## Specialeafhandling:

**Approaching Predictability? Investors’ Legitimate Expectations under the Fair and Equitable Treatment Standard in Renewable Energy Investment Arbitration**

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Resumé

Dette speciale undersøger internationale voldgifttribunalers fortolkning af standarden for “fair og rimelig behandling” i internationale investeringsaftaler. Specialet fokuserer på sager om direkte udenlandske investeringer i vedvarende energi. Det undersøges endvidere, om den aktuelle fortolkning er ensartet i en sådan grad, at den gør det muligt for investorer at forudse deres retsstillings i henhold til denne standard.

Indledningsvist belyses de særegenheder, der præger investeringer i vedvarende energi, og hvorfor sådanne investeringer forudsætter en betydelig grad af stabilitet i værtsstatens investeringsmiljø. Disse særegenheder omfatter politiske risici, længerevarende kontrakter samt risikokofordelen mellem investor og værtsstat.

Herefter redegøres for de særlige karakteristika der præger investeringer i vedvarende energi i modsætning til investeringer i konventionel energi. Dette inkluderer særligt behovet for statslige støtteordninger.

Investorers primære beskyttelse i international ret mod risici og ustabilitet er internationale investeringsaftaler, der har til formål at skabe stabile investeringsforhold. Standarden for fair og rimelig behandling findes i størstedelen af sådanne investeringsaftaler, og beskytter bl.a. investorers berettigede forventninger.

På baggrund af en analyse af international voldgiftspraksis, omhandlende direkte udenlandske investeringer i vedvarende energi, konkluderes det, at der både forekommer fællesnævner og forskelligheder i den aktuelle fortolkning af beskyttelsen af investorers berettigede forventninger.


Endnu en fællesnævner identificeres, idet størstedelen af afgørelserne baserer deres vurdering af, om forventninger er berettigede på, om der kan konstateres objektive faktorer, der taler for en sådan berettigelse.
Den primære uklarhed omkring den aktuelle fortolkning knytter sig dog særligt til disse objektive faktorer, idet analysen viser, at voldgiftspraksis ikke er ensartet, i forhold til hvad der udgør en sådan objektiv faktor.

Afslutningsvist konkluderes det, på baggrund af den manglende konsensus i voldgiftspraksis, at den aktuelle fortolkning af standarden for fair og rimelig behandling ikke er ensartet i en sådan grad, at investorer i direkte udenlandske investeringer i vedvarende energi med sikkerhed kan forudse deres retsstilling i henhold til denne standard.
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1. Introduction

1.1. Preface

Energy fuels modern society. It is crucial to modern industry, our ways of transport and our standards of living. However, conventional energy production takes its toll on the environment. Therefore, the focus on renewable energy sources have proliferated in recent decades. In order to meet both international and national targets for reduction of greenhouse gas emissions and renewable energy ("RE") targets, states have sought to develop domestic generation capacities for electricity via RE sources. Attracting foreign capital in the form of foreign direct investments is vital for the diffusion of RE facilities across countries. One of the primary ways for states to incentivise investments in this sector is to introduce support schemes. Once established, investors build and plan their business cases on the basis of an expectation that they will receive public support in accordance with these schemes.\(^1\) Both states and investors benefit from this arrangement as long as it is sustainable and stable. However, if the support schemes prove to be unsustainable, due to being poorly designed or no longer justified by market conditions, states will not be able to maintain them, making changes to the schemes inevitable. Such changes are catalysts for legal proceedings. Recently, a number of European states have experienced this, as they deemed it necessary to change their remuneration schemes as a result of the combined economic pressure of poorly designed schemes in addition to the economic consequences of the financial crisis of 2007-2008. As a result, a considerable number of investment cases have been initiated against host-states. Especially the Czech Republic, Italy and Spain have been on the receiving end of notices of arbitration. Spain is the respondent in 47 cases brought on the basis of reforms affecting the conditions of the renewable energy sector.\(^2\) Of these cases, 17 have been decided in favour of the investor. 13 of these cases contain publicly available information regarding compensation. At the time of writing, the publicly available awards amount to approximately EUR 1 billion in damages payable by Spain. 27 cases are still pending.\(^3\)

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\(^2\) At the time of writing.


\(^3\) Of these 27 cases, 16 contain publicly available information regarding claims made. At the time of writing, these claims amount to approximately EUR 2.8 billion in damages.
With significant sums at stake in a sector of fundamental importance, it would not be unreasonable to expect that such disputes are settled on the basis of clear and specific legal standards, which are applied consistently and evenly. One of the standards, which have gained increased importance in the later years, is the fair and equitable treatment (“FET”) standard. However, the way this standard has been applied in cases regarding investments in other sectors than RE does not fit into the presumption of a clear and specific standard. On the contrary, despite its growing importance, the FET standard’s content and interpretation remain ambiguous, uncertain and subject to debate. This makes it difficult for investors to assess their legal position in the event that the legal regime in which they invested changes to their disadvantage, threatening the predictability of the outcome of the investment.

The recent wave of international investment arbitral proceedings against Spain, following changes to its RE legal framework, has made it possible to assess how the FET standard is applied in RE investment arbitrations in a systematic manner. This assessment is particularly relevant in the RE sector where stable conditions is of importance for both host-states and investors, due to the unique characteristics of RE energy investments.

1.2. Research question

The FET standard is regularly invoked in investment disputes. It imposes the obligation for host-states to accord investors and their investments fair and equitable treatment. One of the main elements of the standard is the protection of investors’ legitimate expectations. This element is essential in energy investment arbitrations that concern changes to support schemes on which investors relied. The protection of the investor’s legitimate expectations essentially protects the investment against changes to the legal framework on which the investor made its decision to invest. The host-state, in which the investment was made, may be held liable for damages if it is found to have breached the FET standard due to a frustration of the investor’s legitimate expectations. However, the substantive

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content of the FET standard and the element of legitimate expectations is unclear. This is paradoxical, as the standard is part of a framework seeking to grant protection and stability for investors and host-states.

By focusing on a specific sector, this thesis attempts to clarify the application of the element of legitimate expectations under the FET standard. More specifically, what prerequisites are required for foreign investors in the RE sector to benefit from its protection. However, this is not the only aim of the thesis, as it will also seek to establish how the application contributes to predictability and forward planning for foreign investors in RE, in order to evaluate how the contemporary application of the FET standard affects the parties and investors especially.

Therefore, the research question is as follows:

_**How is the element of legitimate expectations under the fair and equitable treatment standard applied in international renewable energy investment arbitration, and does the application facilitate predictability and forward planning for investors in the renewable energy sector?**_

In order to answer this, the thesis will examine the interpretation of the element of legitimate expectations under the FET standard in arbitral awards, including both disputes regarding conventional and renewable energy. This may, in addition to clarifying the interpretation of legitimate expectations, also envisage any differences there might arise in interpretation when comparing conventional and RE awards.

Lastly, the thesis will assess its findings and evaluate these according to the last limb of the research question – how the contemporary interpretation affects the predictability of the standard’s application.

It is expected that the analysis of the arbitral awards will show that common denominators in interpretation exist, but that some aspects are still divergent. Potential divergences are expected to be a result of either differences in facts, differences in interpretation or the fact that awards are rendered through ad hoc tribunals that are not bound by precedence.8 Further, it is an expected outcome that the interpretation differs in RE cases compared to conventional energy cases.

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It is expected that the thesis will find that, with the contemporary interpretation of the element of legitimate expectations in RE cases, some aspects of interpretation have become consistent, but not to a degree where investors can completely rely on the FET provision for predictability and forward planning purposes.

1.3. Research limitations

As with the majority of studies, the scope of this thesis is subject to certain limitations. The thesis’ main objective is to establish how arbitral tribunals apply the FET standard, and more specifically, the element of legitimate expectations, and how this application affects the standard’s availability for forward planning and predictability in RE investments. Therefore, analysing the element of legitimate expectations is the main focus in the thesis. Thus, the many other elements which have been attributed to the standard\(^9\), will not be subject to scrutiny throughout the thesis.

Another limitation of the thesis is the fact that, even though there are a large number of awards, not all of them can be included in the thesis. The reasoning behind which awards are included is explained below in section 1.4.

Most of the awards analysed include elaborate discussions on whether the ad hoc tribunals have jurisdiction over the dispute.\(^{10}\) These cases tend to focus on what has been referred to as the “Achmea issue” following the judgment in Slovak Republic v. Achmea BV\(^{11}\). In all cases analysed in this thesis, the tribunals establish that jurisdiction is present. Since the analysis of the question of jurisdiction in FET claims exceeds the scope of this thesis, the issue of jurisdiction will not be subject to any analysis in this thesis.

\(^{10}\) See for example Charanne B.V. and Construction Investments v. the Kingdom of Spain, SCC Case No. 062/2012, Final Award, 21 January 2016 [unofficial English translation by Mena Chambers, Draft 1, 3 March 2016]; 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, Decision on Jurisdiction, 4 June 2004; Electrabel S.A v. the Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 and 9REN Holding S.A.R.L. v. The Kingdom of Spain, ICSID Case No. ARB/15/15, Award, 31 May 2019.
\(^{11}\) C-284/16, Slovakische Republik v. Achmea BV, Judgment of the Court, 6 March 2018.
The damages awarded in cases can give a palpable sense of the protection granted by the FET standard. When discussing quantum, tribunals mostly discuss how to calculate the damages. In the awards analysed throughout the thesis, the tribunals favour methods of calculation that is “sufficient to compensate the [Claimant] fully and to eliminate the consequences [of the host-state's actions]”. However, the method of calculation varies between the awards. Even though an analysis of quantum could prove to be relevant, it will not be subject to scrutiny.

Therefore, the findings of this thesis have to be seen in light of some limitations. If, however, the scope of this thesis allowed for fewer limitations, it would be relevant to analyse the amount of awarded damages, in order to examine the extent of the protection following an investor’s successful claim. In addition to this, with fewer limitations, it would be possible to include more awards to elaborate on the results of this thesis.

1.4. Methodology and sources

In order to answer the research question, this thesis relies on a legal-dogmatic analysis of present law. The legal-dogmatic method aims at giving a systematic description of present law governing a particular legal field and how it is applied. This is accomplished on the basis of relevant sources of law, mainly (so-called) primary sources of law, while secondary sources are also included in the analysis. This thesis uses the legal-dogmatic method as it describes, systematises and analyses the protection of RE investors’ legitimate expectations granted by the FET standard (de lege lata). The method is relied upon for uncovering unclarities and gaps in the contemporary application of the standard. On the basis of this analysis, it is assessed whether the contemporary application of legitimate expectations under the FET standard facilitates predictability and forward planning for the investor. This assessment is primarily based on a purposive approach to the standard and the protection that it grants, taking into consideration the purpose of the treaties in which it is found. While this is

12 REN v. Spain, Award, 31 May 2019, para. 404.
not a *de lege ferenda* consideration, it is a prospective approach as to how the trends and developments in the application of FET standard affect investors and host-states.

It is a prerequisite for the doctrinal approach that the law is viewed as a system. This thesis examines a provision found in treaties and is thus based on international law. International law as a legal order has been criticised for lacking coherence. The main obstacles for a coherent international legal order have been said to be its decentralised and consensual character, the absence of an international legislature and conversely the existence of multiple actors that engage in shaping the law, creating multiple international norms. Despite these obstacles, this thesis regards and approaches international law as a coherent system.

The legal-dogmatic method relies on relevant sources of law. The formal sources of international law are set out in Article 38 of the Statute of the International Court of Justice (“ICJ”)\(^\text{19}\). First, it recognises treaties, international customary law and general principles of law as primary sources, cf. Article 38 (1) (a)-(c). Next, it recognises judicial decisions and teachings of the most highly qualified publicists as secondary sources, cf. Article 38 (1) (d). The analysis and discussion of the development of the FET standard relies especially on the international investment agreements (“IIAs”) in which it is found and a comprehensive examination and analysis of arbitral practice.

When an analysis is based on arbitral practice of international tribunals, it is important to note that there is no doctrine of binding precedent or *stare decisis* in international law.\(^\text{20}\) Awards rendered by arbitral tribunals are only binding upon the parties to the particular case.\(^\text{21}\) Therefore, arbitrators are not bound by previously decided cases.\(^\text{22}\) Despite the theoretical absence of binding precedent, arbitral

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\(^{19}\) Statute of the International Court of Justice, Apr. 18, 1946.


practice has a *de facto* important role in international arbitral decision-making. International investment tribunals frequently refer to the case law of other tribunals. Some tribunals have even acknowledged that there is a duty, absent of compelling contrary grounds, for tribunals to adopt principles established in a series of consistent cases, and "[...] a duty to contribute to the harmonious development of international investment law in furtherance of the certainty of the rule of law". From a practical perspective, this makes arbitral practice an important source of law, as it gives guidance on how standards are interpreted and applied.

From a methodical perspective, it must be taken into account, when relying on arbitral practice to analyse present law, that future tribunals may explicitly depart from previous cases as they are simply not bound by these. Acknowledging that this may have an influence on the relevance of this thesis’ findings, it must also be emphasised that this feature is one of the factors that make this thesis relevant in the first place. All things being equal, the arbitration system does not facilitate predictability of the law and may create inconsistent applications of standards. The main objective of this thesis is exactly to examine the application of the FET standard, and whether its application is consistent and predictable.

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23 E.D. Brabandere, “Arbitral Decisions as a Source of International Investment Law” in T. Gazzini and E. D. Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations*, 2012, pp. 249 and 264; See e.g. *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, paras. 30-32: “An identity of the basis of jurisdiction of these tribunals, even when it meets with very similar if not even identical facts at the origin of the disputes, does not suffice to apply systematically to the present case positions or solutions already adopted in these cases. Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution. One may even find situations in which, although seized on the basis of another BIT as combined with the pertinent provisions of the ICSID Convention, a tribunal has set a point of law which, in essence, is or will be met in other cases whatever the specificities of each dispute may be. Such precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration. The same may be said for the interpretation given by a precedent decision or award to some relevant facts which are basically at the origin of two or several different disputes, keeping carefully in mind the actual specificities still featuring each case. If the present Tribunal concurs with the analysis and interpretation of these facts as they generated certain special consequences for the parties to this case as well as for those of another case, it may consider this earlier interpretation as relevant.”

24 *The PV Investors v. The Kingdom of Spain*, UNCITRAL, PCA Case No. 2012-14, Final Award, 28 February 2020, para. 521.


There is a vast amount of cases regarding energy investments and the FET standard. Key cases that each contribute to the analysis of the contemporary application of the FET standard and the element of legitimate expectations have been identified and analysed. When analysing the standard’s application in cases regarding RE, this thesis has chosen to focus on a series of cases brought against Spain. These have been chosen as the cases are the most recent cases regarding the FET standard and RE, and because the cases share similar facts, making them ideal for analysing whether there is a potential inconsistency in the application of FET standard. These cases that are all landmark decisions in their own way have been analysed, while other cases brought against Spain in the same “wave” of proceedings is referred to in support of specific findings in the analysis and discussion.

The analysis of RE cases have been structured chronologically. This approach has been chosen to show the development of the application of the FET standard in order to elucidate the contemporary state of the FET standard.

International investment disputes are often complex and based on complicated facts, and awards and decisions are often extensive. In this thesis, facts are reproduced where they are deemed relevant for the analysis.

This thesis also relies on academic writings by respected scholars and various reports from inter alia intergovernmental organisations. These have been critically assessed and are used primarily for descriptive purposes and for supporting arguments in the analysis and discussion of the FET standard and the element of legitimate expectations. These sources are not legally binding and have been granted adequate importance in accordance with this consideration.

In a number of instances, the analyses of awards rely on unofficial English translations of Spanish awards. These lack authority and may not be precise. In the instances where such a translation is relied upon, attention will be directed to this.
1.5. Structure

In order to provide a rigorous answer to the research question, the thesis has been structured as follows:

In Chapter 2, the characteristics of RE investments are examined. This examination provides for the rationale behind the distinct focus on stability in these investments.

Chapter 3 places RE investments within its legal context and explains the main mechanisms providing protection and stability within the legal framework of foreign direct energy investments.

Chapter 4 describes the broader perspectives of the FET standard and its functions in practice. It provides context for the analysis of the standard’s application in the specified sectors of conventional- and renewable energy.

In Chapter 5, arbitral cases regarding investments in conventional energy sources are analysed and discussed, with an emphasis on identifying common denominators and divergences in the application of legitimate expectations. Additionally, this analysis serves as a basis for comparison for the analysis of cases regarding RE.

In Chapter 6, arbitral cases regarding RE are analysed and discussed. A line of cases brought against Spain are analysed chronologically in order to assess the contemporary state of legitimate expectations in RE cases. The analysis focuses on identifying common denominators and divergences in application and interpretation. How these individually affect the standard’s predictability and availability for forward planning is discussed throughout the chapter.

Chapter 7 compiles the findings of the analyses and further assesses what consequences they have for the predictability of the application of legitimate expectations and the FET standard’s availability for forward planning in foreign direct investments in the RE sector.
2. Characteristics of the renewable energy investment framework

This section examines the characteristics of the international energy investment environment. The section explains why stability is important, and how certain characteristics of energy investments challenge this stability. Hereafter, this section explains the major differences between investments in renewable and conventional energy with an emphasis on government funded subsidy schemes.

2.1. Foreign direct investments in the energy sector

Foreign direct investments in the energy sector can be structured in a number of ways: by direct investment into a company in the host-state, by acquiring such company, by setting up a subsidiary in the host-state or through a joint venture between an existing operation and a company in the host-state. In the energy sector, such investments may include facilities for extraction of natural resources or investment in or acquisition of previously government-owned energy facilities following privatisation of the energy sector. Investments in the sector are notoriously complex, expensive and long-term in nature. The sector is also characterised by the fact that natural resources are unevenly distributed among countries, and that energy prices may be subject to dramatic price increases or decreases. Energy and resources play an important role for states and the global economy. Therefore, states possess a significant role in the sector as regulators and sometimes as operators. State participation provides for a special sensitivity for investors when they engage in investments in foreign states, as states have the ability to act more freely in contractual relationships than private entities have. This vulnerability is extended by the long-term nature of the investments, along with the characteristic risk allocation between investor and state, which is elaborated below in section 2.3. This vulnerability can be said to be the Achilles’ heel of foreign direct investments in the energy sector.

28 As was the case in Electrabel v. Hungary and AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010.
sector as it requires increased stability to achieve a satisfying return in addition to repatriating capital. The energy sector has therefore been characterised as the most politically sensitive industry in the world.\textsuperscript{33}

2.2. The need for stability

When most authors describe the need for stability in energy investments, stability is mainly explained implicitly by various factors of the energy investment environment that contribute to instability. However, stability should not only be explained by factors of instability, but also by the fact that it is a general necessity for investors.\textsuperscript{34}

The term “stability” generally refers to the overall preservation of the environment in which the investment was made. Stability is needed to prevent the investment from being deprived of its value by external factors, thus disrupting the core objective of the investment. For the investor, the core objective of the investment is to ensure repatriation of capital and achievement of a return commensurate with the magnitude of the investment and risk.\textsuperscript{35} Due to the extra-legal features of energy investments, stability in the form of protection and preservation of the key conditions affecting investors’ projected rate of return is a priority and a prerequisite for investment.\textsuperscript{36} At least, without mechanisms to protect the stability of key investment conditions it would be a “[…] bold, or poorly advised, investor who chose to proceed with a planned investment in a foreign country”, as stated by Cameron.\textsuperscript{37}

Stability is not only preferable for the investor but provides advantages for the host-state as well. As stability aims to ensure a long life-span for the investment under stable, foreseeable conditions, it


\textsuperscript{34} In an UNCTAD survey, investors ranked political stability as the most important locational factor for investment decision-making. (United Nations Conference on Trade and Development (UNCTAD), \textit{Stability, Skilled Labour and Infrastructure Top Locational Factors for Foreign Affiliates}, UNCTAD Investment Brief, No. 3, 2007).


contributes to energy security, which is of paramount importance to states.\textsuperscript{38} Energy security\textsuperscript{39} can be characterised as entailing physical availability of energy resources at all times at a reasonable price.\textsuperscript{40} Further, energy security can also be characterised as including the capacity to switch freely between resources.\textsuperscript{41} Additionally, stability in the energy sector helps to secure stable revenue for host-states along with job creation in the energy sector.

Stability is threatened by a number of factors which are tied to the characteristics of energy investments and characteristics of the investment environment. This makes the need for stability particularly important in this sector, either in the form of mechanisms that the investor can rely upon to protect and enforce the original bargain struck between the investor and state or to ensure compensation.\textsuperscript{42} The most significant factors of instability in the energy investment sector are explained below.

2.3. Factors contributing to instability

2.3.1. Political risks and the right to regulate

Like any other investor, investors making foreign direct investments in the energy sector face the risk of their investment not turning out fruitful. Investors face, first of all, the business risk, which includes e.g. the product not falling into favour of the market.\textsuperscript{43} Since electricity is always in demand, business risks mostly come in the form of price fluctuations on the energy market. In addition to business risks, investors face another challenge, especially in emerging markets facing dynamic regulation.\textsuperscript{44} Energy investments will normally last much longer than the term of office of the host-state government, who welcomed the investment in the first place. Therefore, the investor’s objective becomes vulnerable to

\begin{thebibliography}{99}
\bibitem{39} It should be noted that energy security can include different elements depending on the resource in question. For example, one must distinguish between oil and gas, as gas (mostly) require a physical link between producer and consumer, which oil does not due to its ability to be stored more easily. (S.S. Haghighi, \textit{Energy Security: The external legal relations of the European Union with Major oil- and gas supplying countries}, 2007, p. 13).
\end{thebibliography}
changes in policy by a successor government, but also to other political realignments in the event of
dramatic economic circumstances. These risks might also come in the form of simple policy
changes. This can be characterised as the political risk of an investment.

Political risks in the energy sector primarily include the risk of changes in laws or the administration
of states’ laws, including onerous regulation. Changes may occur subsequent to making the bulk of
the investment on which the terms have already been agreed upon. Such changes in the legal frame-
work can lead to less profitable investments or can even lead to the investment becoming uneconomic
for the investor.

When discussing political risks, it is important to note that host-states enjoy a sovereign right to reg-
ulate. The assessment of political risks is therefore rarely an assessment of whether regulatory
changes will happen, but rather, an assessment of how such changes can affect the investment. The
right to regulate covers the state’s authority to adopt regulation, thus allowing deliberate changes in
the legal framework. Through the right to regulate, states may adjust their economic, political and
social policies, but within certain limits, as states are ultimately limited by their obligations under
international law. The boundaries in which a state may regulatorily operate may be defined as the
“regulatory scope of manoeuvre”. When a host-state exceeds this scope of manoeuvre, investors
may launch arbitral proceedings against the host-state, seeking damages for the loss of their invest-
ment, e.g. on the basis of the FET standard.

2.3.2. Long-term contracts

Long-term energy contracts are usually offered investors to ensure financing for major projects. They
tend to be economically attractive for investors due to their long durations, often ranging between 15-
30 years. Energy investments require large, up-front payments, which makes long durations of con-
tract required for investors to recover their invested capital. Long-term contracts are also in the host-

50 L. Rimšaitė, “The Perspective Of Long-Term Energy Supply Contracts In The Context Of European Union Competition
state's interest, as they ensure energy security by guaranteeing a stable stream of energy supply. Energy security is increased by the fact that host-states are able to purchase the energy resource at a fixed, predetermined price, which is protected from large fluctuations in energy prices. Thus, long-term energy contracts can generally be viewed as low-risk when compared to investments in facilities that sell energy on the energy spot market, since those are heavily reliant on prevailing energy market prices.

However, there are also significant risks associated with long-term energy contracts, especially considering the political risks that investors endure. Long-term energy investments often require substantial capital flows over a long period of time to recover the investment and get a preferred internal rate of return. Thus, the investment becomes increasingly fragile with prolonged time horizons, due to potential regulatory changes.

Furthermore, these long-term relations between investor and state subjugates the parties to several obligations. Issues may arise in regard to these obligations, since energy contracts are often negotiated years prior to the commencement of the transaction. The evaluation of the terms of the contract is therefore based on analyses made long before the contract period. Hereafter, energy demand may change and economical and societal circumstances may influence the contractual relationship, frustrating the terms of the contract between the parties.

Long-term contractual relationships with states entail a built-in vulnerability because of the fact that a state has the sovereign power to amend the terms of the contract or to terminate it entirely. This may be classified as a structural characteristic of long-term contracts.

Thus, even though long-term energy contracts provide for energy security for states along with great potential for recovering the investor’s investment, it also makes the investor vulnerable to political risks, especially when considering the heavy up-front costs of energy investments.

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2.3.3. Risk allocation

Since investments in the energy sector entail long lasting relationships between investors and host-states, the risk allocation between the parties is rather unconventional. When investing in a foreign state, investors often do so on the basis of government guarantees and incentives. These are usually expressed in contractual form, but supported by a regulatory framework providing the legal basis of the incentives.\(^{56}\) Prior to investment, the risk mainly lies with the host-state, since capital is needed to realise the project. However, when the bulk of the investment has been made, risk allocation shifts dramatically from the host-state to the investor. At this point, the host-state has what it requires, but the investor must wait a long time to recover the investment along with its returns.\(^{57}\) At this point, the state may find, for a variety of reasons, that the bargain is obsolete and therefore revise the terms of the initial agreement. The revision can be caused by a change of government, new policies, or social/economic implications for the host-state.\(^{58}\) Therefore, in the years following the large investment, the investor faces significant risks that the state might modify the terms of the contract. Cameron defines this as "the obsolescing bargain".\(^{59}\) Another major factor in risk allocation in international energy investments is what Cameron refers to as "the price cycle".\(^{60}\) When the parties conclude an agreement, it is based on assumptions about the price range for the project which is linked to expectations about future market conditions. In the event that energy prices rise dramatically, leading to large gains for the investor, the host-state might seek to capture these gains by introducing certain taxes or in other ways attempt to force a renegotiation of the terms of the initial agreement. The host-state might attempt to justify these state actions in terms of fairness or public interest.\(^{61}\)

These two factors contribute to significant periodic instability in international energy investments.\(^{62}\) This has led to investors and host-states designing a variety of legal mechanisms that share the common goal of promoting long-term stability of energy agreements. Fundamental to investors is obtaining binding guarantees from the host-state against the potential impact of the above-mentioned factors of instability.\(^{63}\) However, given that the investor has entered into a long-term relationship with a

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sovereign state, the risk of unilateral state actions, potentially detrimental to the core of the investment, remain.  

