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ARTICLE

The Scope of Investors' Legitimate Expectations under the FET Standard in the European Renewable Energy Cases

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Abstract—In the 2000s, several European states sought to increase foreign investment in their renewable energy sectors. Those governments later wound back those financial incentives. This resulted in dozens of investment disputes. One of the key issues in those disputes was whether the decision to amend or withdraw financial incentives breached investors' legitimate expectations under the fair and equitable treatment standard. This article argues that investors' legitimate expectations should operate analogously to the concept of estoppel. Therefore, if a state makes a clear commitment to induce investment (this includes commitments in legislation), and an investor reasonably relies on that commitment, then the state should not be able to renege on that commitment without generating liability for breaching the fair and equitable treatment standard.

I. INTRODUCTION

In the 2000s, several European States sought to increase foreign investment in their renewable energy sectors. Spain, Italy and the Czech Republic introduced financial incentives that resulted in a surge of foreign investment in renewable energy production. However, those States later wound back those financial incentives after experiencing economic troubles. Foreign investors were negatively impacted and consequently made dozens of investment claims against those States (European Renewable Energy Cases). The majority of those claims have been made under the Energy Charter Treaty (ECT).[2]

One of the key issues in those cases was whether government decisions to amend (and sometimes withdraw) the financial incentives offered to foreign investors constituted a breach of investors' legitimate expectations under the fair and equitable treatment standard (FET standard). The FET standard is the most invoked treaty standard in investor–State arbitration and is also the one most commonly breached

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[2] Energy Charter Treaty (opened for signature on 17 December 1994, entered into force on 16 April 1998)

by States.[3] The concept of investors' 'legitimate expectations' has become a 'core' element of the FET standard.[4] Other elements include stability, transparency and due process.[5] Within the context of investment arbitration, its meaning is often traced back to the *Tecmed* decision, which held that States must respect the 'basic expectations' of investors.[6] Tribunals have held that regulatory stability is another element of the FET standard.[7] Both of these notions have been repeatedly considered in the European Renewable Energy Cases. At the same time, tribunals today emphasise the power of States to regulate in the public interest, irrespective of whether the relevant investment treaty includes a provision explicitly protecting that right. States have also moved in that direction and, as a result, more recent investment treaties provide greater legal protection for State regulation.

A large number of cases with similar facts provides a unique opportunity to compare the reasoning adopted by different tribunals in relation to investors' legitimate expectations under the FET standard. The European Renewable Energy Cases can be divided into two groups: those in which the tribunal has applied a narrower interpretation of investors' legitimate expectations (Majority View) and those in which the tribunal has applied a broader interpretation of investors' legitimate expectations (Minority View). The Majority View is labelled as such because a numerical majority of cases have adopted that legal approach. By extension, the Minority View represents a legal approach adopted in a minority of decisions.

It will be argued that legitimate expectations under the FET standard should operate analogously to the concept of estoppel. Therefore, if a State makes clear commitments to induce an investor to invest, and the investor relies on those commitments, then the State should not be able to renege on those commitments without generating liability. This article will summarise the relevant European regulatory regimes (Section I), analyse the Majority View and Minority View

[3] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 8.96; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 130.

[4] Emmanuel Gaillard and Mark McNeill , 'The Energy Charter Treaty' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements* (2nd edn, OUP 2018) para 2.35; Lucy Reed and Simon Consedine, 'Fair and Equitable Treatment: Legitimate Expectations and Transparency' in Meg Kinnear and Geraldine Fischer (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 287.

[5] Dolzer and Schreuer (n 3) 145–60.

[6] *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) (Tecmed) para 154. Though this passage is frequently cited (see, eg: *MTD v Chile*, ICSID Case No ARB/01/7, Award (25 May 2004) (MTD) para 114; *Eureko v Poland*, UNCITRAL, Partial Award (19 August 2005) para 235; *Saluka Investments v Czech Republic*, PCA Case No 2001-04, Partial Award (17 March 2006) (*Saluka*) para 302), the Tribunal in *Tecmed* did not address the questions of the kinds of representations that could generate legitimate expectations or how to strike the balance between an investor's legitimate expectation and a government's right to regulate in the public interest. Nevertheless, awards following *Tecmed* 'have added depth, breadth, and predictability to the conceptual framework' of the FET standard (Reed and Consedine (n 4) 294).

[7] See eg: *Azurix Corp v Argentina*, ICSID Case No ARB/01/12, Award (14 July 2006) para 360; *CMS v Argentina*, ICSID Case No ARB/01/8, Decision on Jurisdiction (17 July 2003) (*CMS*) paras 274–6; *Enron Corp v Argentina*, ICSID Case No ARB/01/3, Award (22 May 2007) (*Enron*) paras 259–60; *LG&E Energy v Argentina*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) (*LG&E*) paras 124–5; *Occidental v Ecuador*, LCIA Case No UN3467, Award (1 July 2004) (*Occidental*) paras 183–7. Unlike the ECT (n 2), which explicitly refers to stability in the FET standard clause, those cases related to bilateral investment treaties (BITs) that refer to stability in the treaty preambles. Some commentators criticise the importing of 'stability' on the basis of a treaty preamble (see, for eg: Z Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko & Methanex' (2006) 22(1) Arbitration Intl 51). However, Weeramantry notes that referring to the preamble of a treaty is consistent with determining the object and purpose of a treaty under the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(1) (J Weeramantry *Treaty Interpretation in Investment Arbitration* (OUP 2012) para 6.102). The Tribunal in *Total SA v Argentina*, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010) (*Total*) para 116 adopted this view. For other cases that have referred to the importance of stability under the FET standard, see: *PSEG Global Inc v Turkey*, ICSID Case No ARB/02/5, Award (19 January 2007) para 253; *Saluka* (n 6) para 303; *Sempra Energy v Argentina*, ICSID Case No ARB/02/16, Award (28 September 2007) (*Sempra*) paras 298–300.

Table 1. European renewable energy cases

No.	Case Name	Reference	Date	Abbreviation
1.	*Antaris Solar GmbH and Dr Michael Gode v Czech Republic*	PCA Case No 2014-01	2 May 2018	*Antaris*
2.	*Infrastructure Services Luxembourg Sarl and Energia Termosolar BV (formerly Antin Infrastructure Services Luxembourg Sarl) v Spain*	ICSID Case No ARB/13/31	15 June 2018	*Antin*
3.	*BayWa Renewable Energy GmbH and BayWa Asset Holding GmbH v Spain*	ICSID Case No ARB/15/16	2 December 2019	*BayWa*
4.	*Belenergia SA v Italy*	ICSID Case No ARB/15/40	6 August 2019	*Belenergia*
5.	*Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italy*	ICSID Case No ARB/14/3	27 December 2016	*Blusun*
6.	*Cavalum SGPS, SA v Spain*	ICSID Case No ARB/15/34	31 August 2020	*Cavalum*
7.	*CEF Energia BV v Italy*	SCC Arbitration 2015/158	16 January 2019	*CEF Energia*
8.	*Charanne BV Construction Investments v Spain*	SCC Arbitration 2012/62	21 January 2016	*Charanne*
9.	*Cube Infrastructure Fund and ors v Spain*	ICSID Case No ARB/15/20	19 February 2019	*Cube*
10.	*Eiser Infrastructure Limited and Energia Solar Luxembourg Sarl v Spain*	ICSID Case No ARB/13/36	4 May 2017	*Eiser*
11.	*Eskosol SpA (In Liquidation) v Italy*	ICSID Case No ARB/15/50	4 September 2020	*Eskosol*
12.	*ESPF Beteiligungs GmbH, ESPF Nr 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH and Co KG v Italy*	ICSID Case No ARB/16/5	14 September 2020	*ESPF*

Continued

Table 1 Continued

No.	Case Name	Reference	Date	Abbreviation
13.	*Foresight Luxembourg Solar Sarl, Greentech Energy Systems and GWM Renewable Energy SPA v Spain*	SCC Arbitration 2015/150	14 November 2018	*Foresight*
14.	*Greentech Energy Systems A/S and others v Italy*	SCC Arbitration 2015/05	23 December 2018	*Greentech*
15.	*Hydro Energy 1 Sarl and Hydroxana Sweden AB v Spain*	ICSID Case No Arb/15/42	9 March 2020	*Hydro*
16.	*ICW Europe Investments Limited v Czech Republic*	PCA Case No 2014-22	15 May 2019	*ICW Europe*
17.	*InfraRed Environmental Infrastructure GP Limited and Ors v Spain*	ICSID Case No ARB/14/12	2 August 2019	*InfraRed*
18.	*Isolux Infrastructure Netherlands BV v Spain*	SCC Arbitration 2013/153	12 July 2016	*Isolux*
19.	*Masdar Solar and Wind Cooperatief UA v Spain*	ICSID Case No. ARB/14/1	16 May 2018	*Masdar*
20.	*Natland Investment Group and Radiance Energy Holdings v Czech Republic*	PCA Case No 2013-35 [Award Unpublished]	20 December 2017	*Natland*
21.	*NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v Spain*	ICSID Case No ARB/14/11	12 March 2019	*NextEra*
22.	*Novenergia II—Energy and Environment* (SCA) (Grand Duchy of Luxembourg), *SICAR v Spain*	SCC Arbitration 2015/063	15 February 2018	*Novenergia*
23.	*OperaFund Eco-Invest SICAV Plc and Schwab Holding AG v Spain*	ICSID Case No ARB/15/36	6 September 2019	*OperaFund*

Continued

Table 1 Continued

No.	Case Name	Reference	Date	Abbreviation
24.	*Photovoltaik Knopf Betriebs GMBH v Czech Republic*	PCA Case No 2014-21	15 May 2019	*Photovoltaik*
25.	*PV Investors v Spain*	PCA Case No 2012-14	28 February 2020	*PV Investors*
26.	*RREEF Infrastructure Limited and RREEF Pan-European Infrastructure Two Lux Sarl v Spain*	ICSID Case No ARB/13/30	30 November 2018	*RREEF*
27.	*RWE Innogy GmbH and RWE Innogy Aersa SAU v Spain*	ICSID Case No ARB/14/34	30 December 2019	*RWE*
28.	*SolEs Badajoz GmbH v Spain*	ICSID Case No ARB/15/38	31 July 2019	*SolEs*
29.	*Stadtwerke München GmbH, RWE Innogy GmbH and Ors v Spain*	ICSID Case No ARB/15/1	2 December 2019	*Stadtwerke*
30.	*SunReserve Luxco Holdings Sarl and Ors v Italy*	SCC Arbitration 2016/32	25 March 2020	*SunReserve*
31.	*Voltaic Network GmbH v Czech Republic*	PCA Case No 2014-20	15 May 2019	*Voltaic*
32.	*WA Investments Europa Nova Ltd v Czech Republic*	PCA Case No 2014-19	15 May 2019	*WA Investments*
33.	*Watkins Holdings Sarl and Ors v Spain*	ICSID Case No ARB/15/44	21 January 2020	*Watkins*
34.	*Jurgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar GmbH and Co KG v Czech Republic*	PCA Case No 2014-03	11 October 2017	*JSW*
35.	*9Ren Holding Sarl v Spain*	ICSID Case No ARB/15/15	31 May 2019	*9Ren*

(Section II), before outlining reasons why the Minority View is the preferable means for interpreting investors' legitimate expectations under the FET standard (Section III).

