Zoltán Víg

The fair and equitable treatment in the Energy Charter Treaty

Fundamenta Fontium Iuris
15

Forrás: https://thepresentation.ru/uncategorized/truboprovodnyy-transport-belarusi-osobennosti-raspredeleniya-elektroenergii#slides-13

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Vig.indd 2 2021. 08. 26. 9:35:08

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Iurisperitus Publishers
Szeged, 2021

Vig.indd 3 2021. 08. 26. 9:35:08

Fundamenta Fontium Iuris

Series Editor:
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Technical Editor:
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Responsible Publisher:
Márta Görög Dean
President of the Pólay Elemér Alapítvány board of trustees

Prepared by Innovariant Ltd
Senior Editor: György Drágán

ISSN 2061-1609
ISBN 978-615-6268-15-0

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INTRODUCTION

The number of investment arbitration cases from the energy sector is increasing, accompanied by a rise in a more frequent invocation of the Energy Charter Treaty.[1] Statistics show that the most frequently alleged breach by the claimants is the breach of article 10(1) of the Energy Charter Treaty, which makes provision for the obligation to fair and equitable treatment (FET) of investments of investors in the host state.[2] Based on various investor-state arbitration decisions, the fair and equitable standard is usually associated with the (sub-)standard of the investor's legitimate expectations. Therefore, this work examines the requirements of the fair and equitable treatment and the legitimate expectations doctrines as interpretated by arbitral tribunals in the Energy Charter Treaty related arbitral practice.

The first part of the work introduces the reader to the concept of the fair and equitable treatment standard and its sub-standard, the legitimate expectations. The legitimate expectations is a sub-standard that Tribunals have become increasingly reliant on in finding a state liable for a breach of the fair and equitable treatment standard. This is followed by brief presentation of the Energy Charter Treaty as the relevant international convention, and a subsequent presentation of institutions and arbitration rules, to provide the required basic information on these institutions and procedural rules.

The Energy Charter Treaty is important for two reasons: first, it provides the legal base for investment arbitration, and second, it provides basic substantive law. Besides the Energy Charter Treaty, other institutions and rules are also addressed briefly, because in accordance with article 26(2) of the Energy Charter Treaty, the investor party to the dispute may submit the dispute for resolution to the judiciary of the host country, to a special dispute settlement procedure as per prior agreement, or may choose among: (i) ICSID arbitration, which provides a forum for investment arbitration and procedural rules, (ii) *ad hoc* arbitration with UNCITRAL Arbitration Rules, which are only procedural rules, (iii) Arbitration Institute of the Stockholm Chamber of Commerce (SCC) or (iv) Permanent Court of Arbitration (PCA) both of which provide forum and procedural rules.

The second part of the work examines the relevant arbitral practice. There is a relatively large number of cases which were initiated based on the Energy Charter Treaty, more than 130.[3] In the majority of these cases the final award has already been delivered. As we have already mentioned, the majority of these awards deal with the issue of fair and equitable treatment (and the legitimate expectations of the investor), meaning that there is a body of cases suitable for research. This makes possible drawing of conclusions and even finding trends. There is a group of cases within the case law related to green

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1 Sydney Thurman-Baldwin, 'Modernizing the Fair and Equitable Treatment Standards in the ds in the Energy Charter Treaty' (2020) 28 U. Miami Bus. L. Rev. 296, 297 <https://repository.law.miami.edu/umblr/vol28/iss2/4> accessed 23 February 2021.

2 'IIA Issues Note, Special Update on Investor–State Dispute Settlement: Facts and Figures' (UNCTAD 2017) 5 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/isds_settlement_facts_and_figures.pdf> accessed 23 February 2021; Investment arbitration became the standard for the settlement of investment disputes, see Csongor István Nagy, 'The Lesson of a Short-Lived Mutiny: The Rise and Fall of Hungary's Controversial Arbitration Regime in Cases Involving National Assets' (2016) 27(2) The American Review of International Arbitration 239-246.

3 'List of cases' (Energy Charter Treaty) <https://www.energychartertreaty.org/cases/list-of-cases/> accessed 3 September 2020.

energy investments within the European Union. We examine them separately, due to their common characteristics. However, we do not examine cases related to the infamous Yukos dispute, as that subject is specific and distinct enough that it could serve as the basis of an independent monograph, and its unique specialties render it not too suitable for a general analysis like what this book intends to provide. The examination of the case law is closed with a conclusion, which contains the most important findings of the book.

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PART I

1. Protection of foreign investment

Before we start with the discussion of the fair and equitable treatment standard, we would like to give a short and very basic introduction to international investment protection law. First of all, let us see the types of foreign investment. They can be so-called foreign direct investment (FDI), where the investor keeps direct management of the foreign investment. This can be in the form of greenfield investment or investing into an already existing enterprise. The host state may require that domestic investors also participate in the investment, this is the so-called joint venture requirement (this was typical for investments to China in the eighties and nineties). The other type is indirect or portfolio investment (*e.g.* buying foreign shares, bonds), however, this is regulated by other set of laws.[4]

Foreign direct investments are important, because they bring capital, modernization, new technologies, more efficient management technics to the host country, and besides provide the chance for the labor force to get new skills and access to foreign markets. However, there are disadvantages as well. For example, when foreign investors invest into service sector and sell mostly imported goods in the host country. This was the case during the nineties in most Eastern European states. Or when they invest into ore extraction business, get cheaply the ore, and leave huge environmental damage. Or when causing the same damage by operating landfill sites. This leads us to the motivation factors of foreign investors. These are usually securing resources, market, efficiency, and long-term competitiveness.[5]

Foreign investors frequently face different risks related to their investments. These risks can be divided into two groups. Into first fall commercial risks. This is basically about making bad business decisions. The other group, non-commercial risks, are more important for us, as international investment law deals with these, that is to say, tries to protect foreign investors if such risks arise. These are among others expropriation, currency inconvertibility, profit repatriation limitations, devaluation, political instability, deterioration of the investment environment.[6] We can say that the most important aspect of international investment law is investment protection.

There are different legal instruments for the protection of foreign investments. These are:

(i) Domestic legislation, like national investment protection laws. They were widespread in developing countries, especially in Eastern Europe during the nineties of the last century. However, there is a serious problem with these laws: the host country can unilaterally amend or repeal them.

(ii) Individual agreement between the host state and an individual investor. If well drafted, such agreement can provide security for the investor, especially if it

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[4] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010) 8.

[5] Zoltán Víg, 'A külföldi befektetők motivációi' in Erzsébet Csányi (ed), *A Tudás Fája: Az I. Vajdasági Magyar Tudományos Diákköri Konferencia dolgozatai* (VMFK 2003) 370, 370.

[6] Zoltan Vig, *Taking in international law* (Patrocinium 2019) 13.

contains international arbitration clause. However, for small and middle size investors it is difficult to acquire such agreements.

(iii) Bilateral investment treaty (BIT). This is investment protection agreement concluded between the host state and the state of the investor. They usually cover all the investors from the other state, not only large investors, like individual agreements. There are thousands of such agreements between different states, with very similar provisions. They usually contain (i) the host state's duty to provide fair and equitable treatment to the investor, (ii) prohibition of discrimination, (iii) conditions for expropriation of foreign investment, and (iv) the possibility for international dispute resolution.[7]

(iv) Multilateral investment treaties (like the Energy Charter Treaty). There are only few such treaties for special economic sectors. They contain similar provisions to bilateral investment treaties. We should mention here that the tendency is to include investment protection provisions into free trade agreements, good example for this is the Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA).

(v) Investment insurance. Investors can take out insurance for their investments with private insurance companies, however, it is usually very expensive (about one percent of the investment's value *per annum*) and not available for all countries. There is also the so-called Multilateral Investment Guarantee Agency (MIGA) which provides investment insurance to the investors of member countries if they invest into another member country. However, there are special requirements for this, as the main goal of the Agency is to stimulate investment into certain developing countries and sectors.[8]

As the most serious risk for a foreign investor is the taking of property (investment), we should discuss shortly the issue of taking of foreign property. There are different types of such taking. If the taking of foreign investment is an individual measure, it is called expropriation. However, if the taking is a general measure, affecting the whole economy of the host country, or all foreign investors, or a whole economic sector, it is called nationalization (this happened in socialist countries after the war). Nowadays, countries usually try to avoid open expropriation of foreign property, and they resort to so-called creeping expropriation (taking *de facto* control over property rights), like hindering the operation of the foreign investor with denying permits, frequent tax inspections, till the foreign investor sells off the investment cheaply to a local enterprise.

In international law there are certain conditions required for lawful expropriation: (i) the expropriation should be for public purpose, (ii) it should be non-discriminatory, (iii) appropriate compensation should be paid to the foreign investor, and (iv) the due process of law should be respected. The most contested condition is compensation. There are several standards you can read about (like "just" compensation in the Norwegian Shipowners' case, or „fair" compensation in the Chorzów Factory case, or the Hull doctrine, which provides for „prompt, adequate, effective" compensation). However, the majority of investment

[7] For the genesis of BITs see: Csongor István Nagy, "'There is Nothing in a Caterpillar That Tells You It Is Going to Be a Butterfly': Proposal for a Reconceptualization of International Investment Protection Law' (2020) 51(4) Georgetown Journal of International Law 899, 899-905 <https://ssrn.com/abstract=3729175> accessed 22 May 2021.

[8] Imre Vörös, *A nemzetközi gazdasági kapcsolatok joga I* (Krim Bt. 2004) 133-149.

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protection agreements accept the "prompt, adequate and effective" standard, which means, that the compensation should be paid out to the investor promptly, in hard currency and based on the market value (this is the "adequate" requirement) of the investment immediately before the expropriation.

2. The fair and equitable treatment standard

The fair and equitable treatment (FET) standard is provisioned for in most investment treaties, and successfully invoked by the claimant in the majority of investment arbitration cases.[9] At the same time, researching the fair and equitable treatment standard related case law is the most challenging task. Particularly in case law of the Energy Charter Treaty, because there is no uniform interpretation by arbitral tribunals, and its exact normative content is contested.[10]

Before we discuss the legal nature of the fair and equitable treatment standard, it is worth noting a definition by a scholar Yannick Radi. He defines the fair and equitable treatment standard as "a normative outcome of a balancing legislative process aiming at the protection of foreign investors against discriminatory and arbitrary state conducts".[11]

There are several theories regarding the standard's legal nature. According to one of them, fair and equitable treatment covers all other standards related to investment protection. And if any of these is infringed, fair and equitable treatment is concurrently violated.[12] Palombino, an Italian scholar, distinguishes the fair and equitable treatment standard from other standards, such as the non-discriminatory treatment,[13] or the full protection and security standard. However, he states that arbitration practice is not very clear on this issue.[14] He also separates it from expropriation, as there are lot of cases when expropriation is not established, in contrast to the finding of a breach of fair and equitable treatment. However, in the event of (uncompensated) expropriation of foreign property, the violation of fair and equitable treatment is almost always established by tribunals.[15]

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9 IIA Issues Note (2017) 5.

10 'UNCTAD Series on Issues in International Investment Agreements II' (United Nations Conference on Trade and Development Fair and Equitable Treatment 2012) 3 <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 25 May 2021.

11 Yannick Radi, The 'Human Nature' of International Investment Law' (2013) Grotius Centre Working Paper 2013/006-IEL 8. Also published in: (2013) 10(1) Transnational Dispute Management.

12 Francis A. Mann was one of the representatives of this theory. Fulvio Maria Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (T.M.C. Asser Press 2018) 22. According to Palombino, Energy Charter Treaty article 10(1) supports this theory. Strictly based on the text of this article we would say that the fair and equitable treatment standard is not above the other standards but only one of the standards. There are several arbitral decisions which found close connection among these standards, but at the same time also emphasised the autonomy of these standards. For example, see *infra* awards in *Plama* or *Petrobart* cases.

13 In the *infra* discussed *Saluka* case the Tribunal several times emphasized the importance of the non-discriminatory treatment of the investor, also in relation to its legitimate expectations (it will be discussed *infra*). *Saluka Investments BV (The Netherlands) v The Czech Republic*, PCA Case No. 2001-04 (Partial Award) para 307, 309.

14 Palombino (2018) 25.

15 ibid 27.

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According to the authors of the UNCTAD (2012) study, the fair and equitable treatment standard came into existence as an expression of the minimum standard of protection.[16] It is seen as going beyond a specific instance of the international minimum standard treatment that is required by international customary law. However, the study admits that there are several and contradicting awards regarding this issue. For example, in the frequently cited *Saluka Investments BV (The Netherlands) v The Czech Republic*[17] case the Tribunal interpreted the fair and equitable treatment as an autonomous treaty standard.[18] However, there are some scholars who still claim that it cannot be considered for an autonomous custom.[19] The UNCTAD study also admits that there are several and contradicting awards regarding this issue. Based on some of the awards, it can be said that, although international minimum standard is factually not different from the obligation to provide fair and equitable treatment,[20] the two standards should not blindly be equated.[21]

Along with the majority, in the *Saluka Investments BV (The Netherlands) v The Czech Republic* case the Tribunal found that:

> The "fair and equitable treatment" standard in Article 3.1 of the Treaty is an autonomous Treaty standard and must be interpreted, in light of the object and purpose of the Treaty.[22]

The Tribunal stated that when there is no reference to the customary minimum standard, fair and equitable treatment requirement can be interpreted only in the light of the relevant treaty. In this case, namely the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic.[23]

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16 'United Nations Conference on Trade and Development Fair and Equitable Treatment' (United Nations Conference on Trade and Development 2012) XIV.

17 PCA Case No. 2001-04 (<https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> accessed 16 May 2021). To summarize the facts of the case: the Japanese Nomura Group invested into the shares of the Czech bank IPB through a shell company Saluka, a company registered in the Netherlands. They acquired a controlling share. Following this, at the end of the nineties, the Czech Government provided state aid to four other large Czech banks which similarly to the IPB inherited "bad debts". Beginning of 2000 IPB had to file for bankruptcy. Saluka (the Nomura Group) initiated arbitration under the Netherlands-Czech Republic Bilateral Investment Treaty, among others for "failing to accord Saluka's investment fair and equitable treatment". Saluka (Partial Award) para 165; See also: George Stephanov Georgiev, 'The Award in Saluka Investments v. Czech Republic' in llermo Alvarez, W.M. Reisman (eds.) *The Reasons Requirement in International Investment Arbitration* (Brill/Nijhoff 2008) 149–190 <http://icsidfiles.worldbank.org/ICSID/ICSIDBLOBS/OnlineAwards/C3004/CLA-062_Eng.pdf> accessed 25 May 2021.

18 United Nations Conference on Trade and Development (2012) XIV.

19 Palombino (2018) 37.

20 *E.g. Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* ICSID Case No. ARB/09/2.

21 Palombino (2018) 30-31. *Crystallex International Corporation v Venezuela* ICSID Case No. ARB (AF)/11/2, Award para 530: "the tribunal is of the opinion that the FET standard embodied in the Treaty cannot […] be equated to the 'international minimum standard' under customary international law, but rather constitute an autonomous treaty standard.". At the same time, the *Bilcon* tribunal found that "In light of the FTC Notes and in the specific context of NAFTA Chapter Eleven in which this Tribunal operates, "fair and equitable treatment" and "full protection and security" cannot be regarded as "autonomous" treaty norms that impose additional requirements above and beyond what the minimum standard requires." *Bilcon v Canada* (Award on jurisdiction and liability) para 432 (<https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf> accessed 28 May 2021).

22 *Saluka* (Partial Award) para 309. Here the referred Treaty was Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic.

23 ibid para 294.

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We can agree with Palombino, who comes to the conclusion that the fair and equitable treatment standard "is undoubtedly part of the category of general principles specific to a certain field of international law", includes among others due process of law, legitimate expectations and proportionality.[24]

In defining the content of the fair and equitable treaty standard, general international law, and more specifically the Vienna Convention on the Law of Treaties interpretation standards can help us.[25] There is an increasing reference to this legal instrument. It is regularly interpreted by arbitral tribunals in investment arbitrations, purely based on the content of the standard but also dependent on the specific facts of the case.[26] Some authors even argue that it is intentionally vague and not defined in the majority of the treaties, so as to leave its definition to the arbitrators in the specific case.[27] Yannick Radi argues that arbitrators frequently use the teleological method of interpretation. That is to say, they take the purpose and object of the particular investment agreement into consideration when considering the facts of the given case.[28]

Some bilateral and multilateral investment treaties even define the fair and equitable treatment standard. The United States' 2012 U.S. Model Bilateral Investment Treaty, although not very detailed, still gives its definition. It "only" requires access to justice and due process:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;[29]

The Comprehensive Economic and Trade Agreement (CETA), concluded between the European Union and Canada, provides concrete cases for the breach of the fair and equitable treatment obligation in its article 8.10(2):

> […] if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including

24 Palombino (2018) 52.

25 Palombino (2018) 14; See also *Saluka* (Partial Award) para 296. However, the *Saluka* Tribunal did not deny the importance of the facts of the relevant case. (*Saluka* (Partial Award) para 285.)

26 United Nations Conference on Trade and Development (2012) 2; We agree with Palombino that "FET has been progressively shaped by arbitral tribunals, going so far as to embody a (composite) general principle specific to international investment law." Palombino (2018) 15.

27 C. H. Brower, 'Structure, Legitimacy and NAFTA's Investment Chapter' (2003) 36 Vanderbilt Journal of Transnational Law 37, 63.; "The manner in which FET clauses are drafted vary significantly. In effect, three main forms of drafting may be identified: (1) FET as a freestanding obligation;45 (2) FET as an obligation included in a clause referring to a number of standards of treatment;46 (3) FET as an obligation that is required by international law." Palombino (2018) 12-13.

28 Radi (2013) 6.

29 '2012 U.S. Model Bilateral Investment Treaty' (United States Government 2012) Art. 5(2)(a) <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 29 May 2021.

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> a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment;[30]

The Comprehensive Economic and Trade Agreement even realizes that the law is under constant change and development. The next paragraph provides the regular review of this list in article 8.10(2), which may be requested by one of the parties to the Comprehensive Economic and Trade Agreement.[31]

Conditions of the fair and equitable treatment in the Comprehensive Economic and Trade Agreement are basically the synopsis of years of mainstream arbitral practice and sub-standards developed by international investment tribunals. As already mentioned, the vast majority of investment protection agreements do not define the fair and equitable treatment. Instead, it is the role of the arbitral tribunal to define it based on the facts of the specific case. Firstly, the basic principle is that host states should act in good faith, when treating foreign investors. And tribunals have also developed specific sub-standards of fair and equitable treatment, such as, no denial of justice for the foreign investor, due process rights should be respected, no arbitrary treatment, no discrimination, and nor should the foreign investor be coerced or harassed.

Furthermore, the host state should not frustrate representations made to the investor, upon which the investor relied when making the investment, which were taken over by the Comprehensive Economic and Trade Agreement as stated in art. 8.10(4):

> When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.[32]

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30 'Comprehensive Economic and Trade Agreement (CETA)' (EU 2014) <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 29 May 2021; Such sub-standards can be also found in article 13 of the Institut de Droit International Session de Tokyo – 2013 Eighteenth Commission Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties, Rapporteur: M. Andrea Giardina Resolution; These are based on the concepts of the UNCTAD Study, however, that list includes also the frustration of the "legitimate expectations" of the investor. P. xvi United Nations Conference on Trade and Development Fair and Equitable Treatment (2012); "Fair and equitable treatment, which is a key standard of investment protection, must accord investors and investments, in particular: (i) due process, (ii) non-discrimination and non-arbitrary treatment, (iii) due diligence, and (iv) respect of legitimate expectations. The notion of legitimate expectations, as applied to the investor, shall not be construed to include mere expectations of profit, in the absence of specific engagements undertaken towards them by competent State organs. Compensation due to an investor for violation of the FET standard shall be assessed without regard to compensation that could be allocated in case of an expropriation, in accordance with the damage suffered by the investor." '2013 Eighteenth Commission Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties' (Institut de Droit International 2013) <https://www.idi-iil.org/app/uploads/2017/06/2013_tokyo_en.pdf> accessed 29 May 2021.

31 'Comprehensive Economic and Trade Agreement (CETA)' art. 8.10(3).

32 ibid art. 8.10(4).

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3. Legitimate expectations

Investment decisions of investors are affected by their legitimate expectations as they desire legal certainty and a predictable legal environment. Legitimate expectations, as a sub-standard of fair and equitable treatment, is not mentioned in treaties. It is mentioned only in arbitration practice and scholarly writings.[33] Notwithstanding, during the last decade, it has become one of the major components of the fair and equitable treatment standard.[34] Some authors even claim that legitimate expectations may be regarded as a "general principle of international law that prescribes a direction to be followed and, alongside, vests the judge [arbitrator] with the power of inferring [from the principle] the rules applicable to a given case".[35] Yannick Radi considers legitimate expectations as a balancing method used by the dispute settlement bodies, with which they justify and legitimize their rulings.[36] Regarding its relation to the fair and equitable treatment, he goes so far as to state that legitimate expectations is not a sub-category, but a category replacing the fair and equitable treatment.[37]

One of the first awards which referred to the protection of legitimate expectations (or only "expectations") as a sub-standard of fair and equitable treatment was the *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States*[38] case. Tecmed, a Spanish company, requested arbitration against Mexico based on the bilateral investment treaty concluded between Spain and Mexico.[39] Tecmed, among others, claimed that the Mexican authorities had in fact expropriated its investment by denying the renewal of the license to operate Tecmed's landfill, as well as violated the fair and equitable treatment standard of the respective bilateral investment treaty.[40]

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33 However, there are also tribunals which did not find that the breach of legitimate expectation does not violate in itself the fair and equitable standard (see *Mesa Power Group, Llc v Government of Canada*, PCA Case No. 2012-17).

34 Michele Potestà, 'Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept' (2013) 28 ICSID Review 88, 103; Palombino (2018) 86; See also *Saluka* (Partial Award) para 302.

35 Palombino (2018) 89.

36 Radi (2013) 8.

37 Radi (2013) 10.

38 *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States*, Case No. Arb (Af)/00/2 (<https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf> accessed 15 June 2021). *Tecmed* (Award) paras 41, 88, 122.

39 In an earlier NAFTA case, there was already a reference to the expectations of the investor: in the *Metalclad Corporation v The United Mexican States* case, Case No. ARB(AF)/97/1 (<https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf> accessed 14 May 2021), a U.S. waste disposal company, Metalclad Corporation, initiated arbitration proceedings against Mexico alleging, among others, breach of NAFTA article 1110. Its notice of arbitration asserted that Mexico wrongfully refused to permit Metalclad's subsidiary to open and operate a hazardous waste facility that the company had built in La Pedrera, despite the fact that the project was allegedly executed in response to the invitation of certain Mexican officials and allegedly met all Mexican legal requirements. Metalclad sought damages of USD 43,125,000 and damages for the value of the enterprise taken. In this case, the ICSID Arbitral Tribunal interpreted expropriation as including: "also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state." The tribunal also found that Mexico breached the fair and equitable standard, because despite the federal Government's promises the company did not get the necessary licenses.

40 The claimant also argued that not granting the permit deprived the investment of its market value. The respondent argued that it had the discretionary powers for not granting the permit, as it was regulatory measure within the state's police power. The Tribunal concluded that such denial was in fact expropriation of the investment and awarded damages of USD 5.5 million to the claimant. *Tecmed* (Award) paras 35-44; See also: Carlos

The Tribunal defined very clearly the concept of legitimate expectations in the award:

> The Arbitral Tribunal considers that this [the fair and equitable treatment] provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[41]

Several awards later referred to this case regarding the legitimate expectations standard.[42] The award is criticized because the Tribunal bound the fair and equitable treatment standard to the good faith principle, even though the latter cannot be the source of obligation in itself.[43]

In *International Thunderbird Gaming Corporation v The United Mexican States*[44], the Tribunal even defined the concept of legitimate expectations (although, only under the NAFTA):

> […] a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honor those expectations could cause the investor (or investment) to suffer damages.[45]

In case law, we can distinguish among three types of situations which can generate legitimate expectation: (i) specific commitments, (ii) unilateral representation or promise and (iii) regulatory framework.

In the first situation, the host state makes specific commitments in the individual investment agreement concluded with the investor, which the investor claims created legitimate expectations. For example, suppose a Government concludes an investment agreement that promises ten years tax exemption. However, after a few years, a change in Government leadership imposes tax despite the investment agreement that established the foreign investor's expectations. A good example for an award, supporting such a view from the investor, is the *EDF (Services) Limited v Romania*[46] case. The Tribunal found that:

> The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly broad and

Jiménez Piernas (ed.), *The Legal Practice in International Law and European Community Law* (Brill 2006) 218-22.

41 *Tecmed* (Award) para 154.

42 For example, the already mentioned, and frequently cited *Saluka* (Partial Award) para 302.

43 Potestà (2013) 5; See also *Tecmed* (Award) para 154.

44 In this case the foreign investor, who wanted to invest into operating skill machines ("for purposes of enjoyment and entertainment"), asked for official opinion regarding the legality of operating these machines in Mexico. Following the positive written answer, they invested money and started the operations. Shortly after this the Mexican Government shut down the business declaring it illegal. *International Thunderbird Gaming Corporation v The United Mexican States*, NAFTA arbitration under UNCITRAL Rules, 2006 (<https://www.italaw.com/sites/default/files/case-documents/ita0431.pdf> accessed June 17 2021).

45 *Thunderbird* (Award) para 147.

46 *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13.

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unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except 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.[47]

More so, several tribunals have differentiated between legitimate expectations protected under international law and purely contractual expectations.[48] To claim a host state's breach of fair and equitable treatment standard, more than a simple breach of contractual obligations (*i.e.* not merely fulfilling the contract) is needed. An investor would have to prove bad faith, substantial breach, abuse of Government authority or similar.[49] Furthermore, it is questionable whether the investor can invoke the legitimate expectation argument successfully, if it is known or should have known (*i.e.* such as through due diligence) that the Government promises are contrary to legislation.

The second situation, which can generate legitimate expectation, is a unilateral representation or promise. That is, when the host state makes unilateral, informal promises to the investor (*i.e.* comfort letter, official opinion, promise made publicly by the representative of the Government, etc.), on which the investor relies when making the investment. The *Metalclad* case, a NAFTA case that precedes the *Tecmed* case that we have discussed earlier, is a good example of such a situation. The *Thunderbird* case would have also been a good example were it not for the investor not disclosing all the facts, when asking for the official opinion of the Mexican authority. To base the breach of fair and equitable treatment standard on the unilateral representation, the investor must firstly provide proper information to the host state's representatives. There is also the requirement that the Government promises have to be addressed to a specific investor and be specific, regarding its object in investment.[50] General political statements of the representatives of the Government are not considered as specific commitments (except if made in bad faith).[51] But, there is still no clear cut and uniform practice regarding this issue.

The third situation is when the investor relies on the general regulatory framework (*i.e.* legislation) of the host state at the time of making the investment, and the host state changes the regulation. So, in this case, the legislation is general and not directed specifically to a particular investor and its investment.[52] Regarding this issue, tribunals are divided. There are several cases, in which the Tribunal established that the stability of the legal

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47 *EDF* (Award) para 217.

48 *E.g. Parkerings-Compagniet AS v Republic Of Lithuania*, ICSID Arbitration Case No. ARB/05/8 (<https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf> accessed 24 June 2021), or *Duke Energy Electroquil Partners SA v Ecuador*, ICSID Case No. ARB/04/19, *Gustav F W Hamester GmbH and Co KG v Ghana*, ICSID Case No. ARB/07/24; Potestà (2013) 17.

49 Potestà (2013) 18; Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6(3) Journal of World Investment & Trade 357, 380.

50 Potestà (2013) 21.

51 *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15 (<https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf> accessed 3 June 2021) (Award) para 395 states: "… declaration made by the President of the Republic clearly must be viewed by everyone as a political statement, and this Tribunal is aware, as is every individual, of the limited confidence that can be given to such political statements.".

52 Potestà (2013) 2.

environment is essential element of the fair and equitable treatment standard.[53] However, there is a constant evolution both in economy and law. And increasingly, more awards find that there should be a balance between the legitimate expectations of the investor and the host state's public interest (*i.e.* legitimate regulatory interest).[54] Recently, tribunals are increasingly of the opinion that it would be unreasonable to expect the host country not to change its legislation in the public interest (in a non-discriminatory manner).[55] This would be especially detrimental for developing countries, who usually have lower labor and environmental protection standards. And raising these standards has hit hard on foreign investors, who are usually attracted to the low standards in developing countries. Although, theoretically, there is still the so-called stabilization clause as a legal instrument to avoid such situations. Even if the investors do not receive an automatic exemption from the application of new legislation, they may be granted an exemption through the stabilization clause. Therefore, the threshold for claiming a host state's breach of the fair and equitable treatment is high.

At the same time, the majority of authors and arbitral jurisprudence agree that the expectations of the investor have to be reasonable and objective.[56] Meaning that, the investor has to exercise due diligence when making the investment, and take into consideration all the circumstances which might affect the investment in the host country.[57] Some awards even suggest that diligent investors would ask for a stabilization clause from the host state when investing.[58] The problem with such findings is that it is usually the host state that is the stronger party in the investment contract. In the case of smaller investors, there is even greater uncertainty of attaining a stabilization clause.

4. Relevant international treaties, institutions and rules

Before examining the requirements of the fair and equitable treatment and the legitimate expectation doctrine, as interpretated by arbitral tribunals in the Energy Charter Treaty (ECT) related case law, this section provides a short presentation of the relevant international treaties, institutions and rules.

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53 *E.g. Occidental Exploration and Production Company v The Republic of Ecuador*, London Court of International Arbitration Administered Case No. UN 3467 (<https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf> accessed 17 June 2021) (Award) para 183. Or the supra mentioned *Tecmed case*.

54 See: Gábor Hajdu, 'Investment Arbitration and the Public Interest'(2020) 8 Hungarian Yearbook of International Law and European Law 75.

55 *El Paso* (Award) para 352; There are also special situations, like economic crisis and similar. In the *El Paso Energy International Company* case the tribunal stated that: "… a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest." (*El Paso* (Award) para 358).

56 The Tribunal found in the *Saluka* case that "[…] the scope of the [Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic] Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances." (*Saluka* (Partial Award) para 304).

57 Radi (2013) 11.

58 *Parkerings* (Award) paras 332, 336.

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4.1. *The Energy Charter Treaty (ECT)*

The Energy Charter Treaty is good example of a functioning multilateral investment protection treaty containing substantive law. It was launched in the early 90's, when the energy sector offered an excellent opportunity for cooperation between the West (that had the necessary money and increased need for energy) and the post-Soviet and Eastern European states (having energy, but with no money to invest into its exploitation). The Energy Charter Treaty, besides creating a legal framework for striving towards open and secure energy markets, contains an entire chapter on investment promotion and protection (Part III). After all, the fundamental objective of the West was to acquire natural resources related to energy production (and the infrastructure related to their transmission), but also to secure their investments. Among others, Part III of the Treaty contains provisions very similar to those contained in a standard bilateral investment treaty. Such as, the fair and equitable treatment of investors, expropriation of investment, transfers of profit, etc.[59]

Part III begins with article 10, which provides for fair and equitable and non-discriminatory treatment of other contracting parties' investors. The first paragraph of this article is crucial for this work. And besides, it also guarantees the minimum standard, national treatment, and most favored nations treatment for the investors. Therefore, we are going to quote it here:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable 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 favorable 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.

Article 13 of Part III is also important as it deals with the issue of expropriation. The Energy Charter Treaty generally recognizes the right of the contracting parties to take property of foreign investors. However, article 13 ensures that nationalization, expropriation or "measure having effect equivalent to nationalization or expropriation" (namely, indirect or creeping expropriation) can take place only if internationally accepted standards of taking of foreign property are respected. That is to say, if such taking is in the public interest, non-discriminatory, accompanied by the payment of 'prompt, adequate and effective' compensation as defined by the classical Hull doctrine contained in the majority of bilateral investment treaties, and the taking of property is carried out under due process of law. The Energy Charter Treaty expressly requires the existence of public interest in case of expropriation. However, the Treaty does not give the definition of public interest. And it gives no indication of who should determine what public interest is, and on what grounds. Thus, it is on the dispute settlement bodies to define in each specific case what falls under

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[59] 'The International Energy Charter Consolidated Energy Charter Treaty' (International Energy Charter 2016) <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> accessed 3 September 2020.

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public interest. But article 13 does, however, detail the requirements for compensation; that it should represent the "fair market value of the investment" taken, "at the time immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the Investment". This basically defines the "adequate" requirement, in line with the Hull doctrine. The "effective" condition is also detailed, providing that it should be paid in a freely convertible currency. And "promptness" of compensation is guaranteed by providing for interest at a commercial rate from the date of expropriation to the date of payment of the compensation.

Another relevant part of the Energy Charter Treaty is Part V, article 26 which deals with the dispute settlement between the investor and the host state. The Treaty requires the parties involved in the dispute, to firstly try to settle their dispute amicably. However, if they cannot reach an agreement within three months, the investor has the right to bring a claim in front of a national court (or administrative tribunal) of the host country, or to opt for international investment arbitration. In this latter case, the investor may choose amongst the three possibilities: International Centre for Settlement of Investment Disputes arbitration (ICSID), *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

4.2. The International Centre for Settlement of Investment Disputes (ICSID) and its Rules of Procedure for Arbitration Proceedings

The International Centre for Settlement of Investment Disputes (ICSID) was created by the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1956. Its goal was to create a forum and provide for procedural rules for resolving investment disputes between member states and other member states legal and natural persons, through conciliation and arbitration.[60] This is the most often used dispute settlement forum by claimants, as every member state of the Convention recognizes the awards as binding, and will make due of the resulting financial obligations as if arising from a judgment of their own domestic court.[61]

The Convention also provides for setting up the two panels of conciliators and arbitrators, respectively. Each member state has the right to nominate four experts into each panel (which do not have to be citizens of the nominating state). Furthermore, the Chairman of the Administrative Council of ICSID may nominate ten experts into each panel. These must have different nationalities and must possess recognized expertise in the field of law, trade, industry or finances, and must be able to make unbiased decisions. Knowledge of

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[60] The Convention currently counts 162 members. The seat of the organization is in the central office of the International Bank for Reconstruction and Development (IBRD) in Washington, and the organization has international legal personality. Regarding its structure, the main decision-making body is the Administrative Council, into which each member state delegates one member. The President of the above-mentioned International Bank for Reconstruction and Development acts as the Chairman of the Administrative Council ex officio. The International Centre for Settlement of Investment Disputes also has a Secretariat, which deals with administrative matters, led by the Secretary-General who represents the Center. Zoltan Vig, 'International Economic and Financial Organizations' in Zsuzsanna Fejes, Márton Sulyok, Anikó Szalai (eds), *Interstate relations* (Iurisperitus Kiadó 2019) 134-136.

[61] Vig (2019) 135.

