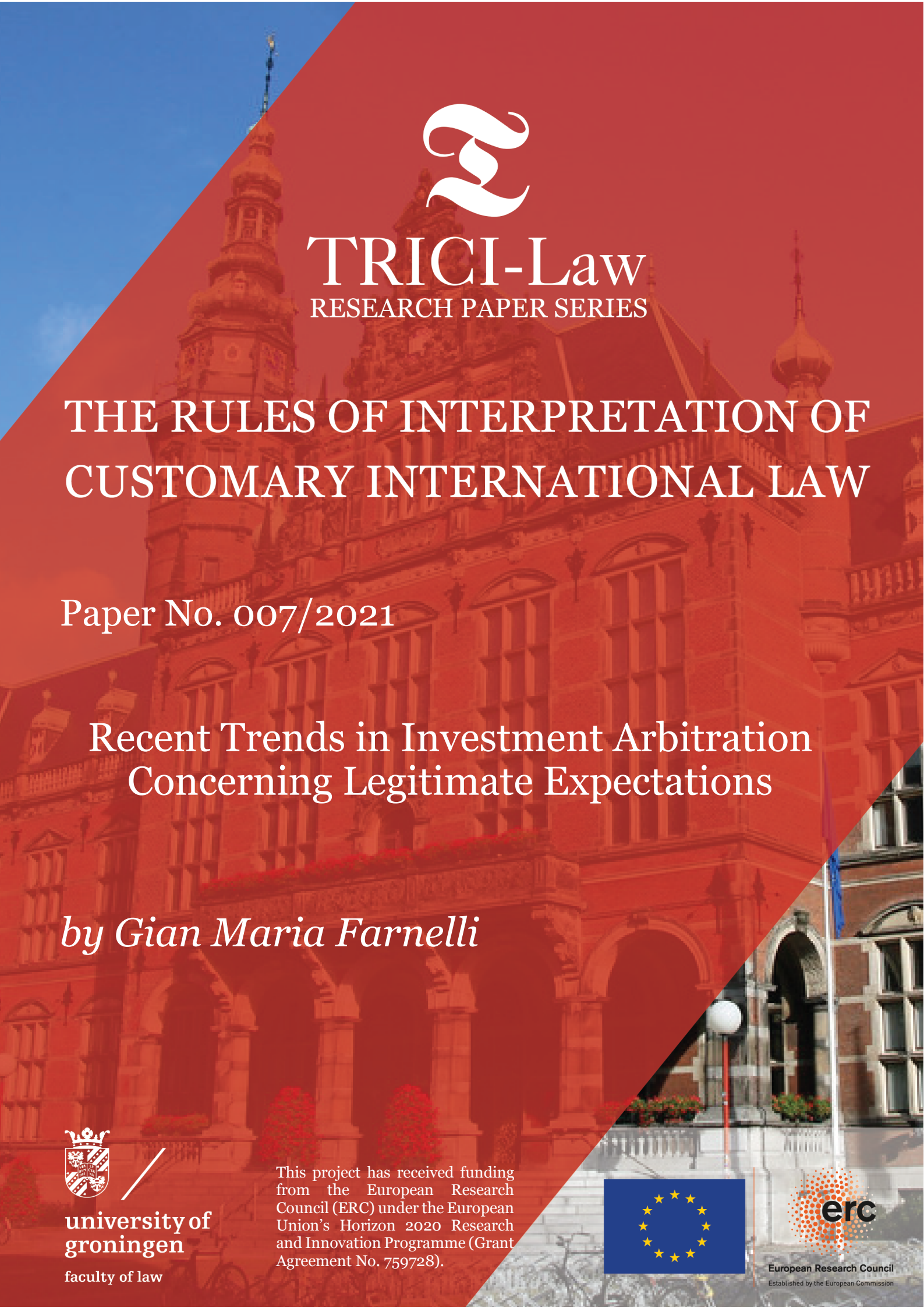

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THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

Paper No. 007/2021

Recent Trends in Investment Arbitration Concerning Legitimate Expectations

by Gian Maria Farnelli

university of groningen
faculty of law

This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

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(pre-edit version) published in:

arnelli, 'Recent Trends in Investment Arbitration Concerning Legitimate Expectations:An Analysis of Recent Renewable Energies Investment Case Law' (0 1) 3(1) Int CL Rev

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RECENT TRENDS IN INVESTMENT ARBITRATION CONCERNING LEGITIMATE EXPECTATIONS: AN ANALYSIS OF RECENT RENEWABLE ENERGIES INVESTMENT CASE LAW

1 Introduction

Amongst the many economic sectors in which foreign investments are particularly important, the one concerning renewable energies ("RE") features as one of the most relevant in relation to energy policies geared towards tackling climate changes in many Countries since the end of the 1990s.[1] Given the high cost of infrastructures, such as photovoltaic ("PV") plants, many States have enacted remuneration schemes aimed at attracting foreign investors, typically in the form of feed-in tariffs ("FIT").[2]

After the 2010 economic crisis, most States have amended their remuneration schemes. This has been particularly the case in EU States.[3] These amendments have prompted a significant number of investment disputes based on claims of breaches of investors' legitimate expectations over the stability of remuneration schemes, alleged to amount to an infringement of the fair and equitable treatment ("FET"), under the second sentence of Article 10(1) of the Energy Charter Treaty ("ECT").[4]

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[1] Brian Abbas, "International Arbitration Rules and Their Effect on Energy Sector Disputes", 21 *International Trade & Business Law Review* (2018) pp. 63, 64-69.

[2] A FIT is a policy which "make[s] use of long-term agreements and pricing tied to costs of production for renewable energy producers" ("Feed-In Tariff (FIT)", in *Investopedia* (19 April 2019), available at https://www.investopedia.com/terms/f/feed-in-tariff.asp).

[3] Julien Chaisse, "Rules and disputes on foreign investment in renewable energies—exploring the nexus of trade and investment treaties", in P. Delimitsis (ed.), *Research Handbook on Climate Change and Trade Law* (2016) pp. 462-501; Carlos Javier Moreiro González, "The Convergence of Recent International Investment Awards and Case Law on the Principle of Legitimate Expectations: Towards Common Criteria Regarding Fair and Equitable Treatment?", 42 *European Law Review* (2017) pp. 402; Francesco Montanaro, "'Ain't No Sunshine': Photovoltaic Energy Policy in Europe at the Crossroads Between EU Law and Energy Charter Treaty Obligations", in G. Adinolfi *et al*. (eds.), *International Economic Law* (2017) pp. 211-230.

[4] *Energy Charter Treaty* (adopted on 17 December 1994; entered into force 16 April 1998) 2080 UNTS 95. On the ECT in general, see Matthew Happold and Thomas Roe, "The Energy Charter Treaty", in T. Gazzini and E. De Brabandere (eds.), *International Investment Law* (2012) pp. 69-97; Abbas, *supra* note 1, 70-75. On the potential development of ECT, see Cees Verburg, "Modernising the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement", 20 *The Journal of World Investment & Trade* (2019) pp. 425-454; R. Leal-Arcas, *Commentary on the Energy Charter Treaty* (2018); K. Hobér, *The Energy Charter Treaty. A commentary* (2020).

Investment tribunals have thus been faced with a number of ECT cases dealing with legitimate expectations in recent years. The aim of this contribution is to analyse the trends emerging from the already substantial case law in the field.

This contribution comes in three parts, next to the present introduction. First, it will illustrate how the protection of investors' expectations has been traditionally addressed by investment tribunals.

Second, it will analyse the recent RE case law. To that end, the study will be confined to claims against Czechia, Italy and Spain, which are the three countries currently involved in the highest number of ECT disputes.[5] The analysis will focus on the interpretation and application of legitimate expectations as an element of the FET, that is a substantive aspects of relevant investment rules and principles, thus avoiding the jurisdictional issues, such as those concerning intra-EU investment arbitration.[6]

Third, some concluding remarks will be presented, to the effect of pointing out that investment tribunals have shifted the relevance of the States' regulatory power and of the investors' due diligence from the merits of a dispute, to the quantification of damages and that this case law corroborates the role of the general principle of legitimate expectations[7] as a general "interpretative element" of FET.[8] The law is stated as of 20 December 2020.

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[5] Out of 122 ECT cases, 6 have been lodged against Czech Republic, 10 against Italy and 43 against Spain (*source*: ECT website (https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/)).

[6] On the issue, see, *inter alia*, Eirik Bjorge, "EU Law Constraints on Intra-EU Investment Arbitration?", 16 *The Law and Practice of International Courts and Tribunals* (2017) pp. 71; Jens Hillebrand Pohl, "Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?", 14 *European Constitutional Law Review* (2018) pp. 767. On the substantive inter-play between EU law and the ECT, see Cees Verburg, "The Energy Charter Treaty and European Union Law: Mutually Supportive Instruments for Economic Cooperation or Schizophrenia in the 'Acquis'?", in M. Akbaba, G. Capurro, *International Challenges in Investment Arbitration* (2019) pp. 124. On the interplay between EU law and investment arbitration as to the international responsibility of States *vis-à-vis* foreign investors, see, *inter alia*, Philipp T. Stegmann, *Responsibility of the EU and the Member States under EU International Investment Protection Agreements. Between Traditional Rules, Proceduralisation and Federalisation* (2019); Simone Vezzani, "The International Responsibility of the European Union and of Its Member States for Breaches of Obligations Arising from Investment Agreements: *Lex Specialis* or European Exceptionalism?", in M. Andenas *et al*. (eds.), *EU External Action in International Economic Law. Recent Trends and Developments* (2020) pp. 281.

[7] The nature as a general principle of international law under Article 38(1)(c) of the Statute of the International Court of Justice of the protection of legitimate expectations has been explicitly acknowledged by Special Rapporteur Marcelo Vázquez-Bermúdez (*First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, UN Doc. A/CN.4/732, 5 April 2019, para 134). See also Mads Andenas, Ludovica Chiussi, "Cohesion, Convergence and Coherence of International Law", in M. Andenas *et al*. (eds.), *General Principles and the Coherence of International Law* (2019) pp. 9.

