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The Role of Investor-State Tribunals in Determining the Scope and Content of the Fair and Equitable Treatment Standard – Legitimate Expectations and Proportionality

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The Role of Investor-State Tribunals in Determining the Scope and Content of the Fair and Equitable Treatment Standard – Legitimate Expectations and Proportionality

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Introduction

In recent years, the legitimacy of the investor-State dispute settlement ("**ISDS**") has been called into question and several initiatives, such as the UNCITRAL Working Group III, are currently looking at various ways to enhance such legitimacy and ensure the sustainability of ISDS. In this respect, certain scholars like Professors Sornarajah[1] and van Harten[2] claim that the interpretative process undertaken by investor-State tribunals has contributed to this legitimacy crisis among others because the application of vague standards, such as fair and equitable treatment ("**FET**"), involves applying subjective notions of what adjudicators perceive as desirable developments of investment law. By contrast, other academics like Professors Schreuer[3] and Franck[4], while opining that the FET standard is flexible by design, consider that this flexibility "may be a virtue rather than a shortcoming"[5] because it allows tribunals to adapt and apply bilateral investment treaties ("**BITs**") or free trade agreements ("**FTAs**") to evolving realities and to engage in a gap-filling function.[6] Notwithstanding their disagreement as to whether the flexibility granted to investor-State tribunals by most BITs enables tailor-made and efficient solutions or undermines the legitimacy of ISDS,

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[1] M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 246-247 (2015).
[2] Gus Van Harten, *The Problem with Foreign Investor Protection* 62, 64 (2020).
[3] Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE (3) 357, 364-365 (2005).
[4] Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1589 (2005).
[5] Schreuer, *supra* note 3, at 365.
[6] Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 73 BRITISH Y.B. INTL LAW 104 (1999) ("On the other hand, the vagueness inherent in the plain meaning approach is not altogether disadvantageous. In some circumstances, both the States and the foreign investors may view lack of precision as a virtue, for it promotes flexibility in the investment process. Investment treaties and contracts are almost invariably prepared in advance of the projects to which they will be applicable; and, usually the parties to these treaties and contracts cannot predict the range of possible occurrences which may affect the future relationship between the State and particular investors.").

the above-mentioned scholars agree on the fact that tribunals have made ample use of such flexibility to determine the scope and content of the FET standard.

Yet, despite the wide acknowledgment of the central role of investor-State tribunals in developing the content of the FET standard and determining its current scope, very few academic publications have focused on how exactly tribunals have developed, justified, and ultimately shaped such scope and content. However, without a more accurate understanding of what investor-State tribunals have been doing when interpreting the FET standard, any attempt to revise BITs, in particular FET clauses, in order to circumscribe the scope of the FET standard and address the current backlash against FET clauses is doomed to fail. Thus, to fill this lacuna, there is a critical need to examine the role of investor-State tribunals from an academic perspective. In this Essay, I attempt to lay the cornerstone of this ambitious project by considering *inter alia* (i) what criteria and factors have the tribunals considered under the FET standard, (ii) what evidentiary standards have the tribunals applied in relation to the FET standard, (iii) what are the key cases that tribunals have most often referred to, (iv) how these key cases shaped the FET standard; and (v) whether there has been a temporal evolution, expansion or contraction of the FET standard.

With these objectives in mind, I conducted an empirical review of the ISDS awards rendered until the end of 2021 in which the tribunal addressed FET claims by foreign investors. The empirical review mainly consists of two different parts. First, statistical analyses attempting to identify the most cited cases and whether correlations can be evidenced between, on the one hand, references to certain cases and, on the other hand, final outcomes reached by investor-State tribunals. Second, a more granular review of certain fundamental cases in order to identify how investor-State tribunals have relied

on, or distinguished, previous awards or adopted different legal perspectives when determining the components and scope of the FET standard. In this regard, while the empirical review encompassed most, if not all, of the components of the FET standard, the present Essay focuses on two specific components that I deemed both relevant and significant. First, this Essay addresses how the concept of legitimate expectations, which has come to form the dominant element of the FET standard, has been developed, justified and circumscribed by investor-State tribunals, and how such concept has evolved over time (**Section I**). Second, I focus on how the principle of proportionality has slowly become an integral part of the FET standard and seemed to be gaining momentum very recently (**Section II**).

I. Legitimate Expectations

Over the last 20 years, the concept of legitimate expectations has imposed itself as "the dominant element" of the FET standard,[7] and much ink has been spilled over its precise contours by various investor-State tribunals. Interestingly, the formulation "legitimate expectations" is not mentioned in the various FET provisions contained in BITs or FTAs. Therefore, the very concept of legitimate expectations constitutes a perfect place to begin reviewing the role of investor-State tribunals in shaping the scope and content of the FET standard because it is a typical product of the case law developed over time by such tribunals.

In this regard, I will first provide some brief statistical analyses relating to (i) the predominant position of the concept of legitimate expectations within the FET standard,

[7] Saluka Investments BV v. Czech Republic, Permanent Court of Arbitration (UNCITRAL), Partial Award, ¶ 302 (Mar. 17, 2006), IIC 210 (2006) [hereinafter *Saluka*].

and (ii) the investor-State awards that have shaped such concept (**Section 1.1**).[8] In addition to the above-mentioned statistical analyses, I have conducted a more granular review of FET awards in order to determine the role that arbitral tribunals played in the development of the concept of legitimate expectations and the definition of the scope of such concept. This in-depth review of FET awards brought to light two main aspects relating to the development of legitimate expectations by investor-State tribunals. First, the emergence of the concept of legitimate expectations as part of the FET standard occurred very rapidly, and the fundamental position attributed to legitimate expectations within the realm of such standard has seldom been called into question (**Section 1.2**). Second, the role, the specific contours and the exact content of the notion of legitimate expectations have been, and still are, the subject of much debate and controversy between investor-State tribunals (**Section 1.3**).

1.1. Statistical Analyses

The predominance of the concept of legitimate expectations is entirely confirmed by looking at the statistics. Indeed, out of 196 reviewed awards, investor-State tribunals addressed legitimate expectations in 140 awards, meaning that legitimate expectations were discussed in 71.43% of all cases. In comparison, the second and third components of the FET standard that tribunals addressed most frequently, namely "arbitrary and discriminatory treatment" and "denial of justice", are only dealt with in 63 and 54 cases respectively.

Turning to the investor-State cases that are most often cited by tribunals in absolute terms when assessing an FET claim based on a breach of legitimate expectations, it is

[8] While more detailed statistical analyses will be ran based on the empirical review performed, they unfortunately were not ready at the date this Essay was due.

unsurprising that those are also the earlier cases. In this regard, the most-cited case is *Saluka* (51 citations) followed by *Tecmed* [9] (48 citations), and *LG&E* [10] (34 citations). However, I submit that a more accurate assessment of the significance of each case can be reached by looking at the number of citations in relative terms. Indeed, absolute citations unduly favor earlier cases as more investor-State awards were issued after them and they thus have had more opportunities to be referred to. Interestingly, looking at case citations in relative terms, certain more recent cases appear. While *Saluka* still finds itself in the leading position by being referred to in 38.93% of cases and *Tecmed* remains high as well (35.04%), *Charanne* [11] appears towards the top of the ranking by reaching 33.93%.

Finally, based on our statistical analyses, it is difficult to clearly identify cases that would consistently be used in support of a finding of FET breach or, conversely, in support of the absence of an FET breach. As a matter of fact, investor-State tribunals are often referring to a wide range of prior awards to set forth the scope and content of legitimate expectations before conducting their legal analysis on the basis of the facts of the case. This in turn means that it is difficult, if not impossible, to identify how much weight a specific tribunal placed on each case that it previously cited.