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law is exceptionally important for those nominated into the panel of arbitrators. During nominations, the Chairman should also consider that the major legal systems of the world are represented in the panels. Members of the panel serve for 6 years, which can be renewed. The jurisdiction of the International Centre for Settlement of Investment Disputes extends to every legal dispute originating directly from investment, in which the parties in dispute are members (state, or any subordinate agency or body of the member state) and a natural or legal person of another member state, provided both parties give their written consent to taking the dispute before the International Centre for Settlement of Investment Disputes.[62] Once parties have given their consent, neither of them can revoke it unilaterally. Such consent is typically given by the host state in bilateral or multilateral (like the Energy Charter Treaty) investment treaties, or in individual investment contracts with the investor (typically in cases of larger, more significant investments). Unless stated otherwise, the consent to arbitration under the Convention excludes any other legal remedy (*e.g.* legal recourse to their respective domestic courts). Two types of procedures can be initiated with the Center: conciliation and arbitration. Each procedure can be initiated by any member state, or any natural or legal person of a member state, in writing. The application must contain information concerning the issues of the legal dispute, the identification of the parties and their consent to conciliation.[63]

When initiating arbitration proceedings, the International Centre for Settlement of Investment Disputes creates an arbitration panel. This panel consists of either one arbitrator, or an odd number of arbitrators (as per agreement of the parties). If the parties could not agree regarding the number of arbitrators and their nomination, the panel consists of three arbitrators. The parties each choose one arbitrator, and the third one (who is the chairman of the panel) is selected based on the parties' agreement. If they once again could not reach an agreement, and if 90 days have passed since the Secretary-General informed the other party about the recording of the claim, then the Chairman of the Center appoints the missing arbitrators, at either party's request. The arbitrators examine their jurisdiction (*i.e.* whether they have the right to proceed) *ex officio*. Regarding substantive law (*i.e.* the body of law summarizing the rights and obligations of the parties), parties may freely make an agreement. In case there is no agreement regarding this, the arbitrators will use the host country's law as the basis (including the private international law norms regarding conflict of laws), as well as the applicable norms of international law. The arbitration tribunal may decide the case based on equity, but only if the parties agree to it. The arbitral proceeding also has its own body of procedural rules, the Rules of Procedure for Arbitration Proceedings[64] and the Additional Facility rules.[65]

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62 Parties to the Energy Charter Treaty give their consent in article 26(3)(a) and according to the same article paragraph 5(a) this is considered a written consent for the purpose of International Centre for Settlement of Investment Disputes arbitration.

63 In case of conciliation, the Center sets up a conciliation committee after the arrival of the application, which consists of an odd number of conciliators, as per the agreement of the parties. Concerning the procedure itself, the International Centre for Settlement of Investment Disputes has a Rules of Procedure for Conciliation Proceedings, but the main essence of it is that the conciliation committee is obliged to clear up the questions of law in the dispute between the parties and to try to find an agreement between the parties, based on mutually agreeable conditions. It is also important to note that the parties involved in the conciliation proceedings may not refer to the views, comments, or settlement proposals of the other party. Vig (2019) 134-136.

64 'Rules of Procedure for Arbitration Proceedings' (International Centre for Settlement of Investment Disputes) <http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/partF.htm> accessed 5 September 2020.

65 These rules are very similar to arbitration rules, but they are used between an ICSID Contracting State or its national, and a non-Contracting State or a national of a non-Contracting State.

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The award, presented in a written form, is signed by all arbitrators voting in favor. An award extends to all questions presented to the panel and includes the reasoning behind the answers. Accordingly, it is important that the panel decides the questions based on a majority vote of all members. And the Secretary-General should promptly send the authenticated copies of the award to the parties, which cannot be made public without their consent.[66] If any dispute arises between the parties, regarding the interpretation of the award, either party can ask for official interpretation. Either party can request in writing from the Secretary-General, the review of the award based on a new fact that could significantly influence the award. This is provided that the fact was not known to the arbitration tribunal and the plaintiff at the time of the award, and it was not a result of the applicant's carelessness that they had no knowledge of this fact. This request must be submitted within 90 days of the disclosure of such fact, but no later than 3 years after the award has been rendered. Either party can request in writing from the Secretary-General to annul the award, based on the following possible reasons: (i) the Tribunal was not properly formed; (ii) the Tribunal has manifestly exceeded its powers; (iii) there was corruption on the part of a member of the Tribunal; (iv) there has been a serious breach of a fundamental rule of procedure; (v) the award does not contain due justification. The award is binding to the parties, and there is no place for any kind of appeal or other types of remedy, except for those listed above. As already mentioned above, every member state recognizes the awards as binding.[67]

4.3. The United Nations Commission on International Trade Law (UNCITRAL) and its Arbitration Rules

The United Nations Commission on International Trade Law is a subsidiary of the United Nations established with the aim to promote the harmonization, unification and modernization of international trade law.[68] The United Nations Commission on International Trade Law has worked out two conventions related to international arbitration (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, New York, 2014), a model law (the UNCITRAL Model Law on International Commercial Arbitration, 1985) and arbitration rules (UNCITRAL Arbitration Rules)[69].[70]

The United Nations Commission on International Trade Law Arbitration Rules apply if the parties agree on them. They contain all the necessary rules for an arbitration procedure,

[66] It is interesting to note that the average procedural cost of international arbitration reaches 8 million USD. This means that small and medium enterprises (SMEs) have very little chance of disputing with the host countries in front of the Center's arbitral tribunal. A. Gebert, 'Legal Protection for Small and Medium-Sized Enterprises through Investor-State Dispute Settlement: Status Quo, Impediments, and Potential Solutions' in T. Rensmann (ed), *Small and Medium-Sized Enterprises in International Economic Law* (Oxford University Press 2017) 294.

[67] However, disputes may arise between the member states regarding the interpretation or application of the Convention. If these issues cannot be resolved through negotiation, they must be presented to the International Court of Justice in The Hague. Vig (2019) 134-136.

[68] 'United Nations Commission on International Trade Law' (United Nations Commission on International Trade Law) <https://uncitral.un.org> accessed 17 May 2021.

[69] The latest revision is of 2010.

[70] 'International Commercial Arbitration' (United Nations Commission on International Trade Law) <https://uncitral.un.org/en/texts/arbitration> accessed 17 May 2021.

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such as on the composition of the arbitral tribunal, arbitral proceedings, award, and of course, a model arbitration clause to avoid later misunderstandings between the parties.[71] However, it should be noted, that the United Nations Commission on International Trade Law does not provide forum for the parties, nor is it an arbitral institution.

4.4. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and its Arbitration Rules

Investor under the Energy Charter Treaty frequently choose the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) as forum, and it also provides procedural rules.[72] However, this institution also administers investment arbitration based on bilateral investment treaties as well as international commercial arbitration.[73]

Contrary to ICSID arbitration, arbitral awards of the Arbitration Institute of the Stockholm Chamber of Commerce are not automatically enforceable. First, they must be recognized in the country of enforcement, what is usually done under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

4.5. The Permanent Court of Arbitration (PCA) and its Arbitration Rules

It was originally established with a seat in The Hague, to facilitate dispute resolution among sovereign states at the very end of the 19th century. However, nowadays it offers arbitration services for investor-state disputes as well. Out of the 136 arbitration cases under the Energy Charter Treaty 14 were administered by the Permanent Court of Arbitration under UNCITRAL Rules.[74] Similarly to the Arbitration Institute of the Stockholm Chamber of Commerce awards, the awards of the Permanent Court of Arbitration are not automatically recognized by foreign countries.

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[71] 'Arbitration Rules' (United Nations Commission on International Trade Law 2010) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf> accessed 17 May 2021.

[72] Out of 136 Energy Charter Treaty cases, 25 were administered under the Stockholm Chamber of Commerce Rules. 'Statistics' (International Energy Charter 2021) <https://www.energychartertreaty.org/cases/statistics/> accessed 22 May 2021.

[73] 'Arbitration Rules' (Arbitration Institute of the Stockholm Chamber of Commerce) <https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf> accessed 22 May 2021.

[74] 'Statistics' (International Energy Charter 2021) <https://www.energychartertreaty.org/cases/statistics/> accessed 22 May 2021.

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PART II

1. Arbitral practice

1.1. AES Summit Generation Limited and AES-Tisza Erőmű Kft v the Republic of Hungary[75]

We are going to start the examination of the arbitral practice with a Hungary-related case, the *AES v Hungary*. The claimants were a company incorporated in the United Kingdom and its subsidiary incorporated and operating a power plant in Hungary. Arbitration proceedings were initiated because of the reintroduction of administrative prices for the electricity produced through the amendment of a 2001 Electricity Act in 2006, and the so-called Price Decrees in 2006 and 2007. The claimants claimed amongst others that in this manner the regulation was a violation of the Hungarian Government's obligation to provide fair and equitable treatment and constant protection and security.[76]

In this case, the claimants presented for the alleged violation of the fair and equitable treatment standard four arguments. First, they claimed that fair and equitable treatment includes an obligation of honoring contractual obligations (ones that the investor reasonably relied on). In this particular case, the claimants accused Hungary of refusing to fulfill its own contractual obligations (set out in a 2001 settlement agreement between Hungary and the claimants, which came about as a result of an earlier investment arbitration) to claimants via the 2006 amendment of the Electricity Act and the introduction of the aforementioned Price Decrees, while also simultaneously encouraging the state-owned electricity company involved in the dispute to ignore its own contractual obligations to the claimants (established in a 2001 contract between the said company and the claimants) through the same amendment and Price Decrees. Second, the claimants advanced that fair and equitable treatment includes an obligation to act in good faith and to respect the investors' legitimate expectations. They claimed that Hungary failed to act in good faith (with regards to the rationale behind the amendment and the Price Decrees, which were, according to the Claimants, chiefly designed to cut excessive profits for energy producers), and that Hungary violated the claimants' legitimate expectations arising from the regulatory framework resulting from the 2001 settlement agreement and the afore-mentioned contract with the state-owned company. Thirdly, claimants took the view that the "stable, equitable, favorable and transparent conditions" sequence of Article 10(1) of the Energy Charter Treaty was part of the fair and equitable treatment standard, which Hungary also violated according to the claimants, as the promised stability was short term, given that, as opposed to the 2001 situation, Hungary effectively eviscerated the original regulatory framework by 2006. Finally, the claimants also argued that Hungary further violated the fair and equitable treatment standard by acting in a non-transparent, arbitrary, and discriminatory fashion that also lacked due process. Here, they referred to how the 2006 amendment of

[75] *AES Summit Generation Limited and AES-Tisza Erömü Kft v the Republic of Hungary*, ICSID Case No. ARB/07/22 (Award), para 4.7. We should mention that there was an earlier arbitration based on the ECT between the parties in 2000 concluded with settlement.

[76] ibid para 4.20.

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the 2001 Electricity Act was allegedly adopted out of political reasons, that specifically aimed at cutting perceived extra profits for electricity generators operating in the host state, such as the claimants. In a similar fashion, the claimants contended that the Price Decrees lacked transparency and due process, due to how they were issued, and in the claimants' view, also demonstrated arbitrariness on the part of the Hungarian state, due to the aforementioned alleged motivations. In particular, the claimants alleged that the Price Decrees relied on a maximum profit figure that was submitted by electricity distribution companies (whereas the Decrees concerned electricity generation companies), and that the prices set out in the Price Decrees were determined in an unclear manner. As for due process, the claimants posited that Hungary gave very short windows of time (four and one business days respectively) for the claimants to comment on the draft, then the final Price Decrees, alongside other alleged breaches of due process.[77]

Hungary's own position on these fair and equitable treatment-related claims was, that the claimants could not have had legitimate expectations as they alleged. Principally, Hungary found problematic that the claimants relied on their 2001 expectations, whereas legitimate expectations as a concept can only arise when the investor makes the investment, which in this particular case was in 1996. In particular, the country posited that there are two necessary elements of legitimate expectations: Government representation and assurances, and the reliance of the investor on these assurances to make the investment. Hungary contended that neither element was present in this case. Thus, even if the 2001 expectations were not ruled out by the Tribunal due to their timing, they still would fail the legitimate expectation test by the lack of assurances and representations given by Hungary to the claimants that would attest to the notion that the pricing regime would never change again. Hungary then argued, that since no legitimate expectations existed on the part of the claimants, the only possible way for determining a violation of the fair and equitable treatment standard was that the host behaved in a manifestly arbitrary manner, or otherwise abused state power. Hungary argued that its own conduct was neither. Interestingly, with regards to the alleged political motivations, Hungary attempted to deflect to the European Union, noting that it had been under mounting pressure by the latter to minimize what the European Union considered unlawful state aid. As such, the new pricing regime was necessary, and the least drastic possible step to realize a European Union compatible market. Hungary also rejected the notions that its dealings with claimants were unreasonable or in bad faith. And finally, Hungary also dismissed the notion that it failed to act in a due process-compliant manner or that it lacked transparency. With regards to the latter, Hungary interestingly argued that the Energy Charter Treaty's transparency requirement has to be interpreted in its own separate manner from national law, and that it did not posit a particularly high threshold for transparency, and even if the Tribunal were to find imperfections with regards to Hungary's transparency, these were not sufficient in themselves to find a violation of the fair and equitable treatment standard. Hungary also posited that the general investment treaty arbitral practice does not require host states to obey so-called ideal notions of transparency, where every single consideration in policy shaping is publicly announced preemptively.[78]

With the positions of the parties thus established, there are findings of the Tribunal we would like to highlight. Firstly, with regards to the claims concerning the contractual obligations, the Tribunal established that even if said contractual obligations tie into the

[77] ibid paras 9.1.1-9.1.10.
[78] ibid paras 9.2.1-9.2.24.

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fair and equitable treatment standard's violation in the present case, it has no jurisdiction to actually adjudicate over breaches of contract. This was because Annex IA of the Energy Charter Treaty, which did not allow in present case for investors or contracting parties of the Energy Charter Treaty to submit disputes concerning contractual obligations (based on the last sentence of Article 10(1) of the Energy Charter Treaty). Interestingly, the Tribunal noted that even so, the Tribunal has the jurisdiction to determine whether Hungary violated a specific Energy Charter Treaty obligation, even if said violation also simultaneously constitutes a breach of contractual obligations. The Tribunal was keen to stress that its actions in this regard should not be interpreted as analyzing contractual obligations and their performance.[79]

Then, the Tribunal moved on to legitimate expectations. First, it established that legitimate expectations can only be created at the moment of the investment, referring to several cases, such as *Duke Energy v Ecuador, Tecmed v Mexico*, and *LG&E v Argentina*. It noted that *Duke Energy v Ecuador* established "at the time of the investment" as a component of legitimate expectations, which was confirmed by *Tecmed v Mexico*, and also reiterated by *LG&E v Argentina*. However, the Tribunal nevertheless acknowledged that the concept of the "time of the investment" can be interpreted by arbitral tribunals in a variety of ways. It raised *CMS v Argentina* as an example, where the arbitral tribunal held that the time of the investment is when the investment was decided and made. The Tribunal utilized this interpretation and examined the time of the investment in this specific case from this perspective. First, it held that the claimants had made an investment in Hungary in 1996, so it had to determine whether legitimate expectations could have sprung up from that 1996 investment. The Tribunal reached the conclusion here that claimants at that time could have had no legitimate expectations regarding the future conduct of Hungary, beyond the general principle that electricity pricing would provide a reasonable return on investment (reasonable return as a principle plays a pivotal role in many investment disputes, see for example the cases concerning Spain's renewable energy sector). Thus, the Tribunal then turned to the year 2001, which was central to the dispute, as the claimants' allegations, as we have seen, heavily relied on this year's events. The Tribunal found that at this point in time, the claimants indeed made an investment (as defined by the Energy Charter Treaty), as they spent almost a hundred million Euros between 2001 and 2005 to complete electricity generator retrofitting. The Tribunal also noted that it is clear that the decision to make an investment was re-confirmed when the 2001 settlement agreement was created. Thus, the question became whether there were any Government representations or assurances at the time on which the investors relied on, and whether Hungary later contradicted these representations and assurances in its conduct. The Tribunal found that the answer to the first question was negative. This also answered the second question in the process. It noted that no representation was made that could have assured the claimants that regulated electricity pricing would not again be introduced, and in general, rejected the claimants' arguments that a 1999 letter (which in fact preceded the launch of an arbitration dispute), or the 2001 settlement agreement's language, constituted sufficient assurances by Hungary. It also noted that said settlement agreement lacked a stabilization clause, and in fact, had a change in law provision that clearly implied potential future regulatory changes. As such, without express and specific commitments, such as through an afore-mentioned stabilization clause, the Tribunal did not find that the claimants had legitimate expectations.[80]

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[79] ibid paras 9.3.1-9.3.5.
[80] ibid paras 9.3.8-9.3.26.

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The Tribunal then turned to the examination of the host state's duty to provide a stable legal and business framework. It stated that article 10(1) of the Energy Charter Treaty (creating stable conditions) is not a stabilization clause. The Tribunal established that this is because legal frameworks are, by definition, "subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts."[81] This means, that the Tribunal recognized that host states have the right to change their legislation in adapting to new circumstances when done on rational public policy grounds. Thus, the Tribunal noted that understanding the concept of stable conditions in this context is a complex task that necessitates taking into account various factors of the given case, such as the specific circumstances surrounding the investor's decision to invest, or the public interest measures the host state has made. However, in this specific case, the Tribunal observed that there were no specific commitments by Hungary towards stability, or any other commitment that could have made the foreign investors legitimately believe that no change in the law could occur (thus consistent with regards to the above paragraphs, where the lack of commitments by Hungary was also discussed). The Tribunal further stated that "any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the times."[82] Thus, it was clear to the Tribunal that no breach of the fair and equitable treatment standard occurred in relation to the stable conditions of the regulatory framework.[83]

The Tribunal then turned to the examination of claims relating to the breach of the fair and equitable treatment via lack of due process, arbitrariness and lack of transparency. First, it established that there was nothing sufficiently irrational or otherwise unreasonable in the motivation of Hungary when it reintroduced administrative electricity prices in 2006, so as to constitute a breach of the fair and equitable treatment standard in the context of the Energy Charter Treaty. It also noted that with regards to actual conduct, for the infringement of fair and equitable treatment, simple imperfection of the state's act or omission is not enough. These must be manifestly unfair or unreasonable or shocking. The Tribunal explicitly stressed this point: that the standard does not demand perfection, but as noted above, and also referred to in the *Tecmed* case, the imperfection must be manifestly unfair or unreasonable. For example, in this specific case, the Tribunal held that several procedural shortcomings in Hungary's implementation of the legislation did not reach the level that would constitute unfair and inequitable treatment. [84] The Tribunal treated protection and security as a separate obligation of the state from the fair and equitable treatment obligation.[85] The 2010 award in this case, which was also later upheld by an ICSID annulment committee, is frequently invoked in later Energy Charter Treaty cases.

[81] ibid para 9.3.29.
[82] ibid para 9.3.34.
[83] ibid paras 9.3.27-9.3.35.
[84] ibid paras 9.3.36-9.3.73.
[85] ibid para 13.3.1.

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1.2. Petrobart Limited v Kyrgyz Republic[86]

The *Petrobart* case is one of the earliest and most exciting cases in the case law of the Energy Charter Treaty where the issue of fair and equitable treatment was raised. Besides, it is a textbook example of the complexity of foreign investment protection, as there were several procedures initiated related to the dispute, and of course, the host state tried in several ways to avoid liability.

The claimant, Petrobart, was a company registered in Gibraltar, that concluded a gas supply contract for one year with a Kyrgyz state-owned company KGM. There was a dispute settlement clause in the contract, which stipulated the Arbitration Court of the Kyrgyz Republic as the preferred forum and Kyrgyz law as substantive law. Petrobart delivered five consignments of gas based on the contract, and accordingly issued five invoices. The first two were paid by KGM. However, the last three invoices were not paid. KGM made promises to pay during the summer of 1998. In the meantime, in September 1998, the president of the Kyrgyz Republic issued a presidential decree to create a new state company based on KGM's assets. In November 1998 Petrobart initiated arbitration proceedings before the Bishkek City Court of Arbitration, to recover KGM's debts. It was awarded more than 1.5 million USD, and even a writ of execution was issued against KGM, and the property of KGM was seized in favor of Petrobart. The Kyrgyz Government intervened by requesting the Court to postpone the execution and promised a subsidy for KGM to fulfil its obligations towards the creditors. The court postponed the execution for three months.[87] In the meantime, some property (and no liabilities) of KGM was transferred to the newly created state company, while other property was rented to another state company. In April 1999, KGM requested bankruptcy from the Bishkek Court, which was successfully granted. Petrobart subsequently requested payment of the debt from the bankruptcy administrator. However, its prospects were not too bright as it was placed into third priority group, and KGM no longer had valuable property.

Petrobart, first initiated international (under UNCITRAL Rules) arbitration in March 2000 based on the provisions of the Kyrgyz Foreign investment law. Originally, foreign investment was defined in this law as "investments appearing as contributions of foreign investors into objects of economic activity in the territory of the Kyrgyz Republic to derive profit". In May 2000 Kyrgyzstan enacted a new law on the interpretation of the Foreign investment law, which provided that "a civil law transaction between two business entities in respect of supplying goods (services), where the purchaser is obliged to pay for the supplied goods (services), does not fall under the definition of foreign investment". Based on the request of the Kyrgyz Government, the Bishkek Court declared that the contract of Petrobart cannot be considered as a foreign investment under the Foreign investment law. In its award rendered in 2003, the UNCITRAL Arbitration more or less reached the same conclusion, and found that "Foreign investment involves a more permanent relationship between the foreign investor and the host state than is involved in the

[86] *Petrobart Limited v Kyrgyz Republic*, SCC case no. 126/2003.

[87] It is interesting how smooth the cooperation between the three branches of Government was in the host country. The court complied with the Government's request to halt the execution, the lawmaker within weeks promulgated the necessary law on the interpretation of the law on foreign investment. This lack of separation of powers was also noted by the Tribunal.

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transitory international sales transaction". And the claim was dismissed due to lack of jurisdiction.[88]

Following the UNCITRAL arbitration proceedings, Petrobart initiated arbitration based on the Energy Charter Treaty, in front of the Arbitration Institute of the Stockholm Chamber of Commerce in September 2003. Based on article 10(1) of the Energy Charter Treaty, Petrobart had five separate claims. It claimed that Kyrgyzstan (i) failed to create stable, equitable, favorable and transparent conditions for its investment, (ii) failed to accord its investment a fair and equitable treatment and most constant protection, (iii) breached its obligation not to accord unreasonable impairment of use and enjoyment of the investment, (iv) breached its obligation to observe the obligation it has entered into with Petrobart, and (v) treated Petrobart's investment less favorable than that required by international law.[89] Furthermore, Petrobart claimed that due to Kyrgyzstan's interventions, the contract was frustrated, what amounted to expropriation and breach of article 13 of the Energy Charter Treaty. However, before turning to these issues, we give a brief review of the most important issues in this arbitration proceeding.

First, the Tribunal examined the applicability of the Energy Charter Treaty against which the Government of Krygyzstan raised three arguments. Kyrgyzstan claimed that Gibraltar, where the seat of Petrobart was, was not party to the Energy Charter Treaty. It is a fact that Great Britain had signed the treaty for Gibraltar as well and made a declaration on its provisional application according to article 45(1). However, when the Treaty was ratified two years later in 1996, Gibraltar was omitted from the ratification document. So, the Tribunal concluded that the Energy Charter Treaty was still provisionally applicable to Gibraltar, as Great Britain made no notification according to article 45(3)(a) to terminate the Treaty regarding Gibraltar. Thus, it was still in force regarding this territory. The next claim by Kyrgyzstan was that Petrobart had no substantial business in a contracting party as required by article 17(1) of the Energy Charter Treaty, as it was managed from London. The Tribunal dismissed this argument, stating that the conditions for the application of article 17(1) were not present in this case. Kyrgyzstan also brought up the *res judicata* issue, as the subject matter of the case had been adjudicated by both the Bishkek Court (not the Arbitration Court), as well as by the arbitral tribunal constituted under UNCITRAL Rules. Regarding the Bishkek Court argument, the Stockholm Chamber of Commerce Tribunal stated that that procedure was based on the domestic law and not on the Energy Charter Treaty, and also that that procedure was initiated by Kyrgyzstan and not by the investor, and the Energy Charter Treaty gives the right to initiate procedure only to investors.. Likewise, regarding the UNCITRAL arbitration, the Stockholm Chamber of Commerce Tribunal was of the opinion that proceedings were based on substantive Kyrgyz law and not on international rights granted by the Energy Charter Treaty. The Tribunal also established that Petrobart was a foreign investor in Kyrgyzstan with an investment under the Energy Charter Treaty.

Based on the facts of the case, the Tribunal decided that measures taken by Kyrgyzstan, in this case, did not amount to indirect expropriation.[90] However, it found that Kyrgyzstan

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88 *Petrobart* (Award) page 8-10.

89 ibid page 73-74.

90 ibid page 77. The most surprising thing in relation to the issues of expropriation is the finding of the tribunal that it „cannot find it established that the Republic failed to ensure that KGM conducted its business in a manner consistent with Part III of the Treaty." For an analysis, see Csongor István Nagy, 'Central European Perspectives on Investor-State Arbitration: Practical Experiences and Theoretical Concerns' (2016) Centre for International Governance Innovation, Investor-State Arbitration Series, Paper No. 16, 11-12; Csongor István

breached article 10(1) on fair and equitable treatment, and article 10(12) of the Energy Charter Treaty, ensuring effective means for the assertion of claims and the enforcement of rights in the domestic law of the host state. Regarding article 10(1) on fair and equitable treatment, the Tribunal did not go into an analysis of each of the five claims of Petrobart based on the article, but stated that this paragraph in its entirety is intended to ensure the fair and equitable treatment of investments.[91] This means that the Tribunal interpreted 10(1) and all the different standards contained in it as components or sub-standards of the fair and equitable treatment standard. The main arguments of the Tribunal for the above finding were the reorganization of KGM (*i.e.* the transfer of its assets to the detriment of the creditors) and the intervention in court proceedings by the Government. Regarding the latter, the court also found that such intervention is not in conformity with the rule of law. Based on the facts of the case, it can be clearly seen that the principle of separation of powers did not function: the Government influenced the judiciary, and it seems that also the lawmaker (see the Law on the interpretation of the foreign investment law). Taking into consideration the "difficult economic situation" of KGM, the Tribunal did not award compensation for lost profit, but did finally awarded to Petrobart 75% of its original claim plus interest.[92]

1.3. Electrabel S.A. v Hungary[93]

This is also a frequently invoked case. A Belgian energy producer and trader company, Electrabel S.A., invested in the energy sector in Hungary. After joining the European Union, Hungary had to, amongst other things, liberalize its energy market and terminate state aid paid to the claimant in congruence with competition rules of the Union.[94] Therefore, Electrabel initiated international arbitration in 2007, requesting higher compensation for so-called 'stranded costs' than the amount offered by Hungary. The company claimed a breach of fair and equitable treatment obligation of Hungary, amongst other claims.[95] Thus, the main issue was whether not paying the maximum compensation to the investor was a violation of the fair and equitable treatment. The Tribunal did not find a violation, but there are some findings worth noting.

Regarding legitimate expectations, as applied to this specific case, the Tribunal found no evidence that Hungary made representations to the claimant at the time of the investment. In the Tribunal's view, this necessarily precluded the existence of any legitimate expectations on the claimant's part. However, it acknowledged that with regards to the fair and equitable treatment standard as found in the Energy Charter Treaty, it is not necessarily indispensable to have a specific representation in order to advance a claim under the standard, as representations might only serve as a factor in assessing the investor's knowledge, and his expectations' reasonableness and legitimacy. But even in the absence of a concrete

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Nagy, 'Hungarian Cases Before ICSID Tribunals: The Hungarian Experience with Investment Arbitration' (2017) 58(3) Hungarian Journal of Legal Studies 291, 297-300.

91 *Petrobart* (Award) page 76.

92 ibid page 83.

93 *Electrabel S.A. v Hungary*, ICSID case no. ARB/07/19 (Award).

94 ibid para 98.

95 ibid para 121.

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representation, the investor is expected to establish a relevant expectation that is based upon reasonable grounds. According to the Tribunal, the claimant failed to accomplish this in the present case. The Tribunal also pointed out that Electrabel could not have legitimate expectations relating to European Union law, for two reasons: Hungary, at all times, was seeking to comply with European Union law, and secondly the claimant itself did not base its claim on European Union law. Furthermore, the Tribunal was of the opinion that the claimant should have known that Hungary joining the European Union will necessarily lead to the former having to liberalize its market. In essence, the commercial risks of operation were obvious at the time, according to the Tribunal, given Hungary's difficult transitional period towards membership in the European Union and related market liberalization, and the common knowledge that long-term power purchase agreements could not coexist in an unchanged form with deregulation.[96] In general, the Tribunal found that the statements the claimant tried to present as representations from Hungary, which guaranteed reasonable profit or reasonable return, could not be assessed as representations or assurances within the specific context of legitimate expectations under the Energy Charter Treaty. This was because both the relevant power purchase agreement, and other statements made by the claimant, contradicted this interpretation.[97]

The Tribunal's next step was to examine whether a legitimate expectations towards maximum compensation (as already mentioned at the beginning of the case analysis) in case the power purchase agreement is terminated could be sustained by the claimants, without the need for any specific representation.[98] Relating to this, the arbitrators already found before the final award itself, that the fair and equitable treatment standard permits the host state to exercise legitimate regulatory interests under appropriate circumstances.[99] In doing this, the host state does not have to exclusively favor the interests of the foreign investor. The Tribunal referred to the *Saluka v Czech* Republic case, in which it was stated that: "The determination of a breach […] requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other.".[100] Therefore, this so-called balancing factor in the Tribunal's opinion precluded a legitimate expectation towards maximum compensation. In the Tribunal's view, such an expectation, once sufficiently balanced or weighed against Hungary's right to pass public interest regulation, ceases to be reasonable or legitimate.[101]

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96 ibid paras 155, 156.

97 ibid para 161.

98 ibid para 163.

99 In the decision on jurisdiction the same Tribunal found that: "While the investor is promised protection against unfair changes, it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment." Para. 7.77 of the Decision on Jurisdiction, Applicable Law and Liability in the *Electrabel S.A. v the Republic of Hungary*, ICSID Case No. Arb/07/19.

100 *Electrabel* (Award) para 165. In the Saluka case the Tribunal also found that "A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.".

101 *Electrabel* (Award) para 166.

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As for the question of potential arbitrariness, the Tribunal drew together the terms arbitrariness, irrationality, unreasonable, inequitable and disproportionate as having the same meaning (collectively referred to as arbitrariness by the Tribunal) under the Energy Charter Treaty's fair and equitable treatment standard. In essence, the Tribunal considered it necessary to fulfill one of the several conditions to find a case of arbitrariness: that Hungary's conduct was arbitrary, that there was no legitimate purpose for Hungary's conduct, or alternatively, that Hungary's conduct had no reasonable relationship to that purpose (which the Tribunal equated with it being disproportionate). After reviewing the claimant's five principal arguments (such as Hungary's motivation for the regulatory changes, issues with compensation, etc.) on how Hungary was supposedly acting in an arbitrary manner, the Tribunal found that none of them are sufficiently strong arguments to establish the host state's arbitrariness, or were otherwise dismissible due to lack of relevance and other factors.[102] It was furthermore stated by the Tribunal that a measure by the host state is not arbitrary if it is reasonably related to a rational policy. This necessarily required two elements in the Tribunal's view, also referring to the *AES Tisza v Hungary* case: the existence of a rational policy, and the reasonableness of state conduct in relation to the policy. These two elements are conjunctively required, the existence of just one is not sufficient. According to the Tribunal (following the *AES* tribunal's logic), rational policy is when the state follows a logical explanation (or to say it in another way, it is in good sense) and aims at addressing a public interest issue. As for reasonableness, there must be a sufficient correlation between the public policy objective of the host state and the actions/measures the host state undertook to achieve it. The Tribunal also added that this reasonableness includes proportionality: the measure's effect on the investor must be proportional to the public policy objective that motivated the host state. This element of proportionality was particularly emphasized by the Tribunal as strongly relevant.[103]

In relation to the above, the Tribunal found that if the test was sufficiently met by the disputed measure, then the host state will necessarily have a wide scope of discretion in determining its exact contents (in harmony with the Tribunal's earlier observations on the host state's regulatory freedom). This discretion is limited by the necessity of correlation between the policy objective and the measure, and a balancing exercise to ensure proportionality between the intended objective of the measure and its impact. Interestingly, the Tribunal took the view that objective correctness is not necessary for a measure to be reasonable under the fair and equitable treatment standard: as the Tribunal put it, the host state can be mistaken without being unreasonable. In this particular case, this was raised by the claimant in relation to how Poland and Portugal took different regulatory directions. In the Tribunal's view, this was not an objection towards Hungary's reasonableness, and regardless, the Tribunal believed there weren't enough material similarities between the three states, to use Poland and Portugal's own measures as benchmarks for Hungary's reasonableness. In relation to this non-requirement of correctness, the Tribunal emphasized that Hungary was undergoing a turbulent period of transition, and thus, potential errors in judgement could have occurred even if the host state acted reasonably. It then proceeded to demonstrate several instances where Hungary manifestly undertook balancing exercises.[104]

[102] ibid paras 167-178.
[103] ibid para 179.
[104] ibid paras 180-188.

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1.4. Plama Consortium Limited v Republic of Bulgaria[105]

This is a very interesting case with a lot of contradictions involving privatization. During the second half of the nineties, the Bulgarian State privatized a company (Nova Plama) that owned an oil refinery. The company soon went bankrupt and the shareholder, Plama Consortium Limited, initiated arbitration in 2003 under the Energy Charter Treaty. The company claimed that the Bulgarian state was responsible for its failure. The Tribunal established that a French citizen, a certain Mr. Vautrin, owned and controlled Plama Consortium Limited indirectly through a very complicated chain and network of companies.[106] Mr. Vautrin was accused by the Bulgarian State of misrepresentation. Under the applicable law[107], a withdrawal of the two well-capitalized investors from the business was required to be disclosed to the Bulgarian Privatization Agency during the privatization, which Mr. Vautrin supposedly "forgot". The Tribunal found that this was unlawful, prohibiting the claimant from enjoying the protection of the Energy Charter Treaty as the investment was obtained by deceitful conduct.[108]

Nevertheless, the Tribunal still discussed the merits of the case. Among others, the alleged breach of fair and equitable treatment obligation. The Tribunal treated the different standards of article 10(1) as interrelated. However, it was noted that despite this, these standards of protection can be also defined individually.[109] When it turned to the discussion of the legitimate expectations of the investor, it referred to the Thunderbird case, in which it was concluded that these expectations should be reasonable and justifiable. At the same time, the host state should respect such principles as good faith, non-discrimination and due process.[110] The Tribunal also stated that the stability of the legal framework is essential as it contributes to the standard of fair and equitable treatment in international law. And so, respecting all these principles, the host state has the right to regulate.[111] The Tribunal also discussed the transparency requirement. It found that the requirement is important to protect the legitimate interest of the investor and stability, and therefore related it to the fair and equitable treatment.[112] Regarding the protection and security requirement of article 10(1), the Tribunal referred to the *AMT v Zaire* case, in which it was stated that:

> The obligation incumbent on the [host State] is an obligation of vigilance, in the sense that the [host State] shall·take all measures necessary to ensure the full enjoyment of protection and security of its investments and should not be permitted to invoke its own legislation to detract from any such obligation.[113]

From this, the Tribunal deducted the obligation of the host state to actively provide a legal framework that secures and protects foreign investment. And through legal security,

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105 *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Award).
106 ibid para 95. However, in its decision on jurisdiction the same Tribunal stated that: „Mr. Vautrin's evidence as to his ultimate ownership and control of the Claimant is not only largely unsupported by contemporary documentation but ... is materially inconsistent with parts of that documentation and also contradicted by other statements apparently attributable to Mr. Vautrin ... „ ibid para. 90.
107 ibid para 107.
108 ibid paras 135, 143.
109 ibid para 163.
110 ibid para 176.
111 ibid para 177.
112 ibid para 178.
113 ibid para 179.

is also related to fair and equitable treatment.[114] However, the standard is not absolute and does not imply strict liability of the host state.[115] The Tribunal found overlapping and a correlation between the fair and equitable treatment standard and the reasonableness and non-discrimination standards. But it pointed out that these standards can be also defined individually.[116]

1.5. Ioannis Kardassopoulos and Ron Fuchs v the Republic of Georgia[117]

At the beginning of the nineties, two foreign investors (Mr.Kardasssopoulos and Mr.Fuchs, Greek and Israeli citizens, respectively), entered into a joint venture with the Georgian state-owned oil company through, Panama-based corporation, Tramex, which was originally based in the United States. The purpose of the joint venture was to extract oil, build pipelines and refineries, and related business activities.[118] The joint venture company got certain concessions that offered exclusive rights from the state. However, after a few years when the competition appeared on the market, the state cancelled these rights with new legislation. On the initiation by the claimants, a commission was established to compensate for the cancellation of the rights. However, the Government stalled proceedings, which ended in no compensation awarded to the claimants. Therefore, the claimants initiated international arbitration, basing their claims on three international instruments; the Energy Charter Treaty as well as the Georgia-Greece and Israel-Georgia Bilateral Investment Treaties in consideration of Mr. Kardasssopoulos being a Greek citizen and Mr. Fuchs an Israeli citizen.[119] All of these international instruments contain the fair and equitable treatment requirement provision.

