EGYPT**

ICSID Case No. ARB/14/4 (31 August 2018)

**FORESIGHT AND OTHERS v. SPAIN**

SCC Case No. 2015/150 (14 November 2018)



**ISOLUX v. SPAIN**

SCC case no. V2013/153 (17 July 2016, publicly available July 2017)

**BLUSUN v. ITALY**

ICSID Case No. ARB/14/3 (27 December 2016, publicly available in June 2017)

**ELI LILLY v. CANADA**

ICSID Case No. UNCT/14/2 (16 March 2017)

**JSW SOLAR v. CZECH REPUBLIC**

PCA Case No. 2014-03 (11 October 2017)

**KOCH v. VENEZUELA**

ICSID Case No. ARB/11/19 (30 October 2017)

**FOUAD ALGHANIM v. JORDAN**

ICSID Case No. ARB/13/38 (14 December 2017)

**EVROBALT AND KOMPOZIT v. MOLDOVA**

SCC (17 December 2017)

**ANTARIS v. CZECH REPUBLIC**

PCA Case No. 2014-01 (2 May 2018)

**GAVRILOVIĆ v. CROATIA**

ICSID Case No. ARB/12/39 (26 July 2018)

**GROT v. MOLDOVA**

ICSID Case No. ARB/16/8 (28 June 2018)

**KREDERI v. UKRAINE**

ICSID Case No. ARB/14/17 (2 July 2018)

**MARFIN v. CYPRUS**

ICSID Case No. ARB/13/27 (26 July 2018)

**DAVID AVEN v. COSTA RICA**

ICSID Case No. UNCT/15/3 (18 September 2018)



## Typical elements of the FET standard

1. Transparency and stability, including by reference to the investors' **legitimate expectations**
2. Proportionality and balance of interests, taking into account the **State's regulatory interests**
3. Due process, including denial of justice
4. Arbitrary, discriminatory, non-transparent or unreasonable conduct

# Legitimate expectations

## Legitimate expectations: recurring elements

- Timing of the expectations
- Assurances/representations by the State: What State conduct can give rise to such expectations?
- Investor due diligence: What constitutes sufficient due diligence?

# Timing of the expectations

## Timing of expectations: The Principles

- “reasonableness of an asserted expectation is to be determined objectively **at the time the investment is made**” (*Gavrilović v. Croatia*)
- legitimacy of expectation must be assessed “**at the time of the investment**, considering the information the investor had (or should have had) if he had acted with the requisite due diligence” (*Antin v. Spain*)
- assessment of expectations **at the time of making the investment** (*Teinver v. Argentina*)
- it is only the investor’s expectations **at the time of the investment** that are relevant (*Cervin v. Costa Rica*)
- FET application will depend on the expectations that were cultivated and fostered by local laws and regulations as they were, specifically **at the time of the investment** (*Novenergia v. Spain*)

## Timing of expectations: The Practice

- ✓ *Novenergia v. Spain*: most of the «warning signs» cited by Spain as casting doubt on the durability of the special regime **post-dated the Claimant's investment** and were thus not relevant
- ✗ *Isolux v. Spain*: investment was only made in 2012, when it would have been much clearer to any investor that the special regime was not sustainable
- ✗ *Cervin v. Costa Rica*: investor could not rely on **statements by the State made *after* the investments**

What type of State conduct can give rise to legitimate expectations by the investor?

## The Principles: State assurances/representations must be specific (?)

- “legitimate expectations founded on **specific assurances or representations made by the State** to the investor are protected” (*Gavrilović v. Croatia*)
- legitimate expectations “depend on **specific undertakings and representations made by the host State to induce investors** to make an investment” (*Union Fenosa v. Egypt*)
- affirmative action by the State, either in the form of **specific commitments or representations made by the host State** (*Antin v. Spain*)



undertakings and assurances need not be specific and can be justified by state conduct and statements that objectively create expectations, regardless of the intent of the state to create them or not (*Novenergia v. Spain*)