Overall, when investor-State tribunals have assessed the merits of the case, claims for breach of legitimate expectations have been successful in 57.72% and unsuccessful in 42.28%. In this regard, it is interesting to note that, when certain cases are referred

[9] Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 10 ICSID Rep 130 (2007) [hereinafter *Tecmed*].
[10] LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), IIC 152 (2006) [hereinafter *LG&E*].
[11] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain, SCC Case No. 062/2012, Final Award (Jan. 21, 2016), IIC 758 (2016) [hereinafter *Charanne*].

to in the award, claims for breach of the FET standard tend to be slightly less successful. In particular, the following three cases seem to illustrate and confirm this observation: (i) *Duke Energy*,[12] cited in 18 awards of which only 27.78% found an FET breach; (ii) *Continental*,[13] cited in 14 awards of which only 35.71% found an FET breach; and (iii) *Parkerings*,[14] cited in 26 awards of which 50% found an FET breach.[15] This finding is not necessarily surprising when considering that each of these three cases emphasized certain limitations to the concept of legitimate expectations. The *Duke Energy* award emphasized that the political, social and economic background of the host State was relevant when assessing whether the investor's expectations were legitimate.[16] The *Continental* tribunal outlined the "reduced expectations" that are engendered by "general legislative statements" and, more generally, recalled the importance of specific commitments, assurances or representations by the host State in the assessment of legitimate expectations.[17] As to the *Parkerings* award, it recalled "the State's undeniable right and privilege to exercise its sovereign legislative power", including the right to enact, modify or cancel a law, except "for the existence of an agreement, in the form of a *stabilisation* clause or otherwise".[18] The *Parkerings* tribunal also specified that investors' right of protection of their legitimate expectations were conditioned upon the exercise of due diligence.[19]

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[12] Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008), IIC 333 (2008) [hereinafter *Duke Energy*].

[13] Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sep. 5, 2008), IIC 336 (2008) [hereinafter *Continental*].

[14] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (Sep. 11, 2007), IIC 302 (2007) [hereinafter *Parkerings*].

[15] The claim here is not that these numbers are statistically significant, but rather that they evidence a certain trend and might be instructive in general.

[16] *Duke Energy*, at ¶ 340.

[17] *Continental*, at ¶ 261.

[18] *Parkerings*, at ¶ 332.

[19] *Id.*, at ¶ 333.

In conclusion, these brief statistical analyses not only evidence the predominance of the concept of legitimate expectations within the FET standard, but also provide some insights into the relevance and importance of certain cases, which are mostly in line with the observations that can be made based on a more detailed and qualitative review of investment awards to which I now turn.

1.2. The Fulgurant Emergence of the Concept of "Legitimate Expectations"

While a very significant number of BITs were signed during the 1990s, investor-State arbitration really gained momentum in the early 2000s. Looking more specifically at cases in which investor-State tribunals addressed and adjudicated claims for breach of the FET standard, the following number of awards were rendered yearly.

2000	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**
4	4	4	5	4	5	4	9	13	7	12
2011	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**
11	15	12	15	8	12	6	16	20	22	8

A review of the early awards evidences not only that the concept of legitimate expectations was rapidly considered as forming part of the FET standard, but also that such concept was swiftly endorsed by investor-State tribunals as constituting the main element of that standard.

In this regard, while the *CME* tribunal did not explicitly mention the investor's expectations in its award, it can reasonably be considered as a precursor of this concept. Indeed, the tribunal held that the Czech Media Council's interference with the investor's contractual arrangements constituted a breach of the FET standard "by

evisceration of the arrangements in reliance upon with [*sic*] the foreign investor was induced to invest."[20]

However, while *CME* laid the foundation for the emergence of the concept of legitimate expectations, the foundational award in this respect is *Tecmed*, in particular the following *obiter dictum*:

> "[The FET clause], 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. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial

[20] CME Czech Republic B.V. v. Czech Republic, Ad Hoc Tribunal (UNCITRAL), Partial Award, ¶ 611 (Sep. 13, 2001), 9 ICSID Rep 121 (2006) [hereinafter *CME*].

> and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instrument, and not to deprive the investor of its investment without the required compensation."[21]

In *Tecmed*, the tribunal engaged neither in an interpretation of the relevant FET clause in accordance with the 1969 Vienne Convention on the Law of Treaties ("**VCLT**"), nor in a review of customary international law. In fact, the tribunal reached the above conclusion through a two-step analysis. First, the tribunal recalled that the FET standard was "an expression and part of the *bona fide* principle recognized in international law".[22] When doing so, it relied on (i) a publication by Brownlie, a British international law scholar, and on (ii) the award rendered in the *S.D. Myers* case, which provided that the FET clause "imports into the NAFTA the international law requirements of due process, economic rights, *obligations of good faith* and natural justice".[23] In a second step, the tribunal held that the host State's obligation to ensure a treatment that does not affect the foreign investor's basic expectations resulted from "the good faith principle established by international law".[24] While one can probably argue whether the first step of the analysis rested on a sound legal basis, the legal basis for the second step was not expressly set out and remained somewhat obscure. That is not to say that this step was wrong as a matter of law. The fact that the obligation not to frustrate the foreign investor's basic expectations formed part of the principle of good

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[21] *Tecmed*, at ¶ 154.
[22] *Id.,* at ¶ 153.
[23] S.D. Myers, Inc. v. Government of Canada, Ad Hoc Tribunal (UNCITRAL), Partial Award, ¶ 134 (Nov. 13, 2000), 40 ILM 1408 (2001) [hereinafter *S.D. Myers*] (emphasis added).
[24] *Tecmed*, at ¶ 154.

faith under international law may have been supported by various sources, e.g., comparative law or international public law. Interestingly, a comparative analysis of domestic legal systems belonging to both the civil law and common law traditions was performed by the *Total* tribunal a few years later and resulted in a finding that the protection of legitimate expectations was recognized in some form or another in many jurisdictions.[25] Relying on the *Total* award, as well as on (i) academic scholars, (ii) domestic court decisions, and (iii) the legal opinion of the foreign investor's expert in the case, the *Gold Reserve* tribunal held the following:

> "Based on converging considerations of good faith and legal security, the concept of legitimate expectations is found in different legal traditions according to which some expectations may be reasonably or legitimately created for a private person by the constant behavior and/or promises of its legal partner, in particular when this partner is the public administration on which this private person is dependent."[26]

With that in mind, the *Gold Reserve* tribunal considered that the legal sources of the protection of the investor's legitimate expectations as part of the FET standard "are to be found in the comparative analysis of many domestic legal systems".[27]

In addition to a comparative analysis of national laws, the *Total* tribunal assessed the content of public international law relying *inter alia* on (i) the International Court of Justice and (ii) the "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" issued by the International Law Commission in

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[25] Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶¶ 128-130 (Dec. 27, 2010), IIC 484 (2010) [hereinafter *Total*].

[26] Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶ 576 (Sep. 22, 2014), IIC 660 (2014) [hereinafter *Gold Reserve*].

[27] *Id.*

2006.[28] Based on such assessment, the tribunal considered that, from an international law perspective, "unilateral acts, statements and conduct by States may be the source of legal obligations which the intended beneficiaries or addressees […] can invoke".[29] Even though such finding appeared to be derived from the principle of estoppel, it nonetheless lent some support to the fact that legal concepts having similar effects to the concept of legitimate expectations were not completely foreign to international law.

In other words, while *Tecmed* did not provide a robust and detailed legal basis in support of the fact that the concept of legitimate expectations formed part of the FET standard, this gap was later filled by other investor-State tribunals, in particular *Total.* In this regard, it is interesting to note that the detailed legal analysis performed in the *Total* award came only after (i) a few scholars had pointed out the fact that the *Tecmed* "standard" was unsupported by any authority,[30] and (ii) the Ad Hoc Committee in the *MTD Equity* case had expressed some skepticisms regarding both the legal basis underlying such standard as well as its conformity with international law.[31]

Yet, despite the fact that *Tecmed* did not refer to any legal authority and provided little, if any, legal basis, the ossification of the concept of legitimate expectations occurred very quickly (and before the *Total* award). Indeed, in the months and years following *Tecmed*, a series of awards addressing alleged FET breaches referred to and cited *Tecmed* without questioning the accuracy and validity of the underlying legal

[28] *Total*, at ¶¶ 131-134.
[29] *Id.*, at ¶ 131.
[30] Zachary Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex*, 22 ARB. INT'L 28 (2006).
[31] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment, ¶¶ 66-67 (Mar. 21, 2007), IIC 177 (2007) [hereinafter *MTD Equity (Ad Hoc Committee)*].

reasoning.[32] As a result, less than three years after the *Tecmed* award, and even though only 11 awards addressing the FET standard had been rendered in the meantime, the *Saluka* tribunal held that the notion of legitimate expectations was "the dominant element of that standard".[33]

The jurisprudential effects that the *Saluka* award had on the development of the concept of legitimate expectations are twofold. On the one hand, by holding that the concept of legitimate expectations constituted the "dominant element" of the FET standard,[34] the *Saluka* tribunal entrenched such concept as forming an integral and essential part of FET. On the other hand, by holding that foreign investors' expectations are protected only to the extent that they "rise to the level of legitimacy and reasonableness in light of the circumstances",[35] the *Saluka* tribunal opened the door to an entirely novel and complex issue, namely what factors should be taken into account when assessing whether the investor's expectations are legitimate and reasonable.