2.4. Renewable energy investments v. conventional energy investments

When states and global actors, including the European Union (“EU”), set goals for the future RE mix, these goals have to be accompanied by appropriate frameworks that support, facilitate and promote RE. However, certain characteristics of energy markets make it difficult to obtain the sufficient investments to develop the RE sector without state intervention.

First of all, modern energy markets are liberalised and promotes competition between energy suppliers, both renewable and fossil-based. RE is more expensive to produce than conventional, fossil-based energy, making it harder for RE producers to penetrate the competitive market. This is mainly due to the fact that RE sources have a lower energy efficiency than typical conventional energy sources. Second, transitioning to RE requires heavy up-front investments in RE technology, which may not, at the time of investment, have proven to be financially viable for investors. Investments in RE therefore bears more risk, as the sector is still in development. Surges in the development of RE technologies make the investment environment dynamic, but prone to unforeseeable changes.

These factors provide for a relatively hostile energy market structure for RE producers. The competition on the liberalised energy markets does not particularly favour RE, especially considering the

steady decrease in energy prices.\textsuperscript{70} This makes investors favour short-term investments when considering these uncertain market conditions. The rapid development of RE technology also weakens the interest in large, up-front investments, as investors has no guarantee that their utilities will not be outdated in the near future.\textsuperscript{71} The RE sector can for those reasons prove difficult to invest and operate in with a profit. These characteristics contribute to the justification of market intervention to promote RE technologies.\textsuperscript{72} Without financial and legal mechanisms to support it, the sector cannot evolve as rapid as required by international RE targets. For such development to take place, states must incorporate \textit{inter alia} financial support schemes for RE investments in their legal frameworks. The next section will explain two typical support scheme mechanisms.

2.4.1. \textbf{Subsidy schemes}

States support RE investments under different regimes, and the support mechanisms may take different forms. This section will examine two key support schemes: feed-in tariffs and feed-in premiums.

A common issue with subsidy schemes, regardless of their form, is that host-states may decide to change or entirely remove these if they are poorly designed or no longer justified by market conditions. This may lead to disputes between the host-state and the investor who relied and planned a business case on the expectation of receiving subsidies throughout the investment. Such disputes impose the need for mechanisms governing the relationship between host-state and investor and investor protection in particular. These mechanisms are examined in Chapter 3.


2.4.1.1. Feed-in tariffs

A feed-in tariff (“FIT”) is an energy support policy generally offered to suppliers in long-term power purchase agreements (“PPAs”). These typically range between 10-25 years in length.\textsuperscript{73} The price offered to the supplier may differentiate depending on technology type, resource quality, project size, etc. The supplier and the state may also have agreed on a decreasing tariff on older energy producing installations to promote technological development.\textsuperscript{74}

FITs generally include three elements: 1) guaranteed access to the energy grid, 2) stable and long-term PPAs, and 3) fixed payments to the supplier that reflects the cost of RE generation.\textsuperscript{75} A challenge when designing a subsidy scheme based on FITs is how to calculate the tariff that suppliers will receive. In the EU, the most favoured way of calculation is by basing the tariff on the actual cost of generation.\textsuperscript{76} Other methods base the tariff on the value of RE generation (avoided costs), or as a fixed-price incentive without regards to renewable generation costs or avoided costs.\textsuperscript{77}

There are several economic advantages of a subsidy scheme based on FITs. First, FITs can secure a stable market for investors because of its long-term nature and fixed incentive. Second, the FITs only cost money for the state if the entitled facility is actually operating. In other words, the FIT is performance based. Third, FITs may act as a barrier against the volatility of the energy market, as prices does not fluctuate according to spot market prices. Fourth, it serves to enhance market access for investors by creating certainty regarding grid access.\textsuperscript{78} A significant advantage of a FIT-based scheme is also its positive impact on RE development and capacity.\textsuperscript{79}

Disadvantages of a FIT-based system include that it does not address the high up-front costs of RE investments and creates upward pressure on energy prices due to rapid growth in emerging, more

costly RE technologies. Importantly, FITs make it difficult to control the overall cost of the subsidy scheme for states as it is difficult to predict the market uptake, especially if no caps are set on capacity or production.\textsuperscript{80}

\textit{2.4.1.2. Feed-in premiums}

As an alternative to FITs, subsidies can be offered to RE suppliers as a premium above the prevailing spot market price, also known as a feed-in premium ("FIP").\textsuperscript{81} As opposed to a FIT, a FIP is based on the energy spot market rather than a fixed tariff in accordance with a long-term PPA. FIPs can, as with FITs, differentiate between RE technologies or project capacities to address different costs of generation.\textsuperscript{82}

FIPs may be constant or sliding. When a FIP is constant, it adds a fixed premium on top of the market price. Even though the market price can fluctuate, the premium remains unresponsive and non-variable.\textsuperscript{83} A constant premium creates a risk for overcompensation for suppliers, as an unresponsive, fixed premium remains even though energy prices increase significantly. Some states have designed sliding premiums to address this issue.\textsuperscript{84} A sliding FIP scheme allows for a variable premium based on the prevailing energy spot market price. In addition, policy makers can introduce caps and floors on total payments to suppliers. In this way, states can respond to increases or decreases in energy prices.\textsuperscript{85}

FIP-based subsidy schemes have several advantages. First, they create an incentive for suppliers to answer high demands of energy, as energy prices increase with high demand.\textsuperscript{86} This advantage is not available for suppliers of wind and solar energy, as they cannot readily control when they feed energy

into the grid, since they are reliant on resources over which they have no control. Second, the use of floors and caps on payments to RE suppliers allows the state to minimise windfall profits for suppliers. At the same time, they protect investors against significant market risks if prices decrease. A major disadvantage of FIPs is the risk of over- and under compensation. If energy prices increase, it may have the undesirable consequence of excessive payments to RE suppliers, exceeding costs significantly, thus leading to higher overall costs for consumers. If energy prices decrease, it may lead to loss of profit for existing RE suppliers. This issue can be addressed by introducing floors and caps on payment to suppliers.

These characteristics of FIPs give premium-based subsidy schemes several advantages compared to FIT-based schemes. FIPs are better for optimising market participation as the structure (for most) creates incentives to produce more energy in times of high demand. Because of this, it allows for more efficient grid management, as the amount of energy fed into the grid will be easier to anticipate when prices increase or decrease. Further, FIPs are generally more compatible with deregulated energy markets, and contributes to competition between suppliers. However, compared to FITs, FIPs also have disadvantages. Generally, energy prices are higher under FIP-based policies, which is mainly due to increased risks due to lower predictability. As opposed to FITs, FIPs are not supported by PPAs, which for RE suppliers is considered an added risk.

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2.5. Sub-conclusion

Investments in the energy sector are notoriously complex, expensive and long-term in nature. Due to certain characteristics of the energy investment environment, and the fact that host-states often act as operators in these investments, investors in this sector become increasingly vulnerable to _inter alia_ regulatory risks. For investors, the core objective of the investment is to ensure repatriation of capital and to achieve a return. Stability is a key prerequisite to achieve this objective. In investment law, stability generally refers to the overall preservation of the environment in which the investment was made. Several factors present in energy investments contribute to instability, including political and regulatory risks, the characteristics of long-term contracts and the risk-allocation between investor and state.

Several factors differentiate investments in conventional energy from investments in RE. RE is less cost-efficient which makes it difficult to penetrate the liberalised energy markets. Because of these uncertainties and the rapid development of RE, investors may refrain from committing to large RE investments, where heavy upfront investments are needed. To accommodate these challenges, host-states may introduce subsidy schemes to promote investments in RE. Examples of such are FITs and FIPs.

These subsidy schemes might lead to disputes between the investor and the host-state, e.g. if the host-state, for various reasons, decide to abolish the subsidy scheme which incentivised the investor to invest in the first place. Such conflicts impose the need for rules regarding investor protection in order to stabilise the relationship between host-state and investor.
3. The legal framework of foreign direct energy investments

With the characteristics and inherent risks of RE investments, one of the main functions of the legal framework surrounding these investments is governing the relationship between investors and host-states and the protection of foreign investments in particular. International investment law governs these issues, and one of the essential parts of the regulatory framework is to strike a balance between the regulatory powers of the host-state and the need for foreign investors to have their interests protected.\textsuperscript{96} The legal framework governing international investments is not a uniform body of law, but consists of different layers of applicable law from different legal orders.\textsuperscript{97} In international law, protection is granted by general principles of law, customary international law and treaties\textsuperscript{98}

A variety of legal instruments exist under the fragmented framework consisting of international, domestic and contractual law, which all contribute to the legal protection of foreign investments. Among these, two key legal mechanisms providing protection and stability can be pointed to. First, one of the fundamental risk-mitigating mechanisms is stabilisation clauses that may be included in the investment contract between the state and the investor. Second, states may negotiate IIAs with other states, being either bilateral or multilateral, to mitigate risks and provide stability for investors.\textsuperscript{99} These have been said to be the cornerstone of the protection of foreign direct investments in international law.\textsuperscript{100}

3.1. Stabilisation clauses included in investment contracts

When investing in larger projects such as RE facilities, the project does not rely solely on general laws of the host-state. Instead, the host-state and the investor will negotiate an investment contract which may adapt the general framework to the specific project and the interests of the parties. Political risks will typically be addressed during these negotiations, as the investor will try to negotiate legal

\textsuperscript{98} These sources are listed as the formal sources of international law in Article 38(1) of the Statute of ICJ.
\textsuperscript{100} J.P. Sasse, \textit{An economic Analysis of Bilateral Investment Treaties}, 1st edn., Gabler Verlag, 2011. p. 46.
guarantees to safeguard the stability of the contract.\textsuperscript{101} Treaties in place between the host-state and the investor’s home-state may include provisions that aim to ensure stability for investors. However, if such provisions are not in place or if they are not as specific as the investor requires, the investor may try to include a stabilisation clause in the investment contract.\textsuperscript{102} Additionally, investors may wish to include a stabilisation clause irrespective of how specific the protection granted by the treaty is to ensure as many forms of legal guarantees as possible in the pursuit of stability for their investments.\textsuperscript{103} Other mechanisms in investments contracts are included to mitigate political risks and facilitate stability\textsuperscript{104}, but stabilisation clauses remain the most important mechanism of stability in investment contracts.\textsuperscript{105}

For host-states, stabilisation clauses may seem to limit its regulatory scope of manoeuvre significantly. Host-states may agree to such clauses as they wish to attract foreign investments and because stability facilitates this objective. Additionally, a singular stabilisation clause may be more attractive for the host-state compared to entering into international obligations which requires substantive international negotiations and ratification processes.\textsuperscript{106} Despite these incentives for host-states to agree to stabilisation clauses, some states do not offer these at all, e.g. the UK, Brazil, Colombia, Libya, Norway and Saudi Arabia.\textsuperscript{107}

Stabilisation clauses vary in form and content. Essentially, they serve as assurances of negotiated terms not being affected by future regulatory changes.\textsuperscript{108} In its purest form, such a clause would

\textsuperscript{104} E.g. clauses regarding choice of law and arbitration. Choice of law clauses provide stability by invoking rules and principles of international law, in order to internationalise the contract, making it so the applicable law in case of a dispute is not restricted to the laws of the host-state. Dispute settlement clauses referring to arbitration (often ICSID arbitration) contribute to stability by providing a neutral forum for the settlement of disputes, instead of the domestic courts of the host-state (P.D. Cameron, International Energy Investment Law: The Pursuit of Stability, 2010, p. 61).
\textsuperscript{107} For some of these states, this may be because there is a generally good track record with international investors and effective legal remedies under the domestic legal framework are present (making the perception of political risk low). Otherwise, it may be a result of legal tradition (e.g. in that Parliament cannot bind itself) or an outcome of bargaining power (established by e.g. a state having extensive control over the domestic energy industry or its character as a capital-exporting state) (P.D. Cameron, International Energy Investment Law: The Pursuit of Stability, 2010, p. 61 and P.D. Cameron, “Stabilisation in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors”, Association of International Petroleum Negotiators (AIPN), Final Report, 2006, p. 13).
require the host-state not to alter its general legal regime for the legal area stated in the clause. As an alternative, the contract may be made exempt from any future regulatory changes, making it, in effect, limited to the legislation of the host-state on the effective date of the investment contract.\textsuperscript{109} The scope of stabilisation clauses is often limited to certain areas of law, e.g. tax law.\textsuperscript{110}

The “freezing” of the host-state's legal regime that the above classic forms of stabilisation clauses provide is not always acceptable for host-states. In addition to this, in the oil nationalisations of the 1970’s in the Middle East and North Africa, such classic stabilisation clauses achieved little when faced with unilateral state action.\textsuperscript{111} Even though the clauses did enable the investors to obtain compensation or settlements, the exercise of sovereign authority was not completely restrained by a classic stabilisation clause.\textsuperscript{112} Consequently, more modern forms of clauses have emerged that respect this reality while limiting political risk as much as possible.\textsuperscript{113} As examples, what is often described as “intangibility clauses” (which prohibits unilateral changes to the contractual regime without the consent of both parties)\textsuperscript{114} and “economic stabilisation clauses” (maintaining the economic equilibrium of the contract as of its effective date)\textsuperscript{115} can be mentioned. Not only did the recalibration of classic stabilisation clauses turn the focus to alternative forms of clauses, but also to other ways of enhancing the stability of an investment.\textsuperscript{116} One of these being the protection granted by traditional sources of public international law such as general principles of law, customary international law and especially IIAs agreed between states.


3.2. Protection provided by international law

3.2.1. General principles of law

As a source of international law, general principles of law serve as a response to avoid situations in where there is no applicable law (non-liquet situations).\textsuperscript{117} Thus, these principles often gain importance when there is no applicable treaty provision or international customary rule.\textsuperscript{118} There are different opinions in the legal literature as to what the prerequisites are for a principle to be constituted as a general principle of law under international law. The prevailing contemporary view is that a general principle of law needs to be 1) of a wide-ranging character (i.e. not specific rules), 2) recognised in the municipal laws of states (in foro domestico) and 3) transportable at the international level, meaning that the principle has to be appropriate for application in the international law framework.\textsuperscript{119}

Investment tribunals have stated that a variety of principles constitute general principles of law. For instance, principles such as good faith\textsuperscript{120}, unjust enrichment\textsuperscript{121}, res judicata\textsuperscript{122}, estoppel\textsuperscript{123} and that parties cannot take advantage of their own fault\textsuperscript{124} have been applied.\textsuperscript{125} Aside from acting as a residual reservoir of legal principles, these principles interact with the other sources of international law – they may develop into customary international rules, be implemented in treaties or assist with the

\textsuperscript{120} See e.g. Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 297 and Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award 29 May 2003, para. 153.
\textsuperscript{121} See e.g. Saluka Investments B.V. v. the Czech Republic, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, para. 449.
\textsuperscript{122} See e.g. Waste Management, Inc. V. United Mexican States (II), ICSID Case No. ARB (AF)/00/3, Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings, 26 June 2002, para. 39.
\textsuperscript{123} Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. the Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, paras. 334 ff.
\textsuperscript{124} See e.g. Sempra v. Argentina, Award 28 September 2007, para. 353.
\textsuperscript{125} R. Dolzer and C. Schreuer, Principles of International Investment Law, 2012, p. 79 (Which also mentions the principles of onus probandi and the right to be heard as principles of international law); and T. Gazzini, “General Principles of Law in the Field of Foreign Investment”, The Journal of World Investment and Trade, Volume 10, No. 1, 2009, p. 111, (which also mentions the principles of exceptio non adimpleti contractus, kompetenz-kompetenz, burden of proof and equality of the parties to be general principles of international law); and in, M. Hirsch, “Sources of International Investment Law”, in A.K. Bjorklund and A. Reinisch (eds.), International Investment Law and Soft Law, 2012, p. 24.
interpretation of treaty provisions. As an example, the general principle of good faith contributes to the definition of the FET standard, as tribunals have stated that the principle is encompassed in the standard.\footnote{See e.g. Semi\textsuperscript{pra} v. Argentina, Award, 28 September 2007, para. 298.}

General principles of law played a significant role in the era of international investment law prior to the proliferation of bilateral investment treaties ("BITs"). Due to the increasing number of rules existing in treaties and customary international law, general principles of law play a relatively insignificant role in contemporary investment arbitrations.\footnote{M. Hirsch, "Sources of International Investment Law", in A.K. Bjorklund and A. Reinisch (eds.), International Investment Law and Soft Law, 2012, p. 27.} They grant protection under international law to investors if their claims are not covered by treaty or customary rules. Other than this, general principles of law may have an impact, as they may be taken into account when interpreting a treaty, as it follows from the Vienna Convention on the Law of Treaties\footnote{Article 31(3)(c) of the Vienna Convention on the Law of Treaties, May 23, 1969.} that relevant rules of international law shall be taken into account when interpreting a treaty. Aside from these specific situations, general principles of law are relatively insignificant with regards to protection of international investments, at least when compared to customary rules and investment treaties especially.

3.2.2. \textit{Customary international law}

International investment law is dominated by investment treaties, but customary international law still plays an important role. First, customary international law shall be taken into account when interpreting a treaty, pursuant to the Vienna Convention on the Law of Treaties\footnote{Article 31(3)(c) of the Vienna Convention on the Law of Treaties, May 23, 1969.} Second, customary rules are highly important when there is no treaty relationship between states or in the case of lacunae in the text and interpretation of rules set out in treaties. Especially international customary rules regarding attribution of conduct to a state, state of necessity, expropriation, denial of justice and nationality of investors are relevant for international investments.\footnote{T. Gazzini, “The Role of Customary International Law in the Field of Foreign Investment”, The Journal of World Investment and Trade, Volume 8, No. 5, 2007, p. 715, and R. Dolzer and C. Schreuer, Principles of International Investment Law, 2012, pp. 78-79.}


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of the IMS and its development under customary international law is not clear. In the case Neer v. Mexico, from 1927, its threshold was described as actions amounting "[...] to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency". Later tribunals have rejected the threshold set out in Neer, but without assigning the standard new content - leaving the substantive content of the IMS unclear. The IMS is not just relevant for investors that are not protected by other (more protective) standards pursuant to a treaty. It is also relevant in relation to the FET standard, as there is a discussion of whether FET is to be interpreted in light of the IMS or as an autonomous standard. The debate on the relationship between the IMS and FET is still ongoing, but it has been argued that the distinction is without relevance, inter alia because the IMS is surrounded with such uncertainty as to its substantive content that it leaves the debate without importance from a practical point of view. In recent investment arbitrations, tribunals have moved away from this discussion and have interpreted unqualified FET provisions distinguished from the IMS.

The protection granted by customary international law has been expanded through the introduction of BITs and other IIAs. In fact, BITs emerged (with the first one negotiated in 1959) as an answer to the inconclusiveness and indefiniteness of the foreign investment protection regime that preceded

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134 See e.g. Saluka v. Czech Republic, Partial Award, 17 March 2006, para. 291.
136 The discussion is still ongoing, but in Glamis Gold, Ltd. v. United States of America, UNCITRAL, Award, 8 June 2009, paras. 601-608, the tribunal noted that even though previous decisions have dismissed the Neer-threshold, they have failed to provide another explanation of what content the IMS holds. Thus, when awards such as Pope & Talbot Inc. V. the Government of Canada, UNCITRAL, Award in Respect of Damages, 31 May 2002, para. 59, rejected the interpretation laid down in Neer, without assigning the standard new content, one could argue that the standard is left without content. The tribunal in Saluka v. Czech Republic, Partial Award, 17 March 2006, para. 291, corroborated this argument. Therefore, as a legal threshold cannot be determined for the IMS, it appears without meaning to suggest that a link between the FET provision and the IMS carries any practical relevance. This thesis adopts this view.
them – predominately customary international law. It offered no consensus as for protection of foreign investments, and the standards that had allegedly emerged lacked substantive content and normativity.\textsuperscript{139}

Customary international rules may co-exist and be applied alongside with and independently from treaty rules. However, in the event of a conflict, it is generally accepted that treaty provisions as \textit{lex specialis} will prevail over customary rules.\textsuperscript{140} Because of this, there is a clear correlation between the number of rules existing in treaties and the relevance of customary international rules. The proliferation of IIAs in the international investment law framework may therefore generally reduce the importance of customary rules in the contemporary legal framework surrounding international investments.\textsuperscript{141}

### 3.2.3. International Investment Agreements

IIAs are the main source of international investment law, and has been said to be the cornerstone of the protection of foreign direct investments in international law.\textsuperscript{142} Thus, the rules of investment treaties are naturally the centre-piece in the majority of contemporary international investment disputes.\textsuperscript{143} Generally, IIAs are entered into with the purpose of creating favourable conditions for investors and their investments and to attract capital that will contribute to economic growth in the host-state.\textsuperscript{144} They can be divided into BITs and multilateral investment treaties (“MITs”).

\begin{itemize}
  \item \textsuperscript{140} See e.g. \textit{ADC Affiliate Limited and ADC & ADMC Management Limited v. the Republic of Hungary}, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, para. 481: “There is general authority for the view that a BIT can be considered as a lex specialis whose provisions will prevail over rules of customary international law [...]”, and T. Gazzini, “The Role of Customary International Law in the Field of Foreign Investment”, \textit{The Journal of World Investment and Trade}, Volume 8, No. 5, 2007, p. 714.
  \item \textsuperscript{142} J.P. Sasse, \textit{An economic Analysis of Bilateral Investment Treaties}, 2011, p. 46.
\end{itemize}
MITs can for instance aim at regulating investments in a confined geographical area (such as the North American Free Trade Agreement\textsuperscript{145} (“NAFTA”)) or at regulating certain types of investments (such as the Energy Charter Treaty\textsuperscript{146} (“ECT”), which concerns investments in the energy sector). Investment chapters with content reminiscent of BITs and MITs may also be inserted in Free Trade Agreements (on which the NAFTA is also an example).\textsuperscript{147} The ECT is particularly relevant for energy investors in its signatory states. It was signed in 1994 and entered into force in 1998, and was the result of the desire of European states to cooperate with Russia and the states in Eastern Europe and Central Asia in developing the energy sector.\textsuperscript{148} Apart from its investment chapter, the ECT covers issues such as energy efficiency, transit and trade. The chapter on investment is patterned along the lines of BITs agreed between European member states, and its standards of protection\textsuperscript{149} are similar to those contained in BITs.\textsuperscript{150}

BITs have been negotiated since 1959 and saw their biggest increase in numbers in the 1990s and 2000s. Today, 2,897 BITs have been signed, and 2,338 of these have entered into force.\textsuperscript{151} The speed of growth has recently declined, and for the first time in 2017 the number of effectively terminated IIAs was higher than the number of new treaties entering into force.\textsuperscript{152} One of the reasons for this

\begin{itemize}
\item and the Gambia-Netherlands BIT (Agreement on encouragement and reciprocal protection of investments between The Republic of The Gambia and the Kingdom of the Netherlands, Sep. 25, 2002): “[...] Recognising that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties [...]”.
\item North American Free Trade Agreement, Jan. 1, 1994.
\item ECT, Article 10(1) and 10(3).
\item At the time of writing.
\item This number does not include free trade agreements with investment chapters or multilateral treaties such as the Energy Charter Treaty, which accounts for the equivalent of more than 1,000 BITs (T. Gazzini, “Bilateral Investment Treaties” in T. Gazzini and E. D. Brabandere (eds.), \textit{International Investment Law: The Sources of Rights and Obligations}, 2012, p. 102).
\end{itemize}
may be that a number of countries have showed an unease with current developments of treaty practice and have started to contest BITs and the investor-state dispute settlement ("ISDS") system. State actions range from terminating existing treaties, denouncing the ISDS system, renegotiating current treaties and initiating new model BITs. Since 2015, the United Nations Conference on Trade and Development (UNCTAD) have provided policy tools and taken stock of IIA reforms, focusing on *inter alia* safeguarding the right to regulate while providing protection, improving ISDS and ensuring responsible investments and sustainable development. This indicates some general acceptance of the need to reform existing treaties. However, this does not change the fact that IIA and the protection that they provide are the most important tools of stability for investors under the contemporary framework of international investment law.

The vast majority of BITs include access to settlement of disputes by international arbitration (either before the Centre for Settlement of Investment Disputes (ICSID) or another form of arbitration). Whereas state-state dispute settlement is the norm in public international law, BITs allow for ISDS. Alleged breaches of standards of protection are enforced by private investors through ad hoc arbitration.

To a large extent, BITs (and other IIAs) include the same standards of protection. Typically, the following provisions are included: 1) a provision on admission of investments, 2) a guarantee against arbitrary and discriminatory treatment, 3) a guarantee of national treatment, 4) a guarantee of most-favoured-nation treatment, 5) guarantees ensuring prompt and effective compensation in case of expropriation, 6) guarantees ensuring compensation for loss caused by war or insurrections, 7) guarantees of free transfers of funds, 8) a guarantee of full protection and security and 9) a guarantee of fair

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153 M. Sornarajah, *The International Law on Foreign Investment*, 3rd edn., Cambridge University Press, 2010, p. 208. As an example, as a backlash against BITs, India have unilaterally terminated 58 BITs and adopted a new Model BIT in 2016, which is more pro state (P. Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash*, 1st edn., Oxford University Press, 2019, p. 353).


and equitable treatment.\textsuperscript{157} While all of these standards contribute to the protection and stability for investors and their investments, the FET standard is of the highest practical relevance, as it is the standard of protection invoked the most in ISDS, and the majority of successful claims pursued are based on violation of the FET standard.\textsuperscript{158} The FET standard is the main focus of this thesis. Its broader perspectives and function in practice will be examined in the following chapter.