## The Principles:

# State assurances/representations may be inferred from legislation/regulation (?)

- “promises or representations to investors may be inferred from domestic **legislation** in the context of its background, including official statements (without) legal force” (*Antaris v. Czech Republic*)
- **representations can be derived from a regulation** aimed at encouraging investments in a specific sector (*Antin v. Spain*)
-  laws do not amount to promises that could engender expectations in investors; **laws are general, while promises and contractual commitments are specific**, and only the latter create legitimate expectations (*Blusun v. Italy*)
- **provisions of general legislation or state policies applicable** to a plurality of persons **do not suffice** generally to establish legitimate expectations required under an FET autonomous standard (*Koch v. Venezuela*)

## The Practice:

### State assurances/representations that can give rise to expectations

- ✓ *Union Fenosa v. Egypt*: letter from relevant ministry sent as “official endorsement” of the investment
- ✓ *Masdar v. Spain*: letters from the relevant Ministry regarding compensation conditions for the facility were deemed to constitute specific commitments
- ✓ *Olin v. Libya*: changes in legal framework to incentivize investment, as well as public assurances and issuances of investment licences
- ✓ *Novenergia v. Spain*: special regulatory framework designed to incentivize investments in Spanish renewable energy sector, combined with promotional material
- ✓ *Antin v. Spain*: Spain’s promotion of the stability of its incentive regime for renewable energy projects; though reports, press releases, preamble of royal decrees, government plans and advertising material

## The Practice:

### State assurances/representations that cannot give rise to expectations

- × *JSW Solar v. Czech Republic*: documents or elements to which there is no proof the investor was privy at the time (e.g., political representations discussing the enactment of a support scheme the investor was not aware of)
- × *Teinver v. Argentina*: legislation which is general in nature, not reflecting any specific commitment
- × *Cervin v. Costa Rica*: announcements regarding a forthcoming tariff regime that was not enacted
- × *Blusun v. Italy*: general commitments or legislation of the host State, by themselves, did not amount to promises that could serve to create legitimate expectations

# Investor due diligence

# Investor due diligence: The Principles

- If general legislation is source of an investor's legitimate expectations, **investor must demonstrate that it has exercised appropriate due diligence and familiarised itself with the existing laws** (*Masdar v. Spain*)
- A **prior risk assessment is necessary**, taking into account all relevant circumstances (*UAB v. Latvia*)
- Investors should be aware of **significant political, economic and other uncertainties in the host state** (*Koch v. Venezuela*)
- Transitioning host States require **an extensive due diligence** (*Gavrilović v. Croatia*)
- It is reasonable for an investor to expect that the host state would comply with its newly-enacted law (*Olin v. Libya*)
- If regulatory framework is adamantly clear, its understanding by common readers **does not require a particularly sophisticated analysis** from the investor (*Novenergia v. Spain*)

## Investor due diligence: The Practice

- × *Antaris v. Czech Republic*: very limited legal advice and no request for specific representations from the host State's regulators
- × *Teinver v. Argentina*: absence of investigation into the legal framework and financial situation of the host State: no clarification or assurances sought in respect of the regulatory framework

# Legitimate Expectations: Summary of outcome of cases 2017/2018



Union Fenosa v. Egypt

Antin v. Spain

Novenergia v. Spain

Masdar v. Spain



David Aven v. Costa Rica

Antaris v. Czech Republic  
Koch v. Venezuela

JSW Solar v. Czech Republic

Cervin v. Costa Rica

Blusun v. Italy

Teinver v. Argentina

Isolux v. Spain

Gavrilović v. Croatia

Fouad Alghanim v. Jordan

# Stability of regulatory framework

## Stability of regulatory framework: Key element of FET

- regulatory stability is a key element of the FET standard (*Natland v. Czech Republic*)
- “[stability and predictability] cannot be absolute requirements, and have often been weighed against further criteria, and most notably the right of the host State to exercise its general legislative power and enforce laws and regulations to protect the public interest” (*UAB v. Latvia*)

## The Principles: FET standard is no guarantee against changes to legal and regulatory framework

- “investors know that **the legislative framework may change** and evolve in the light of circumstances and of political developments; it is not every change which gives rise to a claim based on breach of legitimate expectation” (*Antaris v. Czech Republic*)
- Requirement of **stability** under ECT does not equate to the immutability of the legal framework (*Antin v. Spain*)
- FET standard does not protect against **normal business risks or regulatory action** by the host State (*Koch v. Venezuela*)
- “an investor can have **no legitimate expectation that the host State’s laws will not change**” (*JSW Solar v. Czech Republic*)
- FET standard “**does not give a right to regulatory stability *per se***” (*Eiser v. Spain*)
- FET standard **does not create an independent obligation to provide stable and transparent investment conditions** (*Novenergia v. Spain*)