However, before addressing that issue in more detail in Section 1.3, it is interesting to note that the ongoing debates and controversies around the concept of legitimate expectation have neither impaired its development, nor called into question the fact that it constitutes the fundamental element of the FET standard. On the contrary, several recent awards evidence an emerging trend according to which numerous concepts that were previously considered to constitute independent elements of the FET standard (beside legitimate expectations) have now been found to form part of the concept of

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[32] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004), IIC 174 (2004) [hereinafter *MTD Equity*]; Occidental Exploration and Production Company v. Republic of Ecuador, LCIA Case No. UN3467, Final Award (Jul. 1, 2004), IIC 202 (2004) [hereinafter *Occidental I*]; CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), IIC 65 (2005) [hereinafter *CMS*].

[33] *Saluka*, at ¶ 302.

[34] *Id.*

[35] *Id.,* at ¶ 304.

legitimate expectations, in particular: (i) the obligation to ensure "a stable legal and regulatory framework";[36] (ii) the "principle of proportionality";[37] (iii) the "obligation of transparency and consistency";[38] and (iv) the "obligation of good faith".[39] While it remains to be seen whether this trend will be confirmed in the future, it is fair to say that the concept of legitimate expectations has expanded to such an extent that it is about to swallow the entire FET standard.

1.3. The Evolution of the Scope and Content of Legitimate Expectations

While the emergence of the concept of legitimate expectations occurred very rapidly and without much controversy between various investor-State tribunals, its exact scope and content have been the subject of much debate and controversy, so much so that many important issues remain unsettled in ISDS jurisprudence.

As mentioned above, by finding that foreign investors' expectations must "rise to the level of legitimacy and reasonableness in light of the circumstances" in order to be protected under the FET standard,[40] the *Saluka* tribunal triggered a judicial dialogue among investor-State tribunals. To this day, this judicial dialogue has revolved around the factors and elements that a tribunal may or shall take into consideration when assessing whether the foreign investor's expectations are *legitimate*. While investor-State tribunals seem to have reached a consensus on certain factors and elements, the specific contours of others remain in dispute up until now. Against this background, this section aims at reviewing (i) how the judicial understanding of certain factors and

[36] Foresight Luxembourg Solar 1 S.à.r.l. and others v. Kingdom of Spain, SCC Case No. V 2015/150, Final Award, ¶ 352 (Nov. 14, 2018) [hereinafter *Foresight*].
[37] *Charanne*, at ¶¶ 513-514.
[38] *Foresight*, at ¶ 361.
[39] *Foresight*, at ¶ 362.
[40] *Id*.

elements by investor-State tribunals has crystallized over time through consistent jurisprudence, (ii) how, by contrast, disputes have emerged between tribunals as to the relevancy, scope and weight of certain factors and elements over time, and (iii) how tribunals have adopted different legal perspectives, which in turn have reshaped the judicial debate and borne on the analysis of legitimate expectations.

In this respect, I have tracked the temporal evolution of the following factors and elements in ISDS jurisprudence: (i) the subjective or objective nature of the foreign investor's expectations (**Section 1.3.1**); (ii) the point in time at which the foreign investor's expectations must exist, including in the specific case of expansion of the investment over time (**Section 1.3.2**); (iii) the existence (or absence) of specific commitments, assurances or representations by the host State, either expressly or implicitly (**Section 1.3.3**); (iv) the social, political and economic background of the host State, as well as the industry sector (**Section 1.3.4**); and (v) the conduct of a due diligence process by the foreign investor prior to its investment (**Section 1.3.5**).

1.3.1. The "Objective" Reasonableness of the Foreign Investor's Expectations

With regard to the scope of legitimate expectations, the *Saluka* tribunal observed that a literal understanding of the FET standard set forth in *Tecmed* "would impose upon host States obligations which would be inappropriate and unrealistic".[41] Thus, the *Saluka* tribunal held that:

> "[…] the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their

[41] *Id.*

> expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances."[42]

In addition, the tribunal clarified that investors may not "reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged", and that ascertaining whether the foreign investor's expectations were frustrated required to perform a balancing exercise taking into consideration "the host State's legitimate right subsequently to regulate domestic matters in the public interest."[43] In other words, the *Saluka* award made it clear that (i) the concept of legitimate expectations entails an objective standard and (ii) the investor's expectations must be reasonable and legitimate in light of all the relevant circumstances. These findings have been unanimously accepted by subsequent investor-State tribunals. As stated more recently by the *Charanne* tribunal:

> "A finding that there has been a violation of investor's expectations must be based on an objective standard or analysis, as the mere subjective belief that could have had the investor at the moment of making of the investment is not sufficient. Moreover, the application of the principle accordingly depends on whether the expectation has been reasonable in the particular case with relevance to representations possibly made by the host State to induce the investment."[44]

Once it has been established that the legitimacy and reasonableness of an investor's expectations must be assessed from an objective perspective taking all relevant circumstances into account, two further issues arise, namely (i) when is the relevant

[42] *Id.*
[43] *Id.*
[44] *Charanne*, at ¶ 495.

point in time to perform this assessment, and (ii) what circumstances may be relevant. I will now turn to these two issues.

1.3.2. The Timing of the Foreign Investor's Expectations

Together with the fact that the reasonableness and legitimacy of the foreign investor's expectations must be assessed objectively, the time at which such expectations need to arise in order to be protected under BITs constitutes one of the most undisputed issues between investor-State tribunals.

Very early ISDS cases recognized implicitly that the investor's expectations had to exist at the time of the investment. The *Tecmed* tribunal held that the host State had to refrain from affecting "the basic expectations that were taken into account by the foreign investor to make the investment",[45] thus impliedly considering that only expectations taken into account by the investor at the time of the investment were protected. The first ISDS award to expressly confirm that the investors' legitimate expectations must exist at the time of the investment was rendered in the *LG&E* case. In its award, the tribunal held that the investor's legitimate expectations had to be "based on the conditions offered by the host State *at the time of the investment.*"[46] Thus, it is settled case law that the relevant point in time for the assessment of a foreign investor's legitimate expectations refers to the time at which the investment is decided *and* made.[47]

However, an investment in a foreign State is in principle a long and evolutionary process, which can hardly be reduced to a single and specific point in time, so that the issue arises as to when a specific investment should in fact be considered as made.

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[45] *Tecmed*, at ¶ 154.
[46] *LG&E*, at ¶ 130.
[47] *CMS*, at ¶ 275.

In this respect, relying on the conception of investment put forward by many ICSID tribunals,[48] the *Ulysseas* tribunal held as follows:

> "In order for an 'investment' to arise in this sense, there must be an *actual transfer of money or other economic value* from a national (whether a physical or judicial person) of a foreign State to the host State through the assumption of *some kind of commtiment* [sic] *ensuring the effectiveness of the contribution and its duration over a period of time*."[49]

As can be seen from the above, an investment is in principle considered to be made when there is (i) an actual transfer of economic value from the foreign investor to the host State and (ii) a commitment ensuring the effectiveness and duration of the contribution.

That said, this principle immediately raises a second question, namely at what point is the transfer of economic value sufficient to give rise to the assumption of some kind of commitment by the foreign investor. In this regard, the facts of the *Mamidoil* case and the decision reached by the tribunal are instructive. The sequence of events in *Mamidoil* can be summarized as follows.[50] In January 1999, the Republic of Albania, the host State, approved the investment. In June 1999, the Parties executed a lease agreement. In September 1999, the site was transferred to the foreign investor and

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[48] Without going into the details of what constitutes an investment in ISDS jurisprudence, it is generally accepted that at least the following three criteria must be present: (i) contribution of money or assets; (ii) a certain duration; and (iii) a risk. *See* Salini Costruttori S.p.a. and Italstrade S.p.a. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (Jul. 23, 2001), 6 ICSID Rep 398 (2004).

[49] Ulysseas, Inc. v. Republic of Ecuador, Permanent Court of Arbitration (UNCITRAL), Final Award, ¶ 252 (Jun. 12, 2012), IIC 548 (2012) [hereinafter *Ulysseas*].