[8] Katia Yannaca-Small, "Fair and Equitable Treatment Standard: Recent Developments", in A. Reinisch (eds), *Standards of Investment Protection* (2008) pp. 111-130, at 130.

2 The protection of legitimate expectations as part of FET in investment arbitration

Investment case law have consistently acknowledged that "legitimate expectations [are] the dominant element" of FET.[9] Building upon such case law, and in particular the award in *CMS* which held that the connection between the FET and the "stability and predictability of the business environment" grounding the investors' expectations is the same as the international minimum standard and thus forms part of customary international law,[10] authoritative literature has maintained that "the investor's legitimate expectations are protected even without a treaty guarantee of FET".[11] However, literature has also warned against the establishment of a list of the "customary interpretative elements" of the FET, given the constant developments in investment case law.[12]

As it is apparent, issues concerning legitimate expectations usually arise in relation to changes in the domestic regulatory framework in which investors are operating. Such a domestic legal framework constitutes the factual background of a case from the investment law perspective.[13] Thus, this section will first consider how investment tribunals have addressed the power of a State to change its legal framework as a matter of investment law. Second, the analysis will focus on general case law concerning legitimate expectations themselves in relation to such

[9] *Saluka Investments BV (The Netherlands) v The Czech Republic*, PCA Case No. 2001-04, Partial Award (17 March 2006), para 302 (Watts, Fortier, Behrens). To the same effect, see *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para 154 (Grigera Naón, Fernández Rozas, Bernal Verea); *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/08, Award (12 May 2005) para 279 (Orrego Vicuña, Lalonde, Rezek); *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007) para 298 (Orrego Vicuña, Lalonde, Morelli Rico); *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para 7.74 (Veeder, Kaufmann-Kohler, Stern). On the relationship between legitimate expectations and FET, see, *inter alia*, André von Walter, "The Investor's Expectations in International Investment Arbitration", in A. Reinisch and C. Knahr (eds), *International Investment Law in Context* (2008) pp. 173-200; Christopher Campbell, "House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law", 30 *Journal of International Arbitration* (2013) pp. 361; Michele Potestà, "Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept", 28 *ICSID Review* (2013) pp. 88; Fulvio Maria Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (2018), 85-121; Josef Ostřanský, "An Exercise in Equivocation: A Critique of Legitimate Expectations as a General Principle of Law under the Fair and Equitable Treatment Standard", in A. Gattini, A. Tanzi and F. Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (2018) pp. 344-377.

[10] *CMS*, *supra* note 9, para 284.

[11] Rudolf Dolzer and Christopher Schreuer, *Principles of International Investment Law* (2008), 135.

[12] Yannaca-Small, *supra* note 8, at 130.

[13] On the relationship between States' regulatory powers and FET see Paolo Bertoli and Zeno Crespi Reghizzi, "Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes", in T. Treves, F. Seatzu and S. Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (2014) pp. 26-49, 39-42.

changes.

2.1 *States' regulatory powers*

The sovereign right of a State to amend its legal framework has been mostly addressed in investment case law with regard to expropriation.[14] However, case law and literature have maintained that "state measures, *prima facie* a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation",[15] thus without triggering the obligation to compensate. This is in line with the so-called "police powers" doctrine, whereby a State is "not liable for economic injury that is the consequence of bona fide regulation".[16] On the other hand, some tribunals have maintained that an investor is entitled to compensation whenever a State measure impairs the economic value of its investment, according to the so-called "sole effect" approach.[17]

Outside the field of expropriation case law, the "police powers" approach has been referred to by investment tribunals in relation to alleged breaches of FET. In *Tecmed*, the Tribunal upheld the police powers doctrine, qualifying it as "undisputable".[18] Similarly, in *Saluka*, the Tribunal maintained that the "police powers" doctrine forms part of customary law[19] and highlighted the need to give due regard to "the host State's legitimate right […] to regulate domestic matters in the public interest".[20]

Accordingly, one may argue that a general, *bona fide* non-discriminatory regulatory measure does not amount *per se* to a breach of FET. This, unless the Host State has generated a legitimate expectation to legal stability.

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[14] See, *inter alia*, August Reinisch, "Expropriation", in P.T. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) pp. 407-458, 432-438; Sondra Faccio, *Indirect Expropriation in International Investment Law between State Regulatory Powers and Investor Protection* (Editoriale Scientifica 2020).
[15] Ian Brownlie, *Public International Law* (6th ed.; OUP 2003), 509. On regulatory freedom, see in general Aniruddha Rajput, *Regulatory Freedom and Indirect Expropriation in Investment Arbitration* (2018).
[16] *Lauder v. Czech Republic*, UNCITRAL, Final Award (3 September 2001), para 198 (Briner, Cutler, Klein), referred to in *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), para 278 (Rigo Sureda, Lalonde, Martins). On the police power doctrine, see Catherine Titi, "Police Powers Doctrine and International Investment Law", in Gattini, Tanzi, Fontanelli, *supra* note 9, pp. 323-343, 334-339; Jorge E. Viñuales, "Foreign Investment and the Environment in International Law: An Ambiguous Relationship", 80 *British Yearbook of International Law* (2010) pp. 244, 325-326.
[17] See Titi, *supra* note 16, 329-333; Viñuales, *supra* note 16, 324-325; Rajput, *supra* note 15, 47-72.
[18] *Tecmed*, *supra* note 9, para 119.
[19] *Saluka*, *supra* note 9, para 262.
[20] *Ibid*., para 305.

2.2 *Legitimate expectations and the stability of the Host State legal framework*

It is unquestionable that legitimate expectations, with special regard to legal stability, fall within the scope of investment law.[21] However, investment tribunals have not followed a uniform and consistent approach to the issue at hand. On the one hand, one finds awards which identify the FET as the source of the requirement of legal stability. On the other, legal stability appears in the case law as the object of investors' expectations, which qualify as legitimate upon certain conditions discussed below. According to the 2012 UNCTAD Study on *Fair and Equitable Treatment* ("2012 UNCTAD Study"),[22] these two approaches are respectively dubbed "legal stability" and "qualifying requirements" approach,

On the one hand, few tribunals have taken the stance that legal stability is an autonomous obligation under FET and that any modification in the domestic legal regime significantly impairing the economic value of the investment triggers the obligation to compensate. This, because legal stability would be "an essential element" of FET,[23] to the effect that a "'roller-coaster' effect" of continuing amendments to a given domestic legal framework would constitute a breach of the FET.[24] As it is apparent, this approach is reminiscent of the above mentioned "sole effect" approach.[25]

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[21] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed., 2012), 145-150; Michele Potestà, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept", 28 *ICSID Review* (2013) pp. 88, 98-100 doi: 10.1093/icsidreview/sis034; Shotaro Hamamoto, "Protection of the Investor's Legitimate Expectations: Intersection of a Treaty Obligation and a General Principle of Law", in W. Shan and J. Su (eds.), *China and International Investment Law. Twenty Years of ICSID Membership* (2014) pp. 141-169; Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration. A Theory of Detrimental Reliance* (2019), 3. *Contra*, *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, Decision on Liability, Separate Opinion of Arbitrator Pedro Nikken (30 July 2010) para 3 (Salacuse, Kaufmann-Kohler, Nikken).

[22] UNCTAD, *Fair and equitable treatment* (2012), UN Doc. UNCTAD/DIAE/IA/2011/5, 64 ("2012 UNCTAD Study"). On case law on two approaches, see Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence. A Preliminary Ruling System for ICSID Arbitration* (2017), 297-298; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Law. Substantive Principles* (2nd ed., 2017), 145-149; Federico Ortino, "The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?", 21 *Journal of International Economic Law* (2018) pp. 845; Diego Zannoni, "The legitimate expectation of regulatory stability under the Energy Charter Treaty", 33 *Leiden Journal of International Law* (2020) pp. 451.

[23] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award (1 July 2004), para 183 (Orrego Vicuña, Browe, Barrera Sweeney). Similarly, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007) para 260 (Orrego Vicuña, Tzchanz, van den Berg), though the Tribunal also noted that "the stabilization requirement does not mean the freezing of the legal system or the disappearance of the regulatory power of the State" (*ibid*., para 261).

[24] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007), para 250 (Orrego Vicuña, Fortier, Kaufmann-Kohler). Similarly, *Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Final award (15 July 2011), para 446 (Danelius, Creutzig, Gaillard).

[25] *Supra*, note 17.

On the other hand, the majority of investment tribunals seem to have deemed legitimate only the investors' expectations grounded on commitments directly or indirectly addressed *vis-à-vis* the investor by the Host State,[26] since only those expectations would be "reasonable and justifiable".[27] This, because FET does not deprive States of "a reasonable degree of regulatory flexibility"[28] and "investors must expect that the legislation will change".[29] The undertakings needed to give raise to legitimate expectations usually takes the form of stabilisation clauses,[30] but few investment tribunals have also held in principle that legitimate expectations may be based on promises made by State officials or conditions laid out in domestic legislation.[31]

In addition to the above requirement that a State has committed itself to legal stability, case

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[26] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para 148 (Kerameus, Gantz, Covarrubias Bravo); *Gami Investments, Inc. v The Government of the United Mexican States*, UNCITRAL, Award (15 November 2004), para 76 (Paulsson, Reisman, Lacarte Muro); *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) para 130 (Bogdanowsky de Maekelt, van den Berg, Rezek); *Duke Energy Electroquil Partners and Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008), paras 340 and 351 (Kaufmann-Kohler, Gómez-Pinzón, van den Berg); *Continental Casualty Company v The Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008), paras 161, 257–263 (Sacerdoti, Veeder, Nader); *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010), para 145 (Sacerdoti, Álvarez, Herrera Marcano); *Philip Morris SARL v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), para 426 (Bernardini, Born, Crawford).

[27] *International Thunderbird Gaming v United States of Mexico*, UNCITRAL, Award (26 January 2006) (Van den Berg, Wälde, Ariosa), para 147; emphasis added. The Tribunal excluded that a communication by State officials could give rise to legitimate expectations, when such communication is solicited by the investor without "a proper disclosure" of all the relevant circumstances of the investment (*ibid*., paras 155 and 160-166).

