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The Renewable Energy Saga: Exploring the Controversial Points of the Legal Cases in Italy and Spain and the Consequences for State Practice.

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Introduction.

This thesis aims to evaluate the potential influence of the Renewable Energy Saga on State practice, particularly regarding the application of the Fair and Equitable Treatment (FET) Standard, which is a cornerstone of international investment law.

The Renewable Energy Saga is the name that has been attributed by scholars to the series of lawsuits involving different States (such as Spain, Italy, and the Czech Republic) on the merits of the measures adopted by the aforementioned that had the effect of modifying the incentives and subsidies that were once granted to foreign investors to install PV solar plants in the States' territories. Considering those measures inconsistent with the relevant treaties, foreign investors started to bring the States in front of Arbitral Tribunals, claiming that, in this way, the States breached several articles of the Energy Charter Treaty (ECT), a multilateral agreement establishing a framework for cooperation in the energy domain among the signatory states. Notably, the most remarkable claim brought by foreign investors concerns the alleged violation of Art. 10 of the ECT, which contains the FET standard. This is an important standard of treatment that refers to the "*manner* in which the host State's laws are applied"[1] towards foreign investors. The controversial point of this standard is the absence of a universally accepted definition, implying that tribunals have a greater margin of application, even though some general principles to define the FET standard have been identified by Arbitral Tribunals over time. Yet, the application of the standard lacks uniformity as tribunals assign different relevance to these principles.

The focus of this thesis will be on fourteen of the cases brought in front of Arbitral Tribunals against Italy and Spain since the number of publicly available Arbitral Awards for each State is significant. The decision to study the Spanish and the Italian cases comes from the fact that, despite differences in the subject matter of the disputes related to their national regulations on renewable energy incentives, the claims filed by the investors are similar. Notably, a shared theme concerns the

[1] See S. D. Collins, *An Introduction to International Investment Law*, 2017, Cambridge University Press, chapter 5.2.1.

claim that the two States, through the enactment of particular laws discussed in detail in the following chapter, have allegedly violated Article 10 of the ECT. Investors argue that these actions breached their legitimate expectations of stability of the legal framework. Nevertheless, tribunals occasionally arrived at divergent outcomes. The most relevant and controversial point of the Renewable Energy Saga cases is, in the context of the analysis of the potential breach of the FET standard by tribunals, the evaluation of whether the States, by modifying their incentive schemes, have frustrated the legitimate expectations of stability of the investors. In this regard, the notion of *prudent or diligent investors* and the debate on the *regulatory stability* of the legal framework deserve a particular focus. What impact did this have on the subsequent practice of the States involved?

To answer the research questions, it will first be necessary to analyze the laws enacted by Spain and Italy between 2003 and 2016 in relation to the historical and economic context existing at the time: before the advent of the financial crisis in 2008, the measures adopted provided generous incentives for foreign investors. After 2008, States took a step back with these reforms to face the increasing State deficit. For the purposes of this thesis, these last reforms are the heart of the subsequent legal proceedings brought in front of the arbitral tribunals by foreign investors, as they claim that those are the laws that breached Art. 10 of the ECT.

The first chapter will thus focus on the summary and analysis of the legal framework, starting with the directives of the European Parliament and Council n. 2001/77/EC and 2009/28/EC. This preamble is crucial to comprehend why the incentives were issued in the first place and why it was important for European Union member States to create a safe, profitable environment for foreign investments in the field of electricity produced from renewable energy sources.

Next, it will be necessary to discuss the evolution of the national legal frameworks of Spain and Italy separately. Starting with Spain, it is interesting to analyze the relevant laws and decrees adopted by the Spanish government aimed first to introduce incentives to attract foreign investments The most relevant act is Royal Decree 661/2007, which deserves a deep and particular analysis for the purposes of this thesis since it is the base from which the foreign investors have

claimed to develop their legitimate expectations of stability.[2] This Decree will be found in all of the legal cases analyzed. After the worldwide financial crisis started, and the continuous increase of Spain's tariff deficit, Royal Decree-Law 6/2009 was enacted. This act is the starting point of a series of measures adopted by the State which had the effect of reducing the incentives in several ways.

To have a clear view of Italy's legal framework, it is necessary to start from 2003, when Italy, to implement directive 2001/77/EC, enacted legislative decree n.387/2003. The analysis will then proceed with the explanation of the relevant content of the five *Conto Energia* and the respective ministerial decrees that implemented them. To have a better understanding of the legal cases brought in front of arbitral tribunals by foreign investors, a special focus will be on the *Romani* (Legislative Decree of 3 March 2011, n.28), the *Destinazione Italia* (Law-Decree of 23 December 2013, n.145) and to the *Spalma Incentivi* (Law-Decree of 24 June 2014, n.91) decrees and the judgment of the Italian Constitutional Court on the constitutional legitimacy of Art. 26 of the *Spalma Incentivi* Decree with Articles 3 and 41 of the Italian Constitution.

The second chapter will concentrate on the legal cases brought by foreign investors before Arbitral Tribunals against Spain and Italy. The research will examine the approaches followed by Tribunals to address the claim that the measures adopted by the two States amounted to a breach of Article 10, paragraph 1, of the ECT. This will be accomplished by taking into consideration nine awards involving Spain and five awards involving Italy: these will be analyzed separately to have a better understanding of the different positions adopted by tribunals. First, these judgments will, in turn, be subdivided based on the Tribunals' decisions regarding whether or not the measures adopted by the two States between 2003 and 2014 constitute a breach of Article 10 of the ECT. Subsequently, we will separate the judgments concerning Spain from those concerning Italy. We will carry out an analysis of the positions of the tribunals to identify a possible common thread between the Awards.

The following step involves an examination of most controversial points concerning the application of the FET standard by Arbitral Tribunals in the relevant

[2] See F. Balcerzak, *Renewable Energy Arbitration – Quo Vadis?*, 2023, pages 26-38.

legal decisions. This analysis will start with an exploration of the evolution of the interpretation of the standard and its application by Arbitral Tribunals. The study will then extend to the examination of the obligation of a State to protect the investors' legitimate expectations, this being one of the general principles employed by tribunals to ascertain if there was a breach of the FET standard, also introducing and defining the concept of *diligent investor* and its application in the judicial decisions. The final point of analysis is the balance between states' sovereign right to regulate and their duty to protect investors' legitimate expectations of regulatory stability, focusing on how Tribunals delineate this balance.

Chapter three will address the thesis' research questions by examining the potential impact of the Awards rendered by Arbitral Tribunals within the context of the Renewable Energy Saga on subsequent State practices. First, it will be necessary to consider the most recent International Investment Agreements (here IIAs) adopted not only by the concerned parties but also by other, third States. The relevant treaties to take into account are Italy's Model BIT (2022) and the Spain-Colombia BIT (2021), the India Model BIT (2015) – and some of the subsequent BITs concluded by India and other States – and the Dutch Model BIT (2019). Next, it is interesting to analyze how the FET standard and the Minimum Standard of Treatment (here 'MST') of aliens are intertwined in the new-generation IIAs. The latter, a customary principle in international law, is widely considered by the majority of scholars as the minimal baseline of treatment that states are obliged to afford to aliens.

The purpose of this thesis is to determine whether the Renewable Energy Saga has influenced States' decisions regarding the content of new IIAs. If so, it aims to assess the extent to which the Articles in these new IIAs have been shaped by the positions adopted by Arbitral Tribunals in the relevant legal cases.

Chapter 1.

The domestic regulatory frameworks: an analysis of the legal measures adopted by Spain and Italy in the context of the Renewable Energy saga.

TABLE OF CONTENTS: 1.1 Premises. 1.2 The European Union's Directives. 1.3 Spain: analysis of the evolution of the regulatory framework from Law 54/1997 to Royal Decree 413/2014. 1.4 Italy: a glance at Italy's regulatory framework from LD 387/2003 up to the Italian Constitutional Court's ruling, n. 16/2017, on the judgment of constitutional legitimacy of the *Spalma Incentivi* Decree. 1.5 Conclusions.

1.1 Premises.

This first chapter will focus on the analysis and the history of the Spanish and Italian legal frameworks with which the two States provided incentives for foreign investors who wanted to invest in solar plants. This legal analysis is crucial because it allows not only a better understanding of the international arbitration tribunals awards in the context of the European Renewable Energy Saga, a topic that will be covered in the second chapter, but also to understand why some States, after this juridical saga came to an end, decided to adopt provisions in their IIAs that make it more difficult for foreign investors to bring them in front of arbitral tribunals for the alleged breach of articles contained in these international treaties.

To have a general view of the whole regulatory framework, we first analyze the objectives and the most relevant articles of the two European Union directives and the consequent national legislation enacted by Spain and Italy over the following decade. More specifically, the articles analyzed will be those concerning the conditions that the facilities must comply with, for them to be eligible to receive the remuneration; then we will proceed in analyzing the evolution of the remuneration schemes provided in the different national regulations, focusing mainly on those decrees on which the claimants assert to have allegedly relied at the time the investment was made and the subsequent provisions that allegedly frustrated the claimant's legitimate expectations, as claimed by the investors themselves, resulting in the violation of the fair and equitable treatment standard contained in Art. 10 of the ECT.

1.2 The European Union's directives.

The starting point of this saga can be identified in the directive adopted by the European Parliament and Council, n.2001/77/CE, enacted to fulfill the goals outlined in the Kyoto Protocol to the United Nations Framework Convention on Climate Change of 1997. At that time, this Protocol was the only legally binding treaty that provided for the obligation for the world's most industrialized States to reduce greenhouse gas emissions within an established timetable, which in this case was "at least 5 percent below 1990 levels in the commitment period 2008 to 2012"[3]. To achieve this target, the Protocol provides a series of general obligations for the State parties set forth in Article 2, which encourages them, among all other goals, to promote the switch towards greater use of energy derived from renewable resources through the implementation of national legislation.[4] The Protocol also established that by 2005, States parties would have to had to demonstrate that they had taken steps forward to achieve the specified objectives.[5]

The European Union and all its member States ratified the Kyoto Protocol on the 31st of May, 2002.[6] While the ratification process was taking place, in 2001 the European Union Parliament and Commission issued Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market, raising awareness on the importance of the exploitation of renewable energies to achieve not only the objectives of environmental protection and sustainable development, but also to create local employment and to have an overall positive impact on society.[7] In its preamble, the directive imposes an obligation for Member States to set "national indicative targets for the consumption of electricity produced from renewable energy sources"[8] within the timeframe established by the directive itself. This obligation echoes again in Article 3, which imposes upon Member States the obligation to publish reports every five years to

[3] See Kyoto Protocol to the United Nations Framework Convention on Climate Change, article 3, para. 1, 10 December 1997.
[4] *Ibidem*, article 2, para. 1(a)(iv).
[5] *Ibidem,* article 3, para. 2.
[6] See European Commission, *Kyoto Protocol*, 4 March 2004, MEMO/04/43.
[7] See Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, preamble para. 1.
[8] *Ibidem,* preamble para. 5.

set such national indicative targets for the future and the measures adopted or planned to be adopted to reach these milestones.[9] The same article introduces national indicative targets aimed at fulfilling the European Union's objective of generating 22.1% of the total electricity consumed from renewable energy sources.[10]

The directive attributes the European Commission the authority to monitor the situation in each Member State and evaluate whether the states are making efforts to meet the prescribed national indicative target of 12% of gross domestic renewable energy consumption by 2010.[11] In this prospect, States shall take appropriate measures to achieve such target: paragraph 14 of the preamble of the directive provides for a non-exhaustive list of mechanisms that can be adopted by Member States, for example, investment aids, green certificates, tax exemptions or reductions, tax refunds and direct price support schemes.[12] One of the most interesting articles of Directive 2001/77/CE concerns the introduction of the "guarantee of origin" of electricity produced from renewable energy sources, which must be "mutually recognized by Member States"[13]. This discipline is contained in Art. 5 and allows States to create competent bodies responsible for monitoring the issuance of these guarantees.[14]

In 2007, however, it was understood that States would never meet the national indicative targets for 2010.[15]

In 2009, Directive 2009/28/EC was adopted by the European Parliament and the Council. The aim of this directive is still to promote the use of energy from renewable energy sources; it amends two previous directives, one of them being Directive 2001/77/EC. The 2009 directive raised the target for the European Union's overall energy consumption from renewable sources from the initial 12%

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[9] *Ivi,* art. 3, para. 2.
[10] See final judgment of 26 February 2021 in the case *Silver Ridge Power BV* v. *Italian Republic*, ICSID Case No. ARB/15/37, para. 114.
[11] See Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001, note 7, preamble para. 7.
[12] *Ibidem*, preamble para. 14.
[13] *Ibidem*, art. 5, para. 4.
[14] *Ibidem*, art. 5, para. 2.
[15] See Balcerzak, note 2, page 25.

set in the 2001 directive to 20%, to be achieved by 2020.[16] In order to meet the national overall target for the share of energy from renewable sources, States might apply support schemes, which could take the form of direct price support schemes including feed-in tariffs (FITs)[17] and premium payments[18], or cooperation measures, also with third countries.[19] In its preamble, the directive specifically says that the European Union is aware of the fact that Member States have different renewable energy potentials and have adopted incentive schemes at a national level that best adapt to the domestic situation; for this reason, it is imperative for the purposes of this directive to "guarantee the proper functioning of national support schemes […] in order to maintain investor confidence and allow Member States to design effective national measures to target compliance"[20].

1.3 Spain: analysis of the evolution of the regulatory framework from Law 54/1997 to Royal Decree 413/2014.

With Law 54/1997, of 27th November, on the Electric Sector, Spain liberalizes the energy supply market in the country, which until then, was under the control of the State. The primary purpose of this first-analyzed law is to encourage solar photovoltaic (PV) investments.[21] Previously, the Spanish electric sector was overseen by a majority-owned public company. However, the 1997 Spanish national legislation assigns the sector's responsibilities to two private, commercial companies. These private persons are in charge of the economic and technical management of the system, while the Spanish State retains its public planning authority concerning transmission facilities that need to be integrated into urban and territorial planning. [22]

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[16] See Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, preamble para.13.
[17] "Feed-in tariffs" means the amount to be paid to owners of energy-production installments for each unit of electricity that they give to the State.
[18] *Ibidem,* art. 2(k).
[19] *Ibidem,* art. 3, para. 3.
[20] *Ibidem*, preamble para. 25.
[21] See J. Kristensen, M. Slomka, S. Shamsi, Economic and Financial Issues in Renewable Energy Arbitration, 2022, Global Arbitration Review.
[22] See Ley 54/1997, de 27 noviembre, del Sector Eléctrico, preamble, pag 35097-35098.

The fundamental scope of this law is to establish the regulation of the electric sector, keeping in mind the objectives of ensuring domestic consumers the most efficient supply of electricity at the lowest possible cost.[23] Article 1 of Law 54/1997 states that the guiding principles by which the new electric system regime would abide are those of objectivity, transparency, and free competition.[24] The respect of these principles is to be monitored by the *Comisión Nacional del Sistema Eléctrico*,[25] a public entity in charge of regulating the energy systems by participating in many, different legislative, administrative and planning programs in the context of the electric sector.[26]

Title IV of Law 54/1997 regulates the production of electric energy. It introduces two different types of applicable regimes of electric energy production: the first one is the *Ordinary Regime*, which applies to traditional generation plants, whereas the second one takes the name *Special Regime*, which applies to "generators of electricity from non-consumable renewable energy"[27] – the acknowledgment of this new regime of production of electricity is fundamental in the context of Spain's commitment to reduce greenhouse gases.[28]

The Ordinary Regime states that "the construction, operation, substantial modification, and closure" of electric energy production facilities falling under this regime shall be subject to prior authorization by the competent, administrative authorities.[29] In order to receive the authorization, investors must comply with certain criteria, which are listed in paragraph 2 of Article 21; among these, the need to demonstrate the economic and financial capacity for project implementation. In case of non-compliance with the terms and conditions aforementioned, or in the case of substantial variation of the budget, the consequence could be the withdrawal of the authorizations.[30] Additionally, it provides for the obligation to register

[23] *Ivi,* preamble, page 35097-35098.
[24] *Ibidem,* Art. 1, para. 3.
[25] *Ibidem,* Art. 6, para. 1.
[26] *Ibidem,* Art.8, para. 1.
[27] See A. Noilhac, *Renewable Energy Investment cases against Spain and the quest for regulatory consistency,* 2020, QIL, p. 24.
[28] See Real Decreto 2818/1998, de 23 de diciembre, sobre producción de energía eléctrica por instalaciones abastecidas por recursos o fuentes de energía renovables, residuos y cogeneración, preamble.
[29] See Ley 54/1997, note 22, Art. 21, para. 1.
[30] *Ibidem,* Art. 21, para. 6.

electricity-producing facilities in the Administrative Registry of Electrical Power Production Facilities (RAIPRE), as a prerequisite for submitting energy offers to the market operator.[31] RAPIRE is a register, the establishment of which is provided by Law 54/1997, in which all previously authorized electric energy production facilities shall be registered and inside which it is specified the conditions under which the concerned facilities have been installed and their respective power.[32] Remuneration under the Ordinary Regime was based solely on the wholesale market price of electricity.[33]

The production of electric energy falls under the Special Regime in specific instances, listed in Article 27, paragraph 1. For example, this regime applies to energy produced by installations whose power does not exceed 50 Mw, such as the case of auto producers using forms of electricity production associated with non-electrical activities, but under certain conditions, when the producers use some of the non-consumable renewable energy as primary energy, but must not carry out activities under the ordinary regime, or when non-renewable waste is used as primary energy:

> "a) Autoproductores que utilicen la cogeneración u otras formas de producción de electricidad asociadas a actividades no eléctricas siempre que supongan un alto rendimiento energético.
> b) Cuando se utilice como energía primaria alguna de las energías renovables no consumibles, biomasa o cualquier tipo es biocarburante. siempre y cuando su titular no realice actividades de producci6n en el régimen ordinario.
> c) Cuando se utilicen como energía primaria residuos no renovables."[34]

It also falls under the classification of "Special Regime" the electric energy produced from facilities treating and reducing waste from specific sectors (agricultural and services), with a capacity of no more than 25Mw.[35]

Spain maintains its authority on the establishment of remuneration schemes under the Special Regime.[36] Article 30, provides the different remuneration schemes: in general, this article "[guarantees] that producers under the special

[31] *Ivi,* Art. 21, para. 5.
[32] *Ibidem,* Art. 21, para. 4.
[33] *Ibidem,* Art. 16, para.1.
[34] *Ibidem*, Art. 27, para. 1.
[35] *Ibidem,* Art. 27, para. 1.
[36] *Ibidem,* Art. 3, para. 1(b).

regime would receive a 'reasonable rate of return' on their investments in the sector"[37] in line with the cost of money in the capital market. The remuneration for facilities under the Special Regime is a FIT, calculated on the basis of the electricity production for each facility.[38] Paragraph 4 of the same Article states that certain facilities are eligible for a premium, which will be determined by the Government to ensure that the price of electricity generated by these facilities falls within a percentage range of 80 to 90 percent of the average electricity price. Renewable energy production facilities may receive premium tariffs that exceed this specified limit in exceptional cases.[39] To receive the aforementioned remunerations, the electrical power installations must be registered in the RAIPRE; furthermore, when registering the renewable energy production facilities, it shall be specified which remuneration scheme the generators are entitled to.[40]

Law 54/1997 is developed through Royal Decree 2818/1998 (here 'RD 2818/1998). This Royal Decree is designed to establish incentive programs for electric energy production facilities, enabling these installations to compete in the open market: in general, a system of temporary incentives is implemented. However, installations covered by the Special Regime are eligible for no-time-limit incentives, reflecting the State's need to adapt to the costs and implications associated with this innovative form of energy production.[41] This RD introduces the feed-in tariffs from which the power plants under the Special Regime could benefit and "premiums paid over wholesale market prices"[42], which must be reviewed every four years to adjust them to the evolution of the price in the electricity market.[43]

In 2001, the European Union's Directive 2001/77/CE set Spain's national target for renewable energy production at 29.4% and a national target of gross domestic energy consumption from renewable sources to achieve at 12%, both of them to be

[37] See J. Biggs, *The Scope of Investors' Legitimate Expectations under the FET Standard in the European Renewable Energy Cases*, 2021, ICSID Review, page 6.
[38] See Ley 54/1997, note 22, Art. 16.
[39] *Ibidem*, Art. 30, para. 4.
[40] *Ibidem,* Art. 31.
[41] See Real Decreto 2818/1998, note 28, preamble.
[42] See Balcerzak, note 2, page 28.
[43] See Real Decreto 2818/1998, note 28, Art. 32.

achieved by 2010.[44] Directive 2009/28/EC set a national target for the share of energy from renewable sources in gross final consumption of energy to be achieved by 2020 at 20%.[45] Nonetheless, RD 2818/1998 did not receive the desired success: it did not attract the desired level of investments, making it impossible to meet the national indicative targets set by Directive 2001/77/CE within the expected timeframe.[46]

As a consequence, RD 2818/1998 is substituted by Royal Decree 436/2004 (here 'RD 436/2004'), which establishes the methodology for updating and systematizing the legal and economic regime of the activity of production of electrical energy in special regime. This was therefore supposed to complete Law 54/1997 and to meet the national indicative targets set by Directive 2001/77/CE within the expected timeframe.[47] With this RD, Spain wants to improve the stability of the tariffs.[48] RD 436/2004 guarantees to those investments falling under the Special Regime, regardless of the remuneration method chosen, a reasonable return, and for "consumers a reasonable allocation of costs attributable to the electricity system".[49] Many features remained unaltered: it is still necessary to receive prior approval from the competent administrative body and to be registered in the RAIPRE for power plants to fall under the Special Regime and thus be entitled to any form of remuneration.[50]

Chapter IV of RD 436/2004 regulates the economic regime. Article 22 oversees the pricing of electricity generated by facilities operating within the special regime, giving producers two choices: they can either sell the energy they produce directly on the market, earning the electricity price along with an incentive and premium,

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[44] See Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 note 7, Annex.
[45] See Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009, note 16, Annex I, Table A.
[46] See Balcerzak, note 2, page 29.
[47] See Noilhac, note 27, page 24.
[48] See J. Kristensen, M. Slomka, S. Shamsi, Economic and Financial Issues in Renewable Energy Arbitration, 2022, Global Arbitration Review.
[49] See Balcerzak, note 2, page 30.
[50] See Real Decreto 436/2004, de 12 de marzo, por el que se establece la metodología para la actualización y sistematización del régimen jurídico y económico de la actividad de producción de energía eléctrica en régimen especial, Art. 15, para.1.

or they can opt to sell the produced energy to the distribution system and receive a regulated tariff as compensation.[51]

The following Articles define the amount of the regulated tariff and that of the premium. Article 40 states that, starting from 2006, coinciding with the publication of follow-up reports on the Plan for the Promotion of Renewable Energy compliance, a periodic review of tariffs, premiums, incentives, and additional measures will occur every four years. The Article specifies that the updated tariffs and premiums will become effective on the 1st of January of the second year following the year in which the review was conducted and shall not have a retroactive effect, meaning that it should only apply to facilities that became operative after the reviewed tariffs, incentives, and premiums entered into force.[52]

In the end, also RD 436/2004 failed to attract the desired level of investments in Spain. In 2007, the Spanish National Energy Commission published a report on new draft regulations that were meant to replace RD 436/2004. Here, the Commission recognizes the significance of economic incentives in fostering energy markets based on renewable sources. It emphasizes that the upcoming regulations should ensure stable and predictable economic incentives throughout the entire life of the facilities.[53] This led to the enactment of Royal Decree 661/2007 (here 'RD 661/2007'), which regulates the activity of production of electrical energy in the special regime. This regulation incorporates the economic principles contained in both Law 54/1997 and RD 436/2004. In fact, in the preamble, it is stated that the economic regime set forth in this regulation is based on the principles contained in Law 54/1997, granting owners of renewable energy production facilities a reasonable return for their investment, and to electricity consumers a reasonable allocation of the costs attributable to the electricity system. RD 661/2007 echoes RD 436/2004 concerning the cost at which the electricity produced from facilities falling under the special regime shall be sold in the market.[54]

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[51] See Final Award in the case *Stadtwerke München GmbH, RWE Innogy GmbH and Others v. The Kingdom of Spain*, 2 December 2019, ICSID Case No. ARB 15/1, para. 63.
[52] See Real Decreto 436/2004, note 50, Art. 40, para. 1-3.
[53] See Balcerzak, note 2, page 32.
[54] See Real Decreto-Ley 6/2009, de 30 de abril, por el que se adoptan determinadas medidas en el sector energético y se aprueba el bono social, preamble, page 7.

RD 661/2007 still required plants to register their facility in the RAIPRE. Next, they must obtain authorization from the competent administrative authority for activities such as the construction, operation, substantial modification, transmission, and closure of the installations. This is a mandatory step for the inclusion of the facility in the special regime and, consequently, for receiving the anticipated remuneration.[55]

Article 24 encompasses the remuneration schemes to which investors are entitled for energy produced by facilities under the special regime. This article provides that investors had two possibilities of feed-in tariffs: they could choose to sell the energy produced under a regulated, fixed tariff[56], which shall remain unaltered for the entire operational lifetime of the facility, or to sell their energy directly into the market and consequently receive the negotiated price, plus a premium tariff, as was already stated in Article 22 of RD 436/2004:

> "a) Ceder la electricidad al sistema a través de la red de transporte o distribución, percibiendo por ella una tarifa regulada, única para todos los períodos de programación, expresada en céntimos de euro por kilovatio-hora.
> b) Vender la electricidad en el mercado de producción de energía eléctrica. En este caso, el precio de venta de la electricidad será el precio que resulte en el mercado organizado o el precio libremente negociado por el titular o el representante de la instalación, complementado, en su caso, por una prima en céntimos de euro por kilovatio-hora"[57]

The method chosen shall be applied to the facility for at least one year; in the event that the investor realizes that the method chosen is not suitable for its facilities, the decision has to be communicated to the National Energy Commission a minimum of one month prior to the date of the option change.[58] The provisions of this Article did not extend to photovoltaic plants, as only FITs were applicable to them. RD 661/2007 introduces three categories of regulated tariffs, the amount of which depends on the working capacity of the energy production facilities: the lesser the working capacity, the higher the compensation; it also sets upper and lower limits for the FITs and premiums.[59] The regulation granted that the amount of the tariff

[55] *Ivi,* Articles 6 and 9.
[56] The amount of the tariff was to be determined by taking into account several factors listed in Art. 25 of RD 661/2007.
[57] *Ibidem,* Art. 24, para. 1.
[58] *Ibidem,* Art. 24, para. 4.
[59] See Balcerzak, note 2, page 34.

would apply throughout the whole operating life of the facility at the higher level for 25 years, to decrease after the start of the 26th year.[60]

Article 44 regulates the update and revision of the tariffs and premiums, saying that, these values will be updated annually, adjusting to the fuel price indexes and the national consumer price index. Article 44 also states that starting from 2010, tariffs and premiums will be reviewed quarterly, together with the upper and lower applicable rate limits of the tariffs; while carrying out these reviews, Spain commits to always grant investors a reasonable rate of return. It also specifies that the revisions will not affect installations that received their commission certificate before the 1st of January of the second year following the year of the revision.[61] Additionally, RD 661/2007 allows renewable energy producers to sell and transmit electricity whenever it is produced, giving them "priority of access and priority of dispatch to the electric grid"[62].