[50] Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, ¶ 700 (Mar. 30, 2015), IIC 682 (2015) [hereinafter *Mamidoil*].

construction works were scheduled to start in February/March 2000. However, in October/November 1999, Albania informed the foreign investor of possible policy changes regarding the use of the port of Durres and thus advised to suspend the works. When faced with the issue of determining when the investment was made for the purpose of assessing the investor's legitimate expectations at the time, the tribunal made the following findings:

- Before the approval from the host State, "the potential investor retains its freedom and flexibility and is able to react to policy changes without material losses, while the potential host State has not yet expressed any commitment", so that there is no reason to protect the investor's legitimate expectations.[51]
- Once an agreement is reached with the host State, "the expectations are properly defined and created, and the State is bound to respect them."[52] However, "potential investor still retains a considerable degree of flexibility and is able to desist at no or limited costs, while the State is asked to protect an investment that has not yet materialized", so that there is still no reason to protect the investor's legitimate expectations.[53]
- The situation changes when the foreign investor actually starts to transfer a certain economic value as it "loses its flexibility" to desist from the project and "depends on consistent conduct of the host State."[54]

[51] *Id.*, at ¶ 704.
[52] *Id.*, at ¶ 705.
[53] *Id.*
[54] *Id.*, at ¶ 706.

Based on the above-mentioned findings, the *Mamidoil* tribunal reached the following conclusion:

> "Therefore, the Tribunal finds it difficult to fix a precise point in time within a long process of decision-making and implementation. Rather, the evolving and gradual nature of the process has to be taken into consideration with an objective to balance both parties' interests. That leads to the necessity of a concrete appraisal of these interests when judging the host State's measures. The investor's flexibility is reduced the more it commits funds to implementation, and the gradual loss of flexibility increases the legitimate expectation of stability and protection, while the State, although retaining its right and duty to pursue public policy objectives, is obliged to respect the legitimate expectations by pursuing the objectives consistently, coherently and predictably."[55]

Based on the above, the tribunal found that when the investor was warned about policy changes regarding the use of the port of Durres, it "had not yet started to spend the 8 million USD" for the construction of the tank farm,[56] so that "it had still a great deal of flexibility and would not have suffered significant financial losses had it suspended the preparatory works."[57] Thus, the relevant point in time to assess the investor's legitimate expectations with regard to the use of the port of Durres was when it started the construction works.[58] In this respect, the tribunal concluded that, at this point in time,

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[55] *Id.*, at ¶ 707.
[56] *Id.*, at ¶ 720.
[57] *Id.*, at ¶ 721.
[58] *Id.*, at ¶ 724.

the investor "could not legitimately expect that it would be allowed […] to discharge tankers in Durres port when it was clear that the port would no longer operate."[59] In conclusion, based on *Ulysseas* and *Mamidoil,* an investment is in principle made when there is an actual transfer of economic value indicating that the investor has assumed a commitment towards the realization of the investment, meaning that it has lost its flexibility to desist from the investment at limited costs.

In a similar vein, there are cases in which multiple points in time might become relevant to assess an investor's legitimate expectations. This might in particular arise when (i) an investment is effectuated through multiple steps over a certain period of time, or (ii) a single investor makes an initial investment and then expands its presence in the host State by making further investments, either expanding a project or developing new projects. In such cases, the question arises as to what the relevant point in time is to assess the investor's legitimate expectations. This issue was first addressed by the *AES Summit* tribunal.[60] In the *AES Summit* case, the foreign investor first acquired a majority shareholding in a Hungarian electricity generation company, which held a power purchase agreement with Hungary, in 1996. Then, in 2001, the foreign investor began investing in the complete retrofit of all four units at a specific power station. In this context, the tribunal considered that both the acquisition of shares in 1996 and the investment in the retrofit in 2001 constituted investments. As a result, the tribunal assessed whether the foreign investor could have legitimate expectations

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[59] *Id.*, at ¶ 735.

[60] AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, ¶¶ 9.3.13-9.3.18 (Sep. 23, 2010), IIC 455 (2010) [hereinafter *AES Summit*].

regarding the conduct of Hungary about which it complained based on the conditions prevailing either in 1996 or in 2001.[61]

The approach adopted by the *AES Summit* tribunal was articulated in a more detailed and comprehensive way by the *Frontier Petroleum* tribunal, which held that:

> "Of note, where investments are made through several steps, spread over a period of time, legitimate expectations must be examined for each stage at which a decisive step is taken toward the creation, expansion, development, or reorganisation of the investment."[62]

Thus, in cases of (i) an investment including multiple stages or (ii) multiple related investments made by the investor, legitimate expectations that were created and relied upon by the investor to make or expand the investment must be assessed for each such stage. Building on the *Frontier Petroleum* award, the *Novenergia* and *SunReserve* tribunals further clarified how to determine the relevant point in time in multiple-step investments. In its award, the *Novenergia* tribunal noted that (i) the investment phase might go through various stages in large projects, such as negotiations, due diligence, internal corporate decisions, external contractual commitments, financing, acquisition, construction, registration, start-up and first generation of revenues, and (ii) the investment might be "structured to be executed in consecutive stages even if there are binding commitments predating such subsequent stages".[63] In such cases, the *Novenergia* tribunal held that "the timing of the investor's *decision* to invest sets a

[61] *Id.*
[62] Frontier Petroleum Services Ltd. v. Czech Republic, Permanent Court of Arbitration (UNCITRAL), Final Award, ¶ 288 (Nov. 12, 2010), IIC 465 (2010) [hereinafter *Frontier Petroleum*].
[63] Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain, SCC Case No. 2015/063, Final Arbitral Award, ¶ 538 (Feb. 15, 2018), IIC 1369 (2018) [hereinafter *Novenergia*].

backstop date for the evaluation of legitimate expectations."[64] Relying on *Novenergia*, the *SunReserve* award held the following:

> "[I]f multiple investment decisions are made in reliance of an evolving set of expectations, … the temporal analysis should focus on the legitimate expectations that existed, if any, at the different points in time the investor made distinct decisions to make or expand its investment."[65]

The application of this standard to the facts of the case by the *SunReserve* tribunal is particularly instructive. The foreign investors alleged that their investments encompassed distinct facets, in particular (i) shares and equity participation in the Italian companies and the corresponding photovoltaic facilities; (ii) those companies' rights to returns, claims to money and performance pursuant to the applicable regulatory regime and contracts; (iii) tangible and intangible property rights, including various photovoltaic facilities; (iv) rights conferred by law, in particular the rights to fixed incentive tariffs conferred through various decrees; and (v) rights conferred by various licenses, permits and contracts.[66] On this basis, these investors claimed that their investments were made in multiple stages and, accordingly, that their legitimate expectations should be assessed for every single of these stages. However, the *SunReserve* tribunal recalled that "the point in time when an investor decides to make its investments refers to *the time when the investor actively decided* to establish or acquire investments in the host State."[67] In this regard, the tribunal held that the mere

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[64] *Id.,* at ¶ 539.
[65] SunReserve Luxco Holdings S.à.r.l. and others v. Italian Republic, SCC Case No. V 2016/32, Final Award, ¶ 743 (Mar. 25, 2020), IIC 1644 (2020) [hereinafter *SunReserve*].
[66] *Id.*, at ¶ 744.
[67] *Id.,* at ¶ 752 (emphasis added).

fact that the investments "happened to evolve over time as a result of any rights being conferred by statute or contract does not imply that each stage of evolution constitutes a distinct investment decision."[68] In the present case, the foreign investors had decided to make their investments in Italy when they had acquired their shareholding in the companies developing and operating the photovoltaic plants at issue, and subsequent evolutions of these investments were not the result of separate and distinct investment decisions by investors, but rather a logical consequence of the original acquisition of shares.[69]

In conclusion, the relevant point in time to assess the foreign investor's legitimate expectations consists of the time when such investor decides to make, and actually makes, its investment. By their very nature, foreign investments are evolutionary and entail an active conduct of establishing or acquiring investments on the part of the investor. In this regard, a specific investment will be considered as a multi-step investment only to the extent that each step entails a separate and distinct decision to make a new, or expand an existing, investment. By contrast, the mere fact that, after the foreign investor has decided to invest and taken the first step towards investing, a specific investment gradually evolves, in the sense that the investor (i) makes further capital contributions to acquire assets, (ii) obtains certain licenses and permits relating to the management, operation or use of these assets, or (iii) enters into agreements for the purpose of managing, operating or using these assets, constitutes a logical and natural corollary of the initial investment decision and does not entail a separate and distinct decision. In such case, the only relevant point in time for the assessment of

[68] *Id.*
[69] *Id.*, at ¶¶ 753-754.

legitimate expectation consists of the initial investment decision, which is also the only investment decision *stricto sensu*, as the subsequent steps constitutes nothing more than the logical evolution towards the perfection of the investment and not result from separate and distinct decisions. Moreover, the decision to invest must be accompanied by the actual making of the investment, meaning that the investor must perform an economic transfer, which entails a commitment towards the investment and reduces the investor's flexibility to desist from the investment.