[28] *Electrabel*, *supra* note 9, para 7.77.

[29] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No. ARB/05/20, Final Award (11 December 2013), para. 666 (Lévy, Alexandrov, Abi-Saab). Similarly, *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para 364 (Caflisch, Bernardini, Stern).

[30] See Dolzer and Schreuer, *supra* note 11, 75; Mustafa Erkan, *International Energy Investment Law. Stability through Contractual Clauses* (2010), 104-108; Sam Foster Halabi, "Efficient Contracting between Foreign Investors and Host States: Evidence from Stabilization Clauses", 31 *Northwestern Journal of International Law & Business* (2011) pp. 261, 292-294; Bertoli and Crespi Reghizzi, *supra* note 13, 46-48; Sotonye Frank, "Stabilisation Clauses and Foreign Direct Investment: Presumptions versus Realities", 16 *The Journal of World Investment and Trade* (2015) pp. 88, 89-94; Katja Gehne, Romulo Brillo, "Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment", in *Essay in Transnational Economic Law* 143 (March 2017), 6-9, available at http://institut.wirtschaftsrecht.uni-halle.de/de/node/23 (last visit: 10 December 2019); Jola Gjuzi, *Stabilization Clauses in International Investment Law A Sustainable Development Approach* (2018), 37-54. The actual possibility of stabilisation clauses to prevent a State from exercising its regulatory power have been subject to criticism. See Abdullah Faruque, "Validity and Efficacy of Stabilisation Clauses Legal Protection vs. Functional Value", 23 *Journal of International Arbitration* (2006) pp. 317, 323-324; Roger Tafotie, "Les clauses dites de stabilisation dans les contrats d'investissement international: requiem pour une pratique incohérente et inefficace", 91 *Revue de droit international et de droit comparé* (2014) pp. 429.

[31] Hamamoto, *supra* note 21, 148-156 and 166-168; Potestà, *supra* note 21, 103-113; Joseph E. Neuhaus, "The Enforceability of Legislative Stabilization Clauses", in D.D. Caron, S.W. Schill, A. Cohen Smutny and E.E. Triantafilou, *Practising Virtue. Inside International Arbitration* (2015) pp. 318-329, 326. See *contra*, *Philip Morris*, *supra* note 26, para 426.

law shows a second, concurrent condition for the investors' expectations to be deemed legitimate, namely that the investor acted in a "diligent" or "prudent" manner.[32] This particularly refers to carrying out due diligence investigations on the Host State legal framework,[33] since the legitimacy of the investors' expectations "must be assessed against the background of information that the investor knew and should reasonably have known at the time of the investment".[34] This importance given to the investors' due diligence is in line with the increasing attention that investment tribunals devotes to the investors' behaviour prior and during the execution of its investment.[35]

The general preference showed by the case law for the "qualifying requirements" approach upholds the sovereign right of a State to amend its domestic legal framework, unless it has committed to the contrary *vis-à-vis* a "diligent" foreign investor, in a manner which is reminiscent of the above "police powers" approach.[36] This preference appears to stem from the fact that the "legal stability" approach may be considered "unjustified, as it would potentially prevent the host State from introducing any legitimate regulatory change, let alone from undertaking a regulatory reform that may be called for".[37]

3 Recent energy investment disputes

Against the background of the above case law, this section will analyse decisions in recent investment disputes concerning investment in the RE sector and stemming from alleged breaches of investors' expectation to legal stability.

The section will come in two parts. First, a brief sketch of the Czech, Italian and Spanish RE regime will be provided, so as to present the factual circumstances which prompted the case

[32] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), para 333 (Lévy, Lew, Lalonde); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011), para 142 (Nariman, Anaya, Crook). See Yulia Levashova, "The Role of Investor's Due Diligence in International Investment Law: Legitimate Expectations of Investors" (*Kluwer Arbitration Blog*, 22 April 2020).

[33] 2012 UNCTAD Study, *supra* note 22, at 70. It has been argued that foreign investors "should […] 'understand the social, economic and environmental values of the societies in which they [would] operate', while the knowledge of the domestic legal setting should encompass also its international human rights obligations" (Attila Tanzi, "On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector", 11 *The Law and Practice of International Courts and Tribunals* (2012) 47, 71-72). See also Potestà, *supra* note 21, 119-121.

[34] *Electrabel*, *supra* note 9, para 7.78.

[35] See Attila Tanzi, "The Relevance of the Foreign Investor's Good Faith", in Gattini, Tanzi, Fontanelli, *supra* note 9, pp. 193-220.

[36] *Supra*, note 16.

[37] 2012 UNCTAD Study, *supra* note 22, 67.

law in question. Then, investment tribunals' decisions will be addressed, considering first whether and how tribunals have dealt with the nature of "legal stability" as an autonomous obligation within the FET, or one of the investors' potential legitimate expectations; second, how tribunals have addressed the issue of the existence of stabilisation commitments; third, whether and how tribunals addressed the investors' due diligence; fourth and last, the *criteria* applied and considerations made in determining the *quantum* of compensation.

3.1 *The relevant domestic legal frameworks*

3.1.1 The Czech RE legal framework

Czechia RE legal framework was instituted in 2005. Act No. 180[38] obliged RE producers to connect their facilities to the electric energy grid and obliged grid operators to purchase such production for a FIT set by the Energy Regulatory Office ("ERO"). The FIT, whose burden fell on consumers, was to be applied for 15 years,[39] later extended to 20 years.[40]

Such regime was amended starting from 2010. In April, the ERO was required to reduce the FIT for plants connected to the electricity grid in 2011.[41] In November, the Czech Parliament terminated the RE producers' exemption from the income tax which had been in force since 1993.[42] In December, Czechia limited the contribution of consumers to the FIT,[43] establishing that the shortfall between funds raised from consumers and the amount of subsidy to be paid to producers was to be financed from State budget through a so-called "Solar levy", meant to apply exclusively to plants put into operation between 1 January 2009 and 31 December 2010. The Solar levy was later extended to all the plants commissioned in 2010.[44]

On 10 March 2011, the Czech Constitutional Court was asked to repeal the Solar levy and the withdrawal of the income tax exemption. The Constitutional Court denied both requests, observing that both measures were proportionate to the legitimate goal of avoiding a rise in electricity prices for end-consumers, and that legal certainty cannot be equated to absolute

[38] Czech Act No. 180, 31 March 2005.
[39] Czech ERO Regulation No. 475/2005, 7 December 2005.
[40] Czech ERO Regulation No. 364/2007, 28 December 2007.
[41] Czech Act No. 137, 21 April 2010.
[42] Czech Act No. 346, 2 November 2010. The income tax exemption was instituted with Act No. 586, 18 December 1992.
[43] Czech Act No. 402, 1 December 2010.
[44] Czech Act No. 310, 2 October 2013.

unchangeability of the legal environment.[45]

3.1.2 The Italian RE legal framework[46]

Italy established its RE regime in 2003 with Legislative Decree No. 387 ("LD 387/2003"),[47] which provided that PV energy producers would receive a FIT to be determined in subsequent ministerial decrees. Such decrees, dubbed "Conto energia", were adopted starting from 2005 and provided a twenty-year FIT whose costs were to be borne by consumers.

Conto energia I was adopted in 2005.[48] It provided that incentives would be granted only to producers applying for them prior to the achievement of a "national capacity target", set by the same *Conto Energia I* and raised with a subsequent amendment of 6 February 2006. Under *Conto Energia I*, individual producers entitled to FIT received a "Tariff recognition letter" from the Italian authorities and concluded a contract with the Italian Energy Service Management Society ("GSE Convention").

Such framework was amended two years later, with *Conto energia II*[49], which further increased the national capacity target, though lowering the FIT rates. *Conto Energia II* established that incentives would be granted on the basis of the technical features of facilities.

Three years later, *Conto energia III* was adopted.[50] Similar to *Conto energia II*, it lowered the FIT rates but raised the national capacity target. It also established that FIT would be granted also to facilities entering into operation within fourteen months from the achievement of the national capacity target.

Conto energia IV was enacted a year later, in 2011.[51] It increased the national capacity target and set a ceiling on the incentives program costs for semester, thus precluding approval of incentives for PV facilities after the achievement of the ceiling. In the meantime, Italy had also

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[45] *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v Czech Republic*, PCA Case No. 2014-03, Award (11 October 2017), paras 56-62 (Kaufmann-Kohler, Born, Tomka). This case was brought before an investment Tribunal on the basis of the Czech and Slovak Federal Republic-Germany BIT, rather than the ECT. See "Czech solar award comes to light, offering clarity as to tribunal's handling of jurisdictional questions – including whether 'investor' must be defined in light of domestic law" (*IA Reporter*, 28 January 2018).

[46] For a complete overview of the Italian legal framework, see Sondra Faccio, "The Italian Energy Reform as a Source of International Investment Disputes", 52 *Rivista di diritto internazionale privato e processuale* (2016) pp. 460.

[47] Italian Legislative Decree No. 387, 29 December 2003, (2004) 25 *Italian Official Gazette*, Ordinary supplement No. 17.

[48] "Ministerial Decree of 28 July 2005", (2005) 181 *Italian Official Gazette* 28.

[49] "Ministerial Decree of 19 February 2007", (2007) 45 *Italian Official Gazette* 24.

[50] "Ministerial Decree of 6 August 2010", (2010) 197 *Italian Official Gazette* 29.

[51] "Ministerial Decree of 5 May 2011", (2011) 109 *Italian Official Gazette* 103.

adopted Legislative Decree 28/2011 ("Romani Decree"),[52] establishing *inter alia* that the remuneration scheme would be adapted to reductions in PV technologies costs and to the incentives offered in other EU countries

The last *Conto Energia V* was adopted in 2012.[53] It provided that the remuneration scheme would cease to apply thirty days after the achievement of a total FIT program cost of EUR 6.7 billion per year.

The following year, Italy tried to tamper the changes constituted by *Conto energia V* through Law Decree No. 145,[54] which offered to PV energy producers a voluntary re-modulation mechanism. Such mechanism consisted in either the maintenance of the *Conto energia* incentives for the remainder of the initial twenty-year period; or the reduction of the rate and a prolongment for seven additional years of the regime, for a total of a twenty-seven-year period.