From the claimants' perspective (specifically Mr. Fuchs'), a violation of the fair and equitable treatment standard occurred. Though Mr. Fuchs primarily relied on the Israel-Georgia BIT's fair and equitable treatment standard provision in his claim, the Tribunal also chose to include interpreting fair and equitable treatment under the Energy Charter Treaty in its analysis, hence its relevance to the present book. The primary basis of this claim was that the fair and equitable treatment standard should be considered an autonomous standard that demands a higher level of conduct from the host state than just the minimum standard (as based on customary international law). The latter claim the claimants attempted to justify by referring to the *Saluka v Czech Republic* case. In general, the claimants' claim in this regard can be divided into four arguments: that there was a breach of legitimate expectations, that Georgia's administration acted in an arbitrary and/or negligent fashion, and there was an insufficiency of action, that there was a failure to provide due process during the administrative proceedings, and that the host state's conduct towards the foreign

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114 ibid para 180.

115 ibid para 181.

116 ibid para 182-184. "The standard of „reasonableness" therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of „non-discrimination" requires a rational justification of any differential treatment of a foreign investor." ibid para 183.

117 *Ioannis Kardassopoulos and Ron Fuchs v the Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15 (Award).

118 ibid para 73.

119 ibid para 57.

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investor was inconsistent. Out of these, the legitimate expectations sub-claim was the most stressed by the claimants.[120]

By contrast, Georgia rejected the claimants' reading of the *Saluka v Czech Republic* case (arguing that the case showed that finding a violation of the fair and equitable treatment required more than just illegality or lack of authority in the host state's conduct), and attempted to establish that the fair and equitable treatment standard can be considered as an equivalent to the customary international law, and thus, the threshold for violating the standard is high. With regards to the specific sub-claims, Georgia argued that the claimants' alleged legitimate expectations were not valid, and that it is an attempt by the claimants to deflect responsibility for bad business decisions onto the host state (referring to the *Maffezini* case in the process). It also stressed that the regulatory flexibility of host states is an integral part of interpreting legitimate expectations. The other sub-claims were likewise rejected by Georgia.[121]

The Tribunal first had to determine what was the content of the fair and equitable treatment standard in the context of the Israel-Georgia BIT (and the Energy Charter Treaty). Partially based on the *Saluka v Czech Republic* case, it determined that the fair and equitable treatment standard is tied to the encouragement of foreign investment, and that legitimate expectations serve as its crucial element. Referring here to the *Saluka v Czech Republic*, the *Sempra v Argentina*, and the *Tecmed v Mexico* cases, the Tribunal evaluated whether the fact that specific assurances (of compensation) were only given after the investment was made affected the legitimacy of thr expectations. The Tribunal found that while the specific expectation of compensation was only raised due to these specific assurances later on, this did not preclude claimants from having legitimate expectations towards Georgia's conduct, specifically that it would treat their investment in a reasonably justifiable manner, and that its conduct would not violate the basic necessities of consistency, transparency, non-discrimination and what the Tribunal called even-handedness. So, the Tribunal found that the fair and equitable treatment obligation, as well as legitimate expectation of the investors to treat their investments in a non-discriminatory, transparent and consistent manner, does not only apply to the investment. Rather, the obligation also applied to the compensation procedure, as well as to the work of the compensation commission that was stalled by Georgia. And so, the Tribunal found the compensation procedure as non-transparent, arbitrary and unfair, referring to the excessive delays of the compensation procedure, circular responses by the host state's Government, and the complete denial of responsibility by Georgia towards the claimants' compensation (despite evidence showing that senior members of Georgia's Government were aware that claimants were owed compensation). Thus, the Tribunal found that Georgia violated the fair and equitable treatment standard, not only under the Israel-Georgia BIT, but also under the Energy Charter Treaty (tying the latter into the context through the notable overlap in "treaty matrices" as the Tribunal put it).[122] Ultimately, an award was rendered in favor of the claimants in 2010 (beyond the violation of the fair and equitable treatment standard, expropriation was another issue the Tribunal found in favour of the claimants). The related ICSID annulment proceedings were suspended in 2011, then discontinued.[123]

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[120] ibid paras 409-416.
[121] ibid paras 417-427.
[122] ibid paras 428-452.
[123] 'Ioannis Kardassopoulos v Georgia' (International Energy Charter) <https://www.energychartertreaty.org/details/article/ioannis-kardassopoulos-v-georgia-icsid-case-no-arb0518/> accessed 24 June 2021.

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1.6. *Limited Liability Company AMTO v Ukraine*[124]

The claimant was a Latvian company (AMTO) that started to buy shares in a Ukrainian registered company (EYUM-10), that supplied services to a nuclear power plant (Zaporozhskaya AES), and a division of the state-owned company (Energoatom) in 2000. In 2003, AMTO had acquired 67% of EYUM-10's shares. In the meantime, Zaporozhskaya AES accumulated debt towards EYUM-10, therefore, the company initiated proceedings against Zaporozhskaya AES and obtained judgement, and finally asked for execution. However, it was stayed, because of bankruptcy proceedings against Energoatom. Meanwhile, the Ukrainian State also enacted legislation that interfered with the bankruptcy proceedings.[125]

The claimant claimed, amongst others, breach of fair and equitable treatment (arbitrary and discriminatory treatment, violation of due process, infringement of the principle of legality, offending legitimate expectations regarding the enforcement of claims, failing to provide a stable, predictable and transparent framework).[126] The Tribunal did not find the breach of fair and equitable treatment, however, there are still some interesting issues related to this case. For instance, as a response to the host state's claim that AMTO did not conduct due diligence when investing, AMTO argued that it was "entitled to believe that Ukraine, being a Contracting Party of the ECT, and hence also its organs and enterprises, would act in conformity with the obligations under the Convention".[127] Meaning, that the claimant regarded the Treaty as a guarantee for its reasonable and objective expectations.

The AMTO Tribunal, similarly to the Plama Tribunal, found that there can be an overlapping between the fair and equitable treatment and the minimum standard requirement in international law. That is to say, that the host states should refrain from unreasonable, discriminatory or non-transparent actions. Therefore, the "claimant can plead that the same conduct breaches various obligations in Article 10(1) in circumstances where the content and relationship between these obligations is not clear".[128] Furthermore, the Tribunal found that denial of justice is a "manifestation of a breach of the obligation of the state to provide fair and equitable treatment". In practice, it happens when the host state's organs (administrative, legislative or judicial) do not assure the possibility for the foreign investor to exercise its rights.[129]

1.7. *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*[130]

This case concerned transfer of license to extract hydrocarbons in Kazakhstan. However, as only parts of the award are publicly available, and therefore only very limited data is

124 *Limited Liability Company AMTO v Ukraine*, Arbitration Institute of the Stockholm Chamber of Commerce Arbitration No. 080/2005 (Award).
125 ibid. paras 15-24.
126 ibid para 27.
127 ibid.
128 ibid para 74.
129 ibid para 75.
130 *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No. ARB/07/14 (Award).

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accessible regarding the facts of the case, we are going to examine only part of the award available and dealing with the issue of fair and equitable treatment.[131]

The available part of the award is very didactical with a logical structure, and some important findings. The Tribunal established that the fair and equitable treatment is more than the minimum standard treatment, and therefore:

> when assessing Respondent's actions, a specific standard of fairness and equitableness above the minimum standard must be identified and applied for the application of the ECT.[132]

Furthermore, the Tribunal also stated that denial of justice squarely falls under the standard of fair and equitable treatment in the context of Article 10(1) of the Energy Charter Treaty. Thus, if fair treatment is to be followed, then there should be no denial of justice.[133]

Beyond that, the Tribunal was also of the opinion that:

> a judicial act breaches the standard of fair and equitable treatment and/or denial of justice standards only if the act attains the high threshold which is described in Waste Management, Final Award (Ex CA-15) at para. 98: "Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process." The Tribunal views that a misapplication of domestic procedural or substantive law provision might under certain circumstances be an indication of lack of due process. However, the Tribunal emphasizes, and the Parties agree, that by no means would this be sufficient to establish a breach of Article 10(1) ECT committed by a judicial act.[134]

The Tribunal also made some observations regarding the standard of most constant security and protection. Particularly, the Tribunal was of the opinion that this standard is fundamentally distinct from the fair and equitable treatment standard, and has a meaning beyond the latter standard. The purpose of this standard in the Tribunal's view is that it protects the integrity of a foreign investment against interference, by say use of force or particularly physical damage. It does not actually extend to contractual rights.[135]

Finally, the Tribunal was particularly clear that corruption in itself (assuming the Tribunal can find evidence of it) is a grave violation of the fair and equitable treatment standard under the context of Article 10(1) of the Energy Charter Treaty.[136] Regardless, in this particular case, the Tribunal found no breach (of the fair and equitable treatment standard or otherwise) and rendered an award in favour of Kazakhstan in 2010.

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131 'Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan' (Investment Policy Hub) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/248/liman-caspian-oil-v-kazakhstan> accessed 13 May 2021.

132 *Liman* (Award) para 263.

133 ibid para 268.

134 ibid para 285.

135 ibid para 289.

136 ibid para 422.

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1.8. Mohammad Ammar Al-Bahloul v Republic of Tajikistan[137]

In this case, the claimant was an Austrian investor that invested in exploration and production of oil and gas in Tajikistan in 1998. Agreements were signed with the Tajik State Committee which promised necessary materials and licenses from Tajikistan. In 2000, with a new agreement, the parties set up a joint venture with the foreign investor's majority shareholding, and further exploration and production agreements were signed. However, there were permanent technical and management issues, and the promised licenses were not issued by the state. On the other hand, the Austrian investor did not pay the whole contribution undertaken to the joint venture company. The Tajik party initiated a court proceeding in Tajikistan to reduce the Austrian party's interest in the joint venture company, in proportion to its contribution. National court proceedings successfully reduced the Austrian investor's interests in the joint venture, to which the investor, among other things, claimed a violation of due process and fair and equitable treatment under international arbitration.[138]

The Tribunal accepted the viewpoint of the *Petrobart* tribunal that all the provisions from article 10(1) are interlinked.[139] And the grounds for breach, inconsistency and lack of transparency in the issuance of licenses and in the issuance of visas being the first, were examined. The Tribunal stated that transparency and consistency are definitely elements of the fair and equitable treatment standard. Regarding transparency requirement, it referred to the *Metalclad* award which found that all relevant legal requirements affecting the investment should be capable of being readily known to the investor.[140] Concerning consistency, it quoted the *Tecmed* decision, which stated that the foreign investor should be entitled to expect the host state to act, without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.[141] However, it added that none of them require the chilling of the legal system by the host state, but rather to act in an open manner and consistent with commitments it has undertaken.[142] However, in the case of consistency, the Tribunal could not establish the fault of the Tajik state. Nor did the Tribunal find enough evidence to establish the failure of the host state to meet legitimate expectations in the issuance of licenses.[143] The Tribunal established a test and required the proof of the nature of the expectation, the reliance on the expectation and the legitimacy of that reliance.[144] It also referred to the *Thunderbird* and *Parkerings* cases but did not find enough evidence. Claimant's third basis for alleging unfair and inequitable treatment related to the question of due process and/or denial of justice in the Tajik court actions.[145] The court found that the duty to provide due process is part of the obligation to provide fair and equitable treatment.[146] The Tribunal identified several aspects of denial

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137 *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, Arbitration Institute of the Stockholm Chamber of Commerce Case No. V (064/2008) (Award).
138 ibid paras 58-91.
139 ibid paras 178-179.
140 ibid paras 183.
141 ibid para 184.
142 ibid para 185.
143 ibid para 199.
144 ibid para 200.
145 ibid para 218.
146 ibid para 221.

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of justice in jurisprudence, like failing to notify the investor about the hearing, deciding in its absence, maliciously misapplying substantive law, exercising unreasonable pressure on the investor (like refusing to prolong licenses), etc.[147] However, due to limited evidence, the Tribunal could not establish denial of justice or breach of due process.

1.9. AES Corporation and Tau Power B.V. v Kazakhstan[148]

AES v Kazakhstan was an Energy Charter Treaty arbitration case that dealt with the question of legitimate expectations extensively. It also had an interesting perspective on the fair and equitable treatment standard as a whole.

The dispute originated from the privatization efforts of Kazakhstan over the course of the 1990s. Due to the necessity of restructuring its electricity sector, owing to its newfound independence after the end of the USSR, Kazakhstan decided to encourage foreign investment into their country through the privatization of several of its state-owned electricity companies. These involved the passing of several resolutions by the nation's authorities. One of which explicitly aimed at the creation of competitive wholesale market for electricity production by 1998. According to the claimant, the respondent was of the opinion that the particular resolution's content was more a statement of intent. Meanwhile, an Irish subsidiary of the primary claimant (though there was some dispute between the parties about the period during which the subsidiary was under the control of the claimant), acquired one of these privatized power plants, and later was announced as the winner of tenders related to two concessions and four heat and power plants. The latter explicitly led to a formal agreement between the primary claimant's subsidiary and the respondent host state (the Altai Agreement). The rights conferred by this agreement were later assigned to another company (the secondary claimant). This was followed by further agreements among various foreign investors and their subsidiaries related to the Kazakh electricity market. However, after the privatization, Kazakhstan engaged in a sweeping competition law reform between 1998 and 2008, by enacting nine different pieces of legislation (many of which related to monopolies, and the electricity production market specifically). Consequently, the regulatory environment for companies involved in electricity production, significantly changed over these years. As a result of this legislation, several of the claimants' companies were registered as dominant market players and subjected to fines and penalties over alleged violations of competition law, and for abusing their market positions. In total, the primary claimant's subsidiaries were subjected to 53 different orders and/or fines between 2001 and 2010. Furthermore, as alleged by the claimant, Kazakhstan Government bodies also threatened criminal prosecution against these subsidiaries from 2007 onwards.[149] Also, between 2002 and 2010, Kazakhstan attempted to make domestic courts proclaim the invalidity of the above-mentioned Altai Agreement. The agreement led to a protracted dispute concerning whether its arbitration clause invalidated the jurisdiction of domestic courts which in the end, an English court established the arbitration clause as valid.[150]

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[147] ibid para 221.
[148] *AES Corporation and Tau Power B.V. v Kazakhstan*, ICSID Case No. ARB/10/16 (Award).
[149] ibid paras 19-50.
[150] ibid paras 58-60.

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The Arbitral Tribunal analyzed separately the legislative evolution related to the case from 2009 to 2012. From 2009 onwards, Kazakhstan enacted further legislation which followed the trend already established in the previous period, and some of which aimed specifically at the electricity production market. Such as the 2009 electricity law and its 2012 amendment. Based on these regulations as well as the earlier ones, the Government took actions against the claimants' companies. This culminated in actual criminal proceedings being launched against the companies' select personnel in 2011. Such as the general director of the companies, who was investigated by Kazakhstan's financial police as well as faced various administrative proceedings and fined for alleged monopoly activity and market position abuses. This led to a significant escalation of the dispute between the parties.[151] And finally, investment arbitration was initiated with ICSID by the claimants in 2010 based on the Energy Charter Treaty and the Kazakhstan-United States BIT.

There were numerous claims in this case, however, we are going to focus on the question of legitimate expectations and the fair and equal treatment standard. One of the claims was that the provisions of the Altai Agreement, in conjunction with the circumstances in which it was concluded, as well as various pieces of legislation and the Energy Charter Treaty itself, entitled the claimants to legitimate expectations in the period prior to 2009. These expectations included amongst others, not being subject to price control or other sanctions, indemnification for losses resulting from any breach of the Altai Agreement, Kazakhstan refraining from taking any action that would have a material adverse effect on their investments or the enjoyment of their rights provided by the Altai Agreement.[152] The Tribunal categorized the expectations raised by the claimants into four categories: (i) expectations of a stabilization of their position towards legislation being more adverse to their investment; (ii) expectations regarding the way in which Claimants were allegedly entitled to be treated under relevant Kazakh competition law, in particular with regard to their asserted right to sell electricity at market rates and to do so through central trading companies using blended tariffs; (iii) expectations that Kazakhstan would only apply rational competition policies in a reasonable and proper manner for the purpose of deterring or redressing anti-competitive conduct. (iv) and finally, expectations that Kazakhstan would resolve disputes arising out of the Altai Agreement by way of arbitration.[153]

However, as per the Tribunal's view, all these expectations were ultimately directed towards the effects of the revisions of the Kazakh competition law that Kazakhstan accomplished prior to 2009, and thus were examined by the Arbitral Tribunal in this context. In relation to this, the Tribunal denied that there would be a legitimate expectation from claimants of no changes in Kazakhstan's general competition law for the public interest, or an exemption from such revisions. Furthermore, the Tribunal also dismissed the notion that successive amendments of Kazakh competition law would constitute a violation of legitimate expectations. It noted that the Kazakh state would have had to make a very clear commitment to the claimants on not modifying its regulatory framework in some specific manner, to have a legitimate expectation for the claimants to be protected from further evolution of competition law. The Altai Agreement did not contain such explicit commitments, and thus, the Tribunal ruled that there was no legitimate expectation. The Arbitral Tribunal also noted that Kazakhstan was introducing commonly used regulatory tools, all in the pursuit of goals that had been clearly announced by the state when the

[151] ibid paras 51-57.
[152] ibid paras 283-285.
[153] ibid para 286.

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foreign investment was being contemplated and concluded, which reinforced the Arbitral Tribunal's view that the claimants had no reason to believe that they are insulated from further regulatory evolution. With regards to other alleged legitimate expectations concerning market and trading practices, the Tribunal also examined whether the relevant provisions of the Altai Agreement gave rise to a legitimate expectation, the frustration of which would constitute a separate breach of fair and equitable treatment. According to the Tribunal, the breach of contract does not automatically mean a breach of treaty protection, denying that legitimate expectations under treaty and under contract were conterminous with each other. Instead, the latter would only be also a legitimate expectation under treaty, if it is of such nature that it justifies its protection under the given treaty, and the frustration of it is sufficiently serious in nature that it constituted an independent breach of the given protection standard of the treaty. The Tribunal also highlighted that there must be other factors, other than the existence of the contract, that justifies considering an expectation of performance of the contract as a legitimate expectation under the Energy Charter Treaty. Particularly, the overall circumstances must be considered, such as the expectation's basis, the reasons for its frustration, etc. Since these factors were missing according to the Tribunal in the present case, it rejected the claimants' allegation in this regard. With regards to blended tariffs and similar terms-connected, alleged legitimate expectations, the Arbitral Tribunal highlighted that these are too vague, lack definition in the Altai Agreement, and are interpreted too differently in meaning by the involved parties. Thus, the Tribunal believed that, considering other relevant factors, such as the stage of development of Kazakhstan's economy and the stage of competition law development in the host state, these provisions in the Altai Agreement are not sufficiently clear to give rise to a legitimate expectation protected by the fair and equitable treatment standard. As for the expectations arising out of stabilization, the Arbitral Tribunal simply referred to an earlier part of its award, where it determined that the stabilization clause found in the Altai Agreement cannot be exempted from a given legal provision of a law, while remaining subject to other, beneficial provisions, and thus it can also not give rise to a legitimate expectation on the claimants' part. And for the third category of expectations, the Arbitration Tribunal noted that the legitimate expectation in this case is an expectation that the Energy Charter Treaty's and the BIT's relevant standards will be applied by Kazakhstan. Thus, this is a question of whether the competition law as applied by the Kazakh state was in breach of the fair and equitable treatment standard (and thus will be discussed below by us, as well). Finally, regarding the arbitration clause, the Tribunal used a similar argument as earlier, noting that a contractual expectation does not automatically suffice for giving rise to a legitimate expectation protected under the broader fair and equitable treatment standard, and instead, the circumstances must also be considered alongside the breach of contract. In this case, the Tribunal rejected to decide on the validity of the arbitration clause, citing its lack of jurisdiction. However, it did acknowledge that English courts at the place of arbitration did confirm the validity of the clause, and thus the claimants cannot claim to have been deprived of legitimate forums to resolve the dispute. The Tribunal also believed that the claimants have shown no proof that they suffered damages due to the domestic courts' ruling against the validity of the clause. Thus, the Tribunal determined that it is not possible to base a claim on legitimate expectations (and the breach of fair and equitable treatment consequently) on the fact that Kazakhstan's domestic courts ruled the arbitration clause to be invalid, at the given stage of the proceedings at least. If in the future,

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damages would arise from this aspect of the dispute, then the claimants are free to file a new claim.[154]

After dealing with the legitimate expectations sub-standard, the Tribunal moved to examine the applicability of the larger fair and equitable standard with regards to the other sub-claims made by the claimants in relation to occurrences prior to 2009. The Tribunal declined to establish a detailed definition of the fair and equitable treatment standard, noting that all interpretations of the standard contain a shared element: a significant threshold of impropriety on the host state's part. Thus, the Tribunal reasoned that to determine whether the fair and equitable standard was breached, it is necessary to examine whether any of the actions by Kazakhstan in this period were sufficiently serious to fail the standard. In particular, the Tribunal used the requisiteness of transparency, stability and predictability as a baseline. The Tribunal also referred to the *AES v Hungary* case, specifically by accepting the latter tribunal's assertion that fair and equitable treatment is only infringed if the host state's actions or procedural omissions, considering the facts and circumstances presented to the arbitrators, are manifestly unfair or otherwise unreasonable (to the extent that it would surprise or even shock a sense of juridical propriety). Based on these reasons, the Tribunal rejected the claimants' claims in this context, and found that neither the enactment nor the application of Kazakhstan's competition law changes reached that threshold. Beyond this general dismissal, the Tribunal also examined in detail the various sub-claims related to alleged violations of the fair and equitable treatment standard in the period leading up to 2009. For many of these, it referred to its earlier statements regarding legitimate expectations, considering these sub-claims of fair and equitable treatment violation to be essentially an extension of the legitimate expectation claims, and thus unsuited for separate discussion. For other sub-claims, such as the claimants' allegations regarding coercion, harassment and lack of due process for example, the Arbitral Tribunal found that the factual basis for these sub-claims is insufficient. And with regards to the lack of due process, it also noted that violating the fair and equitable treatment standard requires a substantial denial of justice. According to the Tribunal, this was not the case in the present dispute, as it found the conduct of the Kazakh courts and other governmental bodies to be sufficiently motivated, and considered them detailed in their findings, while also noting that there were instances of these bodies deciding in favor of the claimants. Thus, there was no violation of the standard in the Arbitral Tribunal's view, as there was no substantial denial of justice.[155]

Interestingly, the claimants attempted to advance here an argument that refraining from unreasonably or arbitrarily impairing investments is a separate protection standard than fair and equitable treatment. The Arbitral Tribunal mostly side-stepped having to answer this question, noting that even if there are theoretical differences between the two standards, their application in the present case largely overlaps due to how the claimants constructed their claims. Thus, the Tribunal used the above-described arguments relating to the fair and equitable treatment standard to dismiss these particular sub-claims.[156]

Moving on, claims were also advanced connected to alleged violations of the fair and equitable treatment standard (and legitimate expectations) under the Energy Charter Treaty based on the conduct of Kazakhstan between 2009 and 2015. In particular, the claimants were mostly advancing such claims based on the 2012 electricity law amendment that we already mentioned among the facts of the case. In particular, the claimants believed the

154 ibid paras 283-297, 323.
155 ibid paras 308-324.
156 ibid paras 325-331.

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law mandating that all electricity producers re-invest all their income and profits into their generating facilities was unreasonable and disproportionate for the pursuit of any legitimate policy goal by Kazakhstan. Most of these were dismissed by the Tribunal based on its earlier findings on legitimate expectations, or as the Tribunal noted with regards to the frustration of legitimate expectations deriving from other provisions of the Energy Charter Treaty, the sub-claims presented by the claimants replicate the content of substantive provisions of the Energy Charter Treaty, and thus are indistinguishable from the sub-claims the claimants already advanced under these provisions. Thus, it ruled that these sub-claims do not give rise to a separate breach of the fair and equitable standard that can be assessed by the Tribunal. However, it devoted significantly more attention to the question of legitimate expectation to earn a reasonable return of and on an investment, which was what Kazakhstan allegedly violated with its conduct as described above. The Tribunal here ascertained that there exists a legitimate expectation to that effect, and that it necessarily implies the right to a certain degree of discretion when it comes to the use of this return by the investors, such as the right to repatriate it (in theory). It based this on provisions of the Altai Agreement, as well as on general principles. The Tribunal also emphasized here that the fair and equitable standard's protection of legitimate expectations is not absolute, but rather the restriction must be seen as unfair or inequitable. Thus, it analyzed whether Kazakhstan's implementation of policy was reasonable and proportionate. Curiously, the Arbitral Tribunal determined that while a certain degree of restriction on the repatriation of returns could be seen as justified within the context (ergo, it appears indispensable to prevent a collapse of the electricity system), Kazakhstan had to show that this threat of collapse was sufficiently real and imminent, and that no measures could have been reasonably introduced that had less intrusion upon the rights of the claimants. According to the Tribunal, the host state failed on the latter point. This was compounded by the fact that these regulations were meant to stay in place for seven years, thus meaning that they were not merely a response to an immediate threat of collapse, but represented a larger policy plan, according to the Tribunal. As such, the Tribunal ruled that in this context, there was a violation of the fair and equitable standard, via the frustration of the protected legitimate expectations of the claimants.[157]

Interestingly, while the arbitral Tribunal found in favour of the claimants in the above context (though almost all their other sub-claims were rejected), the Tribunal did not award damages.[158]

1.10. Anatolie Stati, Gabriel Stati, Ascom S.A., Terra Raf Trans Traiding Ltd. v Kazakhstan[159]

This case was similar to the Kazakh case of *AES Corporation and Tau Power B.V. v Kazakhstan*, in that both involved the oil and gas sector, and allegations of a targeted governmental harassment campaign. However, the Tribunal in this case found a significantly more damning factual situation. And thus, its conclusion on fair and equitable treatment was also different.

[157] ibid paras 384-412.
[158] ibid para 492.
[159] *Anatolie Stati, Gabriel Stati, Ascom S.A., Terra Raf Trans Traiding Ltd. v Kazakhstan*, SCC Case No. V (116/2010) (Award).

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As mentioned above, the case concerned exploration and supply of oil and gas within Kazakhstan. The claimants were Moldavian, Romanian and Gibraltarian persons (natural and legal). According to the facts of the case, the claimants invested heavily into the exploration of Kazakh oil and gas fields and established a functioning business enterprise. However, in 2008, the Kazak president issued a confidential document (several years after the initial investment, and by which time the companies were up and running). The motive behind the document was a letter from the president of Moldova, which expressed concerns that claimants were using the proceeds from their Kazakhstan investment in areas under UN sanction in South Sudan. Thus, the document instructed Kazakh governmental bodies to thoroughly check claimants' companies. Kazakhstan contended the notion that the president's document was an order (which was the claimants' opinion of this factoid), insisting that it was a pro-forma advisory document the president is obligated to send to Government bodies if he becomes aware of potentially unlawful conduct. Interestingly, as mentioned above, the document was confidential, but the claimants nevertheless managed to obtain a copy of it. The confidential document was soon followed by an order from the Kazakh deputy prime minister, which instructed Kazakh authorities to begin a thorough audit of the claimants' two companies. Afterwards, the Kazakh Government and administrative bodies found a several irregularities regarding the claimants' companies. These included among others the "discovery" that the companies were operating a trunk pipeline (whereas they only had a license for field pipelines) by the Kazakh financial police, and subsequent finings and various other administrative and court procedures. Certain executives of the claimants' companies also faced criminal prosecution, with Kazakh authorities believing that they violated Kazakh law with regards to the companies' pipelines and business deals. Various Kazakh experts and expert bodies also attested to the factual truth of the proceedings against the claimants' companies (though claimants argued that this was due to governmental pressure). Numerous other procedures against the claimants' companies followed at different levels of the Kazakh Government in the next two years.[160]

In general, as per the claimants' allegations, the market value of the claimants' companies significantly dropped between 2008 and 2010 (due to the various proceedings against them, rendering normal operation impossible), which the Kazakh Government allegedly attempted to capitalize on by having its state-owned oil and gas company offer to purchase it repeatedly, at a fraction of the investment's initial value. In the end, the claimants found a Kazakh-based private company willing to purchase the investment at a value closer to its initial value, but the purchase was allegedly frustrated and delayed by the Kazakh Government. Interestingly, as per the claimants' statements, this company was owned by an influential and powerful Kazakh business family. According to the claimants' allegations, when Kazakhstan understood that investment arbitration would be initiated against it after the closure of the sale, the Government moved to outright seize the investment by forcibly moving it into a public trust. By contrast, Kazakhstan attributed the devaluation of the investment to the bad financial management practices of the claimants, the general economic crisis of 2008, and the companies' failure to properly acquire export licenses, among other factors. The respondent host state also referred to its numerous domestic administrative and court decisions, as well as the opinions of various Kazakh expert bodies, and insisted that its actions were coherent and enacted in full accordance with Kazakh law. Curiously, the claimants alleged that the ordeal their companies underwent effectively constituted

[160] ibid paras 4-5.

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a targeted and deliberate campaign of harassment, driven by a specific "playbook" of Kazakhstan.[161] Regardless, the dispute went into arbitration in 2010, before the Stockholm Chamber of Commerce, and relying on the Energy Charter Treaty. The claimants alleged numerous breaches of the Treaty, including fair and equitable treatment, the Energy Charter Treaty's umbrella clause, expropriation and others. Given the focus of the current book, we are naturally going to only examine in detail the Tribunal's conclusions regarding fair and equitable treatment.

In total, the claimants assembled six categories of actions undertaken by Kazakhstan between 2008 and 2010, which they argued constituted a breach of the fair and equitable treatment standard as found in Article 10(1) of the Energy Charter Treaty. We are going to briefly look into each of these, as they will be relevant for properly summarizing the Tribunal's conclusions. In the first category, the claimants identified actions directed against claimants' companies and employees, based on fabricated grounds. This category mostly related to the above-mentioned dispute concerning whether the companies were operating trunk pipelines without license or not. Thus, we can see that in this case, there was a fundamental disagreement between the parties about the facts from the beginning of the dispute, and which persisted well into the arbitral proceedings. Claimants also highlighted the opacity and lack of transparency Kazakhstan allegedly displayed here. The second category of actions closely ties to the first one, and argued that Kazakhstan's prosecution and conviction of one of the claimants' employees, with the same judgment also delivering a hostile verdict towards a non-party (one of the companies), effectively constituted a sham trial, that was motivated by politics, violated due process and was factually incorrect. In the third category of fair and equitable treatment breach action was related to Kazakhstan's refusal to approve one of the claimants' companies' contractual right to continue energy resource exploration in certain properties as defined by that contract (which the company signed with the Government of Kazakhstan). This was part of the allegedly harassing and impeding actions that we mentioned earlier. The claimants argued here that this third category contained two separate breaches of the fair and equitable treatment standard: first, Kazakhstan arbitrarily ignored the company's request for a six-month extension of the contract, and secondly, the claimants' legitimate expectations were frustrated because Kazakhstan failed to extend the exploration contract, despite making promises to the company that it would do so earlier. The fourth category identified by the claimants was that Kazakhstan allegedly used the extensive and varied administrative proceedings against the claimants' companies to burden them with ownership and title, which allegedly devalued the investment and made it harder for the claimants to sell it at on appropriate market value. This tied into the claimants' concept of Kazakhstan acting in bad faith to take over their investment. The fifth category is related to the actions of the Kazakh Government mentioned above in the discussion of facts: the alleged fabrication of the grounds for directly seizing the claimants' investment. And the sixth category seemingly tied into a denial of justice argument: claimants alleged that they filed dozens of complaints to various Kazakh authorities about their situation but received no substantive reaction.[162]

Kazakhstan argued that the Government authorities were acting in a coherent, consistent manner. The respondent host state also argued that the Tribunal must individually examine each allegation of fair and equitable treatment violation and that none of these allegations

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[161] ibid paras 216-633.
[162] ibid paras 897-919.

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individually meet the bar necessary to find a breach of Article 10(1). Kazakhstan argued in favor of a high bar or threshold of fair and equitable treatment violation, which necessitates blatant misconduct on the host state's part. Otherwise, in Kazakhstan's opinion, fair and equitable treatment would be interpreted in an overly investor-friendly manner and thus would prevent host states from admitting investors. The respondent essentially argued that the claimants sought not fair, but preferential treatment compared to other investors, which they did not receive and thus felt prosecuted.[163]

The Tribunal took a methodical approach to the question of fair and equal treatment. First, it determined the abstract definition of the standard, noting that both parties seem to agree at least that fair and equitable treatment means that the host state must act in a manner that is consistent with the legitimate expectations of investors. So, we can observe that the Tribunal somewhat conflated the sub-standard with the wider standard and did not examine them separately. With regards to fair and equitable treatment, it also noted that its exact content is case-specific and must consider the specific factual circumstances of the given case, and then those circumstances must be evaluated in the legal context of the Energy Charter Treaty. To accomplish this goal, the Tribunal proceeded to undertake an extensive factual overview of the case. However, it emphasized that fair and equitable treatment is "treatment", meaning that not a single action of Kazakhstan has to be considered, but rather the host state's treatment of the investment over a longer period of time. It found that the Tribunal does not have to establish whether there was a playbook as the claimants alleged, the factual overview in itself establishes that Kazakhstan's conduct constituted a violation of fair and equitable treatment. The Tribunal conceded that while some specific actions undertaken by Kazakhstan might appear arguable (if not necessarily convincing), the sum of Kazakhstan's actions as seen cumulatively in context, and the stark and obvious difference in treatment before and after the presidential document, can only lead to the conclusion that Kazakhstan's disputed measures constituted a string of coordinated harassment of the foreign investor, and thus a breach of the fair and equitable treatment standard established in Article 10(1) of the Energy Charter Treaty. The Tribunal highlighted some specific factors that confirmed this conclusion: the sharp turn in Kazakhstan's behavior in 2008 was ultimately suspicious, as before 2008 Kazakh authorities regularly inspected the companies' pipelines (which leads to the question of why it was not discovered earlier that these were trunk pipelines, as Kazakhstan alleged). Furthermore, the Tribunal noted that the financial police of Kazakhstan was not a competent authority to classify pipelines, lending further credence to the assertion of the Kazakh authorities acting arbitrarily. The Tribunal also accepted the claimants' allegation based on the available evidence that the Kazakh Government (through the financial police) compelled relevant expert bodies to withdraw any statements in favor of the claimants. The Arbitral Tribunal also questioned the notion that any of the claimants' actions (within the context of the FET evaluation) were contrary to Kazakh law, leading to the conclusion that there was a great degree of arbitrariness exhibited by Kazakhstan.[164]

Interestingly, the Tribunal also concluded that since it has already established a breach of the fair and equitable treatment standard, it need not examine further potential breaches of the Energy Charter Treaty relating to expropriation (Article 13) in detail, unless the damages sought by the claimants for them are not covered by the fair and equitable treatment breach.[165]

[163] ibid paras 920-940.
[164] ibid paras 941-1095.
[165] ibid paras 1202-1208.

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In the end, the Tribunal, based on the violation of fair and equitable treatment as described above, awarded half a billion USD to the claimants in 2013, and also ordered the respondent to pay half of the claimants' legal costs. Kazakhstan unsuccessfully tried to annul the award in front of Swedish courts in 2016/2017 and in 2020. In the former case, Kazakhstan attempted to deploy a number of both procedural and substantive arguments, alleging procedural irregularities (such as claimants supplying false facts to the Tribunal) and that the foreign investors' activities constituted a massive scheme of fraudulent corruption. These arguments were all dismissed by the Svea Court of Appeal[166], the judgment of which came under extraordinary review of the Supreme Court of Sweden at Kazakhstan's request. However, the Supreme Court simply noted that Kazakhstan had not shown any circumstance that would constitute a grave procedural error on the court of appeal's part.[167] In 2020, the same courts also noted that the matter is a *res iudicata* and that Kazakhstan brought no new fact to the case that would justify another examination of the merits.[168] The enforcement proceedings of the award are also notable for being extremely elaborate, involving courts of Belgium, Italy, Luxembourg, Netherlands, the United Kingdom and the United States.