1.3.3. Specific Commitments, Assurances or Representations by the host State

The significance of specific commitments, assurances or representations by the host State to the foreign investor for evaluating BIT claims has always been, and continues to be, one of the issues around which there is substantial controversy, and investor-State tribunals regularly disagree, in particular as to what commitments, assurances or representations should be considered specific.

This divide can probably be explained, at least in part, by two competing approaches to the treatment of States in international investment arbitration. On the one hand, the "private international law" approach (influenced by international commercial arbitration) views the relationship between the host State and the foreign investor as a horizontal private law relationship,[70] which in turn entails that the relevant framework to assess specific commitments, assurances or representations is eminently contractual. On the other hand, the "public law" approach considers the relationship between the host State and the foreign investor as a vertical relationship because the State is acting in its public and sovereign capacity,[71] which in turn entails that specific commitments,

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[70] Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 64 (2013).
[71] *Id.*, at 63-64.

assurances or representations are assessed through the prism of the State's inherent regulatory power.

Against this background, the following sections of this Essay will first focus on how investor-State tribunals have approached the issue of specific commitments, assurances and representations by the host State, both in general (**Section 1.3.3.1**) and more specifically with regard to the concept of legitimate expectations (**Section 1.3.3.2**). In a second step, I will briefly address how tribunals have attempted to circumscribe and determine whether commitments, assurances and representations are specific enough (**Section 1.3.3.3**). Finally, the last section will be dedicated to what has been, and still remains, the most debated and controversial issue, namely whether general laws and regulations may entail specific commitments, assurances or representations, and what legitimate expectations such laws and regulations may generate on the part of the foreign investor (**Section 1.3.3.4**).

1.3.3.1. The Importance of Assurances and Representations by the Host State Predates the Legitimate Expectations Doctrine

Even before the emergence of the central concept of legitimate expectations, investor-State tribunals mentioned the existence of representations by the host State as a relevant factor in assessing a BIT claim based on an alleged FET breach. In particular, the *Waste Management* tribunal held that when applying the FET standard, "it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[72] Similarly, in *Metalclad*, the tribunal emphasized the fact that the development of the landfill project began based on the

[72] Waste Management Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004), IIC 270 (2004) [hereinafter *Waste Management*].

federal government's representations that the investor "had all that was needed to undertake the landfill project", including in terms of municipal permits.[73] In light of the foregoing, there can be no doubt that investor-State tribunals recognized the importance of assurances given, or representations made, by the host State in the context of an FET breach prior to the emergence of the concept of legitimate expectations.

1.3.3.2. Specific Commitments, Assurances or Representations as a Relevant Factor in Assessing Legitimate Expectations

In the specific context of the legitimate expectations doctrine, early investor-State awards have emphasized that the existence, respectively the absence, of specific commitments, assurances or representations by the host State constituted a relevant factor when assessing the legitimate nature of an investor's expectations. This is well illustrated by the *Parkerings* case. The *Parkerings* tribunal found that the expectation is legitimate "if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment."[74] In the absence of such assurances or representations, "the circumstances surrounding the conclusion of the agreement", including the conduct of the State at the time of the investment, are "decisive to determine if the expectation of the investor was legitimate."[75]

While investor-State tribunals rapidly agreed on the fact that the existence of specific commitments, assurances or representations constituted a relevant factor for the assessment of investors' legitimate expectations, over time a few specific issues

[73] Metaclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 80 and 87-89 (Aug. 30, 2000), IIC 163 (2001) [hereinafter *Metaclad*].
[74] *Parkerings*, at ¶ 331.
[75] *Id.*

have arisen in the ISDS jurisprudence in connection with the notion of "specific commitments, assurances or representations". In the following sections, this Essay will address two issues that have been at the forefront of the jurisprudential dialog between investor-State tribunals. The first issue revolves around which statements or actions by the host State may be considered as specific commitments, assurances or representations and exactly how specific they must be. The second issue, which gathered a lot of attention in recent awards addressing the change of certain incentive schemes in the renewable energy sector, concerns (i) whether general laws and regulations may constitute a specific commitment and, as a related question, (ii) to what extent such laws and regulations create legitimate expectations.

1.3.3.3. What Constitutes Specific Commitments, Assurances or Representations

At the outset, it bears emphasis that, similarly to the FET standard and to the legitimate expectations concept, the notion of "specific commitments, assurances or representations" does not have a single, unequivocal and plain meaning. Indeed, when called upon to assess the specificity of a given commitment, investor-State tribunals can decide to look at several different factors, in particular (i) the form in which a commitment was made, (ii) the circle of addressees to which a commitment was made, and (iii) the content and clarity of the commitment itself. As a consequence, different investor-State tribunals have addressed the issue of specificity of a given commitment taking different factors into consideration. That said, despite the lack of uniformity among tribunals, the various approaches must not necessarily be construed as incompatible with one another, but rather as complementary to one another.

The first investor-State tribunal to address the issue of specific commitments, assurances or representations in more detail was the *Continental* tribunal. In its award,

the tribunal held that "the specificity of the undertaking allegedly relied upon" constituted a relevant factor to assess the investor's legitimate expectations in the context of the FET standard.[76] In this respect, the *Continental* tribunal distinguished the specificity of commitments based on *the form in which such commitments were made* by the host State and came to the following conclusions:

i) political statements do not generate legal expectations;[77]

ii) general legislative statements engender reduced expectations because their enactment is by essence subject to subsequent modification, withdrawal or cancellation;[78] and

iii) contractual undertakings by the host State, in particular when made in connection with a legislative framework and for the purpose of attracting foreign investments, generate as a rule legal rights and corresponding "expectations of compliance".[79]

While endorsing the distinction based on the specificity of the undertaking adopted by the *Continental* tribunal, the *El Paso* tribunal suggested that there were two types of commitments that could be considered "specific". First, commitments can be specific as to their addressee, meaning that they were "directly made to the investor".[80] Second, commitments can be specific because of their object and purpose, meaning that their "precise object was to give a real guarantee of stability to the investor."[81] The first type of specific commitments identified in the *El Paso* award clearly focuses on *the*

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[76] *Continental*, at ¶ 261(i).
[77] *Id.*
[78] *Id.*, at ¶ 261(ii).
[79] *Id.*, at ¶ 261(iii).
[80] El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶¶ 375-376 (Oct. 31, 2011), IIC 83 (2006) [hereinafter *El Paso*].
[81] *Id.*, at ¶¶ 375 and 377.

circle of addressees. As to the second type of specific commitments, it seems to assess specificity based mainly on *the content and clarity of the commitment*. However, it could also be said to refer to the circle of addressees as the object and purpose of a commitment might have the corresponding effect of narrowing the potential circle of addressees to which it was made. For example, if a specific commitment concerns a particular regulatory aspect in a given industry sector, the circle of addressees is automatically limited to investors active in this industry sector.

Finally, the assessment of the specificity of a given commitment based on the content and clarity of such commitment is well illustrated by the *Mamidoil* case. In its award, the *Mamidoil* tribunal held as follows:

> "The person to whom an assurance is to be imputed must be aware of the consequences of his or her actions, and the person who wants to rely on it must reasonably discern the commitment. A representation, even by conduct, must therefore amount to a clear and identifiable commitment, which is attributable to the person who makes the representation, and which is reasonably conveyed to the addressee."[82]

In light of the above, investor-State tribunals have adopted various approaches when assessing the specificity of a commitment. However, far from being exclusive of one another, these approaches can perfectly be applied in a complementary way in order to reach a holistic assessment of the specificity of any given commitment, assurance or representation by the host State.

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[82] *Mamidoil*, at ¶ 643.