Lastly, in 2014, Italy enacted the "*Spalma-incentivi* Decree",[55] which provided three different optional FIT regimes for PV energy producers.[56]

3.1.3 The Spanish RE legal framework

In 1997, Spain introduced a Special regime for RE facilities meeting technical requirements for registration in the Administrative Registry for Electrical Power Generating Units ("RAIPRE").[57] RAIPRE-registered facilities were allowed to sell their production, incorporating it into the grid, at a tariff to be determined in subsequent decrees. The following year, Spain established a four-year period for revisions of the premium granted to registered facilities.[58] Later on, in 2004, the regime was amended so as to provide that registered PV facilities would receive a FIT for their full lifespan,[59] whose duration was advertised to be of 25 years during the 2005 and 2007 promotional campaign "The Sun Can Be Yours".

In December 2005, the Spanish Supreme Court maintained that the Government had "no

[52] Legislative Decree No. 28, 3 March 2011, (2011) 71 *Italian Official Gazette*, Ordinary Supplement No. 81.
[53] "Ministerial Decree of 5 July 2012", (2012) 159 *Italian official Gazette*, Ordinary Supplement 153.
[54] Law Decree No. 145, 23 December 2013, (2013) 300 *Italian Official Gazette* 1.
[55] Law Decree No. 91, 24 June 2014, (2014) 144 *Italian Official Gazette* 39.
[56] Option A provided that Italy would pay a new, reduced FIT over a twenty-four-year period, starting from the plant's entry into operation. Option B maintained the original twenty-year FIT period, reducing the incentive between 2015 and 2019 and then increasing the rate as established by Ministerial decree of 16 October 2014. Option C maintained the twenty-year FIT period, though reducing the rate (*ibid*., Article 26(3)).
[57] Spanish Law No. 54, 27 November 1997.
[58] Spanish Royal Decree No. 2818, 23 December 1998.
[59] Spanish Royal Decree No. 436, 12 March 2004.

legal hurdle" concerning amendments of the RE legal framework.[60] This was reiterated the following year".[61]

The Spanish RE regime was further amended in 2007, with Royal Decree No. 661 ("RD 661/2007"),[62] which established that PV plants would receive a FIT on the basis of their technical feature. Furthermore, RD 661/2007 provided, under Article 44(3), that future changes to the tariff would not be applied to existing installations.

Starting from 2008, Spain began amending its legislation in order to reduce the costs of the RE regime. In 2008, it reduced the FIT rates for RAIPRE-registered facilities after the adoption of RD 661/2007.[63] In 2010, it reduced the FIT period from the entire lifespan of the PV plant to a fixed term of 25 years,[64] later adjusted to 28,[65] and later 30,[66] years, and introduced a limit to the energy for which a PV plant would be entitled to the FIT.

Last, in 2013, Spain substituted the Special regime laid out in Law 54/1997 with a New Regime, to be applied to old and new plants, based on the "reasonable return" criterion[67] and categorizing facilities on the basis of technical criteria different from the ones set under the 2007 legislation.[68]

3.2 *Case law*

3.2.1 Legal stability as an autonomous obligation or a legitimate expectation

The nature of "legal stability" – either an autonomous obligation, or one of the investors' potential legitimate expectations – has not been addressed either in a consistent or in a clear manner in the RE disputes under analysis.

Some tribunals even avoided the issue at hand, either because it was "unnecessary" in light

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[60] *Charanne B.V. and Construction Investments S.a.r.l. v Spain*, SCC Case No. 062/2012, Award (21 January 2016), para 506 (Mourre, Tawil, von Wobeser), referring to decision by the Spanish Supreme Court dated 15 December 2005. The award original language is Spanish. Mena Chambers provided an unofficial translation, available at https://www.italaw.com/cases/2082 (last visit: 10 December 2019). See "UPDATED: Spain prevails on merits in first of many Energy Charter Treaty claims in the solar sector" (*IA Reporter*, 25 January 2016).
[61] *Charanne*, *supra* note 60, para 506, referring to decision by the Spanish Supreme Court of 25 October 2006.
[62] Spanish Royal Decree No. 661, 25 May 2007.
[63] Spanish Royal Decree No. 1578, 26 September 2008.
[64] Spanish Royal Decree 1565, 19 November 2010.
[65] Spanish Royal Decree No. 14, 23 December 2010.
[66] Spanish Law No. 2, 4 March 2011.
[67] Spanish Royal Decree Law No. 9, 12 July 2013. The "reasonable return" criterion was later clarified with Spanish Law No. 24, 26 December 2013, and with Ministerial Order IET/1045/2014, 20 June 2014.
[68] Royal Decree No. 413, 10 June 2014.

of the circumstances of the case,[69] or for reasons of judicial economy.[70]

Other tribunals have been ambiguous in dealing with the matter at issue. The *Blusun* Tribunal mentioned that "the obligation to create stable conditions is conceived as part of the FET standard",[71] and then addressed the "legal instability" and the legitimate expectations claims separately.[72] Similarly, the *Antin* Tribunal concurred with the Claimants in holding that "the ECT's FET standard includes the obligation to provide a stable and predictable legal framework for investments",[73] but then addressed only legitimate expectations stressing that they were "closely related to [the Claimants'] claims about the stability of the legal framework".[74] The *RREEF* Tribunal held that the distinction made by Claimants between the investors' right to legal stability and the obligation not to frustrate the investors' legitimate expectations was "an artificial issue",[75]

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[69] *Greentech Energy Systems A/S, et al v. Italian Republic*, SCC Case No. V 2015/095, Award (23 December 2018), para 457 (Park, Haigh, Sacerdoti); *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Direction on Quantum (31 Augusto 2020), para 403 (Collins; Haigh; Bethlehem). See "In now-public Energy Charter Treaty award, Park-chaired tribunal finds that Achmea ruling does not preclude tribunal's jurisdiction, but Sacerdoti dissents on liability" (*IA Reporter*, 13 January 2019) and "Analysis: In Cavalum v. Spain, majority finds that promise of reasonable return was the "cornerstone" of Spain's renewables framework; David Haigh considers that claimants had vested right to higher incentives" (*IA Reporter*, 8 September 2020).

[70] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on jurisdiction, liability and quantum principles (12 March 2019), para 602 (McRae, Fortier, Boisson de Chazournes). See "Analysis: newly-divulged NextEra v. Spain decisions reveal fault lines between solar dispute tribunals on legitimate expectations derived from legislation and appropriateness of DCF valuation" (*IA Reporter*, 10 June 2019).

[71] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016), para 315(c) (Crawford, Alexandrov, Dupuy). See "ANALYSIS: in new award, Italian renewables changes appear less dramatic than those in recent Spain case, thus leading to failure of Blusun's FET claim; arbitrators disagree on expropriation assessment" (*IA Reporter*, 7 June 2017).

[72] *Blusun*, *supra* note 71, paras 320-364 and 365-374.

[73] *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (15 June 2018), para 533 (Zuleta, Reichert, Thomas). See "Antin v. Spain (Part 1): arbitrators see extensive due diligence by investors in concentrated solar power sector, and reject a series of jurisdictional and admissibility objections" and "Antin v. Spain (Part 2): Spain breached investors' legitimate expectations when eliminating essential features of regulatory framework despite previous representations of legal stability" (*IA Reporter*, 24 June 2018)

[74] *Antin*, *supra* note 73, para 534. Similarly, see *Charanne*, *supra* note 60, para. 486; *Foresight Luxembourg Solar 1 S.Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v Kingdom of Spain*, SCC Case No. 2015/150, Award (14 November 2018), paras 351-352 (Moser, Sachs, Vinuesa); *Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on jurisdiction, liability and directions on quantuM (9 March 2020), para 584 (Collins, Rees, Knieper). See "Analysis: arbitrators in Greentech v. Spain award agree that Achmea ruling is not relevant to their jurisdiction, but ultimately disagree whether Spain is liable for breach of Energy Charter Treaty" (*IA Reporter*, 20 November 2018), and "Analysis: In latest award against Spain, arbitrators decide that investors in small-hydro plants could not reasonably expect fixed incentives, but were entitled to a reasonable rate of return" (*IA Reporter*, 13 March 2020).

[75] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum (30 November 2018), para 314 (Pellet, Volterra, Nikken). See "A new Spain ruling surfaces, revealing that tribunal majority sees a

though then addressing only the Claimants legitimate expectations to receive a reasonable return from their investment.[76]

Other tribunals assessed the existence of an autonomous obligation to provide a stable legal environment. This is the case of the Tribunal in the four *ICW*, *Photovoltaic Knopf*, *Voltaic Network* and *WA Investment*,[77] who dismissed the argument in the merits because Czechia exercise of regulatory power in amending the RE regime preserved the fundamental feature of the incentives' regime.[78]

However, the majority of tribunals have argued that legal stability is just part and parcel of the protection of the investors' legitimate expectations. The *Isolux* tribunal explicitly took the stance that FET under Article 10(1) ECT does not establish an autonomous obligation to create a stable legal environment "whose violation would generate rights in favour of investors of the other Contracting Party, *per se*".[79] This determination was reiterated in similar terms in *Antaris*,[80]

more limited legitimate expectation: to reasonable rate of return for energy investors, but not to broader regulatory stability" (*IA Reporter*, 17 March 2019).

[76] *RREEF*, *supra* note 75, para 399.

[77] *I.C.W. Europe Investments Limited v The Czech Republic*, UNCITRAL, Award (15 May 2019), para 529; *Photovoltaik Knopf Betriebs-GmbH v The Czech Republic*, UNCITRAL, Award (15 May 2019), para 483; *Voltaic Network GmbH v The Czech Republic*, UNCITRAL, Award (15 May 2019), para 487; *WA Investments-Europa Nova Limited v Czech Republic*, UNCITRAL, Award (15 May 2019), para 570 (van Houtte, Beechey, Landau). See "Revealed: reasons why Van Houtte, Beechey, and Landau saw no legitimate expectation to stabilization of Czech solar feed-in-tariffs; newly-seen award also deemed intra-EU objection untimely" (*IA Reporter*, 23 June 2019).