On the same day as RD 661/2007 was enacted, the competent ministry held a press release in which he commented on the content of the decree, stating that the future revisions of the tariffs would not have retroactive effects, meaning that they would not apply to facilities already operating. This statement helped to intensify the perception of legal certainty and stability of the legal framework provided by this Royal Decree. Eventually, RD 661/2007 turned out to be the most successful among all the other laws and decrees enacted in the previous years.[63]

The following year, the Spanish National Energy Commission published Report 30/2008 "in relation to the proposed Royal Decree for compensation for electricity production using solar photovoltaic technology for facilities after the deadline for remuneration under Royal Decree 661/2007 of 25 May, and for such technology, of 29 July 2008"[64]. The report discusses the importance of legal certainty and the safeguarding of legitimate expectations. It suggests that the stability and predictability of the economic incentives outlined in RD 661/2007

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[60] See Real Decreto 661/2007, de 25 de mayo, por el que se regula la actividad de producción de energía eléctrica en régimen especial, Art 36, table 3.
[61] See Real Decreto-Ley 6/2009, note 54, art 40, para. 1-3.
[62] See Balcerzak, note 2, page 35.
[63] *Ibidem,* pages 35-36.
[64] See final award in the case *Charanne and Construction Investments v. The Kingdom of Spain*, 21 January 2016, SCC Case No. 062/2012, para. 130.

could attract significant investment in the renewable energy sector, as it reduces regulatory uncertainty. Still, the report underlined that the need to safeguard these principles cannot be intended as an obstacle to the modification of the legal system, nor it could be interpreted as a "stabilization clause"[65]. This entails that any regulatory modification should be carried out with adequate assurances and caution, implementing measures that aim to reduce or prevent any disappointment from investors. Such measures might include the implementation of transitional periods to facilitate foreign investors' adjustment to the new regulatory framework or the provision of compensatory mechanisms.[66]

In the same year, Royal Decree 1578/2008 (here 'RD 1578/2008') was adopted. This decree incorporates RD 661/2007, specifically for PV installations, which were excluded from Article 24 of the previous Royal Decree. It also permits PV facilities that failed to register in the RAIPRE under RD 661/2007 within the given timeframe to access the benefits of the Special Regime. However, the FIT rates under this decree are lower compared to those available under RD 661/2007.[67]

2008 was also the year in which Europe experienced the effects of the financial crisis, which produced severe effects on Spain's economy. Among them, a consequence was the drop in electricity demand. This event, combined with the incentives that were still provided under RD 661/2007 and RD 1578/2008, led to an increase in the deficit caused by tariffs. The so-called "tariff deficit", as defined in Royal Decree-Law 6/2009 (here 'RDL 6/2009'), is the "financial gap between the costs of subsidies paid to RE producers and revenues derived from energy sales to consumers".[68] The preamble of RDL 6/2009 states that the incumbent situation, which caused an imbalance between the tariffs and the energy prices, has harmed the primary objective of achieving greater energy efficiency and is putting at risk not only the financial situation of the companies operating in the electricity sector

[65] A "stabilization clause" is an article that could be inserted in IIAs by which the State binds itself not to change the relevant legislation applicable to the contract. This means that States apply to the contract the legal framework that was in force at the time the contract was concluded.
[66] See Informe 30/2008 de la CNE en relación con la propuesta de real decreto de retribución de la actividad de producción de energía eléctrica mediante tecnología solar fotovoltaica para instalaciones posteriores a la fecha límite de mantenimiento de la retribución del real decreto 661/2007, de 25 de mayo, para dicha tecnología, page 9.
[67] See Balcerzak, note 2, page 38.
[68] *Ibidem,* page 39.

but also, and above all, the sustainability of the entire system.[69] Hence, the Spanish government's intervention became imperative to limit the rise in the deficit. This goal was pursued by restricting the number of facilities eligible for the Spanish incentive program provided by RD 661/2007; this is achieved through an increase in the bureaucracy required for participation.[70] Article 4 introduces the requirement for renewable energy facilities to first register in the pre-assignment register, a new sub-section of the RAIPRE, as a condition for receiving entitlement to the economic regime.[71] Following the pre-registration in the pre-assignment register, the installation's owners will have a maximum of thirty-six months from the date of the notification to register their facilities in the RAIPRE and thus enjoy the economic incentives provided under the Special regime and, consequently, to sell energy.[72]

Starting from 2010, the Spanish government adopted measures that modified the entity and the duration of the incentives provided by the previous regulations over time and gradually dismantled the Special Regime, resulting in detrimental effects for owners of renewable energy production facilities. The key regulatory changes introduced will be briefly summarized to understand which modifications investors claimed to constitute a violation of their legitimate expectations and, consequently, a breach of the Fair and Equitable Treatment standard outlined in Article 10 of the ECT.

The first one was Royal Decree 1565/2010 (here 'RD 1565/2010') of 19 November, which regulates and modifies certain aspects relating to the activity of production of electrical energy in special regime. This regulation is entirely based upon amendments. The most controversial is the one provided in Article 1, Tenth, which eliminates the disbursement of tariffs after the twenty-sixth year of the operating life of the plant.[73] This amends Article 36 of RD 661/2007 which provided renewable energy facilities falling under the Special Regime a tariff for

[69] See Real Decreto-Ley 6/2009, note 54, preamble.
[70] See J. Biggs, note 37, page 7.
[71] See Real Decreto-Ley 6/2009, note 54, Art. 4, para. 1-2.
[72] *Ibidem,* Art. 4, para. 8.
[73] See Real Decreto 1565/2010, de 19 de noviembre, por el que se regulan y modifican determinados aspectos relativos a la actividad de producción de energía eléctrica en régimen especial, Art. 1, Tenth.

the entire life of the plant that would remain fixed for twenty-five years and then decrease from the twenty-sixth year.[74]

This limit was changed shortly thereafter. Royal Decree-Law 14/2010 (here 'RDL 14/2010') of 23 December, establishing urgent measures for the correction of the tariff deficit in the electricity sector increased the duration of the disbursement of the fixed tariff up to twenty-eight years for PV plants.[75] This regulation was enacted in response to the 2010 decrease in demand and the surge in electricity production from renewable sources, driven by favorable weather conditions, factors which significantly impacted the forecast parameters for the electricity system tariff deficit.[76] The innovative element of this regulation is the introduction of an access toll amounting to €0.5/MWh for energy producers for the use of the transmission of distribution networks, from which - until then - were exonerated. The amount of the fee is calculated based on several factors, such as the technological features of each facility, and the degree of participation of these additional costs, but still committing to guarantee a reasonable return for their investments, as stated in the preamble:

> "[…] parece razonable que los productores de régimen especial realicen también una contribución para mitigar los sobrecostes del sistema, contribución que debe ser proporcional a las características de cada tecnología, a su grado de participación en la generación de esos sobrecostes y al margen existente en la retribución cuya rentabilidad razonable queda en todo caso garantizada."[77]

The tariff deficit problem soon became a political issue. In 2011, after the elections, a new government, led by Mariano Rajoy, was formed. One of its objectives was to reduce the tariff deficit and therefore implemented a series of measures to address this problem since RDL 14/2010 fell short of its intended goal.[78] Soon after the government was formed, Royal Decree-Law 1/2012 (here 'RDL 1/2012'), of 27 January, suspending the procedures for the pre-allocation of

[74] See note 56.
[75] See Real Decreto-ley 14/2010, de 23 de diciembre, por el que se establecen medidas urgentes para la corrección del déficit tarifario del sector eléctrico, first additional disposition.
[76] See Real Decreto-ley 1/2012, de 27 de enero, por el que se procede a la suspensión de los procedimientos de preasignación de retribución y a la supresión de los incentivos económicos para nuevas instalaciones de producción de energía eléctrica a partir de cogeneración, fuentes de energía renovables y residuos, preamble.
[77]See Real Decreto-ley 14/2010, note 75, preamble and first transitional disposition.
[78] See Balcerzak, note 2, page 44.

remuneration and the suppression of the economic incentives for new facilities for the production of electricity from cogeneration, renewable energy sources, and waste, was enacted**.** RDL 14/2010 acknowledges in the preamble that, given the difficult economic and financial situation, it is prudent to temporarily suspend all economic incentives for the installation of facilities until the issue of the tariff deficit is resolved.[79] These measures apply to all the facilities falling under the Special Regime, including PV solar plants, that did not meet the deadline of registering in the pre-assignment register introduced by Article 4, paragraph 1, of RDL 6/2009 before the date of entry into force of RDL 1/2012 and to facilities under the ordinary regime that did not receive the authorization by January 2012.[80] Article 4 provides for the suspension of the pre-allocation procedure for the granting of economic incentives.[81]

Subsequently, other measures were implemented. One of them implemented a 7% tax on all electricity delivered to the national grid, irrespective of its origin or the regime under which the facilities were operating.[82] Another important measure that was implemented to address the problem of the tariff deficit was Royal Decree-Law 2/2013 (here 'RDL 2/2013'), of 1 February, on urgent measures in the electricity system and financial sector. The measures adopted in this decree were aimed at reducing the costs resulting from the special regime, preventing additional burdens on consumers[83]. The most relevant articles for the purpose of this dissertation are the ones that modify some dispositions of RD 661/2007. Firstly, Article 2, which abolishes premiums and their upper and lower limits; secondly, Article 3 removes the option for investors who, under Article 24, paragraph 1, of RD 661/2007[84], had opted to sell their energy directly on the market at a negotiated price along with a premium tariff, from switching to a fixed tariff. [85] In other words, investors who initially chose to rely on market prices cannot change their decision.

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[79] See Real Decreto-ley 1/2012, note 76, preamble.
[80] *Ibidem,* art. 2, para. 1.
[81] *Ibidem,* art. 4, para. 1.
[82] See Balcerzak, note 2, page 45.
[83] See Real Decreto-ley 2/2013, de 1 de febrero, de medidas urgentes en el sistema eléctrico y en el sector financiero, preamble.
[84] See page 10.
[85] See Real Decreto-ley 2/2013, note 83*,* Articles 2, 3.

On the 13th of July 2013, Royal Decree-Law 9/2013 (here 'RDL 9/2013'), adopting urgent measures to ensure the financial stability of the electric system, was enacted. The extent of this Decree-Law's impact is groundbreaking. Primarily, it eliminates the Special Regime with the ultimate goal of ensuring financial stability in the electricity system. In its place, it introduces a brand new regime that entails a "specific remuneration" determined by "standard costs per unit of installed capacity".[86] In the preamble, it is stated that the objective of this new regulatory framework is to provide a suitable response to the significant change in circumstances experienced in recent years, but always to protect the investors' right to a reasonable return.[87] RDL 9/2013 amends Article 30, paragraph 4 of Law 54/1997, by introducing a new specific scheme ensuring that this remuneration system does not exceed the minimum level necessary to cover the costs required for installations to compete on par with other technologies in the market.[88] The parameters on which the specific remuneration is calculated are set in Article 1, paragraph 2, of RDL 9/2013; they could be reviewed every six years:

> "For the calculation of that specific remuneration, the following elements shall be considered, based on the installation's regulatory useful life and by reference to the activities carried out by an efficient and well administered business:
> a) The standard revenues for the sale of generated energy valued at market price of production;
> b) The standard exploitation costs;
> c) The standard value of the initial investment.
> To that effect, the costs or investments determined by laws or administrative regulations that do not apply to the Spanish territory shall not be considered in any case. In the same manner, only those costs and investments related to the activity of electric energy generation can be taken into account.
> […] Such reasonable return will be based on, before taxes, the average returns in the secondary market of the State's ten-year bonds plus the adequate differential."[89]

This new regime did not enter into force immediately, because it required further specifications, which were subsequently provided by additional acts. Before this, however, it is necessary to introduce Law 24/2013 of 26 December, on the Electric Sector, which replaced Law 54/1997. It recognizes both the significant

[86] See Balcerzak, note 2, page 48.
[87] See Real Decreto-ley 9/2013, de 12 de julio, por el que se adoptan medidas urgentes para garantizar la estabilidad financiera del sistema eléctrico, preamble.
[88] *Ibidem,* Art. 1, para. 2.
[89] See Final award in the case *Masdar Solar & Wind Cooperatief U.A.* v. *The Kingdom of Spain*, 16 May 2018, ICSID Case No. ARB/14/1, para. 132.

overall impact it had on Spain's economy and the challenges encountered by the electricity production sector, including the tariff deficit, that Law 54/1997 failed to address. This led to multiple adjustments to the legal framework in an attempt to stabilize the economic and financial situation of the system.[90] Law 24/2013 contains an entire chapter, Title III, on the economic and financial sustainability of the electric system, understood as the capacity to meet the total costs of the system. Article 13 establishes meticulously what costs the system has to incur – moreover retribution – and how these will be financed.[91] This regulation abolishes definitively the difference between the Ordinary Regime and the Special Regime, so that, from this moment on, all plants are subject to the same conditions, irrespective of the source of production of electricity.[92] However, the specific regime applicable to renewable energy production facilities, established by RDL 9/2013, is maintained.[93] The new, uniform conditions of applicability are set in Title IV, which regulates the production of electricity. A prerequisite for installations to participate in the market and to be eligible for the incentives is to be registered in the administrative registry of electric power production facilities, in which the conditions of such installations and their respective power shall be provided. The owners of such facilities are bound to maintain the same production capacity.[94] On the other hand, plants falling under the specific regime, to receive the incentives provided in the specific remuneration schemes, must be registered to the registry of the specific remuneration regime.[95] The main scope, procedures, and conditions for registering in this Registry were not yet defined in this law, but it will be in the subsequent Royal Decree 413/2014 (here 'RD 413/2014').

The regime provided by RDL 9/2013 and Law 24/2013 was implemented with the adoption, by the Spanish government, of RD 413/2014 of 16 June, which regulates the activity of production of electrical energy from renewable energy sources, cogeneration, and waste. This piece of legislation defines some characteristics of the new, specific remuneration scheme and introduces additional

[90] See Ley 24/2013, de 26 de diciembre, del Sector Eléctrico, preamble.
[91] *Ibidem,* Art. 13, para. 1-2.
[92] *Ibidem*, preamble.
[93] *Ibidem,* Art. 14, para. 4.
[94] *Ibidem,* Art. 21, para 2-4.
[95] *Ibidem*, Art. 27.

criteria for compensation for installations falling under this regime, keeping in mind that the ultimate scope is still that of granting a reasonable return to investors.[96] RD 413/2014, in fact, provides for a specific remuneration, in addition to the normal remuneration earned for the sale of energy valued at the price of the market, for those installations that do not reach the minimum level necessary to cover the costs to be employed to compete equally with other technologies on the market, thus enabling them to have a reasonable return.[97] However, the amount of the specific remuneration is capped to "that which would be received by a notional 'standard installation' which is deemed to have a standard operational life of twenty-five years"[98]. This standard of comparison was introduced to prevent the inclusion of higher costs incurred by an inefficient company when applying EU state aid rules regarding compensation provided for a matter of general economic interest.[99] To calculate the amount of the specific remuneration, two components shall be taken into account: the investment and operation. The investment component compensates for investment costs that cannot be recovered through the sale of energy[100], while the operation component covers the difference between the market price per unit of energy and the estimated operating costs per unit of energy.[101]

However, some important details of this new regime were still unclear. Their articulation was left to the Spanish Government, which subsequently enacted Ministerial Order IET/1045/2014 of 16 June 2014, approving remuneration parameters for type installations applicable to certain installations for the production of electric energy from renewable energy resources, cogeneration, and waste. With this Order, the elimination of the difference between the Ordinary and the Special regime becomes definitive, thus resulting in plants being subject to equal conditions. Ministerial Order IET/1045/2014 essentially confirms the remuneration scheme set forth by RD 413/2014 and sets the remunerative

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[96] See Real Decreto 413/2014, de 6 de junio, por el que se regula la actividad de producción de energía eléctrica a partir de fuentes de energía renovables, cogeneración y residuos, preamble.
[97] *Ibidem*, Article 11, para. 2.
[98] See ICSID, *Masdar Solar & Wind Cooperatief U.A.* v. *The Kingdom of Spain*, note 89, para. 135.
[99] See ICSID, *Stadtwerke München GmbH, RWE Innogy GmbH and Others v. The Kingdom of Spain*, note 51, para. 94.
[100] See Real Decreto 413/2014, note 96, Art. 16, para. 1.
[101] *Ibidem,* Art. 17, para. 1.

parameters applicable to the facilities of production of electric energy from renewable sources.

1.4 Italy: a glance at Italy's regulatory framework from LD 387/2003 up to the Italian Constitutional Court's ruling, n. 16/2017, on the judgment of constitutional legitimacy of the Spalma Incentivi Decree.

European Union Directive 2001/77/CE set Italy's national indicative target for the contribution of electricity produced from renewable energy sources at 25% to gross energy consumption to be reached by 2010.[102] To implement this Directive, and therefore to introduce measures that would allow the State to meet the established national target, Italy enacted Legislative Decree 387/2003 of 29 December (LD 387/2003). This Decree aims to promote the development of energy produced from renewable energy resources in the national and European markets, as a first step towards the adoption of a European legal framework regulating energy production from environmentally-friendly sources.[103] Article 7 directly addresses solar panels and states that the Italian government, more specifically the Minister for Production Activities and the Minister for the Environment, shall issue subsequent decrees defining the criteria for which facilities are entitled to receive incentives for the generation of electricity from solar energy; the following paragraph lists the elements that the Ministers shall take into account for the definition of this criteria. Among them, the most relevant for the purposes of this research is the one outlined in letter *d*, which provides that the criteria must establish procedures for determining the extent of promotion measures. The incentivization of energy production shall happen through FITs of decreasing amount and duration while ensuring that it remains sufficient to fairly compensate for both the initial investment and ongoing operating costs associated with solar energy production:

> "I criteri di cui al comma 1, senza oneri per il bilancio dello Stato e nel rispetto della normativa comunitaria vigente:
> […]

[102] See Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 note 7, Annex.
[103] See Decreto Legislativo del 29 dicembre 2003, n.387, attuazione della direttiva 2001/77/CE relativa alla promozione dell'energia elettrica prodotta da fonti energetiche rinnovabili nel mercato interno dell'elettricità, Art. 1.

> *d)* stabiliscono le modalità per la determinazione dell'entità dell'incentivazione. Per l'elettricità prodotta mediante conversione fotovoltaica della fonte solare prevedono una specifica tariffa incentivante, di importo decrescente e di durata tali da garantire una equa remunerazione dei costi di investimento e di esercizio; […]"[104]

However, when delineating the factors to be taken into account for establishing the criteria, LD 387/2003 states that the costs of these incentives must not be borne by the State.[105] In practice, however, these costs were passed on to consumers through their electricity bills. This pattern persists in subsequent decrees as well.[106] Apart from the remuneration scheme based on FITs, LD 387/2003 also introduces another regime, which takes the name of the "off-take regime" [107]; this alternative regime provides that electricity produced by renewable energy plants that have power less than 10 MVA, if requested by the owner, could be purchased directly by the GSE[108], instead of selling that directly into the market.[109] This regulation additionally offers the opportunity for energy generated by facilities utilizing renewable energy sources to obtain a "guarantee of origin", certifying that the energy originates from renewable sources.[110]

The criteria for the incentive system established in Art. 7 of LD 387/2003 were implemented by the so-called *Conto Energia*. *Conto Energia* decrees are a set of five Ministerial Decrees that were enacted by the Italian government from 2005 to 2012. In 2005 and 2006, Italy implemented two Ministerial Decrees, with the latter, the Ministerial Decree of 6 February 2006, slightly modifying and specifying some aspects of the former, that is Ministerial Decree of 28 July 2005; the two decrees together constitute the first *Conto Energia*.[111] The most relevant modifications concern the increase of some key values, such as the national cumulative nominal

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[104] *Ivi,* Art. 7, para. 2.
[105] *Ibidem,* Art. 7.
[106] See Final Award in the case *CEF Energia BV* v. *Italian Republic*, 16 January 2019, SCC Case No. 158/2015, para. 111.
[107] See S. Faccio, *The assessment of the FET standard between legitimate expectations and economic impact in the Italian solar energy investment case law*, 2020, QIL, page 7.
[108] "Gestore dei Servizi Energetici" is a state-owned company responsible for paying the incentive tariffs to electricity producers under the *Conto Energia* decrees, as defined by SCC, *CEF Energia BV* v. *Italian Republic*, note 106, para. 111.
[109] See Decreto Legislativo del 29 dicembre 2003, n.387, note 103, Art. 13, para. 2-3.
[110] *Ibidem*, Art. 11, para. 1.
[111] See Decreto Ministeriale del 28 luglio 2005 and Decreto Ministeriale del 6 febbraio 2006 are considered to be the first *Conto Energia*.

power target to be installed by 2015, which rose from 300 mW to 1000 mW, and the increase in the maximum limit of cumulative nominal power for all installations eligible for incentives.[112]

This framework delineated the criteria for solar energy installations to be eligible for incentives.[113] This included details on the features of the facilities, the timing, deadlines, and how incentives were given to energy producers. PV installations that had a nominal power between 1kW and 1000kW, therefore relatively small facilities, which became operative after 30 September 2005, were eligible to receive such incentives.[114] Yet, The remuneration scheme in the first *Conto Energia* is ruled in Articles 5 and 6. Article 5 establishes the criteria for calculating incentives for PV facilities with a nominal power equal to or below 20 kW, while Article 6 governs the same for PV installations with a nominal power exceeding 20 kW. In both cases, the incentive consists of a feed-in tariff (paid to the producers per kilowatt-hour of electricity it produced for a period) of twenty years.[115] Tariff rates were to be adjusted every year, starting from January 1st, based on the annual rate of change – referring to the past twelve months – of consumer prices for the families of workers and employees.[116]

The first *Conto Energia* establishes the requirements that PV plants' owners must fulfill to be eligible for the incentives. Firstly, they must submit a request to the implementing body for the construction of the installation and the consequent eligibility for the incentive tariff within the deadlines established by paragraph 1 of Article 7, along with the preliminary project proposals for the plant, asking therefore for previous authorization. After verifying that the plant fulfilled the requirements, the implementing body, within ninety days after the request was submitted, will communicate the outcome; if the response is positive, the plant shall be constructed and operative within twenty-four months.[117] This last-mentioned step will be modified by the subsequent *Conto Energia*, since this is the only

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[112] See Decreto Ministeriale del 6 febbraio 2006, criteri per l'incentivazione della produzione di energia elettrica mediante conversione fotovoltaica della fonte solare, Art. 1-2.
[113] See Decreto Ministeriale del 28 luglio 2005, criteri per l'incentivazione della produzione di energia elettrica mediante conversione fotovoltaica della fonte solare, Art. 1.
[114] *Ibidem,* Art. 4, para. 1-2.
[115] *Ibidem,* Artt. 5-6.
[116] *Ibidem,* Art. 6, para. 6.
[117] *Ibidem,* Art. 7.

Ministerial Decree that provides that the eligibility response to receive incentives be provided before the activation of installations. The Authority for Electric Energy and Gas (AEEG) is in charge of pointing out "the implementing body", in charge of disbursing the investments, which, case, is the GSE.[118] The confirmation of eligibility for incentive tariffs under *Conto Energia* I is provided through a formal letter from the GSE, which specifies the tariff rate agreed upon for a period of twenty years with the owner of the photovoltaic plant. It serves as the basis for a contract between the producer and the GSE. Any changes to the contract require written agreement from both the producer and the GSE.[119]

The following four *Conto Energia* were adopted to update the terms and conditions to keep up with the evolution of the economic context in the country. The second *Conto Energia*, enacted with Ministerial Decree of 19 February 2007, was introduced to simplify the procedures for accessing investments, even though it did not significantly change the regime set in the first *Conto Energia*.[120] The amount of the FITs is slightly reduced and it is provided that the tariff rate would be lowered every year based on the date the installation became operative, but the guarantee of disbursement of the tariff always remains at twenty years, with the prospect of revising the incentives for PV installations that became operative after 2010.[121] The plants eligible for the incentives provided under the second *Conto Energia* are those with nominal power equal to or above 1kW that did not benefit from the FITs provided in the first *Conto Energia*; therefore, the 2007 Ministerial Decree maintained the lower limit, omitting, however, the upper 1000 kW limit.[122]

The purpose of the second *Conto Energia* is to accelerate the overall process by eliminating the preliminary authorization phase that was indeed present in the 2005 Ministerial decree. Indeed, the investor must submit to the GSE the preliminary project of the implant and, in the same request, shall demand the connection to the grid. The main difference with the first *Conto Energia* is that this Ministerial Decree

[118] *Ivi,* Art. 9, para. 2.
[119] See SCC, *CEF Energia BV* v. *Italian Republic*, note 106, para. 115-116.
[120] See Decreto Ministeriale del 19 febbraio del 2007, criteri e modalità per incentivare la produzione di energia elettrica mediante conversione fotovoltaica della fonte solare, in attuazione dell'articolo 7 del decreto legislativo 29 dicembre 2003, n. 387, preamble.
[121] *Ibidem,* Art. 6.
[122] *Ibidem,* Art. 4, para. 2.

provides the authorization for incentive tariffs to be accorded only after the plant becomes operative.[123] Art. 16 provides that the entry into force of the Ministerial Decree of 19 February 2007 does not prejudge the dispositions contained in the first *Conto Energia,* which will continue to apply to those PV facilities that, by 2006, already acquired the right to these incentives.[124]

In 2010, the third *Conto Energia* was enacted, adopted with the Ministerial Decree of 6 August 2010. applies to photovoltaic facilities that commence operation after 31 December 2010 with nominal power equal to or greater than 1 kW.[125] As in the second *Conto Energia*, the upper limit was omitted. It can be observed that incentive rates have undergone gradual changes tending towards reduction from the third *Conto Energia*.[126] Essentially, the reduction of the tariff is justified by the evolution of the photovoltaic technology, which had the effect of reducing the costs of the components and those of the photovoltaic systems. The FIT rates have decreased because lower incentives are now sufficient to ensure investors a reasonable return.[127] Art. 8 establishes the amount of the tariff rates, which is reduced according to the date in which the installation becomes operational; furthermore, it provides that the incentive rate for plants that become operative after 2012 and 2013 will be reduced by 6% each year. Still, this Ministerial Decree grants that the tariffs will be disbursed for a period of twenty years.[128] Another novelty included in the third *Conto Energia* concerns the procedures the investor has to follow to be entitled to the tariff. In reality, it skips all the initial procedures and authorization requests: the relevant article immediately states that the investor must submit a request for incentives to the GSE within ninety days of the plant becoming operational. Subsequently, the implementing body has one hundred and twenty days to respond both on the eligibility of the facility to the incentive and, if the answer is positive, on the amount.[129]

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[123] *Ivi,* Art. 5, para. 1, 5.
[124] *Ibidem,* Art. 16, para. 1.
[125] See Decreto Ministeriale del 6 agosto 2010, incentivazione della produzione di energia elettrica mediante conversione fotovoltaica della fonte solare, Art. 7, para. 2.
[126] *Ibidem,* Art. 7, para. 2.
[127] See final Award in the case *Sun Reserve Luxco Holdings SRL* v. *Italy*, 25 March 2020, SCC Case No. 132/2016, para. 41.
[128] See Decreto Ministeriale del 6 agosto 2010, note 125, Art. 8, para. 2, 4.
[129] *Ibidem,* Art. 4, par. 1, 2.