1.3.3.4. Whether General Laws and Regulations Can Constitute Specific Commitments and What Legitimate Expectations They Might Generate

Ever since the very early days of investor-State arbitration, an issue that has been looming in the background was the relationship between general laws and regulations in force at the time of the investment in the host State and the foreign investor's legitimate expectations.

In the cases relating to the Argentine financial crisis in the early 2000s, tribunals had to decide whether the repeal of various laws and regulations adopted by Argentina in relation to the privatization of the transportation and distribution of gas breached the FET standard. Because most of these tribunals held that Argentina had, as a matter of fact, fundamentally altered the applicable regulatory regime by abrogating most of its laws and regulations, tribunals did not really dwell on whether these laws and regulations constituted specific commitments.

That said, in more recent investor-State awards, two fundamental issues have emerged in relation to general laws and regulations enacted by, or in force in, the host State at the time of the investment: (i) whether general laws and regulations can constitute specific commitments, and (ii) whether, and what kind of, legitimate expectations might arise from such laws and regulations.

In connection with the above-mentioned issues, some investor-State tribunals highlighted the existence of differing school of thoughts.[83] For example, the *Masdar* tribunal identified two schools of thought: the first one considering that specific

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[83] Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, ¶ 490 (May 16, 2018), IIC 1375 (2018) [hereinafter *Masdar*]; RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, ¶ 453 (Dec. 30, 2019), IIC 1716 (2020) [hereinafter *RWE Innogy*].

commitments can result from general statements in general laws or regulations, and the second one considering that something more than general regulations is required for specific commitments to exist.[84]

While it is correct that investor-State tribunals have not adopted a consistent and principled approach when assessing whether general laws and regulations amount to specific commitments and give rise to legitimate expectations, the various "schools of thought" might in fact not be as different as indicated in the *Masdar* award. A close review of the ISDS jurisprudence reveals that much of the confusion around these issues apparently stems from the fact that investor-State tribunals have not necessarily been very careful in circumscribing and differentiating different types of legitimate expectations. In fact, a certain commitment by the host State may give rise to various expectations for the foreign investor, some of them legitimate and others not.

Despite the absence of a consistent and principled approach by investor-State tribunals, a detailed review of the ISDS jurisprudence allows the identification of several fundamental principles, four of which are discussed hereafter.

The first general principle is that, while the existence of specific commitments, assurances or representations by the host State is relevant to assess the investor's legitimate expectations, such commitments, assurances or representations are not necessary for legitimate expectations to arise.[85] This principle was set forth by the *Electrabel* tribunal in the following terms:

> "While specific assurances given by the host State may reinforce the investor's expectations, such as assurance is not always indispensable.

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[84] *Masdar*, at ¶¶ 490 and 504.

[85] Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.78 (Nov. 30, 2012), IIC 567 (2012) [hereinafter *Electrabel (Decision*

> […] Specific assurances will simply make a difference in the assessment of the investor's knowledge and of the reasonability and legitimacy of its expectations."[86]

The corollary of this first principle is that, irrespective of whether general laws and regulations may constitute specific commitments, they may give rise to legitimate expectations on the part of the foreign investor.

At times, certain investor-State tribunals seemed to adopt a different approach and consider that specific commitments, representations or assurances by the host State constituted a prerequisite to an FET claim for breach of legitimate expectations. In particular, the *Glamis Gold* tribunal held that the FET standard "requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations".[87] At first glance, this finding seems to be irreconcilable with the above-mentioned principle. However, a closer look at the

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on Liability)]; Murphy Exploration & Production Company – International v. Republic of Ecuador, PCA Case No. 2012-16, Partial Final Award, ¶ 248 (May 6, 2016), IIC 852 (2016) [hereinafter *Murphy Exploration*]; *Novenergia*, at ¶¶ 546 and 650; Antaris GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01, Award, ¶ 360(5) (May 2, 2018), IIC 1413 (2018) [hereinafter *Antaris*]; *SunReserve*, at ¶ 699; Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31, Award, ¶ 538 (Jun. 15, 2018), IIC 1439 (2018) [hereinafter *Antin*]; Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶ 388 (Feb. 19, 2019), IIC 1593 (2019) [hereinafter *Cube*]; NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, ¶ 592 (Mar. 12, 2019) [hereinafter *NextEra*]; SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award, ¶ 313 (Jul. 31, 2019) [hereinafter *SolEs*]; *RWE Innogy*, at ¶¶ 454-455; *see also LG&E*, at ¶ 133; Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 262 (May 22, 2007), IIC 292 (2007) [hereinafter *Enron*]; Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 298 (Sep. 28, 2007), IIC 221 (2005) [hereinafter *Sempra*]; BG Group Public Limited Company v. Argentine Republic, Ad Hoc Tribunal (UNCITRAL), Final Award, ¶ 307 (Dec. 24, 2007), IIC 321 (2007) [hereinafter *BG Group*]; National Grid PLC v. Argentine Republic, Ad Hoc Tribunal (UNCITRAL), Award, ¶¶ 175 and 178-179 (Nov. 3, 2008), IIC 178 (2006) [hereinafter *National Grid*]; Suez, Sociedad General de Aguas de Barcelona S.A. and others v. Argentine Republic, ICSID Case No. ARB/13/19, Decision on Liability, ¶¶ 232-233 (Jul. 30, 2010), IIC 443 (2010) [hereinafter *Suez*].

[86] *Electrabel (Decision on Liability)*, at ¶ 7.78.

[87] Glamis Gold, Ltd. v. United States of America, Ad Hoc Tribunal (UNCITRAL), Award, ¶ 620 (Jun. 8, 2009), IIC 380 (2009) [hereinafter *Glamis Gold*].

Glamis Gold award reveals that the tribunal's main finding was two-fold: (i) legitimate expectations concern "situations '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", and (ii) a State "may be tied to the objective expectations that it creates in order to induce investment."[88] Thus, more than whether the host State made specific assurances to the investor, the decisive element in the *Glamis Gold* award was whether the host State's conduct and statements generated objective expectations in order to induce investment.

Since the well-established case law considers the existence of specific commitments by the host State to constitute a relevant factor (but not a requirement) when assessing the investor's legitimate expectations, the next issue to address concerns which legitimate expectations can arise in the presence, and in the absence, of such commitments. This is precisely where the second and third principles come into play.

In connection with the first principle, the second principle clarifies the type of legitimate expectations that do *not* arise in the absence of such commitments. More specifically, in the absence of specific "stabilization" (or stability) commitments from the host State, the foreign investor cannot have the legitimate expectations that the legal framework will remain entirely unaltered for the duration of its investment because of (i) the State's inherent power to regulate and (ii) the evolutionary nature of laws and regulations.[89] This expectation has sometimes been referred to as an "expectation of

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[88] *Id.*, at ¶ 621.

[89] *Parkerings*, at ¶ 332; *Continental*, at ¶¶ 258 and 261(ii); *Glamis Gold*, at ¶ 813; EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, ¶ 217 (Oct. 8, 2009), IIC 392 (2009) [hereinafter *EDF v. Romania*]; *AES Summit*, at ¶¶ 9.3.29-9.3.31; *El Paso*, at ¶ 374; Micula and others v. Romania, ICSID Case No. ARB/05/20, Award, ¶¶ 529 and 666 (Dec. 11, 2013), IIC 621 (2013) [hereinafter *Micula*]; *Charanne*, at ¶ 499; *Murphy Exploration*, at ¶ 276; Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/17, Award, ¶¶ 422-423 (Jul. 8, 2016), IIC 844 (2016) [hereinafter *Philip Morris*];

stability".[90] One of the most exhaustive and convincing articulation of this principle can be found in the *EDF v. Romania* award:

> "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 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."[91]

In line with the second principle, in the absence of specific commitments to that effect, a foreign investor cannot legitimately expect the regulatory regime to remain entirely unaltered and frozen for the entire duration of its investment. However, this does not necessarily mean that foreign investors cannot have any legitimate expectations based on the regulatory regime in force at the time of their investment. Indeed, while "stabilization" expectations can only arise when the host State undertake specific

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Blusun S.A., Jean-Pierre Lecorcier, and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award, ¶¶ 367 and 371 (Dec. 27, 2016), IIC 1317 (2016) [hereinafter *Blusun*]; Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, ¶¶ 382 and 387 (May 4, 2017) [hereinafter *Eiser*]; Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen, and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic, PCA Case No. 2014-03, Final Award, ¶ 408 (Oct. 11, 2017), IIC 1311 (2017) [hereinafter *Wirtgen*]; *Cube*, at ¶ 397; *NextEra*, at ¶ 584.