[78] *I.C.W.*, *supra* note 77, para 535; *Photovoltaik*, *supra* note 77, para 489; *Voltaic Network*, *supra* note 77, para 493; *WA Investments*, *supra* note 77, para 576.

[79] *Isolux Infrastructure Netherlands B.V. v Kingdom of Spain*, SCC Case No. 2013/153, Award (12 July 2016), para 764 (Derains, Tawil, von Wobeser). The award is available only in Spanish. The translation herewith quoted is contained in *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. 2015/063, Award (15 February 2018), para 643 (Sidklev, Crivellaro, Sepúlveda Amor). See "In now-public Isolux v. Spain award, measures that later breached investor protections in Eiser case were not deemed to breach Isolux's legitimate expectations" (*IA Reporter*, 29 June 2017).

[80] *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award (2 May 2018), para 360(1) (Collins of Mapesbury, Born, Tomka). See "Antaris v. Czech republic (part 1): arbitrators find that czech solar levy is not eligible for energy charter treaty 'tax measure' carve-out" and "Antaris v. Czech republic (part 2): on merits, tribunal finds that investment protection does not extend to 'speculative' investors" (*IA Reporter*, 6 July 2018).

BayWa,[81] *Belenergia*,[82] *Cube*,[83] *Eiser*,[84] *Eskosol*,[85] *ESPF*,[86] *Infrared*,[87] *Novenergia*,[88] *PV*

[81] *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019), para 458 (Crawford, Grigera Naón, Malintoppi). See "Analysis: majority of BayWa v. Spain tribunal finds that claimants only had expectations of a reasonable rate of return, but decides that claw-back provision violates the ECT; Horacio Grigera Naon sees broader ECT violations" (*IA Reporter*, 5 December 2019).

[82] *Belenergia S.A. v Italian Republic*, ICSID Case No. ARB/15/40, Award (6 August 2019), para 566 (Derains, Hanotiau, Fernández Rozas). See "Analysis: Belenergia v. Italy award reveals growing fault-lines between tribunals as to whether solar contract provisions were stablization promises that give rise to legitimate expectations" (*IA Reporter*, 14 August 2019).

[83] *Cube Infrastructure Fund SICAV and others v Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on jurisdiction, liability and partial decision on quantum (19 February 2019), paras 410-411 (Lowe, Spigelman, Tomuschat). See "Analysis: Unpacking the reasons why the Cube Infrastructure v. Spain tribunal unanimously saw an ECT violation with respect to PV investments, but disagreed with respect to later hydro investments" (*IA Reporter*, 22 July 2019).

[84] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award (4 May 2017), para 382 (Crook, Alexandrov, McLachlan). See "In depth: arbitrators in Eiser award deem ECT to protect against "total" and unreasonable regulatory change, but tax measure is excluded; Spain fails in bid to admit favourable SCC award into evidence" (*IA Reporter*, 11 May 2017).

[85] *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award (4 September 2020), paras 383 and 423 (Kalicki, Tawil, Stern). See "Analysis: Eskosol v. Italy tribunal finds that bankrupt domestic entity remained under "foreign control", but dismisses claims on the merits" (*IA Reporter*, 10 September 2020);

[86] *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award (14 September 2020), paras 443-444 (Alvarez, Pryles, Boisson de Chazournes). See "Analysis: Majority in ESPF v. Italy finds "clear and specific commitment" by Italy to pay fixed feed-in-tariffs; Laurence Boisson de Chazournes disagrees" (*IA Reporter*, 18 September 2020).

[87] *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award (2 August 2019), para 366 (Drymer; Park; Dupuy). See "In just-surfaced InfraRed v. Spain award, tribunal saw specific commitments by Spain not to revise the tariffs, premiums, and price limits applicable to the claimants' CSP plants" (*IA Reporter*, 30 March 2020).

[88] *Novenergia*, *supra* note 79, para 646. See "Award in latest Spain loss surfaces, and SCC tribunal is seen to have taken jurisdiction over Novenergia's claims, but gives effect to Energy Charter Treaty's tax measures carve-out" and "On merits and damages, latest Spanish renewables award finds breach of FET in 'radical' departure from earlier regulatory regime and a DCF-based valuation yields €53m in compensation for Novenergia" (*IA Reporter*, 21 February 2018).

Investors,[89] *SolEs*.[90] *Stadtwerke*,[91] *STEAG*[92] and *Sun Reserve*.[93]

3.2.2 Existence of a stabilisation commitment

The second issue which deserve attention is how the case law addressed the existence of a stabilisation commitment as a basis for the investors' legitimate expectations. With that regard, whilst tribunals tasked with deciding disputes against Czechia and Italy consistently followed the "qualifying requirements" approach, tribunals deciding the Spanish cases have, in few instances, followed the "legal stability" approach, to the effect of deeming not relevant the issue in point.

Tribunals deciding disputes against Czechia have unanimously excluded that Czech legislation and State officials' representations amounted to stabilisation commitments. In *Wirtgen*, the Tribunal, though referring to the investors' reliance on "the state's promises of stability at the time of making its investment",[94] excluded that the language of the relevant Czech legislation represented an undertaking not to alter the RE regime,[95] also because "'any general legal provision' cannot give rise to legitimate expectations".[96] The *Antaris* Tribunal held that provisions of general legislation may not ground legitimate expectations and that, absent a stabilisation clause, a State is not prevented from amending its legal framework.[97] The same conclusion was reached by the

[89] *The PV Investors v. Spain*, UNCITRAL, Final award (28 February 2020), para 567 (Kaufmann-Kohler, Brower, Sepúlveda Amor). See "Jurisdictional decision in PV Investors v. Spain surfaces: majority of Kaufmann-Kohler/Sepulveda-Amor declines jurisdiction over domestic claimants under the UNCITRAL Rules; Brower disagrees" (*IA Reporter*, 20 March 2020).

[90] *SolEs Badajoz GmbH v Kingdom of Spain*, ICSID Case No. ARB/15/38, Award (31 July 2019), para 315 (Donoghue, Williams, Sacerdoti). See "Analysis: in previously-confidential SolEs Badajoz v. Spain award, arbitrators lay out reasons for finding jurisdiction and awarding €40 million to investor for breach of the ECT" (*IA Reporter*, 4 September 2019).

[91] *Stadtwerke München GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award (2 December 2019), para 195 (Salacuse, Hobér, Douglas). See "Analysis: Majority in Stadtwerke Munchen v. Spain considers that investors in Spanish CSP plants could not legitimately expect legislative stability; Kaj Hober disagrees" (*IA Reporter*, 5 December 2019).

[92] *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, (8 October 2020), Decisión sobre jurisdicción, responsabilidad e instrucciones sobre cuantificación de daños (Spanish only), paras 461-463 (Zuleta, Tawil, Dupuy). See "Analysis: Tribunal majority in STEAG v. Spain reads investment pre-registration requirement as incorporating a specific commitment, but sees contributory fault by the investor; dissenter considers that the investment received a reasonable return" (*IA Reporter*, 16 October 2020).

[93] *Sun Reserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, Award (25 March 2020), para 692 (van den Berg, Sachs, Giardina). See "Breaking: SCC tribunal finds no breach of Energy Charter Treaty by Italy, in latest award to decide renewables claims" (*IA Reporter*, 27 March 2020).

[94] *Wirtgen*, *supra* note 45, para 411.

[95] *Ibid*., paras 413 and 427-435.

[96] *Ibid*., para 410.

[97] *Antaris*, *supra* note 80, paras 360 and 437.

Tribunal in the four *ICW*, *Photovoltaic Knopf*, *Voltaic Network* and *WA Investment* cases.[98] Similar considerations may be made with regard to tribunals deciding the Italian cases, though they reached different conclusions on the existence, or not, of a stabilisation commitment. In *Blusun*, the Tribunal dismissed the claim concerning legal stability, to the exclusion of Italy's responsibility for a breach of FET, holding that a law, though being "a representation as to future conduct of the state",[99] is different from a stabilisation commitment, in the absence of which a State is not obliged to maintain unaltered its legal framework.[100] Similarly, in *Belenergia*, the Tribunal held that FET does not prevent States from exercising their regulatory power,[101] and excluded that both the GSE Conventions and the Italian legislation could amount to stabilisation commitments, because the former, being an administrative act, could not contain such specific commitments, and the latter, being general legislation, was not personally addressed to the Claimant.[102]

Quite differently, the *Greentech* Tribunal found by majority that assurances given in the *Conto Energia* decrees were sufficient to give rise to legitimate expectations,[103] since the decrees and the Tariff recognition letter contained a stabilisation clause.[104] The *CEF* Tribunal unanimously took the same position,[105] though acknowledging that a change in the legal framework does not constitute *per se* a breach of legitimate expectations and that due regard has to be given to the reasons grounding the State decision to amend its legislation.[106]

Only the *Sun Reserve* Tribunal took the position that "legitimate expectations can be created in the absence of specific promises or commitments by the host State".[107] This point was not further developed because the Tribunal found that Italy had not generated, implicitly or explicitly, any expectation.

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[98] *ICW*, *supra* note 77, para 528; *Photovoltaic Knopf*, *supra* note 77, paras 482; *Voltaic Network*, *supra* note 77, para 486; *WA Investment*, *supra* note 77, para 569.
[99] *Blusun*, *supra* note 71, para 371. See also *ibid*., para 373.
[100] *Ibid*., para 372. In reaching this conclusion, the Tribunal referred to *El Paso* (*supra* note 29, para 372) and *Philip Morris* (*Philip Morris*, *supra* note 26, para 426) (*Blusun*, *supra* note 71, paras. 368-369).
[101] *Belenergia*, *supra* note 82, para 572.
[102] *Ibid*., paras 579-580. Similarly, *Eskosol*, *supra* note 85, paras 423-452.
[103] *Greentech*, *supra* note 69, paras 446-449. Similarly, *ESPF*, *supra* note 86, para 512.
[104] *Ibid*., para 453, borrowing language from *Parkerings*, *supra* note 32, para 332.
[105] *CEF Energia BV v Italian Republic*, SCC Case No. 158/2015, Award (16 January 2019), para 242 (Reichert, Sachs, Sacerdoti). See "In newly-disclosed Energy Charter Treaty award, Italy loses CEF Energia case; majority finds breach of fair and equitable treatment standard in intra-EU solar case" (*IA Reporter*, 17 May 2019).
[106] *CEF*, *supra* note 105, paras 236-237.
[107] *Sun Reserve*, *supra* note 93, para 699.