This article analyses the European Renewable Energy Cases shown in Table 1:[8]

[8] Cases as of 18 September 2020.

II. FACTUAL BACKGROUND

This section will outline the key pieces of legislation in the Spanish, Italian and Czech renewable energy regulatory regimes. One of the most common claims raised by investors was that States had made specific commitments guaranteeing investors fixed feed-in-tariffs (FiTs) and that in later amending those FiTs, the States had breached the investors' legitimate expectations under the FET standard.[9]

A. *Spain*

This subsection outlines some of the main elements of the Spanish regulatory regime.

(i) *Law 54/1997*

The Spanish incentives regime can be traced back to Law 54/1997, which sought to liberalise the Spanish energy market. The law divided the Spanish electricity system into an 'ordinary' regime and a 'special' regime (this included renewable energy production). Article 30(4) guaranteed that producers under the special regime would receive a 'reasonable rate of return' on their investments in the sector.

(ii) *RD 661/2007*

The central piece of legislation in the Spanish renewable energy disputes was RD 661/2007, which introduced new financial incentives for renewable energy producers. Article 24 provided renewable energy producers with two different incentives regimes to choose between. They could either: (*i*) receive a guaranteed FiT for all electricity produced (ordinary regime); or (*ii*) sell electricity on the market and receive a premium payment based on certain conditions (special regime). According to art 44(1), the FiT rate would be adjusted annually based on inflation. Article 36 stated that the FiTs would be paid for 25 years. Article 17 provided that in order to qualify for either regime, producers had to register their facilities with the Registro Administrativo de Instalaciones de Produccion en Regimen Especual (RAIPRE). Article 17 stated that Spain was also obligated to pay incentives on all electricity produced by an eligible facility.

RD 661/2007 also provided that there would be a review of the FiT rate in 2010, but that any subsequent changes to the FiT rate would not apply to existing facilities. Article 44(3) stated that:

> The revisions to the regulated tariff and the upper and lower limits [under the premium option] indicated in this paragraph *shall not affect facilities for which the deed of commissioning shall have been granted* prior to January 1 of the second year following the year in which the revision shall have been performed.[10]

A press release that accompanied RD 661/2007 confirmed this, stating that:

> The revisions carried out in the future of the tariffs will not affect those Installations already in operation. This guarantee provides legal safety for the producer, affording stability to the sector and fostering its development.[11]

[9] Feed-in-tariff regimes: in which governments commit to paying electricity producers a fixed price for the electricity that they produce for the national grid.
[10] Emphasis added.
[11] Cited in *Foresight* (Table 1) para 274.

(iii) *RD 1578/2008*

Spain then passed RD 1578/2008, which introduced a similar, though scaled back, incentives regime.[12] It could be distinguished from RD 661/2007 as it explicitly provided that remuneration for existing renewable energy facilities could be changed.[13]

(iv) *RDL 6/2009*

RDL 6/2009 sought to reduce a growing tariff deficit by limiting the number of participants in the Spanish incentives regime. Article 4(2) required producers to register with a pre-assignment registry. This was a preliminary step before completing full registration with the RAIPRE. After registering with the pre-assignment registry, facilities had 36 months in which to complete RAIPRE registration. Once a facility was registered, the producers had 36 months in which to enter production.

(v) *RD 1614/2010*

Spain then introduced RD 1614/2010, art 4 of which reiterated the commitment contained in RD 661/2007:

> For solar thermoelectric technology facilities that fall under RD 661/2007 [. . .] revisions of tariffs, premiums and upper and lower limits referred to by article 44.3 of the aforementioned Royal Decree, *shall not affect facilities registered definitively in the [RAIPRE] as of 7 May 2009*, nor those that were to have been registered in the [Pre-Assignment Registry] under the fourth transitional provision of RDL 6/2009.[14]

RD 1614/2010 was also intended to reduce the growing tariff deficit, and included further changes to the incentives regime. Article 1 imposed on producers an 'access fee' for entry to the electricity network. Article 2 introduced a limit on the number of hours of production that would benefit from the incentives regime.

Between 2012 and 2014, the Spanish Government introduced numerous additional changes that fundamentally altered the financial incentives originally introduced under RD 661/2007:

- Law 15/2012 introduced a 7 percent tax on all electricity production.
- RDL 2/2013 removed the special regime under the incentives regime and amended the means for calculating the inflation rate applicable to FiTs.
- RDL 9/2013 repealed RD 661/2007 and introduced a new regulatory regime whereby producers would be paid the market price for electricity produced and would receive a 'special payment' that was based on a plant's capacity and determined by the operation costs and initial investment costs of a 'standard plant' in the sector.[15] Producers would be eligible for the 'special payment' only once production reached a certain level. This new regime applied to existing plants.[16]

[12] ibid para 279.

[13] 'Fifth additional provision' states that: 'In the course of 2012, in light of the technological developments in the sector and in the market, and of the performance of the remunerative framework, the compensation for electricity power generation with solar photovoltaic technology, *may be amended*' (emphasis added). See also: *9Ren Holding* (Table 1) para 213.

[14] Emphasis added.

[15] Article 30(4): 'This remuneration regime shall not exceed the minimum required level to cover the costs that are necessary for installations to compete on an equal footing with the rest of the technologies in the market in order to allow those installations to obtain a reasonable return, by reference to the standard installation.' See also: *Masdar* (Table 1) para 132.

[16] *Masdar* (Table 1) para 135.

B. *Italy*

This subsection outlines some of the main elements of the Italian regulatory regime.

(i) *Legislative Decree 387*

Legislative Decree 387 was introduced in 2003 and provided that solar energy producers would receive bonus payments for all electricity produced. Although the cost of those payments would be borne by Italian consumers, the State-owned Gestore dei Servizi Energetica (GSE) was responsible for paying producers. In addition, the Italian Government issued several ministerial decrees under the Conto Energia framework that included guaranteed FiTs for 20 years. If an investor qualified under the Conto Energia framework, GSE would provide written confirmation to the producer of the FiT rate that would be paid for 20 years. For example, a letter under the Conto II scheme stated:

> With reference to the photovoltaic plant named [name of the relevant plant], we hereby communicate the admission to the incentive tariff under Ministerial Decree 19 February 2007, equal to 0.3460 euro/kWh. [. . .] The tariff will be recognized for a twenty year period . . . the tariff is constant . . . for all the twenty year period.[17]

Producers would also enter into a contract with GSE that, among other things, also confirmed the FiT rate that producers would receive. For example, the Tribunal in *Greentech* cited the following extract from one of those GSE contracts:

> The tariff to be granted to the photovoltaic plant [Ferrante] pursuant to this Agreement is equal to 0.3140 euros/kWh and is constant in current currency. [. . .] This Agreement is effective as of 29 April 2011 and will expire on 28 April 2031.[18]

(ii) *Spalmaincentivi Decree*

Given the rising costs of the framework, and the fact that Italian consumers were covering those costs, in 2014 the Italian Government introduced the Spalmaincentivi in Legislative Decree 91/2014. Producers were given three options: (*i*) receive reduced FiTs for 24 years; (*ii*) maintain the original 20-year period but receive reduced FiTs between 2015 and 2019 and then receive increased FiTs; or (*iii*) receive reduced FiTs (with a rate fixed to the producers' plants) for 20 years. The Government also introduced an annual administration fee to be paid by producers.

C. *Czech Republic*

This subsection outlines some of the main elements of the Czech regulatory regime.

(i) *The Act on Promotion*

In 2005, the Act on Promotion was introduced to encourage foreign investment in renewable energy.[19] The Czech Energy Regulatory Office (ERO) would set FiTs annually. Those FiT rates would apply to any investments made in the following year.

[17] Cited in *Greentech* (Table 1) para 127.
[18] ibid para 128.
[19] Act No 180/2005.

The ERO was prevented from reducing the FiT rate by more than 5 percent from the year before.[20]

The Act on Promotion contained a number of benefits for renewable energy producers. First, producers were exempt from paying income tax for the first five years of an investment's operation. Secondly, section 6(1)(b)(1) provided that FiTs would be high enough to ensure that investors would be repaid the cost of their investments within 15 years. Thirdly, the 2005 Technical Regulation promised investors that they would receive an average annual return of 7 percent over the course of 15 years (later increased to 20 years under the 2007 Technical Regulation). Fourthly, section 6(1)(b)(2) provided that the FiT rate for an investor, as set annually by the ERO, would be set in advance of an investment beginning operation and would then be 'maintained as the minimum' FiT rate for 15 years. The section stated:

> [the ERO] sets, one calendar year in advance, the purchasing prices for electricity from Renewable Sources ... so that (b) for facilities commissioned [...] (2) after the effective date of this Act, the amount of revenues per unit of electricity from Renewable Sources, assuming Support in the form of Purchasing Prices, is maintained as the minimum [amount of revenues], for a period of 15 years from the commissioning year of the facility.[21]

(ii) *2010 changes*

Due to the financial strain of the incentives, a number of changes were introduced in 2010. First, the income tax exemption was abolished. Second, the 5 percent restriction on annual FiT rate adjustment was removed. The ERO could therefore reduce FiT rates as it wished. Third, the Government imposed a levy on producers to cover financial shortfalls, which consequently capped the percentage of FiT costs covered by consumers. The levy was originally set at 26 percent but was reduced to 10 percent in 2012.