1.11. Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v Albania[169]

In this case the arbitral Tribunal examined the issue of fair and equitable treatment within the Energy Charter Treaty's context in relatively great detail.

The origins of the dispute stem from the 1990s, during which period Albania abandoned its centrally planned and controlled economy in favor of a market economy, as part of the political changes following the downfall of its communist regime. The claimant in the present case was a Greek petroleum company, which had spent the 1990s exploring the investment potentials within Albania (though the actual length of preparation was disputed between claimant and respondent, both agreed that the claimant made a concrete proposal (which failed) in 1995). In particular, the claimant was considering the potential of establishing and/or renovating a petroleum tank farm at one of Albania's ports. In the end, they chose the port of Durres and attempted to secure an investment in the area from the Albanian Government, with varied success (as shown by the above-mentioned failed proposal). But between 1998 and 1999, the claimant managed to reach an agreement with the relevant Albanian Government bodies (Ministry of Economics and Privatization) and executed a 20-year lease contract to renovate, construct and develop a petroleum tank farm on the leased area of the port. The Tribunal found it difficult to establish a fixed timeline for the construction process, as the claimant made contradictory statements, some of which

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166 'Svea Court of Appeal Judgement' (International Energy Charter) <https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/29_Stati/Judgment_of_the_Svea_Court_of_Appeal_on_Kazakhstan_s_Set_Aside_Application__Eng.PDF> accessed 18 May 2021.

167 'Report of Proceedings of the Supreme Court of Sweden' (International Energy Charter) <https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/29_Stati/Decision_of_the_Supreme_Court_of_Sweden__English_.pdf> accessed 18 May 2021.

168 'Minutes of the Supreme Court of Sweden' (International Energy Charter) <https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/29_Stati/Decision_of_the_Supreme_Court_of_Sweden_II__English_.pdf> accessed 18 May 2021.

169 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v Albania*, ICSID Case No. ARB/11/24 (Award).

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were also disputed by Albania. In the end, the Tribunal found that the most reasonable conclusion was that this tank farm was being constructed from around March 2000 to February 2001, at least with regards to core construction works. During the construction work, the claimant was ordered by the port authority (acting under another ministry) to cease their activities. This was because the port of Durres was under consideration for a renovation master plan, which potentially included the transfer of any petroleum tank farms to other tank farms. In fact, work on the construction was ceased for several months due to the port authority's order (which also affected other foreign investors developing the area) but later allowed to resume and be completed. In 2001, the claimant managed to secure a 10-year trading permit for the petroleum tank farm, which allowed it to continue functioning for its duration unless there was an earlier cancellation of the permit by relevant Albanian authorities. Over the course of the following years, the claimant operated the completed petroleum tank farm, though in the background, the port's restructuring was still being planned and partially executed by Albanian authorities through a variety of governmental decisions and regulatory changes. However, there was contention between the parties about how much this was following the original master plan. This restructuring could have eventually led to the ceasing of petroleum unloading activities at the port. The claimant was aware of this possibility to some extent, and during this period, attempted to negotiate a relocation, if necessary, provided it was granted proper compensation in exchange. Albanian authorities, however, stuck to the claimant relocating at its own cost, without compensation. Beyond the trade permit, the claimant encountered issues with the acquisition of different permits throughout the construction and operation of the petroleum tank farm. To wit, the claimant only managed to obtain an environmental permit in 2007 (after first applying for it in 2000), though the permit was manifestly temporary. The construction site and construction permit, meanwhile, were never granted to the claimant (even though the Albanian Government approved the construction project in principle). The question of the exploitation permit was meanwhile particularly contentious from a factual perspective: Albanian authorities requested that the claimant applied for such a permit in 2003-2004, but accounts differed on whether the claimant applied to the relevant Albanian authorities or not. And finally, the case also involved a customs warehouse authorization, which was granted to the claimant in 2006. In the end, Albania's prohibition on petroleum processing ships in the Durres port became effective in 2009. Afterwards, the claimant relied on existing deposits in the petroleum tank farm and trucks to continue petroleum trading in limited, relatively small quantities, until the expiry of its trading permit in 2011. The original lease contract remained theoretically valid (if practically non-functional) by the time of arbitration.[170]

As the above passages already suggested, there was a high degree of contention between the parties regarding numerous facts of the case, involving conflicting allegations regarding communication and motivation, among other matters. The chief hotspots of this factual clash served as the onus behind the dispute and the reason the claimant filed for arbitration, thus we should also highlight them here. Namely, while the claimant admitted to being aware of potential changes to the port of Durres' functioning, it alleged that it had faith in the stability of the 20-year lease contract and that it would be largely exempted from any restructuring going on in the port. The claimant also alleged that it exercised due legal diligence by repeatedly asking relevant Albanian authorities about what legal steps to take

[170] ibid paras 55-137.

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and what permits to request. However, alleges being told that it already has governmental authorization, and no further steps are necessary. Thus, believed that there is no need for further permits. Furthermore, and perhaps most importantly, the claimant believed that the 2009 closure of the port with regards to petroleum unloading ships was not motivated by a master plan of restructuring (as we mentioned above), which the claimant believed that Albania had largely abandoned for the most part, but rather by a desire to provide a competitive advantage to an Italo-Albanian competitor of the claimant. The claimant also alleged that during this period, it suffered from arbitrary and excessive tax claims from Albania, as Albania imposed excise taxes and VAT on quantities of petroleum as shown on the bills of lading, and not on the actual quantities as they departed from the customs warehouse. This was arbitrary according to the claimant because it failed to take into consideration that due evaporation and other losses, the differences between the two quantities can be significant. Finally, the claimant also contended that Albania ignored frequent occurrences of fuel smuggling, which caused damages to the claimants' operations between 2001 and 2011.[171] Albania, of course, refuted all these claims, thus leading to the dispute, which was filed in 2011 by the claimant in front of the ICSID, relying on the Albania – Greece BIT and the Energy Charter Treaty.

As with other cases, our principal focus is on how the arbitral Tribunal adjudicated the claimant's alleged violation of the fair and equitable treatment standard. The claimant also argued other breaches of the Energy Charter Treaty and the BIT, such as indirect expropriation. First, we must clarify that since the afore-mentioned BIT contained explicit no fair and equitable treatment standard, the Tribunal based its examination of the topic solely on the Energy Charter Treaty, which emphasizes its value for research from our perspective. The Tribunal in general divided its examination of fair and equitable treatment into four separate subcategories, each analyzed independently: the provision of a stable and transparent legal framework, legitimate expectations, alleged exertion of pressure, and denial of justice. This followed the same structure that the claimant used in their presentation.[172]

Thus, the first claim that related to fair and equitable treatment was that Albania failed to provide a stable and transparent legal framework to the claimant. In particular, the claimant believed that even given Albania's state of economic and legal transition, its legal framework was extraordinarily unstable, unclear and contradictory. This included not informing the claimant about Albania's possible plans for the port of Durres in the last years of the 1990s, as the claimant contended that it would not have agreed to the lease contract had it known that the investment's legal future is uncertain. The minimum storage capacity was significantly reduced in 2002, decreasing the viability of running a tank farm business then re-increasing it in 2008 just before the claimant's investment stopped its activity. The State of Albania did not order the relocation of the claimant's tank farm or make known to the claimant the conditions of relocation when the port was shut down. Nor did it specify the permits needed for the claimant's investment and their requirements. Albania primarily argued that claimant failed to negotiate for stabilization clauses; that the necessity of regulatory and infrastructural changes in Albania was manifestly obvious and foreseeable, and that it never made any representation to the claimant in the lease contract that would suggest it would have the ability to use it for discharging petroleum-carrying vessels for the totality of the lease contract's duration.[173]

[171] ibid paras 139-258.
[172] ibid paras 582-585.
[173] ibid paras 586-597.

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When assessing the above contentions by the parties, the Tribunal established three criteria that must be considered when examining fair and equitable treatment in the context of a stable and transparent legal framework. Partially based on other arbitration cases,[174] the Tribunal first established that a critical factor here was the necessity of balancing (between the obligation and other legally relevant interests) and that legislative changes must not be characterized as continuous oscillation and unpredictability. The second criterion was whether Albania's specific situation (a period of drastic economic, political and legal transition) is relevant to the interpretation of this obligation to provide a stable and transparent legal framework. The Tribunal was of the opinion that this specific situation was of relevance to the present case. Moreover, the claimant was found to be very familiar with Albania's specific history and circumstances. It also highlighted that Albania had to build its infrastructure from scratch and suffered from great internal strife. Thus, the Tribunal basically argued that foreign investors are not entitled to believe that Albania's efforts to live up to its international treaty obligations would generate the same results of stability as in more developed and stable countries. And that the minimum due diligence of host states to live up to treaty obligations is circumstance specific. The third criterion the Tribunal considered was that the foreign investor itself is obligated to evaluate the circumstances before investing and that the host state's obligation to provide a stable and transparent legal framework does not dispense with this obligation. Thus, to rely on this framework obligation, the foreign investor must first conduct itself with diligent inquiry and information-gathering. The Arbitral Tribunal noted that in this context, the conduct of both parties must be examined in order to determine fairness and equitableness.[175]

Based on the above criteria, the Tribunal assessed the conduct of both parties to determine whether there was a breach of fair and equitable treatment standard in this specific context of the legal framework. First, it found that, based on the analyzed facts of the case, Albania made no specific representation and undertaking to assure the stability of the legal framework in the specific context of the claimant's investment. It clarified for the parties that, without any detailed assurance or substantive commitment on the part of the host state, positive replies to an investor's investment proposal cannot be construed as a commitment to stabilizing a legal framework for the claimant's investment. The Tribunal also pointed out that the lease contract does not mention the use of Durres' port facilities for tankers, it only entitled the claimant to set up a fuel storage center on the leased area. The contract also cannot be construed as possessing an implied term with regards to stabilization, due to the lack of any executive statements, directives, or such to this effect from Albania. So, there was neither specific commitment in this regard. As for Albania's plans for restructuring the country's infrastructure, the Tribunal found its modernization policy coherent and consistent, if somewhat delayed. It also found that Albania made sufficient warnings of possible changes to the claimant in an appropriate timeframe and accommodated the claimant. The claimant was allowed the continued use of the Durres port for petroleum ships up until 2009 when the port that was supposed to replace it was opened. Interestingly, the Tribunal did acknowledge certain shortcomings in Albania's conduct, but these did not meet the threshold necessary to establish a violation of the obligation to provide a stable and transparent legal framework. As for other allegations raised by the claimant in this regard, the Tribunal dismissed the notion that the reduction of the minimum storage

[174] Like *AEA v Hungary, Saluka v Czech Republic, Lemire v Ukraine*.
[175] *Mamidoil* (Award) paras 598-634.

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capacity between 2003 and 2008 constituted an instability of the legal framework, noting that the measure had a legitimate experimental policy objective of fostering competition, it was in effect for five years, and was mostly reverted due to compliance with European Union requests. Thus, it reasoned that the measure and its revocation cannot be construed as arbitrary and unstable. As for the alleged failure of Albania to provide information on the permits needed by the claimant, the Tribunal again considered the struggling governance of Albania in the period, and that the claimant had its own obligation to make independent inquiries about the legal requirements of its investment. While the Tribunal agreed with the claimant that there were certain imperfections and lack of communication from Albanian authorities, the legal texts related to the permits were stable and transparent, and thus the claimant could have learned the information via independent inquiry. As such, Albania could not have violated the obligation to provide a stable and transparent legal framework this way.[176]

The second line of allegations advanced by the claimant, concerning fair and equitable treatment, was that Albania frustrated its protected legitimate expectations. The claimant posited that even though neither the business plan it submitted to Albania, nor the lease contract explicitly refers to the use of petroleum ships, the claimant found it an obvious and implied element of the parties' engagement. Especially given that it was an integral part of the claimant's business plan. Thus, the claimant alleged that it had cause to believe that it would be allowed to operate its tank farm as intended for the entire duration of the lease contract. These expectations were allegedly reinforced by Albania allowing the claimant to finish constructions, after first suspending them. These expectations were frustrated in part by Albania only issuing a temporary trading permit and not renewing it, and by the prohibition of discharging fuel ships in the port of Durres from 2009 onwards. Albania advanced a similar counterargument, as we have seen above, that the claimant could not have legitimately expected to have their tank farm remain operational as under the original conditions for twenty years, given the transitional stage of Albania both from a legal and infrastructural perspective. It also noted that it never made any representation to the claimant that it would be authorized to use the port for the lease's full duration, nor did it breach any term of the lease contract. Most notably for us, it also highlighted that the continued use of the tank farm by fuel ships between 2001 and 2009 was a special privilege granted to the claimant and several other Greek companies (until the construction work in the newer port was complete), because of an agreement between Albania and Greece.[177]

From the Tribunal's perspective, the principal question here was when did the legitimate expectations emerge in the investor, as an expectation can only arise when the investment is made. Due to the particularities of this case, such as that no stabilization representation was made by Albania to the claimant, that the investor's scouting activities took several years, as well as other facets of the dispute, determining this exact time was found to be difficult by the Tribunal. As such, it reasoned that instead of looking for a fixed point of time during the investment process, it takes into consideration the evolving and gradual nature of the investment process by weighing the interests of both the investor and the host state. Based on this general approach, it identified two types of actions by Albania (accompanied by general time periods) in relation to which legitimate expectations could have occurred from the claimant's side. The first one was whether the claimant could

[176] ibid paras 635-675.
[177] ibid paras 676-689.

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have legitimately expected, between the approval of the investment in 1999 and the start of the construction in 2000 that it would be exempted from acquiring the construction site permit, the construction permit, and the exploitation permit. The Tribunal found that an investor cannot claim legitimate expectations with respect to its illegal operations, as the lack of permits made the construction manifestly contrary to Albanian laws. Albania also never explicitly confirmed to the claimant that these requirements would be waived, according to the Tribunal. Interestingly, Albania's inaction against the claimant later was not considered a relevant factor by the Arbitral Tribunal, as only the above-described time was relevant to the determination of legitimate expectation, consistent with the Tribunal's earlier general observations. The second Albanian measure that could be connected to possible legitimate expectations from the claimant was the 2009 closure of the Durres port for discharging fuel ships. In a similar fashion to the first measure, the timeframe for legitimate expectation established by the Arbitral Tribunal was between the execution of the lease contract in 1999, and the start of the construction in 2000. In this case, the situation is further muddled by that during the year 1999, the claimant received warnings from certain Albanian authorities that a restructuring plan was being considered, which could potentially leave the future petroleum tank farm without access to fuel ships. This was followed by the temporary suspension of construction works until Albania and Greece managed to negotiate a temporary agreement. This indicated to the Tribunal that Albania did not suddenly change its mind in 2009, but rather behaved consistently and coherently. It noted that while in other cases, such as *Tecmed v Mexico, Eureko v Poland*, and *MTD v Chile*, the arbitral tribunals concluded the revocation of a license, the withdrawal of approval, or that the prohibition of a previously authorized activity constituted a frustration of legitimate expectations. But the circumstances in the present case markedly differ. Namely that the actions of Albania did not target the investment itself but rather the business environment. For a similar situation to occur in the present case, Albania would have had to revoke the lease contract. However, this did not happen. The Tribunal thus had to examine whether the claimant had a legitimate expectation to access the port as part of the general circumstances and conditions at the time of the investment. Here, the Arbitral Tribunal took the view that there must be more on the claimant's side to a legitimate expectation than the subjective hope that nothing will change for the worse. Namely, there must be a promise from the host state, either implicitly or explicitly, one that is identifiable under the circumstances and thus can transform the investor's subjective hope into objective (and thus legitimate) expectation. No such promise existed. And furthermore, the Tribunal found that Albania's consistent public policy of increasing modernization of its infrastructure was sufficiently weighty to shift the balance in the host state's favor in this regard: the investor does not have an absolute right to expect that old structures would continue to exist, regardless of circumstances.[178]

The third aspect of fair and equitable treatment that was raised in the dispute, concerned the alleged exertion of pressure by Albania. Namely, the allegation that Albania prohibited the discharge of fuel tankers in the port of Durres when it realized that the claimant would relocate only if compensated. Therefore, Albania used governmental power to force the tank farm out of the Durres port. The Tribunal dismissed this argument, noting that Albania's position regarding the closure of the port was consistent from 2000 to 2009 (specifically that the claimant and select Greek companies could use the port to discharge fuel until

[178] ibid paras 691-735.

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the newer port is completed). And that the host state was also consistent in both offering a privileged location in the newer port if the claimant relocated while also making clear that it would not attempt to force a relocation on the claimant. Thus, both parties were clear and transparent in their positions according to the Tribunal.[179]

The final aspect of fair and equitable treatment that was raised in the dispute concerning the denial of justice. This concerned the alleged unfairness of taxation due to the difference in fuel quantities that the claimant endured (as we explained earlier in the case). Namely, the Albanian Supreme Court declining the jurisdiction of civil courts on the matter, and referring it to administrative court jurisdiction, allegedly denied the claimant its access to justice in the host state. The Tribunal made it clear that it is not part of its role to act as an appeal against domestic courts, and that it has no competence to evaluate questions of domestic Albanian law. However, it noted that the Albanian Supreme Court's judgment appears reasoned, understandable, coherent, and consistent with the Albanian legal system. It did not appear clearly improper, discreditable, or shockingly disregarding of Albanian law. Therefore, the denial of justice claim lacked foundation according to the Tribunal. Thus, no violation of fair and equitable treatment could be proved in this case.[180]

In a similar fashion, the Tribunal found that no other violation of the Energy Charter Treaty could be determined. And thus, the claimant lost the case in 2015, with each party bearing its own costs.[181] ICSID annulment proceedings were later started but were then discontinued.[182]

1.12. Energoalians Ltd. v Moldova[183]

The *Energoalians Ltd. v Moldova* case is a typical example of a Tribunal finding a violation of the fair and equitable treatment standard by denial of justice. The claimant in this case was a Ukrainian private company producing and distributing electricity. This company entered into a number of contracts from 1999 onwards on the supply of electricity with a Moldovan state-owned electricity company. As a result, the state-owned company accrued a degree of debt towards the claimant for the electricity supplied. The payment of this debt was cumbersome due to the extensive restructuring and transfers of assets between state-owned electricity companies that was orchestrated by the Moldovan Government in the years following the original contracts concluded with Energoalians by a decree (no. 1000). As part of this process, a major part of the original state-owned company's assets, activity, etc. were transferred to another state-owned company. Eventually, the question of the debts owed to the claimant reached the so-called Audit Chamber of the Republic of Moldova. The Audit Chamber was an institution that was closely tied to the Moldovan parliament, and not a regular judicial body. The Chamber determined several administrative irregularities relating to the contracts signed between the claimant and the original state-owned company,

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179 ibid paras 736-749.
180 ibid paras 750-771.
181 ibid para 839
182 'Mamidoil v Albania' (International Energy Charter) <https://www.energychartertreaty.org/details/article/mamidoil-jetoil-greek-petroleum-products-societe-anonyme-sa-v-albania-icsid-case-no-arb1124/> accessed 20 May 2021.
183 *Energoalians Ltd. v Moldova, ad hoc* arbitration under UNCITRAL Rules (Award).

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which resulted in a reduction of the debt owed to the claimant. The claimant unsuccessfully challenged the Audit Chamber's decision (decree) via national courts, before turning to international arbitration under the Energy Charter Treaty and the Ukraine-Moldova BIT. Simultaneously, there were also claims in front of national courts relating to the portions of the debt held by other companies as a result of the restructuring.[184]

There are two relevant facets of the dispute. The first being Decree no. 1000, which was contested by the claimant as being contrary to their (and other creditors') legitimate expectations. As for the second facet, the Arbitral Tribunal also had to ascertain whether the Audit Chamber's decree constituted a violation of the fair and equitable treatment standard, specifically concerning denying justice to the claimant.

Implicitly, the Arbitral Tribunal had seemingly accepted that legitimate expectations served as a sub-standard for fair and equitable treatment and referenced the two in conjunction with each other. In this specific case, the third version of the legitimate expectations mentioned in Part I was present in the case, namely that the host state should provide stability in its "general regulatory framework". This is the most sensible category to put the Tribunal's approach to legitimate expectations into, as the violation of legitimate expectations was raised in conjunction with the changing regulatory environment, it was not a case of a government withdrawing from a formal obligation or informal promise made to the investors in specific. The Arbitral Tribunal examined the circumstances surrounding the issuance of Decree No. 1000. An important sub-question they had to answer was whether the mechanism contained in the Decree, supposedly there to protect the company's creditors, was also sufficient to justify the Decree not being aimed at infringing the interests of the creditors. The Tribunal determined that these mechanisms were vague, general, and depended on further actions by Moldova's Ministry of Finance, there was also a lack of clear information towards the creditors about what sort of remedies would be available to them. In a similar sense, the Tribunal also noted that the Decree, by forcing the discontinuation of economic activity of the debtor, also cut off the income meant to serve as repayment for its debts. Thus, the Tribunal acknowledged that the primary aim of the Decree was to protect Moldova's national interests (retaining state control over electricity), at the same time, it undoubtedly restricted the interests of the creditors. Interestingly, the Tribunal dismissed the claimant's arguments that the Decree was discriminatory (by allegedly differentiating between foreign and domestic creditors), or aimed specifically at the claimant, and it also dismissed the notion that the Decree constituted an illegal form of reorganization under Moldovan law. However, it explicitly found that the Decree nevertheless violated the legitimate expectations and interests of the creditors (and also violated fair and equitable treatment in the process), specifically by violating the state's obligation towards "stable, equitable, favorable and transparent conditions" found in Article 10(1) of the Energy Charter Treaty.[185] This aspect is interesting to us because the Tribunal confirms in this particular case that regulatory changes need not be contrary to the general framework of national law to be considered a violation of the third approach to legitimate expectations.

The second facet is related to the Audit Chamber's decree. The claimant alleged that this decree was a violation of the fair and equitable treatment standard, by constituting a denial of justice to the claimant and other creditors. The Tribunal analyzed the decree to determine the veracity of this claim. Interestingly, it noted that the Audit Chamber's

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[184] ibid paras 66-106.
[185] ibid paras 342-348.

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proceedings were unusual in several respects. First of all, the claimant was not entitled to participate in the Audit Chamber's proceedings. Second, the Audit Chamber disregarded evidence and statements provided by the original state-owned company, as well as other Moldovan governmental bodies, to decide that a certain number of electric transfers did not take place. It based its conclusion solely on the lack of regulations-compliant accounting. Similarly, the arbitral Tribunal determined that while electricity transfer did take place in some cases, it found the evidence, that the state-owned company already paid for it, to be flimsy. As a result, the Tribunal considered the Audit Chamber's decree to be arbitrary. An interesting question was also raised with regards to whether the Audit Chamber is a judicial body, and thus whether denial of justice can occur. The Tribunal concluded that while it is not a regular court, the Audit Chamber did fulfill a quasi-judicial role, and hence can be considered a judicial body from the perspective of the denial of justice claim. Therefore, the Tribunal concluded that it violated the fair and equitable treatment standard within the Energy Charter Treaty.[186] So, we can see that the Tribunal considered even formally non-judicial bodies capable of committing denials of justice towards the foreign investor, provided that the function of these other bodies is sufficiently judicial in character.

The Tribunal also addressed the national court proceedings and their results to some extent, though it mostly dismissed the various allegations of the claimant in this regard, or noted that from the perspective of the Tribunal, it is not strictly necessary to determine whether the courts' conduct constituted an additional and different violation of the Energy Charter Treaty.[187]

In the end, the Tribunal found in favor of the claimant, though it excluded part of its claims due to lack of jurisdiction (about one-fifth of it, related to one of the contracts), and awarded 195.5 million MLD in damages, with interest.[188] It should be added, that there were several annulment proceedings related to the award in front of French courts (involving the Paris Court of Appeal, and the Court of Cassation of France). But these mostly concerned jurisdictional questions and those of definitions found within the Energy Charter Treaty (such as investor). At the moment, the Paris Court of Appeal posed a number of preliminary questions to the Court of Justice of the European Union relating to these definitions.[189]

1.A. Cases related to green energy investments in the European Union

There is a set of cases related to incentives provided for investors who invested into green energy sector, and later revoked by some European countries like Spain, Italy or the Czech Republic.[190] The policy change happened during the years of austerity following the economic crisis of 2009.

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186 ibid paras 349-356

187 ibid para 366.

188 ibid paras 384, 413, 422, 436.

189 'Energoalians v Moldova' (International Energy Charter) <https://www.energychartertreaty.org/details/article/energoalians-ltd-v-moldova-uncitral/> accessed 20 May 2021.

190 Some of these cases have a potential regulatory chill effect. See: Gábor Hajdu, 'Recent Investment Cases Against EU Member States: Europe's Green Energy Policies Under Threat?' in: Kristína Hoghová, Daniel Klimovský, Boris Kolman (eds), S*ociálne vedy z perspektívy mladých vedeckých pracovníkov IV: Zborník príspevkov z medzinárodnej vedeckej konferencie doktorandov a mladých vedeckých pracovníkov* (Fakulta sociálnych vied Univerzita sv. Cyrila a Metoda v Trnave 2020).

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With regards to Spain-related cases, due to the large number of cases based on generally the same factual premises (or very similar), we try to avoid repetitions, and therefore introduce the reader to the common factual background once, including a general presentation of some basic facts as presented in the following. The background of the dispute lies ultimately in various European Union directives, particularly Directives 2001/77/EC and 2009/28/EC, which set targets for the Member States for the production of electricity generated from renewable energy sources within specified periods. Partially to comply with its related obligations, and partially to address its problems of energy dependence, Spain created a special regime for electricity generation that was designed to boost investment in renewable energy sources. This regime was made possible through a series of royal decrees and laws stretching from the late 1990s to 2010. Specifically, electric energy producers covered by this special regime had a series of guaranteed rights, that is to say, they had the right to incorporate their surplus energy into the system, receiving remuneration determined in accordance with the legal foundations of the regime. They also had the right to receive a premium, the amount of which was determined by various factors such as the level of energy delivery to the grid, the effective contribution to the improvement of the environment by the producer, etc. All of this was to make it possible for producers to achieve reasonable rates of return on their investments.[191] Furthermore, in 2005, the Spanish Government adopted a new renewable energy plan for the period of 2005-2016, which actually modified an existing plan for the promotion of renewable energies in Spain between 2000 and 2010. This plan maintained existing commitments to supply a given percent of Spain's total energy consumption with renewable energy by 2010, but also added two new, more ambitious targets for the same year: increasing renewable energy generation to an almost 30% of Spain's energy generation, and increasing the use of biofuel in transport to almost 6%. This plan was realized by a series of decrees and laws over the course of the next several years. As a result, a legal environment was created, which was greatly favourable to foreign investors looking to invest into the renewable energy sector.[192]

1.13. Charanne B.V. (Netherlands) Construction Investments S.à.r.l. (Luxembourg) v The Kingdom of Spain[193]

In the Charanne case, the claimants, Charanne and Construction acquired shares of a Spanish company Grupo T-Solar Global S.A. in 2009. This company owned more than three dozen renewable energy facilities in Spain, producing electricity with photovoltaic technology.[194] At the time, there was a special regulation providing incentives and subsidies to such renewable energy producers, and the afore-mentioned photovoltaic solar power plants were also covered by this special legal regime. To be more specific, the afore-mentioned T-Solar company was established in 2007, and the great majority of its photovoltaic solar power plants (according to the claimants) were all registered with the so-called RAIPRE registry (which covered renewable energy plants benefiting from Spain's special regime)

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[191] *Isolux Infrastructure Netherlands B.V. v Spain*, SCC Case V (2013/153) (Award) paras 86-90.
[192] ibid paras 91-116.
[193] *Charanne B.V. (Netherlands) Construction Investments S.à.r.l. (Luxembourg) v The Kingdom of Spain*, SCC Arbitration No. 062/2012 (Award).
[194] ibid paras 4,5.

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before the autumn of 2008, thus even before the investment was made by the claimants. In 2012 the claimants initiated international arbitration based on the Energy Charter Treaty, claiming that the new renewable energy regulation Spain introduced in 2010 retroactively caused losses to its investments by eliminating regulated tariffs after a while, and by introducing further requirements.[195] Therefore, it was in breach of the provisions of the Energy Charter Treaty, and so claimed damages.[196] The claim specifically referred to three articles of the Energy Charter Treaty: (i) to article 13, claiming expropriation, (ii) article 10(1), claiming that Spain breached its fair and equitable treatment obligation, and (iii) article 10(12), claiming that Spain breached its duty to provide effective means for the protection of the investors' rights.

Regarding the first claim, the Tribunal did not find that the claimants could prove that Spain's actions amounted to expropriation, and rejected the breach of article 10(12).[197] However, for us, the examination of the alleged breach of fair and equitable treatment standard is far more interesting and relevant. The claimants believed this standard requires the "maintenance of a stable and predictable legal framework", and that the host country breached it by frustrating the legitimate expectations of the investors by changing the regulatory and economic framework in unexpected ways. They asserted that they relied on the "commitments and representations" of the host state, and that the emergence of legitimate expectations' stabilization clause is not necessary. Furthermore, the claimants also posited that the regulatory changes were retroactive in nature, violating their rights, thus breaching the fair and equitable treatment standard from this perspective as well.[198]

For the Tribunal, the first step was determining the content of the fair and equitable treatment standard, as it appears in the context of Article 10(1). It was of the opinion that the language of article 10(1) is clear that the fair and equitable treatment is part of a more general obligation to create stable, equitable, favorable and transparent conditions.[199] This means that unlike some tribunals, the Tribunal in *Charanne* did not apparently label these obligations as constituting parts of the fair and equitable treatment obligation, but rather the latter forms a part of the former.

After having succinctly established the foundations, the Tribunal went on to review each specific fair and equitable treatment-related element of the claimants' claim. First, it examined the question of regulatory instability, as it was already mentioned that the claimants contended that Spain's renewable energy reforms in 2013 led to an ongoing instability of the regulatory framework. Interestingly, the Tribunal did not adjudicate this particular aspect of the dispute, determining that it had no jurisdiction to do so. Due to how the claim was submitted by the claimants, the scope of the international arbitration only extended to pre-2013 Spanish regulations. Thus, the Tribunal took the view that it could not use the 2013 regulatory changes as a basis for its decisions, without manifestly exceeding its power as an arbitral tribunal in the process. Instead, the Tribunal determined that only the 2010 norms can serve as a basis for examining any alleged violation of Spain's international obligations. And with regards to the 2010 norms, the Tribunal found that it could not posit that Spain breached its treaty-based obligation of regulatory stability. It also noted that the clarity of the regulatory framework is not in dispute, and in fact, any

195 ibid paras 78-80, 143-147, 149.
196 ibid para 268.
197 ibid para 467.
198 ibid paras 293-296, 392, 475.
199 ibid paras 476-477.

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raised ambiguity by the claimants exclusively refers to the evolution of the legal regime between 2010 and 2013, a subject that as the Tribunal determined, did not form part of the scope of the arbitration.[200]

Regarding 2010 norms, which fall under the scope of its investigations, the Tribunal determined that the existence of legitimate expectations could be a relevant factor. The Tribunal derived from the good faith principle of customary international law a rule, according to which host states cannot induce foreign investors to make investments, with said inducements generating legitimate expectations, then later ignore its commitments that served as the basis for these legitimate expectations. In this particular case, the question was thus, whether the regulations that created the original beneficial special legal regime generated legitimate expectations as well, and whether these expectations were violated by the 2010 regulations Spain introduced. To support this position, the claimants referred to the *El Paso v Argentina, Perenco v Ecuador*, *Total v Argentina*, *CMS v Argentina*, and *Enron v Argentina* cases. The claimants also referred to a 2012 UNCTAD study on fair and equitable treatment, which posited, that not only specific commitments made to the investor can generate a legitimate expectation, but also regulations that are not specifically addressed to any specific investor, but which are introduced with the specific goal of inducing foreign investments, and on which the foreign investor relied on when making the investment.[201]

However, regarding the legitimate expectations claim, the Tribunal concluded that no specific commitments were made by the host state (Spain) in the present case. The Tribunal stated for example, that there was no stabilization clause or other specific agreement, assurance or statement in which the host state promised to the claimants not to change the regulatory framework existing at the time of the investment. Having not found any statement addressed to the claimants by Spain, the Tribunal thus ruled out this potential source of legitimate expectations.[202]

The claimants, by contrast, argued that the two regulations that formed the original special legal regime were in essence specific commitments, as they were directed at a specific group of investors, limited in number, who met the regulatory requirements within specific time periods. The Tribunal heavily disagreed with this notion, as it was of the belief that the fact that the regulations were directed to a limited group of investors, and were thus not universal in scope, did not necessarily turn them into commitments specifically addressed at each investor meeting the regulatory requirements. The Tribunal posited that such limitation in scope does not mean that a law or regulation loses its general nature shared by other laws and regulations. In fact, the Tribunal was of the opinion that if it did find that such laws and regulations would constitute specific commitments by the host state, merely because the persons affected by the regulation are limited in character and number, then that would result in an excessive limitation on the regulatory power of hosts states, with regards to regulating the economy in a manner that is suitable to the given public interest in the given situation. Thus, it reached the conclusion that no specific commitment could be found by Spain towards the investors.[203]

Even without specific commitments, the Tribunal did not initially rule out the possibility that, while interpreting them as specific commitments would be contrary to legal principles, the regulations, and more specifically, the regulatory framework in itself might generate

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200 ibid paras 478-485.
201 ibid paras 486-489.
202 ibid paras 490.
203 ibid paras 491-494.

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legitimate expectations. Here, the Tribunal first established that legitimate expectations should be based on an objective standard, as the starting position of this examination. It noted that mere subjective belief on the part of the investor when it made the investment is insufficient in itself. It also stressed that the expectation must have been reasonable, in light of the circumstances of the particular case, and with relevance towards representations made by the host State to the foreign investor that served to induce investments. Thus, the Tribunal turned to examining these representations. First of these were the documents disseminated by Spain, as part of its campaign to attract investments in the renewable energy sector. These documents promised high returns and other benefits to investors. However, the Tribunal rejected the notion that these campaign materials could have generated legitimate expectations, at least with regards to the belief that the beneficial tariff regime would not be modified. In particular, the Tribunal found issue with the documents' lack of specificity, and that the language used in them did not indicate, in any reasonable reading, that the tariff regime would remain untouched for the rest of the operating lives of the photovoltaic solar plants.[204]

Having dismissed these potential representations, the Tribunal again turned to the question of whether the regulatory framework itself could cause a legitimate expectation to come into being. The Tribunal's general position here, consistent with its earlier remarks, was that if the framework does not contain a specific commitment, then the investor could not have had a legitimate expectation that the existing legal regime would remain unmodified. To reinforce this position, the Tribunal looked to *Electrabel v Hungary* (which stressed that host states are entitled to regulatory changes, and the requirement of fairness cannot be interpreted as immutability, but rather that changes to the framework should be fair, consistent and predictable), *CMS v Argentina* (which also reinforced the notion that the host state's regulatory framework is allowed to evolve under the principles of foreign investment protection law), and *El Paso v Argentina* (which posited that "economic and legal life is by nature evolutionary",[205] and that fair and equitable treatment should not be equated with stability of the legal and business framework). The Tribunal ruled that approving the existence of such a legitimate expectation would essentially mean the freezing of Spain's regulatory framework with regards to the eligible photovoltaic solar power plants, as the regulatory framework would be subject to the same international legal effects in practice, as if Spain had provided a stabilization clause or other specific commitment. This was a conclusion the Tribunal found unsupportable.[206]

Furthermore, the Tribunal also noted that the jurisprudence of the highest Spanish domestic courts also reinforced the notion that there could have been no legitimate expectation that the regulatory framework would remain unchanged. In relation to this, the Tribunal also agreed with Spain that the investors should exercise due diligence when investing. Specifically, legitimate expectations necessarily demand that the investor first makes a diligent analysis of the legal regime its planned investment would fall under. Thus, the only instances where there would be a violation of the investors' legitimate expectations would be situation where the host state's new regulatory measures were not foreseeable at the time of the investment. Applying this principle to the present case, the Tribunal concluded that the claimants could have reasonably foreseen alterations to the regulatory framework at the time they made their investments. The Tribunal emphasized in particular that a relatively

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[204] ibid paras 495-497.
[205] *El Paso* (Award) paras 350, 352..
[206] *Charanne* (Award) paras 498-503.

high level of care could be expected of foreign investors in fields as highly regulated as the energy sector, where thorough knowledge of applicable law is essential for successful investments.[207] Beyond these argumentations, the Tribunal also offhandedly dismissed the claimants' allegation that the registration of the affected plants into the RAIPRE system would have entitled them to an acquired right to the tariff system, which in turn would have given rise to legitimate expectations. The Tribunal agreed with Spain that registration into the RAIPRE system was only an administrative requirement, and did not actually entitle investors to acquired rights. Interestingly, the Tribunal also noted that legitimate expectations must be analyzed under international, and not national law, so the relevance of the exact domestic legal consequences of the registrations is questionable regardless.[208]

But by the same token, the Tribunal concluded that at the same time, the investor has a legitimate expectation that the state will not act "unreasonably, disproportionately or contrary to the public interest", when modifying the existing regulation based on which the investment was made.[209] Regarding the issue of proportionality, the Tribunal found that it is satisfied as long as the changes are not capricious or unnecessary, and do not amount to suddenly and unpredictably eliminating the essential characteristics of the existing regulatory framework. The essential characteristics in the Tribunal's reading were the guaranteed tariff (or potentially a premium where relevant), and privileged access to the electricity distribution grid. As already implied, these features were not eliminated in the Tribunal's view.[210] Thus, the claimants failed to prove a violation of the fair and equitable treatment standard on these grounds as well, the amendments to the regulatory framework were not considered by the Tribunal to be unreasonable, arbitrary, disproportionate or contrary to the public interest.[211] The retroactivity argument was likewise dismissed by the Tribunal.[212] In the end, no breach was found by the Tribunal.