3.3. Sub-conclusion

The legal framework surrounding international investments governs the relationship between investors and host-states. One of its core functions is protecting and granting stability for investors. This is especially important for foreign investments in RE because of the characteristics and inherent risks of such investments. A variety of legal instruments granting protection exist under the framework, which consists of international, domestic and contractual law. Stabilisation clauses found in investment contracts and IIAs are key legal mechanisms for providing protection and stability. IIAs are the main source of international investment law and therefore the most important tool for stability found in international law. Customary international law and general principles of law gain importance when interpreting IIAs and if there is no IIA in force between the respective States. IIAs typically include access to ISDS and several standards of protection. They all contribute to the protection and stability for investors and their investments, but the FET standard is of the highest practical relevance.


4. The fair and equitable treatment standard

Today, the FET standard is one of the most frequently included standards in IIAs. An analysis of 335 BITs from the 1990s concluded that the FET standard was present in 307 of 335 BITs. From the 1990s until today, the standard has been increasingly included in BITs and sectoral MITs such as the ECT. In spite of the wide use of the FET provision in IIAs, the standard is still surrounded by much uncertainty. The actual protection provided by the standard relies heavily on the approach taken to interpretation and application by arbitral tribunals.

In order to be able to outline the contemporary state of the FET standard, it is important to first consider the broader perspectives of the standard’s functions in practice. As a part of understanding the function of the FET standard, its interplay with stabilisation clauses must be discussed. Next, it is relevant to examine how the standard is typically incorporated in investment treaties, before pointing out what substantive content can be attributed to the standard on the basis of arbitral case law. These themes are examined in turn in the sections below.

4.1. Raison d'être of the fair and equitable treatment standard

The FET standard has been described as the catch-all provision of investment treaties as it addresses acts that does not fall within the scope of other specific standards, but that are still deemed to be in violation of the object and purpose of IIAs - which is inter alia to protect and promote foreign investments for the prosperity of the contracting parties.

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This is often reflected in BIT preambles, e.g. in the BIT between Egypt and Denmark (Agreement between the Government of the Arab Republic of Egypt and the Government of the Kingdom of Denmark concerning the promotion and reciprocal protection of investments, Jun. 24, 1999.): “[...] Desiring to create favourable conditions for investments [...]”, and the Gambia-Netherlands BIT (Agreement on encouragement and reciprocal protection of investments between The Republic of The Gambia and the Kingdom of the Netherlands, Sep. 25, 2002): “[...] Recognising that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties [...]”.

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Because of its broad and vague nature, the FET standard interacts and overlaps with other standards of protection, however, it is widely accepted that FET is an autonomous standard. Thus, when examining whether there has been a violation or not, tribunals have distinguished FET from other standards and examined separately whether each respective standard has been violated. A perspective of this is that the FET standard is independent from the national treatment standard, meaning that a given treatment can be a violation of the FET standard even if the foreign investor receives the same treatment as investors from the host-state.

Another situation where the FET standard may offer redress is when the particular facts of a case does not clearly support a claim for direct expropriation. In a broader sense, especially from an investor perspective, the FET standard is a response to the need for long-term stability in foreign investments and to the origins of instability that can potentially threaten stability and predictability, as explained in section 2.3.

As briefly touched upon above, the FET standard is an inherently vague and broad concept. This has also been pointed out by tribunals, such as in CMS v. Argentina: “The Treaty, like most bilateral investment treaties, does not define the standard of fair and equitable treatment and to this extent [the respondent’s] concern about it being somewhat vague is not entirely without merit”.

Looking at the FET standard as a way to ensure legal protection in situations that does not fall within the scope of other specific standards, the vagueness and lack of definition may be more of a virtue rather than a shortcoming for investors. It may be a virtue, as it is impossible in practice to list all the possible types of infringements that might constitute unfair and unequitable treatment. Only a broad provision will have the potential to catch all the relevant factual situations, and a more well defined and clear standard may not catch all possible infringements. On the other hand, what a broad standard adds in protection, it lacks in predictability. Although the scope and application of the FET standard

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162 See e.g. *El Paso Energy International Company v. the Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 337.
163 This was addressed in the case *PSEG v. Turkey*, also characterising the function of the FET as “filling the gaps”: “The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.” [emphasis added] (PSEG v. Turkey, Award, 19 January 2007, paras. 238-239).
is and has been difficult to gauge, some substantive content can be attributed to it by inter alia identifying typical factual situations to which the standard has been applied.\textsuperscript{165} What substantive content can be said to be attributable to the FET standard will be examined below in section 4.4. At first, the interplay between the FET standard and stabilisation clauses will be discussed.

4.2. The interplay between stabilisation clauses and the fair and equitable treatment standard

Stabilisation clauses are not always, for a variety of reasons, present in investment contracts, but they are common in long term investments in the extractive industries.\textsuperscript{166} Contractual stabilisation clauses may lead to difficult and heavily politicised situations for host-states, which means that some states may refrain from including such clauses in investment contracts, forcing investors to rely primarily on treaty provisions for protection.\textsuperscript{167}

The actual legal effect of the inclusion of a stabilisation clause in an investment contract is not fully clarified in the jurisprudence.\textsuperscript{168} Some scholars suggest that a stabilisation clause offers an extra layer of protection in addition to the FET standard.\textsuperscript{169} The main difference in the protection granted by the provisions is that, under the FET, “[…] simple non-discriminatory bona fide regulation does not trigger compensation, while the presence of a stabilization clause can make such action compensable”.\textsuperscript{170} This shows that the threshold of the two mechanisms are not the same. This was also apparent in AES v. Hungary where the tribunal noted that:

"The stable conditions that the ECT mentions relate to the framework within which the investment takes place. Nevertheless, it is not a stability clause. A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts."  

Maniruzzaman\textsuperscript{172} suggests that the two standards function together. His view is that the inclusion of a stabilisation clause may signal whether the investor was a diligent investor and may therefore support the investor’s legitimate expectation of regulatory stability.\textsuperscript{173} If the investor and the state had agreed on a stabilisation clause, this points to the investor having legitimate expectations regarding the legal environment in which the investment was made.

Hirsch\textsuperscript{174} points to another reason why stabilisation clauses are important in foreign direct investments. He suggests that the main reason for using the contract-based stability tools are risk allocation, forward planning, and promoting in advance production or investment.\textsuperscript{175} Because of the long-term nature of energy investments and since host-states’ legal frameworks are inherently dynamic, such investments are subject to increased political and regulatory risks. Consequently, the parties will naturally expect significant risks involved with such investment, which is why the contractual terms can serve as a preliminary risk allocator. Especially stabilisation clauses can serve as such as the parties can adjust risk allocation formulas connected to regulatory changes to their advantage.\textsuperscript{176}

Cameron\textsuperscript{177} has a more practical approach to why the two stability tools co-exist. He suggests that the two remedies are not incompatible, but oppositely they can be “combined to maximize pressure on the host state”.\textsuperscript{178} He points to the procedural aspects being significant in this matter. For example, the threat of arbitration under both treaty and contract can be a clear pressure point for the investor against the state. Cameron states that a combination of breaches on both contract and treaty gives the

\textsuperscript{171} AES v. Hungary, Award, 23 September, para. 9.3.29.
investor the widest possibility of potential compensation. In addition to this, a contract-based dispute may serve to bring state-owned energy companies, who may have large amounts of assets, into the proceedings. As Cameron points out, the treaty-based protection through the FET standard may give the investor an extra layer of protection, but it will never completely replace the similar contractual terms in the agreements, “which remains the beating heart of the investor’s overall stability”. As Maniruzzaman also pointed out, Cameron reiterates that case-law have shown that a stabilisation clause can sometimes be the key to the application of the FET standard, as it shows that the investor was diligent prior to the investment which may support the investor’s legitimate expectation.

4.3. Language of fair and equitable treatment provisions in current treaty practice

IIAs have considerable similarities in their content and clauses included. However, there is no single uniform version of an IIA. Most BITs and MITs do, however, provide for FET of foreign investments. However, the wording of the provision varies from treaty to treaty. The specific wording plays a role in applying the standard, one of the reasons being that every type of provision has to be interpreted taking into account inter alia its context. Therefore, making a general prima facie assessment of the interpretation of the standard of the FET standard without taking into account the wording should in principle be done with caution.

The most widespread approaches to the FET standard in investment treaty practice are to include a FET provision 1) requiring "fair and equitable treatment" in an unqualified form, 2) linking the FET standard to international law, 3) linking the FET standard to the IMS under customary international law or 4) including a FET provision listing specific examples of infringement. This list is not exhaustive as there are examples of other types of FET provisions. However, as the approaches just

mentioned are the most common, these will be developed further below.

1) Unqualified FET provision

Some investment treaties make use of a FET provision with no further qualifications.\(^{186}\) Unqualified FET provisions have sparked a discussion of whether the clause in its unqualified form is to be interpreted in the light of the IMS under customary international law or whether it refers to an autonomous standard to be interpreted on a case-by-case basis.

As discussed in section 3.2.2., the relation between the FET standard and the IMS have been discussed by tribunals and scholars. The debate is still ongoing, but it has been argued that the distinction is without relevance, \textit{inter alia} because the IMS (and its development under customary law) is also surrounded with uncertainty as to its substantive content, making the debate of no importance from a practical point of view. In more recent investment arbitrations, tribunals have focused less on this theoretical discussion, and have turned their attention to the semantic meaning of FET and the content under the obligation, thus interpreting unqualified FET provisions as referring to an autonomous FET standard.\(^{187}\) This leaves a wide margin of discretion for the arbitral tribunals when deciding on the merits of a specific case. As mentioned, this would arguably also be the case, even if the FET standard was to be interpreted in light of the IMS. This argument revolves around the distinction between the two different approaches to interpretation arguably being theoretical and without substantive practical relevance.

2) FET provision linking the FET standard to international law in general

Whereas unqualified FET provisions may lead to an interpretation of the standard focusing on the semantics of “fair and equitable”, FET provisions which include a reference to international law

\(^{186}\) An example of this is art. 4(1) in the BIT in force between Guyana and Switzerland (Agreement between the Swiss Confederation and the Republic of Guyana on the Promotion and Reciprocal Protection of Investments, Dec. 13, 2005.). This clause conferring fair and equitable treatment reads as follows: "Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. […]”. This specific clause also lists the standard of full protection and security. This does not modify the FET standard; the standards are merely bundled in the same clause.

aim to ensure that the arbitral tribunal has to base its interpretive approach on principles of international law. This includes, but is not limited to, customary international law.\(^{188}\)

A reference to international law is typically made in one of two ways. The first common type of reference is a general reference limiting the interpreter to not go further than what international law imposes regarding the scope and substantive content of the FET standard.\(^{189}\) In other IIAs, the reference to international law is made by requiring treatment in accordance with international law as the minimum requirement of protection, rather than limiting the interpreter to not go further than what international law impose the scope and substantive content of the FET standard to be.\(^{190}\)

The provision sets a floor of protection, but not a ceiling. This way of linking the FET standard to international law is thus effectively close to the unqualified FET standard where arbitral tribunals have a greater freedom of interpretation.\(^{191}\)

3) **FET provision linking the FET standard to the IMS under customary international law**

A third widespread approach taken in IIA’s is linking the FET standard to the IMS under customary international law. An example of this is Article 1105 (1) in the NAFTA\(^{192}\), which, following


\(^{189}\) This is exemplified in art. 3(2) in the BIT in force between Croatia and Thailand (Agreement Between the Government of the Republic of Croatia and the Government of Thailand on the Reciprocal Promotion and Protection of Investments, Feb. 18, 2000): “Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall 'be accorded fair and equitable treatment in accordance with international law and the provisions of this Agreement. […]’” [emphasis added].


The FET clause included in art. 2(2) in the BIT in force between Finland and Montenegro (Agreement Between the Republic of Finland and Montenegro on the Promotion and Protection of Investments, Nov. 14, 2008) is an example of this way of linking FET to international law: “Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party full and constant protection and fair and equitable treatment. In any case a Contracting Party shall accord treatment no less favorable than that required by international law and the provisions of this Agreement. […]” [emphasis added].


\(^{192}\) “Article 1105: Minimum Standard of Treatment: 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. […]” [emphasis added].
the NAFTA tribunal’s decision in *Pope & Talbot*[^193] was linked to the IMS by the NAFTA Free Trade Commission in a set of Notes of Interpretation[^194].

Later, the approach and language used in the Notes of Interpretation have been included in model BITs in the NAFTA countries.[^195] It has also been incorporated in a number of BITs between non-NAFTA countries.[^196]

From a host-state perspective, linking the FET standard to the IMS is done to prevent an expansive interpretation of the FET standard. As mentioned in relation to unqualified FET clauses, limiting arbitrator's interpretive headspace so that they cannot go beyond what customary international law declares to be the content of the IMS, does not necessarily make the application of the standard less uncertain. The IMS also lacks clearly defined content. Linking the FET standard to the IMS may lead to arbitral tribunals applying a higher threshold for finding a breach of the standard if compared with unqualified FET provisions, but a degree of unpredictability still persists.[^197] The discussion of whether the FET standard in general should be interpreted in light of the IMS is still ongoing, but in more recent investment arbitrations, tribunals have focused less on this theoretical discussion, and have turned their attention to what content the obligation encompasses.[^198]

[^193]: Which found that the FET standard was additive to the requirements of international law and that the minimum standard of treatment was not to be applied as the relevant threshold (*Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, paras. 110-118).

[^194]: NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. 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 the customary international law minimum standard of treatment of aliens. [...].

[^195]: See e.g. art. 4 in Agreement Between the Government of the United Arab Emirates and the Government of the United Mexican States in the Promotion and Reciprocal Protection of Investments, Jan. 19, 2016.

[^196]: See e.g. art. 5(1) in the BIT between Japan and Kenya (Agreement Between the Government of Japan and the Government of the Republic of Kenya for the promotion and Protection of Investment, Aug. 28, 2016).


4) **FET clause listing specific examples of infringement**

In an attempt to combat the unpredictability surrounding the FET standard, some IIAs add specific examples of infringement to the FET provision.\(^{199}\)

4.4. Specific application of the fair and equitable treatment standard in arbitral practice

Looking at the existing cases in which the FET standard has been applied, it is evident that the range of factual situations that potentially give rise to claims of unfairness and inequity are unlimited. As the FET standard is broad and its meaning dependent on the specific facts of each case, the challenge of suggesting a number of subgroups encompassed in its substantive content lies in finding commonalities in cases that shed light on its meaning, scope and application. This exercise has not only been attempted by scholars but also arbitral tribunals.

4.4.1. **Key elements of the FET standard**

Despite its generally recognised importance in international investment law, the FET standard was not given substantive content by tribunals until around the year 2000, starting with the cases *Metalclad v. Mexico\(^{200}\)* and *Maffezini v. Spain\(^{201}\).\(^{202}\) These cases found that lack of transparency can be a violation of the FET standard. In addition to lack of transparency the tribunal in *Metalclad* also found that “Mexico failed to ensure a [...] predictable framework for Metalclad's business planning and investment”.\(^{203}\) In cases following *Metalclad*, this notion can be said to have developed into the broader doctrine of protecting the legitimate expectations of the investor.

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\(^{199}\) An example of this is art. 2(2) in the BIT between the Netherlands and Oman (Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Sultanate of Oman, Jan. 17, 2009), which specifically prohibits discriminatory measures: “[...] Each Contracting Party shall ensure fair and equitable treatment to the investments or nationals or persons of the other Contracting Party and shall not impair, by unjustified or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals or persons. [...]”.

\(^{200}\) *Metalclad Corporation v. the United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, 30 August 2000.

\(^{201}\) *Emilio Agustín Maffezini v. the Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000.


\(^{203}\) *Metalclad v. Mexico*, Award, 30 August 2000, para. 99.
When certain substantive categories started to form, more and more tribunals turned to use sub-groups of typical emanations of the standard as a way to describe its scope. The first time a tribunal divided the FET standard into a list of elements was in Tecmed v. Mexico, which is often cited in subsequent arbitral jurisprudence. Other tribunals have set forth similar lists, although not identical.

When interpreting the FET standard, arbitral tribunals are not able to “simply adopt its own idiosyncratic standard of what is 'fair' and 'equitable', without reference to established sources of law”, as stated in Mondev v. USA. These sources of law are “[...] State practice and judicial or arbitral caselaw or other sources of customary or general international law”, as specified in ADF v. USA.

Tribunals thus play a critical role in fleshing out the elements of the standard. Because of this, and the fact that the FET standard gains meaning when applied to a particular set of facts, the FET standard has been said to have a developmental character. This is evident when analysing arbitral awards in the time following the standard being attributed substantive content. Due to its developmental character, the application of the FET standard is evident only by examining trends through a series of individual cases.

This has been done by different scholars, with the result of lists singling out certain types of state conduct that can potentially constitute a violation of the FET standard. These lists contain similar concepts but are not identical. Whereas these lists are not identical, most of the deviations consist of

205 Tecmed v. Mexico, stating that “The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, [...] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. [...]” [emphasis added] (Tecmed v. Mexico, Award, 23 May 2003, para. 154).
207 Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 119.
208 ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 184.
differences in naming and bundling of the concepts. While it may be possible to produce a list of typical situations where the FET standard is applied, its application will always be tied to the facts of the specific case. Therefore, no list can be said to be exhaustive, and the abstract criteria only provide rough guidelines.\footnote{212} Nevertheless, the standard is often found to encompass elements such as protection of the investor from arbitrary treatment\footnote{213}, denial of justice and due process\footnote{214}, discrimination\footnote{215} and harassment and coercion\footnote{216}. Additionally, it requires good faith\footnote{217}, transparency\footnote{218}, protection of the investor’s legitimate expectations (including consistent conduct and the stability of the legal and business framework) and reasonableness and proportionality\footnote{219}.

\footnote{213} Arbitrariness has mostly been analysed in the context of a separate obligation in BIT’s prohibiting arbitrary measures. However, several tribunals have found that protection against arbitrariness is part of the FET standard, e.g. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 315.
\footnote{214} The element of due process and denial of justice has been applied by a variety of arbitral tribunals, e.g. in Metalclad v. Mexico, Award, August 30 2000, para 91; Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 143; Tecmed v. Mexico, Award, 29 May 2003, para. 162; Waste Management v. Mexico (II), Award, 30 April 2004, para. 98; ADC v. Hungary, Award of the Tribunal, 2 October 2006, para. 435; International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award, 26 January 2006, paras. 197-198.
\footnote{215} Waste Management v. Mexico (II), Award, 30 April 2004, para. 98; CMS v. Argentina, Award, 12 May 2005, para. 290.

The non-discrimination element of FET appears to prohibit discrimination in the sense of specific targeting of a foreign investor on grounds such as gender, race or religious beliefs, whereas standards such as national treatment and MFN deals with discrimination based on nationality (United Nations Conference on Trade and Development (UNCTAD), “Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II”, 2012, pp. 81-82).
\footnote{216} Pope & Talbot v. Canada, Award on the Merits of phase 2, 10 April 2001, para. 181; Tecmed v. Mexico, Award, 29 May 2003, para. 163; Saluka v. Czech Republic, Partial Award, 17 March 2006, para. 308; Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008, paras. 179, 185-187, 190 and 193; Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 338.

The principle of good faith may overlap with the rule on arbitrary treatment and other components and will in many cases be subsumed and leave the other components to be discussed (R. Dolzer, “Fair and Equitable Treatment: Today's Contours”, Santa Clara Journal of International Law, volume 12, issue 1, 2013, p. 17).
\footnote{218} Maffezini v. Spain, Award, 13 November 2000, para. 83; Metalclad v. Mexico, Award, 30 August 2000, para. 99.
\footnote{219} Pope & Talbot v. Canada, Award on the Merits of Phase 2, 10 April 2001, paras. 123, 125, 128 and 155; Saluka v. Czech Republic, Partial Award, 17 March 2006, paras. 304-307; Tecmed v. Mexico, Award, 29 May 2003, para. 122.
4.4.2. The element of legitimate expectations

The protection of investors’ legitimate expectations is considered the most important element of the FET standard. In Electrabel v. Hungary the tribunal noted that, “It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor’s reasonable and legitimate expectations”.220

The rationale of recognising legitimate expectations in foreign investments is rooted in the characteristics of the investments. With long-term investments comes a risk that the underlying conditions of the investment will change due to regulatory or political factors, which may result in a lower return than originally expected by the investor.

Commitments made explicitly or implicitly are crucial when determining the legitimate expectations of an investor.221 Tribunals have taken different approaches when assessing such commitments. Some awards suggest that an investor may achieve legitimate expectations only from specific commitments addressed directly to the investor (e.g. in the form of a stabilisation clause), while others find that commitments not addressed directly to the investor, e.g. specific commitments in general legislation may suffice to create legitimate expectations.222 This thesis names the first approach as the narrow approach, whereas the latter is named the broad approach. This ambiguity in interpretation is of high importance for the application of the element of legitimate expectations and will be subject to analysis throughout the analysis of both conventional- and renewable energy awards.

Inconsistency of conduct by the host-state may violate the protection of the investor’s legitimate expectations under the FET standard. In Tecmed, when describing the FET standard, the tribunal stated that, “The foreign investor expects the host State to act in a consistent manner […].”223, and in MTD v. Chile224 the tribunal emphasised the inconsistency of action between two arms of the same government and found that such conduct violated the FET standard.225

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220 Electrabel v. Hungary, Award, 25 November 2015, para. 7.75.
223 Tecmed v. Mexico, Award, 29 May 2003, para. 154.
225 MDT v. Chile, Award, 25 May 2004, para. 163. In this case, a minister of Chile had approved the investor’s project and thereby indicating that the project was feasible in a certain location from a regulatory point of view. However, another agency of the host-state determined that zoning regulations stood in the way of the project in that location.
Since early cases such as *Tecmed*, a number of tribunals have examined the host-state’s obligation to maintain a stable legal and business framework in line with the investor’s legitimate expectations. Setting out the general principle to be applied, the tribunal in *Tecmed* considered “[…] that [the FET standard], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment”. Subsequent cases have followed this approach, e.g. *CMS, LG&E v. Argentina* and *Enron v. Argentina*, which all concerned emergency measures taken by Argentina after the country suffered from a financial crisis between 1999 and 2002. All relying on the preamble of the relevant BIT, the tribunals found that the FET standard included the requirement of a stable legal and business framework for the investment. In all three cases, it was found that the measures taken by Argentina were in breach of the FET standard, as they had removed a regime of tariff guarantees that had induced investments and thus undermined any stable framework for investment. No specific commitment was made to the claimants, but the guarantees in the Argentine legislation were found to constitute a promise to the foreign investors and were found sufficient to create legitimate expectations. In both *CMS* and *Enron*, Argentina was in breach of the FET standard irrespective of the motivation behind the measures taken.

The cases mentioned is merely an extract of cases taking a relatively investor-friendly approach to the protection of the legitimate expectations of the investor. It has been suggested that an approach deeming a breach of the FET standard in the event of any adverse change in the business or legal

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232 *CMS v. Argentina*, Award, 12 May 2005, para. 280; *Enron v. Argentina*, Award, 22 May 2007, para. 268. Similarly, in *Occidental v. Ecuador (Occidental Exploration and Production Company v. the Republic of Ecuador (I))* , LCIA Case No. UN3467, Final Award, 1 July 2004, concerning a US company engaged in exploration and production of oil in Ecuador, where the tribunal stated that “The stability of the legal and business framework is […] an essential element of fair and equitable treatment […] Moreover, this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not.” (*Occidental v. Ecuador (I)*, Final Award, 1 July 2004, paras. 183 and 186).
framework of the host-state is too broad. This would prevent legitimate regulatory change and does not take into account that investors should expect regulations to change over time.\(^{233}\)

A number of tribunals have emphasised that the requirement of a stable legal and business framework is not absolute. Instead, some tribunals have set out criteria for determining the legitimacy of an investor's expectation, e.g. in *Parkerings-Compagniet v. Lithuania*\(^{234}\). The tribunal rejected the FET claim, as Lithuania had not given explicit or implicit promises to the investor, and because the circumstances in Lithuania at the time of the investment were not indicative of stability - Lithuania was in transition from its communist past.\(^{235}\) Interestingly, the tribunal noted that if a stabilisation clause had been included in the investment agreement, this would create a legitimate expectation: “[…] the Claimant could (and with hindsight should) have sought to protect its legitimate expectations by introducing into the investment agreement a stabilization clause or some other provision protecting it against unexpected and unwelcome changes”.\(^{236}\)

Another approach was set forth in *Duke Energy v. Ecuador*\(^{237}\). The tribunal held that not only the facts surrounding the investment but additionally “[…] political, socioeconomic, cultural and historic conditions prevailing in the host State […]”\(^{238}\) must be taken into account. This approach has been welcomed by some, as it is argued that it allows for contextualisation of what an investor can legitimately expect from the authorities in the host-state.\(^{239}\) Others argue that these circumstances (political, socioeconomic, etc.) are exactly what investment treaties between states are made to overcome.\(^{240}\)

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234 The criteria were: (1) An explicit promise or guarantee made to the investor by the host-state; (2) an implicit assurance or representation from the host-state that the investor took into account in making the investment; (3) where no assurances made, the circumstances surrounding the conclusion of the agreement; and (4) the conduct of the host-state at the time of the investment (*Parkerings-Compagniet v. Lithuania*, Award, 11 September 2007, paras. 330 and 334-338 and P.D. Cameron, *International Energy Investment Law: The Pursuit of Stability*, 2010, p. 214).
Arbitral tribunals have also held that investors are to perform due diligence and not rely solely on the commitments of the host-state. In *MTD* the amount of damages awarded the claimant was reduced by 50% as the investor should have assessed its legal situation.\(^{241}\)

Another qualification that has been made by a significant number of tribunals is balancing the investor’s expectations with the state’s right to exercise its sovereign power to legislate and to adapt its legal framework to changing circumstances.\(^{242}\) The groundwork for this approach was laid in *Saluka* in which the tribunal stated that:

"No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. [...] the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration [...] The determination of a breach of [FET] therefore requires a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other."\(^{243}\)

The state’s right to regulate was also addressed in *Parkerings-Compagniet* where the tribunal noted that it is “[…] each State's undeniable right and privilege to exercise its sovereign legislative power”, as long as this is not done in an unfairly, unreasonable or inequitable manner.\(^{244}\)

The approach is summed up in *Total v. Argentina*, “[…] changes to general legislation, in the absence of specific stabilization promises to the foreign investor, reflect a legitimate exercise of the host State’s governmental powers, that are not prevented by a BIT’s fair and equitable treatment standard and are not in breach of the same”.\(^{245}\)

The element of legitimate expectations will be further examined in the specified sectors of conventional- and renewable energy in Chapters 5 and 6, respectively.