As referred to above, the Spanish case law is less consistent in following the "qualifying requirements" approach, and in assessing whether Spain undertook stabilisation commitments towards investors.

In *Charanne*, the Tribunal assessed that Spain had not taken commitments not to alter its legal framework,[108] since "[t]o convert a regulatory standard into a specific commitment of the state […] would constitute an excessive limitation on power of states to regulate the economy in accordance with the public interest".[109] Similarly, the *BayWa*, *Hydro*, *Isolux* and *Stadtwerke* tribunals stressed that general-character regulations[110] and promotional materials from a State agency without regulatory powers[111] could not be equated with specific commitments towards foreign investors, thus excluding the existence of a stabilisation commitment.[112] Consistent with the above reasoning, but with opposite results in the merits, the *9Ren*, *Masdar* and *OperaFund* tribunals held that RD 661/2007 contained a stabilisation clause[113] which made the claimants' expectations legitimate and reasonable.

Other tribunals in Spanish cases have followed the "qualifying requirements" approach, though affirming that the investors' expectations that the legal framework would not be drastically altered is always protected, notwithstanding the existence of a stabilisation commitment. One may refer in this sense to *Eiser* as the source of this stream of decisions. Indeed, that Tribunal held that the FET protects "investors from a fundamental change to the regulatory regime"[114] and that, since

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[108] *Charanne*, *supra* note 60, para 490.
[109] *Charanne*, *supra* note 60, para 493.
[110] *Hydro*, *supra* note 74, paras 585-586; *Isolux*, *supra* note 79, paras 775.
[111] *Stadtwerke*, *supra* note 91, para 287.
[112] *BayWa*, *supra* note 81, para 463; *Isolux*, *supra* note 79, paras 784-785; *Stadtwerke*, *supra* note 91, para 261. See also *Infrared*, *supra* note 87, paras 406-408.
[113] *9REN Holding S.a.r.l v Kingdom of Spain*, ICSID Case No. ARB/15/15, Award (31 May 2019), para 257 (Binnie, Haig, Veeder); *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018), paras 499-500 (Beechey, Born, Stern); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, ICSID Case No. ARB/15/36, Award (6 September 2019), para 481 (Böckstiegel, Reinisch, Sands). It is worth noting that the *OperaFund* award was taken by majority, and that Professors Sand dissented in particular with regard to the relevance to be given to the Spanish Supreme Court decisions (*OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, ICSID Case No. ARB/15/36, Dissenting Opinion on Liability and Quantum by Professor Philippe Sands QC (6 September 2019), paras 17-23). See "Breaking: Spain ordered to pay 41.7 million in new ECT award, as tribunal of Binnie, Haigh and Veeder reject intra-EU objection and deem Spanish renewables legislation to be a specific obligation to investor; claimant 9Ren is subsidiary of US private equity fund First Reserve" (*IA Reporter*, 2 June 2019); "In now-public Masdar award, tribunal says Achmea ruling has "no bearing" upon ECT dispute, finds that Spain reneged on specific commitments, but disagrees on appropriateness of discounted cash-flow method" (*IA Reporter*, 20 May 2018); "Analysis: In OperaFund v. Spain award, reasons emerge for split amongst arbitrators as to "express stability commitment" in Spanish renewables regime" (*IA Reporter*, 27 September 2019).
[114] *Eiser*, *supra* note 84, para 363.

the Spanish RE regime underwent a radical change which impinged on the investment value, Spain breached the investors' legitimate expectations.[115] A similar position was also expressed in *Antin*,[116] *RWE*[117] and *Watkins*.[118]

However, the *Antin* and *Watkins* tribunals also found that RD 661/2007, taken together with other Spanish representations, contained stabilisation commitments,[119] whilst the *RWE* Tribunal excluded that legislative provisions could be equated to contractual clauses.[120] The *Cube*, *NextEra*, *Novenergia* and *SolEs* tribunals, too, found for claimants on legitimate expectations on both the grounds that, on the one hand, Spain had committed not to alter its legal framework through its legislation and representations by State officials;[121] and, on the other, that the Spanish RE regime's amendments were "dramatic",[122] "drastic",[123] "disproportionate"[124] or "substantial".[125]Though the recent annulment of the *Eiser* award for lack of impartiality of one of the arbitrators[126] will reduce its authority as a precedent, the above case law confirms that only disproportionate amendments may breach legitimate expectations.

Lastly, two tribunals apparently departed from the "qualifying requirements" approach and

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[115] *Ibid*., para 382.
[116] *Antin*, *supra* note 73, paras 562-568.
[117] *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on jurisdiction, liability and certain issues of quantum (30 December 2019), para 451 (Wordsworth, Kessler, Joubin-Bret). See "In latest Spain ruling, arbitrators find no violation of RWE's legitimate expectations, but see a breach of the ECT's proportionality requirement" (*IA Reporter*, 6 January 2020).
[118] *Watkins Holdings S.à r.l. and others v Kingdom of Spain*, ICSID Case No. ARB/15/44, Award (21 January 2020), paras 562-563, adopting the *Eiser* reasoning (Abraham, Pryles, Ruiz Fabri). It is worth noting this award was taken by majority, and that Professor Ruiz Fabri dissented on the conclusions reached by the Tribunal on FET, stressing how the Tribunal failed to provide sufficient reasoning for its decision (*Watkins Holdings S.à r.l. and others v Kingdom of Spain*, ICSID Case No. ARB/15/44, Dissent on Liability and Quantum by Professor Hélène Ruiz Fabri (21 January 2020), paras 4-5). See "Analysis: in Watkins v. Spain award, majority finds that changes to Spain's renewable energy incentives scheme amount to ECT violations; dissenter considers that the majority decision lacks 'clarity'" (*IA Reporter*, 23 January 2020)
[119] *Antin*, *supra* note 73, para 553; *Watkins*, *supra* note 118, para 495.
[120] *RWE*, *supra* note 118, para 458.
[121] *Cube*, *supra* note 83, paras 388, 390-391 and 401; *NextEra*, *supra* note 70, paras 584-590; *Novenergia*, *supra* note 79, paras 666-669; *SolEs*, *supra* note 90, para 423.
[122] *Cube*, *supra* note 83, paras 391, 421 and 440.
[123] *Novenergia II*, *supra* note 79, para 695. The Tribunal also utilized adjectives like "unexpected" and "radical" (*ibid*., paras 695-697).
[124] *SolEs*, *supra* note 90, para 462.
[125] *NextEra*, *supra* note 70, paras 597. The Tribunal argued that Spanish "fundamentally and radically" altered its RE regime, going "beyond anything that might have been reasonably expected by Claimants" (*ibid*., para 599).
[126] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on annulment (11 June 2020). See "Analysis: Eiser v. Spain annulment committee stresses its role as guardian of the ICSID system, imposes a "high" bar for double hatting, and finds that numerous undisclosed past and present connections between an arbitrator and the claimants' quantum experts warrants annulment of the underlying award" (*IA Reporter*, 12 June 2020).

followed the legal stability approach. In *Foresight*, the Tribunal first maintained that "[i]n the absence of a specific commitment to the investor by the host State, the investor cannot expect the legal or regulatory framework to be frozen",[127] then held by majority that the Claimants had a legitimate expectation that the regime "would not be fundamentally and abruptly altered"[128] even though Spain had not taken specific undertakings on legal stability.[129] The *RREEFF* Tribunal held that the "principle of stability" enshrined in Article 10 ECT is breached by any "unpredictable radical transformation" of the legal framework,[130] impinging on the investors' expectations to get a reasonable return from their investment.[131] Therefore, Spain breached its obligations by significantly altering the legal framework applicable to the investors and causing damages to the investor.[132] Since the Tribunal found that Claimants suffered damages stemming from the retroactive application of the 2013 and 2014 amendments,[133] it held that Spain breached their legitimate expectations to a reasonable rate of return. It is to be noted that this conclusion was reached also by the *Cavalum*,[134] *Hydro*,[135] and *PV Investors*[136] tribunals, which, however, stressed that the Spanish legal framework contained a commitment to guarantee a reasonable rate of return.

3.2.3 Due diligence requirement

As referred to above,[137] according to abundant case law, investors may claim a breach of FET through a frustration of their legitimate expectations under the condition that they have made proper due diligence on the risk of a regulatory change. The point has been addressed in the Czech, Italian and Spanish case law in a wavering way, as follows.

Aside from *Charanne*, where the Tribunal excluded the legitimacy of the investors' expectations and found for Respondent without addressing due diligence,[138] tribunals finding for Respondent have usually stressed that the conduction of proper due diligence is a requirement for the invocation of investors' legitimate expectations, though conceding that "it is unreasonable to

[127] *Foresight*, *supra* note 74, para 368.
[128] *Ibid.*, para 388.
[129] *Ibid*., para 368.
[130] *RREEF*, *supra* note 75, para 315.
[131] *Ibid*., para 399.
[132] *Ibid*., paras 460 and 472.
[133] *Ibid*., para 483.
[134] *Cavalum*, *supra* note 69, paras 596-612.
[135] *Hydro*, *supra* note 74, 690.
[136] *PV Investors*, *supra* note 89, para 638.
[137] *Supra*, Section 2.2.
[138] *Charanne*, *supra* note 60, para 366.

expect [investors] to conduct extensive legal due diligence".[139] This has been the case in *Isolux*, whereby the Tribunal held that investors' expectations are not legitimate when it is possible for a "prudent" investor to foresee a change in the legal framework on the basis of available information,[140] which includes decisions of the most important judicial authorities of the Host State.[141] Stressing a different nuance, the Tribunal in *Blusun* excluded that Claimants made proper due diligence because their report had "significantly underestimated the level of risk […] of incurring legal or administrative difficulties".[142]

Conversely, tribunals finding for claimants have generally devoted little space to the due diligence requirement in the motivation of their awards. Some tribunals acknowledged the existence of legal due diligence reports, but did not address, or minimally addressed, their contents.[143] The *Greentech* Tribunal did not even consider the fact that the Claimants did not carry out due diligence investigations – an issue which apparently the Respondent failed to raise.[144] On the opposite, the *ESPF*, *OperaFund* and *Watkins* tribunals, in finding for Claimants, assessed their due diligence by thoroughly analysing their reports.[145]

Other tribunals have *de facto* reversed the burden of proof with regard to the investors' due diligence. In *Cube* and *Novenergia*, the claimants had not filed the due diligence report, whose existence was proved through witnesses.[146] These tribunals stated that they found unconvincing the Respondent's argument according to which proper legal due diligence would have foreseen

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[139] *ICW*, *supra* note 77, para 517; *Photovoltaic Knopf*, *supra* note 77, para 470; *Voltaic Network*, *supra* note 77, para 435; *WA Investment*, *supra* note 77, para 523. Similarly, *Belenergia*, *supra* note 82, para 584; *RWE*, *supra* note 118, para 513.