III. TRENDS IN THE EUROPEAN RENEWABLE ENERGY CASES

Within the European Renewable Energy Cases, two trends have emerged regarding investors' legitimate expectations under the FET standard: the Majority View and the Minority View. Both trends converge on certain issues. First, there is agreement that legitimate expectations may be based on a State's legal system at the time of an investment.[22] Secondly, legitimate expectations may also be based on State representations made explicitly or implicitly to investors.[23] Thirdly, investors should undertake due diligence before making an investment, which will influence investors'

[20] Section 6(4): 'Purchasing Prices set by the Office for the following calendar year shall not be less than 95% of the Purchasing Prices in effect in the year for which the setting decision is made.'

[21] Emphasis added.

[22] Dolzer and Schreuer (n 3) 145; Dolzer Fair and Equitable Treatment: Today's Contours Santa Clara Journal of International Law, Vol. 12 Issue 1 (2014) 22. See also: *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009) paras 190-1; *BG Group v Argentina*, UNCITRAL, Award (24 December 2007) paras 297–8; *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008) para 340; Enron (n 7) para 262.

[23] Dolzer and Schreuer (n 3) 145. See also: *Parkerings* Compagniet AS v Lithuania ICSID Case No. ARB/05/8, Award (11 September 2007) para 331.

legitimate expectations.[24] Finally, tribunals should apply the Vienna Convention on the Law of Treaties when interpreting FET standard clauses in investment treaties.[25]

The two approaches can be distinguished in two main ways: (*i*) what constitutes a specific commitment from a government to an investor; and (*ii*) the margin of appreciation granted to governments to regulate in the public interest without generating liability for breaching an investor's legitimate expectations.[26] This section will analyse the Majority View and the Minority View with a focus on those issues.

A. *The Majority View*

The majority of tribunals in the European Renewable Energy Cases have adopted the Majority View.[27] The Majority View is sympathetic to the policy concern that the FET standard infringes on the sovereignty of States. Indeed, although some tribunals applying the Majority View have still held States liable for breaching the FET standard, those tribunals have nevertheless applied a high threshold for establishing liability and have granted States broad discretion to regulate without breaching the FET standard. Tribunals outside the European Renewable Energy Cases have also repeatedly applied the Majority View.[28]

(i) *Relationship between stability and legitimate expectations*

Tribunals applying the Majority View have usually held that there is no standalone obligation of regulatory stability under article 10(1) of the ECT and that, instead, investors' legitimate expectations are, absent a specific commitment from the State, limited to regulatory stability.[29] Article 10(1) of the ECT provides:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, *encourage and create stable, equitable, favourable and transparent conditions* for Investors of other Contracting Parties to make Investments in its Area. *Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.* Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.[30]

[24] See, eg: *SunReserve* (Table 1) para 714.

[25] VCLT (n 7). See, : *Blusun* (Table 1) para 278; *Hydro* (Table 1) para 540; *SunReserve* (Table 1) para 674.

[26] See eg: *RWE* (Table 1) para 453: 'there is no consensus as to what kinds of commitments can give rise to legitimate expectations. In particular, as identified in the Masdar case, there are differing schools of thought as to whether a commitment given in general regulations can give rise to a legitimate expectation'.

[27] The Tribunals in *Masdar* (Table 1) and *9Ren* (Table 1) (and a number of dissenting opinions discussed in Subsection III.B) did not apply the majority view.

[28] See eg: *CMS* (n 7) para 277; *Continental Casualty v Argentina*, ICSID Case No ARB/03/9, Award (5 September 2008) (*Continental Casualty*) para 261; *El Paso* Energy Corp v Argentina ICSID Case No. ARB/03/15, Award (31 October 2011) paras 374–8; *Electrabel v Hungary*, ICSID Case No ARB/07/19, Decision on Applicable Law and Liability (30 November 2012) (*Electrabel*) para 7.77; *LG&E* (n 7) para 139; *Saluka* (n 6) paras 305–6.

[29] *NextEra* (Table 1) paras 600–1; *Eiser* (Table 1) para 382; *PV Investors* (Table 1) para 567. However, this position is not universally accepted. See, eg: *ICW Europe* (Table 1) para 529; *Photovoltaic* (Table 1) para 483; *Voltaic* (Table 1) para 487; *WA Investments* (Table 1) para 570. The Tribunal in *Hydro* (Table 1) noted that stability and legitimate expectations were separate parts of ECT (n 2) art 10.1 but nevertheless linked FET and stability at para 583: 'the idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework does not mean the virtual freezing of the legal regulation of economic activities'.

[30] Emphasis added.

For example, the Tribunals in *Isolux*[31] and *Novenergia*[32] both held that regulatory stability was not a standalone requirement and that it is 'nothing more than an illustration of the obligation to respect the legitimate expectations of the investor'.[33] Similarly, the Tribunal in *Foresight* held that:

> In the absence of a specific commitment to the investor by the host State, the investor cannot expect the legal or regulatory framework to be frozen. In such circumstances, a host State has space to reasonably modify the legal or regulatory framework *without breaching an investor's legitimate expectations of stability.*[34]

By linking legitimate expectations with regulatory stability, tribunals are able to lower investors' legitimate expectations.

Additionally, tribunals have set a high threshold for what constitutes a breach of regulatory stability, holding that States' actions must have radically transformed the relevant regulatory regime in order to breach investors' legitimate expectations. The Tribunal in *Eiser* held that the FET standard under article 10(1) of the ECT 'necessarily embraces an obligation to provide fundamental stability in the *essential characteristics* of the legal regime relied upon by investors in making long-term investments'.[35] As was explained in *RREEF*, this approach 'excludes any unpredictable radical transformation in the conditions of the investments'.[36] The application of article 10(1) means that 'regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value'.[37] This grants States discretion to regulate in the public interest without generating liability for breaching the FET standard, even if they have made representations to investors.[38]

(ii) *What constitutes a specific commitment*

Tribunals applying the Majority View have held that investors have a legitimate expectation that they are shielded from regulatory changes only if a government makes a specific commitment to that effect.[39] For example, the Tribunal in *EDF* held that '[e]xcept where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable'.[40]

What constitutes a specific commitment is therefore critical and is defined narrowly under the Majority View. The Majority View places an emphasis on the form of any commitment or representation and, in doing so, focuses less on the substance of

[31] *Isolux* (Table 1) para 764.
[32] *Novenergia* (Table 1) para 643.
[33] *Isolux* (Table 1) para 765. See also: *Novenergia* (Table 1) para 646: stability is 'simply an illustration of the obligation to respect the investor's legitimate expectations through the FET standard, rather than a separate or independent obligation'.
[34] *Foresight* (Table 1) para 356 (emphasis added).
[35] *Eiser* (Table 1) para 382 (emphasis added). See also: *Antin* (Table 1) para 532; *RREEF* (Table 1) para 315.
[36] *RREEF* (Table 1) para 315. See also: *Eiser* (Table 1) para 382; *Cavalum*(Table 1) para 406.
[37] *Eiser* (Table 1) para 382.
[38] See eg: *ICW Europe* (Table 1) para 530: 'it does not in all circumstances affect the state's inherent right to exercise its sovereign power to respond to changing circumstances, for example with revisions in its legislation or legal system'. See also: *Antin* (Table 1) para 531; *Hydro* (Table 1) para 676; *Photovoltaic* (Table 1) para 484; *Voltaic* (Table 1) para 488; *WA Investments* (Table 1) para 571.
[39] See eg: *Hydro* (Table 1) para 592.
[40] *EDF v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) para 217.

a representation. McLachlan, Shore and Weiniger describe the limits of this principle as follows:

> A claim based upon a specific assurance from the host State generally arises from the creation of a bilateral relationship between the host State administration and the investor: whether by contract, licence or a relationship of specific representation.[41]

One example that satisfies that threshold is if the State's commitment is contained in a contract.[42] For example, the Tribunal in *CEF Energia* held that Italy had made a specific commitment to the investor (*i*) by issuing seven tariff recognition letters that unequivocally stated that the 'incentive tariff will be recognized for a period of twenty years as of the date of entry into operation of the plant' and (*ii*) by entering into subsequent contracts with the investor that provided a fixed FiT for 20 years.[43]

The Tribunal in *Belenergia* (which also related to the Italian regulatory regime) applied an even stricter approach to the notion of contractual commitments. It held that the investor contracts with the Italian government did not constitute specific commitments, as the contractual terms 'were replicated from the relevant legislation' and they 'were not personally addressed' to the investor.[44] The Tribunal therefore equated the contractual representations with legislative commitments, which did not create specific commitments. It was held that Belenergia therefore had no legitimate expectation that it would be shielded from the reduction of FiTs.

Investors may nevertheless derive legitimate, albeit reduced, expectations from legislation. For example, some tribunals applying the Majority View have held that investors did have a legitimate expectation that they would receive a 'reasonable rate of return' on their investments, and they based that conclusion on representations in legislation promising investors a 'reasonable rate of return'.[45] The Tribunal in *PV Investors* reached that conclusion and held that the 'requirement of reasonable profitability *restricted the State's power to amend the framework* and thereby *guaranteed a level of stability* of the conditions in which investors operated'.[46] Those tribunals did not explain why investors could rely on a general legislative representation guaranteeing a reasonable rate of return but not on a specific legislative representation regarding guaranteed FiT rates.

Tribunals have also held that representations made in legislation do not constitute specific commitments that investors will be unaffected by later legislative or regulatory changes, even if such representations are specific in substance and directed at a class of specific investors.[47] The Tribunal in *Isolux* went as far as holding that, in the Spanish context, the 'existence of a Special Regime throughout the life of the Plants

[41] McLachlan, Shore and Weiniger International Investment Arbitration – Substantive Principles [2nd ed.] Oxford University Press (2017) para 7.166.

[42] However, this does not mean that the FET standard operates as an umbrella clause. See, eg: Schreuer 'Fair and Equitable Treatment: interactions with other standards from Investment Protection and the Energy Charter Treaty' edited by G. Coop & C. Ribeiro, JurisNet (2008) 93.

[43] *CEF Energia* (Table 1) paras 211–13.

[44] *Belenergia* (Table 1) para 580. The Tribunal did not cite any legal authorities in support of this stricter approach to what constitutes a contractual commitment.

[45] See eg: *Hydro* (Table 1) para 690; *Cavalum* (Table 1) para 601: a reasonable rate of return was the 'cornerstone of the [Spanish] incentive regime'.

[46] *PV Investors* (Table 1) para 616 (emphasis added).