\(^{241}\) *MTD v. Chile*, Award, 25 May 2004, paras. 242-243 and 246.


\(^{244}\) *Parkerings-Compagniet v. Lithuania*, Award, 11 September 2007, para. 332.

\(^{245}\) *Total v. Argentina*, Decision on Liability, 27 December 2010, para. 164.
4.5. Sub-conclusion

In this chapter, the general characteristics of the FET standard and its use and application in practice have been considered. The FET standard is a response to the need for long-term stability in direct foreign investments. It acts as a catch-all provision, addressing acts that does not fall within the scope of other standards. The wording of FET provisions varies from treaty to treaty. The most widespread approaches are to include an unqualified FET provision, a FET provision linked to international law in general, a FET provision linked to the IMS or one of the approaches mentioned with specific examples of infringement added to it. The use of different wordings raises the question of how this affects the interpretation of the standard. However, tribunals have moved away from this discussion, which can be argued to be more relevant in theory than it is in practice. Instead, tribunals have focused on identifying specific elements that the standard consist of. The FET standard has a developmental character, which is evident when analysing the line of arbitral cases in the time after the standard was first attributed substantive content. The FET standard protects investors from e.g. arbitrary treatment, denial of justice, discrimination and harassment and coercion. Additionally, the standard encompasses the elements of good faith, due process, transparency and the protection of the investor’s legitimate expectations.

Having described the broader perspectives of FET and its application, the analysis of the standard will in the following chapters be narrowed down to focus on the element of legitimate expectations in cases regarding energy investments, in order to qualify if the standard’s application through its development have become a standard facilitating predictability and forward planning for investors in the RE sector.
5. Fair and equitable treatment in conventional energy investment arbitration

This chapter examines the application of the FET standard in arbitral awards concerning conventional energy. In addition to uncovering aspects of the FET standard, this is important to later understand how the FET standard is applied in RE cases.

5.1. Application of the fair and equitable treatment standard in conventional energy arbitration

The developmental character of the FET comes to light in the decisions rendered by arbitral tribunals in cases regarding conventional energy investments. Earlier cases, such as CMS (and similar cases arising from measures adopted between 1999 and 2002 when Argentina experienced a financial crisis) and PSEG v. Turkey take a broader approach to the interpretation of FET and the element of legitimate expectations particularly. Conversely, more recent awards, such as AES and Electrabel, apply a stricter interpretation.

5.1.1. CMS v. Argentina & PSEG v. Turkey

In CMS, a claim was brought against Argentina under the US-Argentina BIT. CMS argued that Argentina had breached their obligation to provide FET, as it had “[…] profoundly altered the stability and predictability of the investment environment, an assurance that was key to the decision to invest”. These assurances consisted of different measures relating to the calculation of tariffs. The claimant argued that they were assured *inter alia* a right to tariffs calculated in dollars and for the

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246 E.g. LG&E and Enron.
247 The measures *inter alia* removed the right for investors to calculate tariffs in US dollars.
248 CMS Gas Transmission Company v. the Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005.
tariff to be adjusted according to the United States Producer Price Index ("US PPI").\textsuperscript{252} The assurances existed both in the general legislation and in a license issued by the host-state.\textsuperscript{253} The measures on which the investors relied upon were altered by Argentina in 2000-2002, making it so the tariff could not be calculated in US dollars. Instead, the tariff was redenominated in pesos at the rate of one peso to the dollar. Additionally, the US PPI adjustments were terminated, and the peso was devalued.\textsuperscript{254}

In \textit{PSEG} the dispute mainly concerned the fact that the claimants did not receive the treatment that they believed they were entitled to.\textsuperscript{255} The main issue was that the Turkish Government and PSEG could not agree on the final terms of the investment. The negotiations were halted over several years with no apparent progress. Further, after several years of negotiations, the respondent eliminated the possibility of the claimant obtaining treasury guarantees during their investment. The claimant therefore argued that their "[...] legitimate expectations originating in government assurances were also entirely disregarded, particularly since the legal and business environment of the investment was

\textsuperscript{252} CMS v. Argentina, Award, 12 May 2005, para. 57.
\textsuperscript{253} CMS v. Argentina, Award, 12 May 2005, paras. 84-85.
\textsuperscript{254} CMS v. Argentina, Award, 12 May 2005, para. 65.
\textsuperscript{255} In the 1980’s, Turkey had a growing demand for electricity which resulted in the government privatising the energy sector. In 1994, the claimant, PSEG, requested the Ministry of Energy to enter into negotiations of a contract with the final goal of developing a lignite-fired electric power plant in Turkey (\textit{PSEG v. Turkey}, Award, 19 January 2007, para. 19). In 1995, the Ministry approved of the feasibility study that PSEG had prepared on the project. It was approved by the government in the form of a concession contract (\textit{PSEG v. Turkey}, Award, 19 January 2007, para. 20). The project ran into several issues after this. A revised mine plan showed that the project, due to exploration issues, would entail a much larger investment than originally planned and the overall investment would increase by approximately US$ 1 billion (\textit{PSEG v. Turkey}, Award, 19 January 2007, para. 24). In 1998, the claimant submitted three proposals to take account for the changed costs which all entailed a price increase compared to the original agreed upon electricity purchase price. What the parties agreed on was contested. The claimant argued that an agreement was never reached, but Turkey claimed that the dispute arose because the project had never left the drawing board. The claimant had dramatically underestimated the costs of the project, and thus the respondent argued that there were never entered into a commercial agreement. It follows from this, that the activities undertaken were merely preparatory and that they never involved any legal expectation (\textit{PSEG v. Turkey}, Award, 19 January 2007, para. 54).
dramatically altered”. Thus, the claimant’s arguments in PSEG resemble the ones put forth by the claimants in CMS, in that both claimants argued that their legitimate expectations were frustrated due to the investment environment being profoundly/dramatically altered.

In CMS, Argentina’s main arguments were that the measures did not breach the standard as “[…] the legislative prerogatives of the State cannot be frozen in time and the [measures] is just one such exercise of its prerogative”. The tribunal found that the FET obligation under the BIT was breached.

In PSEG, Turkey argued that:

“An unfinished negotiation cannot be converted into a Treaty breach, contrary to the Claimants argumentation. The Respondent add that the Contract did not either guarantee that any such agreements would be successfully concluded, but only that there was a right to negotiate those agreements. For the Respondent, there can be no legitimate expectation that the proposed revisions of the Contract would be accepted no matter the cost to the Government.”

The tribunal in PSEG also found a breach of FET, however, the two cases’ reasoning differ.

Both disputes concerned whether the claimant had legitimate expectations that were derived from government assurances, even though these were not exclusively addressed to the investor.

The tribunals in CMS and PSEG approach the question of legitimate expectations differently. In CMS, it found that the disputed measures did in fact entirely transform the legal environment under which the investment was decided and made. It contemplated that, “It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made”. Concluding that the obligation of FET was breached because of the alteration of the regulation and the licence on which the investment relied, the tribunal acknowledged that legitimate expectations of a stable and predictable legal and business

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256 PSEG v. Turkey, Award, 19 January 2007, para. 225.
258 CMS v. Argentina, Award, 12 May 2005, para. 281.
261 CMS v. Argentina, Award, 12 May 2005, para. 277.
The framework could be derived from other sources than assurances made to the investor directly, as CMS legitimately established expectations both from general legislation and the license itself.262

This suggests a broad approach to the question of where from legitimate expectations can arise, since the tribunal accepts that expectations may legitimately arise from specific commitments in general legislation.

The tribunal further sought to tie the investor’s expectations to objective factors in both the legislation on which the investor relied and in the license. In other words, the claimant needed to show objective support for its expectation in order for the tribunal to find it legitimate. The tribunal found that both the general legislation and the license itself specifically provided for tariff calculation in dollars.263

The tribunal notes about both commitments that “this guarantee is sufficient to legally give rise to a right of the claimant to this effect”.264 It is therefore difficult to assess whether the tribunal had reached the same conclusion absent of specific commitments in the license by solely relying on objective factors found in the general legislation.

As a starting point, the tribunal in PSEG took a different approach. The tribunal argued from the standpoint that legitimate expectations can only arise from specific commitments made by the host-state to the investor. The tribunal stated that, “Legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed”265, and found that the inducement made by the state was “[...] a matter of general policy that did not entail a promise made specifically to the Claimants [...]”.266 This suggests a narrow approach, since it rejects that legitimate expectations can be based on general legislation.

Like in CMS, the tribunal also suggests an interpretation with emphasis on objective factors since it specifically required an assurance or representation made directly to the investor that would evince objective support for the expectation.

262 In the similar cases also against Argentina, LG&E and Enron, the tribunal reached the same conclusion (LG&E v. Argentina, Decision on Liability, 3 October 2006, para. 133; Enron v. Argentina, Award, 22 May 2007, paras. 264-266).
263 CMS v. Argentina, Award, 12 May 2005, para. 133.
264 CMS v. Argentina, Award, 12 May 2005, para. 133.
266 PSEG v. Turkey, Award, 19 January 2007, para. 243.
Thus, in principle, the tribunals in CMS and PSEG have different approaches to from where legitimate expectations can be derived. This contributes to a lack of uniform understanding of the provision, which can provide for less predictability regarding the standards interpretation.

However, even though no direct promises were made in PSEG, the tribunal decided in favour of the investor, which ultimately resulted in a broader approach than the tribunal first indicated. The tribunal applied what it described as the *roller-coaster effect*. This essentially entailed that even though the claimant could not have individual expectations to the particular issues of the dispute due to a lack of objective factors supporting these, the claimant nonetheless had a legitimate expectation that it would not endure the "*continuous legislative changes*" that it did. The tribunal thus concluded that the investor had in fact a legitimate expectation that the host-state would act fairly and equitably in regards to regulation, since the investment was based on "*an assessment of the state of the law and the totality of the business environment at the time of the investment*". In other words, according to PSEG, an investor can at least expect a *reasonably* stable and predictable framework, without specific assurances from the host-state, but must accept that the framework will not remain totally unchanged.

Thus, as a starting point, the tribunal in PSEG took a narrow approach based on objective factors. However, it broadened the scope of where from legitimate expectations could arise since the host-state had *significantly* altered the investment environment through continuous legislative changes. This shows that the tribunal was willing to apply a broader approach, based on the investor’s subjective expectations of reasonable stability, when the host-state's conduct proved to be severe.

Both CMS and PSEG emphasise that bad faith on the part of the host-state is not a requirement for finding a breach of the FET. In CMS, Argentina argued that a deliberate intention to ignore an obligation or even bad faith would be required to breach the standard. It emphasised that changes were made to the regulation since they were needed because of the crisis, in order to continue the operation of public services. The tribunal stated that bad faith is not a requirement of breach. PSEG reiterated this, and this approach has been followed in subsequent cases including the most recent cases concerning the FET standard. This can give rise to consequences for host-states, as certain

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269 *CMS v. Argentina*, Award, 12 May 2005, para. 270.
regulatory measures can be barred by the host-states’ international obligations. For example, the on-going conversion from conventional energy to RE requires extensive regulation. Since bad faith is not a requirement for liability, such regulation could be hindered by the host-states’ obligation under the FET standard.273

5.1.2. AES v. Hungary274 & Electrabel v. Hungary275

The awards following the earlier cases of CMS and PSEG narrowed down the interpretation of the FET standard. Clear examples of this are AES and Electrabel. Both cases concerned disputes arising from Hungary’s accession to the EU.

In AES276, the tribunal applied a narrow approach compared to CMS. It did so by rejecting that legitimate expectations could arise from the general legislation on which the investor relied. Further, it

275 Electrabel S.A v. the Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, and Award, 25 November 2015.
276 This is another case that arose from the host-state's privatisation of the energy sector, which happened in Hungary in 1995. The modernisation entailed privatisation of several state-owned power stations (AES v. Hungary, Award, 23 September 2010, para. 4.2). In 1996, AES entered into a purchase and sale agreement ("PSA") with two Hungarian state-owned companies under which AES purchased a majority shareholding in a previously state-owned company. The investment was approximately US$ 130 million and included a new power station and two older coal-fired power stations (AES v. Hungary, Award, 23 September 2010, para. 4.3). Under the PSA, Hungary was obliged to sign long-term PPAs for all the plants, whereas AES would retrofit the existing plants and construct an additional plant (AES v. Hungary, Award, 23 September 2010, para. 4.4). In 2000, AES commenced arbitration against Hungary for failing to prolong the PPAs as promised in the initial agreement. They also launched arbitration against the state-owned companies. In 2001, both arbitrations were settled and the claims were dropped. The settlement agreement included the prolonging of the PPAs but also further improvements of the plants that AES would finance. Furthermore, the agreement included a clause that provided for good faith negotiations if a change of law would damage the agreement between the parties (AES v. Hungary, Award, 23 September 2010, paras. 4.5-4.10). Most importantly, the settlement agreement included a new pricing schedule which provided that as long as the generator prices were subject to administrative prices, the prices that were fixed by state-decrees already in motion would be acknowledged and applied. The agreement also set out a pricing formula which were to be applied if administrative pricing was to be terminated (AES v. Hungary, Award, 23 September 2010, para. 4.11). In 2004, Hungary acceded to the European Union. As of January 2004, the administrative pricing regime was terminated. For a time after the termination, the specific formula established in the new pricing schedule was applied (AES v. Hungary, Award, 23 September 2010, paras. 4.12-4.13). The government of Hungary found hereafter that the profits of AES were unjustifiably high and suggested to AES that profits would be capped at a maximum of 7.1% (AES v. Hungary, Award, 23 September 2010, para. 4.18). In 2006, Hungary reintroduced administrative pricing for electricity and two price decrees were issued. Consequently, the formula established in the settlement agreement was no longer
applied a strict approach to what could constitute objective factors supporting the investor’s expectations.

AES argued *inter alia* that the FET provision in the ECT had been breached due to a frustration of their legitimate expectations.277 The claimant specifically argued that the reintroduction of administrative prices made Hungary fail to act in accordance with the legitimate expectations on which the claimant relied.278 Further, AES claimed that Hungary had agreed to provide a certain level of financial and legal stability when entering into a PPA and that this was also frustrated by the reintroduction of the administrative pricing, which “eviscerated the legal framework upon which the Claimants had legitimately relied”.279 Hungary argued that the claimant had no legitimate expectations as it was understood that the figures originally agreed upon could change over time. Also, since the initial investment was made in an environment with administrative prices, the claimant could have no legitimate expectation that these would not be reintroduced.280 Hungary further argued that, if expectations were created, they would not create any rights for the claimant as they could not be legitimate. For expectations to be legitimate, they would need to be based on affirmative government representations or assurances.281 Hungary also emphasised that countries who are acceding to the EU are likely to have many legislative changes.282

The tribunal’s assessment of the element of legitimate expectations mainly revolved around whether the government of Hungary led AES to believe that administrative pricing would never be reintroduced following the 2001 settlement agreement. The tribunal concluded that the settlement agreement did not “[...] equate to absolute certainty, giving rise to internationally protected legitimate expectations”.283 The tribunal in AES followed the initial narrow approach of the tribunal in *PSEG* by reiterating the fact that an investor must be able to show that specific representations were made directly to the investor in order to establish legitimate expectations.284 It applied a similar interpretation of what could constitute objective factors supporting the investor’s expectations, when arguing that very

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277 *AES v. Hungary*, Award, 23 September 2010, para. 9.1.1.
278 *AES v. Hungary*, Award, 23 September 2010, para. 9.1.4.
279 *AES v. Hungary*, Award, 23 September 2010, para. 9.1.5.
280 *AES v. Hungary*, Award, 23 September 2010, paras. 9.2.2 - 9.2.4.
281 *AES v. Hungary*, Award, 23 September 2010, para. 9.2.8.
282 *AES v. Hungary*, Award, 23 September 2010, para. 9.2.10.
283 *AES v. Hungary*, Award, 23 September 2010, para. 9.3.25.
284 *AES v. Hungary*, Award, 23 September 2010, para. 9.3.31.
specific commitments (such as a stabilisation clause) was needed in order to establish legitimate expectations.

Even though the tribunal agreed with PSEG regarding what constituted objective factors, it did not reiterate PSEG’s view that expectations could arise absent of such factors under certain circumstances. As opposed to this, the tribunal in AES dismissed that legitimate expectations could be derived from the investor’s subjective expectation that the general legislation on which it relied would persist throughout the investment:

“The stable conditions that the ECT mentions relate to the framework within which the investment takes place. Nevertheless, it is not a stability clause. A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts.”

It therefore determined that the investor could not have legitimate expectations since “[...] no specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a stability clause) or that could legitimately have made the investor believe that no change in the law would occur”.

The objective support for the investor’s expectation that the tribunal requires in AES is strict, especially compared to CMS. As the analysis of CMS showed, the expectations that the investor had were legitimised by assurances made in both the license and in the general legislation. Both of these provided for a specific calculation of tariffs, which led the tribunal to conclude that legitimate expectations had been established, even though no guarantees that this method of calculation would remain unchanged throughout the entire investment was present. In AES, the investor relied inter alia on a government industry information memorandum, which included statements on the target return and specifically required the host-state to prepare cost reviews prior to introduction of new pricing mechanisms. The tribunal found that none of these “[...] relate in a sufficiently material way to Claimants’ central complaint [...] for the Tribunal to find that Hungary’s conduct in 2006/2007 was contrary to representations and assurances said to have been made to AES Summit in 1996”. Compared to CMS, the AES award therefore applied a higher threshold regarding the specificity required to establish an objective factor supporting the investor’s expectations.

285 AES v. Hungary, Award, 23 September 2010, para. 9.3.29.
286 AES v. Hungary, Award, 23 September 2010, para. 9.3.31.
287 AES v. Hungary, Award, 23 September 2010, para. 9.3.19.
The tribunal therefore reached the conclusion that the FET provision had not been breached, as AES could not have any legitimate expectations that administrative pricing would not be reintroduced\textsuperscript{288}, and that the legal environment in which they invested would remain the same throughout the investment.\textsuperscript{289}

\textit{Electrabel}\textsuperscript{290} and AES are similar in their facts and outcome. However, some considerations differentiate \textit{Electrabel} from AES.

Electrabel argued that Hungary breached the FET provision by not paying any net stranded costs following the termination of the PPA in question, and alleged \textit{inter alia} that this failure to provide compensation violated Electrabel’s legitimate expectations.\textsuperscript{291}

On legitimate expectations, Electrabel agreed that the expectation was not founded on any specific guarantees or assurances regarding Dunamenti’s future profitability. Electrabel argued, on the other hand, that it had a legitimate expectation that if the PPA was terminated, Dunamenti would be adequately compensated and that Hungary would act to minimise the harm suffered by Electrabel.\textsuperscript{292} The tribunal found that there was no evidence that Hungary, at the time of investment, had represented that it would act differently from the way it eventually did. Therefore, the claim on legitimate expectations could not succeed.\textsuperscript{293}

The statements that Electrabel submitted as assurances could not be taken as such, as it was never promised that Electrabel would be entitled to a certain return on its investment.\textsuperscript{294} However, the tribunal stated that “[...] a specific representation is not indispensable to a claim advanced under ECT’s

\textsuperscript{288} AES \textit{v. Hungary}, Award, 23 September 2010, para. 9.3.26.
\textsuperscript{289} AES \textit{v. Hungary}, Award, 23 September 2010, para. 9.3.35.
\textsuperscript{290} In 1995, Dunamenti, a Hungarian state-owned entity, which was the owner of the largest power plant in Hungary, entered into a PPA with MVM, the state-owned wholesale electricity buyer. Subsequent to the PPA, and as part of privatisation of the sector, foreign investors, including Electrabel, invested substantially in Dunamenti as shareholders. When Hungary acceded to the EU in 2004, the European Commission conducted a formal investigation into the state aid provided by Hungary under the PPA. In 2008, the Commission issued a decision declaring the PPA unlawful, and thus, it was terminated in 2008. When anticipating the termination in 2007, Electrabel commenced arbitration against Hungary for stranded costs following the PPA termination. Stranded costs are defined as “costs incurred by a company operating in a sector undergoing deregulation, prior to deregulation, that could have been recovered under a regulated market, but cannot be recovered in a liberalized market.” (Electrabel \textit{v. Hungary}, Award, 25 November 2015, para. 101).
\textsuperscript{291} Electrabel \textit{v. Hungary}, Award, 25 November 2015, para. 124.
\textsuperscript{292} Electrabel \textit{v. Hungary}, Award, 25 November 2015, para. 133.
\textsuperscript{293} Electrabel \textit{v. Hungary}, Award, 25 November 2015, para. 155.
FET standard.

It therefore considered whether Electrabel could have legitimate expectations, despite having received no specific assurance or representation by Hungary. On the evidence, it found that Electrabel did not.

On this point, Electrabel maintains that specific representations to the investor is the primary source of expectations, as was argued in AES. However, even though the claimant was not successful in its claim on legitimate expectations, the tribunal accepted that specific assurances from the host-state was not decisive to the success of such claim, but that these merely assist “[...] in the assessment of the investor’s knowledge and of the reasonableness and legitimacy of its expectations”. The tribunal argued that for legitimate expectations to be established absent of specific assurances, the investor must still base their expectations on reasonable grounds. In other words, objective factors must still be present in order to show the expectations’ legitimacy, but these can exist in other forms than specific assurances.

This indicates a different, more lenient interpretation to what can constitute objective factors supporting the investor’s expectations than was seen in AES. Yet, Electrabel could not provide such reasonable grounds for their expectations. Electrabel relied on specific sections in the general legislation in place at the time of the investment, an industry information memorandum and on tender information provided prior to the investment. None of these were sufficient to establish reasonable grounds that could point to Electrabel having legitimate expectations.

The tribunal also discussed whether objective factors could be derived from general legislation or if they can only exist in form of direct representations to the investor. Electrabel argued that their expectations were inter alia derived from the Hungarian Electricity Act. The tribunal argued that, if Electrabel were to be entitled to a reasonable return on its investment, such entitlement should have been evident from the PPA, and that the omission of such entitlement in the PPA was “[...] fatal to Electrabel’s case”. Thus, it was implied that specific assurances, for them to give rise to legitimate expectations, should be made directly to the investor. Electrabel could therefore not rely on assurances in the general legislation.

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*Electrabel* emphasised the balancing exercise between the investors’ expectations and the host-states right to regulate to a higher degree than previous awards. The tribunal stated that the FET standard allows for a balancing exercise by the host state where the host-state is not required to “*elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance*.”  

It concluded on this weighing exercise that, even if Electrabel had a legitimate expectation that it would receive the maximum compensation for stranded costs, when weighed against Hungary’s right to regulate, such expectation would neither be reasonable nor legitimate. It further argued on the subject of legitimate expectations that,

> "While the investor is promised protection against unfair changes, it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment."

*Electrabel* therefore mostly corroborates the decision in *AES*. It reiterates that legitimate expectations must have its origin in specific assurances or representations made to the investor from the host-state. However, the tribunal in *Electrabel* did go so far as to consider whether a legitimate expectation could have emerged without such specific assurance or representation but emphasised that the investor must still provide reasonable grounds for their expectations. This is not to be understood as *Electrabel* accepting legitimate expectations without any objective factors supporting them, it merely provides for a lower threshold of what can constitute such factors.

### 5.1.3. *MCI v. Equador*

The awards analysed above provides insight to how legitimate expectations can arise, and especially what constitutes objective factors supporting the investor’s expectations. The tribunal in *MCI v.*
Equador puts this in words. The tribunal argued that expectations must, first of all, be linked to a legitimate objective. The tribunal elaborated this by stating that the "[...] legitimacy of the expectations for proper treatment entertained by a foreign investor protected by the BIT does not depend solely on the intent of the parties, but on certainty about the contents of the enforceable obligations". In other words, legitimate expectations cannot solely be based on subjective factors, i.e. the investor’s assumption that the legal regime in which it invested would persist throughout the investment. Rather, a legitimate expectation requires objective evidence that the host-state entered into an enforceable obligation and that this was communicated directly to the investor. Thus, it is not sufficient that the investor can prove that they did in fact expect a certain treatment that they did not receive. To uphold an expectation as legitimate, it is required that the investor objectively had a legitimate right to believe that they would be treated in a certain way throughout the investment. Since the contract between the claimant and the respondent in MCI did not give rise to an obligation to resolve existing disputes, which the claimant had argued it had legitimate expectations of, the claimant could not succeed in its claim.

5.2. Sub-conclusion

This section has sought to identify common denominators and divergences in application of legitimate expectations in arbitral proceedings concerning investments in conventional energy.