In the meanwhile, the European Directive 2009/28/CE was adopted. It establishes the national indicative target for the contribution of electricity produced from renewable energy sources at 17% to gross energy consumption to be reached by 2020.[130] This directive was implemented by the Legislative Decree of 3 March 2001, n. 28, also known as the *Romani Decree*. The purpose of this measure is firstly, to continue providing investors with equitable compensation to cover their investment and operating expenses, thereby maintaining their confidence through a stable rate of incentives over a fixed period equivalent to the average lifespan of a facility, as provided by Article 24;[131] secondly, to adapt tariffs to reflect cost reductions in photovoltaic technology and lower electricity costs for consumers.[132] This last principle, together with the principles of efficiency, stability, simplification, and reduction of burden on consumers, is reflected in Art. 23 of the *Romani Decree*, on the general principles regulating the remuneration schemes.[133] This legislation adds additional criteria for some types of PV plants to qualify for incentives, increasing the challenge for these facilities to meet the criteria set out in the *Romani Decree* for remuneration. For example, it states that solar plants constructed on agricultural land would qualify for feed-in tariffs only if the plant's capacity was less than 1 MW and if it occupied less than 10% of the surface on which it was installed.[134]

The most relevant dispositions of this decree are Article 24, which has been already mentioned, and Article 25. In order for PV facilities to receive incentives outlined in this measure, investors need to enter into private law contracts with GSE. The remuneration scheme provided under Article 24 applies to PV plants that became operative after 31 December 2012.[135] Article 25, on the other hand, alters certain elements of the prior *Conto Energia*. For example, it restricts the eligibility of the third *Conto Energia* to PV plants that began operation before 31 May 2011,

[130] See Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 note 16, Annex I, Table A.
[131] See Decreto Legislativo del 3 Marzo 2011, n.28, attuazione della direttiva 2009/28/CE sulla promozione dell'uso dell'energia da fonti rinnovabili, recante modifica e successiva abrogazione delle direttive 2001/77/CE e 2003/30/CE, Art. 24, para. 1.
[132] See SCC, *CEF Energia BV* v. *Italian Republic*, note 106, para. 130.
[133] See Decreto Legislativo del 3 Marzo 2011, n.28, note 131, para 1-2.
[134] *Ibidem*, Art. 10, para 4.
[135] *Ibidem,* Art. 24, para. 1, 2 (d).

deviating from the initial timeline of 31 December 2013.[136] Furthermore, these two articles assigned the Ministry of Economic Development and the Ministry for Environment and Sea Protection with the responsibility of establishing the incentive framework for renewable energy investments and outlining the procedures for tariff revisions through subsequent special decrees.[137] It is under this last provision that the last two *Conti Energia* were adopted.

The *Romani Decree*, namely because of the provision that changed the temporal scope of the third *Conto Energia*, has had disadvantageous effects on some investors, who were unable to obtain benefits under the aforementioned Ministerial Decree.[138]

On 5 May 2011, the fourth *Conto Energia* was adopted by the Ministry for Economic Development pursuant to Articles 24, paragraph 5, and Article 25, paragraph 10. The preamble of this Ministerial Decree envisions the achievement of the so-called "grid parity"[139] in the short to medium term. This Decree applies to PV facilities that become operative between 31 May 2011 and 31 December 2016.[140] Therefore, it is noticeable that the fourth *Conto Energia* concerns those plants that had been excluded from the incentives outlined in the third *Conto Energia*, as amended by Article 25, paragraph 9 of the *Romani Decree.* Furthermore, the incentive structure is now linked to an annual cumulative threshold. It is specified that the installed capacity target now aligns with an annual indicative cumulative incentive cost ranging from EUR 6 to 7 billion.[141] This represents a novel aspect absent in prior decrees. In the case in which the lower threshold of EUR 6 billion was reached, the Decree allows the Ministry for Economic Development to revise the tariffs.[142] Likewise, the fourth *Conto Energia* stipulates that the incentive tariff must be disbursed for a duration of twenty years

[136] *Ivi*, Art. 25, para. 9.
[137] *Ibidem*, Art. 24, para 5, and Art. 25, para. 10.
[138] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 153.
[139] As stated in para. 154 of the final Award in the case *Sun Reserve Luxco Holdings SRL* v. *Italy*, "grid parity" means "a situation where generation of power trough photovoltaic plants would be at an equal or lower cost than the price of purchasing power from the electricity grid".
[140] See Decreto Ministeriale del 5 maggio 2011, incentivazione della produzione di energia elettrica da impianti solari fotovoltaici, Art. 1, para. 2.
[141] *Ibidem,* Art. 1, para. 2.
[142] *Ibidem,* Art. 2, para. 3.

and that it shall be constant, starting from the date on which the plant is connected to the grid.[143]

The fifth and final *Conto Energia* was implemented on July 5th of the subsequent year. This decision came as Italy approached the expenditure limit of EUR 6 billion set by the fourth *Conto Energia* at the beginning of 2012. As outlined in the latest Ministerial Decree, Italy essentially had the authority to adjust incentive tariffs.[144] The reason of the attainment of the lower limit was due to the fact that technological progress and scale economies have made solar panel facilities cheaper. This has led to more plants being set up, but it has also meant more costs for the government.[145] The competent authorities tried to solve the problem by including a provision stipulating that the fifth *Conto Energia* would no longer be applicable 30 days after the AEEG resolves that the yearly cumulative cost threshold of EUR 6.7 billion has been reached.[146] This implies that the upper threshold set at EUR 7 billion outlined in the fourth *Conto Energia* is lowered by EUR 300 million. The aforementioned resolution was adopted on 6 June 2013.[147]

This new regime provides two different incentive schemes based on the capacity of the PV facilities; these tariffs are granted for 20 years.[148] The first one is the "all-inclusive tariff", which applies to plants with a nominal power of up to 1 MW.[149] This tariff is composed of the value of the incentive and the price of electricity.[150] The second incentive tariff applies to plants whose nominal power exceeds 1MW, and it amounts to the difference, if positive, between the all-inclusive tariff and the income earned from selling energy into the market. Additionally, all types of plants are entitled to a bonus tariff for energy consumed on-site.[151] This decree additionally mandates that owners of PV facilities, who are receiving tariffs outlined in any of the five Conto Energia decrees, must pay a fee determined by the

[143] *Ivi,* Art. 12, para. 2.
[144] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 159.
[145] See Decreto Ministeriale del 5 luglio 2012, Attuazione dell'art. 25 del decreto legislativo 3 marzo 2011, n. 28, recante incentivazione della produzione di energia elettrica da impianti solari fotovoltaici, preamble.
[146] *Ibidem*, Art. 1, para. 5.
[147] See ICSID, *Silver Ridge Power BV* v. *Italian Republic*, note 10, para. 135.
[148] See Decreto Ministeriale del 5 luglio 2012, note 145, Art. 5, para. 4.
[149]*Ibidem*, Art. 5, para. 1.
[150] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 162.
[151] See Decreto Ministeriale del 5 luglio 2012, note 145, Art. 5, para. 1.

quantity of incentivized energy generated.[152] Similarly to the previous *Conto Energia* decrees, in order to benefit from the tariffs provided under this last Ministerial Decree, PV installation owners must enter into private contracts with the GSE, but whereas beforehand mutual agreements were required to change the terms of the contracts, now GSE is allowed to unilaterally modify them.[153]

In 2013, Law-Decree 145/2013, also known as *Destinazione Italia*, was adopted to attract foreign investments to help the economic recovery of the country, making local businesses more competitive.[154] It sets out ten priority measures that the Government plans to adopt to meet the aforementioned general objective. The measure affecting the electricity sector attempts to reduce the burden on electricity bills for over than EUR 500 billion, among everything, by revising the incentive tariffs.[155] It gives the possibility to renewable energy producers who benefit from green certificates, all-inclusive tariffs, or premium tariffs for their plants to choose for alternative option between either maintaining the tariff benefits for the agreed-upon twenty-year period, forfeiting any additional benefits thereafter or agreeing to reduce the percentage of the tariffs outlined in all *Conto Energia* decrees to extend the duration of the incentive period by seven years.[156]

The pivotal moment in the Italian Renewable Energy Saga is marked by the enactment of the Law-Decree on June 24th, 2014. Known as *Spalma Incentivi*, this legal measure faced significant opposition from many investors, leading to challenges in arbitral tribunals. Within this decree, Article 26 stands out, particularly regarding the remodulation of the incentive tariff regime and disbursement modalities for PV plants with a nominal power exceeding 200 kW, starting from 1 January 2015.[157] Even though the facilities affected by this Article only represent 4 percent of all beneficiaries under the *Conto Energia* decrees, they

[152] *Ivi,* Art. 10, para. 4.
[153] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 163.
[154] Piano "*Destinazione Italia*", 12 dicembre 2013, page 4.
[155] *Ibidem,* page 11.
[156] Decreto-Legge del 23 dicembre 2013, n. 145, Interventi urgenti di avvio del piano "Destinazione Italia", per il contenimento delle tariffe elettriche e del gas, per la riduzione dei premi RC-auto, per l'internazionalizzazione, lo sviluppo e la digitalizzazione delle imprese, nonché misure per la realizzazione di opere pubbliche ed EXPO 2015, Art. 1, para. 3.
[157] Decreto-Legge del 24 giugno 2014, n.91, Disposizioni urgenti per il settore agricolo, la tutela ambientale e l'efficientamento energetico dell'edilizia scolastica e universitaria, il rilancio e lo sviluppo delle imprese, il contenimento dei costi gravanti sulle tariffe elettriche, nonché per la definizione immediata di adempimenti derivanti dalla normativa europea, Art. 26, para. 1.

actually receive 60 percent of the total incentive expenditure.[158] The *Spalma Incentivi* Decree was adopted to overcome the rising costs of the framework established by the previous measures, which was weighting entirely on Italian consumers, and tried to ensure a fairer allocation of the tariff among different categories of energy users.[159] The remodulation would be achieved by the introduction of an obligation for PV facilities' owners to choose among three options, that investors shall communicate to GSE by 30 November 2014. The first option provides for the disbursement of progressively reduced tariffs spread out over a period of twenty-four years starting from the activation of the plant, as opposed to the original twenty-year period. The second one maintains unaltered the twenty-year period throughout which the tariffs are disbursed, but it divides the disbursement into two phases: initially, a lower incentive tariff is disbursed, followed by a second phase where the incentive tariffs are equally increased. Likewise, the third choice also kept the initial 20-year incentive period intact but introduced a gradual reduction in incentive tariffs for the remaining period, from 6 to 8 percent, proportionally to the capacity of a photovoltaic plant. If investors do not communicate their choice within the established deadline, the third option is applied by default.[160] As far as concerns facilities benefitting from the "all-inclusive tariff" under the fifth *Conto Energia*, the reduction would only apply to the incentive component.[161] However, PV plant owners may access bank loans or other compensatory measures to mitigate the economic impact of the reduction:[162]

> "The recipients of the incentive tariffs mentioned in paragraphs 3 and 4 may access to bank loans amounting up to the difference between the expected incentive tariff as of 31 December 2014 and the remodulated incentive tariff pursuant to paragraphs 3 and 4. Such loans can benefit, cumulatively or alternatively, on the basis of agreements with the banking system, of funding or guarantees by *Cassa depositi e prestiti S.p.A* . . ."[163]

[158] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 258, 261.
[159] See Biggs, note 37, page 8.
[160] Decreto-Legge del 24 giugno 2014, n.91, note 157, Art. 26, para. 3.
[161] *Ibidem,* Art. 26, para. 4.
[162] *Ibidem,* Art. 26, para. 5.
[163] Art. 26, para. 5, as translated in SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 264.

The *Spalma Incentivi* Decree also modifies the method of payment of incentive tariffs, providing that, starting from the second semester of 2014, the tariff would be disbursed in constant monthly installments amounting to 90 percent of the plant's estimated yearly average production, whereas before it was issued every month, in accordance to the actual energy production of the installation.[164] Additionally, this Law-Decree increases the Administrative Management Fee to be borne by producers to cover the costs incurred by the GSE in carrying out management activities.[165]

According to data provided by the GSE, as of November 30, 2014, 37.29 percent of photovoltaic plant operators opted for the second tariff remodulation option, while only 1.39 percent selected the first option.[166]

The constitutional legitimacy of Article 26, paragraphs 2 and 3, of the *Spalma Incentivi* Decree was challenged before the Italian Constitutional Court by the Regional Administrative Court (TAR) of the Lazio Region, asserting their potential inconsistency with Articles 3[167], and 41[168] of the Italian Constitution. It was claimed that Article 26, paragraphs 3 and 4, were inconsistent with the principle of legitimate reliance, since the measure challenged had the effect of worsening the term-relationship with the GSE and violated the guarantees of stability of the previous incentive schemes. Furthermore, it was stated that the remodulation provided in the *Spalma Incentivi* Decree was unreasonable and discriminatory because it only penalized PV facilities with a nominal capacity over 200kW, making it difficult for these to operate within the scope of its freedom of economic initiative in the market on an equal footing, excluding from this modification other categories

[164] *Ivi,* Art. 26, para. 2.
[165] *Ibidem,* Art. 25,
[166] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 263.
[167] Article 3 of the Italian Constitution states that "all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country."
[168] Article 41 of the Italian Constitution states that "private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes."

of plants with the same nominal power (e.g. facilities installed in schools and public entities) and smaller plants.[169]

The Constitutional Court found the claims groundless. Firstly, the Court explains that it is not inadmissible for the Italian State to modify legislation, even if this modification has the effect of "[unfavorably changing] the regulation of long-term relationships"[170], provided that these changes do not result in an irrational regulation and substantially and arbitrarily modify the situations which existed beforehand. In this case, the actions of the State would result in a breach of the principle of legitimate reliance of the citizen.[171] Secondly, the Court excludes the violation of the principle of legal certainty, based on the rationale of the contested norm. By analyzing it, the Court concludes that it could not possibly have "unreasonably and unforeseeably affected the long-term relations, arising from the agreements reached by the percipients of the incentives with GSE"[172], essentially because this Law-Decree needed to address the problem of the increasing weight of the incentive on the State budget, since it became more expensive. This regulation aimed at adjusting the extent of the incentives also in light of the reduction of the costs of energy production and the considerable technological development of the sector.[173] Also the TAR of the Lazio Region, by looking at the general context in which the regulation was adopted, recognizes that the guarantee that the incentive would be disbursed for twenty years does not imply that the measure providing for such remuneration should remain unchanged, and rejects the claimant's assertion that the changes made by the challenged measure were unpredictable. In fact, the TAR states that the scope of the *Spalma Incentivi* Decree is to assure the stability not only of the remuneration scheme but also of the overall system.[174] The Court's ruling maintains that the imposition of general constraints on the exercise of economic initiative does not contravene the same freedom

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[169] See sentenza della Corte Costituzionale Italiana del 7 dicembre 2016 sul giudizio di legittimità costituzionale in via incidentale, n. 16/2017, para. 2.
[170] *Ibidem,* para. 8.1 as translated in SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 273.
[171] *Ibidem*, para. 8.1.
[172] *Ibidem,* para. 8.2 as translated in See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 273.
[173] *Ibidem*, para 8.2.
[174] *Ibidem,* para. 8.3.

guaranteed by Article 41 of the Italian Constitution, provided such limitations align with the overarching social utility objectives.[175] Likewise, the Court rejects the claim that the measures provided by Article 26, paragraphs 2 and 3, of the *Spalma Incentivi* Decree are discriminatory towards PV facilities with nominal power over 200 kW since these are the types of plants that eventually absorb the greatest amount of incentives, with corresponding greater burden on the system.[176]

In conclusion, the Italian Constitutional Court declares unfounded the question of constitutional legitimacy of Article 26, both paragraphs 2 and 3, of the *Spalma Incentivi* Decree.[177]

1.3 Conclusion.

Analyzing the national frameworks of Spain and Italy provides insight into the progression and necessary measures each State had to take to initially adhere to European directives, followed by addressing the resulting challenges stemming from the implementation of those incentives. This analysis allows a better understanding of the primary reasons behind cases brought before arbitral tribunals by foreign investors.

In both countries, the primary driver for implementing the challenged measures was the substantial strain placed on the state budget by the incentives. Consequently, authorities sought solutions to alleviate this fiscal burden.

Concerning Spain's national legislation on the development of electric energy produced by renewable sources, it is easier to understand how, especially because of the economic and financial crisis of 2008, the regimes previously created were slowly dismantled and the incentives were modified in a way that resulted detrimental for foreign investors. The motive behind the decision of the Spanish government to gradually modify the incentive scheme, until the Special regime was dismantled, was driven by the need to address the problem of the tariff deficit.

In the case of Italy, whereas the 2008 crisis was not explicitly mentioned even in the preambles of the analyzed legislative measures, it is safe to say that it had significant weight on the decision to adopt the legislative measures that have been

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[175] *Ivi*, para 11.
[176] *Ibidem,* para. 10.
[177] *Ibidem,* decision of the Italian Constitutional Court, para. 1, 2.

considered economically detrimental by the investors. With these measures, Italy wanted to relaunch the national economy, by making enterprises more competitive and by reducing State’s expenditure.

Chapter 2.

The Fair and Equitable Treatment standard in some relevant cases of the Renewable Energy Saga: the Arbitral Tribunals' positions.

TABLE OF CONTENTS: 2.1 Premises. 2.2 Cases in which the Tribunals found that the FET standard was breached. 2.3 Cases in which the Tribunals have rejected allegations that States violated the FET standard. 2.4 Analysis. 2.4.1 The application of the FET standard by Arbitral Tribunals. 2.4.2 The investor's legitimate expectations: an analysis of the concept of diligent investor. 2.4.3 An analysis of the concept of due diligence. 2.4.4 The relation between the investors' expectations of regulatory stability and the States' power to regulate. 2.5 Conclusion.

2.1 Premises.

Studying the comprehensive measures undertaken by Spain and Italy over a decade, as discussed in the previous chapter, allows a better understanding of the Arbitral Awards outlined in this chapter. Both Spain and Italy implemented regulatory adjustments beginning in 2009. While purportedly grounded in legitimate public objectives — namely, Spain's aim to diminish tariff deficits and Italy's objective to reduce costs related to this sector — these changes engendered a climate of regulatory uncertainty from the perspective of investors.[178] As a result, numerous investors have filed lawsuits against the two states in front of Arbitral Tribunals, alleging a breach of the obligations outlined in the ECT, whose primary objective was to promote long-term cooperation in the energy sector between the Contracting Parties.[179]

This series of cases takes the name of the 'Renewable Energy Saga', notable for the fact that, despite the challenged measures being the same and the investors bringing essentially identical claims, the conclusions reached by the Tribunals were inconsistent. For Spain, in the majority of cases, the challenged measures are those that altered the remuneration scheme provided in RD 661/2007 on which the alleged legitimate expectations of the investors were based, specifically the measures adopted from RD 1565/2010. On the contrary, the Italian measures

[178] See Faccio, note 107, pages 7-8.
[179] See final Award in the case *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À.R.I. v. The Kingdom of Spain*, 4 May 2017, ICSID Case No. ARB/13/36, para. 378.

challenged by the Claimants were those adopted from LD 28/2011, the *Romani* Decree. Specifically, the majority of claims concern the *Spalma Incentivi* Decree.[180]

In this regard, this chapter will focus on the claim that the late measures adopted by the States constitute a breach of the FET standard under Article 10, paragraph 1, of the ECT, which provides that:

> "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"[181]

The investors essentially claimed that the two States breached the fair and equitable treatment standard in two ways: first, by failing to create stable, equitable, favorable, and transparent conditions in the energy sector; and second, by frustrating their legitimate expectations.[182]

This chapter will focus on analyzing fourteen Awards of this Saga, consisting of nine against Spain and five against Italy. Firstly, these awards will be categorized into two main groups: those in which the Tribunals identified a breach of the FET standard and those in which no violation occurred. Next, an examination of the most controversial aspects of these decisions will be conducted, focusing firstly on the interpretation of the standard provided in Article 10, paragraph 1, of the ECT, by the Arbitral Tribunals; then, we move on to the debate on how investors' legitimate expectations can emerge and the element of 'due diligence', reserving particular attention to the approaches employed by the Tribunals to assess whether the Claimants had legitimate expectations that deserve protection under the relevant

[180] See Faccio, note 107, page 8.
[181] See *Energy Charter Treaty,* Art. 10, para. 1.
[182] See F. Dias Simões, *Blusun S.A. and others v Italy*: *Legal (in)stability and renewable energy investments*. RECIEL, 2017, 298–304, page 299.

Article of the ECT; the last point to be analyzed is the relation between the undisputed sovereign right of states to regulate and their obligation to safeguard investors' legitimate expectations of regulatory stability, focusing on the approaches used by the Tribunals to draw the line in the context of the balancing exercise.

2.2 Cases in which the Tribunals found that the FET standard was breached.

This paragraph will analyze the positions taken by the arbitral tribunals in several cases within the Renewable Energy Saga, wherein the tribunal concluded that the measures implemented by the two States constitute a breach of the FET standard outlined in Article 10, paragraph 1, of the ECT.

a) Spain

The first award to be examined is the case of *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À.R.I. v. the Kingdom of Spain* (here *Eiser*). The Arbitral Tribunal maintains that the State's power to regulate is an undisputed sovereign right, adding that the obligation to afford investors fair and equitable treatment does not inherently imply a right to regulatory stability.[183] Alternatively, the responsibility to ensure foreign investors receive fair and just treatment encompasses protecting them against fundamental changes in the regulatory framework that fail to consider the circumstances of investments made under the previous regime.[184] Acknowledging this, the question of the Tribunal is "to what extent treaty protections, and […] the obligation to accord investors fair and equitable treatment under the ECT, may be engaged and give rise to a right to compensation as a result of the exercise of a State's acknowledged right to regulate"[185]?