[47] See eg: *Blusun* (Table 1) paras 367 and 371.

could not be an expectation *per se*, *regardless of its content*'.[48] The Tribunal in *Antaris* held that '[p]rovisions of general legislation applicable to a plurality of persons or a category of persons, do not create legitimate expectations that there will be no change in the law'.[49] This also reflects the position of tribunals outside the European Renewable Energy Cases context.[50]

There are two commonly cited reasons for why legislative commitments do not constitute specific commitments under the Majority View. First, legislation may be amended in the future.[51] As held in *Eiser*, investors 'could not reasonably expect that there would be no change whatsoever in the RD 661/2007 regime over three or four decades. As with any regulated investment, some changes had to be expected over time'.[52] The *RREEF* Tribunal held that the representation regarding FiTs in Spanish law RD 661/2007 did not constitute a specific commitment, as it was subject to change.[53] The second reason that legislation cannot constitute a specific commitment is because it is not specific in either application or substance. The Tribunal in *Charanne* held that even if the Spanish incentives were 'directed to a limited group of investors', that:

> does not make them to be commitments specifically directed at each investor. The rules at issue do not lose the general nature that characterizes any law or regulation by their specific scope. To convert *a regulatory standard into a specific commitment of the state, by the limited character of the persons who may be affected*, would constitute an excessive limitation on [the] power of States to regulate the economy in accordance with the public interest.[54]

Other tribunals have held that legislation was specific, but declined to rule that a specific commitment was established. In *Foresight*, the Tribunal held that the investors had legitimate expectations 'based foremost on the *express language of RD 661/2007*, which sets out *fixed FiTs* to be paid for [the] entire operating life of a PV facility'.[55] However, despite that, it was unwilling to hold that such express language constituted a specific commitment to the investor. Instead, the investors' legitimate expectation was that the Spanish regulatory regime 'would not be radically changed'.[56] The Tribunal in *PV Investors* also noted that it:

> is correct that Article 44.3 states that certain revisions that may occur in the future under that decree would not affect existing installations. However, that mere statement in and of itself does not make of Article 44.3 a stabilization commitment according to which the State guaranteed that future legislative or regulatory change would not affect the investment.[57]

[48] *Isolux* (Table 1) para 803 (emphasis added).
[49] *Antaris* (Table 1) para 360. Also cited in *CEF Energia* (Table 1) para 185. See also: *Continental Casualty* (n 28) para 261.
[50] See eg: *Continental Casualty* (n 28) para 261(ii): '*general legislative statements engender reduced expectations*, especially with competent major international investors in a context where the political risk is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and ius cogens' (emphasis added). See also: *El Paso* (n 28) paras 376–8; *Philip Morris Brands v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) (*Philip Morris*) para 426.
[51] See eg: *Antaris* (Table 1) para 360; *NextEra* (Table 1) para 584; *BayWa* (Table 1) para 474; *RWE* (Table 1) para 538.
[52] *Eiser* (Table 1) para 387.
[53] *RREEF* (Table 1) para 384: The Tribunal did hold that the statement in the preamble of RD 661/2007 (that investors were guaranteed a 'reasonable return on their investments') did constitute a specific commitment, even though it was also legislative in nature, and therefore also subject to future change.
[54] *Charanne* (Table 1) para 493 (emphasis added).
[55] *Foresight* (Table 1) para 378 (emphasis added).
[56] ibid.
[57] *PV Investors* (Table 1) para 601.

The Tribunal held that the 'constantly evolving [regulatory] framework' meant that it was unreasonable for investors to rely on legislation, even if it is 'correct' that legislation contained commitments.[58]

In *Novenergia*, the Tribunal also acknowledged that RD 661/2007 provided a fixed and guaranteed return, holding that the investor 'has convincingly established that its initial expectations were legitimate since there was nothing to contradict *the guaranteed FIT in RD 661/2007* and the surrounding statements made by the Kingdom of Spain'.[59] However, it did not take the next step of holding that the investor had a legitimate expectation that the guaranteed FiTs would remain fixed. Instead, the Tribunal concluded that the investor 'had a legitimate and reasonable expectation that there would *not be any radical or fundamental changes* to the Special Regime as set out in RD 661/2007'[60] and that Spain's changes had been 'radical and unexpected' and had 'entirely transformed' the regulatory regime.[61] The Tribunal did not address why the legislative commitments made by Spain did not create a legitimate expectation that the FiT rate would be fixed.

Similarly, the Tribunal in *Cube* held that the Spanish regulatory regime was specific in substance[62] and in scope[63] and therefore created legitimate expectations.[64] However, despite that, it concluded that the 'investors have no right to insist that the system of remuneration remain unchanged'.[65] The Tribunal did not elaborate on how it reached that conclusion. By limiting the types of representations that constitute a specific commitment, tribunals are able to grant states greater discretion to regulate without breaching the FET standard.

(iii) *Margin of appreciation*

The 'margin of appreciation' doctrine stems from European Court of Human Rights jurisprudence. It provides that a 'state is entitled to a certain "space to manoeuvre", within which its conduct is exempt from full-fledged review'.[66] In recent years this deference towards State actions has, consistently with the abovementioned policy considerations, 'found growing favor within investor-state arbitration'.[67] It is often referred to as a State's 'right to regulate' in the public interest. The upside for tribunals applying this principle is that it is undefined, so they have broad discretion to choose how much 'deference' should be granted to States that exercise their right to regulate without generating liability.[68] This discretion informs decisions made both inside and outside the European Renewable Energy Cases context.[69] For example,

[58] ibid para 602. See also ibid para 613: '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'.

[59] *Novenergia* (Table 1) paras 681 (emphasis added) and 697: The Tribunal also referred to a 'fixed long-term FiT'.

[60] ibid para 681 (emphasis added). See also ibid para 688: the claimant 'could not have reasonably expected that there would be no changes at all to the regulatory regime that would lower the value of its investment'.

[61] ibid para 695.

[62] *Cube* (Table 1) para 401.

[63] ibid para 388.

[64] ibid para 404: 'RD 661/2007 did set out limitations and qualifications and provided for the revision of the regime that it established. It was a complex, sophisticated regime designed to be stable; and it was reasonable for the Claimants to expect stability from it and to act in reliance upon it.'

[65] ibid para 408.

[66] Julian Arato, 'The Margin of Appreciation in International Investment Law' (2014) 54(3) Virginia J Intl L 549–50.

[67] ibid 553.

[68] The undefined nature of the principle and the fact that it is not included in investment treaties are two of the main criticisms directed at the margin of appreciation of doctrine. See, eg: *Antaris* (Table 1) (Born dissent) paras 41–2.

[69] See eg: *CMS* (n 7) paras 277–81; *El Paso* (n 28) paras 365–74; *Electrabel* (n 28) para 7.77; *Saluka* (n 6) paras 305–6; *Total* (n 7) para 164; *United Utilities v Estonia*, ICSID Case No ARB/14/24, Award (21 June 2019) para 574.

the Tribunal in *Philip Morris* held, in the context of public health-related regulations, that:

> the 'margin of appreciation' is not limited to the context of the ECHR but 'applies equally to claims arising under BITs,' at least in contexts such as public health. The responsibility for public health measures rests with the government and *investment tribunals should pay great deference to governmental judgments of national needs* in matters such as the protection of public health.[70]

Within the European Renewable Energy Cases, tribunals have repeatedly emphasised the broad discretion of States to regulate in the public interest without incurring liability. For example, the Tribunal in *Hydro* noted that 'the expression "margin of appreciation" can be used to convey the point that the State's right to regulate is subject to a wide latitude, subject to its compliance with its duties under the ECT and customary international law'.[71] As a result, legislative changes 'are not prevented by the FET standard if they do not exceed the acceptable margin of change in the exercise of the host State's normal regulatory power in pursuance of a public interest'.[72] The Tribunal concluded that 'the State is entitled to a high measure of deference, and the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances'.[73] Similarly, the Tribunal in *SunReserve* held that the threshold for establishing a breach was 'high' and that a breach would therefore require a 'radical or fundamental change'.[74]

The Tribunal in *Antaris* also held that there is no breach of the FET standard if changes 'do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change'.[75] The Tribunal in *RREEF* noted that 'it is generally recognized that States are in charge of the general interest and, as such, enjoy a margin of appreciation in the field of economic regulations. As a result, the threshold of proof as to the legitimacy of any expectation is high'.[76]

In determining what constitutes an acceptable margin of change, and therefore what constitutes a breach of an investor's legitimate expectations, tribunals applying the Majority View have granted the 'high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders'.[77] As a result, only a radical change to a regulatory regime satisfies this high threshold. The Tribunal in *NextEra* concluded that the cumulative changes in Spain meant that the 'regime was fundamentally and radically changed' in breach of the investor's legitimate expectations.[78] Similarly, the Tribunal in *Eiser* concluded

[70] *Philip Morris* (n 50) para 399 (emphasis added).
[71] *Hydro* (Table 1) para 589. See also: *PV Investors* (Table 1) para 583: 'it is also recognized that States, as the entities tasked with balancing the often competing interests involved, enjoy a margin of appreciation in the field of economic regulation'. See also: *Cavalum* (Table 1) para 430.
[72] *Hydro* (Table 1) para 590.
[73] ibid para 676(8).
[74] *SunReserve* (Table 1) para 692.
[75] *Antaris* (Table 1) para 360.
[76] *RREEF* (Table 1) para 262. See also: *RWE* (Table 1) paras 567 and 647; *BayWa* (Table 1) para 480.
[77] *Antaris* (Table 1) para 360. See also: *Eskosol* (Table 1) para 433.
[78] *NextEra* (Table 1) paras 599 and 601. See also: *SolEs* (Table 1) para 462: 'The Second Set of Disputed Measures was disproportionate in the sense that the term was used in Charanne, because those measures suddenly and unexpectedly removed the essential features of the regime in place when Claimant invested.'

that there had been a breach of the FET standard, but only after concluding that Spain's regulatory changes 'deprived Claimants of essentially all of the value of their investment'.[79]

Tribunals applying the Majority View in the European Renewable Energy Cases have therefore disregarded the multiple representations made by States in legislation, government statements and communications with investors. As a result, investors' legitimate expectations are potentially no higher than the basic requirement of stability already guaranteed under article 10(1) of the ECT.

B. *Minority View*

A minority of tribunals in the European renewable energy cases have applied the Minority View. It has been argued in a number of dissenting opinions[80] and a small number of majority opinions.[81] The Minority View focuses less on public policy considerations and applies a lower threshold for establishing liability for breaching the FET standard than the Majority View.