However, there was a dissenting opinion by one of the arbitrators. Part of this opinion concerned the fair and equitable treatment standard, so briefly examining it would prove useful. The dissenting arbitrator's position was that contrary to the Tribunal, the legal order in force when the investment is made can itself originate legitimate expectations, thus opposing the more "specific commitment"-focused approach of the Tribunal. The dissenting arbitrator's main argument was that the specific circumstances of the two regulations serving as the regulatory framework's basis, could have created an objective belief in investors (and thus legitimate expectations), owing partially to the limited number of targeted recipients and similar factors. The arbitrator considered it legally unacceptable that host states could modify frameworks without any judicial consequences in such a way as to eliminate benefits, benefits on which foreign investors relied on, after the host state used the framework to attract investments in the first place. The arbitrator also rejected the Tribunal's conclusion that the concept of a legal framework generating legitimate expectations would lead to the freezing of said framework. Instead, the arbitrator merely noted that states always retain regulatory power, but they have to compensate the damage caused by their alterations to the framework.[213]

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207 ibid paras 504-506.
208 ibid paras 509-510.
209 ibid para 514.
210 ibid paras 517-519.
211 ibid para 539.
212 ibid para 549.
213 *Charanne* Dissenting Opinion of Prof. Guido Santiago Tawil paras 5-11.

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In this case, the dispute concerned a 120 MW energy project in the Region of Puglia in Italy. The project planned to connect approximately 120 photovoltaic power plants to each other and finally to the national electricity grid.[214] The investors first established a Belgian holding company (Blusun S.A.), and later two Italian subsidiaries. However, there were several issues related to the project and its financing. At the same time, Italy changed the favorable treatment of energy projects and revoked certain incentives.

When it comes to the merits of the case, the claimants highlighted an alleged causal link between the solar energy project's failure and Italy's regulatory actions. They noted that in general, there was a lack of construction project financing in Italy during 2010-2011 on the field of solar energy projects, due to the legal insecurity created by Italy's measures. This alleged legal insecurity, this perceived instability deterred potential investors from making financial investments into the claimants' project, according to the claimants. And finally, the self-redress proceedings and stop-work orders that came to be in late 2011, early 2012, ended their project for good.[215] Legally speaking, they thus claimed breach of article 10(1) of the Energy Charter Treaty by failing to create stable, equitable, favorable and transparent conditions (on account of the legal insecurity allegedly caused by Italy). Furthermore, they also claimed a breach of fair and equitable treatment obligation by Italy frustrating the investors' legitimate expectations. In addition, the claimants also alleged a breach of article 13(1), thus claiming expropriation.[216] Interestingly, while the claimants seemingly separated the legal instability/insecurity claim from the fair and equitable treatment standard (for which they referred to in the context of legitimate expectations), the Tribunal invoked precedents which treated legal insecurity in the context of the fair and equitable treatment standard. Thus, we will also necessarily examine the legal instability claim in an ancillary fashion.

Mostly relying on the *Charanne* case, the Tribunal noted that, without a specific commitment made to the investor, the host country is free to adapt its legislation to the needs of economic changes and public interest.[217] The Tribunal generally accepted that individual measures, which on their own do not violate fair and equitable treatment obligation, cumulatively may do it. However, it held that in this case these measures, even cumulatively, did not reach the level necessary to breach it. Thus, it rejected the legal instability claim.[218]

The second claim, one which was much more firmly founded in the concept of fair and equitable treatment, both in the argumentation of the claimant, and in the statements of the Tribunal, was the legitimate expectations claim. Essentially, the claimants posited that they had legitimate expectations that the so-called Third Energy Account (the favorable

[214] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3 (Award) para 53.
[215] ibid para 310.
[216] ibid para 311.
[217] ibid paras 319, 367. At the same time, it referred to the so-called roller-coaster effect "In *PSEG Global v. Turkey* (not ECT case), the tribunal found a breach of the fair and equitable treatment (FET) standard by reference to what it described as: ... the 'roller-coaster' effect of the continuing legislative changes. '[stability cannot exist in a situation where the law kept changing continuously and endlessly, Paras. 250, 254". ibid para 315.
[218] ibid paras 361, 364.

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regulatory environment) would be maintained for the entirety of its duration (so, until the end of 2013). This was presented by the claimants, and accepted by the Tribunal, as an alternative claim to the legal instability claim. The Tribunal referred to several other cases here, such as *Charanne, El Paso*, and *Philip Morris v Uruguay*. Based on these, the Tribunal took the view that it is problematic to view laws as express promises by the host state. In fact, according to the Tribunal's opinion, regardless of the difficulties surrounding the interpretation of informal representations, there is a clear distinction between laws and contractual commitments. In the Tribunal's view, international law cannot turn something that was not binding in the first place to a binding obligation, nor can it render something that was originally temporary perpetual. Furthermore, the Tribunal also noted that considering the circumstances (especially European Union law) it was clear, or should have been clear, the incentives offered under the Third Energy Account were subject to modification (consistent with the observations we made regarding the other claim). The Tribunal thus took the view, that specific commitments need to be made by the host state, in order to establish an obligation on its part. However, it also acknowledged that:

> If it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime. These considerations apply even more strongly when the context is subsidies or the payment of special benefits for particular economic sectors.[219]

Though claimants attempted to use witness testimony to establish that they had reasonable expectations towards the Third Energy Account living out its planned duration, according to the Tribunal, when viewing the specific circumstances of the case, it should be clearly noted that the risk of change is carried by the investors by default, and that reasonable market expectations in themselves cannot serve as a basis for shifting risks to the host state's budget. According to the Tribunal, circumstances can and do change, and without a specific commitment, this risk cannot be shifted away from the investors. Thus, in the absence of any specific relevant commitment by Italy towards the claimants, the Tribunal could not establish a legitimate expectation as posited by the claimants.[220] In general, The Tribunal rejected the claimants' claims in all respects in its 2016 award. This award was also upheld by the ICSID annulment committee later.[221]

1.15. Antaris Gmbh and Dr Michael Göde v the Czech Republic[222]

Antaris was a case between German investors who invested in solar power plants and the Czech Republic. The Czech Republic changed the system of incentives, as there were too many investments into this subsidized energy sector. The claimants initiated international arbitration based on the Energy Charter Treaty and a BIT, claiming among others unfair

[219] ibid para 372.
[220] ibid paras 365-374.
[221] 'Blusun v Italy' (International Energy Charter) <https://www.energychartertreaty.org/details/article/blusun-sa-jean-pierre-lecorcier-and-michael-stein-v-italy-icsid-case-no-arb143/> accessed 22 May 2021.
[222] *Antaris Gmbh and Dr Michael Göde v the Czech Republic*, PCA Case Nº 2014-01 (Award).

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and inequitable treatment, unreasonable and arbitrary measures, and indirect or creeping expropriation.[223]

Out of the claims presented by the claimants, one of the relevant claims for us is that the claimants alleged that the Czech Republic breached an obligation to provide a stable and predictable legal framework. Interestingly, the claimants posited that this is a separate, autonomous obligation from the obligation to protect the legitimate expectations of investors. However, referring to *Tecmed v Mexico, Bayindir v Pakistan* and other cases, the claimants tied both obligations to the fair and equitable treatment standard in their argumentation regardless. Essentially, the claimants attempted to differentiate so-called basic investors' expectations towards the stability of an investment framework, and individual legitimate investor expectations. Claimants further contended that a promise of stability may come into being even without a specific stabilization clause inside the legal framework, and that stabilization clauses are in general not relevant in establishing an international law stability obligation, as these clauses arise in the context of domestic law. Contractual stabilization clauses likewise should be considered unnecessary in the claimants' view, owing to the circumstances, namely that in the renewable energy sector, it is atypical for the Czech Republic to enter into contractual relationships with individual foreign investors.[224]

As for legitimate expectations, the claimants posited that a threefold test must be used, referring to the *Micula v Romania* case, namely:

> (a) the Respondent made a promise, assurance or representation of regulatory stability; (b) the Claimants relied on such promise, assurance or representation; and (c) such reliance was reasonable.[225]

In general, the claimants alleged that they had a legitimate expectation regarding the stability of the feed-in-tariff levels over the lifetime of the project (twenty years, to be precise), and that the income tax exemption they benefited from would remain in place for six years. The claimants noted that the fair and equitable treatment standard does not expressly describe what type of expectations can be considered legitimate, arbitral tribunals must determine them based on the specific circumstance, and consider whether the host state's behavior gave rise to an expectation in the foreign investors that its regulatory framework would not change to their detriment. And according to the claimants, when examining the circumstances of the case, it was clear that the Czech Republic was attempting to attract foreign investors by providing long-term and stable incentives. They also contended that domestic legislation can effectively serve as a promise by the host state in the context of legitimate expectations, and even dismissed the results of the *Charanne v Spain* case, as being different due to its unique factual circumstances, and that the claimants there attempted to invoke an extremely long-term stability commitment from the host state. Interestingly, the claimants attempted to argue that the general promises contained by Czech legislation (in their view), were converted to specific promises via the investors undergoing the licensing process, and acquiring permissions to construct, and then operate the photovoltaic plants at the center of the dispute. The claimants also extensively detailed how their reliance on these alleged promises by the Czech Republic was reasonable, while conversely, the Czech Republic's amendment of the previously investor-beneficial framework was unreasonable.[226]

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223 ibid para 74.
224 ibid paras 263-270.
225 *Ioan Micula, Viorel Micula and others v Romania*, ICSID Case No. ARB/05/20 (Award) para 178.
226 *Antaris* paras (Award) 271-318.

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The Czech Republic mainly argued that a stabilization clause is absolutely essential for establishing either claim as being acceptable, and that none of its regulations contained a stabilization clause or otherwise sufficiently implied stability to the extent that claimants alleged. In general, the Czech Republic denied that Article 10(1) of the Energy Charter Treaty would create a stabilization obligation in present circumstances. The host state heavily referred to *Charanne v Spain* to argue that a stabilization guarantee was absolutely necessary, and that in general, governmental statements issued regarding relevant regulatory frameworks should not be necessarily treated as stabilization guarantees. The Czech Republic reinforced this by referring to *Arif v Moldova*, to claim that any legitimate expectation must be precisely identified with regards to its origin, thus any such expectation derived from regulations must be based on actual provisions of said regulations. In present case, the Czech Republic argued, there was no such provision from which a legitimate expectation could be derived from. Naturally, the Czech Republic also took the position (referring to *AES v Hungary* and *Electrabel v Hungary* in the process) that the claimants relying on assurances was unreasonable under the circumstances.[227]

The Tribunal referred to several precedents, and established numerous statements about the nature of fair and equitable treatment in its opening remarks. Principally, it noted that the fair and equitable treatment standard would be violated if legal or business stability, or specifically, a regulatory framework, was altered in such a way that it would frustrate the investors' legitimate and also reasonable expectations, or the guarantees of stability given to said investors. It acknowledged the Czech Republic's position with regards to the origin of the legitimate expectation: the expectation's origin must be clearly identifiable, so that the expectation's scope can be determined with sufficient precision. It also reiterated the afore-mentioned test of the legitimate expectations. Namely, that the claimant should prove that the clear and explicit (or implicit) representation was attributable to the host state. That it was reasonably relied upon by the claimant, but subsequently repudiated by the host state. It also interestingly accepted the notion that specific guarantees may arise from legislation as well. It noted that specific representations can be significant factors when it comes to assessing the investor's knowledge, or the reasonableness and legitimacy of its expectations, but are not otherwise strictly necessary to advance a legitimate expectation claim. Interestingly, the Tribunal also stated that regulatory provisions that apply to a plurality of persons, or a category of persons, cannot create a legitimate expectation that the law will not change. The Tribunal furthermore accepted that an expectation might be created by general legislation, but without an explicit stabilization clause, any amendment to said legislation would only violate the fair and equitable treatment standard if the host state's conduct exceeds the normal regulatory power it is afforded in the pursuit of public interest, or it otherwise modifies the regulatory framework (relied upon by an investor at the time of making the investment) in a fashion that is outside the acceptable margin of change.[228] Regardless of this notion, this Tribunal accepted that there is no need for an "express stabilization clause" and that an implied promise might be enough for a legitimate expectation of stability.[229]

The Tribunal also reinforced the notion that legal stability requirements and legitimate expectations do not affect the host state's right to legislate, and that the host state is not forced to elevate the interests of foreign investors above all other considerations, but instead,

227 ibid paras 318-359.
228 ibid para 360.
229 ibid para 399.

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the fair and equitable treatment standard allows for a balancing or weighing exercise (a phrase also used by other arbitral tribunals) on the part of the host state. However, it was also quick to note that outside of specific promises, or other representations by the host state towards the investor, it is not possible for the foreign investor to use investment treaties as a sort of insurance policy against regulatory changes. As some final notes on the nature of fair and equitable treatment, the Tribunal also concluded that the protection of investors from arbitrary or otherwise unreasonable behavior is part of the fair and equitable treatment standard, non-impairment similarly being part of the standard in the Tribunal's view. Lastly, it noted that regardless of other considerations, the foreign investor is entitled to an expectation that the host state will not act in a manifestly inconsistent or unreasonable manner.[230]

However, it rejected all the claims of the claimants as "there was neither an impairment of the investment, nor the use of unreasonable or irrational or arbitrary measures". And it also took into consideration that the investor did not exercise due diligence when investing and rejected all the claims of the claimants.[231] Thus, it rendered an award in favor of the Czech Republic in 2018.

Interestingly, there was a dissenting opinion by one of the arbitrators. The dissenting arbitrator mainly disagreed with the Tribunal's interpretation of the facts of the case, with regards to the fair and equitable standard. Specifically, the dissenting arbitrator argued that one of the legislative acts relevant to the case contained not only an abstract promise of stability (which was the Tribunal's view), but also a statutory guarantee. Furthermore, the dissenting arbitrator took a strong stance on how the Energy Charter Treaty provides unqualified fair and equitable treatment, and that if the host state provides either express or implied assurance of a specific treatment to investors, then failing to follow those assurances will naturally lead to failing the fair and equitable treatment standard as well. He also rejected the Tribunal's observations regarding assurances given as part of general legislation towards groups or categories of persons. The dissenting arbitrator believed that there was no significant difference between an undertaking directed towards a class of investors or an individual investor, within the context of the fair and equitable treatment standard (which, in his opinion, should explicitly rise above such technicalities to ensure effective protection). He also disagreed with the need to tie the legitimate expectations of an investor to a specific representation or point of origin, noting that in this context especially, the legitimate expectation refers to the general regulatory framework. But even more so, he rejected the Tribunal's view that a certain margin of appreciation when it comes to the host state amending its regulatory framework was compatible with the objectives and character of the Energy Charter Treaty (and the relevant BIT). His primary concern was that applying this margin of appreciation to fair and equitable treatment would undermine the very purpose of this legal guarantee to investors afforded by the Energy Charter Treaty. In the dissenting arbitrator's view, this approach would also not lead to a crystallization of the regulatory framework, but would still maintain the sovereign regulatory rights of the host state. In the end, he took the position that the Czech Republic's conduct in walking back on its assurances would establish a violation of the fair and equitable treatment standard.[232]

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[230] ibid para 360.
[231] ibid paras 440, 446.
[232] *Antaris* Dissenting Opinion of Mr. Gary Born paras 12, 32-33, 42-55,58.

1.16. Sunreserve Luxco Holdings S.à.r.l., Sunreserve Luxco Holdings II S.à.r.l., Sunreserve Luxco Holdings III S.à.r.l. v the Italian Republic[233]

During the '80s and the '90s, Italy introduced plans and regulations providing incentives to produce energy from renewable resources. Which was also supported by European Union directives. This tendency of providing incentives for renewable energy went on at the beginning of the new millennia. Based on these incentives,[234] the claimants, three companies all subsidiaries of SunReserve International LP, started to invest and develop photovoltaic plants in Italy in 2010, and built up altogether nine such plants.[235] Shortly after this, Italy partly revoked and partly changed the rules related to these incentives. The investors initiated arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce claiming breach of article 10(1) of the Energy Charter Treaty by Italy, particularly by not providing fair and equitable treatment to its investment, impairing it through unreasonable and discriminatory measures, and breaching the "umbrella clause".[236]

The Tribunal carried out a very detailed analysis of all the issues in the case. First, there were some general findings of the Tribunal, like the legal standard for the fair and equitable treatment obligation is not the same as the customary international law minimum standard for fair and equitable treatment obligations. This follows first of all from the text of article 10(1). And that the international law minimum standard is incorporated into the Treaty but only as a minimum threshold of treatment of foreign investors.[237] The Energy Charter Treaty does not define the fair and equitable treatment obligation, therefore, it should be interpreted according to Article 31(1) of the Vienna Convention on the Law of Treaties.[238] So, the Tribunal concluded that to determine the meaning of fair and equitable, all the circumstances of a given case should be considered.[239] Furthermore, a "stable and transparent legal framework" is also an important part[240] that should be balanced against the host state's public interests. That is the right to regulate, as also expressly mentioned in the Energy Charter Treaty.[241] Based on all this, the Tribunal established that the standard of breach of the fair and equitable treatment obligation is high and referred to in the *AES v Hungary* case that the host state's actions should be "manifestly unfair or unreasonable".[242] It also referred to words "radical or fundamental".[243]

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233 *Sunreserve Luxco Holdings S.à.r.l. (Luxembourg); Sunreserve Luxco Holdings II S.à.r.l. (Luxembourg); Sunreserve Luxco Holdings III S.à.r.l. (Luxembourg) v the Italian Republic*, SCC arbitration V (2016/32).

234 For qualifying power plants, among others, these were: incentive tariffs for 20 years, obligation to purchase electricity from renewable energy producers by the state company, minimum price guarantee, no payment of "imbalance costs", etc.

235 *Sunreserve* (Award) paras 183-184.

236 ibid para 585.

237 ibid paras 672, 673.

238 ibid para 676.

239 ibid para 683.

240 Article 10(1) of the ECT: "create stable, equitable, favorable and transparent conditions for Investors" is part of the context", also some other objectives from title I and II of the Treaty, like "stable and transparent legal framework", if we try to interpret FET according to VCLT (requires a treaty provision to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose).

241 *Sunreserve* (Award) para 685.

242 ibid para 688.

243 ibid para 692.

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As per the claimant's claim,[244] the Tribunal treated legitimate expectations, transparency and consistency, and good faith as tenets of the fair and equitable treatment obligation and examined separately.[245] It started with the analysis of legitimate expectations standard. First, it examined if the investor's expectations were legitimate; if it relied on these expectations, and finally if they were frustrated by the conduct of the Italian state.[246] Regarding the first issue, the Tribunal was of the opinion that legitimate expectations can be created by general legislation, and that specific commitments by the host state are not necessary for this.[247] At the same time, the Tribunal cited the *Saluka v Czech Republic* case that that the investor's expectations should be legitimate and reasonable, and such expectations cannot be based only on the investors' subjective motivations (should be "crystalized"). It also established that the investor has the duty of "due diligence" of a "prudent investor" when investing.[248] Second, regarding the reliance of the investor on legitimate expectations, the Tribunal stated that it is a factual question.[249] And third, as to the issue of frustration of the legitimate expectations, it concluded that not every breach of legitimate expectation of the investor is automatically a breach of the fair and equitable standard, in other words, international obligations under the Energy Charter Treaty. There is a high standard to constitute a breach,[250] thus it should be proven that the conduct of the host state:

> […] was manifestly or grossly unfair or unreasonable, was arbitrary or discriminatory, or that the host State engaged in a willful neglect of duty or a willful disregard of due process of law or showed an extreme insufficiency of action falling far below international standards, such that the conduct would shock judicial propriety.[251]

After the legitimate expectation standard, the next issue under scrutiny was the independent nature of the transparency and consistency duty on the part of the host state. The Tribunal held that fair and equitable treatment obligation can be breached by the host state's non-transparent and non-consistent conduct, even if such conduct did not amount to the frustration of legitimate expectations. However, it emphasized again that for the breach of fair and equitable treatment standard the change should be "radical or fundamental".[252]

The parties were also in dispute whether the good faith principle is an independent component of the fair and equitable treatment obligation. According to the Tribunal, it is not a separate obligation under article 10(1) but an indispensable part of all obligations in international law.[253]

Following the examination of the standards, the next step was to see if Italy frustrated the claimants' legitimate expectations. The claimant claimed that statutory regulatory framework also creates legitimate expectations, and that it took into consideration several factors which constituted the basis for its legitimate expectations, when it decided to invest into the plants, like Italy's policy goals, decrees which promised to keep the incentives

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[244] ibid para 588.
[245] ibid para 667.
[246] ibid para 695.
[247] ibid para 699.
[248] ibid paras 711,714. See also Sondra Faccio, 'The assessment of the FET standard between legitimate expectations and economic impact in the Italian solar energy investment case law' (2020) 71 QIL 3, 14.
[249] *Sunreserve* (Award) para 715.
[250] ibid para 727.
[251] ibid para 728.
[252] ibid paras 733, 735.
[253] ibid para 737.

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for 20 years, tariff confirmation letters from the state company (implementing body of the decrees), public statements of Italian officials confirming the incentives, confirmation of the incentives by Italian Government agencies.[254] Interestingly, the Tribunal did not find, based on different excuses, that these factors created legitimate expectations for the investor or that they satisfied the threshold of legitimacy. One of the most interesting arguments of the Tribunal was the lack of acquiring a tariff confirmation letter from the state company before the investment, and that the investor did not meet the requisite threshold of objective certainty.[255] Finally, regarding the first claim that the Spalma-incentivi Decree frustrated the investors' legitimate expectations and that it constituted a breach of the fair and equitable treatment obligation, the Tribunal did not grant for the claimants.[256]

Likewise, the Tribunal rejected claims that the imposition of the Administrative Management Fee or the imbalance costs and changes to the minimum guaranteed price regime amounted to a breach of fair and equitable treatment obligation and frustrated the claimants' legitimate expectations.[257] The Tribunal also did not establish that Italy's conduct was non-transparent or non-consistent, or that it had proceeded in bad faith when dealing with the investor.[258]

1.17. Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v Kingdom of Spain[259]

This is one of those cases in which the Tribunal found in favor of the investors. The claimants (investors from the United Kingdom and Luxembourg) initiated arbitration in 2013, based on the Energy Charter Treaty. They claimed that the host state, Spain, breached its obligation to provide fair and equitable treatment by amending the regulatory framework related to renewable energy projects.[260] The claimants, after conducting legal due diligence in 2007[261], started investing in concentrated solar power plants relying on the legal regime established by a royal decree from the same year. These plants began operation in 2012. However, due to economic reasons, already during the next two years, Spain changed the subsidy and tax system related to concentrated solar power plants.

The Tribunal, first of all, established that it is accepted by arbitral jurisprudence that host states have the right to change the regulatory framework if economic circumstances change and the public interest requires so.[262] This means that if there is no stabilization

254 ibid paras 601, 770.
255 ibid para 839 and 125.
256 ibid para 871.
257 ibid paras 213, 886, 905.
258 ibid paras 917, 920, 921. The Tribunal also rejected claims relating to the state's alleged breaches of the fair and equitable obligation and the Umbrella Clause: "Tribunal finds that in order for "obligations" to be covered within the Umbrella Clause in Article 10(1) ECT, there needs to be privity between the host State and the investors or investments in question. This privity requirement can be satisfied either by specific consensual or contractual arrangements between the host State and the particular investors or investments in question, or by unilateral legislative or regulatory acts directed at a small and well-defined class of investors." ibid para. 995.
259 *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v Kingdom of Spain*, ICSID case no. ARB/13/36 (Award).
260 ibid para 155.
261 ibid para 118.
262 ibid para 351.

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clause or other specific assurance which would give ground for legitimate expectations, the investor should not be surprised by the change in the regulatory framework.[263]

There were other claims of violations of the Energy Charter Treaty, however, the Tribunal approached the case primarily from the aspect of fair and equitable treatment obligation: "obligation to accord investors fair and equitable treatment provides the most appropriate legal context for assessing the complex factual situation presented".[264] The investors claimed that this obligation under the Energy Charter Treaty is an autonomous standard, and that it should be interpreted in the context of the Treaty's object and purpose, that is to say, assuring stable conditions for the investors. Furthermore, they maintained that a stabilization clause contained in the royal decree of 2007 was crucial to their decisions to invest in this sector.[265] The Tribunal agreed and established that the meaning of the fair and equitable treatment obligation must be determined in the context of the particular treaty in which it is found.[266] Therefore, the Tribunal referred to the principles of the European Energy Charter and to article 2 and articles 10(1) ("create stable … conditions") of the Energy Charter Treaty, and came to the conclusion that both of them aim at creating a stable investment environment.[267] Thus, fair and equitable treatment obligation embraces the duty to assure fundamental stability in the legal regime on which the investor relied when investing, and radical change of that regime is not acceptable. Especially if that change leads to depreciation of the investment.[268] Therefore, fair and equitable treatment obligation in the Energy Charter Treaty should protect investors from fundamental change to the regulatory regime.[269] In the opinion of the Tribunal, in this case, the host state's measures were unprecedented and entirely new.[270] And so this drastic and abrupt change of the regulatory regime destroyed the investment's value.[271] The latest financial report available for the Tribunal, for example, showed that the earnings of the company under the new regulation were not enough even to cover the operational and financing costs of the plants.[272] The Tribunal, comparing this case with the *Charanne* case, concluded that both the factual and the legal situation differ fundamentally. And that its effects are more dramatic in comparison with from those in the *Charanne* case.[273] It also referred to the fact that several Spanish authorities[274] expressed reservations regarding the new regulation's sweep and novelty.[275] The Tribunal also contrasted this case to the *AES v Hungary* case, and found that there were assessments of the characteristics of individual parts, while in this case, the regulation was designed on the one size fits all principle.[276]

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263 ibid para 362.
264 ibid para 353.
265 ibid para 357.
266 ibid para 376.
267 ibid para 377-380.
268 ibid para 382. One of the arguments was also that the investor was able to get the necessary high initial capital for the investment because the legislation at the time of the investment offered "predictable subsidized prices" and thus stable return on the investment. ibid para 412.
269 ibid para 363.
270 ibid para 365, 389.
271 ibid para 387.
272 ibid para 416.
273 ibid para 367, 368. Furthermore, it referred to the *El Paso* case, were the tribunal concluded that "a number of measures, while individually not denying fair and equitable treatment, together effected a total alteration in the prior legal regime relied upon by the investor." ibid para 384.
274 *E.g.* the Council of State drew attention to the dramatic scope of the proposed change.
275 *Eiser* (Award) para 407.
276 ibid para 401.

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Considering all the above mentioned, the Tribunal concluded that with the amendment of the legal framework, Spain deprived the investor of its investment's value, and thus breached its obligation to provide fair and equitable treatment.[277] The awarded reparation was calculated assessing the reduction of the fair market value of its investment by calculating the present value of cash flows said to have been lost on account of the disputed measures.[278]

The award was later annulled by the ICSID Annulment Committee in 2020, citing improper constitution of the Tribunal, and a serious departure from the fundamental rules of procedure.[279]

1.18. Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain[280]

This is the other renewable energy case, where the claimant was successful. The claimant, a company registered in Luxembourg, acquired Novenergia Spain in 2007 which held seven photovoltaic power plants through seven other Spanish companies.[281] The claimant initiated arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce in 2015. The issue was the same as in previous cases, the state promised incentives to invest in the photovoltaic power plants, but subsequently changed its policy and legislation.

The Tribunal in this case very much relied on precedents. First, it emphasized the importance of expectations of the investor at the time of the investment, and these expectations are primarily based on the host state's laws.[282] As a next step, it examined if the stability and transparency obligation of the host state forms part of the fair and equitable treatment requirement in the Energy Charter Treaty. Based on earlier case law it found that it is not a separate obligation, just an example of the obligation to respect the investor's legitimate expectations through the fair and equitable treatment standard.[283] However, the most important element of the fair and equitable treatment obligation is the legitimate and reasonable expectation of the investor.[284]

The Tribunal also found that the legitimate expectation of the investor of a stable regulatory framework can arise not only from the host state's explicit guarantees and commitments but also from implicit conduct or statements of the state not specifically directed towards the individual investor.[285] Thus, the Tribunal should examine whether the host state with its conduct and statements objectively provided a basis for legitimate expectations of the investor.[286] The host state has the right to change the regulation, however,

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277 ibid para 418.
278 ibid para 441.
279 Decision on the Kingdom of Spain's Application for Annulment in the *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À R.I. v Kingdom of Spain*, ICSID case no. ARB/13/36 (Award) para 255.
280 *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Arbitration (2015/063) (Award).
281 ibid para 2, 3.
282 ibid para 534.
283 ibid para 646. It also found that unreasonable and discriminatory actions of the host state which impaired the claimant to manage and use its investment, are good examples for the breach of fair and equitable standard. ibid para 714.
284 ibid para 648.
285 ibid paras 650, 651.
286 ibid para 652.

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the fair and equitable standard should protect the investors from radical or fundamental changes.[287] The Tribunal also referred to the "acceptable range of legislative and regulatory behavior" expression from the AES Summit case.[288]

The Tribunal invoked the opinion of the Electrabel and the Saluka Tribunals, which stated that under the Energy Charter Treaty, the host state does not have an unconditional obligation to respect the investor's interests. It is required from the state to take into consideration the investor's legitimate and reasonable expectations and to balance them with the public (or legitimate regulatory) interest when regulating, taking into consideration all the circumstances. The effects of the intended measure should be proportionate with regards to the affected interests.[289]

The one who claims the breach of the fair and equitable treatment standard, also bears the burden of proof.[290] There was no formal due diligence by the claimant, however, the Tribunal found that the claimant did carry out a reasonable analysis of the Spanish regulatory framework prior to its investment.[291] Spain, with a measure introduced in 2013, retroactively terminated the fixed long-term feed-in tariff (originally, Spain promised incentives for the lifetime of the plants). According to the Tribunal, this measure was radical and unexpected and entirely changed the legal environment and had damaging economic effect for the investor.[292] The economic effect of the measures is only one factor that should be taken into consideration. Contrary to the Eiser Tribunal, this Tribunal did not require obliterating effect of such measures.[293] Thus, with this radical measure the host state violated its fair and equitable treatment obligation towards the investor, and therefore, the Tribunal ordered Spain to pay compensation.[294]

1.19. PV Investors v Spain[295]

The factual background of the *PV Investors v Spain* is very similar to the *Charanne v Spain* case. To be specific, it was about the changes in Spain's regulatory framework relating to solar energy. The claimants were numerous foreign investors of Luxembourg, Dutch and German origin, each of them possessing a renewable energy investment in Spain that originally fell under a special regime, similar to what we already discussed in *Charanne*. The foundation of this regime was a 1997 law on the energy industry and a regulation from 2007. The 2007 regulation, in particular, provided significant advantages and incentives to

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287 ibid para 654.
288 ibid para. 655.
289 ibid paras 657, 658.
290 ibid para 660.
291 ibid para 679.
292 ibid para 695.
293 ibid para 694.
294 ibid para 697.
295 *PV Investors v Spain*, PCA Case No. 2012-14; See also: Anna De Luca, 'Renewable Energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom' (2015) Bocconi Legal Studies Research Paper No. 2657395; Rachel Nathanson, 'The Revocation of Clean-Energy Investment Economic-Support Systems as Indirect Expropriation Post-Nykomb: A Spanish Case Analysis' (2013) 98 Iowa L. Rev. 863; Ioannis Glinavos, 'Solar Eclipse: Investment Treaty Arbitration and Spain's Photovoltaic Troubles' in Constantin Gurdgiev, Liam Leonard, Maria Alejandra Gonzalez-Perez (eds), *Lessons from the Great Recession: At the Crossroads of Sustainability and Recovery* (Emerald 2016).

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investors seeking to develop the renewable energy sector in Spain. However, this special regime gave way to a significantly less beneficial regime in 2010, as a consequence of the global financial crisis. This was ultimately followed by a law in 2013 that erased the distinction between normal and special regimes, citing the lack of purpose in separately regulating renewable energy. Thus, these investors initiated arbitration against Spain in 2011 (as the 2010 regulatory changes already allegedly harmed their investments, as with *Charanne*), based on the Energy Charter Treaty. In this case, their claims focused on alleged breaches of Article 10(1) of the Treaty, particularly legitimate expectations. Interestingly, the investors also put forward an alternative claim to the arbitral Tribunal (in response to certain statements by Spain), which reasoned that even if the Tribunal were to find that the investors' legitimate expectations were limited by Spain's own concept of reasonable return, then Spain still faces liability for breaching the Energy Charter Treaty, due to lowering said reasonable return by its newer regulatory policies.[296]

PV Investors was a particularly long-running case, as it was concluded only in 2020. In its final award, the arbitral Tribunal devoted significant attention to the question of fair and equitable treatment, and especially to legitimate expectations. In its analysis, it relied partially on the already discussed *Charanne* case, which we can consider logical, given that nearly the same factual background was present in both cases. The Tribunal's particular approach here was a common method of tribunals, it first discussed the concept of fair and equitable treatment (and legitimate expectations) in general terms, followed by applying these established principles to the particular case at hand. The Tribunal established that it followed the *Electrabel* interpretation, in that fair and equitable treatment consists of the protection of legitimate or reasonable expectations, the protection against arbitrary, unreasonable and disproportionate conduct, and the principle of transparency. However, it also noted that the Energy Charter Treaty, in particular, emphasizes stability as a core component of Article 10(1) which raised the question of whether this means that stability is an integral part of the content of fair and equitable treatment (as the claimants alleged). The Tribunal was of the opinion (referring again to *Electrabel*, and also to *Plama*) that stability is not an absolute requirement in itself of fair and equitable treatment, but is otherwise closely linked to, and intertwined with fair and equitable treatment. It also iterated, that based on the intention and goal of the Energy Charter Treaty, it would be wrong to assume that the requirement of stability is absolute: rather, it must be balanced with other relevant principles, such as those that derive from the state's right to adapt its regulations to changed circumstances. This is similar to the view we have seen tribunals take in other ECT-related investment cases, stressing the necessity of balancing between regulatory stability and state sovereignty.[297]

When it came to legitimate expectations specifically, the Arbitral Tribunal first noted some general principles here as well. Referring directly to *Charanne* (and also *Perenco*) in establishing that legitimate expectations have an objective standard of protection (as opposed to a subjective standard), they must be interpreted by tribunals concerning all relevant circumstances. It also reiterated the commonly accepted principle by investment tribunals, that legitimate expectations must arise in an investor at the time the investment is made. Similarly, it established three general criteria that must be examined: (i) there must be a specific commitment given to the investor by the host state, (ii) the change in

[296] *PV Investors* (Award) paras 181-216.
[297] ibid paras 561-571.