[90] InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award, ¶¶ 320(2) and 351-355 (Aug. 2, 2019), IIC 1641 (2019) [hereinafter *InfraRed*]; *Foresight*, at ¶ 356.

[91] *EDF v. Romania*, at ¶ 217.

commitments, foreign investors can legitimately hold other types of expectations as evidenced by the next general principle.

Complementing the second principle, the third principle that can be deduced from the ISDS jurisprudence concerns the type of legitimate expectations that a foreign investor may have despite the absence of specific commitments by the host State. In this regard, irrespective of the existence of specific commitments, assurances or representations by the host State, foreign investors may entertain the legitimate expectation that the legal framework at the time of the investment will not be *entirely* altered or *radically* modified.[92] This expectation has sometimes been referred to as an "expectation of consistency".[93] In this regard, the *InfraRed* tribunal, relying on prior investor-State awards, reached the following conclusion:

> "[…] the Tribunal is of the view that an expectation of consistency, *i.e.*, that the regulatory framework will not be radically or fundamentally changed may arise even in the absence of such a specific commitment, depending on the facts. […] Although a host state enjoys the sovereignty to modify its laws and regulations, its liability towards investors may be engaged (again depending on the facts) if, in doing so, it fundamentally or radically alters a regulatory framework upon which the investors legitimately relied to invest."[94]

[92] *LG&E*, at ¶ 139; *El Paso*, at ¶ 374; Toto Costruzioni Generali S.P.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Award, ¶ 244 (Jun. 7, 2012), IIC 545 (2012) [hereinafter *Toto*]; *Charanne*, at ¶ 514; *Eiser*, at ¶ 382; *Novenergia*, at ¶ 654; *Foresight*, at ¶ 359; *Cube*, at ¶ 398; *NextEra*, at ¶ 596; *RWE Innogy*, at ¶ 451; Watkins Holdings S.à.r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award, ¶ 563 (Jan. 21, 2020) [hereinafter *Watkins Holdings*]; Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42, Decision on Jurisdiction Liability and Directions on Quantum, ¶ 675 (Mar. 9, 2020) [hereinafter *Hydro Energy*].
[93] *InfraRed*, at ¶¶ 320(2) and 356-360.
[94] *Id.*, at ¶ 368.

Finally, the fourth and final principle is the more complex to articulate and undoubtedly addresses the crux of the matter, namely (i) whether general laws and regulations may be considered as encompassing specific commitments, and accordingly (ii) what types of legitimate expectations may arise from such laws and regulations. In this respect, the fourth principle contains two prongs. The first prong is that, in principle, general laws and regulations do not entail a specific commitment that they will remain entirely unchanged for the duration of the investment.[95] This first prong was clearly expressed by the *Charanne* tribunal:

> "Thus, the relevant question is whether the existing regulatory framework at the time of investment could give rise to a legitimate expectation protected by international law that it would not be modified or altered by norms such as those adopted in 2010."[96]
>
> "Although RD 661/2007 and RD 1578/2008 were directed to a limited group of investors, it does not make them to be commitments specifically directed at each investor. The rules at issue do not lose the general nature that characterizes any law or regulation by their specific scope. To convert a regulatory standard into a specific commitment of the state, by the limited character of the persons who may be affected, would constitute an excessive limitation on power of states to regulate the economy in accordance with the public interest."[97]

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[95] *Saluka*, at ¶ 305; *Parkerings*, at ¶ 332; Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, ¶ 219 (Aug. 27, 2008), IIC 338 (2008) [hereinafter *Plama*]; *Continental*, at ¶ 258; *EDF v. Romania*, at ¶ 217; *El Paso*, at ¶¶ 367-368; *Charanne*, at ¶¶ 492-494; *Philip Morris*, at ¶ 426; *Blusun*, at ¶¶ 367 and 371-372; *Antaris*, at ¶ 360(6); Stadtwerke München GmbH, RWE Innogy GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award, ¶ 264 (Dec. 2, 2019) [hereinafter *Stadtwerke*].

[96] *Charanne*, at ¶ 498.

[97] *Id.*, at ¶ 493.

In a similar vein, the *Blusun* tribunal recalled that "tribunals [had] so far declined to sanctify laws as promises"[98] and further specified that:

> "It is also true that a representation as to future conduct of the state could be made in the form of a law, sufficiently clearly expressed. But there is still a clear distinction between a law, i.e., a norm of greater or lesser generality creating rights and obligations while it remains in force, and a promise or contractual commitment."[99]

Thus, in accordance with this first prong, the State retains its right and privilege to exercise its sovereign legislative and regulatory powers, and the investor has no legitimate expectations of stability, i.e., expectations that the regulatory framework will remain entirely unaltered.

As to the second prong of the fourth principle, it encompasses a limited caveat for situations in which general laws and regulations are enacted for the specific purpose of attracting and inducing foreign investment. In this context, without going as far as recognizing a legitimate expectation of stability of the entire regime, several arbitral tribunals held that when a foreign investor makes an investment in conformity with specific requirements set forth in general laws and regulations adopted for the purpose of inducing foreign investment, the investor may have the legitimate expectation that the basic or essential features of this regulatory regime will not be modified.[100]

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[98] *Blusun*, at ¶ 367.
[99] *Id.*, at ¶ 371.
[100] *LG&E*, at ¶ 139; *Micula*, at ¶¶ 686-688; *Murphy Exploration*, at ¶¶ 252-254; *Eiser*, at ¶¶ 363-365; *Novenergia*, at ¶ 656; *Cube*, at ¶¶ 388 and 412; 9REN Holding S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/15/15, Award, ¶ 295 (May 31, 2019) [hereinafter *9REN*]; *InfraRed*, at ¶ 449; The PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Final Award, ¶ 616 (Feb. 28, 2020), IIC 1653 (2020) [hereinafter *PV Investors*]; Cavalum SGPS, S.A. v. Kingdom of Spain, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 612 (Aug. 31, 2020) [hereinafter *Cavalum*].

The rationale of this second prong lies in the protection of the foreign investor's "reasonable reliance interests".[101] These tribunals seem to recognize that, in certain specific circumstances, general laws and regulations may constitute a commitment specific enough to give rise to "limited" legitimate expectations of stability with regard to the essential features of the regulatory regime.[102] This approach is well illustrated by the *InfraRed* case in which the tribunal held the following:

> "In the light of the above, the Tribunal finds that, by 2010, Respondent has in fact made a specific commitment to the CSP sector that CSP plants registered in the Pre-allocation Register would be shielded from subsequent regulatory changes at least as regards certain elements of the Original Regulatory Framework.
>
> […] the Tribunal finds that Respondent specifically committed that future revisions of the values of the regulated tariff, the pool price premium and the applicable upper and lower limits would not affect those CSP plants registered on the Pre-Allocation Register."[103]

In the specific context of cases relating to the modification of Spain's regulatory regime regarding feed-in tariffs for solar energy, a number of investor-State tribunals held that, while foreign investors could not hold legitimate expectations of stability regarding the entire regulatory regime, i.e., that the feed-in tariffs in force at the time of the investment would remain entirely unaltered, they were nonetheless entitled to

[101] *Blusun*, at ¶ 372.
[102] Investor-State tribunals have used various formulations when expressing this principle. *E.g.*, *Novenergia*, at ¶ 656 ("the essential characteristics of the legislation"); *Cube*, at ¶ 412 ("the fundamental economic basis"); *PV Investors*, at ¶ 616 ("the regulatory framework's *leitmotiv*" and "the essential feature"); *Cavalum*, at ¶ 612 ("the cornerstone of the subsidy regime").
[103] *InfraRed*, at ¶¶ 449 and 451 (emphasis omitted).

expect that Spain would continue to ensure a reasonable rate of return for their investments as it constituted the essential feature of such regime.[104] In this regard, the finding made by the tribunal in *PV Investors* is particularly relevant and instructive:

> "Having established that reasonable investors could not expect an immutable tariff for the operational lifetime of their plants, the question arises what, if anything, they could have expected. As the Tribunal has already noted, investors could legitimately expect to receive a reasonable return on their investments. This entitlement is enshrined first and foremost in the 1997 Electricity Law, which is the cornerstone of the Spanish electricity system. It is repeated in the preamble to RD 436/2004 and later, more importantly, in that of RD 661/2007. In other words, reasonable profitability or the 'guarantee' of reasonable rates of return, to use the terms of the preamble of RD 661/2007, was the regulatory framework's *leitmotiv*, the essential feature underpinning all of the instruments that were enacted through the years. The requirement of reasonable profitability restricted the State's power to amend the framework and thereby guaranteed a level of stability of the conditions in which investors operated. Differently put, that

[104] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶ 517 (Nov. 30, 2018), IIC 1537 (2018) [hereinafter *RREEF*]; BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, ¶¶ 472-473 (Dec. 2, 2019), IIC 1724 (2019) [hereinafter *BayWa*]; *PV Investors*, at ¶ 616; *Cavalum*, at ¶ 612; FREIF Eurowind Holdings Ltd. v. Kingdom of Spain, SCC Case No. V 2017/060, Final Award, ¶¶ 537-538 and 540 (Mar. 8, 2021) [hereinafter *FREIF*].