(i) *Relationship between stability and legitimate expectations*

Tribunals applying the Minority View have focused on whether government representations have constituted specific commitments to investors. Given that tribunals applying the minority view have repeatedly found that governments made specific commitments, it was not necessary to discuss the separate issue of stability in much detail. Those tribunals that did address the issue held that stability was a standalone requirement under the ECT.[82]

(ii) *What constitutes a specific commitment*

Under the Minority View, the form of a commitment is not critical. Instead, it is the substance of a commitment that is critical. The Tribunal in *9Ren* held that:

> there is no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself where (as here) such a commitment is made for the purpose of inducing investment, which succeeded in attracting the Claimant's investment and once made resulted in losses to the Claimant.[83]

Similarly, Born held in Antaris that:

> the decisive issue is not the form of a state's undertaking (as a contract, statute, decree or regulation) to investors, but whether the statements and actions of the state provide a sufficiently clear commitment regarding future treatment to give rise to legal rights or legitimate expectations on the part of an investor.[84]

As a result, it is possible for States to make binding commitments in legislation. Born stated in *JSW Solar* that:

[79] *Eiser* (Table 1) para 418. See also: *RWE* (Table 1) para 451: 'a breach of Article 10(1) may be established if there has been some form of total and unreasonable change to, or subversion of, the legal regime'.

[80] See eg: *Antaris* (Table 1) (Born dissent); *Charanne* (Table 1) (Tawil dissent); *Isolux* (Table 1) (Tawil dissent); *JSW Solar* (Table 1) (Born dissent); *Cavalum* (Table 1) (Haigh dissent).

[81] See eg: *Masdar* (Table 1), *9Ren* (Table 1) and *ESPF* (Table 1).

[82] See eg: *ESPF* (Table 1) para 443; *Antaris* (Table 1) (Born dissent) para 32; *JSW Solar* (Table 1) (Born dissent) para 9; extracts from the unpublished Natland Award, published by IA Reporter.

[83] *9Ren* (Table 1) para 295.

[84] *Antaris* (Table 1) (Born dissent) para 35. See also: *JSW Solar* (Table 1) (Born dissent) para 11; *Watkins* (Table 1) para 526; *ESPF* (Table 1) para 512.

> it is well-settled that a state may, under international law, make a binding commitment to foreign investors in its legislation, rather than in individual contracts or specific representations to individual investors.[85]

Cases outside the European Renewable Energy Cases have also held that legislation may contain specific commitments.[86] For example, *Enron* related to legislative incentives introduced by Argentina's Government in the 1990s to encourage foreign investment in natural gas. The Tribunal noted that the incentives 'contain[ed] specific guarantees to attract foreign capital to an economy historically unstable and volatile'.[87] The guarantees included the payment of tariffs to producers in US dollars, adjusted every six months in line with US inflation rates and a promise that the tariffs would not be frozen without compensation. The Tribunal held that '[s]ubstantial foreign investment' was made in reliance 'on the strength of such guarantees'.[88] It concluded that the combination of governmental marketing and the 'statutory enshrinement of the tariff regime' meant that Enron 'had reasonable grounds to rely on such conditions'.[89] *LG&E* related to the same regulatory changes. The Tribunal similarly held that the investor 'relied upon certain key guarantees in the Gas Law' that created 'specific expectations among investors'.[90] Argentina was consequently 'bound by its obligations' as it was 'unfair and inequitable' to change the legislative guarantees relied upon by foreign investors.[91] This approach ensures that the legal force of legislative commitments is upheld, irrespective of whether legislative commitments may be amended in the future. This also means that States can provide benefits to investors without having to enter into individual contracts with each of them separately.[92]

As detailed in the 2012 United Nations Conference on Trade and Development (UNCTAD) Report on the FET standard and other cases, there are two types of specific commitments: (*i*) commitments that have a specific object and purpose (made 'with a specific aim to induce foreign investments'); and (*ii*) commitments that are 'personally' targeted at a specific investor.[93] Tribunals applying the Minority View have repeatedly stated that the legislative representations made in the European Renewable Energy Cases satisfied both of those elements. First, the legislation must provide certainty regarding the state's commitment and the purpose of that commitment. As explained in one dissenting opinion:

> where a state is found to have provided undertakings or commitments to a class of investors of specified treatment, for a prescribed period of time, in its general legislation,

[85] *JSW Solar* (Table 1) (Born dissent) para 11. See also: *ESPF* (Table 1) para 530.

[86] See eg: *CMS* (n 7) para 27: Jurisdiction may be established if 'general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments'.

[87] *Enron* (n 7) para 264.

[88] ibid.

[89] ibid para 265.

[90] *LG&E* (n 7) para 133.

[91] ibid paras 133–4. Despite these statements, the Tribunal ultimately adopted a majority view position as it: (*i*) acknowledged the policy consideration of necessity; and (*ii*) based its finding of FET breach on the basis that Argentina went 'too far by completely dismantling the very legal framework constructed to attract investors', as opposed to the breach of legislative commitments (para 139).

[92] *Antaris* (Table 1) (Born dissent) para 37: 'It would gravely obstruct a state's governance and regulation, and undermine the rule of law, to deny states the power to make binding commitments to private parties, including investors, by way of legislative (or regulatory) guarantees.'

[93] 'Fair and Equitable Treatment Standard', UNCTAD Series on Issues in International Investment Agreements II (2012) (UNCTAD Report) 69. See also: *El Paso* (n 28) para 375.

> obligations of fair and equitable treatment apply no less than where the state has made a specific stabilization commitment to an individual investor.[94]

This was reflected in the Czech legislation, which stated that the FiT rate would be 'maintained as the minimum [amount of revenues], for a period of 15 years from the commissioning year of the facility'.

Similarly, in the Spanish context, the Tribunal in *9Ren Holding* concluded that:

> There is no doubt that the Claimant independently arrived at this understanding of RD 661/2007 prior to its investment, and *relied on the clear undertaking in RD 661/2007* in deciding to invest €211 million in Spanish renewable energy projects.[95]

The Tribunal therefore held that Spain's commitment had a clear object: to induce investment in Spain's renewable energy sector and that:

> There is no doubt that an enforceable 'legitimate expectation' requires a clear and specific commitment, but in the view of this Tribunal there is no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself where (as here) such a commitment is made for the purpose of inducing investment, which succeeded in attracting the Claimant's investment and once made resulted in losses to the Claimant.[96]

The Tribunal concluded that 'the clear and specific 'guarantee' in RD 661/2007 satisfies the requisite degree of 'specificity'.'[97] This constituted a breach of the FET standard under the ECT, on the ground that 9Ren Holding had made significant long-term financial commitments in reliance on Spain's representations. As noted in another award, the investors were therefore 'entitled to an expected and determinable benefit'.[98]

Secondly, commitments must be directed at a specific group. For example, the investors in Spain had to register with the RAIPRE in order to be able to benefit from the FiTs and other financial benefits offered by Spain. There was also a temporal requirement that any facility had to be in operation by a certain date after completing registration. The investors in *Masdar* received a specific letter stating that their plants were registered and therefore eligible to benefit from the financial incentives regime under RD 661/2007.[99] Those requirements meant that 'a limited number of potential recipients'[100] who satisfied the necessary requirements were 'entitled to a specific and determined benefit'.[101]

(iii) *Measures in support of specific commitments made*

The legislative commitments made by the Spanish, Italian and Czech governments were not made in isolation. They were supported in various ways as part of an

[94] *Antaris* (Table 1) (Born dissent) para 44.

[95] *9Ren Holding* (Table 1) para 270 (emphasis added). The Tribunal in *InfraRed* (Table 1) took a different approach to the other tribunals applying the alternative view, noting at para 421 that although RD 661/2007 did not contain a specific commitment, RD 1614/2010 did contain a specific commitment as it reiterated that in RD 661/2007 'with even more specificity' and, as a result, the investor was shielded from subsequent regulatory changes.

[96] *9Ren Holding* (Table 1) para 295. See also: *Charanne* (Table 1) (Tawil dissent) para 7; *BayWa* (Table 1) (Naon dissent) para 6.

[97] *9Ren Holding* (Table 1) para 299.

[98] *Charanne* (Table 1) (Tawil dissent) para 12.

[99] *Masdar* (Table 1) paras 516–17: 'In accordance with the provisions of Section 1 of the Fifth Temporary Provision of the aforementioned Royal Decree Law, the economic regimen for the facilities that are registered in the Pre-Allocation Registry for Compensation . . . will be as foreseen in Royal Decree 661/2007, dated 26 September.'

[100] *Charanne* (Table 1) (Tawil dissent) para 8.

[101] *Isolux* (Table 1) (Tawil dissent) para 13.

overarching aim to attract foreign investment in renewable energy. Tribunals applying the minority view have emphasised these additional measures.

a) Government statements

In relation to the Czech incentives regime, there are eleven examples of statements made and actions taken by the government that supported its representations in the Act on Promotion.[102] For example, in a 2005 report for the European Commission the Czech Republic stated that the Act on Promotion 'provides for an unprecedented system of support in the form of fixed purchase (feed-in) prices and, where necessary, supplements to market prices for electricity, and also guarantees a level of return on each unit of electricity produced for a period of 15 years'.[103] Another example was the ERO's Pricing Regulation, which stated that:

> Feed-in tariffs and green bonuses determined pursuant to the [Act on Promotion] shall apply throughout the entire expected lifetime of the facility producing electricity as set out by the Public Notice implementing certain provisions of the [Act on Promotion].[104]

It was concluded that the various statements 'unequivocally assured investors' that they would receive a guaranteed FiT rate for 15 years and that there 'is no other plausible interpretation of these unequivocal representations, made consistently and uniformly over many years, by numerous different governmental representatives in the Czech Republic'.[105]

Another example, in the Spanish context, was a press release from the Spanish Government, on the same day that RD 661/2007 entered into force, that reinforced the legislation's unequivocal representations to investors.[106] The press release stated that the 'tariff revisions carried out in the future will not affect those installations already operating. This guarantee affords legal safety to the producer, providing stability to the sector and promoting its development. The new regulations will not be of a retroactive nature'.[107] Naon's dissent in *BayWa* contended that '[s]tatements in this press release are consistent with the wording precluding the retrospective application of its provisions set forth in Article 44.3 of RD 661/2007, [they] constitute specific representations that future tariff revisions would have no retroactive effect and would not affect facilities already in operation'.[108] Accordingly, he concluded that the wind farm investors could rely on the stability of the FiT.[109] Haigh's dissent in *Cavalum* also pointed out the 'panoply of inducements created by Spain in the form of these two decrees, press releases and Ministerial statements, statements by the CNE, IDAE and Invest In Spain' as evidence of Spain's intention to provide a guaranteed FiT.[110]