The Tribunal then turns on the interpretation of Article 10, paragraph 1, of the ECT following the rules of interpretation outlined in Article 31 of the Vienna Convention on the Law of the Treaties (here VCLT). Considering the context and purpose of the Treaty, the Tribunal determines that the initial sentence of Article 10,

[183] See ICSID, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À.R.I. v. The Kingdom of Spain*, note 179, para. 362.
[184] *Ibidem,* para. 363.
[185] *Ibidem*, para. 362.

paragraph 1, highlights the significance of legal system stability in influencing investments.[186] However, this does not imply that the regime should remain unchanged. Rather, failure to provide investors with fair and equitable treatment occurs when modifications to the regulatory framework significantly alter it, resulting in adverse effects on investments:

> "The Tribunal concludes that Article 10(1)'s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This does not mean that regulatory regimes cannot evolve. […] However, the Article 10(1) obligation to accord fair and equitable treatment means that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value."[187]

The tribunal affirms that the evidence demonstrates that the new, untested regulatory framework outlined in RD 9/2013 had detrimental effects on the claimants' investments, substantially depriving them of all their value.[188] As a matter of fact, it is reported that the Specific Regime drastically cut revenues of one of the disputed plants by 66%, ignoring the real returns.[189] This is because the new regulatory approach, which determined a reduced 'reasonable return' by considering what a hypothetical efficient plant would earn, failed to acknowledge that the higher initial construction and financing costs incurred by the Claimants' facilities in order to achieve greater production inevitably led to a diminished return on their investment."[190]. The Tribunal recognizes that such modifications in the regulatory framework introduced by Spain question the fairness and equity of change to the new Regime.[191] The new regime fails to ensure investors a 'reasonable return', as compensation is no longer tied to the amount of electricity generated, but rather to the generating capacity of PV plants and regulatory estimates of hypothetical capital operating costs, disregarding actual costs and the actual

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[186] *Ivi,* para. 380.
[187] *Ibidem*, para. 382.
[188] *Ibidem,* para. 365.
[189] *Ibidem,* para. 389.
[190] *Ibidem,* para. 393.
[191] *Ibidem,* para. 395.

characteristics of the facilities.[192] Spain implemented a retroactive uniform approach to pre-existing facilities, which had been initially planned, funded, and built under the regulatory framework outlined in the Special Regime provided in RD 661/2007.[193] The Tribunal therefore concludes that Spain's repeal of RD 661/2007, and its decision to apply an entirely new method to reduce the remuneration for Claimants' existing plants, results in a breach of the FET standard because the principle of regulatory stability was violated.[194]

In 2018, the final Award in the case *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR* v. *The Kingdom of Spain* (here *Novenergia*) was rendered by the Arbitral Tribunal. Similarly, in this case, the breach of Article 10, paragraph 1, of the ECT was determined by the violation of the principle of regulatory stability. To ascertain this violation, the Tribunal firstly rules on the content of the FET standard contained in Article 10 of the ECT. The tribunal states that the "obligation of the State to encourage and create stable […] and transparent conditions for Investors of other Contracting Parties […]"[195] does not represent a stand-alone obligation for the State, indeed, it illustrates the obligation of the State to protect the legitimate expectations of the investors;[196] this entails that the Tribunal will assess the stability and transparency obligation as part of the FET standard.[197]

The Tribunal then proceeds to determine the scope and applicability of the FET standard, stating that its primary element is constituted by the legitimate expectations of the Claimant.[198] According to the Tribunal, such expectations can arise from the State's legal framework, plus any general undertakings and assurances made by the host State, and "the expectation that the regulatory framework will be stable can arise from, or be strengthened by, state conduct or statements".[199] To ascertain whether the FET standard was violated, it is necessary

[192] *Ivi,* para. 398.
[193] *Ibidem,* para. 400.
[194] *Ibidem,* para. 418.
[195] See note 181.
[196] See the final award in the case *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, 15 February 2018, SCC Arbitration 063/2015, para. 643.
[197] *Ibidem,* para. 646.
[198] *Ibidem,* para. 648.
[199] *Ibidem*, para. 650, 651.

to assess whether the State's actions have created legitimate expectations regarding the stability of the regulations introduced via RD 661/2007.[200] Firstly, the Tribunal states that the FET standard does not automatically provide a right to regulatory stability, rather, it protects "investors from a radical or fundamental change to legislation or other relevant assurances by a state that do not adequately consider the interests of existing investments already made on the basis of such legislation"[201], and that these modifications to the regulatory regime must remain within the bounds of legislative and regulatory conduct to avoid breaching the FET standard.[202] Secondly, the Tribunal establishes that the key date for evaluating whether the investor held legitimate and reasonable expectations is the day the investor decided to invest, identifying 13 September 2007 as the relevant date.[203] This is because, in this particular case, it is challenging to determine the exact date on which the investment was made.[204] Subsequently, the Tribunal reports a series of relevant statements made by Spain concerning the Special Regime that were made to attract investments and it states that such claims formed part of the basis for the Claimant's investment.[205] The Tribunal therefore finds that the Claimant had legitimate expectations that the regulatory framework established by RD 661/2007 would remain unaltered.[206]

After this analysis, the Tribunal has to determine whether or not the regulatory changes introduced after 2009 constitute a breach of the FET standard contained in Article 10, paragraph 1, of ECT. The Tribunal recognizes Spain's authority to modify the legal framework and acknowledges that the motive behind the challenged measures, addressing the tariff deficit, is legitimate. It states that the majority of the measures adopted by Spain do not fall outside of the acceptable range of legislative and regulatory behavior, except for RDL 9/2013 and the subsequent measures.[207] In this instance, the Tribunal deviates from the approach seen in the *Eiser* case, where the ruling solely considered the investment's loss in

[200] *Ivi,* para. 652.
[201] *Ibidem,* para. 654.
[202] *Ibidem,* para 655.
[203] *Ibidem,* para. 539.
[204] *Ibidem,* para. 538.
[205] *Ibidem,* para. 666, 667, 669.
[206] *Ibidem,* para. 681.
[207] *Ibidem,* para. 668-691.

value, taking now into account also the State's regulatory interests.[208] The assessment of whether the FET standard has been breached implies a balancing exercise between the investor's legitimate expectations and the State's right to regulate.[209] The Arbitral Tribunal concludes that Spain violated the FET standard in Article 10, paragraph 1 of the ECT since the changes brought by RDL 9/2013 were radical and unexpected.[210] In the final Award in the case *Novenergia*, the Tribunal justifies its position:

> "[the measures] fell outside the acceptable range of legislative and regulatory behaviour, […] entirely transformed and altered the legal and business environment under which the investment was decided and made […] and constitute a substantial deprivation of the Claimant's investment"[211]

In 2018, another Arbitral Tribunal rendered its final Award in the case *Masdar Solar & Wind Cooperatief U.A. v. The Kingdom of Spain* (here *Masdar*), in which the Tribunal found that the FET standard in Article 10, paragraph 1, of the ECT was violated because the principle of regulatory stability was frustrated. The Tribunal begins its analysis by underlining that, generally, the purpose of the FET standard is to reassure investors that the legal framework on which investors relied at the time the investment was made will not be subject to unreasonable or unjustified modification and that the same legal framework will not be modified in such a manner contrary to the specific commitments made to the investor.[212] About the first point, the Tribunal recognizes that a State has the power to amend its legislation in response to economic changes. However, this right is not absolute, for instance, when such modifications contravene the specific commitments undertaken by the State.[213] Then, the Tribunal proceeds to describe two schools of thought on which kind of specific commitments can give rise to protected legitimate expectations. The first perspective suggests that these commitments can arise from broad statements within general laws or regulations, while the second argues that such

[208] *Ivi,* para. 693, 694.
[209] *Ibidem,* para. 694.
[210] *Ibidem,* para 695.
[211] *Ibidem,* para 695.
[212] See ICSID, *Masdar Solar & Wind Cooperatief U.A.* v. *The Kingdom of Spain*, note 89, para. 484.
[213] *Ibidem,* para. 485, 486.

commitments cannot arise solely from political or general legislative statements but require additional elements.[214]

When analyzing the first approach, the Tribunal finds that, if this perspective were applied, the investor would need to conduct thorough due diligence, the requirement that was satisfied by the Claimant; therefore, its legitimate expectation that the legal framework would remain unaltered would be reasonable.[215] As a matter of fact, the Claimant believes that Article 44, paragraph 3, of RD 661/2007, stating that future reviews of the regulated tariffs would not affect the FITs "for existing installations commissioned prior to 1 January of the second year following the year in which the revision was implemented"[216], includes a stabilization clause.[217] In this specific legal case, the Tribunal does not endorse any of the two schools of thought. As a matter of fact, it states that, regardless of the approach, the Claimant received specific commitments that the regulatory framework provided by RD 661/2007 would remain unaltered, and that, therefore, its legitimate expectations are reasonable.[218] To reach this conclusion, the tribunal highlights that the procedure by which PV plants need to adhere to receive the benefits provided by RD 661/2007, according to the Tribunal, constitutes a specific, unilateral commitment coming from the State:

> "[…] The State guaranteed the stability of the benefits, if the investors fulfilled a certain number of conditions, both procedural and substantial, during a certain window of time. Specifically, the State undertook that it would offer to investors the possibility to continue to enjoy the existing benefits, provided that within a certain window of time, they did everything necessary to enable them to register in the RAIPRE. This was a very specific unilateral offer from the State, which an investor would be deemed to have accepted, once it had fulfilled the substantial condition of construction of the plant and the formal condition of registration within the prescribed 'window'."[219]

Thus, the Arbitral Tribunal recognizes the potential for specific commitments to arise from general statements found within general legislation as well. This, coupled with the letters from the Spanish government guaranteeing compensation for the

[214] *Ivi,* para. 491, 504.
[215] *Ibidem,* para. 499.
[216] *Ibidem,* para. 501.
[217] *Ibidem,* para. 499.
[218] *Ibidem,* para. 521.
[219] *Ibidem,* para. 512.

entire operational lifespan of the facilities, confirms the existence of legitimate expectations on the part of the Claimants. Consequently, the Tribunal concludes that Spain's subsequent measures violated its obligations under Article 10, paragraph 1 of the ECT.[220]

The next Award that will be analyzed is the final decision in the case *Cube Infrastructure Fund SICAV and others* v. *Kingdom of Spain* (here *Cube*), rendered in February 2019. The Arbitral Tribunal begins by analyzing the applicable legal standard, pointing out that the ECT *per se* does not protect legitimate expectations as such but as part of the FET standard contained in Article 10, paragraph 1. In fact, it states that the concept of legitimate expectations "is familiar in the context of analyses of claims of breaches of FET provisions and it is convenient to use that concept [in this analysis]"[221], but the mere frustration of the investors' legitimate expectations by the State does not imply a breach of the standard.[222] The Tribunal then says that, for legitimate expectations to arise, specific commitments made by the State are not necessary and that these could also arise from general legislation.[223] The Tribunal acknowledges that Article 44, paragraph 3, of RD 661/2007, along with the Government Press Release of the same day, explicitly excluded the retroactive alteration of the regime applicable to existing facilities, but, at the same time, it did not explicitly exclude the possibility of modifying it.[224] The decision of the Arbitral Tribunal differentiates between PV plants and hydro plants since the latter was made later in time when the subsequent measures, which altered the remuneration schemes established by RD 661/2007, had already been enacted.[225] As far as concerns PV plants, the Tribunal finds that Article 44, paragraph 3, of RD 661/2007, created legitimate expectations that the tariffs and premiums would remain unaltered for the first 25 years of the plant's operational lifespan, whereas, concerning hydro investments, the Tribunal found that the investors had legitimate expectations that the regulatory framework would not incur

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[220] *Ivi,* para. 520-522.
[221] See decision on Jurisdiction, Liability and Partial Decision on Quantum in the case *Cube Infrastructure Fund SICAV and others* v. *Kingdom of Spain,* 19 February 2019, ICSID Case No. ARB/15/20*,* para. 386;
[222] *Ibidem,* para. 386-387.
[223] *Ibidem,* para. 388.
[224] *Ibidem,* para. 289.
[225] *Ibidem*, para. 390-391.

fundamental changes retroactively and that the remuneration provided by the same measures would not be reduced so that the investor could still receive a reasonable rate of return.[226] In assessing whether the investor has conducted proper due diligence, the Arbitral Tribunal asked itself whether, in the absence of specific legal advice ascertaining the stability of the Special Regime, the investor could have legitimate expectations that the regulatory regime could not be changed retroactively.[227] In doing this, it underlines the existence of the State's right to regulate, the undeniable right to alter or modify its legislation unless it was provided otherwise.[228] Nonetheless, it was found that Spain "indicated in RD 661/2007 that it was committing itself, in certain limited respects and for a certain limited time, not to exercise its undoubted power to amend the law"[229], therefore justifying the legitimate expectations of stability of the Claimant.[230] This was because the text of this RD was found to be itself clear and specific and such representations were emphasized by the restatements in the Government Press Release; additionally, Spain failed to prove that any other different legal analysis was possible.[231] The reasonability of the legitimate expectations lies in the specificity of Article 44, paragraph 3, of RD 661/2007, setting out limitations, and qualifications and providing for the regular revision of the regime.[232]

Subsequently, the Tribunal underlines that the stability of the legal regime does not amount to its petrification.[233] As a matter of fact, the State can amend its legislation when governmental policies become unsustainable, but these changes should be carried out in the name of public interests and should not negatively affect the basic expectations that investors had at the time the investment was made.[234]

After this previous analysis, the Arbitral Tribunal proceeds to assess whether the measures adopted by Spain after 2009 breached Article 10, paragraph 1, of the ECT. It finds that the modifications introduced with RD 1565/2010, RDL 14/2010,

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[226] *Ivi*, para. 390-391.
[227] *Ibidem,* para. 395.
[228] *Ibidem,* para. 397.
[229] *Ibidem,* para. 400.
[230] *Ibidem,* para 407.
[231] *Ibidem,* para. 401.
[232] *Ibidem,* para. 404.
[233] *Ibidem,* para. 408.
[234] *Ibidem,* para. 409, 413.

and RDL 2/2013 were considered to fall "within the range of adjustments that a reasonable investor must be prepared to accept and accommodate"[235] and did not constitute a fundamental change of the previous regime.[236] According to the Tribunal, the breaking point is marked by the enactment of RDL 9/2013: notably, the transition from a system reliant on "promised" tariffs and premiums to one centered around capped "reasonable returns" represented a significant shift in the economic basis of the relationship between the State and the Claimants.[237] Therefore, the Tribunal concludes that this measure constitutes a breach of the FET standard contained in Article 10 of the ECT, both for PV facilities and hydro investments, even though the legitimate expectations on which the hydro investors relied were less defined and firm.[238]

Another breach of the FET standard provided in Article 10, paragraph 1, of the ECT was identified in the case of *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. The Kingdom of Spain* (here *NextEra*), with the Award rendered in March 2019. Firstly, the Tribunal establishes that Article 10, paragraph 1, of the ECT, is a broad-ranging provision that encompasses several obligations, among them the duty to create 'stable, equitable, favorable and transparent conditions for Investors' and to accord to investments fair and equitable treatment.[239]

The Arbitral Tribunal then addresses the investor's claim that the abovementioned standard was breached because Spain failed to protect the Claimants' legitimate expectations, which constitute an essential part of the standard.[240] It begins by identifying the factors that could form the foundation for the investor's legitimate expectations. It immediately excludes that the regulatory framework itself and the RAPIRE registration requirement could create such

[235] *Ivi,* para. 420.
[236] *Ibidem,* para. 419-424.
[237] *Ibidem,* para. 427.
[238] *Ibidem,* para. 432, 435.
[239] See decision on Jurisdiction, Liability and Quantum principles in the case *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.*V. v. *The Kingdom of Spain*, 12 March 2019, ICSID Case No. ARB/14/11, para. 581.
[240] *Ibidem,* para. 582.

expectations, as the former is subject to legislative changes[241], and the latter is merely an administrative procedure that does not entail any right.[242] However, the Tribunal finds that the several written statements made by the Spanish authorities "constitute the best evidence of Spanish assurances that could be the basis for legitimate expectation"[243] of certainty and security. The Tribunal ultimately asserts that, given the absence of a stabilization clause in RD 661/2007, the key inquiry revolves around whether the Claimants had legitimate expectations that the legal regime would not incur in fundamental changes, thereby avoiding adverse impacts on the investor.[244] It finds that all the elements abovementioned and how RD 1614/2010 was adopted, notably the consultations with the industries and the acceptance of amendments suggested by claimants, is an important element to determine that the Claimants had legitimate expectations that the regime established in 2007 "would not be in a way that would undermine the security and viability of their investment"[245]. The Tribunal concludes that the legitimate expectations of the claimant were fundamentally and radically changed and that these modifications "went beyond anything that might have been reasonably expected by Claimants when they undertook their investment"[246], and, therefore, Spain breached Article 10, paragraph 1, of the ECT.[247]

The last Award concerning Spain, in which the Arbitral Tribunal determined a breach of the FET standard outlined in Article 10, paragraph 1, of the ECT, is the case *9ren Holding S.À.R.L. v. The Kingdom of Spain* (here *9ren*), decision rendered in May 2019. Once more, the breach hinges on the infringement of the principle of regulatory stability. The Tribunal aims to assess whether the actions taken by Spain could give rise to legitimate expectations that the benefits outlined in RD 661/2007 were irrevocable.[248] The Arbitral Tribunal's focus is to determine to which extent

[241] Although the principle of the State's regulatory powers was not explicitly addressed in this section of the Award, the Arbitral Tribunal indirectly delineated the presence and significance of this right held by the State.
[242] See ICSID, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.*V. v. *The Kingdom of Spain*, note 239, paras 584-585.
[243] *Ibidem,* para. 590.
[244] *Ibidem,* para. 591.
[245] *Ibidem,* para. 596.
[246] *Ibidem,* para. 599.
[247] *Ibidem,* para 601.
[248] See final Award in the case *9ren Holding S.À.R.L.* v. *The Kingdom of Spain,* 31 May 2019, ICSID Case No. ARB/15/15, para. 214.

can Spain exercise its regulatory powers without incurring financial consequences under the ECT.[249] It begins by evaluating the State's sovereign right to modify its legal framework, stating that no investor can expect that regulatory frameworks, in general, would remain unaltered "unless very specific commitments have been made towards it or unless the alteration of the legal framework is total"[250]. Therefore, also according to this Arbitral Tribunal, legitimate expectations can only arise from specific commitments, and it acknowledges that such commitment can equally be found in general legislation, as long as this is adopted with the purpose of attracting investments.[251] In fact, quoting the final Award in the case *El Paso Energy Int'l Co. v. Argentine Republic* (2011), the Tribunal states that specific commitments can be of two types: those that target a specific group of persons or those specific regarding their object and purpose.[252] Given that Article 44, paragraph 3 of RD 661/2007 is considered to constitute a specific commitment with regards to a specific objective and purpose, that is to say, to induce foreign investments, it consequently creates legitimate expectations that the benefits provided by the abovementioned measures would remain stable for the whole operational lifetime of the plants.[253]

The Arbitral Tribunal assesses that Spain frustrated the Claimant's legitimate expectations for several reasons. Firstly, Spain clearly stated that Article 44(3) of RD 661/2007 wouldn't apply retroactively, except for adjustments mentioned within the regulation itself. Secondly, their expectation that the tariffs would remain stable was reasonable. Then, when the investor made their investment, they relied on Spain's statements, which ultimately led to the economic losses they incurred.[254] The Tribunal emphasizes that the frustration of the legitimate expectations does not automatically entail that the FET standard was breached, as "[legitimate expectations] based upon a specific representation are only 'a relevant factor' in assessing whether or not the Respondent violated the FET standard in Article 10(1)

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[249] *Ibidem,* para. 243.
[250] *Ibidem,* para. 255.
[251] *Ibidem*, para. 295.
[252] *Ibidem,* para. 294.
[253] *Ibidem,* para. 294-297.
[254] *Ibidem,* para. 307.

of the ECT"[255]. The Tribunal, however, rules that the frustration of the Claimant's legitimate expectations inevitably led to the breach of the FET standard for seven out of eight plants, since the last was not registered until 2011, a year in which the investor could already foresee a modification of the regime established in RD 661/2007.[256] This is because renewable energy projects require large initial investments, which can tie up funds for a long time in contracts like Feed-in Tariffs (FIT), making them financially vulnerable. This system results in an unfair relationship between the State and the investor: when energy prices rise, Spain benefits, and if prices fall, Spain can change the terms, leaving energy companies at a disadvantage.[257]

b) Italy

Transitioning to Italy, the first Award to be analyzed is the 2019 final decision in the case *CEF Energia BV* v. *Italian Republic* (here *CEF Energia*), wherein a breach of the FET standard is identified due to the undermining of the principle of regulatory stability. The Arbitral Tribunal starts by limiting the Claimant's FET claim to the breach of legitimate expectations stemming from the implementation of the *Spalmaincentivi* Decree concerning only one of the three plants owned by the investor.[258] This is because at the time the investment was made, the excluded facilities had not yet met several prerequisites to qualify for incentives when the investment was made. In contrast, the other facility (*Enersol*) had already received the tariff recognition letters and the GSE Agreement at the time the investment was made, thus making it possible to have legitimate expectations.[259] In this regard, to ascertain whether a breach of the FET standard occurred, the Tribunal adopts a two-step approach: firstly, it delineates the origin and scope of legitimate expectations; secondly, it evaluates how Italy's actions frustrated these legitimate expectations.[260]

Starting from the origin and the scope, the Tribunal assesses that the relevant date to determine whether the Claimant had legitimate expectations is 30 Mach

[255] *Ivi,* para. 308.
[256] *Ibidem,* para. 310.
[257] *Ibidem*, para. 311.
[258] See SCC, *CEF Energia BV* v. *Italian Republic*, note 106, para. 190.
[259] *Ibidem,* para. 188- 190.
[260] *Ibidem,* para. 191.

2012. At that time, the plant was already connected to the grid, and seven tariff recognition letters had already been issued.[261] Additionally, the Claimant entered into the seven GSE Agreements, which, however, did not notify of the possibility of unilateral changes that can be brought about by legislation.[262] This feature is remarkable because, at the time, the potential for unilateral changes was already envisaged. Finally, by that time, Italy had already enacted the four *Conto Energia* laws and the *Romani Decree*, which constituted the legal foundation for the incentive schemes.[263] Taking into account the aforementioned four elements, the Tribunal assesses that the Claimant could have had expectations that the incentives would be disbursed "in constant currency, for a twenty year period, and all pursuant to private law contracts […] which could not be amended save by mutual agreement"[264]. Then, the Tribunal proceeds to determine whether the investor indeed had legitimate expectations protected by Article 10, paragraph 1, of the ECT. The Tribunal states that, as of 30 March 2012, the Claimant's expectation was clear regarding the incentives it was to receive and their duration, and the source of this expectation was well-defined.[265] Furthermore, after determining that the Claimant had conducted proper due diligence, it establishes that the legitimate expectations of the investor are reasonable.[266] In conclusion, regarding the first step, the Tribunal establishes that the Claimant's legitimate expectation encompassed receiving these incentives for the promised duration of twenty years.[267]

Then, the Tribunal shall determine if Italy, by enacting the *Spalmaincentivi* Decree, frustrated the Claimant's legitimate expectation of stability of the incentive scheme.[268] To assess this, the Tribunal used the proportionality criteria used in previous Arbitral Tribunals' decisions.[269] The Tribunal uses a 'balancing and weighting' exercise, which consists of finding an equilibrium between the protection of the legitimate expectations of the Claimant and the State's right to

[261] *Ivi,* para. 209-211.
[262] *Ibidem,* para. 214.
[263] *Ibidem*, para. 215.
[264] *Ibidem,* para. 217.
[265] *Ibidem,* para. 222.
[266] *Ibidem,* para. 225.
[267] *Ibidem,* para. 234.
[268] *Ibidem,* para. 235.
[269] *Ibidem*, para. 236.

regulate. It recognizes that Tribunals should respect the dignity of governments, but this respect has limits when considering their international commitments and the specific promises made to investors.[270] The majority of the Tribunal finds that the modification of the incentive with the *Spalmaincentivi* Decree frustrated the Claimant's reasonable and crystallized legitimate expectation that the incentives would remain unaltered for the promised twenty-year period.[271] Therefore it concludes that the three options offered to the investors in the *Spalmaincentivi* Decree, if analyzed in relation to all the aforementioned measures that gave rise to the Claimant's legitimate expectations, constitute a breach of Article 10, paragraph 1 of the ECT, with respect to the Claimant's investment in *Enersol.*[272] This is because regulatory changes should be balanced with the respondent's specific commitments to the investor.[273] In instances of higher level of engagement, actions breaching investor expectations should have less margin of appreciation, even if they seem reasonable.[274]

2.3 Cases in which courts have rejected allegations that States violated the FET standard.

The second set of final decisions by the Tribunals centers on legal cases wherein the Tribunal did not identify a violation of the FET standard outlined in Article 10, paragraph 1, of the ECT.

a) Spain

The first Award to be analyzed is the final decision in the case *Charanne and Construction Investments v. The Kingdom of Spain* (here *Charanne*), rendered in January 2016. The Tribunal determines that the requirement to guarantee fairness and equity, as provided in Article 10, paragraph 1, of the ECT is embedded within the broader duty to create conditions marked by stability, equality, favorability, and transparency.[275] In this case, the Tribunal does not have jurisdiction to determine

[270] *Ivi,* para. 240.
[271] *Ibidem,* para. 247.
[272] *Ibidem,* para. 244.
[273] *Ibidem,* para. 242.
[274] *Ibidem,* para. 243.
[275] See SCC, *Charanne and Construction Investments v. The Kingdom of Spain*, note 64, para. 477.

whether RDL 9/2013 and its implementing measures constitute a breach of the FET standard because the Claimant excluded it from the subject matter.[276] The Arbitral Tribunal's judgment is therefore based only on 2010 norms.[277] Because the jurisdiction of the Tribunal was limited to a few measures, it immediately excludes the possibility that the State violated its duty to provide regulatory stability, since this aspect would require an analysis of all the regulatory changes.[278]

To ascertain further potential breaches of obligations outlined in Article 10, paragraph 1, of the ECT, the Tribunal must evaluate whether RD 661/2007 and RD 1578/2008 generated legitimate expectations on which the investor could rely.[279] The Arbitral Tribunal must assess from where these legitimate expectations, if any, had arisen. Firstly, as in the case *9ren,* it is stated that legitimate expectations can arise both from specific commitments addressed to a particular investor or from rules that are enacted with a specific purpose, that is to induce foreign investments.[280] In this case, however, the Tribunal rules that the 2007 and 2008 measures did not provide any specific commitment towards the Claimant. This is because, even though they were directed to a limited group of investors, "it does not make them to be commitments specifically directed at each investor"[281]. Subsequently, it examines Spain's representations to encourage investments, stating that these factors were insufficient to create legitimate expectations that the tariffs would remain unchanged.[282] Lastly, the Tribunal turns to check whether the relevant legal framework could generate legitimate expectations of stability, concluding that "in the absence of a specific commitment, an investor cannot have a legitimate expectation that existing rules will not be modified"[283]. This is further supported by the principle, as established by the highest Spanish judicial authorities, that national law permitted adjustments to regulations.[284] After assessing the necessity for the investors to conduct detailed due diligence in order to exercise the right of

[276] *Ivi*, para. 481.
[277] *Ibidem,* para. 483.
[278] *Ibidem,* para. 484.
[279] *Ibidem*, para. 486.
[280] *Ibidem,* para. 489.
[281] *Ibidem,* para. 493.
[282] *Ibidem,* para. 495-497.
[283] *Ibidem,* para. 498.
[284] *Ibidem,* para. 504.

legitimate expectations, the Tribunal concludes that the Claimant could not have legitimate expectations that the regulatory framework established would not be subject to modifications.[285]

Nevertheless, the Tribunal still has to ascertain that the FET standard was not violated with the enactment of the 2010 measures. The Tribunal acknowledges that such standard can be violated when a State acts unreasonably, against the public interest, and disproportionately.[286] Based on these criteria, it determines that no breach of the FET standard occurred, and therefore dismisses the claim.[287]

In 2016, the final decision in the case *Isolux Netherlands, BV v. Kingdom of Spain* (here Isolux) was rendered by the Arbitral Tribunal. Here, the Tribunal dismisses the claim that the measures adopted by Spain in 2012 and 2013 constitute a breach of the FET standard provided by Article 10, paragraph 1, of the ECT.[288] It begins by stating that the State's duty to provide investors with stable and transparent conditions for investments made in the territory of that State should not be interpreted as a stand-alone obligation but as a component of the FET standard.[289] In addition, to determine whether such standard of treatment was violated, the Tribunal has to assess whether the investor had legitimate expectations that the remuneration schemes outlined in 2007 and 2008 would remain unaltered. It states that to evaluate the reasonableness of the Claimants' legitimate expectations, the key factors are what a prudent investor must know about the regulatory framework before investing and the specific information available to the investor that gives rise to certain expectations. The investor is not required to conduct extensive due diligence. Therefore, the Tribunal holds that the failure to meet the due diligence requirement is inconsequential if investors were aware of the elements enabling them to anticipate the possibility of unfavorable amendments to the regulatory framework.[290]

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[285] *Ivi,* para. 505, 511.
[286] *Ibidem,* para. 513.
[287] *Ibidem*, para. 541.
[288] See final Award Extracts and Dissenting Opinion in the case *Isolux Netherlands, BV* v. *Kingdom of Spain*, SCC Case V2013/153, unofficial translation, para. 815.
[289] *Ibidem,* para. 764, 766.
[290] *Ibidem,* para. 781.