There are significant differences in how the standard is applied in the cases. One of the differences is the approach to the question of from where legitimate expectations can arise. CMS applied a broad

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305 The case arose from an agreement between the claimants (MCI and New Turbine, through their subsidiary Seacoast, Inc.) and the Ecuadorian state-owned energy provider, INECEL, for the sale of electricity. The claimants had agreed to install and operate two electrical power plants in Ecuador and to sell the energy to the state-owned company (MCI v. Ecuador, Award, 31 July 2007 para. 195). After Seacoast signed the contract, they also signed a clarification contract that would decide the scope of the specific clauses in the contract. Hereafter, Seacoast entered into a joint venture with MCI and New Turbine (MCI v. Ecuador, Award, 31 July 2007, paras. 196-198). In 1996, several differences arose between the claimants and the respondent, Ecuador. The differences related to the date of commencement, the payment for energy under the ‘take or pay’ modality, the duration of the contract, the imposition of fines and penalties and the reimbursement for the cost of fuel (MCI v. Ecuador, Award, 31 July 2007, para. 200). Later in 1996, Seacoast suspended the operation of the plants by invoking non-payment by INECEL for invoices payable under the terms of the contract and later the same year, INECEL declared the contract terminated, alleging that the agreed term had expired (MCI v. Ecuador, Award, 31 July 2007, paras. 201-202).

306 MCI v. Ecuador, Award, 31 July 2007, para. 278.

approach, as it accepted that expectations may legitimately arise from specific commitments in general legislation and not only from specific assurances made directly to the investor. *PSEG* also applied a broad approach, as it decided in favour of the investor, despite the fact that no specific assurances were made directly to the investor. It reached this conclusion through a broad approach based on the investor’s subjective assumption that the general legislation, on which the investor relied, would not be so significantly altered as it was. Contrarily, *AES* and *Electrabel* both applied a narrow approach by arguing that legitimate expectations may only arise from specific assurances made directly to the investor.

With regards to what can give rise to legitimate expectations, the tribunals seem to agree that, absent of severe circumstances such as in *PSEG*, objective factors are needed in order to legitimise the investors’ expectations. However, the awards have different thresholds with regard to what constitutes such an objective factor.

Even though the awards show similarities in the interpretation of the FET standard, they also demonstrate lack of uniformity, making it challenging to deduce the exact protection of the investor’s legitimate expectations under the FET standard. Thus, on the basis of the analysed awards, the FET standard may not be characterised as a standard facilitating predictability and forward planning for the investor due to its divergent application. However, the different interpretations which have been identified might assist when determining whether the standard, at its contemporary state, has developed into such a standard for parties to RE investments.
6. Application of the fair and equitable treatment standard in renewable energy investment arbitration

Recent arbitral awards concerning the RE sector will now be analysed and discussed. The rationale behind splitting the analysis between conventional energy cases and RE cases is that this thesis adopts the view that host-states should be allowed less freedom when altering the legal regimes in which the investors made their investments. This is due to the complexity and characteristics of RE investments and the need for subsidy schemes and state participation to make the investments profitable.

This section examines the interpretation of the FET standard in awards regarding RE investments, and if the above assertion can be sustained. The results from the analysis will contribute to determining how the FET standard, and the element of legitimate expectations in particular, is applied in these cases, and whether the contemporary application facilitates predictability and forward planning for investors in the RE sector.

6.1. The Spanish legal framework for renewable energy investments

All the cases that will be analysed in this section arose from the same changes to the Spanish legal RE framework. It originally came into place to promote RE investments in Spain following the European Union’s new goals regarding RE. Therefore, this legal framework, its alterations and its removal, need to be explained at the outset to provide the context of the disputes.

The legal framework had its legal basis in Law 54/1997 on the Electricity Sector (“Law 54/1997”). Law 54/1997 divided the generation of electricity into two regimes: the ordinary regime (conventional energy facilities) and the special regime (RE facilities). The law constituted the framework for remuneration applicable to the special regime, however, the framework was not specified in concrete terms. The concrete terms were to be implemented through Royal Decrees.

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309 Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. the Kingdom of Spain, SCC Case No. 2015/063, Final Award, 15 February 2018, paras. 78-80.
In 2004, Royal Decree 436/2004\(^{310}\) (“RD 436/2004”) came into force. It expanded the remuneration regime by providing, for those who wanted to invest in RE in Spain, a "durable, objective and transparent framework".\(^{311}\) It further stated that "there is no doubt that the security and stability offered by this new method for calculating the special regime remuneration should help it foster investment in [various RE facilities"]\(^{312}\). RD 436/2004 provided for fixed tariffs and premiums for RE facilities for their lifetime, subject to a reduction after 15 years (hydro plants) or 25 years (hydro plants up to 10 MW and photovoltaic (“PV”) plants). The only condition for obtaining the remuneration was formal registration with the so-called RAIPRE program.\(^{313}\)

In 2005, the government of Spain produced the first prospectus aimed at PV investors under the title: *The Sun Can Be All Yours*.\(^{314}\) The prospectus concerned the attractiveness of PV investments, as they could grant investors a return of around 15%, and since significant financing was available for investors. In 2007, another prospectus under the same name was published which explained that the objective of any investment in the PV sector was to obtain a maximum rate of return through the lifespan of the plant. When explaining the financial aid available to investors, the prospectus referred to the FIT that investors would be entitled to receive. It showed the amount that the FIT would provide for different sized plants, ranging from 0.23 € per Kwh to 0.44 € per Kwh.\(^{315}\) In 2008, the prospectus was updated to show the "Spanish renewable success story" and the fact that it had been "driven by a regulatory framework that has promoted development through stability".\(^{316}\)

The 2004 regime did not produce the necessary volume of investment in RE. Therefore in 2007, RD 436/2004 was repealed and replaced by Royal Decree 661/2007\(^{317}\) (“RD 661/2007”) with the purpose of enabling growth in the sector. The compensation under this regime was a fixed remuneration higher than the 2004 regime. Producers of RE would be able to choose between a FIT or a FIP, which would be available for the entire lifetime of the plant, if properly registered under the RAIPRE.\(^{318}\) A specific


\(^{311}\) Novenergia II v. Spain, Final Award, 15 February 2018, para. 89.

\(^{312}\) Novenergia II v. Spain, Final Award, 15 February 2018, para. 89.

\(^{313}\) Novenergia II v. Spain, Final Award, 15 February 2018, paras. 92-94.

\(^{314}\) Novenergia II v. Spain, Final Award, 15 February 2018, para. 112.

\(^{315}\) Novenergia II v. Spain, Final Award, 15 February 2018, paras. 112-115.

\(^{316}\) Novenergia II v. Spain, Final Award, 15 February 2018, para. 117.


\(^{318}\) Novenergia II v. Spain, Final Award, 15 February 2018, paras. 95-101.
provision in RD 661/2007\textsuperscript{319} (hereinafter referred to as “the stabilising provision”) provided for a mechanism for revising tariffs, but expressly stipulated that such revisions would not apply to plants that were already in operation. This Royal Decree is what most claimants argue entailed legitimate expectations of a fixed tariff, both because of its wording, but also because of the stabilising provision included herein. As Spain quickly reached its capacity target, Royal Decree 1578/2008\textsuperscript{320} (“RD 1578/2008”) was adopted, extending the 2007-regime but on different (not as favourable) terms.

To cope with the consequences of the financial crisis of 2007-2008 and a growing tariff deficit arising from the electricity remuneration regime, in 2010, Spain began to change the legal framework in a way that provided less favourable conditions for investors.

With Royal Decree 1565/2010\textsuperscript{321} (“RD 1565/2010”) all FITs after 25 years of a PV plants lifetime were retroactively removed. Thus, the previous legal framework which allowed for FITs for the lifetime of the plant was significantly limited.

Royal Decree-Law 14/2010\textsuperscript{322} (“RDL 14/2010”) issued a cap on the number of yearly production hours that would be entitled to the FIT (which until then had been unlimited), thus further limiting the remuneration that PV investors could receive.

Law 15/2012 on Tax Measures for Energy Sustainability\textsuperscript{323} (“Law 15/2012”) introduced a 7% income tax on electric production within the Spanish territory. It applied to both renewable and fossil-based energy production, thus further limiting the return of PV investors.

\textsuperscript{319} RD 661/2007, Article 44.3.
\textsuperscript{321} Royal Decree 1565/2010 of 19 November 2010, Modifying Certain Aspects of the Operation of Generators Under the Special Regime, Published in the Official Gazette (B.O.E.) on 22 November 2010.
With Royal Decree-Law 2/2013\(^{324}\) ("RDL 2/2013") the FIT would no longer be indexed to the Consumer Price Index ("CPI"), but instead, it would be indexed to a new, less favourable CPI, thus further deteriorating the return of the investors.

Later, Royal Decree-Law 9/2013\(^ {325}\) ("RDL 9/2013") was adopted, which altered the legal framework completely. It repealed the 2007 regime and replaced it with the "Legal and Economic Regime" which was retroactively applicable to the entire lifespan of PV facilities (taking revenues received before the enactment of the new regime into account). Among other things, the new regime defined a "reasonable rate of return" and used it as a cap of maximum return for the investors and allowed for a revision of the system every six years.

Lastly, Spain would enact Law 24/2013 on the Electricity Sector\(^ {326}\) ("Law 24/2013"), which repealed the distinction between the ordinary regime and the special regime, thus completely abolishing the special regime on which many investors relied on the bases of the originally promised fixed, long-term FIT\(^ {327}\).

The new regime replacing the special regime’s fixed support with the concept of a limited “reasonable return”, was established formally by Royal Decree 413/2014\(^ {328}\). The details of the new regime were amplified in Ministerial Order IET/1045/2014\(^ {329}\), which calculated the rate of return (initially set as 7.398% for the first six-year period) based on a number of hypothetical standard installations.

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\(^{326}\) Law 24/2013 of 26 December 2013, on the electricity sector.

\(^{327}\) Novenergia II v. Spain, Final Award, 15 February 2018, para. 145.

\(^{328}\) Royal Decree 413/2014, of 6 June 2014, regulating the activity of electrical power generation by means of renewable energy, cogeneration and waste sources, published in the Official Gazette (B.O.E.) on 10 June 2014.


These awards are the first public cases in a big wave of cases against Spain, following the changes to the legal framework, which was explained above. *Charanne v. Spain* and *Isolux v. Spain* are in many respects companion cases, since Charanne and Isolux are companies within the same group, and both cases involved the same council and the same co-arbitrators. What differentiated the two cases were the time of investment and the disputed measures. In *Charanne*, the investor specifically argued that RD 1565/2010 and RDL 14/2010 frustrated the legitimate expectation that the 2007 regime would not be subject to regulatory changes[^332]. In *Isolux*, the dispute concerned the changes to the legal environment made in RDL 2/2013 and RDL 9/2013[^333]. Common for the disputes were that both investors claimed that they had retained the right to the fixed FIT that was in effect at the time of their investment and that they had legitimate expectations that this regime would not be subject to change.

Both awards rejected the claimants’ arguments as they found that there was given no specific commitments of stabilisation to them. They follow a narrow approach regarding which sources legitimate expectations can originate from. In its reasoning, *Charanne* emphasised that even though the 2007 regime was directed at a limited group of investors, this did not make it specifically directed at each investor. The regulation did not lose its general nature that characterises any law or regulation[^334]. Therefore, in *Charanne*, based on the general legislation alone, the investor could not have a legitimate expectation that the legal framework would not change. This would amount to the same protection as that of a stabilisation clause and be equivalent to freezing the regulatory framework, which the tribunal could not accept[^335].

[^330]: *Charanne B.V. and Construction Investments v. the Kingdom of Spain*, SCC Case No. 062/2012, Final Award, 21 January 2016.
This analysis relies on an unofficial English translation of the award which is originally rendered in Spanish. The translation being unofficial, it lacks authority and may be inaccurate. The award is translated by the law firm Mena Chambers ([www.menachambersbh.com](http://www.menachambersbh.com)) and was accessed via [www.italaw.com/cases/2082](http://www.italaw.com/cases/2082) on 21 May 2020.

[^331]: *Isolux Infrastructure Netherlands B.V. v. the Kingdom of Spain*, SCC Case No. 2013/153, Award, 6 July 2016.
This analysis relies on an unofficial English translation of the award which is originally rendered in Spanish. The translation being unofficial, it lacks authority and may be inaccurate. The translation was accessed via [www.energycharacter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/38-isolux-infrastructure-netherlands-bv-v-spain/](http://www.energycharacter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/38-isolux-infrastructure-netherlands-bv-v-spain/) on 21 May 2020.

[^332]: *Charanne v. Spain*, Final Award, 21 January 2016, paras. 479-481.

[^333]: *Isolux v. Spain*, Award, 6 July 2016, para. 784.


[^335]: *Charanne v. Spain*, Final Award, 21 January 2016, para. 503.
constitute an excessive limitation on the state’s right to regulate in accordance with the public interest.\textsuperscript{336} In its analysis, the tribunal also rejected that the prospectus \textit{The Sun Can Be All Yours} by itself, or the registration process under the RAIPRE constituted specific commitments.\textsuperscript{337}

The tribunal thus based its application of legitimate expectations on a narrow approach, basing its analysis of whether the investor’s expectations were legitimate on the observation of objective factors i.e. specific commitments given directly to the investor. According to the tribunal, provisions in general legislation cannot constitute such commitments, resulting in a narrow approach to what sources may give rise to legitimate expectations.

This application is reminiscent to \textit{AES} and \textit{Electrabel}, but \textit{Charanne}, put emphasis on an additional element. To exercise the right of a legitimate expectation, an investor must have made a diligent analysis of the legal framework before investing. In this case, the tribunal found that, if the investor had done so, they would have known, due to a number of Spanish Supreme Court decisions\textsuperscript{338}, that the legal environment was subject to change, and thus that they could have no legitimate expectations of the opposite.\textsuperscript{339} This is an extra layer, that was not used by previous tribunals, which suggests that an investor, to have legitimate expectations, needs to be a diligent investor who has thoroughly researched a legal framework without finding any threats to the stability of the regime. The tribunal thus applied the requirement of due diligence as an additional objective factor in assessing whether the investor had legitimate expectations or not.

\textit{Isolux} corroborated the views in \textit{Charanne}. First of all, the tribunal stated that without specific assurances or representations, the investor could have no legitimate expectations as to the legal framework remaining unchanged, especially since Isolux’s investment was made after the changes in 2010 had already been made to the 2007 regime.\textsuperscript{340} The tribunal found that the investor should have been aware

\begin{footnotesize}
\textsuperscript{336} \textit{Charanne v. Spain}, Final Award, 21 January 2016, para. 493.
\textsuperscript{337} \textit{Charanne v. Spain}, Final Award, 21 January 2016, paras. 496-497 and 510.
\textsuperscript{338} E.g. Judgment of Section Three of the Spanish Supreme Court of 15 December 2005, rec. 73/2004, and Judgment of Section Three of the Supreme Court of 25 October 2006, RCA 12/2005. In short, these decisions found that under Spanish law, electricity production facilities under the special regime did not have an unmodifiable right to have the feed-in remuneration scheme remain unchanged.
\textsuperscript{339} \textit{Charanne v. Spain}, Final Award, 21 January 2016, paras. 505-506.
\textsuperscript{340} \textit{Isolux v. Spain}, Award, 6 July 2016, para. 787.
\end{footnotesize}
of the possible changes to the framework due to the above-mentioned Supreme Court decisions\textsuperscript{341}, thus corroborating the focus on due diligence set forth in \textit{Charanne}. On those grounds, the alleged breach of the FET provision was rejected.

Looking at these awards’ close predecessors (\textit{AES} and \textit{Electrabel}), the results and approaches are not unfamiliar. The results are contrary to this thesis’ assertion that host-states have less freedom when altering the legal and business framework in cases regarding RE investments. The two cases continue the narrow approach that was commenced with \textit{AES} and \textit{Electrabel}, and the strict approach in \textit{AES} regarding what constituted objective factors, as they base the assessment of legitimate expectations on the objective observation of whether a concrete and \textit{specific} stabilisation commitment has been given \textit{directly} to the investor or not. It was reaffirmed that expectations could not arise from general legislation itself, since commitments made in the legislation are not specifically directed at each investor, but are inherently general, even though the regulation was aimed at a limited group of investors.\textsuperscript{342} This interpretation is based on the fact that converting a commitment in a law into a specific commitment excessively limits the power of states to regulate in accordance with public interest.\textsuperscript{343}

6.3. Eiser v. Spain\textsuperscript{344}

In this case, Eiser\textsuperscript{345} invested in three concentrated solar power (“CSP”) plants in Spain. Eiser argued that at the time of investment it relied upon inducements and promises made by Spain, in particular the regime established in RD 661/2007. As the measures adopted in 2013-2014 ultimately eliminated RD 661/2007 and substituted it with a different regime, Eiser argued that their legitimate expectations of stability of RD 661/2007 were defeated and their investment deprived of its value. Because of this, they contended that several of Spain’s obligations under the FET provision in the ECT were violated.\textsuperscript{346} For reasons of judicial economy, the tribunal limited its analysis to the FET claim, as this

\begin{flushright}
\textsuperscript{341} The tribunal emphasised that the parent company of Isolux in 2011 had brought an administrative appeal against RD 1565/2010 before the Spanish Supreme Court which made specific reference to i.e. the Supreme Court decisions made in 2005 and 2006 which were mentioned above (\textit{Isolux v. Spain}, Award, 6 July 2016, para. 796).
\textsuperscript{342} \textit{Charanne v. Spain}, Final Award, 21 January 2016, para. 493.
\textsuperscript{343} \textit{Charanne v. Spain}, Final Award, 21 January 2016, para. 493.
\textsuperscript{345} \textit{Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l.}
\textsuperscript{346} \textit{Eiser v. Spain}, Award, 4 May 2017, paras. 347-349.
\end{flushright}
obligation provided the most appropriate legal context for assessing the factual situation.Spain argued that Eiser was only entitled to receive a reasonable return on their investment, which the altered regime ensured. Spain argued that proper due diligence would have shown this.

In its analysis, the tribunal made it clear that absent of explicit undertakings guaranteeing investors that states will not change their regulations, IIAs do not eliminate a state’s right to modify regulatory regimes to meet evolving circumstances. The tribunal concluded that, especially under the ECT, the FET standard “embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long term investments”. Reiterating what previous awards such as CMS have stated, the tribunal underlined that investors must expect that legislation will change, absent a stabilisation clause or specific commitments giving rise to legitimate expectations of stability. However, the FET provision in the ECT entitled the claimants to expect that Spain would not drastically and abruptly revise the regime on which their investment depended, in a way that would deprive the investment of its value.

Assessing the changes in regulation adopted in 2013-2014, the tribunal found that it changed the regulatory regime in a drastic fashion. An entirely new regulatory approach was adopted, and it washed away the financial underpinnings of the claimants’ investment. Since the CSP plants were highly leveraged, a revenue cut of 66% caused by the new regime (in comparison, the profitability of the plants in Charanne was reduced by 8.5-10%) had grave consequences for the investment. Especially the method of calculating the target return under the new regime was consequential. The “one size fits all” calculation based on a hypothetical plant was retroactively applied to existing facilities, like the ones developed by Eiser, that were designed, financed and constructed based on the very different regime of RD 661/2007.

All this sufficed the tribunal to find that the regulations adopted practically deprived Eiser the total value of their investment. In conclusion, the tribunal adopted a standard of which the FET provision

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347 Eiser v. Spain, Award, 4 May 2017, para. 353.
348 Eiser v. Spain, Award, 4 May 2017, paras. 350-351 and 359-361.
349 Eiser v. Spain, Award, 4 May 2017, para. 362.
350 Referring to a number of arbitral cases that stressed stability of the legal and business framework as an essential part of FET (inter alia Occidental (I), CMS, and Parkerings-Compagniet) (Eiser v. Spain, Award, 4 May 2017, paras. 375-386).
351 Eiser v. Spain, Award, 4 May 2017, para. 362.
352 ECT, Article 10(1).
353 Eiser v. Spain, Award, 4 May 2017, para. 387.
354 Eiser v. Spain, Award, 4 May 2017, para. 368.
in the ECT “[…] entitled [the claimants] to expect that Spain would not drastically and abruptly revise the regime, on which their investment depended, in a way that destroyed its value.”

In line with previous cases such as AES, Electrabel and Charanne the tribunal acknowledged that the FET standard is not a guarantee of a right to regulatory stability per se. The state has a right to regulate, and investors should expect legislative changes. It further acknowledged that legislative changes may be more easily justified if they serve to accommodate public policy issues, and that the Spanish tariff deficit constituted such an issue.

However, the tribunal stressed that legitimate expectations of investors are protected, which included an obligation for the host-state to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors. The way the tribunal stipulated the FET standard in this case can be described as a qualified version of applying the obligation of the host-state to ensure a stable and predictable legal framework. Prima facie, it might seem like a strict approach to the obligation, as it only protects the fundamental stability in the essential characteristics of the legal regime from drastic and abrupt changes to the regime. On the other hand, the approach can be viewed as being quite lenient, considering the fact that the tribunal were not able to tie the investor’s expectations to any particular objective factor, but awarded damages on the basis of the investor making an investment in reliance of a legal framework that was later significantly altered. Thus, absent of any specific assurances of stability, liability was established under the FET provision on the basis of the investor’s subjective expectation of stability. This cannot be extended to all changes to the legal framework, as an investor must always recognise the possibility of reasonable changes and amendments to the legal regime on which it invested, absent of specific assurances stating otherwise. Eiser is therefore reminiscent to PSEG in that it takes a narrow approach to the interpretation of legitimate expectations, while focusing on objective factors to support these, but allows for a broad and subjective approach, when significant alterations in the legal environment take place.

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355 Eiser v. Spain, Award, 4 May 2017, para. 387.
357 Eiser v. Spain, Award, 4 May 2017, para. 382.
358 Eiser v. Spain, Award, 4 May 2017, para. 362: “The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability.” and para. 363: “The ECT did not bar Spain from making appropriate changes to the regulatory regime of RD 661/2007. Thus, the Tribunal does not accept Claimants’ contention that RD 661/2007 gave them immutable economic rights that could not be altered by changes in the regulatory regime”.
359 Eiser v. Spain, Award, 4 May 2017, para. 382.
The approach that *Eiser* takes regarding due diligence is different to the approach in *Charanne* and *Isolux*. In both *Charanne* and *Isolux*, the investor’s due diligence was an important circumstance for the tribunals. Just like *Eiser*, *Isolux* also concerns the 2013 regulations. The key difference between these cases is that in *Isolux*, the decision to invest was made after the 2007 regulations had been modified and altered several times. Because of this, and the fact that the investor also should have taken into account the Spanish Supreme Court decisions, the tribunal in *Isolux* found that there was no breach of the FET standard. In *Eiser*, the decisions and the argument of the investor’s due diligence was brought to the attention of the tribunal by Spain, however, the tribunal did not consider this argument in its decision.

### 6.4. Novenergia II v. Spain

In this case, the claimant invested in PV facilities under the 2007 regime and argued that it had legitimate expectations of the fixed FIT for the remainder of the plants’ lifetimes. They argued that their expectations were reasonable, since Spain actively promoted the perception of their legal investment regime as stable, transparent and welcoming to RE investors. They further contended that no reasonable investor would have foreseen that Spain would later dismantle the regime entirely. On the contrary, Spain argued that the claimant could not have expectations based on subjective interpretation of the legal framework when no objective factors supported these, and that no reasonable investor could have expected such a favourable investment environment indefinitely. Spain also emphasised the view that it had not deprived the investments of their value, as the measures continued to provide a reasonable rate of return as set out in Law 54/1997. 

Discussing the outer limits of the FET provision, the tribunal agreed with the claimant that undertakings and assurances by the host-state can be both explicit and implicit. The tribunal thus concluded

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360 *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. the Kingdom of Spain, SCC Case No. 2015/063, Final Award, 15 February 2018.*
361 *Novenergia II v. Spain*, Final Award, 15 February 2018, para. 553.
362 *Novenergia II v. Spain*, Final Award, 15 February 2018, paras. 555-556.
363 *Novenergia II v. Spain*, Final Award, 15 February 2018, para. 554.
364 *Novenergia II v. Spain*, Final Award, 15 February 2018, paras. 580 (c) and 594.
that an expectation of a stable legal framework can be derived from state conduct and/or statements.\footnote{Novenergia II v. Spain, Final Award, 15 February 2018, para. 651.} The tribunal therefore had to assess whether the investor’s expectations derived from the 2007 regime were legitimate and reasonable. Doing so, the tribunal agreed with Electrabel in that it should apply a balancing exercise when making such assessment, weighing in different circumstances, as the host-state is not obliged to elevate unconditionally the interests of the foreign investor above all national interests.\footnote{Novenergia II v. Spain, Final Award, 15 February 2018, para. 657.}

In the tribunals view, the statements made prior to the investment and in the prospectus incentivised investors to invest in Spain’s RE sector.\footnote{Novenergia II v. Spain, Final Award, 15 February 2018, paras. 667-669.} The tribunal was unconvinced with Spain’s arguments that a reasonable investor could not have expected anything more than a reasonable rate of return\footnote{Novenergia II v. Spain, Final Award, 15 February 2018, paras. 692-694.} and that a due diligence of the legal framework would have proven it impossible to achieve the fixed FIT for the remainder of the plants’ lifetime.\footnote{Novenergia II v. Spain, Final Award, 15 February 2018, paras. 674-679.} Thus, the tribunal consequently reached the conclusion that the investor had, at the time of the investment, established a legitimate expectation that the stable legal framework would be preserved throughout the investment. This expectation was reasonably derived from the general legislation on which the investment was based (RD 661/2007) and additional assurances made by Spain to investors in PV facilities.\footnote{Novenergia II v. Spain, Final Award, 15 February 2018, paras. 666-669 and 681.} These assurances were made through the investment prospectus The Sun Can Be All Yours which was aimed at potential investors. It included statements such as “[t]he return on the investment is reasonable and can sometimes reach up to 15%”. It also stated that investors would “obtain a maximum return on the investment” throughout the lifespan of the facility.\footnote{Novenergia II v. Spain, Final Award, 15 February 2018, para. 668.} The tribunal concluded that the FET standard had been breached, since nothing contradicted the guaranteed FIT in RD 661/2007 and the surrounding statements in the prospectus The Sun Can Be All Yours.\footnote{Novenergia II v. Spain, Final Award, 15 February 2018, para. 697.}

Thus, Novenergia II took a broad approach when concluding that an investor could have legitimate expectations on the basis of general legislation at the time of the investment and statements made by the host-state which was not directly addressed to the investor. This broad approach contradicts the narrow approach taken in Charanne and Isolux. However, the award was not decided solely on the
fact that the investor relied upon the legislation at the time of the investment. The tribunal clearly stated that legitimate expectations were also supported by the prospectus. This indicates that the tribunal sought to “anchor” the investor’s expectations to additional objective factors that would legitimise these. By interpretation, it found that the statements in the prospectus constituted such objective factor, implying a lower threshold for objective support than previous awards.