[140] *Isolux*, *supra* note 79, para 781. Similarly, *Antaris*, *supra* note 80, paras 432, 435 and 440; *BayWa*, *supra* note 81, para 590(c); *Belenergia*, *supra* note 82, paras 584-585; *ICW*, *supra* note 77, para 517; *Photovoltaic Knopf*, *supra* note 77, paras 460 and 470; *RWE*, *supra* note 118, para 513; *Stadtwerke*, *supra* note 91, para 281; *Voltaic Network*, *supra* note 77, para 435; *WA Investment*, *supra* note 77, para 523; *Wirtgen*, *supra* note 45, para 422. Other tribunals took the same stance (*Hydro*, *supra* note 74, paras 599-601; *Infrared*, *supra* note 87, paras 361-363; *SolEs*, *supra* note 90, para 331; *STEAG*, *supra* note 92, paras 524-526), though finding for Claimants.

[141] *Isolux*, *supra* note 79, para 793-794. In a similar vein, see *ICW*, *supra* note 77, paras 538-542; *Photovoltaic Knopf*, *supra* note 77, paras 492-496; *RWE*, *supra* note 118, paras 514, *Stadtwerke*, *supra* note 91, para 278; *Voltaic Network*, *supra* note 77, paras 496-500; *WA Investment*, *supra* note 77, paras 579-583; *Wirtgen*, *supra* note 45, para 422.

[142] *Blusun*, *supra* note 71, paras 385-386.

[143] *Antin*, *supra* note 73, paras 111, 114-115 and 120; *CEF*, *supra* note 105, para 233; *Eiser*, *supra* note 84, paras 446-447; *Masdar*, *supra* note 113, paras 494-497.

[144] *Greentech*, *supra* note 69, para 414.

[145] *ESPF*, *supra* note 86, paras 537-538; *OperaFund*, *supra* note 113, para 487; *Watkins*, *supra* note 118, paras 571-589. In a similar vein, see also Similarly, *9REN*, *supra* note 113, paras 272-273. In *OperaFund*, Professor Sands dissented on this point, highlighting that the Tribunal failed to properly assess the evidence before it (*Dissenting opinion by Professor Sands*, *supra* note 113, paras 24-37).

[146] *Cube*, *supra* note 83, para 304; *Novenergia*, *supra* note 79, para 679.

changes in the RE legal framework.[147] The *NextEra* Tribunal took a slightly different position, expressing that non-disclosure of due diligence reports by Claimants "should not lead to any adverse inferences".[148]

Some tribunals finding that the investors carried out proper due diligence addressed the issue of the relevance of domestic courts' decisions. In *9Ren*, the Tribunal deemed such decisions as not relevant with respect to its task, namely to address the legal consequences as a matter of international law of the developments in the Spanish RE regime.[149] In *SolEs*, the Tribunal referred to the Spanish Supreme Court decisions, suggesting caution in their consideration because they applied domestic, rather than international, law.[150] On this, the Tribunal also affirmed that Respondent was not persuasive in arguing that the Supreme Court decisions by themselves were sufficient to exclude that a prudent investor would have expected changes in the FIT regime, thus implying that the burden of proving a lack of due diligence fell on the Respondent.[151] On the contrary, the *Cavalum* Tribunal held by majority that such decisions are "highly relevant" in the determination of the investors' legitimate expectations.[152]

Last, tribunals following the "legal stability" approach have not deemed relevant the issue of the investors' due diligence. The *Foresight* case, again, is a perfect example of this consideration. Though conceding that sophisticated investors should have reasonably expected changes in the Spanish RE regime "within foreseeable limits",[153] and assessing that due diligence was not carried out since a diligent investor would have foreseen the possibility of regulatory changes from the Spanish Supreme Court's decisions,[154] the majority of the Tribunal found that this issue did not affect the legitimacy of the investors' expectations. Furthermore, the Tribunal applied a presumption in the investors' favour, namely that "it is reasonable for an investor to assume that its legal advisors would have raised a red flag had they detected any risk of fundamental change to the regulatory regime".[155] Similarly, the *RREEF* Tribunal, though assessing

[147] *Cube*, *supra* note 83, para 304; *Novenergia*, *supra* note 79, para 679. This position was strongly criticized by the *Sun Reserve* Tribunal (*Sun Reserve*, *supra* note 93, para 713).
[148] *NextEra*, *supra* note 70, para 595; *Novenergia*, *supra* note 79, para 679.
[149] *9Ren*, *supra* note 113, paras 242-244,
[150] *SolEs*, *supra* note 90, paras 429-430.
[151] *Ibid*., para 432.
[152] *Cavalum*, *supra* note 69, para 532.
[153] *Foresight*, *supra* note 74, para 397.
[154] *Ibid*., paras 374 and 380.
[155] *Ibid*., para 380. The lack of proper due diligence has been widely analysed Vinuesa's dissenting opinion. See *Foresight Luxembourg Solar 1 S.Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM*

that the investors were aware of potential changes in the Spanish RE regime, did not infer against the Claimants and dismissed the issue as to whether the investors exercised due diligence as "not relevant".[156]

3.2.4 Compensation

A last issue which deserves attention is the one concerning compensation and, in particular, the criteria applied and considerations made by tribunals finding for claimants in the above reference RE cases in determining the quantum of compensation.

It is to be noted that, given the absence of specific rules on compensation in the ECT, tribunals in the cases at hand referred to the customary rule requiring full compensation in awarding damages to Claimants.[157] As such, one may argue that, in determining the quantum of compensation, tribunals applied standards they deemed to be part of, or at least in accordance with, general international law.

Tribunals in the above referenced cases have mostly awarded less than the amount of compensation requested by claimants, in line with general investment arbitration practice.[158] This, with the relevant exceptions of the *Cavalum*, *Hydro*, *RREEF* and *STEAG* tribunals, which asked the Parties to attempt to reach an agreement on the amount of compensation,[159] and *CEF, Greentech* and *NextEra*, which awarded the same amount sought by claimants, or little less.[160]

In *9Ren* and *Novenergia*, tribunals awarded about four-fifths of the amount requested by claimants.[161] The *Eiser*, *ESPF*, *Foresight*, *OperaFund* and *Watkins* tribunals awarded about two-

Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v Kingdom of Spain, SCC Case No. 2015/150, Partial Dissenting Opinion of Co-Arbitration Raúl E. Vinuesa (14 November 2018), paras 39-53.

[156] *RREEF*, *supra* note 75, para 398. Similarly, *PV Investors*, *supra* note 89, para 613.

[157] *Eg 9REN*, *supra* note 113, para 373; *ESPF*, *supra* note 86, para 585; *Watkins*, *supra* note 118, para 673.

[158] Data on such trend may be found on *Investment Policy Hub* website (https://investmentpolicy.unctad.org/).

[159] Those tribunals reserved the power to quantify compensation were the Parties unable to reach an agreement. So far, only the *RREEF* Tribunal has intervened to that effect (*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Award (11 December 2019)).

[160] The *CEF* Tribunal awarded 9.6 mln euros against the 10.3 mln euros claimed by investor (*CEF*, *supra* note 105, para 268). The *Greentech* and *NextEra* tribunals awarded respectively 11.9 mln euros (*Greentech*, *supra* note 69, para 542) and 290.6 mln euros (*NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Final award (31 May 2019), para 37), as claimed by the respective investors.

[161] The *9Ren* Tribunal awarded 41.76 mln euros against the 52.2 mln euros claimed by investor (*9REN*, *supra* note 113, para 383). The *Novenergia* Tribunal awarded 53.3 mln euros, against the 61.3 mln euros claimed by investor (*Novenergia*, *supra* note 79, para 768).

thirds of the amount of compensation sought by claimants.[162] The *Antin*, *Cube*, *Infrared*, *Masdar*, *PV Investors* and *SolEs* tribunals awarded half, or even less, the compensation requested by claimants.[163]

Most tribunals adopted the DCF valuation method,[164] in line again with general practice.[165] It is however to be noted that tribunals in *NextEra*, *Novenergia*, found such valuation method inappropriate considering the circumstances of the respective cases,[166] and that tribunals following the "reasonable rate of return" line of reasoning generally applied the WACC method of calculation.[167]

It is further to be noted that most tribunals finding for claimants have applied some measure of "regulatory risk" in assessing the quantum of compensation[168]. Most of the times such risk was already taken in consideration in parties' expert reports on compensation,[169] the *9Ren* Tribunal,

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[162] The *Eiser* Tribunal awarded 128 mln euros, against the 196 mln euros claimed by investor (*Eiser*, *supra* note 84, para 432). The *ESPF* Tribunal awarded 16 mln euros against the 28.6 mln euros claimed by investors (*ESPF*, *supra* note 86, para 911). The *Foresight* Tribunal awarded 39 mln euros, against the 58.02 mln euros claimed by investors (*Foresight*, *supra* note 74, para 441). The *OperaFund* Tribunal awarded 29.3 mln USD against the 42.8 mln euros claimed by investor (*OperaFund*, *supra* note 113, paras 623-624). The *Watkins* Tribunal awarded 77 mln euros against the 123.9 mln euros claimed by investors (*Watkins*, *supra* note 118, para 643).