[102] *JSW Solar* (Table 1) (Born dissent) para 50.
[103] ibid para 50.
[104] ibid.
[105] ibid para 51.
[106] The Tribunal in *InfraRed* (Table 1) at para 425 cited a press release issued by the Spanish Government in relation to the later Royal Decree 1614/2010, which 'involves reinforcement of the visibility and *stability of the regulation* of these technologies in the future, and *guarantees the present premiums and tariffs* of Royal Decree 661/2007 as of 2013 for installations in operation and for those included on the pre-register' (emphasis added).
[107] Cited in *Cube* (Table 1) para 266.
[108] *BayWa* (Table 1) (Naon dissent) para 22.
[109] ibid para 23.
[110] *Cavalum* (Table 1) (Haigh dissent) para 23.

b) Government correspondence

Masdar was an exceptional case, as the claimant requested and received written confirmation from Spain that its facilities were entitled to an unaltered FiT. First, the investors in Masdar received a specific letter after completing registration stating that their plants were registered and therefore eligible to benefit from the financial incentives regime under RD 661/2007.[111] Secondly, Masdar wrote to the Spanish Ministry of Industry, Tourism and Business seeking confirmation of its entitlement to financial incentives. The Ministry responded that:

> Currently, and by virtue of the provisions of section 1 of the fifth transitional provision of Royal-Decree-law 6/2009, dated 30 April, the retribution applicable to the installations consists of the tariffs, premiums, upper and lower limits and supplements established in Royal Decree 661/2007.[112]

The *Masdar* Tribunal concluded that it 'would be difficult to conceive of a more specific commitment than a Resolution issued by Spain addressed specifically to each of the Operating Companies, confirming that each of the Plants qualified under the RD661/2007 economic regime for their "operational lifetime".'[113]

This should, in theory, satisfy the Majority View's requirement of a specific written commitment from the State. However, the commitment in *Masdar* was not in the written correspondence from Spain. Instead, it was in the relevant legislation. The written correspondence from the Spanish Government, after the investment was made, merely confirmed the investor's understanding (and the State's acceptance) that the relevant legislation contained a specific commitment.[114] As highlighted by the Tribunal in *9Ren Holding*:

> the specific 'in person' communications in Masdar and some of the other cases did little more than repeat what was already plain on the face of RD 661/2007, and in any case *post*-dated rather than *pre*-dated the investment.[115]

This confirms that the other investors in Spain could rely on the Spanish legislation as it contained specific commitments that the Spanish Government considered itself bound by.

Within the Italian context, the government provided letters in support of the Conto Energia Decrees. Both the legislation and letters (and subsequent contracts) contained specific commitments to an unaltered FiT for 20 years. The Tribunal in *Greentech* held that the 'repeated and precise assurances to specific investors amounted to guarantees that the tariffs would remain fixed for two decades. Italy effectively waived its right to reduce the value of the tariffs'.[116] Italy's changes to the FiTs breached the investor's legitimate expectations, given the 'specificity of the assurances' offered in the underlying legislation and accompanying letters and

[111] *Masdar* (Table 1) paras 516–17: 'In accordance with the provisions of Section 1 of the Fifth Temporary Provision of the aforementioned Royal Decree Law, the economic regimen for the facilities that are registered in the Pre-Allocation Registry for Compensation . . . will be as foreseen in Royal Decree 661/2007, dated 26 September.'

[112] ibid para 519.

[113] ibid para 520.

[114] *Antaris* (Table 1) para 360: the Tribunal applied the Majority View and held that legislative commitments were not binding and that investors should instead seek confirmation from states that they will not be subject to future regulatory amendments. The Tribunal did not address the consequences of a State, such as Spain in *Masdar*, confirming to an investor that legislative commitments were binding.

[115] *9Ren Holding* (Table 1) para 293.

[116] *Greentech* (Table 1) para 450.

contracts.[117] Similarly, the majority in *ESPF* held that Italian 'promotional statements and reports, amongst others, are all consistent with, and confirm the content of, the Conto Energia Decrees and the GSE Letters and GSE Agreements'.[118]

(iv) *Margin of appreciation*

Advocates of the Minority View have rejected the 'margin of appreciation' doctrine in investment law.[119] It was noted in *Antaris* that 'unless the language of the investment protection treaty says otherwise, there is no room for the proposition that states retain a margin of discretion to modify or disregard undertakings given to investors through "general legislation"'.[120] It was also noted that the ECT makes no mention of a 'margin of appreciation'.[121]

As already noted, tribunals under the Majority View have emphasised that governments should be free to regulate as they see fit.[122] The Minority View does not deny that. As explained in one award, there 'is no doubt that as a general rule, no vested right to the continuance of a specific general legal framework exists, nor does a legitimate expectation in the stabilization of laws and regulations'.[123] However, if the exercise of that sovereign right breaches an explicit commitment and, by extension, an investor's legitimate expectations, then a State will need to compensate that investor. Tawil explained in his *Isolux* dissent that governments remain free to regulate as they see fit. Instead, the focus is on the effect of such regulation on an investor's legitimate expectations:

> The host State can always modify a legal regime of general or particular scope for reasons of public interest, but that does not prevent the recognition that, if with said legitimate action, acquired rights or legitimate expectations are affected, it is necessary to compensate the damages caused.[124]

The underlying rationale is that international law should give effect to commitments freely made by States. As noted by the Tribunal in *Watkins*, 'Spain made this commitment to attract investments by offering stability when Spain had no obligation to do so'.[125]

IV. EXPLAINING THE MINORITY VIEW

This section will outline why the Minority View should be applied for determining an investor's legitimate expectations under the FET standard. This section will also address certain related issues that were not addressed in detail by arbitrators in the European Renewable Energy Cases.

[117] ibid para 453.
[118] *ESPF* (Table 1) para 535.
[119] See eg: *Antaris* (Table 1) (Born dissent) paras 41–2: 'Paralleling this analysis, the Tribunal appears to conclude that the state retains a margin of discretion to balance the investor's expectations against public policy objectives and that only exercise of regulatory power exceeding that margin can constitute a breach of that state's obligations under the Treaties' fair and equitable treatment and non-impairment standards, even where an undertaking to investors has been made. I disagree fundamentally with the Tribunal's analysis.'
[120] ibid para 42.
[121] ibid para 50.
[122] See eg: *ICW Europe* (Table 1) paras 539–40; *Photovoltaik* (Table 1) paras 493–4; *Voltaic* (Table 1) paras 497–8; *WA Investments* (Table 1) paras 580–1. See also: *Micula v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013) (*Micula*) para 666.
[123] *Charanne* (Table 1) (Tawil dissent) para 11.
[124] *Isolux* (Table 1) (Tawil dissent) para 9. See also: *Antaris* (Table 1) (Born dissent) para 55; and ibid para 10.
[125] *Watkins* (Table 1) para 528.

A. *Application of the Principle of Estoppel*

The Minority View is based on the principle of estoppel. Though it originated in the common law legal system, it is also considered a principle of international law.[126] The principle of estoppel holds that it would be inequitable for a State to make representations to investors to induce investment, and then later go back on those representations, knowing that investors relied on those representations when making their investments.[127] Dolzer and Schreuer noted that there is an 'overlap' between the FET standard and estoppel.[128] The Tribunal in *Total* also made this link. It noted that:

> [u]nder international law, unilateral acts, statements and conduct by States may be the source of legal obligations which the intended beneficiaries … can invoke. The legal basis of that binding character appears to be only in part related to the concept of legitimate expectations – being rather akin to the principle of 'estoppel'.[129]

This link is appropriate. As explained by Dolzer, 'the purpose of the clause as used in BIT practice is to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties'.[130] Dolzer has also referred to this gap-filling role within the context of civil law systems.[131] As stated by Dolzer and Schreuer, 'specific assurances and representations' made by host States to 'induce investors' will generate legitimate expectations.[132] Tribunals should focus on the substance of a State representation and investor reliance on that representation and, by extension, less on the form of a representation. That is not a unique approach.[133] Tribunals have interpreted the concept of 'legitimate expectations' in relation to principles of estoppel without explicitly making the link with estoppel. For example, the Tribunal in *Suez* noted that investors in Argentina 'deriving their expectations from the laws and regulations adopted by the host country, acted in reliance upon those laws and regulations and changed their economic position as a result'.[134]

Within the European Renewable Energy Cases, multiple tribunals have referred to the principles of estoppel, even if they have not explicitly used that label. Indeed, even tribunals applying the Majority View have referred to the estoppel standard. For example, the Tribunal in *Cube* (which ultimately concluded that Spain violated the FET standard) held that:

[126] James Crawford, *Brownlie's Principles of Public International Law* (8th edn., OUP 2012) 420: 'A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency.' See also: T Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration* (CUP 2019) 37.

[127] See eg: *AWG Group v Argentina*, UNCITRAL, Decision on Liability (30 July 2010) para 226.

[128] Dolzer and Schreuer (n 3) 18 and 132. See also: A Diehl, 'The Core Standard of International Investment Protection—Fair and Equitable Treatment' (Kluwer Law International 2012) 341; Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA) [1984] ICJ Rep 29 paras 129–30; A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 279.

[129] *Total* (n 7) para 131.

[130] Rudoff Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39(1) The International Lawyer 90. This analysis was adopted in *Sempra* (n 7) para 297.

[131] Dolzer (2014) (n 22) 12.

[132] Dolzer and Schreuer (n 3) 149. See also: *Glamis Gold v United States of America*, NAFTA/UNCITRAL, Award (8 June 2009) para 627: legitimate expectations stem from 'the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations'.

[133] See eg: Katia Yannaca-Small, 'The Normative Content of the Fair and Equitable Treatment Standard' in Yannaca-Small (ed) OUP (n 4) para 20.65; Wongkaew (n 126) 9–13.

[134] *Suez v Argentina*, ICSID Case No ARB/03/17, Decision on Liability (30 July 2010) para 226. See also: *Micula* (n 122) paras 668–9; *Total* (n 7) paras 120–1.

> the Respondent held out the assurance of the stability of specific regulatory provisions as an inducement to invest in the renewable energy sector, and was not free to walk away from that assurance at will. Investors were entitled to rely upon that assurance of stability as a firm commitment.[135]

The Tribunals in *RREEF*[136] and in *ICW Europe*[137] also referred to an estoppel-based test.