This approach significantly broadens the interpretation of the FET standard, as it allows for the establishment of legitimate expectations primarily based on the general framework itself and the assumption that it will not be subject to change, along with assurances that are not directly made to the investor. This interpretation is confirmed by a number of arbitral awards, some of them analysed below. Compared to Eiser, the approach in Novenergia II is also more lenient. As Eiser, it accepts general legislation as a source of legitimate expectations, but the protection in Novenergia II is not limited to abrupt and drastic changes. However, it must be kept in mind that Novenergia II put emphasis on the prospectus as well, which served as an additional objective factor, in spite of it not being directly addressed to the investor.

The tribunal rejected Spain’s argument that a thorough due diligence by the investor is required to establish the legitimacy of the investor’s expectations. The tribunal stated in this regard that since the legal framework was so adamantly clear, the analysis that the claimant made on the framework prior to the investment was sufficient, even though no due diligence report was filed in the case. This is a notable approach, especially in a case where the tribunal finds that expectations are legitimised through general legislation supported by a non-direct, public prospectus. Putting emphasis on a thorough due diligence analysis could have provided the tribunal with more objective support for the investor’s expectations, proving that the investor did not invest without assessing potential risks of the investment regime prior to investing.

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375 Novenergia II v. Spain, Final Award, 15 February 2018, para. 681.
376 Other cases that are not analysed in depth in this thesis that corroborate this interpretation are: (1) Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly 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, (2) Foresight Luxembourg Solar 1 S.À.R.L., Foresight Luxembourg Solar 2 S.À.R.L., Greentech Energy Systems A/S, GWM Renewable Energy I S.P.A. and GWM Renewable Energy II S.P.A. v. the Kingdom of Spain, SCC Case No. 2015/150, Final Award, 14 November 2018, and (3) SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award, 31 July 2019.
The tribunal acknowledged that the FET standard does not in itself create an obligation for the host-state to provide, at all times, a stable legal and business environment. However, *Novenergia II* arrived at a different conclusion than previous awards when weighing the interests of the state and investor, and consequently weighed the protection of the investor’s legitimate expectations higher than the state’s right to regulate. It is difficult to say why the tribunal chose another, more lenient approach than the previous awards, but an explanation might be sought in the fact that the prospectus was found to be specific enough to support the general legislation and the expectations derived from it. However, this still constitutes a less strict approach than previous awards, as the tribunal significantly lowered the threshold for what can be characterised as an objective factor, since the prospectus was not made directly to the investor nor included clear and concrete promises of stabilisation.

6.5. *Masdar v. Spain*\(^{378}\)

This case concerned a claim arising out of investments made by *Masdar*\(^{379}\) in three CSP plants in Spain in 2008 and 2009. The investments were made on the basis of the 2007 regime. *Masdar* submitted that it invested in the reasonable expectation that the plants would benefit from RD 661/2007 for their lifetimes and that, once they had been registered under the RAIPRE, there would be no retroactive changes.\(^{380}\) As a consequence of the measures adopted by Spain in 2013-2014, *Masdar* contended that Spain breached its obligation to afford FET under the ECT, in that its legitimate expectations upon which it invested had been frustrated.

*Masdar* submitted that it derived legitimate expectations from both the legal framework at the time of investment and from specific commitments addressed to *Masdar* directly.

As for the former, *Masdar* argued that the entire purpose of RD 661/2007 was to induce investments\(^{381}\), and highlighted a press release published the day RD 661/2007 was enacted, stating that: “*Future tariff revisions shall not be applied to existing facilities. This guarantees legal certainty for the electricity producer and stability for the sector [...]***382. They relied especially upon the stabilising

\(^{378}\) *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018.

\(^{379}\) *Masdar Solar & Wind Cooperatief U.A.*


\(^{381}\) *Masdar v. Spain*, Award, 16 May 2018, para. 401.

provision in RD 661/2007\textsuperscript{383} allegedly guaranteeing investors FITs for the lifetime of plants which had been registered within the specified window.\textsuperscript{384}

As for the latter, Masdar relied on a series of Ministerial Resolutions addressed to each CSP installation respectively. They were obtained during the registration process under the RAIPRE. The first in December 2009 as part of pre-registration, stating that each plant was registered and granted the remuneration regulated in RD 661/2007.\textsuperscript{385} New resolutions were issued in December 2010, confirming that the 2007 regime was applicable to each plant. These resolutions were an answer to enquiries made by Masdar (in the name of each specific plant) requesting confirmation of entitlement to the compensation conditions of RD 661/2007 for the plants’ operating life.\textsuperscript{386} They were given after the Spanish Government released the contemplated 2010 changes to the 2007 regime.\textsuperscript{387} Masdar claimed that these resolutions confirmed that each installation qualified for the 2007 regime throughout their operational lifetimes.\textsuperscript{388}

Spain denied that it was in breach of the FET provision in the ECT.\textsuperscript{389} It emphasised that Masdar could only expect a reasonable return, and that this right had been respected.\textsuperscript{390} Next, Spain relied on the decision in \textit{Charanne} while suggesting that Masdar had failed to conduct legal due diligence. Spain argued that, as they had given no specific commitments of stability, if Masdar had carried out due diligence of the legal framework, they would have understood that the 2007 regime could be modified.\textsuperscript{391} Spain further argued that no expectation could be derived from the stabilising provision in RD 661/2007\textsuperscript{392} specifically, as it did not preclude subsequent measures intended to ensure economic sustainability and to correct over-remuneration within the bounds of ensuring reasonable return.\textsuperscript{393}

\textsuperscript{383} RD 661/2007, Article 44.3.
\textsuperscript{384} \textit{Masdar v. Spain}, Award, 16 May 2018, para. 349.
\textsuperscript{385} \textit{Masdar v. Spain}, Award, 16 May 2018, paras. 516 and 517.
\textsuperscript{386} \textit{Masdar v. Spain}, Award, 16 May 2018, paras 518-519.
\textsuperscript{387} \textit{Masdar v. Spain}, Award, 16 May 2018, paras. 371-372.
\textsuperscript{388} \textit{Masdar v. Spain}, Award, 16 May 2018, paras. 370-378 and 401.
\textsuperscript{389} \textit{Masdar v. Spain}, Award, 16 May 2018, para. 479.
\textsuperscript{390} \textit{Masdar v. Spain}, Award, 16 May 2018, para. 473.
\textsuperscript{391} \textit{Masdar v. Spain}, Award, 16 May 2018, para. 470.
\textsuperscript{392} RD 661/2007, Article 44.3.
\textsuperscript{393} \textit{Masdar v. Spain}, Award, 16 May 2018, para. 453.
The tribunal began its analysis by setting in stone that a state has a right to amend its legislation, and that investors cannot expect legal stability absent of explicit undertakings by the state. It also underlined that this right is not unfettered. In its analysis of the FET standard, the tribunal stated that, notwithstanding the historical variations in application of the standard, it features that an investor can be confident that 1) the legal framework in which the investment has been made will not be subject to unreasonable or unjustified modification (as the respective tribunal found to be the case in *Eiser*), and 2) the legal framework will not be subject to modification in a manner contrary to specific commitments made to the investor.

Having concluded that expectations of stability requires undertakings, the tribunal first discuss from what sources such undertakings can originate. It considers, with its own words, "two schools of thought" on this question. One school considers that specific commitments can result from general statements in general laws or regulations. The other considers that such commitments must be specific and made directly to the investor. In the terminology of this thesis, the first school corresponds to the broad approach to which sources legitimate expectation can originate from, while the second school is the narrow approach. The tribunal considered whether relevant undertakings, i.e. objective factors were present in the relevant sources of both schools.

As for if general legislation gave rise to legitimate expectations of stability, the tribunal found that it did, especially because of the stabilising mechanisms included in general regulations, in particular the stabilising provision in RD 661/2007. In sum, the tribunal concluded that “[...] from the perspective of this first school of thought, the fact that RD 661/2007 [...] included a stabilisation clause is sufficient to exclude any modification of the law, so far as investors, which had made investments in reliance upon its terms, were concerned”. It thus acknowledged that if the broad approach is to be followed, the observation of an objective factor - being the stabilising provision in RD 661/2007 - makes expectations based on this general legislation legitimate.

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396 *Masdar v. Spain*, Award, 16 May 2018, para. 484.
399 RD 661/2007, Article 44.3.
402 RD 661/2007, Article 44.3.
When assessing whether Masdar had legitimate expectations according to the first school of thought, it imposed the condition that, for general legislation to be regarded as a source of legitimate expectations, the investor must demonstrate that it has exercised appropriate due diligence, familiarising itself with existing laws.403 For Masdar, the tribunal found this to be the case, as they had commissioned external reports, engaged with co-venturers which had detailed knowledge of the regulatory framework, held extensive discussions with Spanish banks (which put up 80% capital for the projects) and consulted law firms in respect of regulatory issues.404 Based on this, the tribunal stated that a reasonable investor would not have found indications that there was the slightest possibility that RD 661/2007 would be abolished.405

When considering the second school of thought, the tribunal made clear that, according to its adherents, stabilisation provisions offered in general legislation or political announcements (press releases, prospectuses, etc.) cannot create legitimate expectations. The tribunal concluded that the Ministerial Resolutions addressed directly to each company, confirming that each plant was qualified under the RD 661/2007 economic regime for their operational lifetime, constituted specific commitments to Masdar, on which they derived a legitimate expectation of the benefits granted by RD 661/2007 would remain unaltered.406

In conclusion, the tribunal found that “Because of these specific commitments, and irrespective of whether the general provisions of RD 661/2007 would be sufficient […], the Tribunal concludes that, in any event, Claimant had legitimate expectations that the benefits granted by RD 661/2007 would remain unaltered”.407 By adopting the disputed measures in 2013-2014, Spain had breached its FET obligations under the ECT.408

The decision is thus based on the second school of thought and the observation of objective factors of stabilisation. In this case, the tribunal found the resolutions issued to each specific plant to constitute objective factors. In this way, the reasoning in Masdar resembles the reasoning in Charanne, as its decision is based on the narrow approach and requires specific commitments given directly to the investor. However, taking the tribunal’s reasoning into account as a whole, it is more accepting of the

403 Masdar v. Spain, Award, 16 May 2018, para. 494.
404 Masdar v. Spain, Award, 16 May 2018, para. 497.
405 Masdar v. Spain, Award, 16 May 2018, paras. 497-498.
406 Masdar v. Spain, Award, 16 May 2018, para. 520.
408 Masdar v. Spain, Award, 16 May 2018, para. 522.
broad approach than *Charanne*, as it does not reject the notion that provisions found in general legislation could have been sufficient, if no objective factors outside the general legislation were present. Thus, it does not reject the broad approach, and finds that from the perspective of this approach, the stabilising provision in RD 661/2007\(^{409}\) would have constituted an objective factor sufficient to act as the origin of legitimate expectations. Therefore, the tribunal did not have to engage in the discussion of which school/approach ought to be followed in general, as it found specific commitments constituting objectives factors of stabilisation to be present outside the general legislation.

Another important aspect is the deviation in reasoning between the *Eiser* and *Masdar* tribunals. Both cases concern investments made in reliance of the 2007 regime which was then abolished by the 2013 regime. Both cases found that Spain had breached their obligation to accord FET. However, *Eiser* found that the 2013 regime resulted in a revision so drastic and abrupt, that it did not find it necessary to consider where the investor derived its expectations from. As the *Masdar* tribunal finds it necessary to first consider the investors legitimate expectations, this suggests that it does not consider the changes to the regime to be as drastic as the *Eiser* tribunal did. If it did, it would have been able to decide in favour of the investor on this fact alone. The divergence makes it challenging to draw a line of when changes are to be constituted as drastic and abrupt. This does not contribute to the predictability of the FET standard that the same regulatory changes are assessed differently by two tribunals in similar cases.

However, one way that *Masdar* makes the application of the FET obligation more predictable is by 1) not rejecting that legitimate expectations can indeed arise from general legislation, and 2) emphasising the importance of the investor's due diligence in the event where the investor claims to have derived legitimate expectations from general legislation.\(^{410}\) *Masdar* reinstates the importance of the investor's due diligence after *Eiser* and *Novenergia II* diminished its importance as an objective factor in their assessments.

\(^{409}\) RD 661/2007, Article 44.3.

\(^{410}\) Another case that focused heavily on due diligence was *Belenergia v. Italy* (*Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019). In this award, the fact that the investor had been diligent did not help them in the end, since Italy was favoured in the award. The reason for this was that the tribunal found that a "prudent" investor would have come to another conclusion in their due diligence report. The tribunal stated, "*Thus, the Tribunal cannot but agree with Italy that a "prudent" investor should have predicted Italy’s reduction of feed-in tariffs and derogation of the possibility to combine two incentives (feed-in tariffs with minimum prices)"* (*Belenergia v. Italy*, Award, 6 August 2019, para. 600).
6.6. 9REN v. Spain411

In this case, 9REN who had invested in a number of PV facilities in 2008, submitted that Spain had created a legitimate expectation that the benefits and promises granted by the 2007 regime would be honoured by Spain, and that this expectation was frustrated by the later changes of the regime.412 They relied particularly on the stabilising provision in RD 661/2007413 stating that future tariff revisions would not be retroactive.414 Spain relied upon its sovereign right to amend regulations within the limits of Law 54/1997. It particularly argued that any diligent investor in 2008 would have known that the legislator had no right to create irrevocable commitments (due to the Spanish Supreme Court decisions), and thus, could have no legitimate expectation that the framework would persist forever.415

The tribunal commenced its assessment by establishing that an enforceable legitimate expectation requires a clear and specific commitment.416 It found that no specific commitment was made to the claimant directly.417 If the tribunal were to follow the narrow approach, this would have sufficed to decide against the investor. But a broad approach was applied, as the tribunal accepted the argument that legitimate expectations “may arise from rules 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 on making his investment”.418 It argued that there are no reasons to why clear and specific commitments cannot arise from a regulation which is made to induce investments419, thus distinguishing between two kinds of “specific” commitments which can both give rise to legitimate expectations: those that are specific to the addressee, and those that are specific regarding their object and purpose. The tribunal found that the stabilising provision in RD 661/2007420 fall into the latter

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411 9REN Holding S.À.R.L. v. the Kingdom of Spain, ICSID Case No. ARB/15/15, Award, 31 May 2019.
412 9REN v. Spain, Award 31 May 2019, para. 222.
413 RD 661/2007, Article 44.3.
415 9REN v. Spain, Award 31 May 2019, paras. 233 and 237.
416 9REN v. Spain, Award 31 May 2019, para. 295.
417 9REN v. Spain, Award 31 May 2019, para. 292.
418 9REN v. Spain, Award 31 May 2019, para. 294.
419 9REN v. Spain, Award 31 May 2019, para. 295.
420 RD 661/2007, Article 44.3.
category. On this basis, it found that 9REN had a legitimate expectation that the FIT in RD 661/2007 would continue for the operational life of the PV facilities.

The tribunal acknowledged that legitimate expectations could arise from commitments in general legislation without any need for commitments given directly to the individual investor. This was made possible by an expanded interpretation of what can be characterised as “specific”. It adds the possibility of a commitment being “specific” if it has a specific aim to induce investments. Earlier awards deny this broad approach (e.g. Charanne and Isolux), as they argue that a commitment is only “specific” if it is made directly to the investor. Thus, from the narrow point of view of these awards, commitments in general legislation cannot constitute objective factors of stabilisation, as legislation is characterised by being general and not specific.

With regard to Spain’s argument about due diligence, the tribunal found that there were no indications that due diligence had not been performed by the claimant. It put less emphasis on the argument of due diligence than Charanne and Isolux, which is materialised in its statement that “for the reasons already discussed, the Charanne tribunal placed too much emphasis on the domestic jurisprudence of the Spanish Supreme Court”. Thus, the tribunal follows the interpretation of due diligence in Eiser and Novenergia II, where its importance as an objective factor is diminished.

Concerning the Supreme Court decisions, the tribunal argued that the question was not whether Spain constitutionally had a right to regulate, the question was whether the costs of such changes should fall on Spain or the investors. It stated in this regard that an award in favour of the investor would merely constitute a transfer of the costs of the regulatory changes from the investor back to Spain, without questioning the constitutionality of the measures. The Tribunal concluded that even though unforeseeable circumstances arose for Spain, it had accepted its international obligations under the ECT, including the FET provision. It argued that “[...] the Tribunal’s obligation is not to rewrite history but to give effect to the RD 661/2007 embodiment of government policy to the extent RD 661/2007 created legitimate expectations of stability in accordance with its terms.”

421 9REN v. Spain, Award 31 May 2019, para. 294.
422 9REN v. Spain, Award 31 May 2019, para. 296.
425 9REN v. Spain, Award 31 May 2019, para. 258.
426 9REN v. Spain, Award 31 May 2019, para. 259.
The tribunal further concluded that the new regime frustrated 9REN’s legitimate expectations, since the new regime was fundamentally different from what was guaranteed at the time of the investment. In this assessment it was of particular importance that 9REN did not invest in the expectation of a reasonable rate of return unilaterally defined by Spain, but rather in the expectation of the precise tariffs established in the 2007 regime.\textsuperscript{427}

When assessing whether this frustration amounted to a breach of the FET provision in the ECT, the tribunal emphasised the characteristics of RE investments, and the interplay between these and the disputed measures enacted by Spain:

> “The financial vulnerability of renewable energy projects is the heavy up-front capital costs. Once money is “sunk” in the PV facilities, the funds of the developer (and its bankers) are locked into the FIT contracts with their investments effectively (as the Claimant put it) long-term hostages. If energy prices rise, the benefit accrues to Spain not the operators who, in Spain’s view, will recover only what Spain unilaterally declares to be a reasonable return by reference to the bond market. On the other hand, if energy prices fall, Spain claims the right to resilе from what the Tribunal has concluded was a regulatory guarantee of price stability. Spain’s position is that it alone should benefit from rising prices, but the burden of falling prices is to be off-loaded onto investors. As a matter of Spanish domestic law, such treatment of local investors has been held to be constitutional, but in the Tribunal’s view, such one-sided treatment is neither fair nor equitable. Under the ECT, the Claimant, as a foreign investor, was entitled to fair and equitable treatment and in this case did not receive it.”\textsuperscript{428}

This demonstrates how the FET provision can expand to the characteristics of RE investments. Specifically, when assessing whether the treatment was fair and equitable, the tribunal emphasised the heavy up-front capital costs and that investors are heavily dependent on subsidy schemes.\textsuperscript{429} The importance of stable subsidy schemes in order for investors to recover sunk capital and a return,

\textsuperscript{427} 9REN v. Spain, Award 31 May 2019, para. 303.
\textsuperscript{428} 9REN v. Spain, Award 31 May 2019, para. 311.
\textsuperscript{429} This consideration of the legal investment environment in which these investments take place was also taken into account in Antin v. Spain, in which the tribunal stated that, “The purpose of subsidization in [the RE sector] is to allow the technologies to be developed in the hope that over time the costs associated therewith will decline, thus making RE technologies more competitive.” (Antin v. Spain, Award 15 June 2018, para. 540). The tribunal in Antin v. Spain, decided in favour of the investor as well.
renders the stability of the general regulatory framework on which they relied of paramount importance for investors, as subsidy schemes are often found in general legislation. Considering this, one could argue that this constitutes a compelling reason for the move towards applying a broad approach to which sources legitimate expectations can originate from.

9REN does take this broad approach, and applies it in a more lenient way than Novenergia II and Masdar especially. Masdar was decided on the basis of the narrow approach and specific commitments made directly to the investor, but it did not reject the broad approach altogether like Charanne and Isolux did. Novenergia II was decided based on provisions in the general framework, but the tribunal also sought to “anchor” the investor’s expectations to additional objective factors. 9REN also based its decision on the observation of an objective factor in the general legislation, but as this objective factor alone was found sufficient, the interpretation is slightly more lenient than in Novenergia II.

6.7. Cube v. Spain

Cube v. Spain concerned investments in the Spanish PV and hydro sectors. The investors contended that they invested in reliance of the 2007 regime and that the regulatory reforms of 2013-2014 defeated their legitimate expectations amounting to a violation of the FET obligation under the ECT. In its defence, Spain submitted that attention should be paid to the decision in Charanne while especially emphasising the need for due diligence, and that legitimate expectations can only be derived from specific commitments made to the investor directly and not from the general legal framework itself.

When assessing the question of the investor's legitimate expectations, the tribunal continued the broad approach in 9REN, as it did not consider a specific commitment made directly to each investor necessary for a legitimate expectation to arise. Instead, it stated that:

“At least in the case of a highly-regulated industry, and provided that the representations are sufficiently clear and unequivocal, it is enough that a regulatory regime be established

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with the overt aim of attracting investments by holding out to potential investors the prospect that the investments will be subject to a set of specific regulatory principles that will, as a matter of deliberate policy, be maintained in force for a finite length of time."432

Legitimate expectations can arise from such frameworks, if the investment relied upon it and if those expectations are objectively reasonable.433 In relation to the PV investments, the tribunal found that RD 661/2007 created expectations entitling the investors to rely on the maintenance of the tariffs set out in RD 661/2007 for the operating life of each power plant.434

In relation to the hydro investments, the majority of the tribunal’s finding was different. These investments were made later than the PV investments (which were made in 2008). They were made after the modifications in 2010 had given indications that the 2007-regime would not remain unchanged. Because of this, the expectation was narrower in scope than the expectation on which the PV investments were made and thus resulted in lesser compensation. It was limited to the expectation that there would be no dramatic or fundamental change in the regime, and in particular that remuneration would not cease or be capped once the plant had made (what Spain deemed to be) a reasonable return.435 This finding by the majority is divergent from the decision in Isolux, which also concerned investments made after the measures adopted in 2010. Isolux rejected the investor’s claim inter alia because changes had been made to the regime prior to their investment, and thus could not have created legitimate expectations of a stable regime.436

The tribunal specified that the investor’s reliance on the 2007 regime was justified as 1) the text of RD 661/2007 was clear and specific, 2) those representations were emphasised by a clear and specific restatement in the press release issued on the same day as RD 661/2007, 3) Spain did not show that any more exhaustive legal analysis would have produced any different understanding of the Spanish measures, and 4) the significance of the representations as to the stability of the 2007 regime was not a matter of Spanish law but of international law, in the context of the FET provision in the ECT.437

436 Isolux v. Spain, Award, 6 July 2016, para. 787.
This listing shows that the tribunal based its assessment of whether Cube had legitimate expectations of stability or not, on the observation of objective factors supporting these. In this case, it found that the text of RD 661/2007 and the accompanying press release sufficed to be such factors. Contrary to 9REN, the tribunal does not point to the particular stabilising provision in RD 661/2007, but refers to the regulation as a whole. However, it does point to certain characteristics of the regime which, in its view, show that the regime was designed to attract investments and intended to hold out the promise of regulatory stability. It emphasised that RD 661/2007 stipulated tariffs for 25 years and hereafter, included mechanisms for revising those tariffs, e.g. to the CPI, and a mechanism excluding future changes to the regime to be applicable to existing facilities registered under the regime. Additionally, the regime included mechanisms limiting volatility of market premiums (caps and floors), and for “closing” the regime to new entrants once certain capacity targets were reached. On the contrary, it did not find any objective factors that supported Spain’s claim that the regime only guaranteed a reasonable rate of return.

When assessing whether the changes made to the regulatory regime constituted a breach of the FET standard, the tribunal emphasised that states have the sovereign right to amend their legislation, but that states also have the right to make representations as to future treatment. The tribunal found the measures introduced by Spain in 2010 to be adjustments rather than repudiations of the 2007 regime, and thus did not consider these to be in violation of the FET provision in the ECT. In contrast, the tribunal found the measures adopted in 2013-2014 to constitute a violation of the FET obligation in the ECT, as in relation to the PV investments.

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438 RD 661/2007, Article 44.3.
440 RD 661/2007, Article 44.3.
441 RD 661/2007, Article 27.
The majority also found this to be the case for the hydro investments\(^{446}\), while one dissenting arbitrator found that when the hydro investment was made, the 2007 regime had already been changed significantly, which “must have put on alert every investor”\(^{447}\), as for the stability of the regime.

Spain argued that the investors due diligence was inadequate. The tribunal agreed that the documentary evidence of legal analysis by external advisors was very thin.\(^{448}\) However, the majority of the tribunal considered that the right to rely upon the representations made did not depend on there being evidence of any particular form or scale of legal due diligence by external advisors. It was enough that the investors had made an appraisal of the regulatory regime and based its decision to invest upon the understanding that it would not be significantly amended or abolished retroactively.\(^{449}\) Due diligence (and whatever findings it makes) does not affect the investor’s entitlement to rely upon representations, provided that the investor has acted in reliance upon these.\(^{450}\) This approach to due diligence places this case in the group of cases consisting of *Eiser, Novenergia II* and *9REN* which does not put much emphasis on the due diligence of the investor. However, this award goes further by arguing that due diligence is more or less without relevance. These cases are contrasted by *Charanne, Isolux* and *Masdar* which put more focus on this circumstance and uses due diligence as an objective factor to assess the justification of the investors alleged expectations.