The Arbitral Tribunal recognizes that legitimate expectations can also arise from general legislation generated by the regulatory framework, but this is not the case, since the Claimant was aware of factors enabling them to foresee regulatory changes.[291] Next, it establishes that 29 October 2012 is the relevant date to determine whether the Claimant had legitimate expectations that the regulatory framework would not be modified.[292] It rules that, at that date, investors could not expect that the relevant legal framework would not be modified for several reasons.[293] Firstly, at that time, the regimes outlined in RD 661/2007 and 1565/2008, had already been amended by the 2010 measures.[294] Secondly, the Spanish Supreme Court has affirmed the indisputable nature of the State's right to regulate through several decisions, thereby validating the amendments.[295] After considering these elements, the Arbitral Tribunal establishes that the investor could not have relied on legitimate expectations at that relevant date:

> "[…] As a result, when the decision to invest was made, the Claimant was perfectly aware of the jurisprudence of the Supreme Court that allowed the government to modify the regulatory framework, guaranteeing the investor a reasonable return on investment."[296]

The Tribunal finds that, in October 2012, all investors could anticipate not only a significant alteration of the Special Regime's content but also the potential elimination of the regime, as long as the principle of reasonable return was ensured.[297] Therefore, in light of all the elements analyzed, the Tribunal dismisses the claim that the challenged measures adopted by Spain constitute a breach of the FET standard under Article 10, paragraph 1, of the ECT.[298]

The third and last Spanish final Award to be analyzed is the decision rendered in December 2019 in the case *Stadtwerke München GmbH, RWE Innogy GmbH and Others* v. *The Kingdom of Spain* (here *Stadtwerke*). In this Award, the Tribunal

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[291] *Ivi,* para. 775, 787.
[292] *Ibidem,* para. 784.
[293] *Ibidem,* para. 785.
[294] *Ibidem,* para. 788.
[295] *Ibidem,* para. 789.
[296] *Ibidem,* para. 796.
[297] *Ibidem,* para. 804.
[298] *Ibidem,* para. 815.

examines each of the five obligations outlined by the Parties as defining the content of the FET standard in the ECT.[299]

As far as concerns the first element, which is the State's obligation to afford the investor a stable regulatory regime, the Tribunal outlines that the first sentence of Article 10, paragraph 1, of the ECT does not establish a stand-alone obligation whose breach can be actionable by investors from the Contracting Party, indeed it falls within the concept of the fair and equitable treatment standard outlined in Article 10(1) of the ECT, specifically concerning the protection of the Claimants' legitimate expectations.[300] It rejects the Claimant's allegation that the actions undertaken by Spain amounted to a "bait and switch"[301] stratagem, since it genuinely believes that Spain's actions were carried out in good faith and with the corrective intention of addressing the undesirable consequences resulting from previous legislation, such as the tariff deficit.[302] This shall have allowed investors to foresee the possibility of future modifications. Combining the abovementioned elements with the recognition of the State's power to regulate, the Tribunal rejects the first argument.[303]

The second argument concerns the obligation not to frustrate the investor's legitimate expectations. To assess whether the Claimant's legitimate expectations of stability of the legal framework were reasonable, the Tribunal analyzes each measure the Claimant asserts to constitute a basis for its expectations. This is because, absent a specific commitment by the State, the Tribunal shall conduct an objective examination of the circumstances surrounding an investment, requiring investors to carry out extensive due diligence:

> "[…] In the absence of a specific commitment contractually assumed by a State to freeze its legislation in favor of an investor, when an investor argues […] that such expectation is rooted, among others, in the host State's legislation, the Tribunal is required to conduct an objective examination of the

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[299] See ICSID, *Stadtwerke München GmbH, RWE Innogy GmbH and Others v. The Kingdom of Spain*, note 51, para. 256.
[300] *Ibidem,* para 195, 257.
[301] *Ibidem*, definition in para. 258, "A classic "bait and switch" is a stratagem, often fraudulent or illegal in nature, whereby a person offers or advertises goods or services at an apparent bargain price with the intention of substituting inferior or more expensive goods and services once a buyer becomes committed".
[302] *Ibidem,* para. 258- 260.
[303] *Ibidem,* para. 262.

> legislation and the facts surrounding the making of the investment to assess whether a prudent and experienced investor could have reasonably formed a legitimate and justifiable expectation of the immutability of such legislation. For such an expectation to be reasonable, it must also arise from a rigorous due diligence process carried out by the investor."[304]

The most relevant measure for the purposes of this analysis is Article 44, paragraph 3, of RD 661/2007, notably the commitment that further tariff revisions would not affect installations registered under RD 661/2007.[305] It establishes that the text of the relevant article is almost identical to the text of its predecessor, that is Article 40, paragraph 3, of RD 436/2004. On the basis of this acknowledgment, the Tribunal recalls the Spanish Supreme Court's judgment of 25 October 2006 with which it rejected the claim that RD 436/2004 created a stabilized regime immune to revision.[306] Since this decision was already a matter of public record at the time the investment was made, the Tribunal states that "a reasonable and prudent investor would have known of this decision, understood its implications for a contemplated investment, and adjusted expectations accordingly"[307]. Subsequently, the Tribunal recalled some core principles of Spanish law to enhance the conclusion that the investor could not expect the stability of the legal framework outlined in RD 661/2007. Among them, the most relevant arguments are that, firstly, the nature of the Royal Decrees promulgated by the Spanish government, which cannot eliminate the right of the Spanish Parliament to amend or repeal a Law;[308] secondly, RD 661/2007 could not have contradicted the method to calculate the premium outlined in Law 54/1997:

> "[as] the overriding principle for the calculation of the premium in Article 30(4) of the 1997 Electricity Law was the guarantee of a reasonable rate of return, if the application of the specific provisions of RD 661/2007 had the effect of generating an unreasonable rate of return for energy producers then those provisions would be invalid"[309].

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[304] *Ivi,* para. 264.
[305] *Ibidem*, para. 270.
[306] *Ibidem,* para. 277
[307] *Ibidem,* para. 278.
[308] *Ibidem,* para. 282, (1.)
[309] *Ibidem,* para. 282, (2.).

The Arbitral Tribunal, after considering all the elements quoted by the Claimant, concludes that the investor's alleged expectations cannot be considered either reasonable or legitimate, thus rejecting the second argument of an ECT violation.[310]

As far as concerns the other three arguments, notably the obligation to act transparently, and those not to adopt unreasonable or disproportionate actions, were all dismissed by the Arbitral Tribunal. It therefore concludes that Spain did not breach the obligation contained in Article 10, paragraph 1, of the ECT to provide investors with fair and equitable treatment.[311]

b) Italy

Moving on to the legal cases that involved Italy, the first final Award to be discussed is the one rendered in December 2015 in the case *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein* v. *Italian Republic* (here *Blusun*). To address the legal instability claim, the Arbitral Tribunal analyzes separately the first two sentences of Article 10, paragraph 1, of the ECT: the first one concerning legal stability and the second the fair and equitable treatment standard.[312]

Regarding the legal instability claim, the Tribunal starts by interpreting the aforementioned Article, establishing that the State's obligation to create stable conditions (the first sentence of Article 10, paragraph 1) is an integral part of fair and equitable treatment (second sentence).[313] When delineating the scope of the host State's obligation, the Arbitral Tribunal asserts that the entirety of the Article entails commitments toward investments. The central commitment is to ensure fair and equitable treatment of investments from investors of other Contracting Parties, encompassing both customary international law standards and the obligation to maintain stable conditions throughout all stages of the investment. However, this does not eliminate the State's power to regulate: absent specific commitments, the State is allowed to modify incentives, although these modifications must be proportionate.[314]After having taken into account the four occasions identified by

[310] *Ivi,* para. 308.
[311] *Ibidem,* para. 356.
[312] See Final Award in the case *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, 27 December 2016, ICSID Case No. ARB/14/3, para. 311.
[313] *Ibidem,* para. 315, lett. (c).
[314] *Ibidem,* para. 319.

the Claimant which allegedly resulted in damages to legal instability, the Tribunal dismisses the first claim.[315]

Subsequently, the Tribunal must ascertain whether Italy's actions led to a violation of the FET standard as outlined in Article 10, paragraph 1, of the ECT. To accomplish this, it must first evaluate whether the Claimant held legitimate expectations and then determine if Italy frustrated those expectations. The Tribunal recalls previous cases laws to mark the distinction between the State's legislations and promises or contractual commitments, saying that it is not possible to treat laws as if they were promises[316]:

> "[…] There is a further distinction between contractual commitments and expectations underlying a given relationship: however legitimate, the latter are more matters to be taken into account in applying other norms than they are norms in their own right. International law does not make binding that which was not binding in the first place, nor render perpetual what was temporary only. […]"[317]

Additionally, it establishes that absent a specific commitment, the State isn't obliged to provide subsidies such as feed-in tariffs or maintain them fixed. There is, however, an exception: if lawfully provided, any required adjustments should be made proportionately to the legislative goal and consider the reasonable reliance interests of recipients who have invested significantly based on the previous regime.[318]

The Tribunal determines that Italy did not make any explicit commitment to the Claimant, nor did it expressly guarantee the stability of the relevant Italian laws.[319] Consequently, it concludes that Italy did not violate Article 10, paragraph 1, of the ECT.[320]

In August 2019, the final decision in the case *Belenergia S.A.* v. *Italian Republic* (here *Belenergia*) was rendered by the Arbitral Tribunal. Once again, the Tribunal dismisses the claim that the *Destinazione Italia* and *Spalmaincentivi*

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[315] *Ivi,* para. 364.
[316] *Ibidem,* para. 367.
[317] *Ibidem,* para. 371.
[318] *Ibidem,* para. 372.
[319] *Ibidem,* para. 374.
[320] *Ibidem,* para. 395.

Decrees breached the FET obligation under Article 10, paragraph 1, of the ECT. It begins by marking a clear difference between the FET standard provided under the relevant Article of the ECT and the international standard of treatment, asserting the former as an autonomous standard not to be interchanged with the latter, which derives from customary international law and provides the minimum standard of treatment of aliens that States are obliged to provide.[321] When Article 10 of the ECT stipulates that treatment, in general, must not be "less favorable than required by international law,"[322] it does not imply that the treatment should be identical to that outlined by international law. This broader standard allows the Tribunal some latitude in interpretation.[323] To determine whether Italy’s measures breached the FET obligations, this Tribunal applies the criteria established in the previous jurisprudence.[324] Moreover, it acknowledges Italy's regulatory autonomy, affirming that legitimate regulatory actions in the public interest do not constitute a breach of the FET standard even if they have a detrimental impact on investments.[325]

Firstly, it must determine if Italy’s conduct has frustrated the Claimant’s legitimate expectations. The Claimant asserts that at the time the investment was made, it had legitimate expectations that the FITs and minimum prices would remain unaltered for the entire twenty-year period.[326] Firstly, the Tribunal rejects the claim that the GSE Conventions on feed-in tariffs could have contributed to engendering the Claimant’s legitimate expectations since it does not amount to a specific commitment directly and specifically addressed to Belenergia.[327] Secondly, the Tribunal dismisses the claim that the twenty-year duration initially associated with the tariffs or the prohibition of unilateral changes can be equated with stabilization clauses. The subsidy amounts and durations under the GSE Conventions on feed-in tariffs were derived from the corresponding Italian legislation and they do not represent specific commitments directly addressed to

[321] See Final Award in the case *Belenergia S.A. v. Italian Republic*, 28 August 2019, ICSID Case No. ARB/15/40, para. 568.
[322] See note 181.
[323] See ICSID, *Belenergia S.A. v. Italian Republic*, note 321, para. 569.
[324] *Ibidem,* para. 570.
[325] *Ibidem*, para. 572.
[326] *Ibidem*, para. 573.
[327] *Ibidem,* para. 579.

Belenergia.[328] Such Conventions were subject to a yearly duration and the possibility of subsequent modifications and integration to the minimum prices was not excluded.[329] Finally, the Tribunal disagrees with the assertion that the legal framework preceding the *Destinazione Italia* Decree could have created legitimate expectations of stability.[330] The Tribunal subsequently evaluates the reasonableness of Belenergia's purported expectations, using as a benchmark the information that a "prudent" investor would have needed to be aware of regarding the Italian photovoltaic regulatory framework at the time of the investment.[331] It finds that if Belenergia had acted as a 'prudent' investor, it would have been aware of the possibility that incentives could be reduced.[332] Notably, it finds that a 'prudent' investor, if it had properly examined the regulatory risks in relation to the FITs, the Italian PV laws, and legislation, would have been aware of the possibility of amendments to the remuneration scheme.[333] The Tribunal concludes that Belenergia's investments were made during periods when the possibility of incentive reductions was apparent.[334] It dismisses the argument that the reduction of FITs from 6% to 8% under the *Spalmaincentivi* Decree constitutes a breach of the investor's legitimate expectations, as it was determined to be a 'modest' reduction.[335]

Secondly, the Tribunal rejects the claim of substantive impropriety of the *Spalmaincentivi* Decree, Belenergia could not reasonably expect the persistence of overestimated subsidies for 20 years, as Italy's initial incentives were grounded on underestimated energy production projections.[336] It finds therefore that the reduction of FITs, as, according to the Tribunal, "this change was reasonable, justifiable and proportionate to Italy's policies in the PV sector"[337].

Lastly, the Arbitral Tribunal rejects the claim of procedural impropriety regarding the adoption of the *Spalmaincentivi* Decree, consequently dismissing the

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[328] *Ivi,* para. 580.
[329] *Ibidem,* para. 581.
[330] *Ibidem*, para. 583.
[331] *Ibidem,* para. 584.
[332] *Ibidem*, para. 585-587.
[333] *Ibidem,* para. 600.
[334] *Ibidem,* para. 589, 591, 593.
[335] *Ibidem,* para. 595.
[336] *Ibidem*, para. 604.
[337] *Ibidem*, para. 606.

claim that Italy's measures breached the FET standard under Article 10, paragraph 1, of the ECT.[338]

The next final Award to be analyzed is the one rendered on 25 March 2020 in the case *Sun Reserve Luxco Holdings SRL* v. *Italy* (here *Sun Reserve*). The Arbitral Tribunal begins by defining the applicable legal standard for the FET obligation under Article 10, paragraph 1, of the ECT. First, it rejects Italy's assertion that the FET standard in the relevant article of the ECT should be assimilated to the minimum standard of treatment provided in customary international law.[339] According to the Tribunal, this clear and specific distinction is already delineated in Article 10 of the ECT, wherein states are obliged not to afford investments treatment less favorable than what is required by international law[340] The inclusion of this specific sentence in the relevant article implies that the customary international law standard represents the minimum threshold that host States must adhere to.[341] Finally, the Tribunal ascertains that the lack of a specific definition of FET in the ECT does not automatically suggest that it should resort to the customary international law standard. Instead, it must apply the standard under Articles 31 and 32 of the VCLT.[342] After having specified the object and purpose of the ECT, the Tribunal identifies the main characteristics of the standard: it finds that the concepts of fairness and equitability are not absolute and cannot be reduced to universally applicable definitions, requiring to take into account all the circumstances of a given case;[343] stability and transparency within the legal framework are crucial aspects of the host State's obligation to provide fair and equitable treatment;[344] these two characteristics must be balanced against the host State's right to regulate;[345] the threshold for demonstrating a violation of the FET obligation is high.[346] Concerning this final aspect, the Tribunal outlines the conditions under which state actions could lead to a breach of the standard:

[338] *Ivi*, para. 611.
[339] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 671.
[340] *Ibidem,* para. 672.
[341] *Ibidem,* para. 673.
[342] *Ibidem,* para. 674.
[343] *Ibidem,* para. 683.
[344] *Ibidem*, para. 684.
[345] *Ibidem*, para. 685.
[346] *Ibidem,* para. 688.

> "[…] To constitute a breach of the FET standard, it must be shown that the host State's conduct was manifestly or grossly unfair or unreasonable, was arbitrary or discriminatory, constituted a denial of justice in national proceedings in the host State, or that the host State engaged in a willful neglect of duty or a willful disregard of due process of law, or showed an extreme insufficiency of action falling far below international standards. […]"[347]

The Tribunal determines that to breach the FET standard, the extent of the modifications of the regulatory framework should rise to the level of a "radical or fundamental" change.[348] Subsequently, the Tribunal proceeds to evaluate whether, at the time of the investment, the Claimant was indeed relying on legitimate expectations of stability, and if so, whether Italy's actions constituted a breach of those expectations.[349] To answer the first question, the Tribunal immediately assesses that, in order for the investors' expectations to be protected, these "must rise to the level of legitimacy and reasonableness in light of the circumstances"[350]; this threshold becomes the starting point of the examination of the Tribunal. In determining whether the specific promises or commitments by the host State were capable of creating legitimate expectations, the Tribunal recognizes that these expectations can also rise in the absence of specific commitments by the host State.[351] In this instance, given the absence of a stabilization clause within Italy's legislation or GSE contracts, the Claimant could not reasonably expect that the regulatory framework would be frozen.[352] This consideration is made in light of the necessity to balance the interests of investors with the State's regulatory powers. The Tribunal further establishes that the concept that legitimate expectations must be "crystallized" to receive legal protection implies that they must be objectively identifiable and specific, rather than relying on subjective aspirations or beliefs.[353] Then, it outlines that the standard of due diligence expected from investors should

[347] *Ivi*, para. 688.
[348] *Ibidem*, para. 692.
[349] *Ibidem,* para. 694.
[350] *Ibidem,* para. 697.
[351] *Ibidem*, para. 699.
[352] *Ibidem,* para. 702.
[353] *Ibidem,* para. 710.

align with what a ‘prudent investor’ would reasonably know about the relevant regulatory framework.[354]

The subsequent question to be addressed is whether the investor relied on these expectations when deciding to invest, requiring the Tribunal to identify the relevant point in time for assessing the investor's legitimate expectations.[355] The Arbitral Tribunal supports the Claimants’ assertion that identifying the date of investment as the relevant moment for assessing whether the investor relied on legitimate expectations is reductive. This is because, according to the Claimants, investments are usually “multi-staged, sophisticated and complex transactions that are spread out over a period of time”[356], and such expectations can evolve over time.[357] In such situations, what becomes significant is the date when the investor decided to invest, and this is also the criteria applied by the Tribunal.[358] It is imperative, however, that at each phase of the investment process, the purported legitimate expectations are objectively discernible and unequivocal for the various stages of the investment.[359]

After this first analysis, the Tribunal assesses whether the enactment *Spalmaincentivi* Decree had the effect of frustrating the investors’ legitimate expectations. It starts by establishing first the temporal reference point, which, in this case, must be evaluated by considering the moment when the Claimants chose to invest in Italy, and second “[…] whether that can be singled out as one decisive point in time or is spread out into multiple different investment decisions”[360]. The Tribunal establishes that the Claimant did not make multiple distinct investments at different times; rather, it involved a single investment activity structured in multiple stages over a certain period of time.[361] The Tribunal thus identifies as the relevant date the day in which the Claimants acquired the shares in the companies responsible for developing and operating the photovoltaic plants in question.[362] Next, before assessing which factors could have contributed to the emergence of

[354] *Ivi,* para. 714.
[355] *Ibidem*, para. 715.
[356] *Ibidem,* para. 717.
[357] *Ibidem,* para. 717.
[358] *Ibidem,* para. 718.
[359] *Ibidem,* para. 722.
[360] *Ibidem,* para. 743.
[361] *Ibidem,* para. 750.
[362] *Ibidem,* para. 753.

the legitimate expectations of the Claimants, the Arbitral Tribunal notes that, given that the acquisition dates vary for different power plants, the circumstances that may have existed at the acquisition date for each power plant could differ.[363] It establishes that for eight of the nine plants owned by the Claimant, the common threads for the rise of legitimate expectations are the regulatory frameworks adopted to enact the two relevant European Directives, respectively LD 387/2003 and the *Romani* Decree, the *Conto Energia* Decrees and the public statements made by the Italian authorities to promote the incentive regime.[364] Concerning the GSE letters and contracts, the Tribunal concludes that, despite being issued in alignment with the *Conto Energia* Decrees, they could not have given rise to legitimate expectations, as they did not exist at the time the decision to invest was made.[365] Hence, for these eight plants, the Tribunal does not examine the GSE letters and contracts.[366] The last power plant, *Fiumicino*, was acquired after receiving the GSE's tariff confirmation letter, so this factor is taken into consideration when assessing whether the Claimant was relying on legitimate expectations.[367] The Tribunal, however, dismisses the claim that all the first three aforementioned factors collectively contributed to establishing an expectation of stability regarding the FITs rates for the entire pledged twenty-year duration.[368] Specifically, the Tribunal's most pertinent explanations highlight that the *Conto Energia* Decrees are regarded as 'secondary rules,' thereby being hierarchically subordinate to LD 287/2003 and the Romani Decree. Additionally, neither LD 387/2003 nor EC Directive 2001/77/EC mentioned the twenty-year period during which incentive schemes were expected to remain constant.[369] The most significant aspect of LD 387/2003 is the assurance that eligible plants would receive a "fair remuneration" for the average conventional lifespan of the plant.[370] The Tribunal also interprets the wording 'shall remain constant in current currency for the entire twenty-year

[363] *Ivi*, para. 773.
[364] *Ibidem*, para. 778.
[365] *Ibidem,* para. 781.
[366] *Ibidem,* para. 785.
[367] *Ibidem,* para. 786.
[368] *Ibidem,* para. 789.
[369] *Ibidem,* para. 793, 801.
[370] *Ibidem,* para. 801.

period', concluding that this does not exclude future modifications to the incentive rates; rather it preserves FITs from inflation-related adjustments:

> "[…] the phrase "constant in current currency for the entire twenty year period" should be understood as a confirmation that the incentive tariff rates granted for the average conventional life of photovoltaic plants, once awarded, will not be subject to inflation-related adjustments. However, they may be modified subsequently, as long as the "remuneration" that photovoltaic plant operators receive for the average life of their plant is "fair" in the given circumstances, in accordance with Article 7(2) of the Legislative Decree No. 387/2003."[371]

The Tribunal finds that the only possible legitimate expectation on which the Claimants could have relied while deciding to invest in Italy was to receive a 'fair remuneration' for the average conventional lifespan of the plant, in accordance with LD 387/2003.[372] According to the Tribunal, this expectation does not meet the threshold of legitimacy and reasonableness, and thus, it is not protected under Article 10, paragraph 1, of the ECT. Consequently, the claim for the frustration of the Claimants' legitimate expectations is rejected for eight out of nine PV plants.[373]

Unlike the previously analyzed plants, for the *Fiumicino* plant, the Tribunal also considered the GSE letter and contract. However, it concludes that these instruments played an "accessory role"[374] and could not have given rise to expectations beyond those established by the overall regulatory framework. Once again, the only anticipation feasible was that those plants qualifying for the incentive scheme within the Second or Third *Conto Energia* regimes would receive a "fair remuneration" for the average conventional lifespan of photovoltaic plants, as outlined in LD 387/2003.[375] In the case of the *Fiumicino* plant, the Tribunal finds that the Claimants' expectation of a fair remuneration satisfies the threshold of legitimacy under the GSE confirmation letter.[376] Therefore, the Tribunal proceeds to determine whether Italy's adoption of the *Spalmaincentivi* Decree frustrated this

[371] *Ivi,* para. 809.
[372] *Ibidem,* para. 819.
[373] *Ibidem,* para. 839.
[374] "The term 'accessory' denotes that these instruments were issued by GSE as accessories to public acts, as distinct from instruments that could create binding contractual obligations" as defined in *ibidem*, para. 822.
[375] *Ibidem,* para. 830.
[376] *Ibidem,* para. 840.

specific expectation with regard to the *Fiumicino* plant.[377] It finds that the challenged measure did not frustrate the investor's legitimate expectations for "fair remuneration" for several reasons.[378] Notably, the Tribunal acknowledges that the plants that were assigned by default to the third option under the *Spalmaincentivi* Decree saw a progressive reduction of the incentives.[379] In the case of the *Fiumicino* plant, the reduction amounted to 8%, which, according to the Tribunal, does not classify as unfair remuneration since "this reduction is balanced against other factors to be considered in respect of the sustainability of the overall incentive mechanism for photovoltaic energy"[380] and believes that such remodulation was motivated in the public interest of alleviating the burden on end consumers.[381] In conclusion, the Arbitral Tribunal rejects the Claimants' claim that the *Spalmaincentivi* Decree resulted in a breach of the FET obligation under Article 10, paragraph 1 of the ECT.[382]

The last final Award to be analyzed is the one rendered in 2021 in the case *Silver Ridge Power BV* v. *Italian Republic* (here *Silver Ridge*). The starting point, once again, is the definition of the applicable legal standard. The Arbitral Tribunal assesses that the standard of protection provided under Article 10, paragraph 1, clearly differentiates itself from the minimum standard of treatment of aliens under customary international law.[383] The Parties concurred that specific commitments made by the State can lead to legitimate expectations protected by the FET standard.[384] Nevertheless, they disagree on what constitutes a specific commitment. The Arbitral Tribunal adopts the view that commitments can be classified as 'specific' when they are specifically addressed to a particular individual and those specific regarding the object and scope.[385] Thus the Tribunal establishes that, in this specific legal case, legitimate expectations can arise in the light of those acts that are specifically aimed at inducing investments.[386]

[377] *Ivi,* para. 843.
[378] *Ibidem,* para. 849.
[379] *Ibidem,* para. 850.
[380] *Ibidem,* para. 852.
[381] *Ibidem,* para. 852-855.
[382] *Ibidem,* para. 921.
[383] See ICSID, *Silver Ridge Power BV* v. *Italian Republic*, note 10, para. 401.
[384] *Ibidem,* para. 402.
[385] *Ibidem,* para. 407.
[386] *Ibidem,* para. 408.