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regulatory frameworks must be unreasonable to breach fair and equitable treatment, and that (iii) legitimate expectations must be balanced with the host state's right to regulate (there is a margin of appreciation host states enjoy, especially with regards to economic regulation). As we can see from the other cases presented in this work, this is also quite like the reasoning of several other tribunals (except the specific commitment requirement).[298]

With the contents of both fair and equitable treatment in general and legitimate expectations in specific established by the Arbitral Tribunal, it now turned to applying these principles to the specific case at hand. First, it established that outwardly, none of Spain's relevant regulations constituted a specific commitment to stability with respect to the foreign investors. Then the Arbitral Tribunal turned to a systematic examination of the wider regulatory context to discern whether there was a legitimate expectation towards the immutability of the special regime (at least while the foreign investors' plants were operational). To do so, much like in *Charenne*, it relied on examining the evolution of the renewable energy legal framework in Spain and noted that domestic court practice is highly relevant. The outcomes of this being treated as facts by arbitral tribunals when evaluating legal frameworks. In particular, it noted that when the investments were being made, the Spanish Supreme Court in at least two instances rejected the view that the renewable energy legal framework should not be subject to changes. Alongside similar factors that also indicated an ongoing evolution of the regulatory landscape in Spain, it thus established that no reasonable investor would have a legitimate expectation towards the immutability of the legal framework, and the special regime in the timeframe that the investments were made.[299]

With the lack of a proper legitimate expectation in this regard thus established, the Arbitral Tribunal turned to examining whether any other legitimate expectations could have been at play in the case. It highlighted the legitimate expectation to receive a reasonable return on the investment, which, as the Arbitral Tribunal stated, was also enshrined in several relevant pieces of Spanish legislation and regulation. Thus, a principle of reasonable profitability was certainly present. Considering the circumstances, the Arbitral Tribunal dismissed the applicability of this expectation with regards to the original claim and deferred the subject to the already mentioned alternative claim's examination. Interestingly, in the latter regard, it engaged with the assistance of the parties in a thorough quantification process to show the alleged difference between the reasonable return guaranteed by earlier legislation, and the return the investors would make under the newer regime. Based on this numerical analysis, it concluded that Spain did indeed reduce the reasonable return, and thus violated fair and equitable treatment in this regard.[300]

Returning to the original claim, after legitimate expectations, the Arbitral Tribunal also dealt with other aspects of fair and equitable treatment. To be specific, the allegations that the regulatory changes were unreasonable, arbitrary and disproportionate, amongst other facets. Thus, it followed the same line of thought as several other tribunals, treating the prohibition of discriminatory, unreasonable and arbitrary measures as close to and implicitly part of, (though the Tribunal's language is ambiguous) the concept of fair and equal treatment. Based on the same line of reasoning that it used in the legitimate expectations, it established that regulatory changes in themselves did not satisfy the meaning of unreasonableness, arbitrariness and disproportionateness. The Arbitral Tribunal also noted that there was a

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[298] ibid paras 572-584.
[299] ibid paras 587-615.
[300] ibid paras 616-620, 847.

clear correlation between Spain's policy and the measure. And that it sought a balanced and middle-of-the-road measure when it enacted the newer regime in response to the financial crisis. Thus, it cannot be considered disproportionate, arbitrary or unreasonable. The Arbitral Tribunal also dismissed here allegations relating to Spain's alleged lack of transparency, noting that it had been in contact with investors and was sufficiently clear about its planned measures.[301]

Finally, based on the alternative claim, Spain was found to be in breach of the fair and equitable treatment standard. Awards were rendered to the foreign investors in 2020,[302] which the investors however, later renounced the right of collection.[303]

1.20. Isolux Infrastructure Netherlands B.V. v Spain[304]

As with several of our other Energy Charter Treaty cases we have discussed during the course of this book, *Isolux v Spain* is tied to the evolution and development of the Spanish renewable energy sector.

The claimant (Isolux Infrastructure Netherlands, B.V.) was incorporated under the laws of the Netherlands in 2012. This company had a number of businesses and specifically, investment deals involving Brazilian and Canadian corporations and other private organizations. It also underwent a large overhaul of its bylaws and share division a few months after its incorporation, and received large capital stock investments. At the time of the final award, it held more than 88% of the shares in a Spanish-incorporated solar energy company. This company was the owner and operator of 34 solar power plants in Spain, and thus constituted a significant player in the Spanish solar energy market.[305]

The source of the dispute between the parties lies in the effects of the later reforms affecting electric power generation, and specifically the renewable energy sector, in Spain, as it was the situation in some other Energy Charter Treaty cases relating to Spain. In order to address its tariff deficit, Spain started introducing more substantial changes to the established regime for the production and remuneration of electric power. This included introducing three new taxes at the end of 2012, such as a tax on the value of electric power production, with the aim of assisting in the achievement of a budgetary balance for Spain. This applied to all electricity generating plants, thus signalling the downwards turn in the special status of renewable energy, specifically solar energy in the case's context. This legislative trend continued over the course of 2013, before and after the initiation of investment arbitration, as well as in 2014. These regulatory changes were found by the claimant to be damaging to its investments in the afore-mentioned Spanish solar company, especially the elimination of a feed in tariff, and thus led to an investment arbitration under the Energy Charter Treaty, curiously conducted in Spanish, despite the nominal Dutch nationality of the claimant.[306]

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301 ibid paras 621-632.

302 ibid para 909.

303 'PV Investors v Spain' (International Energy Charter) <https://www.energychartertreaty.org/details/article/the-pv-investors-v-spain-pca-case-no-2012-14/> 3 June 2021.

304 *Isolux Infrastructure Netherlands B.V. v Spain*, SCC Case V (2013/153) (Award).

305 ibid paras 140-161.

306 ibid paras 117-139.

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While the claimant posited several different parts of the Energy Charter Treaty, and jurisdictional matters were also heavily debated, from our perspective, the question of fair and equitable treatment naturally takes the centre stage, being the truly relevant part of the case. Interestingly, as a side note, with regards to Article 10(1) of the Energy Charter Treaty, the claimant attempted to establish an independent obligation of the host state to encourage and create stable and transparent conditions for the making of investments in their territory. Thus, the establishment of a regulatory framework designed to attract investment, only to later radically abolish it, results in a violation of Energy Charter Treaty standards, independently and without necessarily having to also establish the breach of another concrete obligation contained within Article 10(1) (such as fair and equitable treatment, for instance). This was refuted by the Tribunal, which established that such actions could only result in a violation of the Energy Charter Treaty, if they as a consequence resulted in the breach of another concrete obligation of the host state contained within the Energy Charter Treaty.[307]

Moving onto the fair and equitable treatment analysis of the case, the crux of the argument was that the (in part, retroactive) changes Spain made to the regulatory framework for solar energy in 2012-2013, constituted a violation of the legitimate expectations the claimant derived from the previously existing regulatory framework. Unlike some other cases, here, there was no significant dispute regarding whether a legitimate expectation could be established by the foreign investor regarding the immutability of the legal framework. Rather, the claimant argued that it had a legitimate expectation derived from the belief that Spain would respect its commitment of a fixed long-term feed in tariff in a stable and predictable framework. There was also no significant dispute regarding whether Spain made any specific commitments to the foreign investor, as the Tribunal had already established that no such action took place earlier.[308]

This was followed by the Tribunal analysing what exactly legitimate expectations meant in the context of the Energy Charter Treaty. It referred to the UNCTAD's analysis on the matter, noting that an investor can derive legitimate expectations "either from (a) specific commitments addressed to it personally, for example, in the form of a stabilization clause, or (b) rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment.".[309] The Tribunal also referred to other investment cases, such as *Total v Argentina* and *Perenco v Ecuador*, in order to further demonstrate the concept of legitimate expectations. With regards to the former, the Tribunal noted that a legitimate expectation can be generated when the host state (through its public authorities) made the foreign investor believe that the host state's obligation in this regard exists through its conduct or by a declaration made by it, such as officially announcing their intent to pursue a certain line of conduct in the future, on which the foreign investor relied when making the investment or otherwise incurring costs to themselves. And for the latter case, the Tribunal noted in particular that legitimate expectations (being a central aspect of analysis for an alleged breach of the fair and equitable treatment standard) require an objective determination of expectations, which consider all the relevant circumstances.[310]

307 Curiously, there was also a dispute regarding this, that is to say, whether to use the wording of Spanish or English version of the Energy Charter Treaty, though the Tribunal ultimately found it immaterial to the dispute at hand. ibid paras 761-772.

308 ibid paras 773-775.

309 ibid para 775.

310 ibid paras 775-777.

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It also referred to *Electrabel v Hungary* (noting that one of the relevant circumstances is the amount of information that the foreign investor possessed or should have possessed at the time of investing), and *Parkerings v Lithuania* ("The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment."[311]). The latter element (due diligence) is the first aspect that the Tribunal subjected to an in-depth analysis with respect to the present case. It noted that Spain alleged that the claimant failed to carry out proper legal due diligence, and exclusively relied on technical due diligence originating from solar projects conducted in 2008 and 2010. This was not refuted by the claimant, who however argued that foreign investors could not be expected to conduct exhaustive legal and jurisprudential investigations before making their investments (beyond having a general knowledge of the regulatory environment it operates in), and that there is no such international requirement in that would establish such an obligation on the investors' part. The Tribunal agreed with the general notion that foreign investors should not be required to conduct extensive legal investigations, but noted, that in order for a legitimate expectation to be reasonable, it is necessary for the investors to know the aspects of the regulatory framework that could affect their investment, before making their investment. The Tribunal also noted that it is the investor's effective information that invokes specific expectations. This means that the foreign investor cannot have a legitimate expectation derived from the host state's regulatory framework if the investor's personal information allowed them to foresee and anticipate the unfavourable development of said regulatory framework, before the investment was made. This in turn means that new regulatory measures can be considered to be violating the legitimate expectations of the investor if they haven't been foreseeable, whether by a prudent foreign investor, or on behalf of an investor which, because of its personal situation, disposed of specific elements to foresee them.[312]

This leads to another issue that the Tribunal had to consider. The question of foreseeability is tied to the question of when the investment was made. According to the claimant, the decision to invest was made in June 2012, which thus should count as the guiding date for the above consideration, while Spain alleged October 2012 (when the shares in the Spanish solar company were acquired by the claimant). The Tribunal opted to side with the host state's opinion on the matter: while it did not refute the claimant's assertion that the decision to invest was made in June, the claimant would have been able to renounce its investment plans until October, when the shares were actually acquired. This is further compounded by, as the Tribunal noted, by how the claimant was allowed by the provisions of its relevant investment agreement for the purchases of these shares, to terminate without compensation the agreement before the October date of purchase, provided events occurred that could negatively affect the value of the investment. As such, the Tribunal had to determine whether a legitimate expectation by the claimant regarding the existing regulatory framework could have come into being at this later date.[313]

The Tribunal made several observations in this regard. First, it noted that already when the claimant made their decision to invest in June 2012, the original regulatory framework for renewable energy had already been amended, and was subjected to several studies

[311] ibid para 779; *Parkerings-Compagniet AS v the Republic of Lithuania* (Award) para 332.
[312] *Isolux* (Award) paras 778-781.
[313] ibid paras 782-784.

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that made its eventual revision inevitable. As such, the Tribunal noted that no reasonable investor could have had the expectation that this framework would not be amended in the future, and would thus remain unchanged. Furthermore, it found that the claimant had access to special knowledge, which in turn meant that it could not have had a legitimate expectation beyond a reasonable return on its investment, a reasonable investor would have foreseen that the more beneficial feed in tariff system would not have lasted for the entire lifetime of the affected solar plants. And not only the framework was already amended by 2012, but the Spanish legal system had also already affirmed the legality of such changes, including its supreme court, the latter of which clearly noted that the only limit to Spain's power to amend existing regulatory frameworks for renewable energy is that it must guarantee a reasonable return on investments. Interestingly, while the Tribunal acknowledged that the rulings of Spanish courts have no bearing on the dispute, as it must decide the case based on the Energy Charter Treaty and international law only, the rulings were still relevant insofar as the question of legitimate expectations are concerned. The Tribunal also argued that not only a presumption regarding this could be established for reasonable foreign investors, but that in this specific case, the claimant evidently had knowledge of Spanish jurisprudence at the time, as the parent company of the claimant had previously brought related claims to the Spanish court system, the result of which it came to know by September 2012, and which clearly presented to the claimant the picture that the regulatory framework could be subject to change. Thus, it necessarily had time to renounce its investment before October.[314]

The claimant also contended that no reasonable investor could anticipate the complete abolition of the afore-mentioned special regime, nor foresee that a maximum limit would be placed upon the return on an investment, especially considering the legislation's retroactive nature. The Tribunal rejected these views, stating that not only the claimant was a particularly well-informed investor, but its arguments were also not convincing in themselves. Namely, as it was already touched upon, it is not possible to consider the notion that a special regime would last throughout the life of the affected solar plants a legitimate expectation, given the circumstances of the case. By October 2012, it would have been necessarily clear to all investors (or should have been clear) that the system will be further amended. The Tribunal went further in this regard than earlier, noting that even the eventual elimination of the special regime would have been anticipated by any investor. Not to mention the special knowledge the claimant possessed in this regard, which would have made this eventual abolition evident. As for the maximum profit limit, the Tribunal established that the claimant's attempts to argue that the related laws only talk about the guaranteeing of profits in the sense of baseline, but not in the context of a ceiling, thus the imposition of a maximum limit on investment return was unforeseeable, were incorrect. Analysing the text of the related law, the Tribunal found that it merely guaranteed a rate of reasonable profitability, meaning that a minimum profitability is guaranteed (but does not guarantee that a higher return will be possible than what is guaranteed as a minimum), without explicit reference to any concept of a base or ceiling in the profits. The Tribunal also referred to the system of calculations used by the claimant for the profitability of its solar plants to underline that no legitimate expectation could be at play here, either. Finally, it addressed the question of retroactivity. Most interestingly, the Tribunal made a distinction between retroactivity and immediate application (in line with *Nations Energy v Panama*):

314 ibid paras 787-798.

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the relevant regulation did not entail the return of compensations received before it came into effect, or retroactively revoke rights, it merely used both existing and past parameters in its compensation system, which the Tribunal considered nothing unusual. As such, it concluded that no violation of the fair and equitable treatment standard based on the Energy Charter Treaty could be established.[315]

Curiously, there was a dissenting opinion, and part of it dealt with the fair and equitable treatment standard. The dissenting arbitrator was of the opinion that legitimate expectation could be derived from legislation specifically aimed at inducing foreign investments, and on which the foreign investor relied on when making the investment. The arbitrator also disagreed with the conclusion that the relevant date is October 2012. Instead, the arbitrator argued that June 2012 was the appropriate date, since that was when the decision was made by the foreign investor, and when they entered into the relevant investment agreement, and from which date it was effective. The dissenting arbitrator was of the opinion that merely the inclusion of suspensive conditions and provisions guaranteeing the ability to retract the investment decision without penalties are not sufficient enough to alter the relevant date. But the brunt of the dissent was aimed at the predictability of changes to the regulatory framework. The arbitrator argued that neither in June 2012 nor in October 2012 was there convincing evidence that would lead the investors reasonably concluding that the aforementioned feed in tariff system would be completely eliminated. Thus, the arbitrator was of the opinion that if "an investor complies with the requirements established by current legislation to be entitled to a specific and determined benefit, the subsequent ignorance of the investment on the part of the host State violates a legitimate expectation".[316]

Ultimately, the Tribunal rejected all claims made by the claimant. Spain bore 30% of the claimant's costs, while the claimant bore 70% of Spain's costs; whereas 70% of the arbitration costs was borne by the claimant.[317] To our knowledge, no appeal or follow-on process followed the arbitration.

1.21. Voltaic Network GmbH v Czech Republic[318]

This is another Energy Charter Treaty case that is related to the renewable energy sector. As a preamble, we should note that several cases were arbitrated over by the same Tribunal at the same time, relying on the same facts (with the exception that the claimants differed), and reaching the same legal conclusions. As a consequence, we will not discuss separately *ICW Europe v Czech Republic*[319], *Photovoltaik v Czech Republic*[320], and *WA Investments v Czech Republic*[321]. These cases have no independent legal value to us, and thus covering one of them (*Voltaic*) will be sufficient for our purposes.

The foundation of the issue lies in the energy sector regulations that developed in the Czech Republic following the latter's accession to the European Union in 2004. Over

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315 ibid paras 799-815.
316 ibid paras 3-13 and Dissenting opinion of the Arbitrator Prof. Dr Guido Santiago Tawil para 13.
317 *Isolux* (Award) para 868.
318 *Voltaic Network GmbH v Czech Republic*, PCA Case No. 2014-20.
319 *ICW Europe Investments Limited v Czech Republic*, PCA Case No. 2014-22.
320 *Photovoltaik Knopf Betriebs GmbH v Czech Republic*, PCA Case No. 2014-21.
321 *WA Investments-Europa Nova Limited v Czech Republic*, PCA Case No. 2014-19.

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the course of several years, a series of legislations and other regulations have led to the appearance of an incentivizing regime, which greatly favored renewable energy investments through general preferential treatment, a combination of tariff and non-tariff mechanisms, such as obliging grid operators to purchase all electricity produced from renewable energy on a priority basis, etc. These measures were combined with a decrease in prices of photovoltaic components in 2008, which in turn led to solar energy becoming particularly attractive for foreign investors in the Czech Republic. It was among these circumstances that the claimant's investment was set up in 2010, in the form of a solar plant.[322]

However, while the claimant's investment was in the process of being realized, changes were occurring in the Czech political landscape. In early 2009, the then-incumbent prime minister was forced to resign, leading to an interim Government that was in power for more than a year, during which it decided not to interfere in any polarizing or politically contentious subjects. During the tenure of this Government, an impromptu solar energy boom developed in the Czech Republic, which was also popularized by media, with allegations that due to the incentivizing regime, as well as the falling prices of solar panel components, distributors were forced to enhance power lines, which in turn made electricity more expensive to consumers. However, due to the interim Government's nature, no significant steps were taken to address the situation. Over the course of 2009 and early 2010, numerous voices in the Czech Government were highlighting that the current regulatory system in solar energy was unsustainable and prioritized excessive profits for investors over long-term societal benefits. Beyond governmental actors, these views were also echoed by Czech distributor companies, which faced unfavorable outcomes as the result of the solar energy boom. A new EU directive also set a new renewable energy percentage goal for the Czech Republic by 2020. As a result of the latter, an action plan was developed and released in 2010 that seemed to suggest that a beneficial regime would be retained to some extent. However, by the second half of 2010, the Government was sending signs that the solar boom would be addressed by amending the existing incentives regime. This culminated in a proposal that aimed to withdraw the various beneficial subsidies from most solar plants (except the smallest ones). Power plants already connected would have been exempt from this, however. This later changed, and over the next few years, the regulatory regime turned against the previously beneficial system, and included the introduction of a "solar power levy", removing the income exemption, changing the shortened depreciation period. In 2012, a requirement was also introduced by the Czech Government, that renewable energy producers wishing to maintain their access to certain subsidies have to enter into mandatory supply contracts with specific distributors chosen by the Czech Government. This course of events led to the filing of the arbitration claim by the claimant and nine other investors in 2013. Over the course of the arbitral dispute, further regulations were introduced, and the Czech Republic's conduct was assessed by domestic courts (with regards to whether the "solar power levy" was double taxation or not, in particular) as well as the European Commission (with regards to whether the incentives were compatible with the internal market).[323]

From our perspective, the most important facets are those related to fair and equitable treatment, the issue of which was raised by the claimant in connection with the Energy Charter Treaty. The claimant in particular alleged that the Czech Republic failed to provide a

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[322] *Voltaic* (Award) paras 130-156.
[323] ibid paras 157-196.

stable and predictable legal framework via its regulatory changes, and that it also frustrated the claimant's legitimate expectations with its conduct. The Tribunal thus separated the question of fair and equitable treatment into the following categories: stable and predictable legal framework, legitimate expectations, and finally, the question of transparency was also addressed by the Tribunal. We shall follow the same structure in our analysis as well.[324]

Thus, we begin with the question of stable and predictable legal framework. Here, the Tribunal first established that based on the analyzed facts of the case, especially the various regulations introduced as part of the incentivizing beneficial regime, as well as other representations made by the Czech Government, there was no specific/express stabilization commitment from the Czech Republic towards the claimant or other foreign investors, whether legislative, contractual, individual or other. This lack of express commitment, according to the Tribunal, meant that it instead had to determine whether an obligation to provide a stable and predictable legal framework to foreign investments is a separate and distinguishable part of the fair and equitable treatment accorded by the Energy Charter Treaty. The Tribunal here took the view that the above obligation exists as a separate and identifiable element of fair and equitable treatment, distinct from the question of legitimate expectations. It noted that this obligation has to be considered objectively, and that this requirement of stability is not absolute, and instead, all relevant factual circumstances must be taken into account (similar to the other cases we discussed). Considering the present case, it was of the view that the fact that the Czech legal regime was meant to attract foreign investment does not, in itself, also mean a commitment to stability by the Czech Republic. Even though some of the disputed documents (specifically, an explanatory report) contained phrases such as "stable" and "maintain", the Tribunal ruled that these phrases in this context were not enough to establish an undertaking by the host state, partially referring to how such an undertaking would have been far-reaching and potentially burdensome to the host state, and thus it would not have committed to it through a few vague phrases. In the end, it concluded that the host state merely exercised its sovereign right in amending the existing regime, and that the claimants' allegations were without sufficient legal basis, in this regard at least.[325]

Continuing with the second aspect of fair and equitable treatment examined by the Tribunal, legitimate expectations, there were a few interesting observations. First, the Tribunal noted that the domestic court proceedings of a host state cannot shield the host state from international responsibility (in present case, a domestic court judgment already decided that the claimants had no legitimate expectations). Thus, it refused to engage with the domestic court judgment's reasoning as part of its own reasoning, and instead referred to several other investment arbitration cases (such as *Micula* and *Duke Energy*). It established an applicable test to be used for determining whether there had been a violation of legitimate expectations, divided into four parts or questions: i) whether the host state committed to regulatory stability or otherwise assured the investor of it; ii) whether the investor relied on this assurance or commitment in an effective manner; iii) whether this reliance can be considered reasonable, based on the given circumstances (social and economic) and finally iv) whether there was a violation of the investor's legitimate expectations by the host state (excluding minor and insignificant violations). The Tribunal addressed each part separately. For the first question, it ruled that the host state in present case did not give any kind of

324 ibid paras 371-544.
325 ibid paras 484-494.

assurance about regulatory stability to the claimant, that all of its measures were within the scope of its regulatory power, and that in the absence of a stabilization provision (the existence of which the claimant failed to prove), the beneficial regime could be amended whenever the host state had sufficient economic justification to do so. Secondly, it established based on the available facts that the claimant investor was not relying on any such assurance. In fact, certain easement agreements entered into by the claimant seemed to rather show that the claimant was aware of the possibility of termination of its incentives. Thus, two elements of the applicable test failed to prove the existence of legitimate expectations. For the third aspect of the test, the Tribunal noted that even if the claimant was relying on an assurance, it would not have been reasonable in the context, due to the changes in the circumstances the claimant was aware of. For the fourth aspect, the Tribunal interestingly noted that EU law precluded any legitimate expectation that the benefits system would stay in place unchanged. In its reasoning, the Tribunal essentially interpreted EU law (a point of contention with the EU Commission and the Court of Justice of the European Union, as seen from cases like *Achmea*). Finally, the Tribunal reached the conclusion that there was no legitimate expectation in play, and thus the Czech Republic could not be found to be violating fair and equitable treatment in this context.[326]

Fair and equitable treatment was also examined by the Tribunal in the context of transparency. The arbitrators established the fair and equitable treatment standard, as recorded in the Energy Charter Treaty, entailed a transparency component. This transparency component included an implicit requirement according to the Tribunal, that information about the relevant changes in the investment framework are communicated well in advance by the host state. The Tribunal examined the facts, and based on them, determined that the host state's measures were sufficiently transparent in advance, and the notion that changes will occur was possible to predict. Thus, there was no fair and equitable treatment violation with regards to transparency by the host state.[327]

In the end, in 2019, the Tribunal found in its award that there were no breaches of the Energy Charter Treaty. It also ordered the claimant to pay 75% of the costs of arbitration. We have no information on any follow-up proceedings in this particular case.[328]

1.22. RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v Spain[329]

This case is closely tied to the renewable energy reforms affecting Spain's energy sector, though in this case, the foreign investor also invested in wind energy, not just solar energy. The claimants first invested in Spain in early 2011, as part of a project, by indirectly purchasing an equity interest in three companies that dealt with wind power. This was followed by another indirect investment over the course of the summer of 2011, this time into three solar power plants. These solar power plants were already operational when the foreign investor made its investment. Interestingly, the claimants first expressed interest in

[326] ibid paras 495-537.
[327] ibid paras 538-544.
[328] ibid para 649.
[329] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v Spain*, ICSID Case No. ARB/13/30.

investing into Spain's renewable energy sector in 2007, but these plans were shelved due to the beginning of the world financial crisis, and only resumed in 2010. During this latter year, the claimants made a thorough assessment of the afore-mentioned specific investment opportunities, including consultations with financial advisors, bankers and developers. This assessment period also resulted in several reports for the claimants that informed them of the investment situation in Spain regarding the planned investments. Notably, though both the wind and solar investments were assessed separately, the information was pooled by the claimants. Said solar power investments were sold in 2017.[330] The investment arbitration case against Spain, as a result of its regulatory framework changes, was registered in 2013. The claimants sued under the Energy Charter Treaty.

One of the principal questions of the arbitral dispute, and one which is most relevant for the present book, is the question of fair and equitable treatment. The parties disagreed on the precise scope of this standard (as found within Article 10(1) of the Energy Charter Treaty), forcing the Tribunal to make a deliberation in this regard. The claimants' position was that fair and equitable treatment should be considered an independent and autonomous standard that is separate from the minimum standard of protection (as found under customary international law), it only acts as an additional standard to it, but is not a part of it. In favour of this argument, it noted that a certain sentence found in an earlier draft of the Energy Charter Treaty ("[fair and equitable treatment shall be] in accordance with the principles of international law and the relevant national obligations"[331]) was later removed. The claimants further alleged that the fair and equitable standard is absolute in nature, meaning it is not necessary to consider the treatment others receive compared to the injured party when determining whether it has been violated (referring to *Tecmed v Mexico*, *Azurix v Argentina* and other cases). However, the claimants alleged that even if this was not the case, and the fair and equitable treatment standard can be equated to the minimum standard of protection, Spain still violated the standard, as the minimum standard requires a reasonably well-organised modern state dedicated to good governance, but by contrast, Spain's measures were "(a) unannounced, abrupt, retroactive, unprecedented in nature; (b) contrary to EU and international regulatory practice and good governance principles; and (c) were not the least harmful measures available to Spain"[332] and thus did not satisfy the level of good governance required by the minimum standard of protection.[333]

However, Spain had its own views on the scope of fair and equitable treatment. First, it rejected the argument that the fair and equitable treatment standard somehow goes beyond the minimum standard protection, arguing that since the primary goal of the Energy Charter Treaty is to ensure the non-discrimination of covered foreign investors, then if the national treatment provided by the given host state does not adhere to the minimum standard of protection, it is at that point that the Energy Charter Treaty's protections kick-in. Furthermore, Spain also categorically rejected the notion that the Energy Charter Treaty provides a higher level of protection than the minimum standard of protection, or that it contains a fair and equitable standard that can be autonomously interpreted.[334]

330 Decision on Responsibility and the on the Principles of Quantum in the *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v Spain* paras 43-177.
331 'Basic Agreement for the European Energy Charter, Draft 3, 31 October 1991' (CL-238) page 31.
332 *RREEF Infrastructure* (Decision on Responsibility and the on the Principles of Quantum) para 254.
333 ibid paras 252-254.
334 ibid paras 255-257.

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Interestingly, the arbitral Tribunal used a relatively simple method to address these contentions, dismissing the arguments posed by both parties as mostly academic in nature. Instead, it relied on sticking close to interpreting Article 10(1) of the Energy Charter Treaty. It noted that based on the Tribunal's reading of the article, fair and equitable treatment includes in itself the minimum standard of protection as applied traditionally in international law. As such, the removal of the afore-mentioned sentence from the draft of the Treaty has no real significance when it comes to interpreting fair and equitable treatment. In general, it noted that the specific wording of the Energy Charter Treaty trumps general principles, but the Treaty is still anchored in international law and thus must be interpreted according to said law. In a similarly short fashion, the Tribunal determined (with a great degree of assertiveness) that the fair and equitable treatment standard contains the following elements: transparency, constant protection and security, non-impairment including non-discrimination and proportionality and reasonableness. Interestingly, it noted that this is explicitly the case based on the Energy Charter Treaty, suggesting the Tribunal interpreted Article 10(1) in such a fashion as to include a major part of the article into the fair and equitable treatment standard. It noted that even if this was not the case, they would still be express treaty obligations Spain had to comply with. However, beyond the literalist reading of the article, it also noted that legitimate expectations are implied by the article and are thus part of the fair and equitable treatment standard.[335]

While discussing the scope of the standard, the Tribunal also saw it fit to briefly elucidate on the differences between legitimate and non-legitimate expectations, as not all of the foreign investors' expectations necessarily imply an immutability of the conditions relating to the investment. And in line with most other tribunals, it noted that while expectations by nature are subjective, the legitimacy of an expectation must be objectively assessed, thus establishing a two-step process for identifying a legitimate expectation: determine what were the investor's expectations, and whether these expectations were legitimate. If so, then their frustration means that the host state made a wrongful act. Interestingly, the Tribunal took time here to explicitly spell out that several factors must be kept in mind for assessing legitimacy of expectations: that the host states enjoy a wide margin of appreciation in the field of economic regulations, and as such, the threshold of legitimate expectations will necessarily be high and only measures that are in clear violation of the fair and equitable treatment standard can be declared unlawful and in breach of the Energy Charter Treaty.[336]

The disputes concerning the full extent of the fair and equitable treatment standard continued further in the case. First of all, with regards to the requirement of stability and predictability (as envisioned by Article 10(1) of the Energy Charter Treaty), the claimants attempted to establish that the first sentence of Article 10(1)[337] consists of an autonomous free-standing obligation to provide investors and their investments stable conditions, especially with regards to maintaining a stable legal framework. Thus, it is independent of the fair and equitable treatment standard.[338] Meanwhile, the respondent argued that this is incorrect, and that this first sentence does not contain a free-standing standard, but rather, it has to be assessed (as in cases such as *Plama v Bulgaria*) as part

335 ibid paras 258-260.

336 ibid paras 261-262.

337 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.

338 *RREEF Infrastructure* (Decision on Responsibility and the on the Principles of Quantum) paras 288-290.

of the fair and equitable treatment standard.[339] Moving onto the concrete claims of the claimants in the present subject, the claimants alleged that the refurbished renewable energy regime represented a complete overhaul of the original regulatory regime that was in place when the claimants made the investments. They also noted that Spain's statement that the new regulatory system was compatible with the principle of reasonable return in itself confirms that Spain did not adhere to the stability and predictability of the legal framework requirement, as the claimants did not consider the notion of reasonable return when making their investments. Furthermore, they also found issue with how abruptly, opaquely, and retroactively the new legal regime was introduced. They noted that: "[e]ven if the regime did not affect the results or activities resulting from the pre-existing situation, which it does (*i.e.* the electricity already produced and sold on the market), the regulation would still be considered "retroactive" in accordance with the ordinary meaning of the word, and as provided under Spanish law".[340] In conclusion, the claimants' position was that Spain wrongfully subjected them to a roller-coaster of radical changes in the relevant legal regime, that left the investors and their investments in uncertainty, resulting from the change of a stable regime to an ambiguous one.[341]

By contrast, Spain took the position that its measures were adopted for legitimate reasons, and in compliance with its international commitments. It also contended that its measures were not retroactive, as they did not affect already acquired rights by the investors. Interestingly, Spain referred to international arbitral case law, the practice of the European Commission, Spanish case law, scientific doctrine, and the criteria of various investor associations in its argument. Spain also noted that: "the only certainty a diligent investor could have is that the Respondent would take necessary measures to ensure the sustainability of the [Spanish Electricity Sector] and avoid over-remuneration situations, while respecting the principle of a reasonable rate of return".[342] It also referred to the reasonable rate of return principle in other ways, noting that the renumeration towards the investor must be reasonable, but also the cost allocation that return represents for the consumer should be reasonable. It noted that this principle cannot be infinite, but rather its aim is to guarantee a level playing field for renewable energy producers, while also ensuring that it does not place them in a more competitive position than non-subsidised producers. Thus, for Spain, the sensible option to adjust to new circumstances was to amend the hierarchically inferior measures (compared to the 1997 Electricity Law), which were the disputed regulations. Hence, the essential nature of the regulatory framework (respecting the principles of the afore-mentioned 1997 Electricity Law) was not changed, thus Spain had not breached the obligation to provide stable conditions to foreign investments.[343]

In a similar fashion to the earlier dispute regarding the scope of the fair and equitable treatment standard, the Tribunal was of the opinion that whether this was an autonomous standard or part of the fair and equitable treatment standard was an artificial issue. Instead, it merely referred to the *Eiser* case and ascertained that the fair and equitable treatment standard necessarily includes an obligation to provide fundamental stability in the essential characteristics of the legal regime. It noted that the obligation to create a stable environment excludes with complete certainty any unpredictable, drastic transformation in

[339] ibid para 296.
[340] ibid para 291.
[341] ibid paras 291-294.
[342] ibid paras 301.
[343] ibid paras 296-313.

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the conditions of foreign investments. In this regard, it further referred to *Eiser* again (where the subject came up with regards to legitimate expectations, though the Tribunal used it to draw conclusions regarding stability here), and *Blusun* as well, noting that while foreign investors must accept the real possibility of reasonable changes and amendments in the legal framework, radical alterations that are applied to existing investments in such a way as to deprive investors of their investments' value, provided the investors were relying on the original regime when investing. Afterwards, as we have seen elsewhere when dealing with stabilization, the Tribunal sought to determine whether there was any firm pledge towards stability on the part of Spain. In present case, it found that there were none. Interestingly, however, it declined to answer the question of whether the requirement of stability and predictability was violated, noting that it can only be answered by first examining legitimate expectations and the reasonability and proportionality of the changes. Thus, it effectively tied this element of the fair and equitable treatment standard to two other elements. Still, it made a brief detour in its reasoning to examine whether the changes were retroactive (as this was a point of contention with regards to stability by the parties), and found that the changes can be considered retroactive, accepting the claimants' reasoning that while the new legal regime only applies for future remuneration, it still subtracts past remuneration from future renumeration, thus effectively clawing-back past remuneration that was the investors' acquired rights when the remuneration was realised.[344]

The Tribunal then moved on to legitimate expectations. Here, the arguments of the claimants were fairly straightforward, arguing that legitimate expectations were fact specific enquiry, independent of the host state's intentions or good faith, and instead required determining four questions: "first, whether the State's conduct and representation gave rise to expectations; second, whether the expectations are legitimate and reasonable; third, the investor must show that it relied on the State's conduct and representations; and, fourth, its expectations were frustrated by the measures in dispute".[345] The claimants presented the view that Spain's conduct gave rise to their expectations (especially express promises and presentations made by Spain's public officials) that the regime would retain stability in its essential characteristics at least for the entirety of the production and lifetime of their solar plants and wind parks, and that even then, any changes in the regime would only apply prospectively to new renewable energy installations, as otherwise, they would not have made their investments. Interestingly, the principle of reasonable rate of return which was frequently raised by Spain in its arguments were dismissed here by the claimants, who argued that this principle was not directed at investors, but rather towards the regulator when setting specific tariffs, and as such played no role in their legitimate expectations and could not have led them to expecting potential changes to relevant regulation. Finally, the claimants were also of the position that it was not necessary to have exhaustive due diligence for claiming legitimate expectations (though, they noted that the claimants had satisfied a higher standard of due diligence regardless, as they also held face-to-face meetings with high level Spanish officials on the issue of investments and the regulatory environment).[346]

Spain's position on legitimate expectations was rather straightforward as well, stressing that in the absence of specific commitment to stability, the foreign investor cannot have a legitimate expectation that the regulatory framework would not change. The main thrust of its argument was that the Tribunal must analyse how much knowledge the investor

344 ibid paras 314-328.
345 ibid paras 336.
346 ibid paras 331-348.