## The Principles: State retains right to regulate

- “absent explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, **investment treaties do not eliminate States’ right to modify their regulatory regimes** to meet evolving circumstances and public needs” (*Eiser v. Spain*)
- **FET standard** obligates States to “create stable, equitable, favourable, and transparent conditions” but “**preserves the regulatory authority of the host state to make and change its laws and regulations** to adapt to changing needs [...] subject to respect for specific commitments made” (*Blusun v. Italy*)



## ... with some limitations

- Host State has a regulatory right but **not an unfettered right**; FET standard does not ensure full regulatory stability but **regulatory changes must stay within the boundaries of an acceptable range of legislative and regulatory behaviour** (*Novenergia v. Spain*)
- Host State has the right to modify its legal framework but **not in an unreasonable or unjustified manner or which violates specific commitments** undertaken towards the investor (*Masdar v. Spain*)
- Such **changes** “should have **due regard to the reasonable reliance interests** of recipients who may have committed substantial resources on the basis of the earlier regime” (*Blusun v. Italy*)
- **Changes** must be “**consistent with assurances on stability** of the regulatory framework provided by the State and required by the ECT” (*Antin v. Spain*)

## Stability of regulatory framework: The Practice

- ✓ ***Eiser v. Spain:*** FET protects against “unprecedented and wholly different regulatory approach, based on wholly different premises”
- ✓ ***Novenergia v. Spain:*** Measures adopted in 2013/2014 which replaced the regime with a new framework which had a “significant damaging economic effect” on the investor’s plants, decreasing revenues by 24-32% (but where investor retained a profit margin)
- ✓ ***Antin v. Spain:*** 2013/2014 measures introduced by Spain eliminated the “essential features” of the renewable energy system

## Stability of regulatory framework: The Practice

- × *Eli Lilly v. Canada*: a change in the relevant regulatory law without a dramatic departure from previously established domestic case law is not a FET violation
- × *JSW Solar v. Czech Republic*: regulatory measures do not breach FET if they are a reasonable, carefully calibrated response to developments in a sector at a time of economic and political uncertainty

# Stability of Regulatory Framework: Summary of outcome of cases 2017/2018



Eiser v. Spain

Natland v. Czech Republic

Antin v. Spain

Novenergia v. Spain



Antaris v. Czech Republic

Koch v. Venezuela

Blusun v. Italy

Isolux v. Spain

JSW Solar v. Czech Republic

# Denial of justice and breach of due process

# Denial of justice and breach of due process: The Principles

- “denial of justice under the FET standard equates with denial of justice under customary international law” (*Chevron v. Ecuador, Track II*)
- Unfair decision constitutes a denial of justice if **its shocking nature** implies a breach of due process (*Olin v. Libya*)
- “a governmental authority cannot be faulted for acting in a manner validated by its courts, unless the conduct of the courts themselves constitutes a breach of treaty” (*Fouad Alghanim v. Jordan*)
- denial of justice is defined as **inexcusable rulings** i.e. rulings that no reasonably competent judge could make (*Fouad Alghanim v. Jordan*)
- **clear evidence of egregious and shocking conduct** (*Eli Lilly v. Canada*)

# Denial of justice and breach of due process: The Practice

- ✓ ***Olin v. Libya***: a state measure lacks transparency if communicated several weeks after its enactment, without the investor being informed in advance that such measure in relation to its investment is contemplated, and being given a reasonable opportunity to engage in a dialogue with the government to find an adapted solution
- ✓ ***Cervin v. Costa Rica***: two years and four months to reach a decision instead of eight days as provided under the law was a “gross and flagrant failing on the part of the administrative authority to comply with one of its most fundamental obligations, that of processing with reasonable diligence a recourse”
- ✓ ***Chevron v. Ecuador, Track II***: impugned judgment was clearly improper and discreditable, with the failure by the national system as a whole to satisfy minimum standards