Decisions applying the Minority View have also applied those principles, but have followed through to a logical conclusion.[138] For example, it was noted in one dissenting opinion that:

> the focus is not on artificial or arbitrary distinctions between 'statutory' and 'contractual' undertakings or 'general legislation' and 'specific assurances', but on *whether the state's actions and statements have provided undertakings to investors which it would be unfair or inequitable for the state to dishonor*. [. . .] The decisive question is not the form of a state's representations but whether the content and character of those representations is sufficiently clear to give rise to legitimate investor expectations that the state will abide by its commitments.[139]

If a State makes an explicit representation to a specific group of investors and the investors rely on that representation, it would be inequitable for the State to be able later to go back on that representation without compensating the investor. The requirements of estoppel have been repeatedly satisfied in the European Renewable Energy Cases.

B. *Investors' Legitimate Expectations are Separate from any Obligation of Stability*

Legitimate expectations should be based on the relevant legal system and any representations made by the relevant State.[140] Absent express wording to the contrary, the issue of whether an investor has a right to general regulatory stability should be a separate issue. The Tribunal in *ICW Europe* held that the 'obligation to guarantee a stable and predictable investment framework forms part of the FET standard' under the ECT.[141] However, this requirement is 'legally distinct from the protection of an investor's legitimate expectations'.[142] This is reflected in decisions outside the European RenewableEnergyCases that have held that any requirement to provide stability under the FET standard is separate.[143] Such separation is important, as some tribunals in the European Renewable Energy Cases have combined the two principles and held that investors' legitimate expectations are limited to general

[135] *Cube* (Table 1) para 397.
[136] *RREEF* (Table 1) para 388. See also: *Antin* (Table 1) para 532: 'a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered—i.e., stripped of its key features—as applied to existing investments in ways that affect investors who invested in reliance on those regimes'.
[137] *ICW Europe* (Table 1) para 542. See also: *Charanne* (Table 1) para 486: a State cannot induce foreign investment 'to later ignore the commitments that generated such expectations'. See also: *Hydro* (Table 1) para 568: governments 'should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime'.
[138] *JSW Solar* (Table 1) (Born dissent) para 85.
[139] *Antaris* (Table 1) (Born dissent) paras 44–5 (emphasis added).
[140] Dolzer (2014) (n 22) 22.
[141] *ICW Europe* (Table 1) para 529. See also: *Stadtwerke* (Table 1) para 257. See also: Dolzer (2014) (n 22) 23: the ECT (n 2) 'expressly recognizes an obligation on the part of the host state to provide for legal stability'.
[142] *ICW Europe* (Table 1) para 529. See also: *Photovoltaic* (Table 1) para 483; *Voltaic* (Table 1) para 487; *WA Investments* (Table 1) para 570.
[143] See eg: *Occidental* (Table 1) para 183; *CMS* (n 7) para 274; *Enron* (n 7) para 260.

stability (irrespective of any government representations).[144] That link artificially minimises an investor's legitimate expectations.

A general stability requirement only requires that the fundamental features of the legal framework remain in place. However, investors in the European Renewable Energy Cases had legitimate expectations that went beyond that separate and basic requirement (i.e. that investors would receive an unaltered FiT for a set number of years). As a result, an express stability requirement acts as a 'floor' and investors' legitimate expectations may impose additional obligations on States. By equating legitimate expectations with stability and holding that investors only have a legitimate expectation of basic stability, the representations made by States that should define the scope of an investor's legitimate expectations are undermined.[145]

C. *Legislation May Contain Specific Commitments*

It is argued under the Majority View that legislation is subject to change, and that as a consequence, investors cannot rely on commitments contained in legislation. Ultimately, it is an issue of risk allocation. Under the Majority View, the risk of legislative change should rest on investors. The Tribunal in *Stadtwerke* contended that:

> The law of unintended consequences, a frequent phenomenon in policy making, reflects the fact that purposeful actions, undertaken with good intentions, such as encouraging solar energy development, sometimes result in undesirable outcomes. When that happens policy makers often take what they perceive as necessary corrective actions to remedy the situation, which is exactly what happened in Spain.[146]

Disregarding the previous commitments of States, which voluntarily assume the risk of legislative change due to subsequent 'undesirable outcomes' is unconvincing. Investors should be able rely on explicit commitments made in legislation, in the same way that they should be able to rely on other explicit government representations. For example, governments may be liable for unilateral statements if those governments induced reliance on those statements and the other parties consequently relied on those statements.[147] The underlying rationale is simple: if States want to benefit from foreign investment, they should accept the responsibility of upholding freely made commitments which were made with the intention of encouraging foreign investment and which guarantee specific treatment. This is consistent with the position under the Minority View.[148] Accordingly, States should accept the responsibility that comes with making specific legislative commitments to investors.

[144] See Subsection III.A.iii.
[145] See eg: *Foresight* (Table 1) para 356; *Antin* (Table 1) para 555.
[146] *Stadtwerke* (Table 1) para 260.
[147] Dolzer and Schreuer (n 3) 18. See also: William Michael Reisman and Mahnoush H Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' (2004) 19(2) ICSID Rev—FILJ 342: in the context of unilateral government statements, it was argued that '[w]here a host State which seeks foreign investment acts intentionally, so as to create expectations in potential investors with respect to particular treatment or comportment, the host state should, we suggest, be bound by the commitments and the investor is entitled to rely upon them in instances of decision'. This was cited in *Total* (n 7) para 119.
[148] *JSW Solar* (Table 1) (Born dissent) para 11; *Masdar* (Table 1) para 490; *Watkins* (Table 1) para 537.

(i) *Substance of a specific commitment*

The key is to look to the substance of the legislation and the purpose of that legislation. As explained by the Tribunal in *ICW Europe*, and applying the principles of estoppel, one must look at: '(a) whether the Respondent gave an assurance as to regulatory stability; (b) whether the Claimant effectively relied on such assurance; (c) whether this reliance was reasonable ... (d) whether the Respondent violated the Claimant's legitimate expectations'.[149] The Tribunal in *El Paso* focused on the substance of legislation, holding that 'two types of commitment might be considered "specific": those specific as to their addressee and those specific regarding their object and purpose'.[150]

The regulatory regimes in Italy, Spain and the Czech Republic satisfied those requirements. They were deliberately and clearly designed to attract foreign investment in the renewable energy sector and provided a long-term regulatory framework that investors relied on. For example, article 44(3) of RDL 661/2007 under the Spanish regulatory regime addressed the issue of future changes to the FiT rate, stating that any changes would not affect existing plants. The legislative commitment was clear regarding both the duration of the FiTs that investors would receive and the impact of any future changes to FiTs. The Tribunal in *OperaFund* stated that it had 'no doubt that the stabilization assurance given in Article 44(3) is applicable for the investments by Claimants. Indeed, *it is hard to imagine a more explicit stabilization assurance than the one mentioned in Article 44(3)*'.[151] Specifically, 'Article 44(3) of RD 661/2007 contained an express stability commitment that served its purpose of inducing investment in part by shielding investors in Claimants' position from legislative or regulatory changes'.[152] Spain was under no obligation to make such promises to investors. It was a policy decision made on the basis of self-interest. The majority in ESPF similarly noted that the Italian regulatory regime was 'designed to attract investment and [was] directed at investors who made investments that met specific requirements on the relevant timeline. The *Conto Energia* regime was not just a general framework, it provided specific incentives to investors who met specific requirements'.[153]

This affects the importance of due diligence in the specific factual circumstances found in the European Renewable Energy Cases. The Tribunal in *SunReserve* applied the Majority View and noted that:

> given the State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic or social conditions of the host State.[154]

It is of course important for investors to undertake due diligence before making an investment. The purpose of due diligence is to anticipate future regulatory changes.

[149] *ICW Europe* (Table 1) para 542. See also: *Charanne* (Table 1) para 486: a state cannot induce foreign investment 'to later ignore the commitments that had generated such expectations'. Although those decisions both applied the Majority View, they were correct to focus on the importance of reliance, at least in theory. This focus was not reflected in the tribunals' final decisions.

[150] *El Paso* (n 28) para 375. See also: UNCTAD Report (n 93) 69.

[151] *OperaFund* (Table 1) para 485 (emphasis added).

[152] ibid. See also: *Cavalum* (Table 1) (Haigh dissent) para 24.

[153] *ESPF* (Table 1) para 518. See also: para 524: 'The Conto Energia Decrees ... established detailed rules for applying, qualifying for and receiving the incentive tariffs.'

[154] *SunReserve* (Table 1) para 714. See also: *Antaris* (Table 1) para 360(6).

The likelihood of (and nature of) such changes will then influence an investor's legitimate expectations. However, in the European Renewable Energy Cases, the regulatory frameworks (*i*) already anticipated future changes to the FiT rates and (*ii*) explicitly provided that existing investments would be shielded from such regulatory changes. As a result, investors' legitimate expectations regarding the FiT rate could not reasonably have been affected by due diligence on that specific issue.

Not only were the purpose and substance of the regulatory regimes clear, but so were the criteria that investors had to satisfy in order to benefit from those incentives. Investors had to register with the relevant regulatory authority and satisfy temporal construction requirements in order to be eligible. In the case of Spain, that reliance was validated when the Spanish Government sent letters to the investor in *Masdar* confirming that they would receive an unaltered FiT as they had complied with the requirements contained in RDL 661/2007.[155] This high level of interaction between the State and investors would even satisfy the test provided by the *CEF Energia* Tribunal under the Majority View. In the context of the Italian regulatory regime, it held that:

> the greater the level of engagement as between a sovereign and an investor, such as here through Respondent's undertaking to maintain a specific incentivized tariff for 20 years, ultimately resulting in legitimate expectations which are clear in both scope and origin, the more rigorous the scrutiny must be of acts which, even if reasonable, cut across those legitimate expectations.[156]

The correspondence in *Masdar* demonstrates that the Spanish Government knew that the content of its commitments and the specific group of investors that were eligible to benefit from those commitments met the threshold of 'engagement' that would bind Spain.

It is not only advocates of the Minority View that believe that legislation may contain commitments. In *JSW Solar* (which applied the Majority View), the Czech Republic conceded during the hearing that it was possible for states to make binding commitments to investors in legislation. The state noted that:

> What we're saying is that [legislation providing a stabilization guarantee] has to be very clear and explicit in terms of constituting a commitment of stabilization. So, if the Legislature says we're going to stabilize this legal regime, then, of course, that would apply, certainly. We're just saying that was not the case here at all.[157]

The Tribunal in *JSW Solar* did not address that concession in its award.