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possessed of the regulatory framework at the time of its investment, due to the objective standard of legitimate expectations. It noted that claimants only made a cursory analysis of Spain's regulatory framework, and failed to make the necessary due diligence. Spain also argued that even if due diligence can be established, the investors' expectations were still not in line with the objective standard, since without a specific commitment to investors guaranteeing immutable regulation, there can be no valid legitimate expectation in that regard. It ended its argument with a lengthy factual and (domestic) legal analysis intending to prove that the claimants did not possess legitimate expectations towards immutability of the regulatory framework, especially with regards to the remuneration regime.[347]

In its conclusions on legitimate expectations, the Tribunal first noted that it is for the investors to prove that their expectations were legitimate, by demonstrating that they were reasonable and objective considering the circumstances of the investments. The Tribunal mainly focused on the question of whether the amendments to the regime that were introduced after 2012 constituted a drastic, radical alteration, which unexpectedly affected the investments' conditions. Here, the Tribunal referred to the *Charanne* case, noting that the examination of legitimate expectations must be based on objective standards and analysis, that subjective belief on the part of the investor is in itself insufficient to establish a legitimate expectation, and that the expectation must have been reasonable (for which the various representations made by the host state could be relevant). As already mentioned earlier in the case's summary, the question of reasonable return cropped up here, as it was relevant for the exact content of the claimants' hypothetical legitimate expectations. The Tribunal was of the opinion that this principle was evidently part of the guarantees provided by Spain to foreign investors. In fact, it concluded that this principle was the main specific commitment on part of Spain towards investors benefiting from the special renewable energy legal regime. Though, it also noted that this commitment must be interpreted alongside other considerations, with which it was systemically intertwined, such as Spain's concerns about electricity costs and energy production competitiveness. As such, the Tribunal concluded that the only legitimate expectation on the part of the claimants was a reasonable return for their investments, though it also highlighted that this aim (reasonable return) was accomplished through specific means that were designed to attract investment into the renewable energy sector, which was otherwise unattractive if considered purely on a market basis. The Tribunal also noted, however, that this legitimate expectation necessarily included an expectation that implied a reasonable rate of return which is significantly above a mere absence of financial loss for the investors. The Tribunal also dealt with the methods that should be used to establish the potential violation of the legitimate expectation, mostly acquiescing to the claimants' statements that were presented above on the issue. The Tribunal also concurred with Spain's remark on the necessary objectivity and reasonability of assessing these investor expectations.[348]

With the fundamentals of legitimate expectation thus established, the Tribunal turned to answering the questions posed by it in this specific case. First, it noted that it was without doubt that Spain's conduct and representation gave rise to legitimate expectations "insofar as the [c]laimants were entitled to expect that the Respondent would not significantly modify the legal framework applicable to the investors as provided for in its domestic law at the time when the investments were made".[349] The Tribunal concurred with the *Novenergia*

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347 ibid paras 349-377.

348 ibid paras 378-388

349 ibid paras 390.

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case's tribunal, highlighting that the legal framework of Spain as it existed at the time of making the investment will be decisive when considering legitimate expectations. It further referred to *Eiser*, *Charanne* and *Isolux* in stressing that the time of the investment served as a crucial factor. After noting the time of investment (between February and August 2011) and that the *Isolux* case concerned similar circumstances (which the claimant tried to argue away with the notion that changing legislation since then changed legitimate expectations on the part of the investors), the Tribunal engaged in a detailed overview of Spain's regulatory actions at the time, in order to determine whether there could have been any new stronger or different expectations on the part of the investors. The Tribunal found this to be not the case. It also examined the question of due diligence briefly, also referring to *Electrabel v Hungary* on the matter. Ultimately, it noted that due diligence of the investors is not a relevant question when characterized as diligence. Rather, it simply concluded, based on the facts of the case, that the investors were made aware that Spain's legal framework might change in the future, thus any expectation towards ruling out any change with regards to the legal framework could not have been legitimate. In the end, it was the Tribunal's opinion that there was a legitimate expectation to get a reasonable return on the investments, but this didn't include a guarantee of immutability with regards to the legal framework, though it did mean that amendments to the system should be reasonable and equitable. Interestingly, the Tribunal deferred the question of answering whether this was the case, noting that this can only be answered with a global view towards the case, and with taking into account economic calculations.[350] The latter ultimately resulted in the Tribunal finding that with regards to the solar power plants, Spain breached its commitment towards insuring a reasonable rate of return for the investors.[351] Since the Tribunal considered reasonable return a legitimate expectation, this would logically lead to the Tribunal concluding (in a roundabout fashion) that a legitimate expectation was violated, and thus by extension (taking into consideration the categorisation of standards relied on by the Tribunal) the fair and equitable treatment as well.

But as already noted earlier in the case, the Tribunal considered other standards it held to be components of fair and equitable treatment as well, such as transparency. In this specific case, the claimants presented an argument based on *Tecmed v Mexico*, *Electrabel v Hungary* and *Plama v Bulgaria*, to contend that "the State's conduct toward investors and the legal environment must be free from ambiguity and uncertainty, for it not to be in breach of the FET standard".[352] They also noted that host states must be forthcoming with information on any planned regulatory changes that could affect foreign investors. Spain, by their account, failed in this regard. It was of the claimants' view that Spain dismantled the original regime in a non-transparent manner, lacking both visibility and predictability. They also noted that Spain failed to establish a clear methodology regarding some changed subsidies, and that the timeframe in some regards was unclear.[353] Spain rejected these allegations, arguing that the Energy Charter Treaty does not guarantee the complete predictability of the legal framework to foreign investors. Spain also argued that it followed all lawfully established procedures without undue delays, and involved stakeholders in the process of the regulatory change, and that the necessity of changes was communicated (or at least alluded to) by

[350] ibid paras 390-399.
[351] ibid para 600.
[352] ibid para 400.
[353] ibid para 400-406.

Spain as early as 2009. It raised numerous other factual elements that suggested Spain gave ample transparency to the process of regulatory changes.[354]

The Tribunal's analysis of the transparency sub-standard started with the statement that while a violation of it cannot be considered an autonomous breach of fair and equitable treatment in itself, on the one hand, the practical consequences would be the same legally speaking, and on the other hand, as shown by the *Novenergia* case, transparency still is a critical element of both stability and legitimate expectations (which the Tribunal folded under fair and equitable treatment). The Tribunal made a very succinct decision here, noting that the claimants' allegations were unpersuasive, as the possibility of adjusting applicable conditions was evidently present in the relevant instruments, while Spain publicized and explained the changes with sufficient care.[355]

Another standard the Tribunal folded under the fair and equitable treatment standard was the prohibition of measures that would be discriminatory or unreasonable. With regards to the first, the claimants relied on a parallel argument, noting that if Spain violated the non-impairment clause of Article 10(1), then that would simultaneously result in breach of fair and equitable treatment. They argued that it did so, by setting up a 7% levy on renewable energy generators, but not on ordinary plants, and thus applied discriminatory measures.[356] Spain rejected these arguments, referring to the notion that the Energy Charter Treaty is aimed to protect against discrimination between foreign and domestic investors, and it thus has nothing to do with the discrimination between renewable and conventional energy producers. It also rejected any claim that its measures were unreasonable or irrational in character, noting that it had clear policy goals it sought to pursue.[357] Interestingly, both parties blurred non-discrimination and reasonableness in their arguments to some extent, something which the Tribunal also took note of.[358]

The Tribunal's position, as mentioned earlier in the case's summary, was that fair and equitable treatment necessarily encompasses the principle of non-discrimination. Interestingly, it stated that even if the Energy Charter Treaty did not have an express provision on fair and equitable treatment or non-discrimination, then the non-discrimination principle would still be applicable based on customary international law. The Tribunal thus first established what non-discrimination means as a principle: it requires host states to treat equally what is equal, but by the reverse, also does not require them to treat different subjects equally (which is why reverse/positive discrimination can be acceptable). Then it turned to applying this principle to the present case, noting that while *prima facie* the 7% levy was unfavourable to renewable energy plants, Spain had included a number of compensatory measures in its revisions, which meant in the Tribunal's reading that it had engaged in reverse discrimination to assure reasonable profitability to the renewable energy investors, to counter the negative outcomes of the levy, and thus no claim of discrimination could be sustained by the claimants.[359]

The final sub-question was the proportionality and reasonableness of Spain's measures. The claimants contended that Spain did not satisfy the proportionality test[360] and offered

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[354] ibid para 407-414.
[355] ibid para 415-416.
[356] ibid para 417-421.
[357] ibid paras 422-427.
[358] ibid para 436.
[359] ibid paras 428-436.
[360] „…assessing whether a State measure is proportionate by comparing the relationship between the burden imposed on the foreign investor and the aim sought by the State measure, with due consideration of the other alternatives available." ibid para 437.

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various alternative measures Spain could have taken to achieve its policy goals while reducing the impact on foreign investors.[361] By contrast, Spain took the position that burden of proving disproportionality falls on the claimants, and rejected allegations that it acted in a disproportionate or unreasonable manner, referring to international law and existing arbitral decisions as support that its measures were proportionate and reasonable in light of the alternatives.[362]

The Tribunal's position was that the parties' discussion of the burden of proof in this context is mostly immaterial, as it considered that whoever brings the claim should have the responsibility of proving its case. It also noted that the proportionality requirement is "fulfilled inasmuch as the modifications are not random, unnecessary or arbitrary, that is, provided that they do not significantly modify the legal framework applicable to the investors".[363] It noted that proportionality is a weighing mechanism that is seeking a balance between differing interests and principles, taking all relevant facts and circumstances into account. For reasonableness, it identified three necessary elements that are required (within the context of exercising regulatory power): legitimacy of purpose (ergo, it represents the interests of society as a while, and it does not change the substance of relevant rights), necessity (there is a pressing social need that needs to be met, this is a higher standard than usefulness or desirability), suitability (the regulatory exercise must be suitable to achieve the legitimate purpose). It also noted that Spain enjoys a margin of appreciation here, though this appreciation cannot be unlimited with the fair and equitable treatment standard constituting the clearest limits of this appreciation, and that it cannot be demanded of Spain to take only measures that could only result in the investors' initial situation being maintained, as this would be equal to immutability of conditions.[364]

Interestingly, the Tribunal was of the opinion, that while it separated the various sub-questions of fair and equitable treatment, the parties treated them in a mixed-together fashion, and thus it considered proportionality and reasonableness the ideal place to assemble them together. In particular, it tied legitimate expectations with reasonableness, and as mentioned earlier in the summary, decided that an empirical assessment was necessary to establish a violation of fair and equitable treatment, especially in connection with reasonableness and legitimate expectations.[365]

Hence, the Tribunal then proceeded to engage in a grand examination of both the legal principles underlying the calculation of damages, and the facts of the case, in order to make an empirical assessment of damages. For the purposes of this book, a detailed account of it is not necessary. In the end, the Tribunal concluded that it lacked the necessary technical expertise to correctly interpret the factual results within the scope of the Decision on responsibility and on the Principles of quantum, thus deferring the question to the Final award. However, as already noted, the Tribunal still managed to find, based on its examinations, that reasonable return was violated by Spain (furthermore, as also already mentioned earlier in the summery it also found that Spain breached the Energy Charter Treaty via its retroactive application of the new energy regime).[366]

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361 ibid paras 437-449.
362 ibid paras 450-459.
363 ibid para 460.
364 ibid paras 460-466, 468.
365 ibid paras 467, 472.
366 ibid paras 473-600.

There was a partially dissenting opinion to this decision by one of the arbitrators. The arbitrator contended the scope of legitimate expectation, arguing in favour of a more claimant-friendly approach. The main crux of its argument was that while it agreed on principles of law with his fellow arbitrators, he disagreed with them on the facts of the case, or rather, what conclusions can be drawn from the facts regarding the calculation of reasonable return.[367]

Ultimately, the case received its final award in 2019, which concerned itself solely with the further calculation of damages, as well as costs, ultimately rendering a monetary award in favour of the claimants.[368] However, the claimants renounced their right to collect these damages, and the case is currently undergoing ICSID annulment proceedings.[369]

1.23. Antin and Antin v Spain[370]

This case was also related to the Spanish reforms affecting the renewable energy sector. As such, we will again focus only on the claimants' specific situation when it comes to the facts of the case. The case is specifically closely tied to the *RREEF v Spain* case, as the claimants in present case were business and investment partners of RREEF. To get into the details, the claimants first became aware of a potential investment in Spain's renewable energy sector in the autumn of 2010, as a Spanish conglomerate was intending to sell part of its renewable energy generation assets. This was followed by the claimants getting into contact with the afore-mentioned RREEF in February 2011, who intended to convince the claimants to partake in an investment in two solar power plants (these power plants were also involved in the factual background of the *REEF v Spain* case). The power plants benefited from Spain's special regime for renewable energy generators due to the dates of their construction and registration. The claimants (and RREEF) carried out a due diligence process between March and June 2011, concerning a potential investment in said plants. During this period, they received both technical knowledge on solar power production, and legal information concerning Spanish regulations. It also included a professional report which noted a certain degree of regulatory uncertainty for (concentrated) solar power plants beyond 2014, but also highlighted that they are in a better position than photovoltaics. After several more reports, as well as numerous meetings, some involving the Spanish National Energy Commission, the claimants concluded in June 2011 at an investor meeting, that based on the available presentations, there was a strong governmental support for concentrated solar power, and thus the sector is likely shielded from regulatory changes (in contrast to the afore-mentioned photovoltaics). Thus, later in June 2011, the claimants made their investment in the afore-mentioned solar power plants. As already known from other cases

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367 Partially Dissenting Opinion of Professor Robert Volterra to the Decision on Responsibility and the Principles of Quantum in the *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v Spain* paras 40-47.

368 *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v Spain* (Final Award) para 81.

369 'RREEF Infrastructure v Spain' (International Energy Charter) <https://www.energychartertreaty.org/details/article/rreef-infrastructure-gp-limited-and-rreef-pan-european-infrastructure-two-lux-sarl-v-spain/> accessed 2 June 2021.

370 *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v Spain*, ICSID Case No. ARB/13/31 (Award).

concerning Spain, 2012 was the year that Spain enacted a number of new legislations that drastically altered the regulatory framework for renewable energy, including concentrated solar power producers.[371] As a consequence, an arbitration case was initiated in 2013, based on the Energy Charter Treaty.

The question of fair and equitable treatment also arose among the merits of the case. The claimants in particular contended that the fair and equitable treatment standard, as found within the Energy Charter Treaty, is an independent and autonomous standard. The claimants emphasized the relevance of Spain's conduct towards provisioning a stable, transparent legal framework for foreign investors, as a central element of the fair and equitable treatment standard in their view. They also alleged that they had legitimate expectations concerning the stability of the legal regime, based on regulatory presentations made by Spain, as well as assurances given by Spain's public officials. These expectations were allegedly frustrated, and the fair and equitable treatment standard was violated by Spain's conduct, in radically transforming the regulation of the renewable energy sector, specifically with regards to concentrated solar power generators. Spain rejected these arguments, postulating that the Energy Charter Treaty only mandates a minimum standard when it comes to restricting the host state's regulatory power, and thus it had not committed a breach of the fair and equitable treatment standard. Spain also denied the legitimacy of the claimants' expectations, noting that they could not have reasonably expected that the beneficial regulatory framework would remain frozen, as there was no stabilization clause and Spain did not make any promises to the claimants about the immutability of the special legal regime. Similarly to other cases involving Spain, the country also relied on the concept of reasonable return as the full extent of fair and equitable treatment in the current context.[372]

The Tribunal thus set out to determine the meaning of the fair and equitable treatment standard within the context of the Energy Charter Treaty. In doing so, it relied partially on customary international law, and also examined the ordinary meaning of the words "fair" and "equitable". With regards to the latter, it examined the meanings both in English and Spanish. It noted, that the terms must be interpreted together with the Energy Charter Treaty's context, object, and purpose. As such, it turned to examining the Treaty's purpose and object. Based on these, the Tribunal reasoned that interpreting the fair and equitable treatment standard under the Energy Charter Treaty thus necessarily involves the Energy Charter Treaty's objectives of legal stability and transparency. This was tied by the Tribunal to the first sentence of Article 10(1). The Tribunal was of the opinion, that Article 10(1)'s language, as well as reinforcing context from the rest of the Energy Charter Treaty, implies a strong obligation for host states to establish stable, equitable, favourable and transparent conditions for investors that goes beyond just encouragement.[373]

The Tribunal also had to determine the scope and extent of this stability obligation, as the parties disagreed on the issue. The claimants were of the opinion, that stability in this context means that the original regime should have stayed in place for the entire life of operation of the affected plants, while Spain was of the belief that no such "freezing" is mandated by the stability requirement and that the Energy Charter Treaty does not limit the regulatory powers of host states to such an extent. Thus, Spain was of the opinion that a reasonable rate of return was sufficient to comply with the stability obligation. The

371 ibid paras 109-139.
372 ibid paras 508-515.
373 ibid paras 516-526.

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Tribunal found that stability does not lead to immutability, referring both to dictionary definitions and other cases such as *Plama v Bulgaria* and *Electrabel v Hungary*. While it mostly thus accepted Spain's position, it disagreed with it on the matter of whether the fair and equitable treatment can be equated to minimum standard found in international law. Referring to *Charanne v Spain* and Eiser v Spain, the Tribunal found that the crucial element in the stability obligation includes the notion that the essential features of the existing regulatory framework are not eliminated in a sudden and unexpected manner.[374] Meaning that "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".[375]

The Tribunal next determined that the legitimate expectations claimed by the claimants closely tie into the stability of the legal framework obligation. As we have seen in several other cases, the parties here disagreed about the content of these expectations and whether they were breached. As usual, the Tribunal first established the universal maxim that legitimate expectations cannot be based on the investor's subjective beliefs or analysed in abstract. Rather, the legitimate expectations must be founded upon an objective standard, and this standard has to be assessed on a case-by-case basis. Next, it decided that the investor's expectations have to be examined based on the time the investor made the investment. Thus, the Tribunal had to consider the timing of the investment, its circumstances, and what information the investor had or reasonably could have possessed, whether it acted with the requisite degree of diligence (this is in contrast to the related *RREEF v Spain* case, where the tribunal found due diligence of lesser practical importance). Furthermore, the Tribunal also established that the legitimate expectations must arise from some action on part of the host state, either in the form of specific commitments, or in the form of representations, the latter of which could be general, such as devising regulations aimed at encouraging investment into specific sectors. These commitments or representations must be as such that they could objectively give rise to a reliance on part of the investor.[376]

Thus, the Tribunal engaged in a detailed analysis of the facts of the case. The Tribunal was of the view that Spain's actions, when examined in their context, clearly show a pattern towards making stability representations through regulatory actions and other statements. It found that at the time the claimants made their investment, Spain was making an indirect representation (through its acts and regulations) that the regime applying to renewable energy projects would remain stable and predictable. Thus, this could give rise to a legitimate expectation. According to the Tribunal's view, this was not an expectation towards immutability, but nevertheless, changes must be consistent with the assurances of stability, the essential features of the regulatory framework relied upon by the investors cannot be eliminated. Interestingly, the *Charanne v Spain* was referenced heavily here, though the Tribunal noted that while the tribunal in that case could not find evidence of Spain violating its obligation to provide regulatory stability, said case also did not involve the newer regulations Spain had passed afterwards. Thus, the question became whether these newer regulations eliminated essential features or not.[377]

To identify the essential features, the Tribunal first referred to the *Charanne v Spain* tribunal's opinion on the matter, noting that it considered the offering of a guaranteed tariff

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[374] ibid paras 527-532.
[375] ibid para 532.
[376] ibid paras 534-539.
[377] ibid paras 540-558.

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and the granting of privileged access to the electricity transmission and distribution grid as the essential features of the regime. The feed-in-tariff system could also be considered as part of this essential feature set. Thus, the Tribunal mused that if it were to adopt the *Charanne* tribunal's view, then these specific features were definitely eliminated by the later regulation. The Tribunal, however, sidestepped answering the issue from this perspective, and instead turned to Spain's position that the only applicable content of legitimate expectations could have been the reasonable rate of return principle. With regard to this, the Tribunal took the interesting position that it is not truly relevant whether the altered regime complies with reasonable return, but rather how reasonable return is determined. In essence, it reasoned that in order to satisfy the stability and predictability obligations under the Energy Charter Treaty, the methodology for calculating reasonable return on concentrated solar power plants must be based on identifiable criteria. Based on the technical analysis of the facts, the Tribunal took the view that this methodology was lacking, and was indeed not based on identifiable criteria, and instead, it was seemingly dependent on governmental discretion, in sharp contrast to the relative precision of the original legal regime on which the investors relied when making their investment. The Tribunal took this to mean that the stability requirement was thus breached, and thus the legitimate expectations of the claimants towards stability were also frustrated. It also rejected Spain's tariff deficit as a justification for the elimination of these key features of the original regime. Hence, the Tribunal found Spain to be in violation of the fair and equitable treatment standard.[378] The fair and equitable standard was also later referenced several times in the Tribunal's reasoning when it came to calculating reparations. The award was rendered in 2018, and was followed by enforcement proceedings in 2019 in Australia. It is currently undergoing ICSID rectification proceedings, the outcome of which is still spending.[379]

1.24. Masdar v Spain[380]

Masdar v Spain concerned Spain's renewable energy sector like many other Energy Charter Treaty cases involving Spain. Interestingly, the claimant was a company owned and controlled by a United Arab Emirates company, which in turn was owned by a company owned by the Government of Abu Dhabi. The claimant's owner company engaged in a fact-finding survey of the Spanish solar energy market very early on, especially with regards to concentrated solar power. In fact, this survey occurred even before the adoption of the feed-in-tariff mechanism in 2007, which Spain used as a crucial lynchpin for attracting foreign investment into the renewable energy sector. Over the course of 2007, the claimant's owner company identified a potential joint venture partner for investments in concentrated solar power. This was followed by the company commissioning a due diligence review as well. This resulted in a report that informed the claimant's owner company on the special regime established in Spain, its conditions and scope. This was followed by a joint venture agreement in 2008, during which a new company was created to purchase three

[378] ibid paras 559-573.

[379] 'Antin v Spain' (International Energy Charter) <https://www.energychartertreaty.org/details/article/antin-infrastructure-services-luxembourg-sarl-and-antin-energia-termosolar-bv-v-spain-icsid/> accessed 3 June 2021.

[380] *Masdar Solar & Wind Cooperatief U.A. v Spain*, ICSID Case No. ARB/14/1 (Award).

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concentrated solar power installations (these would serve as the objects of the dispute later). This company's shares were later acquired by the claimant. But as it was with other cases, the changes to Spanish regulations later on, especially in 2012, led to disputes between the parties.[381] As a result, and following failed negotiations, the claimant initiated arbitration in 2014, based on the Energy Charter Treaty.

The issue of fair and equitable treatment played a central role in the dispute. The main thrust of the claimant's argument in this regard was that Spain frustrated its legitimate expectations upon which the claimant relied. It was this notion of legitimate expectations that served as the chief perspective for the claimant on the fair and equitable standard. In particular, the claimant's position was that through the enactment of Spain's regulatory reforms, the original legal regime was completely dismantled, and replaced with a new legal regime that was significantly less profitable for investors like the claimant, yielding significantly lower returns and also in the process, the new regulatory measures destroyed the stability originally promised by Spain and on which the claimants relied. To be even more specific, the claimant was of the opinion, that it did its outmost to continue benefiting from the special legal regime at place during the original investment, while Spain suddenly and unexpectedly destroyed these expectations via its 2012-2013 measures concerning the renewable energy sector in Spain.[382]

Spain's counterargument emphasised that it maintained the principle of the reasonable rate of return, as we have seen with several other cases involving Spain. Furthermore, the host state claimed that the claimant failed to conduct proper regulatory due diligence, and noted that the report, resulting from whatever legal due diligence the claimant undertook, failed to establish a commitment on the part of Spain towards the immutability of the special legal regime, and thus, the claimant could not have had such beliefs on a solid foundation. Spain especially highlighted that the claimant received a letter from the Spanish Secretary of State for Energy in early 2010, which referenced the future adoption of a new regulatory scheme, and invited investors to ask for clarification (which Spain alleges the claimant failed to follow through). Spain, in general, rejected the notion that it was in breach of the fair and equitable treatment standard found in Article 10(1) of the Energy Charter Treaty, that it failed to provide stable conditions for investment, and that the measures it undertook offended international principles in respect of retroactivity, as Spain claimed that the latter did not purport to revoke already acquired rights and only had an *ex nunc* application. With regards to this, it referred to the *Charanne v Spain* case's argumentation, where the arbitral tribunal noted that Spain's measures were not retroactive, as it applied for the future, and respected already acquired rights, the latter of which consisted of the remuneration investors already received. Spain also alleged that its measures were transparent and underwent proper consultation, and lacked an arbitrary or discriminatory character, and satisfied the requirements of reasonability and proportionality. Furthermore, it attempted to justify its measures as necessary to ensure the stability of the Spanish renewable energy market going forward. Interestingly, the host state also made a point about its information exchanges in late 2010 with the claimant, during which Spain communicated the remunerations enjoyed by the claimant at that point, were not guarantees for the future of the special regime or the amount of future remuneration in specific.[383]

381 ibid paras 81-102.
382 ibid paras 461-468.
383 ibid paras 469-481.

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This Tribunal did not waste too much time with establishing what it believed to be the constituting parts of the fair and equitable treatment standard, even though it acknowledged the relatively large amount of variance that is found in arbitral interpretations concerning the standard. It established that the fair and equitable treatment standard "constitutes a standard the purpose of which is to ensure that an investor may be confident that (i) the legal framework in which the investment has been made will not be subject to unreasonable or unjustified modification; and (ii) the legal framework will not be subject to modification in a manner contrary to specific commitments made to the investor."[384] In essence, the Tribunal indirectly focused on the question of legitimate expectation (which will also be evidenced once the Tribunal started dissecting these two specific constituting elements), though in a structure that can be considered somewhat different from what we have seen in the other cases involving Spain.

With the constituting parts thus established, the Tribunal turned to examine each in turn. Starting with the requirement of there being no unreasonable or unjustified modification, the Tribunal was quick to establish that, although host states enjoy liberty to regulate the energy sector under the Energy Charter Treaty, this right is not unfettered. It referred to several cases, including *Parkerings*, *Continental Casualty*, *Plama*, *EDF, AES Summit*, *El Paso* to reinforce this view. It particularly referred to *CMS* and *Eiser* to establish that explicit undertakings/specific commitments to the investors restrict the host state's liberty to regulate, especially when it comes to dispensing with existing regulatory framework altogether, that would also negatively impact the foreign investors.[385] Thus, this first constituting part directly led to the second constituting element, as the Tribunal outlined the limits of the host state's regulatory freedom, and its answer to this question was in essence the content of the second constituting element of the fair and equitable treatment standard.

The Tribunal's examination of the second constituting element was necessarily far more detailed. It noted that the principal question is determining which kind of specific commitments can give rise to protected legitimate expectations (thus confirming that it considered legitimate expectations to be the essence of the fair and equitable treatment standard). Interestingly, as we have seen with other cases, the arbitral tribunals were divided between the belief that general statements (in general laws or regulations) can give rise to commitments on the part of the host state, and the belief that only specific commitments matter in this context. The Tribunal in the present case explicitly identified these two beliefs/views as opposing schools of thought. It then proceeded to examine the merits of each. With regards to the position that general statements in general regulations can constitute commitments, it noted that the most respected commentators on investment law support the view that the foundation for determining an investor's legitimate expectations is the legal framework or order of the host state when the investment was made. Thus, this could logically lead to the assumption that this foundation can necessarily generate commitments and thus legitimate expectations. In this regard, the Tribunal referred to the *Suez* case, where it was established by the tribunal of that case that the host Government's laws, regulations, policies and statements can result in reasonable and legitimate expectations, and furthermore, frustration of these expectations can directly lead to the host state failing the fair and equitable treatment standard. In support of this view, the Tribunal also raised the conclusions of the UNCTAD, and the dissenting opinion of an arbitrator in *Charanne*

[384] ibid paras 482-484.
[385] ibid paras 485-488.

and *Isolux*. The Tribunal then proceeded to state that if general regulations can be regarded as a source of legitimate expectations, then that necessarily means that the investor must prove that it has exercised appropriate legal due diligence in that it familiarized itself with the existing laws and regulatory environment of the host state. The Tribunal also noted that this knowledge possessed by the investor at the time of the investment was established as a crucial factor by *Electrabel*.[386]

Thus, the Tribunal proceeded to undertake an examination of whether this requisite legal due diligence was undertaken by the claimant or not. It found based on available evidence, that the claimant possessed accurate knowledge of the legal status of the Spanish renewable energy sector at the time of the investment. This knowledge included the knowledge that Spain was actively encouraging investments in the sector, further evidenced by Spain's own press releases and presentations, and the lack of judicial dissent towards the legal regime. Furthermore, the Tribunal also found that the claimant's proactive actions in achieving legal due diligence were satisfactory, as it commissioned external reports, engaged in discussions with a co-investor which had detailed knowledge of the regulatory framework, discussed the subject with Spanish banks, and also consulted law firms. Thus, contrary to Spain's allegations, the Tribunal was of the belief that the claimant achieved legal due diligence. And during this diligence, the Tribunal noted that no suspicion or concern appeared to suggest the possibility that the existing special regime would be swept away with regards to the claimant's investments. Hence, the Tribunal found that based on its due diligence, the claimant established a legitimate expectation. A legitimate expectation that the laws would not be modified, as interestingly, the Tribunal was of the belief that the applicable Spanish regulations contained stabilisation clauses. In particular, the Tribunal found that the language employed by certain Spanish regulations, particularly the clauses promising conditional exemptions to existing facilities from revisions of the tariff system, was sufficient to establish the existence of stabilisation clauses, thus leading to Spain indirectly committing itself to stabilisation through these regulations. Hence, the Tribunal found that if it were to accept this first approach to the origin of legitimate expectations, it would find that there was a frustration of legitimate expectations.[387]

Before committing itself, the Tribunal then proceeded to cover the second school of thought: that general statements in general regulations cannot give rise to commitments and something more specific was necessary. According to the Tribunal, this approach would mean that the previously established stabilisation clauses would be insufficient to establish a legitimate expectation. To explore this viewpoint, the Tribunal referred to cases like *El Paso*, noting the tribunal there found these specific commitments to be two of a kind: either they are specific as to their addressee (ergo the foreign investor), or they are specific regarding their object and purpose. The Tribunal also referred to *Continental Casualty* and *Charanne*, to further reinforce that according to this school of thought, stabilisation provisions in general regulations/legislation, or political announcements cannot create legitimate expectations.[388]

Instead of unambiguously declaring support for either position, the Tribunal decided to first examine the facts of the case in more detail, in order to determine whether there had been specific commitments beyond general legislation. In particular, it concentrated to a specific element of the regulatory scheme, which was dismissed by the tribunal in *Charanne*

[386] ibid paras 489-495.
[387] ibid paras 496-503.
[388] ibid paras 504-510.

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as an unimportant administrative step: the claimant's registration with two special lists that covered renewable energy installations benefiting from the special legal regime. The Tribunal noted that during the course of this process, each of the solar power plants received a specific resolution (in the form of letters) from the Spanish State, each of which contained explicit statements that the plants were to benefit from the aforementioned guarantees (which the Tribunal interpreted as stabilization clauses). This was followed by a further exchange of letters between the claimant's company and the Spanish Ministry of Industry, Tourism and Business, in which the ministry seemingly confirmed these guarantees for the entire operating life of the plants. The Tribunal found that the firstly mentioned resolutions in themselves were sufficient to establish a specific commitment, and the later letters only reinforce this notion. Thus, the Tribunal ultimately decided that regardless whether the first or second school of thought is correct, the claimant evidently possessed legitimate expectations that the beneficial regime it enjoyed originally at the time of making the investment would remain unaltered. Therefore, the frustration of these legitimate expectations directly led to the Tribunal finding Spain to be in breach of the fair and equitable treatment standard as found in Article 10(1).[389] Thus, the dispute was decided in favour of the investor in 2018. The case was later subjected to proceedings towards the staying of the award's enforcement, as well as discontinued ICSID annulment proceedings.[390]

1.25. NextEra v Spain[391]

It was another case that concerned Spain's revision of its renewable energy sector regime. The background of the dispute on the claimants' side lies in a project concerning the construction of two concentrated solar power plants in Spain. The claimants were both incorporated in the Netherlands in 2008, with a US parent company. However, the involvement of parent company-related companies with solar energy in Spain began earlier, in 2007, and related to land easements, water rights purchases, and the planned development of four concentrated solar power plants. After their own incorporation, the claimants focused on developing in this sector as well. In 2009, the two afore-mentioned concentrated solar power plants owned by the claimants were registered. Their construction proceeded from that point on, up until 2012. In 2013, they were registered in Spain's RAIPRE system for plants qualifying for the original special regime.[392] However, as a result of Spain's regulatory changes, the claimants sought arbitral relief and initiated proceedings against the host state in 2014, relying on the Energy Charter Treaty.

The question of fair and equitable treatment played a pivotal role in the dispute. In particular, the claimants and Spain disagreed over the contents of the fair and equitable treatment standard. The claimants took the view that the fair and equitable treatment standard is an autonomous treaty standard that is independent of the minimum standard of treatment principle found in customary international law. They believed that it is a

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389 ibid paras 511-522.

390 'Masdar v Spain' (International Energy Charter) <https://www.energychartertreaty.org/details/article/masdar-solar-wind-cooperatief-ua-v-spain-icsid-case-no-arb141/> accessed 4 June 2021.

391 *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Spain*, ICSID Case No. ARB/14/11.

392 ibid paras 93-179 (Decision on Jurisdiction, Liability and Quantum Principles).