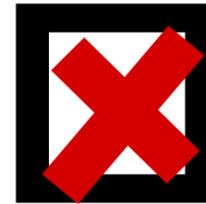
# Denial of justice and breach of due process: The Practice

- × *David Aven v. Costa Rica*: the acts of the judiciary were deemed to be in accordance with internal laws
- × *UAB v. Latvia*: The irregularities in the relevant procedure for the approval of the tariffs must be “weighed alongside the existence of an avenue of appeal”; since there were two avenues for judicial review, they were not considered serious enough to give rise to a breach of due process amounting to a breach of FET
- × *Fouad Alghanim v. Jordan*: although some of the steps taken by the State with respect to imposition of the tax measure were “unusual, even unprecedented”, these steps were still consistent with a State conducting itself according to basic principles of constitutional government and Rule of Law

# Denial of justice and breach of due process: Summary of outcome of cases 2017/2018



Chevron v. Ecuador (II)  
Valores Mundiales v.  
Venezuela  
Olin v. Libya  
Cervin v. Costa Rica (no  
damages awarded)



David Aven v. Costa Rica  
Fouad Alghanim v. Jordan  
Eli Lilly v. Canada  
Gavrilović v. Croatia  
UAB v. Latvia

Arbitrary, discriminatory, non-transparent  
or unreasonable conduct

# Arbitrary, discriminatory, non-transparent or unreasonable conduct: The Principles

- it does not matter whether a tribunal believes that a particular course of action is ‘good’ or ‘bad’, that a different solution might have been ‘better’, or that a State could have done ‘more’, or that other States took different measures”, as long as there is **an appropriate correlation between the host State’s objectives and the measures it took** (*Antaris v. Czech Republic*)
- conduct which appears to be founded on prejudice or preference, rather than on reason or fact, is arbitrary (*UAB v. Latvia*)
- measure has to depart from the law, justice or reason (*Cervin v. Costa Rica*)
- measures that pursue a legitimate objective are neither arbitrary nor unreasonable (*JSW Solar v. Czech Republic*)

## Arbitrary, discriminatory, non-transparent or unreasonable conduct: The Practice

- ✓ *Union Fenosa v. Egypt*: discrimination between users of gas against the investment plant placed an excessive and disproportionate burden on the investor and amounted to conduct that was materially “unjust”, “discriminatory” or “unfair”
- ✗ *Cervin v. Costa Rica*: mere existence of an error in the interpretation or application of a regulatory framework was insufficient; inconsistencies deemed to be too inconsequential to amount to a breach and the conduct had already been part of the authority’s practice at the time of making the investment
- ✗ *Eli Lilly v. Canada*: dramatic change of the law test not met; investor should have, and could have, anticipated that the patent law would change over time as a function of judicial decision-making
- ✗ *UAB v. Latvia*: the Respondent had the rational objective of reducing excessive profits and sheltering consumers from excessive electricity price rises, and its actions were not arbitrary or irrational because there was an appropriate correlation between its objectives and the measures it took