*Cube* follows the broad approach which *Eiser, Novenergia II* and *9REN* also did. It is primarily reminiscent of *9REN* as it accepts that legitimate expectations can originate from general legislation, because specific commitments can also be specific with regard to their aim and purpose. Like *9REN*, it also takes into account the characteristics of the sector in which it applies the standard, as it emphasises that the RE sector is highly regulated. It considers this fact when concluding, that “[a]t least in the case of a highly-regulated industry” a specific commitment directly to each investor is not necessary for a legitimate expectation to arise.

*Cube* corroborates the awards rendered before it, except *Eiser*, as it bases its decision and interpretation on the observation of objective factors supporting the investors alleged expectations.

\(^{446}\) *Cube v. Spain*, Decision of Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, para. 442.


The fact that a line of cases applied the broad approach and based their decisions on objective factors allows for the argument that the application of the FET standard had started to take form as a more manageable standard, facilitating predictability and forward planning for RE investors, at the time of these awards’ publication.

Nonetheless, it is evident that the awards are not aligned in relation to what constitutes an objective factor. Whereas 9REN based its decision on the stabilising provision in RD 661/2007 as the only objective factor, Cube additionally anchors the legitimacy of the investor’s expectations to the press release accompanying RD 661/2007. In the same way, Novenergia II supported the legitimacy of expectations to something more than the regulation itself. In Novenergia II it was the prospectus that was found to be an objective factor, and not the press release. This divergence in interpretation of what constitutes an objective factor makes the application of the FET less predictable. However, in general, the awards following Charanne and Isolux slowly moved towards being more investor-friendly.

6.8. PV Investors v. Spain

The previous cases analysed have different interpretations of what constitutes an objective factor supporting the investor’s expectations. In PV Investors, the tribunal applied a broad approach reminiscent to 9REN and Cube but reaches a different conclusion, as it finds the objective factor to exist in Law 54/1997 and not in RD 661/2007, as the previous awards did.

6.8.1. Case analysis

The dispute concerned a group of investors who invested approximately EUR 2 billion in PV installations in Spain. The investors began investing under RD 661/2007, and all of the PV installations were registered under the RAIPRE. They contended that they relied on the regime in RD 661/2007 when making the investment, and that Spain breached its obligation to accord FET under the ECT,
by enacting subsequent measures altering and ultimately withdrawing the framework. Spain’s primary defence was that the investors were only entitled to a reasonable rate of return, and that this right had been respected with every measure enacted. In response to this, the investors put forward an alternative claim, arguing that, in the event that the tribunal found their legitimate expectations were limited to a reasonable rate of return, Spain still faced liability under the ECT, as the measures in 2010 and 2013-2014 significantly lowered the rate of return.\(^{455}\)

As for their legitimate expectations, the investors submitted that they reasonably derived these from 1) explicit guarantees and assurances made by Spain in the text of RD 661/2007 (especially the stabilising provision herein\(^{456}\)) and 2) public statements made by Spain and various entities regarding the application of the regime.\(^{457}\)

The tribunal found that no reasonable investor could expect an immutable tariff for the operational lifetime of their plants. It considered both if the investors had derived legitimate expectations from the legal framework or from specific commitments (in this way, following the trend of acknowledging that expectations can be derived from specific commitments in the general legal framework at the time of the investment).\(^{458}\)

In respect of the legal framework in force at the time of the investment, the tribunal was "[...] unable to discern in [the stabilising provision\(^{459}\)] a stabilization commitment that would guarantee the Claimants an immutable tariff for the operational lifetime of their plant".\(^{460}\) This finding was based on the following arguments:

First, it was evident from the alterations that occurred since the inception of the special regime in Law 54/1997 that the framework was subject to continuous changes. Importantly RD 436/2004 (which preceded the 2007 regime) contained a clause analogous to the stabilising provision in RD

\(^{455}\) PV Investors v. Spain, Final Award, paras. 213-217.
\(^{456}\) RD 661/2007, Article 44.3.
\(^{457}\) PV Investors v. Spain, Final Award, paras. 238 and 257.
\(^{458}\) PV Investors v. Spain, Final Award, para. 614.
\(^{459}\) RD 661/2007, Article 44.3.
\(^{460}\) PV Investors v. Spain, Final Award, para. 600.

This interpretation of Article 44.3 of RD 661/2007 is divergent from Masdar as the tribunal in this case found that this article was “a stabilisation clause [...] sufficient to exclude any modification of the law, so far as investors, which had made investments in reliance upon its terms, were concerned.” (Masdar v. Spain, Award, 16 May 2018, para. 503).
661/2007\textsuperscript{461}, and that specific clause had not barred the introduction of RD 661/2007 under which the investors decided to invest.\textsuperscript{462}

Second, citing and following Charanne, the tribunal emphasised the decisions from the Spanish Supreme Court preceding the investment.\textsuperscript{463} In relation to this, Spain argued that the investor’s due diligence was inadequate.\textsuperscript{464} The tribunal found that,

“[...] this debate lacks relevance for present purposes. Indeed, whether the Claimants engaged in diligence or not and whether that diligence was “due” or not, cannot alter the fact that on the basis of the law and the jurisprudence the Claimants knew or should have known that changes to the regulatory framework could happen. As a consequence, expectations that they would not happen cannot be deemed legitimate.”\textsuperscript{465}

Following this, the tribunal also concluded that none of the commitments made by Spain invoked by the investors were specific enough for them to expect an immutable tariff.\textsuperscript{466} It specifically referred to the government statements made in the prospectus The Sun Can Be All Yours, which was inter alia relied upon in Novenergia II, and the press release which Cube relied upon. The tribunal in PV Investors found that the statements included in these were either just reiterations of the content in RD 661/2007 or too general to engender legitimate expectations that the framework would not later be modified.\textsuperscript{467}

Thus, the tribunal did not find any objective factors supporting the investor’s expectation of an immutable tariff in either RD 661/2007 or in any of the government assurances, which many previous awards had found. PV Investors therefore had a different appreciation of what constitutes an objective factor, as it did not find that any of the above statements could legitimately give rise to legitimate expectations.

Having denied that the investors could have expected an immutable tariff, the tribunal went on to consider what, if anything, they could have expected. In other words, the tribunal sought to find an

\textsuperscript{461} RD 661/2007, Article 44.3.
\textsuperscript{462} PV Investors v. Spain, Final Award, para. 602.
\textsuperscript{463} PV Investors v. Spain, Final Award, paras. 603-610.
\textsuperscript{464} PV Investors v. Spain, Final Award, para. 407.
\textsuperscript{465} PV Investors v. Spain, Final Award, para. 613.
\textsuperscript{466} PV Investors v. Spain, Final Award, paras. 614-615.
\textsuperscript{467} PV Investors v. Spain, Final Award, para. 615.
objective factor that could legitimately have created expectations (of something else than an immu-
table tariff) for the investor. The tribunal found that in “[t]he legislative centerpiece”\textsuperscript{468} of Spain’s
electricity regulation, Law 54/1997, the remuneration in the special regime was intended to enable
energy producers to ”achieve reasonable rates of return based on the cost of money in capital mar-
kets”\textsuperscript{469}. It agreed with Spain that the “[…] cardinal principle emerging from […] the 1997 Electricity
Law and the implementing decrees up to RD 661/2007 is […] the guarantee of a reasonable rate of
return for investors operating in the Special Regime.”\textsuperscript{470}

It thus found that the investors had a legitimate expectation of, solely, a reasonable rate of return. The
investors were only entitled to compensation if it was established that the disputed measures violated
the guarantee of a reasonable rate of return. It argued that, “This approach strikes the right balance
between, on the one hand, the protection of investors who have committed substantial resources in a
sector, […] and, on the other hand, Spain’s right to regulate and adapt its framework to changed
circumstances […]”.\textsuperscript{471} This statement shows that the tribunal takes a different approach to the weighing
exercise between protection of investors and states’ right to regulate than the previously analysed
cases. Instead, it aims for a middle ground where the investor is not deprived the entire value of the
investment and where the state has the necessary scope of manoeuvre to change its framework to
changed circumstances.

After a rigorous analysis, the tribunal concluded that the regulatory framework, at the time of the
investments, was designed to offer a 7% return\textsuperscript{472} after tax.\textsuperscript{473} For 10 out of 19 of the investors, the
rate of return was below 7%. Therefore, these were entitled to compensation.\textsuperscript{474}

Even though the tribunal decided in favour of the investors’ alternative claim and awarded the 10
claimants a total of EUR 91.1 million, the decision can be seen as a major victory for Spain, as the
investors’ principal claim of approximately EUR 2 billion was rejected.

\textsuperscript{468} PV Investors v. Spain, Final Award, para. 590.
\textsuperscript{469} PV Investors v. Spain, Final Award, para. 590.
\textsuperscript{470} PV Investors v. Spain, Final Award, para. 596.
\textsuperscript{471} PV Investors v. Spain, Final Award, para. 639.
\textsuperscript{472} The tribunal arrived at this percentage inter alia because various documents that were available at the time of the
investment describing the regime, referred to rates of return in the area of 7%, 8% or in between the two (PV Investors v. Spain,
Final Award, paras. 701-710).
\textsuperscript{473} PV Investors v. Spain, Final Award, paras. 709-754.
\textsuperscript{474} PV Investors v. Spain, Final Award, para. 847.
The award in *PV Investors* applied the broad approach, as it was accepted that expectations could legitimately be derived from the general legislation itself.

It is clear that the tribunal put emphasis on objective factors as it stated that it did “[…] *not consider it reasonable for investors to have expected – from an objective viewpoint and regardless of what their subjective belief may have been – that no regulatory changes to RD 661/2007 affecting their investments would ever occur*” [emphasis added].\(^{475}\) However, the objective factor that was found to support the investor’s expectations was an entirely different one than the cases before *PV Investors* had identified, even though the tribunals were presented with the same statements. The tribunal found that expectations could only be derived from Law 54/1997, characterised as the “*legislative centrepiece*”\(^{476}\) of the investment framework, and its *cardinal principle* of the law and the entire framework: a reasonable rate of return. Thus, it did not accept the Royal Decree provisions granting FITs as constituting objective factors as *Novenergia II, 9REN*, and *Cube* did. This interpretation may be, as the tribunal suggests itself, an attempt to strike a balance between the host-state’s right to regulate and the investor’s interests.

In regards to the argument regarding due diligence, the tribunal in *PV Investors* argued that it is without relevance as it would never change the fact that the claimant could not have a legitimate expectation to an immutable tariff. It thus agrees with the approach taken in *Cube* that due diligence is not relevant to the assessment of whether the claimant had legitimate expectations. According to the tribunal in *PV Investors*,

> “[…] this debate lacks relevance for present purposes. Indeed, whether the Claimants engaged in diligence or not and whether that diligence was “due” or not, cannot alter the fact that on the basis of the law and the jurisprudence the Claimants knew or should have known that changes to the regulatory framework could happen.”\(^{477}\)

In other words, according to *PV Investors* and *Cube*, the investor’s legitimate expectations are neither confirmed nor invalidated by their due diligence prior to the investment. The only relevant thing is whether the tribunal finds that the investor actually had a legitimate reason for their expectations based on an assessment of the commitments made.

\(^{475}\) *PV Investors v. Spain*, Final Award, para. 612.
\(^{476}\) *PV Investors v. Spain*, Final Award, para. 590.
\(^{477}\) *PV Investors v. Spain*, Final Award, para. 613.
6.8.2. **PV Investors and the harmonious development in the application of legitimate expectations**

During the proceedings, the investors contended that the tribunal should uphold the primary claim in line with its duty to ensure the harmonious development of international investment law.\(^{478}\) On this, the tribunal stated that it had reviewed all of the awards rendered in investment treaty arbitrations concerning Spanish renewable energies.\(^{479}\) It summarises that a number of tribunals (e.g. *Eiser*, *Masdar* and *Novenergia II*) have upheld claims similar to the investors primary claim. Other cases have resulted in a dismissal of claims (e.g. *Charanne* and *Isolux*) while a third group\(^{480}\) of tribunals have upheld claims with similarities to the investors’ alternative claim.\(^{481}\) Nonetheless, it emphasises that it is not bound by previous decisions and that it has reached its own conclusion based on the facts, submissions and claims before it.\(^{482}\)

Having concluded that it is not bound by previous awards, the tribunal underlined that it must pay due consideration to earlier decisions. Specifically, it believed that, absent of compelling contrary grounds, it had a duty to adopt principles established in a series of consistent cases, and "[...] a duty to contribute to the harmonious development of international investment law in furtherance of the certainty of the rule of law".\(^{483}\)

It can be discussed whether the decision contributes to the harmonious development of international investment law inasmuch as it diverts from the cases previously analysed. On the one hand, it reiterates the broad approach that legitimate expectations can derive from both specific commitments (specific with regard to their aim) made in the general legislation and from commitments made to the investor directly. It also bases its decision on the observation of objective factors supporting the investors expectation. On the other hand, it is divergent from other cases upholding claims “*broadly similar to the Primary Claim in this arbitration*”\(^{484}\) in the tribunal’s own words (referring to e.g. *Eiser* and *Novenergia II*). *Cube* and *9REN* can be added to the list of cases with similar timing in their

\(^{478}\) *PV Investors v. Spain*, Final Award, para. 361.

\(^{479}\) *PV Investors v. Spain*, Final Award, para. 552.

\(^{480}\) These include the tribunals in *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, and *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019. These cases also concluded that the investors could only expect a reasonable return on their investments and awarded damages on this basis.

\(^{481}\) *PV Investors v. Spain*, Final Award, para. 553.

\(^{482}\) *PV Investors v. Spain*, Final Award, paras. 521 and 552.

\(^{483}\) *PV Investors v. Spain*, Final Award, para. 521.

\(^{484}\) *PV Investors v. Spain*, Final Award, para. 553.
investments, the same incentives, statements and disputed measures as in *PV Investors*. On the basis of the same framework and statements, the tribunal rejects the interpretation applied in the previous cases.

In the cases prior to *PV Investors* finding in favour of the investor, arguments reminiscent of the alternative claim were submitted – they were merely rejected. Even though the tribunal emphasised that it was not bound by previous decisions and that it concluded the case on the facts and claims submitted before it, it can be argued that there were no compelling reasons not to follow the interpretation applied in the line of previous cases with similar facts. This was also the overarching argument of the dissenting arbitrator, who found that the primary claim should have been upheld.\(^\text{485}\) Against this, it can be argued that even though e.g. *Novenergia II*, *9REN* and *Cube* all find that investors could legitimately expect FITs, they are not based on the same objective factors. That is to say that these cases are not harmonious even among themselves. However, the entirely different interpretation of what constitutes an objective factor, which that *PV Investors* applied, questions whether the application of the FET standard at its contemporary state facilitates predictability and forward planning for RE investors.

6.9. Sub-conclusion

Following these arbitral awards in the RE sector, it is still not possible to ascertain a uniform application of legitimate expectation under the FET standard with any certainty. As for their outcome, one group of cases dismiss all claims\(^\text{486}\), another finds that investors could legitimately expect the FITs

\(^{485}\) *PV Investors* v. Spain, Concurring and Dissenting Opinion of Charles N. Brower, 28 February 2020, paras. 16-17.

\(^{486}\) This group includes *Charanne* and *Isolux*. 
throughout their investment\textsuperscript{487} and a last group find that investors could only expect a reasonable rate of return\textsuperscript{488}.

However, it is possible to identify some common denominators and divergences in the awards’ interpretation of legitimate expectations under the FET standard. First, the cases can be distinguished from each other by their approach to the sources of legitimate expectations. \textit{Charanne, Isolux} and \textit{Masdar} applies a narrow approach while the remaining cases all apply a broad approach.

Second, in all cases except \textit{Eiser}, tribunals based their decision on the legitimacy of expectations on the observation of objective factors supporting the investors’ alleged expectations.

The most significant divergence between the cases concern these objective factors. They do not agree what constitutes such a factor. \textit{Novenergia II, 9REN} and \textit{Cube} are not uniform with regard to what statements (other than RD 661/2007 in its entirety) constituted objective factors. Although, the most significant difference is between these cases and \textit{PV Investors} which rejected RD 661/2007 and the surrounding statements as objective factors supporting an expectation of FITs. Instead, it found the objective factor supporting the investor’s expectations in the principle of a reasonable rate of return in Law 54/1997.

The cases assign the investor’s due diligence different degrees of importance. \textit{Charanne, Isolux} and \textit{Masdar} use due diligence as an additional objective factor when assessing the justification of the investors alleged expectations. \textit{Eiser, Novenergia II} and \textit{9REN} diminish its importance while \textit{Cube} and \textit{PV investors} renders it without relevance.

The findings gathered in this chapter are compiled in \textit{Table 1} below.

\textsuperscript{487} This group includes \textit{Eiser, Novenergia II, Masdar, 9REN} and \textit{Cube}. Other awards that were not analysed in depth in this thesis, in which the investor also prevailed in their primary claim include: \textit{Antin v. Spain; Foresight v. Spain; SolEs v. Spain; OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain}, ICSID Case No. ARB/15/36, Award, 6 September 2019; \textit{InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain}, ICSID Case No. ARB/14/12, Award, 2 August 2019; and \textit{Watkins Holdings S.à r.l. and others v. Kingdom of Spain}, ICSID Case No. ARB/15/44, Award, 21 January 2020.

\textsuperscript{488} This group includes \textit{PV Investors}. The other cases in which the investor was awarded damages, but only in regards to their alternative claim, have not been covered in depth in the thesis. They include: \textit{RREEF v. Spain, NextEra v. Spain, BayWa v. Spain} and \textit{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.
The trend towards applying a broad approach that have emerged, and the fact that tribunals agree that objective factors are needed to legitimise expectations makes the application of the element of legitimate expectations more predictable. However, the fact that tribunals apply different thresholds with regard to what constitutes an objective factor makes the application of legitimate expectations under the FET standard in RE cases unpredictable, and the application does not facilitate predictability and forward planning for investors.

"Objective factor" identified by tribunals supporting the investor's expectations

<table>
<thead>
<tr>
<th>Case</th>
<th>Narrow approach</th>
<th>Broad approach</th>
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<tbody>
<tr>
<td></td>
<td>Charanne</td>
<td>Isokex</td>
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<tr>
<td>RD 661/2007 in its entirety</td>
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<tr>
<td>Specific stabilising provision in RD 661/2007 (article 44.3)</td>
<td>X</td>
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<tr>
<td>Prospectus, &quot;The Sun Can Be All Yours&quot;</td>
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<td>Law 54/1997, principle of &quot;reasonable rate of return&quot;</td>
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<tr>
<td>Ministerial Resolutions given during the pre-registration process under the RAIPRE, confirming registration under the economic regime of RD 661/2007</td>
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<tr>
<td>Ministerial Resolutions confirming entitlement to the compensation conditions of RD 661/2007 for plants' operating life*</td>
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<tr>
<td>The investors due diligence</td>
<td>X</td>
<td>X</td>
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</tbody>
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*Contrary to the other "objective factors" presented in the table, these were only given to Masdar (X) The relevance of due diligence was diminished

Decided in favour of State
Decided in favour of investor
7. Assessing the contemporary application of the fair and equitable treatment standard and its consequences for predictability

7.1. Common denominators and divergences

From the cases analysed in this thesis, it becomes evident that the FET standard varies in certain interpretational aspects when applied by arbitral tribunals. Sometimes it expands its protection and sometimes it withdraws. The contemporary state of the FET standard is evident only by examining trends and divergences in series of individual cases. In the previous, a series of arbitral proceedings against Spain have been analysed and discussed. Generally, the cases concern similar factual situations. This makes similarities and differences in application of the standard noticeable.

Some common denominators and divergences can be identified.

In general, the Spanish RE cases do not question what elements are embedded in the FET standard (e.g. good faith, due process, transparency, reasonableness/proportionality and legitimate expectations as described in section 4.4.1.). The consistency in these elements improves the predictability of the application of the FET standard, which makes it more practically useful for the parties in RE investments when assessing their legal risk. However, if these individual elements are applied inconsistently, the predictability that the consensus contributes with is diminished.

The most substantial findings regarding this element concern the origin of such expectations, what factors supported the investor’s expectations and the relevance of due diligence.

7.1.1. From where can expectations legitimately be derived?

An essential part of the test of legitimate expectations is the question of from where they can originate. The most recent awards seem to suggest a trend, but due to the many variations in interpretation, it is difficult to deduce a uniform understanding of where from expectations can be derived.

As described in Masdar there have been two schools of thought on the issue. One school considers that commitments can result from statements in general laws or regulations, i.e. the broad approach. The other considers that such commitments have to be made directly to the investor, i.e. the narrow
approach. *Eiser, Novenergia II, 9REN, Cube* and *PV Investors* apply the broad approach, while *Charanne, Isolux* and *Masdar* adhere to the narrow approach.

A number of factors suggest that tribunals are concurringly moving towards the broad approach in cases regarding RE.

First, the broad approach is applied in all cases following *Charanne* and *Isolux*, only interrupted by *Masdar* which did not reject the broad approach, it merely decided the case according to the narrow approach since objective factors were present outside of the general legislation.

Second, the line of cases concluding in conformity with the broad approach consist of a number of awards based on similar facts, that all find that expectations can be derived from specific commitments in general legislation. This shows, that in a line of cases where the facts are similar, different tribunals chose to apply the same interpretation of the FET provision and the element of legitimate expectations. Thus, the results are not obscured by different interpretations as a result of incomparable circumstances.

Third, an interpretation accepting the broad approach serves to take into account the characteristics of the RE sector. Since RE producers are heavily reliant on subsidies, which are often regulated in general legislation, tribunals may have chosen the broad approach in order to accommodate their expectations, which primarily revolve around an assumption of a continuous right to a fixed FIT. This might also explain why the broad approach was accepted more frequently in RE cases compared to the conventional cases. The awards in *Cube* and *9REN* support this assertion.

The fact that *Charanne* and *Isolux* applied the narrow approach speaks against the argument that a trend towards consistent interpretation has been formed. The cases concerned only the 2010- and 2013-regulations respectively, and not both changes. However, this fails to explain the different outcome with regards to where from legitimate expectations can arise. These facts merely contribute to the assessment of what could be expected if expectations were in place, not from where such expectations could arise. There are no other specific indications to why the tribunal in *Charanne* and *Isolux* chose this approach, but it might simply be contributed to the fact that, at the time, recent awards such as *AES* and *Electrabel* had followed the narrow approach.

Assessing the above, it seems reasonable to suggest that the contemporary interpretation of the FET provision includes a broad approach to where from legitimate expectations can arise, allowing for
investors to derive legitimate expectations from the general legislation in place at the time of investment. The notable part of this trend is that the analyses in this thesis show that tribunals applying a broad approach tend to decide in favour of the investor, while tribunals applying the narrow approach mostly favour the host-state, the only exception being *Masdar* (which did not reject the broad approach).

It is significant for the protection of investors that legitimate expectations, and the FET standard’s availability for practical use for forward planning and legal risk assessment, that legitimate expectations may arise from specific commitments in general legislation and not only from specific commitments made directly to the investor. If the latter was the case, the investor would need additional, direct representations from the host-state to support the expectation of the legal framework persisting throughout the investment. The fact that this is not the case provides stability in instances where the investor has not been able to include a stabilisation clause in the investment agreement or achieve a specific representation promising stability. This is especially important in an industry where the investor’s quest is for stability over the lifetime of the investment.

Any common denominator that can be drawn makes it easier for investors and host-states to assess their legal position under the FET standard, both before and during the investment. With this trend of acknowledging specific commitments made in general legislation, RE investors will, with a reasonable degree of probability, be able to rely on such commitments moving forward. This thesis adopts the view that this approach is well founded, as the framework is often the main tool for inducing investments in the RE sector. This is particularly the case as investments are so heavily reliant on elements found in the general legislation (subsidies and accompanying stability measures).

Thus, if the contemporary trend is upheld, it grants investors a higher degree of protection and predictability. At the same time, it also requires the host-state to effectively evaluate the legal implications of its legislative changes and amendments, and what legislation can be altered without exceeding their regulatory scope of manoeuvre.

### 7.1.2. What can the investor legitimately expect?

The origin of legitimate expectations is one thing, assessing what could legitimately be expected is another. All the cases regarding RE facilities, except *Eiser*, based their decision of what the investor could legitimately expect on the observation of objective factors supporting the investor’s alleged
expectations. This is a common denominator, which would indicate the conclusion that this enhances the predictability of the application of legitimate expectations under the FET standard. However, as it follows from the above analysis, it varies what tribunals find the investor could legitimately expect. According to *Novenergia II*, *9REN* and *Cube* the investors could expect the FITs in place at the time of investment, while according to *PV Investors* they could only expect a reasonable rate of return. This derogation is ultimately a result of differences in interpretation and different thresholds as to what constitutes an objective factor sufficient to support alleged expectations.

The cases which found that FITs could legitimately be expected focused on the commitments made in the 2007 regime and the statements surrounding it and found that these constituted objective factors. *PV Investors* rejected that there were objective factors supporting an expectation of FITs. Instead, it reviewed the entire legal framework and found that the overarching principle of the remuneration scheme was a reasonable rate of return established in Law 54/1997, and that this constituted an objective factor. Some might say that this enables host-states to “bait and switch” on investors, by luring investors in with high remunerations in regulations while having protected itself with a lower remuneration in the principal act. Others might say that investors could have and should have reviewed the entire legal framework regulating their investment before investing, and that the decision in *PV Investors* strike a balance between the interests of investors and states. Inasmuch as this may be true, it is not the aim of this thesis to determine the *de lege ferenda* of this challenging weighing exercise, but to assess the application of legitimate expectations under the FET standard, if it is consistent and how the contemporary state of application affects its predictability for investors.