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complex set of distinct (if related) obligations. In particular, the claimants alleged that the standard obligates the host state to protect legitimate and reasonable expectations of the investors, maintain reasonable stability in its regulatory framework, act in good faith and proportionately, and respect due process, and not commit denial of justice. The claimants interestingly also mentioned other facets of Article 10(1) of the Energy Charter Treaty (such as the requirement of transparency, avoidance of arbitrary and discriminatory conduct), which they also folded into the contents of the fair and equitable treatment standard. The claimants particularly emphasized the investors' legitimate expectations towards the stability and transparency of the regulatory framework, and the host state's responsibility for its actions as a crucial element of the fair and equitable treatment standard.[393]

By contrast, Spain's position was that the extent of the fair and equitable treatment standard ends at the minimum standard of protection, specifically national treatment in this context (as it achieves the goal of the Energy Charter Treaty to prevent discrimination against foreign energy investors in this manner). And with regards to the stability issue, Spain took the view that there is a difference between stable conditions and stable regulatory framework, as the Energy Charter Treaty only mandates the former, but not the latter. Meaning, according to Spain, host states have no Energy Charter Treaty-derived obligation to maintain the stability and predictability of the relevant regulatory framework throughout the entire lifetime of the investment. In fact, Spain argued, there is no extreme limit on the host state's regulatory power, nor was it the intention of the Energy Charter Treaty to provide a sort of insurance policy for foreign investors against regulatory changes. Thus, Spain alleged, the only real limit to the host state's regulatory power, within the context of the Energy Charter Treaty, is the minimum standard of treatment principle, and the Treaty's chief objective of non-discrimination. Spain also relied on the more specific interpretation of investors' legitimate expectations: that they can only be based on a specific commitment to stability by the host state.[394]

With regards to the latter, the parties further elaborated on what constituted legitimate and reasonable expectations in their view. The claimants were of the opinion, that they were entitled to legitimate expectations towards Spain maintaining the original favourable regulatory framework for both solar power plants for their entire useful life. The origin of these expectations, according to the claimants, laid in part with the very terms of the original regulatory framework, in part with ministerial resolutions allegedly assuring both solar power plants uniquely and explicitly of stability, and also with the registration of the plants in appropriate registries. Interestingly, the claimants also contended that concentrated solar power investments are capital-intensive, and their success or failure is entirely determined by the actions of the host state, thus the claimants could derive an expectation of stability from the Spanish Government this way as well. It is also interesting that the claimants argued that the principle of reasonable return (a favourite defensive argument of Spain in the sister disputes of this case) was not in itself enough to attract their investment to Spain, thus it could not be the entire content of their legitimate expectations. Specifically, claimants viewed the principle as amorphous, and as a general directive to the regulator, which was superseded by more specific regulations concerning tariffs and premiums. They also noted that they temporarily put their investments on hold in 2010, amidst concerns of potential regulatory changes, but resumed construction after Spain provided assurances of

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393 ibid paras 393-402.
394 ibid paras 403-411.

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regulatory stability to solar energy actors. The claimants also went to great lengths to prove their due diligence in front of the Tribunal. And finally, and most interestingly, the question of EU law intruded into the discussion of legitimate expectations, as the claimants believed that the notion that the original regulatory framework might have been incompatible with EU state aid rules is not relevant to the present discussion of expectations, as even if that was the case, and the original regulatory framework was contrary to EU state aid rules, Spain was still obligated by the Energy Charter Treaty to respect the investors' legitimate expectations through alternative measures (which the claimants contended that Spain did not do).[395]

Spain's more specific position on legitimate expectations was, that in order to establish a breach of the fair and equitable treatment standard, there must be a determination of the expectations that the investors had, or should have had at the time of the investment, and whether these expectations were reasonable or legitimate with respect to the regulatory framework of the time when these expectations formed. However, Spain argued, the investor must fulfil a number of requirements regarding this: it must be aware of the host state's legal framework (both the laws and regulations, as well as applicable case law, how this framework is applied, and what effects it has on the investment). But beyond that, the investor should also know the risks making an investment and even assume these risks. Spain also positioned the almost universally acknowledged notion that legitimate expectations must be objective in character and derived from the specific circumstances at the time when the investment was made. As expected, Spain once again emphasized the reasonable rate of return principle as the fundamental basis of any real legitimate expectation on the part of the investors. It also pointed to the lack of any specific commitments in the rules that would suggest immutability or that investors would necessarily continue enjoying the original beneficial regime (according to Spain, at least). In Spain's view, it had no commitment towards stability. Unlike the claimants, who viewed reasonable rate of return as a directive aimed at the regulator, and one superseded by more specific rules, Spain maintained that the reasonable return principle continued to be at the heart of Spanish regulation of renewable energy, and thus continued to play a crucial role in policymaking. It also noted that the central role of this principle was consistently established by domestic case law as well. Spain also attempted to use the *Charanne* case to argue that a specific regulation at the centre of the dispute (RD 661/2007, the chief instrument for the original beneficial system) was found by the tribunal not containing any specific commitment towards the investors' investments, and thus in lieu of a specific commitment, no investor could have had a legitimate expectation that said regulation would remain unchanged throughout the entire operating life of the plant. It also referred to the *AES* case in general, as proof that it is not possible to deduce a stability clause from a general regulatory framework. Interestingly, with regards to the question of European Union law, Spain took the view that any decision reached by the Tribunal must be compatible with the European Commission's relevant decision on the subject matter.[396]

The obligation to encourage and create stable, equitable, favourable, and transparent conditions was understood by the claimants to be both an autonomous standard in itself, and a matter that influences the interpretation of the fair and equitable treatment standard as well. With regards to this subject, claimants mostly alleged that Spain failed to provide

[395] ibid paras 412-464.
[396] ibid paras 466-516.

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stability, due to the sudden and drastic changes experienced by the regulatory framework, while also emphasizing the retroactive nature of the new regulation, which it viewed as further proof of the lack of stability.[397] As for transparency, the claimants took the view that Spain's conduct in general did not satisfy the requirements of Article 10(1), referring to *Tecmed*, *Electrabel* and *Plama* to support their views. It noted that several crucial technical details of the newer regime were determined in secret, Spain inadequately explained the new systems of categorisation introduced for concentrated solar power plants, and there is a lack of clarity regarding several matters in the new framework. Spain also failed to give prior notice of the changes, according to the claimants, and even if warnings were given, they were well past the period during which the investment was made.[398]

Spain's position was predictably denying the notion that it breached its obligation to provide a stable legal framework, noting that the disputed regulatory actions have maintained all essential characteristics of the original regulatory framework, and that stability in general was maintained with regards to renewable energy regulation. Using the *Plama* case, Spain posited that the regulatory framework in itself does not constitute a specific commitment, and that (referring to *AES*) the Energy Charter Treaty provisions regarding stable conditions do not constitute a stability clause. Spain maintained that its alterations to the legal system continued to uphold the principle of reasonable return (which Spain characterized as the essential feature of the regulatory framework), and were otherwise reasonable and justified. Spain also denied the alleged retroactivity of the disputed measures, noting that these measures only affect the future, and have no ability to affect payments made prior to their entry into force. According to the host state, only measures affecting acquired rights are retroactive. Spain was of the opinion, that the claimants did not possess an acquired right to a fixed remuneration feed-in-tariff-system. It also referred to the award of the tribunal in the *Charanne* case, noting that it already decided in favour of Spain's measures not being retroactive in nature. And finally, with regards to the transparency of the framework, Spain took the position that it had acted transparently, and did not breach Article 10(1) in the process. It noted that the need for reforms was announced years before the alterations, all the legal developments were transparent, and all stakeholders had timely access to information on the topic, and Spain in general acted with absolute transparency with regards to all relevant information, among other arguments.[399]

The claimants also advanced claims based on the standards of proportionality and non-discrimination, but they viewed them as independent standards, not elements of the fair and equitable standard.[400] Regardless, they ended up tying the proportionality standard to the fair and equitable treatment standard over the course of their argumentation, noting that the latter necessarily requires host states to act proportionately with regards to foreign investors.[401]

The Tribunal's analysis of the case, in sharp contrast to the detailedness of the claimants, can be considered relatively succinct. First of all, unlike some other arbitral tribunals, the Tribunal in present case took the view that establishing an overall view of the Energy Charter Treaty's objectives is unnecessary. Instead, it simply noted that while the objectives of the Treaty may be used during the interpretative process of Article 10, an autonomous

397 ibid paras 518-525.
398 ibid paras 526-529.
399 ibid paras 530-547.
400 ibid para 548.
401 ibid para 553.

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analysis of them is not needed. In a similarly to-the-point fashion, the Tribunal wasted little time with establishing the contents of Article 10(1), merely quoting the individual elements of the paragraph, and referring to them as obligations affecting the host state.[402]

One of these quoted obligations was the fair and equitable treatment standard. The Tribunal did not engage in particular with the determination of the meaning and potential constituting elements of the standard. Instead, it merely stated its agreement with the notion that the protection of legitimate expectations is an essential element of the fair and equitable treatment standard, and that this is also the case within the Article 10 of the Energy Charter Treaty. The wording thus suggests that the Tribunal also recognized other elements of the fair and equitable treatment standard, but did not identify them within the context of its decision.[403]

With regards to legitimate expectations, the Tribunal first established that there were several foundations of the alleged legitimate expectations, and examined each of them briefly. The first potential foundation were the terms of the original regulatory framework. The Tribunal's logic here was as to-the-point, as elsewhere in its analysis. The Tribunal noted its belief that the original regulatory framework could not have served as a foundation for legitimate expectations, specifically that the claimants would be guaranteed the terms of the regulatory framework. The Tribunal was of the opinion, that as the framework was based on legislation, it could be changed. It agreed with Spain that the claimants should have been aware that alterations to the legal regime were possible. Thus, the Tribunal reasoned, this regulatory framework in itself could not reasonably have been the basis for a legitimate expectation on the part of the claimants, because then that would entitle them to receive precisely the same benefits the original framework prescribed. The second potential foundation for legitimate expectations were the two registrations of the claimants' plants in the Pre-Assignment Registry and the so-called RAIPRE registry. The Tribunal acknowledged that, while these were necessary parts of the process of acquiring the benefits of the regulatory framework, they did not in themselves grant any right to the special regime. To reinforce this position, the Tribunal also referred to the *Charanne* case, where the tribunal conclusively dismissed RAIPRE as an administrative step that did not result in the acquisition of any rights by investors.[404]

Beyond these general regulatory and administrative steps, there were also two ministerial resolutions in 2010 that claimants used as part of their argument that they had legitimate expectations. These resolutions reiterated the terms of the original regulatory framework. The Tribunal's logic was simple: if the regulatory framework did not include a guarantee of its terms, then its reiteration could not confer such a right either. Thus, the ministerial resolutions could not have been considered as sources of legitimate expectations, according to the Tribunal. Even though all these more general sources of potential legitimate expectations were dismissed by the Tribunal, it did note that they provide some context for legitimate expectations and the claim itself. Specifically, these general facts and circumstances form the context in which a potential specific commitment could be found in the representation and assurance of the Spanish authorities.[405]

Thus, with the more general commitments dismissed, the Tribunal turned to specific commitments. It first established that the potential sources for specific commitments to

[402] ibid paras 580-581.
[403] ibid para 582.
[404] ibid paras 583-585.
[405] ibid paras 586-587.

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the claimants on part of Spain fall into five categories. These included written statements between the investors and Spanish officials, internal memoranda of the claimants on meetings with Spanish officials, witness statements that indicated the claimants' understanding of the Spanish position, and statements made to industry and public trading enterprises. The Tribunal reasoned that out of these, the ones with the best potential evidence of Spanish assurances that could serve as a basis for legitimate expectations would be the written statements made by Spanish officials. However, the Tribunal did note, that despite Spain denying that the other mentioned sources could have weight as evidence, the host state did not deny their factuality. The Tribunal thus reasoned that it could rely on the truthfulness of these other sources as well.[406]

The Tribunal's next step was to establish the scope and extent of the legitimate expectations that the claimants could have reasonably believed in. The Tribunal noted that a belief in a frozen legal regime was certainly unfounded. However, the Tribunal noted that the expectation that the "regime would not be changed in a way that would undermine the security that Claimants had in respect of the economic regime set out in RD 661/2007"[407] is an entirely different matter, given the assurances given by Spain to the claimants. The Tribunal in particular focused on two letters sent by the Spanish Secretary of State for Energy. The Tribunal did not believe the assurances given by the secretary of state in these letters constituted a commitment, but interestingly, it took the position that legitimate expectations can exist in the absence of actual formal commitments by the host state. The Tribunal reasoned that the principal question is whether the content of these letters could reasonably lead to the claimants developing expectations about the future conduct of the Government. It ruled that this was so, especially in light of the context and the other assurances and statements given by Spanish officials. The Tribunal also noted that Spain's regulatory conduct in 2010 suggested to the claimants that there would be no radical changes made to the economic regime (as said regulatory conduct involved extensive consultation with the solar energy sector, during which Spain received and accepted amendments proposed by the solar energy actors). The Tribunal also rejected the argument that the claimants did not perform proper due diligence (as according to Spain, that would serve as an obstacle to establish legitimate expectations). Thus, the Tribunal reached the conclusion that the claimants had a legitimate expectation that the original regulatory framework would not be changed in such a fashion that it would risk the security and viability of their investments.[408]

Therefore, the Tribunal next had to determine whether these expectations were frustrated by the regulatory changes introduced by Spain. The Tribunal was of the opinion that this was the case. It listed several ways the new regime is less beneficial to the claimants, and concluded that the original legal regime was changed at a fundamental and radical level. As a result, the Tribunal noted that:

> [C]laimants were deprived of the security and certainty that, in light of the assurances they had received from Spanish authorities about guaranteeing the legal security of investments underway as well as the forecasts under which the investments were made and affirming legal and regulatory stability, they could have expected. The changes went beyond anything that might have been reasonably expected by Claimants when they undertook their investment.[409]

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406 ibid paras 587-590.
407 ibid para 591.
408 ibid paras 591-596.
409 ibid para 599.

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Therefore, the legitimate expectations of the claimants were indeed frustrated. The Tribunal also refused to consider the reasonable return principle Spain attempted to use as a defending argument. The Tribunal found that the content of the legitimate expectations (based on the very assurances given by Spanish officials) was not reasonable return, but stability and regulatory certainty. Thus, by failing to provide that certainty and security by radically changing the legal regime, Spain also failed to protect the claimants' legitimate expectations. As a consequence, the fair and equitable treatment standard was violated by Spain according to the Tribunal.[410] Interestingly, the Tribunal refused to consider the additional arguments relating to the fair and equitable treatment standard or other elements of Article 10(1), noting that this failure to follow the fair and equitable treatment standard is sufficient to decide in favour of the claimants.[411] Thus, in 2019, the Tribunal found Spain liable for breaching the Energy Charter Treaty, followed by an award shortly after, in which the Tribunal determined the damages. The case is currently undergoing pending ICSID annulment proceedings.[412]

1.26. Infrared v Spain[413]

The claimants, all of United Kingdom nationality, made their investments (two concentrated solar power plants) in 2011. The decision to invest was approved by their investment committees at the end of June, and the subsequent investment took place at the end of July 2011. This occurred 19 months after said concentrated solar power plants were registered with the registry that was in place in Spain at the time, and 16 months before the plants were registered on the RAIPRE registry system (which was already mentioned regarding some other Spanish cases). When this investment was made, constructions were already undergoing on both plants, and there was an evident pressure on the project to finish the constructions by the time the RAIPRE registry system was to be introduced in Spain. While the decision to invest was being considered, the claimants allegedly undertook an extensive (legal, technical and otherwise) due diligence process from multiple different approaches.[414] The legal dispute between the claimants and the Spanish state emerged due to regulatory changes that took place in Spain's renewable energy-related legal framework starting from 2012 (already described *supra*). It was uncontested by both parties that the result of these changes was a decrease in the remuneration received by the claimants, compared to the regulatory framework as it was before the changes took place.[415] Over the course of the arbitral dispute, several breaches of the Energy Charter Treaty were alleged by the claimants, all related to Article 10(1) of the Treaty, and also including the fair and equitable treatment standard. An expropriation claim was also advanced.

410 ibid paras 597-601.
411 ibid para 602.
412 'Nextera v Spain' (International Energy Charter) <https://www.energychartertreaty.org/details/article/nextera-energy-global-holdings-bv-and-nextera-energy-spain-holdings-bv-v-spain-icsid-case-no/> 10 June 2021.
413 *InfraRed Environmental Infrastructure GP Limited and others v Spain*, ICSID Case No. ARB/14/12 (Award).
414 ibid paras 57-67.
415 ibid paras 68-72.

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However, it is the fair and equitable treatment-related aspect of the dispute what interests us. The claimants advanced three specific claims under the umbrella of the fair and equitable treatment standard: (i) that Spain violated an expectation of stability (the claimants alleged that they had a legitimate expectation that the original regulatory framework would remain stable during the relevant plants' operating life, or at least the plants would not be affected by any regulatory changes), (ii) that Spain behaved with arbitrariness (and thus violated an expectation of consistency) by commencing a complete paradigm shift of the regulatory framework, resulting in the essential characteristics of the original framework becoming defunct, and finally, (iii) that Spain acted in a manner that was not transparent (no due process, no forewarning in a timely fashion of affected investors, etc.). The Tribunal seemingly implicitly followed the claimants' categorization of fair and equitable treatment-related issues when it comes to the structuring of the award's analysis.[416]

In order to properly examine these claims, the Tribunal divided up its analysis of the fair and equitable treatment standard into the following four complex questions: (i) what is the legal standard applicable in assessing a host state's fair and equitable treatment obligation (with particular regards to whether it is strictly limited in scope to non-discrimination and/or minimum standard of treatment under international law, and whether due diligence on the part of the investors or the foreseeability of measures affect the analysis); (ii) whether there was a legitimate expectation on the part of the claimants that the original regulatory framework would remain unaltered, at least with regards to the relevant power plants, and whether this legitimate expectation (if real) was frustrated by Spain's measures; (iii) whether there was a legitimate expectation on the part of the claimants that there would be no radical or fundamental changes to the original regulatory framework, and whether this legitimate expectation (if real) was frustrated by Spain's measures; and finally, (iv) whether Spain acted without due process or the requisite transparency in its disputed conduct.[417] The Tribunal answered each question in turn (with the exception of the third question for reasons that will become real), analysing the parties' position before making their own conclusions. This is a logical structure from an analytical standpoint, and so we also strive to follow it in the parts below.

And so, we turn our attention to the first question posited by the Tribunal: the scope and legal assessment of the fair and equitable treatment standard within the context of the Energy Charter Treaty. The claimants' position was that the fair and equitable treatment standard provides more protection than a mere guarantee of non-discrimination or the minimum standard of treatment as found in customary international law. Rather, in their opinion, it includes the protection of legitimate expectations, the obligation to act in good faith, and the requirement of proportionality in the conduct of the host state. The claimants did not deny that host states had the freedom to regulate, but argued that they could be held responsible if their measures frustrated the legitimate expectations of the investors. The claimants took to support the more generalist position regarding the origin of legitimate expectations, noting that they can arise from the regulatory framework itself or implicit state undertakings. However, the claimants argued that even if the Tribunal could not identify such a legitimate expectation, there would still be a fair and equitable treatment-derived expectation of proportionality and consistency on the side of the investors, ergo the claimants. The claimants also posited that no comprehensive legal due diligence on

[416] ibid para 343.

[417] ibid para 344.

the part of investors was necessitated by the fair and equitable treatment standard, merely a requirement that the investors familiarize themselves with the relevant legal framework, and ensure that their investment is made in accordance with local laws.[418] Unsurprisingly, Spain's own interpretation of the scope of the fair and equitable treatment obligation exhausted itself at the prohibition of discrimination and equivalency with the minimum standard of treatment under customary international law. Interestingly, Spain also tried to argue that benefits provided to covered investors by the first and second sentences of Article 10(1) of the Energy Charter Treaty only apply during the actual investment-making process. In Spain's reading, once the investment is made, fair and equitable treatment stops at the afore-mentioned non-discrimination and minimum standard of treatment. Otherwise, Spain argued that legitimate expectations towards stability are only possible if a specific stabilization commitment was entered into by the host state (which Spain alleges is not the case here), and that a thorough legal analysis of the framework and potential expected changes is an essential part of the investor's due diligence.[419]

And now we turn to the Tribunal's own analysis of the scope and the standard's assessment, which occurred after it briefly reviewed existing arbitral practice. First, it immediately rejected Spain's argument that fair and equitable treatment is limited to non-discrimination, citing that arbitral tribunals had a shared understanding that fair and equitable treatment is a distinct standard closely linked to legitimate expectations (this was based on the Tribunal's interpretation of *Charanne v Spain, Isolux v Spain, Eiser v Spain* and *Novenergia v Spain*). However, it took the position that a specific commitment by the host state was necessary to establish a legitimate expectation of stability, referring to a number of cases such as *Charanne v Spain, Eiser v Spain, Parkerings* and others. The oft-mentioned balancing exercise also appeared in the Tribunal's reading here. By contrast, it accepted the concept of legitimate expectation of consistency, in that an expectation that the regulatory framework would not change radically or fundamentally can arise even in the absence of a specific commitment, provided the surrounding facts justify it. As for due diligence, the Tribunal referred to *Charanne v Spain*, and noted that since the majority of the plants' revenue (from the investors' perspective) came from state subsidies, it stands to reason that a stricter interpretation of due diligence is necessary.[420]

With these basic questions answered, the Tribunal moved on to the alleged legitimate expectation of stability. Here, the claimants' argument was essentially that a number of different representations and regulatory actions have essentially created a specific commitment on the part of Spain to maintain the regulatory stability of the original framework. Spain naturally rejected this argument, and claimed that in none of the actions and representations cited by the claimants could a stabilization clause, or any other specific commitment to regulatory stability be found.[421] The Tribunal's own analysis here relied chiefly on four cases: *Charanne*, *Isolux*, *Novenergia* and *Esier*. It noted that although no explicit stabilization clause can be found, certain representations and regulatory actions made by Spain clearly implicated that the power plants included in the afore-mentioned first registry would be shielded from further regulatory changes, and would continue benefiting from the advantages provided by the original regulatory framework for the duration of the plants' operating life. Thus, the Tribunal could find an identifiable and adequate origin for

418 ibid para 346.
419 ibid paras 347-348.
420 ibid paras 365, 350, 366, 368-371.
421 ibid paras 373-389.

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a legitimate expectation of stability to arise. Regarding due diligence, the Tribunal was of the view that even if it accepted Spain's argument that the investors should have carried out a more thorough legal analysis, it would not influence the legitimacy of expectations towards stability due to the afore-mentioned implicit commitment to stability by Spain. The Tribunal also noted that the arbitral tribunals in the four mentioned cases did not examine the same representations, hence creating distinguishing factors that led to a different legal interpretation of similar facts in the present case. Afterwards, it analysed the scope of this specific commitment, and found that Spain did indeed frustrate a legitimate expectation of stability in the context of the Energy Charter Treaty. Because of this conclusion, it also found it unnecessary to analyse the third question (expectation of consistency) out of practical reasons, as it would not lead to a difference in the quantum of damages.[422]

Thus, we can move on to the final question: whether Spain violated its duty of transparency and due process. The claimants' position was that the disputed measures were adopted alongside a number of irregularities that led to a period of harmful uncertainty. Spain's conduct in the claimants' view was not sufficiently forthcoming towards investors, and also failed to disseminate to the public two (in the claimants' view, critically important) reports by consulting firms, among others purported issues of transparency and due process. Spain's own position was that it announced the disputed measures in a timely fashion, and that the adoption of the measures complied with all public consultation procedures mandated by Spanish administrative law. Spain also brought counter-arguments to the smaller issues posited by the claimants (such as the voluminous nature of some ministerial orders, which Spain justified with the comprehensive nature of the reforms and the complexity of the subject matter).[423] The Tribunal's own findings were that Spain did not breach these particular obligations. Analysing the facts of the case, it found that Spain announced the regulatory reforms sufficiently in advance, and the consultation process followed Spanish administrative law. Though it acknowledged that these transparency-related proceedings might have been imperfect, concentrated solar power producers and investors were given more than sufficient opportunities to engage with Spain's authorities regarding the subject. Thus, there was no violation of this particular aspect of fair and equitable treatment by Spain in the Tribunal's opinion. The Tribunal also noted that even if it did find a breach, it would not be materially relevant to the case.[424]

All in all, an award was rendered in favour of the claimants in 2019, owing to the frustration of their legitimate expectations towards stability, and thus violating the fair and equitable treatment obligation found in Article 10(1) of the Energy Charter Treaty. The case is currently undergoing pending ICSID annulment proceedings.[425]

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422 ibid paras 390-456.

423 ibid paras 457-467.

424 ibid paras 470-475.

425 'Infrared v Spain' (International Energy Charter) <https://www.energychartertreaty.org/details/article/infrared-environmental-infrastructure-gp-limited-and-others-v-spain-icsid-case-no-arb1412/> accessed 16 June 2021.

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CONCLUSIONS

Throughout the book, we have thoroughly analyzed the fair and equitable treatment standard and the legitimate expectations of the foreign investors within the context of the Energy Charter Treaty in the available arbitral practice. Some cases, like the Yukos cases, were not included into this analysis, because in some sense they comprise a kind of independent unit within the Energy Charter Treaty related arbitral practice, and from academic perspective it is worth devoting a whole new study to their examination. Others, such as certain Czech green energy cases, are closely tied to already processed cases, hence their analysis was not warranted. Finally, as already referred to in the introduction of the book, many Energy Charter Treaty related cases have ended in settlement agreements or otherwise, their awards are not public, thus, we could not research them. Regardless, this book can easily serve as a comprehensive treatise on fair and equitable treatment and legitimate expectations in the context of the Energy Charter Treaty.

Analyzing the cases from the perspective of the fair and equitable treatment standard, it is possible for us to set up certain common patterns. We generally follow the structure of the theoretical part of the book, so we first begin with certain observations concerning the wider fair and equitable treatment standard, and then we turn our attention towards the legitimate expectations (sub)-standard.

The first issue that most tribunals encountered related to the cases we examined, was determining the nature and content of the fair and equitable standard. The root of this problem is in the way of how the fair and equitable treatment standard is presented in the Energy Charter Treaty (as we also discussed earlier in the book). Article 10(1) seemingly ties the standard to the stable, equitable, favorable and transparent conditions obligation, however, without a more express and clear association, it is difficult for tribunals to determine its exact scope. As we have observed throughout the analyzed case law, tribunals took diverse views towards what constitutes fair and equitable treatment, how it can be categorized in the context of the Energy Charter Treaty's other identifiable standards and obligations. In general, most tribunals seem to agree at least that the fair and equitable treatment standard is an autonomous standard that bears examination independently, when raised by the claimant. Its relationship to the other standards found in Article 10(1) greatly varies depending on the given tribunal, however. Some awards we have studied connected the fair and equitable treatment standard to the obligation of creating and encouraging stable, equitable, favorable, and transparent conditions. Whether the fair and equitable treatment standard is part of this obligation, or other way around, or if the two are independent of each other, but the obligation regardless forms the content of the fair and equitable treatment standard, seems to greatly vary, depending on the case examined. Another interesting facet is whether constant protection and security (third sentence of Article 10(1)) falls under the fair and equitable treatment. Many tribunals seemingly treated this obligation as a separate standard from fair and equitable treatment, but a handful categorized it under the purview of fair and equitable treatment. We can observe similar diversity of opinions when it comes to transparency, impairment by unreasonable or discriminatory measure.

In general, we could observe, that host states very typically try to argue that fair and equitable treatment is synonymous with the minimum standard of treatment as found in customary international law. By contrast, claimants almost always attempt to argue that

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fair and equitable treatment goes beyond this original standard with its scope. From our point of view, it seems that tribunals often agree with claimants in this context, and very often reject the argument that the fair and equitable treatment standard exhausts itself in the minimum standard of treatment. Though, of course, this does not seem to be a universal rule when it comes to tribunals.

So, if we accept that the fair and equitable treatment standard moves beyond the minimum standard of treatment, then the next question that arises is: in what respects is it more than the minimum standard. As noted with regards to categorization, several tribunals have attempted to determine a list or just a general group of elements that serve as constituent parts of the fair and equitable treatment standard, typically based on their reading of Article 10(1): reasonableness, stability, transparency, due process compliant host state conduct, and so on. However, out of all the tribunals we examined, the vast majority seemingly accepted the proposition that the central part of the fair and equitable treatment standard is the protection of the investors' legitimate expectations.

Thus, it stands to reason that we too should focus on this standard, or rather sub-standard of fair and equitable treatment, when it comes to drawing conclusions from the available case law. There are some general observations we can make here. Without fail, the vast majority of the tribunals agreed upon a number of core concepts relating to legitimate expectations. The first of these is that the protection of legitimate expectations is an objective standard, meaning that the focus is not on the subjective perspective of the investor, but rather what objective expectations could be established, based on the consideration of all the circumstances of the given case. Furthermore, another important point that was established by most tribunals, was that legitimate expectations can exist only at the time when the investment is made. Most tribunals agreed that this time was when the investor made the final decision to realize the investment, and at which point there was no return without cost from making the investment. However, we have to note, that in some cases, this point of time was under question, or there were attempts by the claimants to present legitimate expectations that arose later than when the investment was made. Furthermore, most tribunals agreed that any legitimate expectation must be reasonable and proportionate. And finally, most tribunals were in accord that a level of necessary legal due diligence was required on the part of the investor, though different standards of due diligence were established by different tribunals. However, most seemed to concur that perfect due diligence was not a requirement here.

Through a succession of tribunals, various tests were devised regarding legitimate expectations. In the *Antaris v Czech Republic* case, for instance, the tribunal established that the claimant should prove that the clear and explicit (or implicit) representation was attributable to the host state, that it was reasonably relied upon by the claimant, but subsequently repudiated by the host state. By contrast in *PV Investors v Spain*, the arbitral tribunal utilized a similar, but still different three-pronged test, or rather, method: (i) there must have been specific commitment given to the investor by the host state, (ii) this reliance must have been considered reasonable, based on the given circumstances, and (iii) legitimate expectations must be balanced with the host state's right to regulate in the tribunal's consideration of said expectations. The tribunal in the *Voltaic v Czech Republic* case also devised a legitimate expectations test (consisting of four steps in this case): (i) whether the host state committed to regulatory stability or otherwise assured the investor of it, (ii) whether the investor relied on this assurance or commitment in an effective manner, (iii) whether this reliance can be considered reasonable, based on the given

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circumstances, (iv) whether there was a violation of the investor's legitimate expectations by the host state. As we can observe, these tests are largely similar to each other, though there are certain differences. Namely, while in the case of *Antaris* and *PV Investors*, the test only mentions a specific commitment without further qualification, the *Voltaic* test stresses the importance of the host state committing to regulatory stability (we return to this subject later in the conclusions). Similarly, *PV Investors* stands out for mentioning the host state's right to regulate directly, while the other two do not do so. However, they all seem to concur on the necessity of the investor relying on the commitment/assurance, and that this reliance was reasonable.

As already mentioned regarding the tests, the origin of the legitimate expectation must be a commitment or representation. But the view of the tribunals on what constitutes a commitment seems to be different. In general, we can differentiate between two bigger "schools of thought" (which can be further divided up into sub-schools): that a so-called specific commitment from the host state is necessary, and an alternative approach which holds that general commitments and representations, or even the regulatory framework itself, can also serve as a foundation for legitimate expectations. In the first case, tribunals following this view generally tended to agree that a specific and explicit commitment from the host state to the foreign investor was sufficient to establish legitimate expectation. However, there were severe divergences regarding what can be considered a specific commitment: some tribunals rejected treating assurances given by Government officials as specific commitments for example. A similar divergence of views can be observed when it comes to interpreting Government communications made to a group of investors, instead of one specific investor. However, tribunals following this "school of thought" seemed to generally agree that the only case where laws or regulations could serve as a foundation for legitimate expectations is when they included explicit stabilization clauses, or otherwise, it was possible to pinpoint a single provision (or provisions) of the legislation that could be clearly interpreted as a commitment by the host state. The other "school of thought" also accepts the first "school's" instances regarding the origination of legitimate expectations, but adds the view that general and implied commitments can also potentially serve as sources of legitimate expectations on the part of investors. This view chiefly focuses on establishing legitimate expectations based on the regulatory framework, even in the absence of a specific stabilization clause, or in general, provisions that could be clearly interpreted as commitments. However, there are some interesting issues present here, such as the question of whether for example a preamble stating the host state's desire to encourage and protect foreign investment can be read as a general commitment, or whether it was possible to read out an implied commitment from the whole of the regulatory framework and the general conduct of the host state when dealing with foreign investors. The arbitral tribunals gave differing answers to these conundrums.

The scope and content of legitimate expectations also raised some interesting questions. As we already mentioned earlier in the conclusions regarding fair and equitable treatment in general, host states usually attempt to argue that the scope and content of legitimate expectations end at the minimum standard of treatment. Another common argument (we had seen examples of both Spain and Hungary using the argument, for instance) is that foreign investors could only legitimately expect a reasonable rate of return on their investment. In contrast, most investors seem to push forward the notion that legitimate expectations are expectations towards the regulatory stability of the host state's framework, typically for the duration of the operating life of the investor's investment. Tribunals seemed to vary in their interpretation, though most seemed to accept the base notion that a legitimate expectation could be angled towards regulatory stability. However, they also usually stressed simultaneously that even a legitimate expectation towards regulatory stability cannot mean the crystallization of regulation, as the evolution of the regulatory framework is always a given.[426]

Related to this, tribunals frequently emphasized that host states have a sovereign right to regulate, and this right cannot be superseded by international obligations, like the Energy Charter Treaty. The main reason for this is the evolutionary character of economic life (*EDF (Services) Limited v Romania*). Conversely, foreign investors are also entitled to protection by the Energy Charter Treaty. Therefore, tribunals often stressed that there must be a balance exercised between the right to regulate in the interest of some public policy objective, and the interests of foreign investors. In connection with this exercise, the requirements of reasonableness and proportionality are often mentioned by the tribunals (reasonableness is also referred to with regards to the investors' reliance on expectations as mentioned earlier). Perhaps the *RREEF v Spain* case summarizes these aspects best: proportionality means that the host state's measures are not random, arbitrary or unnecessary, and they do not modify the framework in a way that is unnecessarily harmful to the investors, while reasonableness means in the tribunal's reading that the following requirements are fulfilled: legitimacy of purpose (ergo, it represents the interests of society as a while, and it does not change the substance of relevant rights), necessity (there is a pressing social need that has to be met, this is a higher standard than usefulness or desirability), suitability (the regulatory exercise must be suitable to achieve the legitimate purpose). Other tribunals followed similar logic when analyzing reasonableness and proportionality (or their negative counterparts, arbitrariness, discriminatory character of measures, etc.). In the case of some tribunals, their reasoning focused on the question of whether the host state modified the essential characteristics of the original regulatory framework on which the investor's legitimate expectations were based. Furthermore, it is important to note, that while some tribunals focused on these issues from the perspective of legitimate expectations, others also examined the reasonableness and proportionality of the host state's conduct in the general context of fair and equitable treatment. Transparency is also sometimes added to this, though it is also some other times separated from fair and equitable treatment (as already mentioned earlier).

And finally, some general observations. First, it seems clear that tribunals do not rely exclusively on Energy Charter Treaty related arbitral practice (though it plays a rather prominent role in many awards), but also refer to general investment arbitral practice in order to advance their interpretation of fair and equitable treatment. The parties to the disputes also seem to follow this approach in their argumentations. Second, the case law related to green (renewable) energy, with respect to Spain, the Czech Republic and Italy, shows a developmental path, how the reasonings of the tribunals evolved, and how the afore-mentioned divergent positions came to being. This is evidenced by how frequently tribunals invoked earlier cases related to the same regulatory conduct, either to build upon them their own arguments, or to reject them due to differing circumstances or legal interpretation on the part of the tribunal.

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[426] Regarding the potential for the crystallization or chilling of host state regulations, see in general: Gábor Hajdu, 'Regulatory Chill: The Hidden Dangers of Investment Arbitration for EU Countries' in Renáta Kocúrová, Róbert Frimmel (eds), *Sociálne vedy z perspektívy mladých vedeckých pracovníkov II: Zborník príspevkov z konferencie mladých vedeckých pracovníkov* (Univerzita sv. Cyrila a Metoda v Trnave 2018) 37.

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All in all, we can conclude that the question of fair and equitable treatment in the context of the Energy Charter Treaty is still the most important issue. The arbitral practice, though showing common patterns and positions in some respects, is still very colorful. However, we can at least note, that with regards to several aspects of fair and equitable treatment, tribunals now have clearer (if differing) positions to base their own positions on. The issue of legitimate expectations seems to have completely subsumed fair and equitable treatment in the majority of cases, either being the sole object of examination within the standard's context, or being central element to which the tribunal devoted most of its attention. Further developments will likely make this trend clearer, and we can conjecture that predominance of legitimate expectations within this context will continue, though whether a more unified reading can emerge is a different question: the fact that common and nearly universally accepted elements have already come into being is promising, but we still cannot truly pinpoint any sort of real convergence in a number of key issues.

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427 The source for these cases: 'List of cases' (International Energy Charter) <https://www.energychartertreaty.org/cases/list-of-cases/> accessed 4 July 2021.

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