# Arbitrary, discriminatory, non-transparent or unreasonable conduct: Summary of outcome of cases 2017/2018



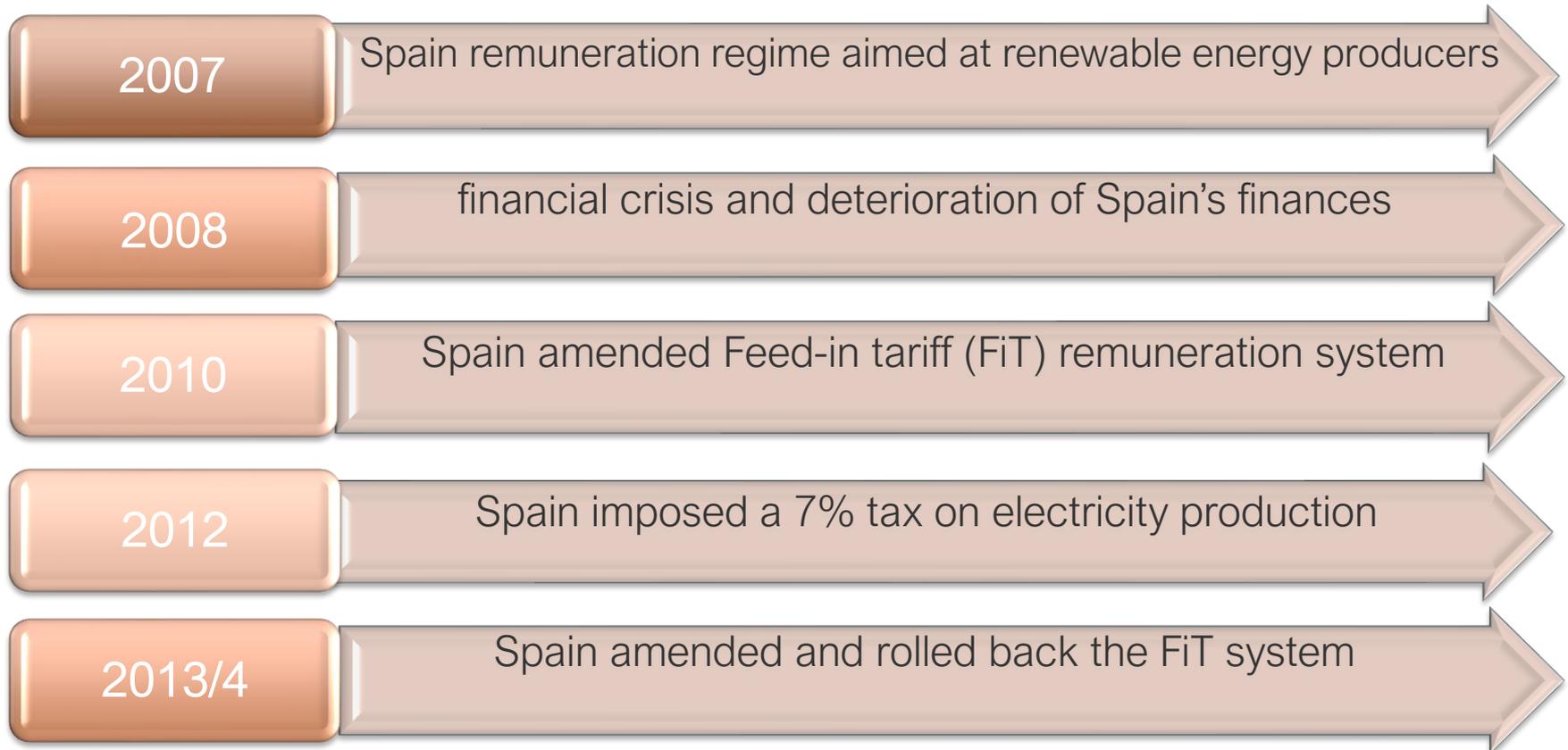
Teinver v. Argentina  
Valores Mundiales v.  
Venezuela  
Olin v. Libya  
Valores Mundiales v.  
Venezuela  
Antin v. Spain



Antaris v. Czech Republic  
Fouad Alghanim v. Jordan  
Cervin v. Costa Rica  
Eli Lilly v. Canada  
Natland v. Czech Republic  
Koch v. Venezuela  
UAB v. Latvia

# Making sense of the Spanish energy cases (?)

## Factual background



## 7 decisions to date – emerging pattern?



- All invoked the FET standard under Article 10(1) ECT:

*“Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create **stable, equitable, favourable 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 favourable 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”.*

- All decided in past 2-3 years
- All based on Spain’s regulatory changes in the renewable energy sector

## Diverging outcomes



### **EISER v. SPAIN**

ICSID Case No. ARB/13/36 (4 May 2017)

### **NOVENERGIA v. SPAIN**

SCC Case No. 2015/063 (15 February 2018)

### **MASDAR v. SPAIN**

ICSID Case No. ARB/14/1 (17 May 2018)

### **ANTIN v. SPAIN**

ICSID Case No. ARB/13/31 (15 June 2018)

### **FORESIGHT AND OTHERS v. SPAIN**

SCC Case No. 2015/150 (14 November 2018)



### **CHARANNE v. SPAIN**

SCC Case No. V062/2012 (21 January 2016)

### **ISOLUX v. SPAIN**

SCC case No. V2013/153 (17 July 2016)

## Making sense of the difference (?)

- Distinguishing *Charanne*: **different regulatory measures**
- Distinguishing *Isolux*: **later investment**

**Thank you**

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