Furthermore, the Parties both acknowledged that the FET standard safeguards foreign investors from significant or fundamental alterations to the legal framework governing their investments.[387] To determine the content of the legal standard, the Tribunal remarks on the importance of the balance between the interests of the investors to be subject to a stable and transparent legal framework and their legitimate expectations and the host State's regulatory powers, including "the ability to adapt its legislative and regulatory framework to new developments"[388]. It recognizes that in arbitral practice, it has been acknowledged that States are not bound to freeze legal frameworks unless explicitly provided.[389] However, investors' expectations must still be protected against those radical or fundamental changes that result in a modification of the essential characteristics of the legal regime, in a manner that fails to consider the circumstances of existing investments made based on the previous regime.[390]

The Tribunal then proceeds to determine whether the State's conduct created legitimate expectations on which the investor was relying at the time of the investment. It determines that the provisions of the Second, Third, Fourth, and Fifth *Conto Energia*, in conjunction with LD 387/2003 and the *Romani* Decree, were detailed and specific, thereby potentially forming legitimate expectations upon which the Claimants could have relied at the time the investment decision was made.[391] Additionally, the abovementioned measures were adopted by Italy with the specific purpose of encouraging investments in the relevant sector.[392] Although the Tribunal determines that these factors collectively constitute specific commitments made by Italy, thus forming legitimate expectations upon which the Claimant could reasonably rely, it also observes that there is no indication that Italy committed itself to keep the legal framework unchanged for twenty years.[393] Indeed, the relevant legislation does not specify either the duration or the precise amount of the incentives: for example, the *Romani* Decree establishes that the

[387] *Ivi,* para. 402.
[388] *Ibidem,* para. 411.
[389] *Ibidem,* para. 415.
[390] *Ibidem*, para. 416.
[391] *Ibidem,* para. 425.
[392] *Ibidem,* para. 429.
[393] *Ibidem,* para. 431.

"incentives should take into consideration the average conventional useful life of plants in setting an appropriate rate of compensation"[394]. According to the majority of the Tribunal, the utilization of the term 'constant' in Article 24, paragraph 2, letter (c), of the *Romani* Decree, referring to the incentives, does not imply that the remuneration rates would be fixed, but rather stable.[395] In contrast, the *Conto Energia* stipulated that incentives would be distributed over twenty years. However, since the *Conto Energia* Decrees were designed to implement LD 387/2003, which mandated that specific rates with decreasing amounts should be set, it becomes evident that the rate would not remain constant throughout the promised twenty years.[396] The Tribunal reinforces its view by assessing that the relevant legislation did not contain any stabilization clause.[397] Therefore, the Tribunal concludes that, at the time of the decision to invest, the Claimant reasonably had legitimate expectations that the legal framework would not be subject to fundamental or radical changes, but could not expect Italy to maintain "the amount or the duration of incentive payments exactly at the level originally laid down in the applicable energy accounts"[398].[399]

Subsequently, the Tribunal must determine whether Italy's enactment of the *Spalmaincentivi* Decree frustrated the legitimate expectations of the Claimant. This evaluation requires a balancing exercise between the investors' interest in the stability of the legal framework and the State's sovereign regulatory powers and it is done through the analysis of the reasonability, the foreseeability, and the proportionality of the challenged measure.[400] The Tribunal recognizes the reasonability of the *Spalmaincentivi* Decree, as it was enacted to serve legitimate public policy objectives, particularly to enhance the sustainability of the incentive tariff scheme for renewable energy amidst economic difficulties.[401] Next, it has to assess whether such modifications to the legal framework could have been foreseen by the Claimant. By recalling the conclusion reached when determining the

[394] *Ivi,* para. 432.
[395] *Ibidem,* para. 433.
[396] *Ibidem,* para. 434.
[397] *Ibidem,* para. 435.
[398] *Ibidem,* para. 437.
[399] *Ibidem,* para 437, 444.
[400] *Ibidem,* para. 446.
[401] *Ibidem,* para. 452.

existence of the Claimants' legitimate expectations, the Tribunal establishes that a prudent investor acting in a highly regulated market shall thoroughly evaluate and consider the potential benefits and disadvantages associated with the market's dynamics, which may necessitate policy adjustments by the host State.[402] Lastly, the Tribunal finds that the FIT reduction from 6% to 8% was not a disproportionate measure for several reasons.[403] Firstly, according to the Tribunal, the *Spalmaincentivi* Decree modified the previous regime preserving its essential characteristics.[404] Secondly, the challenged measure did not have retroactive effects since, among the three options offered by the *Spalmaincentivi* Decree, investors could keep the FITs already received and obtain reduced incentives in the future.[405] Finally, it establishes that the challenged Decree was not disproportionate as it does not adopt a uniform approach and incorporates safeguard measures to prevent investors from suffering significant losses.[406] It finds that the adoption of the *Spalmaincentivi* Decree by Italy did not frustrate the Claimants' legitimate expectations.[407] Then, in light of the arguments already analyzed, it concludes that the challenged measure did not result in a breach of the FET standard under Article 10, paragraph 1 of the ECT.[408]

2.4 Analysis.

After having illustrated the relevant aspects of the legal cases, it is important to analyze the points that constitute the object of debate according to scholars. Firstly, a brief description of the FET standard and its content is required. This is because the FET is a broad standard that Tribunals tend to apply differently in each legal case. After this first introduction, the first controversial point will be addressed, that is whether the State's obligation to afford investments fair and equitable treatment and the State's obligation to create stable conditions for investors of the other Contracting Parties can be considered as two separate,

[402] *Ivi,* para. 457.
[403] *Ibidem,* para. 470.
[404] *Ibidem,* para. 461.
[405] *Ibidem,* para. 462.
[406] *Ibidem,* para. 466, 467.
[407] *Ibidem,* para. 474.
[408] *Ibidem,* para. 477.

autonomous obligations or if the two commitments are part of the same obligation. Secondly, we will analyze the concept of legitimate expectations, focusing on how these can arise – if these can be created from general legislation or if specific commitments by the State are required. Subsequently, the concept of due diligence and that of "prudent investor" and their application by Arbitral Tribunals in pertinent legal cases will be examined. As a matter of fact, Tribunals have taken different positions on whether and how due diligence should be conducted by investors. Lastly, the focus will be shifted to the relationship between the investors' economic interests and the States' sovereign right to regulate. In fact, in recent decades, tribunals have affirmed that the FET standard encompasses both the responsibility of states to maintain a stable legal framework and the duty to safeguard the legitimate expectations of investors.[409] Thus the last part of this analysis will revolve around the extent to which a State can exercise its regulatory powers without facing liability and the illustration of the approaches used by the Tribunals in the relevant legal cases to draw the line between the safeguard of the State's right to regulate and the protection of investors' legitimate expectations.

2.4.1 The application of the FET standard by Arbitral Tribunals.

The initial provision of the FET standard was introduced in the Havana Charter (1948) for the establishment of an International Trade Organization.[410] It is one of the most important and common standards of treatment to exist in International Investment Law. Commonly acknowledged as one of the 'absolute' standards, this criterion delineates a particular level of conduct expected from a State toward investments made by foreign investors in its territory, regardless of the treatment it affords to its own citizens or those of other States.[411] However, this standard is one of the most controversial to define, since it lacks a universally accepted definition. As a matter of fact, it is a broad standard that can encompass various governmental actions that inherently investment-deterring, for which specific rules may result

[409] See F. Ortino, *The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?*, 2018, Journal of International Economic Law (4, 2018), King's College London Law School Research Paper No. 19-6, page 20.
[410] See UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2012, page 5.
[411] See Balcerzak, note 2, page 187.

inadequate. For this reason, the purpose of this clause in BIT practice is to cover any areas that might not be addressed by more detailed rules. This ensures that investors are protected at the level that the treaties intend.[412] The conventional formula that can be found in Treaties provides that "investments made by investors of one Party in the territory of the other Party shall be accorded fair and equitable treatment"[413], without specifying the scope or the content. Over the last two decades, the meaning of this standard has been outlined individually by Arbitral Tribunals in each legal case by referring to general principles from domestic law.[414] One of the most relevant examples is the definition given by the Arbitral Tribunal in the case *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, for which the FET standard encompasses several obligations falling upon the State:

> "[…] the fair and equitable treatment standard encompasses inter alia the following concrete principles
> - the State must act in a transparent manner;
> - the State is obliged to act in good faith;
> - the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;
> - the State must respect procedural propriety and due process.
> The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations."[415]

Tribunals typically embrace and employ these principles, even though they tend to give different relevance to them. Consequently, this might result in an inconsistent application of the standard by Arbitral Tribunals, prompting scholars to draft a non-exhaustive list of categories of State behavior that could constitute a breach of the FET standard,[416] among them:

> "1. Denial of justice
> 2. Breach of due process
> 3. Frustration of investors' reasonable and legitimate expectations
> 4. Instability in the host state's legal framework
> 5. Lack of transparency

[412] See R. Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 2005, The International Lawyer, Vol. 39, No. 1 (SPRING 2005), pp. 87- 106, page 90.
[413] See Collins, note 1, chapter 5.2.1.
[414] See UNCTAD, note 410, page 6.
[415] See final Award in the case *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, 29 July 2008, ICSID Case No. ARB/05/16, para. 609.
[416] See Collins, note 1, chapter 5.2.1.

6. Arbitrary decision making
7. Bad faith
8. Coercion and harassment."[417]

It is still important to remark that in International Arbitration, and international jurisprudence in general, the concept of 'legally binding precedent' does not apply. Nonetheless, Arbitral Tribunals have apparently developed a new practice, which takes the name of 'normative expectations', meaning that all investors engaged in an investment dispute expect Tribunals to align with previous decisions when rendering a judgment. In the Renewable Energy Saga, however, this principle was not completely followed.[418]

Likewise, the ECT does not define the FET standard.[419] The current FET wording in Article 10, paragraph 1, of the ECT reflects the political and economic situation existing at the time of its negotiation. The incorporation of the FET, along with other investment protection standards, stemmed from the need to address regulatory ambiguities observed in the former Soviet Union States. This inclusion aimed to safeguard European Union investors operating within the fossil fuel sector.[420]

In ECT disputes, several Arbitral Tribunals recognized that the FET standard contained in the relevant Article provides an obligation for contracting parties "to act consistently and transparently, accord due process, refrain from arbitrary or discriminatory measures, and ensure stable and equitable conditions"[421], additionally including, as stated in *Electrabel S.A. v The Republic of Hungary*, the obligation to refrain "from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment"[422]. These elements were also applied by the Arbitral Tribunals in the Renewable Energy Saga legal cases, although none of them, in their judgment, explicitly defined the content

[417] See F. Sarmiento, S. Nikièma, *Fair and Equitable Treatment: Why it matters and what can be done*, November 2022, IISD Best Practice Series, Policy Brief.
[418] See M. E. Bagnulo Cedrez, *Investment arbitration in the energy sector*, 2020, Revista de Derecho, 20(39) 183-216, page 188.
[419] *Ibidem,* page 188.
[420] See B.G. Kuzhatov, *The Energy Charter Treaty reform: Why and how to reach a consensus on fair and equitable treatment?,* 2022, Elsevier, Energy Policy 163 (2022) 112769.
[421] See C. Benson, C. Yim, V. R. Orlowski, *The Energy Charter Treaty,* Fourth Edition, October 2022, Global Arbitration Review, pages 17-44, pages 32-33.
[422] See Noilhac, note 27, page 22.

of the FET standard. However, the Tribunal in the Sun Reserve case delineates some characteristics contributing to the definition of the FET standard. These include recognizing that fairness and equitability are not absolute concepts, necessitating consideration of all case circumstances. Additionally, importance is placed on the stability and transparency of the legal framework, alongside balancing exercises between these characteristics and the State's regulatory powers.[423] The Arbitral Tribunal in the case *The AES Corporation and Tau Power B.V. v. Republic of Kazakhstan* also acknowledges that, in order to constitute a breach of the FET standard, a State's action must be deemed manifestly unfair or unreasonable.[424] Nonetheless, since the ECT is an international Treaty, it shall be interpreted according to the criteria set forth in Articles 31-33 of the VCLT. In this regard, the main discussion in the Renewable Energy Saga was whether the obligation to "create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area"[425] contained in the first sentence of Article 10, paragraph 1, and that to "accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment"[426] contained in the second sentence of Article 10, paragraph 1, should be considered as two separate, autonomous obligations or if they should be interpreted and applied as intertwined commitments. The fact that they could be read as separate, autonomous obligations would imply that the State's obligation to encourage stable, transparent conditions could be directly actionable by investors of the Contracting Parties.[427] Consequently, this would entail a more articulated analysis by the Tribunal, which would otherwise have had to conduct a more complex analysis, having to analyze the stability and transparency obligation separately.[428]

The majority of Arbitral Tribunals in the cases analyzed (namely in *Eiser*, *Novenergia II*, *Masdar*, *Isolux*, *Blusun*, *Sun Reserve,* and *Stadtwerke*) conclude that the two sentences shall not be interpreted as two separate obligations, rather the

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[423] See notes 166-169.
[424] See Benson, Yim, Orlowski, note 421, page. 33.
[425] See note 181.
[426] *Ibidem.*
[427] See ICSID, *Stadtwerke München GmbH, RWE Innogy GmbH and Others v. The Kingdom of Spain*, note 51, para. 195.
[428] See SCC, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, note 196, para. 646.

obligation to provide stable conditions is incorporated in the broader State's obligation to provide fair and equitable treatment.[429] Generally speaking, Tribunals believe that the different standards of protection encompassed in Article 10, paragraph 1 of the ECT shall be considered as "closely related and manifest different components of the FET standard".[430] The perspective of the Arbitral Tribunal in the *Stadtwerke* case is noteworthy since it arrives at this conclusion by articulating that, while the first clause of Article 10, paragraph 1, of the ECT lacks explicit guidance on the particular characteristics that such a condition must encompass, the subsequent sentences within the same provision delineate specific actions that a State may not undertake against protected investments.[431] Additionally, in the *Novenergia II* case, the Arbitral Tribunal linked the State's obligation to foster stable, transparent conditions to the State's obligation to protect the investors' legitimate expectations:

> "Put differently, the Tribunal agrees with the arbitral tribunals' findings in *Isolux, Plama* and *Eiser* that the stability and transparency obligation is simply an illustration of the obligation to respect the investor's legitimate expectations through the FET standard, rather than a separate or independent obligation. […]"[432]

Similarly, the Arbitral Tribunals in the *Charanne* and *Sun Reserve* cases endorse the notion that the two elements mentioned above should be interpreted and applied as a combined standard of treatment. The significant difference is that these two Courts reversed the order of the two obligations in their conclusions: they state that the obligation to provide investments with fair and equitable treatment is included in the broader, more general obligation to create stable, equitable, favorable, and transparent conditions. This is an alternative interpretation, which scholars have not thoroughly examined, that however has an equal outcome in terms of results.[433]

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[429] See Bagnulo Cedrez, note 418.
[430] See Benson, Yim, Orlowski, note 421, page 32.
[431] See ICSID, *Stadtwerke München GmbH, RWE Innogy GmbH and Others v. The Kingdom of Spain*, note 51, para. 195.
[432] See SCC, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, note 196, para. 646.
[433] See Bagnulo Cedrez, note 418, page 195.

The remaining Arbitral Tribunals (in the cases *Cube*, *NextEra*, *9ren*, *CEF Energia*, *Belenergia*, and *Silver Ridge*) do not address this point. In the *NextEra* case, the Tribunal delineates the obligations stemming from the interpretation of Article 10, paragraph 1, of the ECT. Among these obligations are the duty to foster and establish stable conditions for investors, as well as the obligation to provide investments with fair and equitable treatment. However, the Tribunal does not engage with the inquiry of whether these two obligations should be construed and implemented separately or collectively.[434] The position adopted by the Arbitral Tribunal in the case *Silver Ridge* is noteworthy, as it states that this inquiry is irrelevant to the purpose of the decision and, therefore proceeds to analyze only the second sentence of the relevant Article of the ECT.[435]

Another relevant element is constituted by the determination of the threshold to assess whether the FET standard under Article 10, paragraph 1, of the ECT was breached. In the majority of the decisions analyzed, the Arbitral Tribunals share the position that this threshold is considerably high[436] since only radical, fundamental, unreasonable, or unjustified changes to the essential characteristics of the relevant legal framework applying to existing investments are considered to amount to a breach of the standard.[437]

In summary, given the absence of a precise definition regarding the scope of conduct encompassed by the FET standard and the resultant variance in application among different Tribunals, it becomes apparent how Tribunals commonly converge on the role of the obligation to ensure stable conditions in the context of Article 10, paragraph 1, of the ECT and the degree to which alterations to the pertinent legal framework may constitute a violation of the FET standard.

2.4.2 The investor's legitimate expectations.

Legitimate expectations are one of the most important elements of the FET standard, and they are commonly perceived as "one's reliance on a legal and

[434] See ICSID, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.*V. v. *The Kingdom of Spain*, note 239, para. 581.
[435] See ICSID, *Silver Ridge Power BV* v. *Italian Republic*, note 10, para. 393.
See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 688.
[437] See ICSID, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À.R.I. v. The Kingdom of Spain*, note 179, para. 382.

administrative framework when making an initial investment, or expanding an existing one"[438]. The State's obligation to protect the investors' legitimate expectations is widely considered to be one of the most essential elements of the FET standard. The legal content of such expectations differs depending on the relevant legal system at issue.[439]

In the Renewable Energy Saga, the debate around the investors' legitimate expectations revolves around how such expectations can arise. To this end, scholars have identified three ways in which these expectations can emerge: these can usually be grounded on specific commitments, unilateral representations, or regulatory frameworks.[440] For this analysis, the elements of interest are legitimate expectations arising from specific commitments and those arising from general legislation existing at the time of the investment, so the second element will not be taken into consideration. In arbitral practice, it is thought that specific commitments usually amount to contractual commitments entered by the State with individual investors. This view is endorsed by the existence of the *umbrella clause*[441] that States can include in their IIAs. In the case of the ECT, this provision can be found in the last sentence of Article 10, paragraph 1.[442] The violation of a specific commitment by the State automatically amounts to a breach of the FET standard, thus limiting the freedom of the State to regulate.[443] In the absence of a specific commitment, the protection of the investors' legitimate expectations must be balanced with the State's right to regulate.[444]

In the analyzed legal cases, a predominant portion of investors asserted that they had legitimate expectations that the tariffs would remain unchanged throughout the entirety of the promised duration. Even though the Arbitral Tribunal

[438] See AA. VV., *Fair and Equitable Treatment in Investment Arbitration*, 2022, ACERIS Law LLC.
[439] See F. Ortino, *The Origin and Evolution of Investment Treaty Standards. Stability, Value and Reasonableness,* 2019, Oxford University Press, page 143.
[440] See Z. Víg, *Legitimate Expectations in the Arbitral Practice of Green Energy Cases Under the Energy Charter Treaty*, 2022, Hungarian Journal of Legal Studies 62 (2021) 2, 115–130, page 119.
[441] Umbrella clauses serve to incorporate additional obligations stemming from alternative sources, commonly contracts, within the scope of a Treaty.
[442] "[…] 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" as contained in Art. 10, paragraph 1, of the ECT.
[443] See D. Zannoni, *The legitimate expectation of regulatory stability under the Energy Charter Treaty*, 2020, Leiden Journal of International Law, n.33, pages 451- 466, page. 456.
[444] See Faccio, note 107, page 11.

in the case *Belenergia* argues that specific commitments directly addressed to the investors are necessary for legitimate expectations to arise[445], the majority of the analyzed Arbitral Awards generally recognize that general legislation can create legitimate expectations protected by International Investment Treaties.[446] For example, in *Charanne*[447], the Arbitral Tribunal recalls the principle established in the 2012 UNCTAD study on the FET standard from which the investors' legitimate expectations can be derived:

> "(a) specific commitments addressed to it personally, for example, in the form of a stabilization clause, […] (b) rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment"[448].

Notably, point (b) recognizes that legitimate expectations can arise from general legislation, provided that those laws were adopted to attract investments. This principle was also invoked by the Tribunals in several cases, as in *9ren*[449]. In *Novenergia II*, the Tribunal acknowledges the possibility for legitimate expectations to arise from general legislation, plus general undertakings and assurances made by the State.[450] The Arbitral Tribunals in *NextEra*, *CEF,* and *Isolux* also acknowledge that legitimate expectations may arise from general legislation, although not in these cases, as they contend that a prudent investor would have been aware of the factors facilitating anticipation of regulatory alterations. The Tribunal in the *Masdar* case began by describing the two possible scenarios under the two different schools of thought on the creation of legitimate expectations. Nevertheless, the Tribunal refrains from endorsing either school of thought, though it acknowledges that specific commitments are requisite for the emergence of legitimate expectations. It concedes, however, that such commitments could also be found in general legislation. In the *Blusun* case, the Tribunal concludes that "a

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[445] See ICSID, *Belenergia S.A. v. Italian Republic*, note 321, para. 580.
[446] See Balcerzak, note 2, page 309.
[447] See SCC, *Charanne and Construction Investments v. The Kingdom of Spain*, note 64, para. 489.
[448] See UNCTAD, note 410, page 69.
[449] See ICSID, *9ren Holding S.À.R.L.* v. *The Kingdom of Spain*, note 248, para. 294.
[450] See SCC, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, note 196, para. 650.

representation as to future conduct of the state could be made in the form of a law, sufficiently clearly expressed”[451]. Finally, the tribunals in *Sun Reserve* and *Stadtwerke* acknowledge the potential for legitimate expectations to originate from general legislation in the absence of specific commitments.[452] Among the scrutinized cases, only the Tribunal in the *Eiser* case did not explicitly address this subject. In any case, Tribunals widely agree that to be protected, legitimate expectations of the investor must rise to the level of legitimacy and reasonableness in light of all circumstances.[453]

A curious position is the one adopted by the Arbitral Tribunal in the *9ren* case, which adopts the position that general legislation could constitute a specific commitment.[454] This view was rejected by the majority of Tribunals for two reasons: first, because legislation may be subject to modifications in the future; second, some Tribunals argue that “legislation cannot constitute a specific commitment […] because it is not specific in either application or substance”.[455]

Legitimate expectations based on general legislation deserve protection against radical or unreasonable changes. Investors cannot expect that the regulatory framework would not be amended, but such amendments must be “reasonable, proportional and done in the public interest”[456]. To assess whether such expectations are reasonable, the Tribunals must take into account all the circumstances surrounding the investment, from the legal, economic, political, and social point of view. Two aspects necessitate consideration: firstly, the imperative to pinpoint the precise date upon which the court will ascertain whether the investor had legitimate expectations; and secondly, the obligation to conduct due diligence on the part of investors. It is important to emphasize the first point because, by considering the different dates and measures existing at that relevant date, Arbitral Tribunals can assess the totality of circumstances surrounding the investor's

[451] See ICSID, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, note 312, para. 371.
[452] See *Sun Reserve Luxco Holdings SRL* v. *Italy,* note 127, para. 699, *Stadtwerke München GmbH, RWE Innogy GmbH and Others* v. *The Kingdom of Spain,* note 51, para. 314.
[453] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 708.
[454] See M. Schmidl, *The Renewable Energy Saga from Charanne v. Spain to the PV Investors v. Spain: Trying to see the Wood for the Trees*, 2021, Kluwer Arbitration Blog.
[455] See Biggs, note 37, page 13.
[456] See Balcerzak, note 2, page 315.

expectations to determine whether these existed, were legitimate and thus warrant protection, based on the information available at the time.[457] Usually, the date that tribunals take into consideration is the date on which the investment was made. However, in some of the relevant cases, such as *Sun Reserve*, the Arbitral Tribunals acknowledge that investments are complex, multi-staged transactions that cannot be traced back to a specific date. Indeed, since these transactions can be spread out over a period of time, it is important to recognize that also the legitimate expectations of the investor can evolve during this time frame. In such cases, the Tribunal takes into account not the date on which the investment was made, but rather the date on which the investors decided to invest.[458] The same concept was adopted by the Arbitral Tribunal in the case *Novenergia II*[459]. In my view, emphasizing this aspect is crucial as the identification of various dates considered by the tribunal to evaluate the investor's legitimate expectations implies the inclusion of diverse state measures and circumstances existing at the relevant time.[460] Consequently, this could serve as one of the explanations for the inconsistency in the conclusions drawn by tribunals regarding the FET standard.

2.4.3 An analysis of the concept of due diligence.

In the assessment of the reasonability of the investors' legitimate expectations, another controversial point revolves around the positions adopted by Tribunals regarding whether extensive due diligence is required for such expectations to be established. The investors' obligation to conduct proper due diligence is rooted in international jurisprudence, even though it is not explicitly required under the FET standard.[461] This condition is necessary for Tribunals to assess the reasonability and objectivity of the investors' expectations, and therefore whether these deserve protection[462], as it requires them to take into account all the circumstances and the

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[457] *Ivi,* page 190.
[458] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 717-722.
[459] See SCC, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, note 196, para. 538-539.
[460] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 773.
[461] See Y. Levashova, *Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law,* August 2020, Netherlands International Law Review (2020) 67:233-255, page 246.
[462] *Ibidem*, page 238.

risks associated with investing in the relevant host State.[463] Tribunals also use this principle to evaluate the scope of the State's regulatory authority. The extent to which a state can alter or adjust its laws and policies in the public interest without breaching the FET standard hinges on how tribunals reconcile the concept of stability with other elements, such as the investor's due diligence.[464]

Since in the Renewable Energy Saga, the investors' expectations were related to the stability of the legal framework, the extent to which due diligence is mandated "depends on the extent of the foreseeability of changes at the time of the investment and the respective efforts undertaken by an investor to predict these changes"[465]. However, in jurisprudence, there is little to no guidance on how this obligation on the part of the investor must take place, and not all tribunals apply it. For instance, when no formal certification of due diligence is required, the relevant threshold established by Arbitral Tribunals lies within the legitimate expectations that a hypothetical 'prudent investor' would have.[466] This is because legitimate expectations are evaluated against an objective standard, thus in no case investors can benefit from their ignorance.[467] There is no clear definition of the conduct expected from a "prudent investor" as it varies depending on the specific circumstances of each case. Nonetheless, some tribunals have identified two features that a prudent investor should possess: firstly, they should have knowledge of relevant national laws and judicial decisions, and secondly, they should consider various sources of information available at the time of investing.[468] The employ of this broad standard by Tribunals can be justified by the fact that consistently holding States accountable whenever an investor's expectations are frustrated could potentially freeze the domestic regulatory framework and prioritize investor interests over public concerns.[469]

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[463] See UNCTAD, note 410, page 78.
[464] See Y. Levashova, *The Role of Investor's Due Diligence in International Investment Law: Legitimate Expectations of Investors*, 2020, Kluwer Arbitration Blog.
[465] See Levashova, note 461, page 243.
[466] See Balcerzak, note 2, page 190.
[467] *Ibidem,* page 323.
[468] See Levashova, note 461, page 247.
[469] See S. Matos, *Investor Due Diligence and Legitimate Expectations*, 2022, Journal of World Investment & Trade 23 (2022) 313-328, page 326.