In relation to this, what should be particularly noted is that these cases share similar facts, but fall out differently. They all concern investments in solar power, they have the same timing of investment, concern the same commitments and statements, the same regulations, the same disputed measures and they are brought on the basis of the same treaty against the same host-state. Even though the tribunals operate based on the principle of *jura novit arbiter*, it is relevant to emphasise that in the other cases than *PV Investors*, arguments reminiscent of the alternative claim in *PV Investors* were

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489 Other tribunals have come to the same conclusion as *PV Investors*, among these *RREEF* and *BayWa*. However, in these cases the timing of investments were different. Investments were made either before the 2007 regime was enacted or after the 2007 regime was changed in 2010 (but before the time of investment in *Isolux*).
brought before the tribunals, but were dismissed. As much as this constitutes a difference in the interpretation of a particular set of facts, this also speaks to the predictability, or rather, unpredictability, of the FET standard.

Further underlining the unpredictable contemporary state of legitimate expectations, Novenergia II, 9REN and Cube which have similar outcomes as to what could legitimately be expected, are not consistent in their reasoning. They all rely on RD 661/2007 in its entirety. In addition, they each rely on an additional factor, but there is no convergence between these factors. Three cases, all considering the same scope of expectations to be legitimate, all presented with the same commitments and statements, all with a different interpretation of which of these statements are sufficient objective factors legitimising investors’ expectations.

The inconsistent threshold as to what constitutes an objective factor sufficient to legitimise an investor’s expectations points to the fact that there is no common understanding of the FET provision and the element of legitimate expectations. The tribunal in PV Investors explicitly state that their difference in approach is explained by “[...] a different appreciation of the circumstances that underpin the Spanish RE cases”. This may be an inherent consequence of settling disputes through ad hoc tribunals: they are not bound by precedence. In the end, the approach taken by the tribunal comes down to the views of the majority of the arbitrators, and whether they find that the interests of the state or the investor carries the greatest weight. This approach makes it impossible to ascertain the scope of the FET standard and the element of legitimate expectations especially. The inconsistency as to what constitutes an objective factor, i.e. what an investor could legitimately expect undermines the degree of protection and predictability granted by the tendency towards tribunals applying the same broad approach as to where expectations can be derived from.

7.1.3. The relevance of due diligence

The specific elements of the due diligence argument are thoroughly discussed throughout Chapter 6, but the question here is whether the requirement of the investor to conduct a diligent analysis of the

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490 Possible explanations as for divergences throughout the cases are discussed more in depth below in section 7.3.
491 PV Investors v. Spain, Final Award, 28 February 2020, para. 555.
legal framework prior to investing can be viewed as a common denominator in the interpretation of the FET provision.

When looking at the first RE awards, Charanne and Isolux, the tribunals apply the investors’ due diligence as an objective factor when determining whether their expectations were legitimate. This emphasis on due diligence was mainly directed at the Supreme Court decisions, which the tribunal found should have led to different conclusions of the investors’ due diligence analyses. Putting emphasis on the investor’s due diligence analysis may constitute an objective factor in that it shows that the investor did not go blindly into the investment, but assessed potential risks prior to investing. Such finding may support the investor’s alleged expectations, but it might also invalidate these, as were the case in Charanne and Isolux.

In Masdar, the tribunal corroborated this view when it argued that, to derive legitimate expectations from general legislation, an investor must have shown due diligence assessing the legal framework. In Novenergia II, the tribunal did not abandon due diligence’s importance entirely, but it did not put emphasis on it, since the regulatory framework was so adamantly clear.

In Cube, the tribunal entirely rejected the relevance of due diligence and essentially undermined the potential of due diligence to become a consensual objective factor to be considered in assessing the investor’s legitimate expectations. It argued that it was practically without relevance, since the only way that the investor could have legitimate expectations was if the tribunal found that it actually had acquired the right to these expectations. PV Investors took the same standpoint.

Going forward, it is difficult to argue that the requirement of the investor’s due diligence represents a common denominator in the application of the FET standard. Even though recent awards assert the due diligence argument to be without relevance, it is reasonable to suggest that future awards may again consider it a relevant objective factor supporting a claim based on legitimate expectations.

The disagreement between tribunals on this issue disrupts the predictability in the application of the FET provision, as it creates uncertainty regarding the extent and existence of the responsibility for the investor to act diligently prior to investing.

If the concept was to be unified, this thesis adopts the view that the approach taken in Masdar is well-founded, especially when taking into account that a balance has to be struck between the expectations of investors and host-states' right to regulate. Masdar states that the relevance of the investor’s due diligence is diminished when expectations are derived from specific commitments made directly to
the investor. On the contrary, it imposes the condition that for commitments in general legislation to be regarded as a source of legitimate expectations, the investor must demonstrate that it has exercised appropriate due diligence (using a “reasonable investor” as a benchmark), familiarising itself with existing laws and potential risks.  

This approach, where the investor’s obligation to conduct due diligence is considered an important objective factor, reduces the risk of potential opportunistic investment claims. If the investor finds (or a reasonable investor would find) that changes to the framework are foreseeable, the investor must acquire a direct and specific stabilisation commitment in order to be protected.

7.2. Renewable energy investments v. conventional energy investments – what role does it play?

It is unclear whether it plays a role for the application of the FET standard that a dispute concerns an investment in the conventional energy sector or in the RE sector. In the conventional energy awards, the tribunals did not provide insight that they had assessed the issues that typically arise in energy investments in their considerations, whereas several RE awards addressed this factor. This difference in considerations might have affected the outcomes. The RE awards that addressed this, such as 9REN and Cube, did particularly note the highly regulated industry and the vulnerability of investors in the RE sector due to sunk costs, heavy up-front investments and the reliance on government funded subsidy schemes. Considering the importance of these characteristics, one could argue that these should be taken into account when assessing the scope of manoeuvre host-states enjoy when altering legal regimes on which the investors relied upon when investing.

It is not evident in the awards how these considerations affected the outcomes. One could argue that the fact that the tribunals actually took note of the vulnerability of the RE sector could be evidence that it played a role in the assessment of the overall case. On the other hand, it cannot be deduced from the mere mentioning, that it constituted a significant factor for the tribunals. However, considering the challenges for investors in RE, it is likely that these challenges were taken into account in deciding the awards.

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492 Masdar v. Spain, Award, 16 May 2018, paras. 494 and 497.
This thesis adopts the view that ignoring the fact that an investment is made in the RE sector would be ignoring a major factor of these disputes. Investors in the RE sector face several challenges compared to investors in conventional energy investments, the most important one being that RE investments rarely generate sufficient profit without proper financial aid from government funded subsidy schemes. Therefore, reliance on these schemes and tariffs become of paramount importance to the investor. It seems reasonable to expect that tribunals assessing disputes in the RE sector take this into consideration. This might have contributed to the fact that the RE awards in the majority of cases have applied the broad approach, leading to awards decided in favour of the investors, whereas a greater proportion of the conventional energy awards were decided in favour of the state, based on the narrow approach.

7.3. Are divergences attributable to other factors than differences in interpretation?

In order to establish that it is the interpretation of legitimate expectations that varies between cases, it must be addressed if there are other factors that may explain the identifiable divergences in reasonings and conclusions in the particular cases analysed. The main factors that may potentially explain divergences are differences in facts and the features of international investment arbitration.

7.3.1. Differences in facts

The FET standard is heavily reliant on the facts of the case in which it is applied. Normally, an obvious explanation of differences in decisions is that the facts of the cases differ. However, the RE cases which have been analysed share very similar facts. They concern investments in solar power, they have the same timing of investment (except Isolux), concern the same commitments, the same regulations, the same disputed measures (except Charanne and Isolux that only disputed the 2010- and 2013-regulations respectively) and they are brought on the basis of the same treaty against the same host-state. As have been addressed, the differences in facts present in Charanne and Isolux does not relate to the particular element on which they divert from other cases, being the approach to the available sources of legitimate expectations. Rather, it has been suggested that this divergence is a result of different approaches to interpretation.
In *Masdar*, the investor received a set of Ministerial Resolutions that other investors did not. This led to the tribunal finding for the investor. As for the remaining cases – *Eiser, Novenergia II, 9REN, Cube* and *PV Investors*, the facts are not entirely identical, but it is difficult to imagine a group of cases with facts more similar than these. Still, they do not arrive at the same conclusion. The ones that do, base their conclusions on different reasonings. Only the tribunal in *PV Investors* address this issue. It expressly explain that the differences in its application compared to other cases may be explained by that “[…] the facts presented to this Tribunal may not be identical to those underlying other decisions”493 and further “[…] a different appreciation of the circumstances that underpin the Spanish RE cases.”494 It is not apparent how *PV Investors* differ from the prior line of cases *Eiser, Novenergia II, 9REN* and *Cube*, and the tribunal does not point to any specific differences. This would indicate that it is rather a different appreciation than differences in facts that is the catalyst of its divergent interpretation and application. The same consideration applies to the other cases, as no relevant differences in facts are apparent in these awards either. This illustrates that one of the primary reasons for inconsistencies in the awards is the fact that arbitrators have different approaches to the interpretation of the FET standard.

As for a standard so heavily reliant on facts, it shows a lot about its unpredictability that cases based on similar facts are decided differently. This displays more about the lack of predictability, than a series of consistent decisions which are based on the same facts (where the reason for consistency might just be a result of the facts being consistent and not the interpretation being consistent).

### 7.3.2. Features of international investment arbitration

Some of the general features of the investment arbitration framework may contribute to inconsistencies in a series of individual but comparable cases. The framework is a decentralised, non-hierarchal and ad hoc legal system of dispute settlement.495 One of its main features is that arbitrators are not

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493 *PV Investors v. Spain*, Final Award, 28 February 2020, para. 554.
494 *PV Investors v. Spain*, Final Award, 28 February 2020, para. 555.
bound by previously decided cases. The reason and main benefit of the absence of binding precedent is that the parties are assured that their case is examined based only on its particular factual circumstances, the law applicable to the particular dispute and the arguments brought by the parties. Another characteristic of the framework is that awards are not appealable as they are final and binding to the parties. These characteristics are commonly referred to as advantages of arbitration but may ceteris paribus contribute to inconsistent application of standards.

7.4. Evaluating predictability

Throughout this thesis, the analyses of awards have pointed in many directions regarding the interpretation of the FET standard. This thesis has focused on the element of legitimate expectations and whether the awards regarding RE have harmonised their interpretation to a degree where the standard facilitates predictability and forward planning in the RE sector.

As was touched upon above, the RE cases showed an emerging trend towards applying a broad approach and basing the legitimacy of expectations on the observation of objective factors. These common denominators improve the predictability of how the standard will be applied in future disputes in the RE sector. In this way, the contemporary application of legitimate expectations enhances the predictability and the standard’s availability for forward planning for investors. This approach has the implication that host-states, in order to safeguard themselves from an overwhelming amount of proceedings, need to effectively evaluate the legal implications of general legislation enacted with the specific aim to induce investments.

However, this consistency and predictability which is a result of common denominators, is undermined by the fact that tribunals show a lack of consensus of what constitutes objective factors supporting the investor’s expectations. The differences to the threshold have shown to be of significant importance for the outcome of a case. This is materialised by the fact that PV Investors awarded the

claimant only approximately 5% of what they claimed under their primary claim, due to a different appreciation of what constitutes an objective factor than the awards before it.

Summing up, even though the analysis of the FET standard in RE investment has shown that we can expect certain characteristics of its application to be predictable, it has also shown that tribunals still lack a uniform appreciation of how to apply other important aspects, thus significantly decreasing the amount of predictability that it provides.

7.4.1. Predictability at every cost?

It is an important perspective to include whether stability and predictability are desirable for investors at every cost. Predictability might be achieved by applying only one approach when assessing legitimate expectations. For purposes of predictability, a narrow approach focusing on specific commitments made directly to the investor (such as in Charanne) might entail a more uniform interpretation. But if predictability is achieved through narrowing down the scope of the FET standard, this may undermine one of the standard’s main functions: to ensure legal protection in unprecedented scenarios and in situations that does not fall within the scope of other specific standards. Thus, even though predictability would be achieved by adopting a uniform interpretation in this regard, it would be at the cost of protection.

The broad approach taken by more recent cases has shown to be prone towards deciding in favour of investors. However, it may not be in the long-term interest of investors or host-states if predictability is sought achieved through the adoption of an interpretation that is too expansive. If the scope of the FET ends up being too investor-friendly, states might end up refraining from incorporating a FET provision at all in future BITs or even withdraw themselves from MITs including a FET provision. Irrespective of what one might find to be the right balance between the interests of states and

498 As an example of this, India decided not to include a FET provision in its new 2016 Model BIT, as ISDS tribunals often interpreted this provision too broadly, from its point of view (P. Ranjan and P. Anand, “The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction”, in Northwestern Journal of International Law & Business, Vol. 38, issue 1, 2017, p. 28).

499 As an example, Italy withdrew from the ECT in 2015. Officially, the justification was to cut the costs of Italy’s memberships in international organisations. However, it has been put forward that it might also have had an influence, that Italy feared proceedings under the ECT for various changes made to the Italian solar power framework in 2014. However, withdrawing from the ECT does not protect Italy from looming claims, as the ECT contains a sunset provision regarding investments made before the withdrawal.
investors, it is evident that adopting an interpretation that is either too strict or too expansive, in the long-term may worsen the position of investors compared to today, even though the FET standard in itself, at its contemporary state, does not offer a great deal of predictability.

7.4.2. Procedural pressure and protection

From a more holistic point of view, the FET standard may grant investors protection in other ways than it does in a strict legal sense. For example, the pressure created by the numerous proceedings filed against Spain, due to the changes made to the RE framework, have resulted in Spain offering an olive branch to the investors. In November 2019, Royal Decree 17/2019\(^{500}\) (“RDL 17/2019”) was enacted, setting out the reasonable rate of return for the next six-year period for facilities subject to the new regime. It is set at 7.09%\(^{501}\) before tax until 2026 where the next regulatory six-year period will begin. The rate was set at 7.398% before tax for the first regulatory period from 2014-2020. RDL 17/2019 offers the possibility for facilities which were affected by the measures adopted in 2010 and 2013-2014 to maintain the 7.398% rate until 2031 if they waive their right to continue proceedings, file new proceedings and to receive any compensation as for cases regarding the changes made to the RE regime.\(^{502}\)

This shows that the FET standard, and the procedural pressure that it can potentially result in, can grant investors protection and stability (in this case, a higher fixed return for a twelve-year period, instead of a lower rate for a six-year period) in ways additional to its legal protection. However, the offered return may still be seen as insignificant in comparison to potentially being awarded the full amount equivalent to the previous FITs. Despite this, awards such as PV Investors (which awarded the investors a return of 7% after tax) may push investors towards agreeing to arrangements as the

\(^{500}\) Royal Decree 17/2019 of 22 November, on the adoption of urgent measures for the legislative alignment on the retributive parameters affecting the electricity system and the response to the process of withdrawals from service of thermal power plants, published in the Official Gazette (B.O.E.) on 23 November 2019.

\(^{501}\) The calculation is based on 10-year Spanish sovereign bonds plus a differential (PV Investors v. Spain, Final Award, 28 February 2020, para 283).

one set forth by Spain, as this at least grants stability for a twelve-year period, avoids litigation risk and saves investors the time and costs spent on arbitration proceedings.
8. Conclusion

The main objective of this thesis has been to analyse and systematise the application of the element of legitimate expectations encompassed in the FET standard in international RE investment arbitration, and to assess whether the contemporary application facilitates predictability and forward planning for investors.

This analysis commenced with an examination of the characteristics of investments in the energy sector. The thesis showed that such investments are notoriously complex, require heavy up-front investments and are long-term in nature. All these factors subject the investment environment to instability. In the energy sector, stability is challenged by the fact that investments often require the investor to enter into a contractual relationship with the host-state, which subjects them to increased political and regulatory risks. The political and regulatory risks originate from host-states’ sovereign right to regulate. These risks are further increased by the certain characteristics of the energy sector, inter alia the need for long-term contracts. Furthermore, the characteristic risk allocation and energy market volatility provides for increased instability, and therefore vulnerability for the investor, as mainly the investor carries the financial burden when the bulk of the investment has been made. Host-states also aim for stability in order to provide energy security, stable revenue and jobs. Because of this, investors and host-states strive for stability in international energy investments.

Furthermore, the thesis examined the key differences between investments in conventional energy and RE. The thesis discovered that investors in the RE sector face additional challenges compared to investors in conventional energy. Conventional energy is generally more cost-efficient, which makes it significantly harder to penetrate the liberalised energy markets for RE suppliers. The rapid development in RE technology also makes investors less inclined to invest large sums in a technology that, in a few years, might prove to be obsolete. These additional challenges in the RE sector are sought accommodated by government subsidy schemes of which this thesis examined two: FITs and FIPs.

Such subsidy schemes may later prove to be disadvantageous to the host-state due to being poorly designed or when they are no longer justified by market conditions. Therefore, states might amend or completely abolish these. Such actions convey the regulatory and political risks that investors might face and display why investor protection is an important factor in foreign direct investments.
The legal framework governing international investments is not a uniform body of law but consists of different layers of applicable law from different legal orders, those being contractual, domestic- and international law. The traditional way of ensuring stability is to include a stabilisation clause in the investment contract between the investor and host-state, which serves as an assurance of negotiated terms not being affected by future regulatory changes. Another significant source of protection is the traditional sources of public international law. IIAs are the main source of international investment law and therefore the most important tool for protection and stability found in international law. IIAs can be divided into BITs and MITs. One of the most important MITs currently in force is the ECT which concerns investments in the energy sector. IIAs are generally entered into to create favourable conditions for investments and to attract capital to the host-state. This purpose is achieved by including access to ISDS and several standards of protection. Of these standards, the FET standard is of the highest practical importance, as it is one of the most frequently included standards in IIAs and as it is the one invoked the most by investors.

The FET standard acts as a catch-all provision, addressing acts that does not fall within the scope of other standards or that is not in breach of clauses contained in investment agreements. It has a developmental character, which is evident when analysing awards rendered in the time after the standard was first attributed substantive content. Based on such awards, the thesis concluded that the standard in general protects the investor from *inter alia* arbitrary treatment, denial of justice, discrimination and harassment and coercion. Additionally, it requires the host-state to show good faith, due process, transparency and the protection of the investor’s legitimate expectations.

The thesis then sought to establish the interpretation of the element of legitimate expectations in arbitral awards concerning renewable energy disputes, using an analysis of conventional energy disputes as a basis of reference to determine whether there are notable differences in application between the two. The thesis concluded that there are both common denominators and divergences as for the application of legitimate expectations under the FET standard in energy investment arbitration.

The tribunals had a different appreciation of *from where* legitimate expectations could arise. This resulted in the thesis identifying two approaches: a broad and a narrow approach. The broad approach entails that expectations can legitimately arise from specific commitments in general legislation, while the narrow approach rejects such expectations as being legitimate. As for conventional energy cases, *CMS* and *PSEG* applied the broad approach, while *AES* and *Electrabel* applied the narrow
approach. In the renewable energy cases, Charanne, Isolux and Masdar also applied the narrow approach. Despite the different approaches, it was concluded that there is an emerging trend towards applying the broad approach in RE cases, as all of the remaining, more recent RE cases applied this approach. This thesis adopted the view that this trend is well founded as the framework is often the main tool for inducing investments in the RE sector, making investments heavily reliant on elements found in the general legislation (subsidies and accompanying measures of stability). However, it has been concluded that, even if some tribunals emphasise the characteristics of RE investments in their decisions, it is not evident on a general basis how much these characteristics affect the reasoning and outcome of RE cases.

The thesis found that the trend towards applying a broad approach enhances the protection granted to investors, as the analysis showed that tribunals applying this approach are more inclined to decide in favour of the investor, suggesting that the approaches are connected to the outcome of the awards.

Another common denominator has been identified as tribunals in both conventional and renewable cases agreed that, absent of severe circumstances such as in PSEG, objective factors supporting the investor’s expectations are needed in order to legitimise these.

However, the tribunals did not agree on what constituted such objective factors. In the conventional energy awards, the difference was apparent as AES and Electrabel demanded objective factors constituting clear commitments of stability, while the tribunal in CMS was satisfied with the general legislation and the license issued to the investor providing for a specific obligation for the host-state.

The divergent interpretation of what constitutes an objective factor is even clearer in the RE awards which share similar facts but arrives at different conclusions. The difference is evident even in the cases with similar outcomes: Novenergia II, 9REN and Cube. They all base their decision on the 2007 regime in its entirety. In addition, they each rely on an additional objective factor, but there is no convergence between these. Novenergia II finds the prospectus and the statements therein to be a factor in support of the investors’ expectations, Cube relies on the press release that accompanied the 2007 regime and 9REN relies on the particular stabilising provisions in the 2007 regime. PV Investors diverts significantly from other cases deciding in favour of investors. It rejected the 2007 regime and the surrounding statements as objective factors supporting an expectation of guaranteed FITs. Instead, it found that the objective factor supporting the investor’s expectations was the principle of a reasonable rate of return in the 2007 regime’s principal act.
The tribunals’ application of the investor’s obligation to conduct due diligence has also been concluded to be a divergence. Charanne, Isolux and Masdar use due diligence as an additional objective factor when assessing the justification of the investors alleged expectations. Eiser, Novenergia II and 9REN diminish its importance while Cube and PV investors renders it without relevance. This thesis adopted the view that the approach taken in Masdar, using due diligence as an objective factor when investors rely on general legislation as a source for expectations, is well-founded. Due diligence shows that investors did not blindly rely on general legislation, but carefully assessed potential risks prior to investing. The approach in Masdar reduces the risk of opportunistic investment claims that may arise if due diligence is not used as an objective factor.

The renewable cases analysed share similar facts. It has been addressed whether specific differences in facts between cases could constitute a cause of divergence. The thesis has rejected this assertion. However, it has been acknowledged that the features of international investment arbitration may contribute to inconsistent application of legal standards.

It can be concluded that the common denominators identified enhance the predictability of the application of legitimate expectations, making the FET standard more readily available for practical use of forward planning for investors. Prima facie, this development in interpretation accommodates the need for stability in RE investments. However, the divergences in application which have been identified, especially the differences in interpretation and thresholds of what constitutes an objective factor, undermine the degree of predictability brought by the common denominators. On this basis, it is concluded that the contemporary application of the element of legitimate expectations, encompassed in the FET standard, in international RE investments does not facilitate predictability and forward planning for investors.
9. Bibliography

9.1. Treaties, Conventions and Statutes

- Agreement Between the Republic of Finland and Montenegro on the Promotion and Protection of Investments, 14 November 2008.
- Agreement on encouragement and reciprocal protection of investments between The Republic of The Gambia and the Kingdom of the Netherlands, 25 September 2002.
- Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Sultanate of Oman, 17 January 2009.
- Statute of the International Court of Justice, 18 April 1946.
9.2. Spanish National Legislation and Press Releases

Royal Decree 17/2019 of 22 November, on the adoption of urgent measures for the legislative alignment on the retributive parameters affecting the electricity system and the response to the process of withdrawals from service of thermal power plants, published in the Official Gazette (B.O.E.) on 23 November 2019.


9.3. Judicial decisions

9.3.1. Arbitral decisions and awards

- 9REN Holding S.À.R.L. v. the Kingdom of Spain, ICSID Case No. ARB/15/15, Award, 31 May 2019.
- ADC Affiliate Limited and ADC & ADMC Management Limited v. the Republic of Hungary, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006.
- AES Corporation v. the Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005.
- ADF Group Inc. V. United States of America, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003.
- Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005.
- BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019.
- Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award, 6 August 2019.
- Charanne B.V. and Construction Investments v. the Kingdom of Spain, SCC Case No. 062/2012, Final Award, 21 January 2016 [unofficial English translation of Award by Mena
Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010.

CMS Gas Transmission Company v. the Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005.


Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008.


El Paso Energy International Company v. the Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011

Electrabel S.A v. the Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, and Award, 25 November 2015.

Emilio Agustín Maffezini v. the Kingdom of Spain, ICSID Case No. ARB/97/7, Award, 13 November 2000.


Glamis Gold, Ltd. V. United States of America, UNCITRAL, Award, 8 June 2009.

InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award, 2 August 2019.
- Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly 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.
- International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award, 26 January 2006.
- Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018.
- Metalclad Corporation v. the United Mexican States, ICSID Case No. ARB (AF)/97/1, Award, 30 August 2000.
- Mondev International Ltd. V. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002.
- Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. the Kingdom of Spain, SCC Case No. 2015/063, Final Award, 15 February 2018.
- Occidental Exploration and Production Company v. the Republic of Ecuador (I), LCIA Case No. UN3467, Final Award, 1. July 2004.
- OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36, Award, 6 September 2019.
- Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007.
- Pope & Talbot Inc. v. the Government of Canada, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, and Award in Respect of Damages, 31 May 2002.
- 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.
- Saluka Investments B.V. v. the Czech Republic, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006.
- SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award, 31 July 2019.
- Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.
- The PV Investors v. The Kingdom of Spain, UNCITRAL, PCA Case No. 2012-14, Final Award, 28 February 2020, and Concurring and Dissenting Opinion of Charles N. Brower, 28 February 2020.
- Waste Management, Inc. V. United Mexican States (II), ICSID Case No. ARB (AF)/00/3, Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings, 26 June 2002 and Award, 30 April 2004.

9.3.2. European Court of Justice

– C-284/16, Slovakische Republik v. Achmea BV, Judgment of the Court, 6 March 2018.

9.3.3. The Spanish Supreme Court


9.4. Books

– Boute, “Energy Trade and Investment Law: International Limits to EU Energy Law and Pol-
icy” in M. M. Roggenkamp, et al. (eds.), Energy Law in Europe: National, EU and Interna-
ford University Press, 2010.
– R. Dolzer and C. Schreuer, Principles of International Investment Law, 2nd edn., Oxford Uni-


9.5. Articles


9.6. Reports

9.7. Websites and online articles