(ii) Purpose of a specific commitment

Turning to the issue of legislative purpose, the 2012 UNCTAD Report outlined that 'general regulations that are put in place specifically to induce foreign investments and on which an investor relies can expose a State to liability if it subsequently decides to change or withdraw those regulations'.[158] The Tribunal in *Total* held that legislation could contain specific commitments. Specifically, it distinguished between laws 'aimed at providing a defined framework' for investments and laws 'not

[155] *Masdar* (Table 1) paras 519–22.
[156] *CEF Energia* (Table 1) para 243.
[157] Cited in: *JSW Solar* (Table 1) (Born Dissent) para 11—Transcript of Day 1, 83.
[158] UNCTAD Report (n 93) 77.

specifically addressed to the relevant investor'.[159] Although investors cannot rely on legislation in the second category, they can rely on legislation in the first category.[160] As a result, 'a claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations. This is the case for regimes, which are applicable to long-term investments and operations'.[161] The Tribunal noted that another critical element was the 'clarity with which the authorities have expressed their intention to bind themselves for the future'.[162]

The incentive regimes in Spain and the Czech Republic were entirely contained in legislation. As a result, investors in those jurisdictions could not have entered into contracts with those States, even if they wanted to. Therefore, the investors should have been able to rely on the specific commitments contained in legislation as the investors had no choice but to register with the relevant national authorities, and having done that, they were subject to the conditions contained in the various legislative instruments that governed those regulatory regimes. This was beneficial for those governments as it meant that they did not have to negotiate individual contracts with each investor.

(iii) *Reliance on a specific commitment*

Finally, an investor must also establish that its reliance was reasonable.[163] As held in *Micula*:

> There must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit. The crucial point is whether the state, through statements or conduct, has contributed to the creation of a reasonable expectation, in this case, a representation of regulatory stability.[164]

The Spanish, Italian and Czech Governments were aware of the significant long-term investment required for renewable energy plants and that debt-financing repayments were determined on the basis of the regulatory regime as it stood when investments were made. In *Foresight*, the claimants explained that 92 percent of the total costs of its photovoltaic facility stemmed from the facility's construction[165] and, as a result, international lenders required predictable cash flows when providing financing.[166] Guaranteed FiTs were therefore critical for long-term financial planning. Further, investor reliance can be reinforced by additional governmental representations. This may influence what expectations (if any) an investor may reasonably hold. It was noted in *JSW Solar* that the Czech Republic had made unequivocal statements that investors were entitled to a minimum FiT rate for 15 years on at least 11 separate occasions.[167] Those representations further reinforced the State's commitment in the Act on Promotion.

[159] *Total* (n 7) para 122.
[160] ibid.
[161] ibid.
[162] ibid para 121.
[163] McLachlan, Shore and Weiniger (n 41) para 7.184.
[164] *Micula* (n 122) para 669.
[165] *Foresight* (Table 1) para 273. *SolEs* (Table 1) para 415: 'PV plants cannot compete with conventional forms of energy production without substantial public subsidy or other form of incentive. They are capital-intensive, meaning that most of an investor's costs are incurred prior to operation (90%, according to Claimant's expert).'
[166] *Foresight* (Table 1) para 282.
[167] *JSW Solar* (Table 1) (Born dissent) para 50.

D. *Any Discretion Granted to a State Must Be Reflected in a State's Representations*

Under the Minority View, expectations stemming from specific commitments should be protected, even if they conflict with subsequent government regulation in the public interest.

(i) The impact of the FET standard on state sovereignty

Tribunals applying the Majority View have repeatedly stated that it was important to protect a State's right to regulate in the public interest and that investors must expect legal systems to change.[168] The policy rationale is that holding States liable may infringe on States' national sovereignty. This should not be a concern for tribunals. There are two reasons for this. First, liability under the FET standard does not stop States from regulating in the public interest.[169] Instead, liability generates a right to compensation for an adversely affected investor. That right to compensation does not affect any regulation introduced by a State.[170] Tawil's dissent in *Isolux* explained that States:

> can always modify a legal regime of general or particular scope for reasons of public interest, but that does not prevent the recognition that, if with said legitimate action, acquired rights or legitimate expectations are affected, it is necessary to compensate the damages caused.[171]

Similarly, the Tribunal in *Greentech* noted that 'states certainly retain the sovereign prerogative to amend their laws. However, if the state gives an investor express assurances that no amendment would occur, the investor must be fairly compensated if those assurances are violated'.[172] On that basis, any amendment would constitute a breach of the investor's legitimate expectations and generate liability. Liability does not prevent regulation. The fact that investors have brought claims against Spain, Italy and the Czech Republic demonstrates that investment protection has not prevented those States from exercising their sovereignty and introducing legislative changes.

Second, States exercise their sovereignty when they pass legislation that contains financial commitments and when they accept foreign investors investing under those regulatory regimes. States also exercise their sovereignty when they enter into investment treaties that contain FET clauses that may (depending on the specific wording of the clause) hold them liable if they breach subsequent representations made to foreign investors.[173] As argued by the investors in *OperaFund*:

> By entering into the ECT, Respondent accepted a limitation on its powers to alter the remuneration framework that applies to Claimants' investment: it accepted that if it gave foreign investors clear and repeated assurances of a long-term and stable framework, it

[168] See Section III.A.iii. See also: C Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6(3) JWIT 374: the principle of legitimate expectations is 'not absolute and does not amount to a requirement for the host State to freeze its legal system for the investor's benefit. A general stabilization requirement would go beyond what the investor can legitimately expect'.

[169] *OperaFund* (Table 1) para 485.

[170] *CMS* (n 7) para 29: 'ICSID tribunals cannot pass judgment on whether such policies are right or wrong. Judgment can only be made in respect of whether the rights of investors have been violated.'

[171] *Isolux* (Table 1) (Tawil dissent) para 9.

[172] *Greentech* (Table 1) para 452.

[173] Dolzer and Schreuer (n 3) 20.

> could not contradict those with impunity if it subsequently decided to take the remuneration framework apart.[174]

Similarly, the majority in *ESPF* noted that 'Italy had complete control over how it designed its scheme and opted for a regime that provided numerous incentives and support for these investments'.[175]

Even the Tribunal in *Cube*, which applied the Majority View, conceded that States 'have the right, and the legal power, to make representations as to the future treatment of investments in such a manner as to create expectations that cannot be defeated without violating a duty of Fair and Equitable Treatment'.[176] The consequence is that, absent a treaty provision to the contrary, States should not be able to avoid the financial commitments that they have freely made, regardless of the underlying purpose of the later legislative changes that generate liability for breaching investors' legitimate expectations. The Tribunal in *CEF Energia* noted that it 'is an inherent aspect and quality attaching to the dignity of a sovereign that promises made and obligations accrued by it are respectfully and carefully upheld and vindicated'.[177] Therefore, and as held in *Greentech*, 'repeated and precise assurances to specific investors' regarding fixed FiTs means that a State has 'effectively waived its right to reduce the value of the tariffs' for those specific investors.[178] Those voluntary commitments should be upheld.

(ii) *Guarantee of regulatory stability*

Further, unless provided in the relevant investment treaty, there should not be a free-standing guarantee of regulatory stability.[179] This issue is not specifically addressed by the Minority View. However, the author believes that this is consistent with the principles promoted by the Minority View. This position grants discretion to States, as they would only be held liable for legitimate expectations that they generate based on their own actions and representations. However, such discretion is only effective if states are held responsible for actions and representations that they do make. This position was supported in *Total*:

> In the absence of some 'promise' by the host State or a specific provision in the bilateral investment treaty itself, *the legal regime in force in the host country at the time of making the investment is not automatically subject to a 'guarantee' of stability* merely because the host country entered into a bilateral investment treaty with the country of the foreign investor. The expectation of the investor is undoubtedly 'legitimate', and hence subject to protection under the fair and equitable treatment clause, if the host State has *explicitly assumed a specific legal obligation for the future*, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law.[180]

[174] *OperaFund* (Table 1) para 431.
[175] *ESPF* (Table 1) para 510.
[176] *Cube* (Table 1) para 397.
[177] *CEF Energia* (Table 1) para 243.
[178] *Greentech* (Table 1) para 450.
[179] *RREEF* (Table 1) (Volterra dissent) para 21: it would be 'incorrect to juxtapose as a binary legal choice, in evaluating the conduct of a State in this context, either that a State enjoys a margin of appreciation so broad that it is always allowed to do whatever it likes consequence free or that an implicit stabilisation obligation exists that limits a State's conduct'. See also: *Total* (n 7) para 115: any limitation on governments 'should not lightly be read into a treaty which does not spell [out such limitations] clearly nor should they be presumed'.
[180] *Total* (n 7) para 117 (emphasis added). See also: para 118: this obligation also applies to government 'conduct' or 'declaration(s)'.

As a result, if a law is targeted at specific investors and states that 'the FiT rate is X and will remain unaltered for Y years', and the State subsequently changes the FiT rate within that timeframe, then that State should be held liable for breaching an investor's legitimate expectations. However, if a law targeted at specific investors states that 'the FiT rate is X and will be reviewed every Y years', then investors should be subject to subsequent changes as provided under the law. Similarly, if a law states that 'the FiT rate is X' but does not provide any timeframe for the rate's application, then investors should also not expect that it will remain unchanged and they will be subject to any subsequent changes, unless they are so drastic that they breach a stability obligation or the international minimum standard (depending on the wording of the FET standard in the relevant investment treaty). As already noted, the Minority View focuses on the substance of any representations made by the State (and not solely on the form of those representations).[181]

V. CONCLUSION

There is no doubt that many of the arguments made in relation to the Minority View run counter to current policy arguments and trends in the field of investment law. It is therefore unlikely that arguments under the Minority View will receive greater acceptance in the foreseeable future. However, it should be remembered that one of the main goals of investor-state dispute settlement was to provide investors and governments with greater legal certainty regarding the treatment of foreign investments. The Minority View upholds that goal. It grants States discretion to regulate without generating liability when they have not made commitments to investors but holds them liable when they have breached specific commitments that they made (and that investors relied on). The Spanish, Italian and Czech governments in the European Renewable Energy Cases made specific commitments to investors, and as a result, those investors had a legitimate expectation that those commitments would be upheld.

[181] The focus on the effect of a measure will allow tribunals to avoid 'second guessing' government policy by deciding whether the relevant policy change was proportional to the goal of the policy. This approach was applied by Born in his dissent in *Philip Morris* (n 50) para 145: 'the tribunal must assess whether, viewed in the context of a state's legislative and regulatory actions, a particular measure is rationally related and fairly proportionate to the state's articulated objectives'.