In the legal cases analyzed, Arbitral Tribunals adopted divergent positions on whether detailed due diligence must take place before legitimate expectations can arise.[470] The various stances can be categorized into three distinct groups. In *Charanne*[471], *Masdar, Stadtwerke*[472], and *Silver Ridge*[473], the Arbitral Tribunals establish that detailed due diligence is required in such a highly regulated sector. Notably, in the *Masdar* case, the Tribunal determined that when legitimate expectations stem from general legislation, the investor "must demonstrate that it has exercised appropriate due diligence and that it has familiarized itself with the existing laws"[474]. Second, the Tribunals in the *Isolux*[475], *Cube*[476], *Belenergia*[477], *Sun Reserve*[478], and *NextEra* cases do not require investors to conduct extensive due diligence, as they believed it was not a prerequisite for a successful claim regarding the protection of legitimate expectations. Rather they apply the threshold of knowledge possessed by a prudent investor. Lastly, in *Novenergia II* the obligation to conduct proper due diligence is excluded in the light of sufficiently clear legislation.[479] The issue was not explicitly addressed in the cases *Eiser*, *9ren*, *CEF,* and *Blusun*.

In conclusion, since Arbitral Tribunals generally accept the possibility that legitimate expectations can also arise from general legislation, an assessment of the due diligence conducted by the investors before investing in the host State becomes relevant, as stated by the Tribunal in the *Masdar* case. It is not correct to use the term 'necessary' because, as seen in this paragraph, Tribunals have adopted different positions on whether and how detailed due diligence shall be performed for legitimate expectations to be entitled to protection under the FET standard.

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[470] See Balcerzak, note 2, page 322.
[471] See SCC, *Charanne and Construction Investments v. The Kingdom of Spain*, note 64, para. 505.
[472] See ICSID, *Stadtwerke München GmbH, RWE Innogy GmbH and Others v. The Kingdom of Spain*, note 51, para. 264.
[473] See ICSID, *Silver Ridge Power BV* v. *Italian Republic*, note 10, para. 457.
[474] See ICSID, *Masdar Solar & Wind Cooperatief U.A.* v. *The Kingdom of Spain*, note 89, para. 494.
[475] See SCC, *Isolux Netherlands, BV* v. *Kingdom of Spain*, note 288, para. 781.
[476] See ICSID, *Cube Infrastructure Fund SICAV and others* v. *Kingdom of Spain*, note 221,para. 396.
[477] See ICSID, *Belenergia S.A. v. Italian Republic*, note 321, para. 584.
[478] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 714.
[479] See SCC, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, note 196, para. 679.

2.4.4 The relation between the investors' expectations of regulatory stability and the States' power to regulate.

The State's power to regulate for public purposes is an undisputed sovereign right recognized in customary international law. This right can sometimes collide with the commitments made by the State towards foreign investors. For this reason, in recent years, there has been growing attention to the necessity to strike a balance between the protection of the interests of foreign investors and safeguarding the general public interests of the host State, allowing the host State to deviate from the standard protection regime when serving the general public interest. This phenomenon is attributed to the proliferation of neoliberal inclinations, which prioritize the profitability of private entities.[480] Notably, the relevance attributed by investors to the concept of 'legal stability' constitutes a crucial element when deciding to invest in a foreign State.[481] As a matter of fact, the element of stability is described as "the holy grail of every investor in every sector"[482]. The principle of legal stability can be linked not only to the first sentence of Article 10, paragraph 1, of the ECT, which requires States to create stable, equitable, and transparent conditions in the energy sector[483] but also to the concept of protection of the investors' legitimate expectations.[484]

Under the Renewable Energy Saga, a greater focus must be on the latter State obligation. The extent to which a state can exercise its regulatory authority without facing liability can also depend on whether the investors' legitimate expectations were based on specific commitments or general legislation. In this context, it becomes important to discuss the concept of the 'margin of discretion' of a State, which refers to the State's right to regulate in the public interest. Moreover, in situations where specific commitments are absent, there is a lack of clear directives on how this principle should be interpreted by Tribunals. This ambiguity grants Tribunals significant leeway in deciding the extent to which they should defer to

[480] See C. Focarelli, *Diritto internazionale*, fifth edition, Milano, CEDAM, 2019, pages 542, 550, 556-557, page 556.
[481] See L. Mehranvar, S. Sasmal, *The Role of Investment Treaties and Investor-State Dispute Settlement in Renewable Energy Investments*, December 2022, New York: Columbia Center on Sustainable Investment (CCSI), page 12.
[482] See Balcerzak, note 2, page 191.
[483] See Dias Simões, note 182, page 299.
[484] See Ortino, note 439, page 19.

States exercising their regulatory powers without facing legal repercussions.[485] In the relevant legal cases, Claimants often equated specific commitments outlined in general legislation with stabilization clauses. Similarly, scholars have concluded that investors cannot expect stabilization commitments made in legislation to remain immutable. Indeed, these are as much subject to modifications as all other dispositions of the relevant legal framework.[486] The main difference between legitimate expectations arising from specific commitments and those arising from general legislation is that in the former case, the State does not retain any more "margin of discretion to balance the investor's expectations against public policy objectives, no matter whether the regulatory change is properly or improperly retroactive"[487]; thus, a breach of a specific commitment to stability automatically amounts to a breach of the FET standard.[488] In the latter case, a breach of the FET standard would occur solely in instances where the modifications to the regulatory framework result in fundamental, unreasonable, and disproportionate in respect to the objective to achieve.[489] According to Ortino, these scenarios could serve as useful guidelines for tribunals in assessing how the FET standard regulates regulatory changes in the absence of a stabilization commitment. In the former situation, we encounter what is termed as 'strict stability,' illustrated by instances like the inclusion of a stabilization clause within the pertinent treaty. On the other hand, the concept of 'soft stability' comes into play in the latter scenario, where the purported breach of the FET provision is assessed considering factors such as procedural fairness, reasonableness, and proportionality of the amendment.[490] This entails, once again, the necessity by Arbitral Tribunals to engage in a balancing exercise between the investors' interests and the host State's power to regulate. Within these boundaries, a certain degree of change is permissible and aligns with the FET standard; consequently, investors may reasonably expect that the legal framework of the host state will not exceed the acceptable margin of

[485] See Biggs, note 37, page 14.
[486] See Zannoni, note 443, page 458.
[487] *Ibidem,* page 459.
[488] *Ibidem,* page 459.
[489] *Ibidem*, page 460.
[490] See Ortino, note 409, page 5.

appreciation.[491] As stated in paragraph 2.4.1, the majority of the Arbitral Tribunals in the relevant legal cases established that the first sentence of Article 10, paragraph 1, of the ECT cannot be interpreted as a stabilization clause, at least in the strict sense.[492] The primary distinction between the first and second approaches lies in the factors taken into consideration by the Tribunals when evaluating a purported breach of the FET standard. As a matter of fact, the host State's regulatory authority element is only taken into account when applying the 'softer approach'.[493] This results in a greater tempering of investors' legitimate expectations.[494]

In the Renewable Energy Saga, Arbitral Tribunals engage in a balancing exercise when assessing the alleged frustration of the Claimants' legitimate expectation of regulatory stability. Within this context, and also taking into account the abovementioned distinction, the Tribunals generally acknowledge the wide latitude granted to States in regulating public interests, particularly in the absence of specific commitments from the host State.[495] As stated in the *Sun Reserve* case, the Tribunal establishes that the threshold for assessing a breach of the FET standard under Article 10, paragraph 1, of the ECT was high, thus requiring a radical or fundamental change.[496]

When engaging in a balancing exercise in the analyzed legal cases, certain Tribunals have embraced the 'proportionality' approach as their standard of review. This method hinges on assessing the proportionality of the host State's actions as a pertinent element in the balancing process[497] and it consists of three elements, which are the "suitability, necessity and proportionality stricto sense"[498]:

> "Generally speaking, in conducting proportionality analysis the tribunal must first determine whether the measure giving effect to the interest is capable of achieving its objective. It must then be ascertained whether the measure is necessary to achieve its end, or whether a less restrictive but equally effective measure could be used instead. Finally the tribunal must

[491] See Zannoni, note 443, page 461.
[492] See Ortino, note 439, page 18.
[493] *Ibidem*, page 33.
[494] See Biggs, note 37, page 11.
[495] *Ibidem*, page 15.
[496] See SCC, *Sun Reserve Luxco Holdings SRL* v. *Italy*, note 127, para. 668.
[497] See Ortino, note 439, page 150.
[498] See Bagnulo Cedrez, note 418, page 204.

> consider if the effects of the measure imposed are excessive compared to the competing right or interest that has been infringed."[499]

Before this, however, the Tribunal shall demonstrate that the State's conduct was implemented for a legitimate purpose since this method assumes that the action was adopted in the public interest.[500] In the *Charanne* case, the threshold established by the Arbitral Tribunal to assess the proportionality of the measures adopted by Spain is high. It indicated that such criteria would be met "as long as the changes are not capricious or unnecessary and do not amount to suddenly and unpredictably eliminate the essential characteristics of the existing regulatory framework"[501]. The 'proportionality' approach was implemented more rigorously by the Arbitral Tribunal in the *Blusun* case. Compared to the position adopted by the *Charanne* Tribunal, the *Blusun* Tribunal has to look more carefully at where the line should be drawn, attempting to figure out when host countries can change rules to fit new needs and when they should stick to promises made to investors to protect their fair expectations.[502] It establishes that amendments to lawfully granted subsidies, absent specific commitments, are allowed to the extent that the modification is not "disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources based on the earlier regime"[503]. Lastly, in the *CEF Energia* case, the Tribunal engaged in a 'balancing and weighting' exercise of the expectations of the Claimant that were found to be specific enough to create legitimate expectations that the incentives would remain constant for the promised twenty years.[504] Hence, the Tribunal determines that when there are specific commitments that the Claimant relied upon when deciding to invest, States have less leeway. Consequently, the balancing process becomes more rigorous:

> "[…] the greater the level of engagement as between a sovereign and an investor, such as here through Respondent's undertaking to maintain a specific incentivized tariff for 20 years, ultimately resulting in legitimate expectations

[499] See Collins, note 1, para. 9.7.
[500] See Bagnulo Cedrez, note 418, page 204.
[501] See SCC, *Charanne and Construction Investments v. The Kingdom of Spain*, note 64, para. 517.
[502] See Dias Simões, note 182, page 302.
[503] See ICSID, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, note 312, para. 372.
[504] See SCC, *CEF Energia BV* v. *Italian Republic*, note 106, para. 237.

> which are clear in both scope and origin, the more rigorous the scrutiny must be of acts which, even if reasonable, cut across those legitimate expectations. […]"[505]

In the *Eiser* case, the Tribunal employed a different approach to reconciling the State's regulatory authority with the safeguarding of investors' legitimate expectations, known as the 'sole effect' theory. Tribunals examine the impact of measures implemented by the host State to ascertain whether they have partially or completely deprived the investor of the benefits of their investment. Therefore, each instance requires an analysis to determine whether the measures represent a typical exercise of regulatory authority or if they have resulted in the deprivation of the expected benefits from the investment. A causal relationship between the measures and their effects must be established. In the *Eiser* case, the Tribunal shares the position outlined in *Charanne*, emphasizing, however, that the measures enacted by the State had the effect of depriving Claimants of essentially all the value of their investment.[506]

2.5 Conclusion.

In conclusion, this chapter helped to understand the central controversy surrounding the legal cases of the Renewable Energy Saga, namely, the inconsistency in the positions taken by various Arbitral Tribunals. This inconsistency arises from the absence of the 'legally binding precedent' principle in international investment arbitration, allowing Tribunals to attribute different importance to the various elements constituting the FET standard. This, coupled with the divergent interpretations offered by Tribunals and the broad nature of the FET standard, which lacks a universally accepted definition, this situation engenders unpredictability for States and constrains their right to regulate.[507] In my view, one of the most significant factors contributing to this inconsistency is the determination of various dates from which the Tribunals are required to evaluate the existence of the legitimate expectations of the Claimants. This implies that the

[505] *Ivi,* para. 243.
[506] See ICSID, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À.R.I. v. The Kingdom of Spain*, note 179, para. 418.
[507] See Sarmiento, Nikièma, note 417, page 5.

measures under consideration by the Tribunals may vary depending on when the relevant date was identified.

Moreover, the influence of the concepts of 'due diligence' and the 'prudent investor' on evaluating the extent of the State's regulatory authority deserves a particular focus. In the cases under analysis, Tribunals employ the due diligence requirement to balance the alleged State's obligation of stability of the legal framework. As a matter of fact, the threshold used by the majority of the Arbitral Tribunals for determining whether a breach of legitimate expectations occurred is whether, at the time the investment – or the decision to invest – was made, the information available would have enabled a prudent investor to anticipate the potential for changes in the legal framework of the State involved. This is an implicit recognition of the legislative authority of the State. Furthermore, the degree to which regulatory changes are considered foreseeable hinges on the content of the due diligence and risk evaluation efforts undertaken by the investor.[508] The due diligence requirements serve as a valuable tool for Tribunals to strike a balance between the regulatory authority of the host State and the safeguarding of investors' legitimate expectations. This, in my view, is particularly evident in cases where legitimate expectations stem from general legislation. By assessing what a hypothetical prudent investor would have known and anticipated at the time of making investment decisions, Tribunals can determine the extent to which a State can exercise its regulatory powers without facing liability. If the information accessible to a prudent investor when investing could have reasonably led to foreseeing potential modifications in the relevant legal framework, then the State retains the freedom to exercise its regulatory powers accordingly.

[508] See Levashova, note 464, page 252.

Chapter 3.

The subsequent States' practice on the Fair and Equitable Treatment Standard: the aftermath of the Renewable Energy Saga.

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3.1 Premises.

The examination of pertinent legal cases within the Renewable Energy Saga has revealed noteworthy transformations in the landscape of international investment law. These cases have highlighted the obsolete nature of the ECT's text, which fails to emphasize the importance of safeguarding States' right to regulate for public policy objectives. Instead, the ECT was originally designed to favor European investors. In response, many States are now actively seeking to include language in their IIAs that not only protects but also advances their regulatory sovereignty.[509]

In this chapter, we will analyze the effects of the Renewable Energy Saga legal cases on the evolution of States' practice, through the inclusion of some relevant provisions in some of the most recent IIAs, either Model BITs or BITs, and compare such Articles with the previous ones. The focus will be on the provisions governing the FET standard and those on incentives. The latter constitutes a novelty in the field of IIAs, and, in my opinion it represents the most evident consequence of these legal cases. Additionally, it is interesting to evaluate the current relationship between the FET standard and the minimum standard of treatment (here 'MST') of aliens provided under customary international law. First, we need to examine the evolution of the MST's interpretation. Following this, we can assess how the FET standard, particularly in its modern iterations, interacts with the MST principle.

[509] See C. Baltag, R. Joshi, K. Duggal, *Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?*, 2023, ICSID Review, Vol. 38, No. 2, pp. 381-421, page 382.

This analysis will shed light on how these two principles are integrated within contemporary FET provisions. Finally, we will examine the specific implications of this saga and attempt to anticipate its potential future impacts. In this regard, it is relevant to mention Spain's Real Decreto-Ley 17/2019 (referred to as "RDL 17/2019") potential impact on the pending cases within the context of the Renewable Energy Saga. Next, we will examine a pertinent study on the actual impact of IIAs on foreign direct investments. We will focus on factors that, according to the interviewed investors, play a more significant role in the investment decision-making process and are considered to be more attractive.

3.2 The effects of the Renewable Energy Saga on the most recent IIAs: a growing trend towards higher protection.

For several years, there has been ongoing discussion about the reform of IIAs. In 2018, the UNCTAD Reform Package for the International Investment Regime introduced a framework for this purpose. The initial phase of this process identifies five priority areas for reform. Of particular importance for this analysis is the need to preserve the State's regulatory authority while still ensuring investor protection.[510] In this context, the report proposes several potential ways to reform the FET standard.[511] The first option is to qualify the standard by referencing customary international law, despite recognizing the challenges associated with this approach. Another option is to clarify the content of the standard by introducing a non-exhaustive list of State obligations. However, this approach has the disadvantage of potentially enabling the expansion of the interpretation of FET through subsequent arbitration. A third option is for States to introduce a closed list of specific obligations, thus replacing the general clause. This is the most favored approach, as will be indicated in this paragraph. Finally, another possibility is to omit the FET clause altogether. This is the most radical among the four approaches, which has the effect of "[reducing] States' exposure to investor claims, but also [reducing] the protective value of the agreement".[512]

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[510] See UNCTAD, *Reform Package for the International Investment Regime*, 2018, page 7.
[511] *Ibidem,* page 33.
[512] *Ibidem,* page 36.

The Renewable Energy Saga has had a notable impact on State practice. Its influence has reached other States not directly engaged in the legal proceedings. This is evident in the formulation of numerous BITs, Model BITs, and IIAs adopted in recent years. In this context, the European Commission's release of implementing decisions regarding authorizations granted to individual EU members for BITs is noteworthy. This has the scope to delineate the boundaries of Member States' negotiating powers, requiring the inclusion of provisions encompassing the FET standard, and to prohibit unreasonable, arbitrary, or discriminatory measures.[513]

a) 2022 Italy Model BIT.

The most relevant example is Italy's 2022 Model BIT. To have a better understanding of the possible interpretations of the most relevant clauses, we will resort to the commentaries contained in the *Non-Paper*[514] *of Annotations to Model Clauses for the Negotiation or Re-Negotiation of Bilateral Investment Treaties between Member States and Third Countries* (here 'Non-Paper'), published by the European Commission in 2023. This is because the content of the relevant Articles provided in the abovementioned paper and that of the 2022 Italian Model BIT are the same. Nonetheless, it is first necessary to elucidate that Model BITs serve as mere instruments intended to facilitate the commencement of negotiations for an agreement. Consequently, they do not inherently impose any obligations upon the Contracting Parties.[515]

In Article 2, paragraph 3, of its 2003 Model BIT, Italy merely references the FET standard as one of the protection standards to accord to investments of investors of the other Contracting Parties. There is no explicit mention of the scope, nor a clear definition of such standard.[516] Italy has not entered into any BITs since 2009. In 2022, the new Model BIT was adopted, and the difference with the first

[513] See M. C. Malaguti, *The New Italian Model BIT Between Current and Future Trends*, 2021, The Italian Review of International and Comparative Law 1 (2021) 113-131, page 117.
[514] A 'Non-Paper' is an informal document commonly employed in closed negotiations with EU institutions. It does not constitute an official EU Model BIT, nor does it represent an official position; rather, its purpose is to embody "a broader investment protection approach of the Commission and promote the best practices for Member States", as defined in P. Nacimiento, B, Scharaw, J. Lui, *European Commission Publishes Non-Paper of Model Clauses for Member States' Bilateral Investment Agreements with Third Countries*, 19 February 2024, Kluwer Arbitration Blog.
[515] *Ibidem,* page 119.
[516] See Model BIT Italy, 2003, Art. 2, para. 3.

one is significant. The new model is, in fact, less favorable to foreign investors, enabling Italy to wield its regulatory powers without the fear of incurring liability for its actions. In other words, Italy seeks to avoid the possibility of facing arbitration in the future. This is a clear consequence of the legal cases brought against the Arbitral Tribunals in the Renewable Energy Saga.

Firstly, Article 4 takes the name of 'Treatment of Investors', thus modifying the original name contained in the 2003 Model BIT, that is 'Promotion and Protection of Investments'. Such provision dedicates three paragraphs to the FET standard. The first paragraph provides the obligation for States to afford investments and investors of the other Contracting Party with fair and equitable treatment in accordance with the terms outlined in the remainder of the Article. For the first time, Italy limits the scope of the FET standard to certain types of conduct engaged by the State, introducing a closed list of actions that would amount to a breach of the standard:

> "2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 through measures or series of measures that constitute:
> (a) denial of justice in criminal, civil or administrative proceedings; or
> (b) fundamental breach of due process, including a fundamental breach of transparency in judicial and administrative proceedings; or
> (c) manifest arbitrariness; or
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
> (e) abusive treatment such as harassment, duress or coercion."[517]

These elements have been drawn from arbitral jurisprudence and are widely regarded by Tribunals.[518] It is important to note that letter (d) drastically limits the scope of the discrimination that could amount to a breach of the FET standard. As a matter of fact, the use of the word 'targeted' emphasizes the importance of the element of intention, narrowing down the cases in which a State's alleged discriminatory conduct can amount to a breach of the standard.

Another innovative aspect is found in the following paragraph of the same Article, which explicitly deals with the assessment of the investor's legitimate expectations by the Tribunals:

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[517] See Model BIT Italy, 2022, Art. 4, para. 2.
[518] See European Commission, *Annotations to the Model Clauses for negotiation or re-negotiation of Member States' Bilateral Investment Agreements with third countries*, 21/09/2023, page 10.

> "3. When determining a breach of paragraph 2, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."[519]

Here, Italy explicitly states that Tribunals may consider the investors' legitimate expectations in the case in which a host State has made specific commitments to an identifiable investor, and whether the investor has relied on such representation when deciding to invest.[520] As a consequence, legitimate expectations are only considered relevant when assessing an alleged violation of the standard in the circumstances listed in paragraph 2, rather than being regarded "as a standalone element that in itself would give rise to a violation of the FET standard".[521] This represents a clear effect attributable to the Renewable Energy Saga, where Tribunals almost unanimously acknowledged the potential for legitimate expectations to arise from general legislation.[522]

Moreover, Article 6 of the Model BIT acknowledges the State's sovereign right to regulate for public purposes, introducing it within a specific provision, and places significant emphasis on subsidies. Drawing lessons from the Renewable Energy Saga, Italy chose to safeguard its regulatory authority by incorporating an article specifically addressing its power to regulate, named 'Investment and Regulatory Measures':

> "1. The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy, and data protection, or the promotion and protection of cultural diversity.
> 2. For greater certainty, the provisions of this Agreement shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits.
> 3. For greater certainty and subject to paragraph 4, a Party's decision not to issue, renew or maintain a subsidy

[519] See Model BIT Italy, 2022*,* Art. 4, para. 3.
[520] See M. C. Malaguti, note 513, page 122.
[521] See *Annotations to the Model Clauses for negotiation or re-negotiation of Member States' Bilateral Investment Agreements with third countries*, note 518.
[522] See note 446.

> (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or
> (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy,
> shall not constitute a breach of the provisions of this Agreement.
> 4. For greater certainty, nothing in this Agreement shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement, where such action has been ordered by the competent authorities, or as requiring that Party to compensate the investor therefor."[523]

It was deemed necessary to introduce this provision to reaffirm the State's right to regulate in the public interest. In recent years, there has been a trend in arbitral practice to limit such powers, sometimes causing the so-called 'regulatory chill' on the enactment of regulations for public interests. Paragraph 2, also referred to as the 'non-stabilization clause', clarifies that the investment protection provisions do not imply a commitment from the Parties to freeze the regulatory framework. Even if regulatory adjustments have adverse effects on covered investments or investor profit expectations, there is no obligation for the Parties to provide compensation.[524] This is to prevent investors from arguing that the relevant legal framework is immutable, as observed in the analyzed legal cases. Notably, Italy safeguards its prerogatives to amend or revoke subsidies, absent a specific commitment and when required by the competent authorities without breaching the provisions contained in the Agreement, with two exceptions: firstly, if the State has made explicit commitments ensuring the non-alteration of such subsidies, and secondly, if any modifications are executed in accordance with the stipulated terms and conditions.

The content of the provisions on fair and equitable treatment and the relation between investments and the State's regulatory powers contained in Italy's 2022 Model BIT is also similar to those contained in Articles 8.9 and 8.10 of the 2017 Comprehensive Economic and Trade Agreement (CETA) between Canada, and the EU and its Member States.[525] Similarly to the Italian Model BIT, the CETA Agreement introduces an exhaustive list of circumstances for which the State's conduct amounts to a breach of the FET standard. The only difference is that the

[523] See Model BIT Italy, 2022, Article 6.
[524] See *Annotations to the Model Clauses for negotiation or re-negotiation of Member States' Bilateral Investment Agreements with third countries*, note 518, page 7.
[525] See Comprehensive Economic and Trade Agreement, between Canada, of the one part, and the European Union and its Member States, of the other part, 2017, Articles 8.9, 8.10.

last letter of Article 8.10, paragraph 2, leaves room for the introduction of other, possible, additional elements identified by the Contracting States when reviewing the content of the obligation to provide fair and equitable treatment:

> "2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
> […]
> (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
> 3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision."[526]

b) 2021 Spain-Colombia BIT.

In 2021, Spain and Colombia replaced their 2005 BIT with a new treaty. Once again, the impact of the Renewable Energy Saga legal cases is noteworthy. Article 1 of the new BIT, which outlines its scope of application, explicitly states that the provisions contained therein do not cover subsidies or incentives offered by either Party. Furthermore, it specifies that any changes to national legislation regarding subsidies by either Spain or Colombia do not constitute a breach of certain provisions of the treaty, including the obligation to provide investments from investors of the other Contracting Party with fair and equitable treatment.[527] In this regard, the FET standard provided in Article 7 has a stricter scope of application. In fact, the circumstances in which a breach of the FET standard would occur are listed in paragraph 2, these being the denial of justice, the breach of due process, manifest arbitrariness, specific discrimination based on unfair grounds, and abusive treatment:

> "Una Parte Contratante incumplira la obligación de trato justo y equitativo a la que se hace referencia en el apartado I cuando una medida o una serie de medidas constituya:
> a. una denegación de justicia en procedimientos penales, civiles o administrativos;

[526] *Ivi,* Article 8.10.
[527] See Spain-Colombia BIT, 2021, Article 1, para. 7.

> b. un incumplimiento esencial de las garantias procesales, incluido el incumplimiento esencial del principio de transparencia en los procedimientos judiciales y administrativos;
> c. una arbitrariedad manifiesta;
> d. una discriminación especifica por motivos claramente injustos, como la raza, el sexo o las creencias religiosas; o
> e. un trato abusivo (coacción, intimidación o acoso, entre otros) a los Inversionistas."[528]

Introducing a closed list of State behaviors that amount to a breach of the FET standard limits the scope of application of the standard itself, making it more difficult for tribunals to determine that a violation actually occurred. When assessing whether the abovementioned obligation was breached, the Tribunal is allowed to consider the legitimate expectations of a 'diligent' investor and the specific commitments undertaken by the State towards the Investor.[529] This could possibly mean that, in disputes concerning the 2021 Spain-Colombia BIT, the due diligence element must be taken into account by the Tribunal to strike a balance between the obligation to protect the investors' legitimate expectations and the host State's power to regulate in the public interest. Nevertheless, it does not specify which approach should be adopted.