[163] The *Antin* Tribunal awarded 101 mln euros, against the 196 mln euros claimed by investors (*Antin*, *supra* note 73, para 616; the original amount of compensation, 112 mln euros, was rectified on 29 January 2019 (*Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Rectification of the Award (29 January 2019), para 40(b))). The *Cube* Tribunal awarded 33.7 mln euros (*Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Final award (26 June 2019), para 48(d) and (e)), against the 74.08 mln euros claimed by investor (*Cube*, *supra* note 83, para 479). The *Infrared* Tribunal awarded 28.2 mln euros against the 75.7 mln euros claimed by investors (*Infrared*, *supra* note 87, para 93). The *Masdar* Tribunal awarded 64.5 mln euros, against the 165 mln euros claimed by investors (*Masdar*, *supra* note 113, para 523). The *PV Investors* Tribunal awarded 91.1 mln euros against the 520 mln euros claimed by investors (*PV Investors*, *supra* note 89, para 841). The *SolEs* Tribunal awarded 40.98 mln euros against the 97.7 mln euros claimed by investor (*SolEs*, *supra* note 90, para 490).

[164] *9REN*, *supra* note 113, para 407; *Antin*, *supra* note 73, para 691; *CEF*, *supra* note 105, para 275; *Cube*, *supra* note 83, para 477; *Eiser*, *supra* note 84, paras 465-473; *Foresight*, *supra* note 74, para 486; *Greentech*, *supra* note 69, para 562; *Masdar*, *supra* note 113, para 575; *OperaFund*, *supra* note 113, para 621; *SolEs*, *supra* note 90, para 488; *Watkins*, *supra* note 118, para 689. It is to be noted that, in *Watkins*, Professor Ruiz Fabri expressed doubts as to the appropriateness of the DCF as valuation method (*Dissent by Professor Hélène Ruiz Fabri*, *supra* note 118, para 15).

[165] Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (2011), 118-123; Noah Rubins, Vasuda Sinha and Baxter Roberts, "Approaches to Valuation in Investment Treaty Arbitration", in C.L. Beharry (eds), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (2018), 171, 186-189; Kai F. Schumacher and Henner Klönne, "Discounted Cash Flow Method", in *ibid*., 205; McLachlan, Shore, Weiniger, *supra* note 22, 418-419 and 421-435.

[166] *NextEra*, *supra* note 70, para 647; *Novenergia*, *supra* note 79, para 789, referring to the parties agreement on the "inappropriateness" of the DCF method; *RREEF*, *supra* note 75, para 519.

[167] *BayWa*, *supra* note 81, para 514; *Cavalum*, *supra* note 69, paras 688 ff.; *Hydro*, *supra* note 74, para 746; *RREEF*, *supra* note 159, para 27.

[168] *BayWa*, *supra* note 81, para 589.

[169] *Antin*, *supra* note 73, paras 613 and 645; *Cube*, *supra* note 83, paras 466-467; *Foresight*, *supra* note 74, para 527; *Masdar*, *supra* note 113, para 633; *OperaFund*, *supra* note 113, paras 653-664; *RREEF*, *supra* note 75, para 486; *SolEs*, *supra* note 90, paras 530-534.

faced with an expert report not considering such risk, affirmed that, in assessing the *quantum* of compensation, "some measure of 'regulatory risk' should be reflected in the Award because a prudent and well-informed investor would have been alive to the risk that Spain might reduce the FIT tariff".[170]

4 Concluding remarks

The above study has provided an overview of the recent RE case law which provides an extremely rich laboratory for considerations on the contents and the normative relevance of legitimate expectations. The recent – though abundant – RE case law confirms the twofold trend to the subject, consisting of the "legal stability" and the "qualifying requirements" approaches. Most importantly, the recent case law confirms the prevailing reliance by investment tribunals on the latter approach, whilst the "legal stability" approach is regarded as extremely impinging on the sovereign legislative prerogatives of the Host State. This appears from the fact that most tribunals have excluded the existence of an autonomous "legal stability" obligation under FET[171] and have rather assessed the existence of stabilisation commitments.[172]

Whilst decisions in Czech and Italian cases have consistently applied the "qualifying requirements" approach as strictly elaborated by relevant precedents,[173] Spanish cases' awards present peculiarities. Indeed, tribunals in cases against Spain have applied the "qualifying requirements" approach extensively, implying that legitimate expectations protect investors from a *radical* changes in the legal framework also without stabilisation commitments. Unfortunately, those tribunals have not qualified the *criteria* for determining whether a change is radical. One of those tribunal has held that "sophisticated investors […] should have reasonably expected that [the domestic regime] could be modified, 'but within foreseeable limits'".[174] Therefore, one may argue that a change is "radical" whenever it is not "foreseeable". Unfortunately, tribunals have not provided cues on the threshold of the relevant "foreseeability", and its relation to the investors' due diligence.

True, the investors' due diligence has scantly been in the forefront of the investment

[170] *9REN*, *supra* note 113, para 412(h).
[171] *Supra*, Section 3.2.1.
[172] *Supra*, Section 3.2.2.
[173] *Supra*, Section 2.2.
[174] *Foresight*, *supra* note 74, para. 397.

arbitrators' concerns, aside from the context of counterclaims.[175] The case law analysed in this paper confirms such absence. Indeed, as shown above,[176] the Italian and Spanish cases' tribunals finding for claimants have paid little attention to the investors' due diligence, to the point that, in *Greentech*, due diligence was not even addressed, apparently because the Respondent did not raise the issue. However, since abundant case law points towards due diligence as a requirement for the legitimacy of expectations, such issue should have been considered by the Tribunal applying *jura novit curia*, irrespective of the Respondent's failure to raise the issue.[177] It has also been shown that some tribunals have relieved investors from the burden of proving they acted in a "prudent" manner.[178]

The above analysis may lead the reader to think that tribunals have enhanced the protection of investors' legitimate expectations without paying due regard to the regulatory power of States or to alleged investors' "non prudent" behaviour. However, the study has shown that this does not seem to be the case. It appears that the public reasons grounding the exercise of States' regulatory power impairing the economic value of RE investments, or the way in which investors have behaved, have not slipped the mind of arbitrators. The majority of tribunals finding for claimants have awarded less than what was claimed. It is to be noted that the limitation of the amount of compensation was mostly due to the so-called "regulatory risk"[179] and other factors which "included lack of due diligence on the part of the investor […] and a sense that some investors have sought to capitalise unduly on Spain's generous incentive".[180] This reasoning conforms with general international law, with special regard to the principle of contributory negligence as codified in Article 39 of the *Articles on State Responsibility*.[181]

Given the above, it is arguable that tribunals are actually following an intermediate approach between "legality stability" and "qualifying requirements", which literature have dubbed

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[175] Tanzi, *supra* note 35. On counterclaims, see, *inter alia*, Eric de Brabandere, "Human Rights Counterclaims in Investment Treaty Arbitration", 50 *Revue belge de droit international* (2017) pp. 591.
[176] *Supra*, Section 3.2.3.
[177] On *jura novit curia* see, *inter alia*, Attila Tanzi, "On Judicial Autonomy and the Autonomy of the Parties in International Adjudication, with Special Regard to Investment Arbitration and ICSID Annulment Proceedings", *Leiden Journal of International Law* (2020) pp. 57 doi: 10.1017/S0922156519000554.
[178] *Supra*, text at footnotes 146-148.
[179] *Supra*, text at footnotes 169-170.
[180] *BayWa*, *supra* note 81, para 589. See also *Antaris*, *supra* note 80, para 435.
[181] ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, pp. 31-143, at 109. On the issue in general, see Martin Jarrett, *Contributory Fault and Investor Misconduct in Investment Arbitration* (2019).

"proportionality approach"[182] within the context of case law on expropriation. Such approach provides that even though a regulatory measure impairs the investors' property, hence triggering the obligation to compensate, the fact that such a measure is an exercise of the regulatory power of a State, or that the investor has not acted diligently, affects the quantum of compensation, sensibly diminishing it.

Future decisions on the protection of the investors' legitimate expectations will surely benefit from the elaboration of the case law at hand and most probably build upon or at least refer to it, also outside the context of the ECT. This alone will not contribute to the formation of a customary rule on legitimate expectations, whose existence has been to some extent surprisingly excluded by the International Court of Justice,[183] possibly even a general rule on FET.[184]

However, it may be argued that the above case law adds to the process of "internationalization" of the general principle of law on legitimate expectations[185] in its "qualifying requirement" construction, to the effect of establishing it as one of the general "interpretative elements" of FET.[186] Accordingly, one may not exclude that such case law, if consistently enhanced in the future by investment tribunals, possibly in combination with more generous openness in adjudicative contexts other than ISDS, will also contribute to the "customization" of the general principle on legitimate expectations.[187]

[182] Tanzi, *supra* note 33, 72 ff.; Titi, *supra* note 16, 333-334; Viñuales, *supra* note 16, 318-319.
[183] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018*, p. 507, para 162.
[184] Tribunals in the case law at hand have taken different positions on the issue in point. The *Blusun* (*supra* note 71, para 319(3)) and *RWE* (*supra* note 118, paras 444-447) tribunals endorsed the customary nature of FET under Article 10(1) ECT, whilst the *Belenergia* (*supra* note 82, para 568) and *Sun Reserve* (*supra* note 93, paras 669-674) tribunals excluded it.
[185] On the issue of the elaboration of "general principles of law formed within the international legal system", see the Second Report by Special Rapporteur Vázquez-Bermúdez (*Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, UN Doc. A/CN.4/741, 9 April 2020, paras 113-180).
[186] Yannaca-Small, *supra* note 8, at 130.
[187] On the interaction between general principles of law and customary law, see Attila Tanzi, *A Concise Introduction to International Law* (2019) pp. 68-70 and 72-74; Attila Tanzi, "Conclusions: Testing General Principles of Law in International Investment Law: between Principles and Rules of International Law", in M. Andenas *et al.* (eds.), *supra* note 7, pp. 297.