Lastly, part III is dedicated to the State's right to regulate. In this context, it's important to highlight Article 14, where the Contracting Parties mutually acknowledge the State's right to regulate for public policy purposes and try to safeguard this authority. It provides that the mere adoption, modification, or enforcement of a Measure that adversely affects an investment or interferes with an investor's expectations, including profit expectations, does not automatically constitute a breach of any obligation outlined in the Agreement:

> "2. El solo hecho de que la adopción, modificación o ejecución de una Medida afecte negativamente a una Inversión o interfiera con las expectativas del Inversionista, incluyendo su expectativa de ganancia, no constituye por sí mismo un incumplimiento de ninguna obligación bajo este Acuerdo."[530]

This could be interpreted as a reference to the investors' legitimate expectations.

[528] *Ivi,* Article 7, para. 2.
[529] *Ibidem,* Article 7, para. 3.
[530] *Ibidem*, Article 14, para. 2.

c) 2015 India Model BIT and subsequent BITs.

India's 2015 Model BIT may have been influenced by numerous legal cases, resulting in a notably stringent document. Unlike other BITs, it doesn't explicitly mention the FET standard, which is now referred to as the 'Standard of Treatment'. India's Model BIT introduces a comprehensive list of State actions that could constitute a breach of this standard, making it one of the strictest Model BITs ever adopted:

> "3.1 No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through:
> (i) Denial of justice in any judicial or administrative proceedings; or
> (ii) fundamental breach of due process; or
> (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
> (iv) manifestly abusive treatment, such as coercion, duress and harassment."[531]

This article raises several questions. Firstly, linking the standard of treatment to the international standard provided under customary international law restricts the situations in which investors from other Contracting Parties can claim a violation, leaving States more regulatory autonomy. Furthermore, while denial of justice is a concrete principle firmly connected to customary international law, the thresholds for due process and manifestly abusive treatment are notably high. For a violation of the due process element to raise State responsibility, it must be both egregious and remain unremedied. This indicates that these principles are breached only in extreme cases. Similarly, for the abusive treatment element, in order to constitute a violation of the standard, it must be shown that the harassment is continuous, unjustified, and outrageous. These requirements must be satisfied cumulatively.

Additionally, in a departure from other BITs or Model BITs, India reserves the right to issue, modify, or withdraw incentives without incurring liability. Paragraph 2.3 of Article 2, which addresses the scope and general provisions, explicitly

[531] See Model BIT India, 2015, Article 3, para. 1.

excludes the application of the Treaty to subsidies or grants provided by either of the Contracting Parties.[532]

India incorporated the abovementioned Standard of Treatment provision and the Article that excludes subsidies from the scope of application of the Treaty in the India-Belarus BIT (2018)[533] and the India-Kyrgyzstan BIT (2019)[534].

Slightly different from these three is the 2020 India-Brazil BIT. Here, the Contracting Parties decided that the Treaty shall not apply to "subsidies or grants provided by a Party to vulnerable groups in accordance with [the domestic law of the State Party]"[535]. This marks a departure from the Model BIT and the previously-mentioned IIAs, since the Treaty clearly excludes the application of the provisions contained therein to those subsidies directed to a specific target of people. Additionally, Article 4, governing the treatment of investments, specifies the obligations of the Contracting States by linking them to the standard of treatment provided under customary international law. It introduces a further type of State conduct that can amount to a breach of the Article:

> "4.1 Based on the applicable rules and customs of international law as recognized by each of the Parties and their respective national law, no Party shall subject investments made by investors of the other Party to measures which constitute:
> a) denial of justice in any judicial or administrative proceedings;
> b) fundamental breach of due process;
> c) targeted discrimination, such as gender, race or religious belief;
> d) manifestly abusive treatment, such as coercion, duress and harassment; or
> e) discrimination in matters of law enforcement, including the provision of physical security."[536]

d) 2019 Netherlands Model BIT.

The influence of the Renewable Energy Saga is also apparent in the 2019 Dutch Model BIT. In the preamble, the State asserts that the objectives of sustainable development, the need to balance these objectives with economic partnership, can be achieved without compromising the States' right to regulate for public

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[532] *Ivi,* Article 2, para. 3.
[533] See India-Belarus BIT, 2018, Articles 2.4 and 3.1.
[534] See India-Kyrgyzstan BIT, 2019, Articles 2.4 and 3.1.
[535] See India-Brazil BIT, 2020, Article 3.6.
[536] *Ibidem,* Article 4.1.

purposes.[537] The obligation to respect the regulatory powers of the Contracting Parties has also been resumed in Article 2, defining the scope of application of the BIT. The content of paragraph 2 is equal in content to Article 14 of the aforementioned Spain-Colombia BIT, stating that no provision contained in the Agreement shall affect the right of the States to regulate within their territories.[538] However, paragraph 4 refers to the State's authority to modify the national legislation on subsidies. The main difference between this BIT and the other IIAs analyzed in this section is that this clause only applies in two specific circumstances. The first circumstance is when an amendment is requested by a competent court or authority. The second, and the real novelty, is that the amendment cannot constitute a breach of the provisions contained in the Agreement if its adoption was necessary to comply with international obligations between the Contracting Parties. This effectively subordinates any possible future BITs to the obligations contained in any other international treaties:

> "4. Nothing in this Agreement shall be construed as preventing a Contracting Party from discontinuing the granting of a subsidy and/or requesting its reimbursement, where such measure is necessary in order to comply with international obligations between the Contracting Parties or where it has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Contracting Party to compensate the investor therefor."[539]

In my opinion, this paragraph makes it more challenging for States to modify incentives because such amendments are only permitted under two circumstances. However, this provision does not apply in cases where the State has made specific commitments regarding the stability of the regulatory framework.[540]

Article 9 governs the treatment of investors detailing the types of state conduct that may breach the FET standard. This article is similar to Article 8.10 of CETA, as it lists the same obligations and similarly allows Contracting States to expand the list of State actions that could constitute a breach of the FET standard when reviewing its content.[541] The Model BIT provides that, to assess a breach of the FET

[537] See Model BIT Netherlands, 2019, preamble.
[538] *Ibidem,* Article 2, para. 2.
[539] *Ibidem,* Article 2, para. 4.
[540] *Ibidem,* Article 9, para. 5.
[541] *Ibidem,* Article 9, para. 3.

standard, Arbitral Tribunals can take into account the specific representations made by the State towards an investor “to induce an investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Contracting Party subsequently frustrated”[542].

Considering the analyzed IIAs, the first novelty that stands out is that the relevant provisions contained in the analyzed IIAs are often titled ‘Treatment of Investors’ or ‘Standard of Treatment’. This marks a significant departure from previous treaties, wherein the Article containing the FET standard was typically titled ‘Promotion and Protection of Investments’. For example, this was the case in the 2003 Italy Model BIT, the 2005 Spain-Colombia BIT, and in Article 10 of the ECT.

The Indian Model BIT, together with the subsequent BITs concluded with Belarus, Kyrgyzstan and Brazil, stand out as the strictest. India's non-involvement in the Renewable Energy Saga underscores the significance of this Model BIT as evidence of how Arbitral Awards can prompt states to revise their treaty approaches. Firstly, each Model BIT or BIT defines the scope of the FET standard, establishing a high threshold. This was probably done firstly to avoid inconsistency in the application of this standard by Arbitral Tribunals, thus safeguarding their regulatory autonomy, and secondly to minimize the risk of the state being found in breach of the FET standard.[543] Traditionally the clause would stop with the obligation to accord investments of investors of the other contracting parties fair and equitable treatment. With regard to subsidies, all IIAs afford States varying degrees of discretion to amend national legislation concerning subsidies.

Drawing lessons from the positions adopted by the Tribunals in the Renewable Energy Saga, States opted to specify the elements Arbitral Tribunals must take into account when assessing the existence of legitimate expectations. This was accomplished by mandating that the Tribunals consider only the specific commitments made by the State. Consequently, this approach *a priori* excludes the

[542] *Ivi*, Article 9, para. 4.
[543] See D. García Clavijo, *Model International Investment Treaties: Outlining the Future Landscape of International Investment Law*, 2020, Investment Arbitration Outlook Uría Menéndez, n.7, page 23.

possibility that investors' legitimate expectations, in order to be protected, can also arise from general legislation, as otherwise demonstrated in the legal cases under analysis.[544] As a result, this creates greater difficulty for Tribunals in assessing the actual existence of legitimate expectations, as the circumstances under which these expectations can arise are narrowed. Furthermore, a breach of the FET standard would occur automatically if the State breaches a specific commitment made to an investor beforehand. In my opinion, this grants States greater discretion in modifying the domestic regulatory framework and also affects the Tribunal's assessment of the investor's exercise of due diligence: since modifications to the regulatory framework are permitted in the absence of specific commitments unless such changes are fundamental or radical, there is less need for Tribunals to engage in a balancing exercise through the due diligence requirement.

3.3. The debate on the relationship between the fair and equitable treatment standard and the international standard of treatment of aliens.

Another important issue to consider is the relationship between the FET standard and the MST under customary international law. Before addressing this matter, it is helpful to briefly review the evolution of the MST concept from the moment in which a first prototype of definition was given.

The MST encompasses a set of fundamental rights and principles that represent the basic threshold of treatment that states must provide to aliens and their properties.[545] As it is a concept founded in customary international law, it is difficult to exactly define its content, due to its evolving character.[546] The 1926 case *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (here '*Neer*') has been one of the most significant legal cases in defining the types of state conduct that constitute international delinquency. It was one of the first instances in which a concrete definition was provided by a judicial body, specifically the Mexico-US Claims Commission:

[544] See page 81.
[545] See M. Klein Bronfman, *Fair and Equitable Treatment: An Evolving Standard*, 2005, Univesity of Heidelberg, Max Planck Institute for Comparative Public Law and International Law, page 665.
[546] See Kuzhatov, note 420, page 2.

> "[…] the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[547]

This definition implies that a "minimum standard" imposes only minimal obligations on the host State, resulting in minimal protection for foreign investors. According to Dumberry, this legal case has contributed to the emergence of the concept of MST, but the opinion that, as of today, the definition given in the *Neer* case is no longer relevant, is widespread in literature.[548]

The next important step in the evolution of the concept of MST is represented by Article 1105 of the North America Free Trade Agreement (here 'NAFTA') and the consequent Free Trade Commission binding interpretative note of July 2001. With Article 1105 of the NAFTA Agreement, named 'Minimum Standard of Treatment', Contracting Parties are bound to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security"[549]. This formulation raised some questions on the meaning of this Article, namely whether the FET standard was additional to the international minimum standard.[550] The 2001 interpretative note by the NAFTA Free Trade Commission clarified that the FET standard outlined in Article 1105 does not necessitate treatment beyond what is required by the customary minimum standard of treatment of aliens in international law.[551] This interpretation restricts the level of protection granted to foreign investors to that which is established by customary international law.[552]

This short preamble was necessary to understand the innovative character of the 'new generation' FET clauses. According to Dumberry, the recent States' efforts

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[547] See final Award in the case *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, 15 October 1926, UN volume IV, pages 61-62.
[548] See P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105*, 2013, Kluwer Law International.
[549] See UNCTAD, note 410, page 24.
[550] *Ibidem,* page 24.
[551] See Klein Bronfman, note 545, page 666.
[552] See P. Dumberry, *'The "Minimum Standard of Treatment" in International Investment Law: The Fascinating Story of the Emergence, Decline and Recent Resurrection of a Concept'*, in P. Merkouris et al. (eds.) *Custom and its Interpretation in International Investment Law*. Cambridge University Press, page 16.

in delineating the scope of the FET standard have substantially contributed to the solidification of the meaning of MST under customary international law.[553]

In this context, Dumberry's perspective on Article 8.10 of CETA is valuable for understanding the current relationship between the FET standard and the MST under customary international law. Given that the relevant Articles contained in the IIAs discussed earlier mirror the provision found Article 8.10 of CETA, it is reasonable to extend his conclusions to these agreements as well. According to Dumberry, the content of these articles is largely influenced by the interpretation of NAFTA's Article 1105, as delineated by NAFTA Tribunals over the past twenty-five years. These have identified elements that are generally considered to be encompassed within the concept of MST. NAFTA Tribunals, interpreting customary international law, have traditionally adopted a broad view, recognizing its evolutionary nature. However, with the new-generation FET standard clauses "[this] 'evolution' has effectively been stopped with the specific enumeration of elements contained in the FET clause"[554].

As a result, these Articles can be seen as a natural outcome of States' intentions to define the FET standard to protect their regulatory powers. This increased specificity aims to narrow the clause's scope and limit tribunals' interpretative latitude.[555]

A notable aspect is that the relevant articles do not explicitly establish a link between the FET standard and the MST. In my view, the absence of explicit linkage could result in a situation where the FET standard is qualified. This qualification entails a clear delineation of the elements that could constitute a breach of the standard, which, as in these cases, may reflect the actual content of the MST provided under customary international law. However, it is valid to argue that these principles are somewhat general and may still allow for broad and diverse interpretations by Arbitral Tribunals, potentially undermining states' efforts to safeguard their regulatory powers. The use of qualifiers such as "manifest," "fundamental," and "targeted," however, serves to mitigate this possibility.[556]

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[553] *Ivi,* page 18.
[554] *Ibidem,* page 20.
[555] *Ibidem,* page 19.
[556] *Ibidem,* pages 19-20.

Conversely, in instances where the FET standard is unqualified, a reference to the MST or, more broadly, to customary international law can be useful. This approach is evident in two of the most recent, publicly available BITs. In the 2020 Hong Kong, China SAR-Mexico BIT, the FET standard is articulated in Article 5, titled 'Minimum Standard of Treatment'. Here, the Parties refrained from enumerating specific elements that constitute a breach of the standard; instead, they identify the MST as the benchmark for defining the FET standard:

> "1. Each Contracting Party shall accord to investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security.
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens (as evidenced by general and consistent State practice and opinio juris) as the standard of treatment to be afforded to investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:
> (a) "fair and equitable treatment" include the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process; and
> (b) "full protection and security" require each Contracting Party to provide the level of police protection required under customary international law.
> […]"[557]

Furthermore, the Parties in the 2023 Angola-Japan BIT chose not to qualify the FET standard. Article 4 of this BIT, titled 'General Treatment', simply associates the FET standard with customary international law, without providing any additional clarification on the scope of the standard:

> "Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[558]

3.4 Concrete implications and possible future impacts.

The final step of this analysis involves evaluating the potential effects of this shift towards greater protection of the State's right to regulate in new generation IIAs. As this represents a new trend, it is challenging to definitively determine the

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[557] See Hong Kong, China SAR-Mexico BIT, 2020, Article 5.
[558] See Angola-Japan BIT, 2023, Article 4.

future impacts. Therefore, the conclusions drawn are essentially hypotheses based on existing literature and data. By examining the available literature, we can begin to anticipate how this evolving landscape may shape the future of international investment law and policy.

Spain and Italy, along with other states, have withdrawn from the ECT due to the high costs associated with it and the numerous legal cases brought against them. For instance, Italy declared its withdrawal in 2015, which took effect at the beginning of 2016.[559] On the other hand, Spain announced its intention to withdraw in October 2022.[560] However, Article 47, paragraph 3, of the ECT, also known as the '*sunset clause*', stipulates that the provisions of the Treaty shall continue to apply to investments made in the territory of the withdrawing Contracting State for twenty years.[561] This implies that the pending legal cases against the concerned States shall not be affected by the State's decision to withdraw, thus ensuring that the interests of foreign investors are protected and providing them with legal certainty.

It is important to analyze the impact of RDL 17/2019 on the pending Renewable Energy Saga's legal cases. This new RDL aims to update specific remuneration parameters for those renewable energy facilities operating under a special regime. By doing so, it provides the regime with greater legal certainty, emphasizing the urgent need for these updates. Failure to implement them could result in uncertainty regarding the profitability of these installations. This, in turn, could hinder the financing of new projects and impede the realization of new investments crucial to Spain's goal of achieving an environmentally friendly transition by 2030.[562] This RDL establishes the new rate of 'reasonable profitability' that will be applied to facilities included in the specific remuneration regime in the regulatory period 2020-2025, which amounts to 7.09%.[563] However, facilities that

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[559] See G. Iorio Fiorelli, *Italy withdraws from Energy Charter Treaty*, 6 May 2015, Global Arbitration News.

[560] See C. Wendler, L. Lozano, J. Rotenberg, *Spain and other EU member states announce their withdrawal from the ECT: what are the implications for investors and arbitrations?*, 1 November 2022, Freshfields Bruckhaus Deringer.

[561] *See Energy Charter Treaty*, note 181, Article 47, para. 3.

[562] See P. Pérez-Salido, *Royal Decree-Law 17/2019: An Opportunity for Spain to Leave Behind the Renewable Energy Arbitrations?,* 2019, Kluwer Arbitration Blog.

[563] See Real Decreto-Ley 17/2019, de 22 de noviembre, por el que se adoptan medidas urgentes para la necesaria adaptación de parámetros retributivos que afectan al sistema eléctrico y por el que se da respuesta al proceso de cese de actividad de centrales térmicas de generación, Artículo único, para. 1.

received additional remuneration upon the entry into force of RDL 9/2013, are entitled to maintain this compensation for the first regulatory period. RDL 17/2019 provides that this compensation cannot be revised during the subsequent two regulatory periods, effectively until 2031.[564] This exceptional regime applies to those renewable energy facilities that were subject to arbitration or judicial proceedings due to modifications in the specific remuneration regime following RD 661/2007 and RDL 9/2013. In order to qualify, these facilities must demonstrate the early termination of such procedures or waive the compensation awarded as a result of such proceedings by 30 September 2020.[565]

According to Pérez-Salido, this RDL could serve as a starting point to encourage investors to withdraw their pending legal actions against Spain, since the ECT's sunset clause allows investors to present new claims up to twenty years after the date in which the withdrawal from the Treaty takes effect.[566] However, some investors may find it more advantageous to accept a lower rate during the period 2020-2025 and receive compensation from the Arbitral Award, rather than agree to a fixed rate for the next twelve years.[567]

Another important point to consider is the actual impact of investment treaties on foreign investment flows. Several studies have indicated that it is not possible to demonstrate conclusively that the legal protections outlined in these treaties have had a discernible impact on promoting foreign investment. Furthermore, there is no evidence to suggest that the ECT has positively influenced foreign direct investment inflows in the renewable energy sector.[568] Mehranvar and Sasmal investigated the factors influencing the industry experts and renewable energy investors' decisions to invest. They aimed to demonstrate that IIAs are not decisive factors in investment decisions. They began by identifying the top five factors that deter investment in a new state, which include "political instability, legal instability in the energy sector, instability of fiscal and/or energy markets, the macroeconomic profile of a host state, and corruption".[569] According to this study, the most relevant element taken

[564] *Ivi,* second final disposition, two, para. 1.
[565] *Ibidem,* second final disposition, two, para. 3.
[566] See Wendler, Lozano, Rotenberg, note 560.
[567] See Pérez-Salido, note 562.
[568] See Mehranvar, Sasmal, note 481, page 6.
[569] *Ibidem,* page 7.

into account by foreign investors in the decision-making process is that of stability, identifying some of the relevant features expected of a State's legal and regulatory framework:

> "- laws and regulations are publicly available, uniformly administered and applied, and provide a means for affected actors to communicate with relevant authorities;
> - laws and regulations serve clear policy objectives, such as economic development, social welfare or environmental protection, are based on sound legal and empirical evidence; and allow for the mutual benefits of investors and the state;
> - the governance framework is responsive to changing circumstances affecting either the state or the investor; and
> - investors are protected from arbitrary or discriminatory government decisions, and domestic courts will provide impartial means to uphold investors' legal rights and enforce their commercial contracts"[570]

With the emergence of the new wave of IIAs, the aspect of legal stability takes a secondary position. The investors' preference for the legal stability element contrasts with the States' decision to preserve their regulatory autonomy, notably by including 'non-stabilization' clauses in their IIAs. In my opinion, this may lead to an initial period of reduced foreign investment due to investors' lack of confidence in the regulatory framework of the host States. Possibly, as suggested by the 2021 OECD report on the future of investment treaties, transition policies could be implemented by the host States to ease the effects of the new, less generous IIAs towards foreign investors.[571]

3.4 Conclusion.

This final chapter examines the subsequent impacts of the Renewable Energy Saga on States' practice and the concrete implications that followed. It is evident that the legal cases sparked a renewed interest in safeguarding the State's right to regulate in the public interest, without the fear of facing arbitral claims.

The BITs and Model BITs analyzed in this study illustrate how States have addressed the main challenges encountered by Arbitral Tribunals, not only in the context of the Renewable Energy Saga but also in previous legal cases. These

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[570] *Ivi,* page 12.

[571] See OECD, *The Future of Investment Treaties – Possible Directions*, 2021, OECD Working Papers on International Investment, 2021/03, OECD Publishing, page 13.

challenges include limiting the scope of the FET standard by directly or indirectly linking it to the MST under customary international law, determining the legitimate expectations of the investor – which now require specific commitments made by the State to arise – and introducing non-stabilization clauses to prevent unfavorable interpretations by Arbitral Tribunals. Moreover, the introduction of specific clauses directly addressing the States' authority to modify the legal framework concerning incentives, as well as the explicit acknowledgment of the State's right to regulate in the public interest, are clear examples of States' efforts to safeguard their prerogatives. As a result, we observe the emergence of stricter IIAs that are less generous towards investors compared to previous agreements.

However, subsequent research has revealed that IIAs, including the ECT, have not had a significant impact on FDI flows.[572] In my view, this trend is expected to continue with the new BITs and Model BITs, since investors may be more hesitant to invest in States that have adopted such stringent provisions, fearing that their investment might be subject to increased regulatory uncertainty or that they may face greater restrictions on their rights. As a result, the stricter regulations introduced in these new BITs and Model BITs may deter potential investors, potentially hindering FDI flows in the short term.

[572] See Mehranvar, Sasmal, note 481, page 6.

Concluding Remarks.

The scope of this thesis was to assess the potential influence of legal cases within the Renewable Energy Saga on State practices. In the event of a positive confirmation, the study aimed to discern and analyze the resultant effects. Specifically, it focuses on evaluating whether and how the most controversial points characterizing the FET standard violation claims in the analyzed Arbitral Awards impacted States' decisions on the content of new IIAs. The final results show that the Renewable Energy Saga has had an influence on the evolution of States' practice, and that there is a link between these two elements.

To reach this conclusion, it was necessary to first introduce the Spanish and Italian domestic legislation that has characterized this matter. We found that, for Spain, RD 661/2007 was the measure on which investors' legitimate expectations of stability were based. This decree appeared to promise investors a fixed tariff for the installation of PV facilities for a period of twenty-five years. In Italy, investors' legitimate expectations arose from the first three *Conto Energia* Decrees.

However, we observed that due to the 2007 financial crisis, both Spain and Italy had to address increasing deficits. Consequently, they enacted measures to mitigate the burden of these incentives on public expenditure, which resulted in a reduction of the FITs rates for foreign investors.

This led investors to initiate legal proceedings before Arbitral Tribunals, asserting that the measures adopted by both States after the 2007 crisis constituted a breach of the FET standard outlined in Article 10, paragraph 1, of the ECT. Notably, despite the similarity of the challenged measures and the claims brought by foreign investors, the Tribunals reached divergent conclusions.

After analyzing fourteen legal cases, we focused on the common, most controversial points characterizing the majority, if not all, of the Arbitral Awards. Our primary focus was on the application of the FET standard by Arbitral Tribunals and its content; next, we addressed the concept of legitimate expectations and the debate over whether these can arise from specific commitments or general legislation. Additionally, we examined the concepts of due diligence and the 'prudent investor,' and how the diligence element relates to the balancing exercise

conducted by Tribunals between protecting investors' legitimate expectations and the State's right to regulate.

To answer the research question, the final step is to assess whether there is a link between the positions adopted by the majority of Arbitral Tribunals and the new FET standard provisions in recent IIAs. The analysis reveals a connection, indicating that the Renewable Energy Saga has significantly influenced State practice. This has led States to introduce provisions in the new generation of IIAs aimed at protecting and safeguarding the States' right to regulate.

Firstly, we address the issue of the content of the FET standard. Article 10, paragraph 1, of the ECT is formulated vaguely, without specifying obligations. This gives Tribunals considerable discretion in interpreting the standard, resulting in varied applications of the standard by different Arbitral Tribunals. To address this issue, recent IIAs have attempted to specify the types of State conduct that can constitute a breach of the FET standard. This trend was observed in the majority of the IIAs analyzed. Additionally, there is a tendency to link the FET standard to the MST under customary international law. Clarifying the content of the standard limits its scope of application, guiding Tribunals in assessing alleged breaches of the FET standard in the future and minimizing divergent interpretations.

The second controversial point concerns the manner in which legitimate expectations can arise. Most Arbitral Tribunals have acknowledged that legitimate expectations can stem from commitments contained in general legislation. In such cases, Tribunals must balance protecting investors' legitimate expectations with the State's right to regulate, which involves assessing the investor's due diligence. This approach grants Tribunals considerable discretion in determining the extent to which they should defer to a State's regulatory powers without legal repercussions.

Consequently, most of the IIAs analyzed, except for the Indian one, have introduced provisions requiring Tribunals to consider specific commitments made by the State to an investor when assessing the existence of legitimate expectations. By clarifying that legitimate expectations, to be protected under the relevant treaty, must arise only from specific commitments, these IIAs grant States more discretion in exercising their regulatory powers. As a result, Tribunals no longer need to assess the investor's due diligence.

Furthermore, the decision to introduce 'non-stabilization clauses' in the most recent IIAs supports the thesis that there is a link between the Renewable Energy Saga legal cases and the choices made by States in the content of their most recent IIAs. The majority of claims alleging a breach of the FET standard were based on investors' expectations that the legal framework would remain unchanged for twenty-five years.

Lastly, the introduction of clauses that partially or completely exclude the State’s authority to issue, modify, or withdraw incentives and subsidies from the scope of application of the relevant treaties is another clear example of the impact this legal saga has had on State practices.

In conclusion, the results obtained substantiate the thesis that the Renewable Energy Saga has significantly influenced State practice. This influence is evident from the clear connections identified between the most innovative clauses in the new IIAs and the most controversial points addressed in the Arbitral Tribunal rulings. The analysis demonstrates that the legal outcomes of these cases have prompted States to incorporate specific provisions in the new generation of IIAs, aimed at protecting their regulatory autonomy. This marks a substantial departure from previous IIAs, which primarily prioritized the interests of foreign investors.

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