> requirement ensures the existence of 'stable conditions' pursuant to Article 10(1) of the ECT."[105]

In light of the foregoing, when the host State enacted investment-inducing laws and regulations to attract foreign investors, the latter may have the legitimate expectations that the essential features of the regulatory regime will enjoy a certain level of stability and not be abandoned through subsequent modifications.

That said, it bears emphasis that a minority of investor-State tribunals have held that general laws and regulations adopted for the specific purpose of inducing foreign investment may nonetheless be deemed to encompass specific commitments and thus give rise to broader legitimate expectations of stability. Still in the context of cases relating to the modification of Spain's regulatory regime regarding feed-in tariffs for solar energy, the tribunals in *9REN* and *OperaFund* held that the relevant general laws and regulations were sufficiently clear and specific so as to constitute a specific commitment giving rise to legitimate expectations of stability, i.e., immutability of the specific feed-in tariffs provided in the applicable regulatory framework at the time of the investment. In this respect, the *9REN* tribunal made the following observation:

> "There is no doubt that an enforceable "legitimate expectation" requires a clear and specific commitment, but in the view of this Tribunal there is no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself where (as here) such a commitment is made for the purpose of inducing investment,

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[105] *PV Investors*, at ¶ 616.

> which succeeded in attracting the Claimant's investment and once made resulted in losses to the Claimant."[106]

On this basis, the *9REN* tribunal held that, provided that the investment initially complied with the eligibility requirements to obtain feed-in tariffs and continued to do so throughout the life of the facility, the investor had a legitimate expectation that it would continuously receive the specific benefits set out in the general laws and regulations.[107] In *OperaFund,* the tribunal offered some more details as to the rationale underlying its finding that Spain's general laws and regulations contained an express and specific stability commitment regarding the immutability of the feed-in tariffs:

> "The Tribunal, therefore, has no doubt that the stabilization assurance given in Article 44(3) is applicable for the investments by Claimants. Indeed, it is hard to imagine a more explicit stabilization assurance than the one mentioned in Article 44(3): 'revisions […] shall not affect facilities for which the functioning certificate had been granted.' … The Tribunal, thus, agrees that investors could perfect a right to the remuneration set forth by the Spanish legislator, and this is consistent with the Spanish legislator's expressed intention: changes in law were, indeed, contemplated within the express text of RD 661/2007 by its reference to 'revisions', and the contemplated effect of such changes were that these 'shall not affect facilities for which the functioning certificate has been granted.' There is no question as to the State's right to regulate, which has not been challenged. There is no dispute that the

[106] *9REN*, at ¶ 295.
[107] *9REN*, at ¶ 297.

> laws changed in the past and would change in the future. This was expressly contemplated and accounted for within Article 44(3) of RD 661/2007, which laid out the consequences of such changes. Taken in this context, Article 44(3) of RD 661/2007 contained an express stability commitment that served its purpose of inducing investment in part by shielding investors in Claimants' position from legislative or regulatory changes (including the ones complained of in this matter)."[108]

While this rationale appears very fact-specific and relies on a particular legislative provision, it cannot be excluded that tribunals may follow this approach in future cases concerning other regulatory regimes and encompassing different fact patterns.

In conclusion, with regard to general laws and regulations enacted specifically for the purpose of attracting and inducing foreign investment, there remains a certain level of uncertainty and tribunals might reach different conclusions as to the exact type of legitimate expectations (i.e., expectations of stability or consistency) and the scope of such expectations (i.e., stability of the essential features or immutability of the specific regulatory regime). However, the fact that various investor-State tribunals have disagreed as to whether general laws and regulations can constitute specific commitments might not be as problematic as it appears at first glance. While it is true that the existence of specific commitments constitutes a relevant factor for the assessment of legitimate expectations, the variety of factual circumstances that might exist calls into question any attempt to identify and adopt a bright line rule. In other words, it is difficult, if not impossible, to make a strict distinction between, on the one

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[108] OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36, Award, ¶ 485 (Sep. 6, 2019), IIC 1627 (2019) [hereinafter *OperaFund*].

hand, situations in which general laws and regulations should be considered as specific commitments generating "enhanced" legitimate expectations of stability and, on the other hand, situations in which laws and regulations do not entail such commitments, thus generating only "reduced" expectations of consistency.

Rather, it should be acknowledged that, when determining what types of legitimate expectations are engendered by general laws and regulations, investor-State tribunals are faced with, and have to address, an entire spectrum of situations depending on the content of such laws and regulations, as well as all surrounding circumstances. On the one end of the spectrum, general laws and regulations addressed to the entire world and not enacted for the specific purpose of attracting foreign investment are likely to create only reduced legitimate expectations, namely that the regulatory regime will not be entirely altered or radically modified. Towards the middle of the spectrum, general laws and regulations designed specifically to induce foreign investment and encompassing certain guarantees are likely to generate slightly higher expectations, i.e., the fundamental elements of the regulatory regime will not be modified so as to deprive the investor of its investment's value. Finally, at the other end of the spectrum, specific commitments or representations made to a particular investor that applicable general laws and regulations will not be subsequently modified are likely to create enhanced legitimate expectations of stability, namely that this regulatory regime will continue to apply to the investment for its entire duration. While legal certainty would probably call for the adoption of a bright-line rule based on the existence (or not) of specific commitments, a review of the ISDS jurisprudence evidences that investor-State tribunals have rather engaged in a balancing exercise, which might well be the only way to appropriately address the large variety of factual situations.

1.3.4. The Host State's Background and the Industry Sector

Considering the fact that BITs are not supposed to work as an insurance policy against the business risks that every economic actor may encounter in the course of an investment, investor-State tribunals have held that certain surrounding circumstances known (or that should reasonably be known) by the investor at the time of the investment had to be factored in the assessment of legitimate expectations. This concerns in particular (i) the social, economic and political background of the host State (**Section 1.3.4.1**) and (ii) the industry practices and the business risks inherent to certain industry sectors (**Section 1.3.4.2**).

1.3.4.1. The Host State's Background

In addition to the existence of a specific commitment, assurance or representation by the host State, investor-State tribunals held that the assessment and determination of the scope of an investor's legitimate expectations had to duly consider the host State's background, in particular its social, economic and political development.

In this respect, the foundational case is *Duke Energy*. However, in earlier cases, certain investor-State tribunals had already hinted at the fact that the host State's political background was relevant when assessing the foreign investor's legitimate expectations.[109] In particular, the *Parkerings* tribunal outlined that "the political environment in Lithuania [i.e., the host State in the case] was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership."[110] Accordingly, the tribunal held that "legislative changes, far from being unpredictable, were in fact to be regarded as likely", so much so that "in

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[109] *Parkerings*, at ¶ 335; Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, ¶ 20.37 (Sep. 16, 2003), IIC 116 (2003) [hereinafter *Generation Ukraine*].
[110] *Parkerings*, at ¶ 335.

such a situation, no expectation that the laws would remain unchanged was legitimate."[111] While *Parkerings* only mentioned the specific political environment in Lithuania and did not purport to set forth a principle of general application, the *Duke Energy* tribunal expressly set out a general principle according to which the background of the host State must be taken into account when assessing the legitimacy of the investor's expectations. This principle was expressed as follows:

> "The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions in the host State."[112]

In the aftermath of the *Duke Energy* case, several investor-State tribunals have endorsed this principle and applied it when assessing whether the expectations claimed by the foreign investor were legitimate and reasonable.[113]

1.3.4.2. Business Risks and Industry Practices

In addition to the social, economic and political background of the host State, certain tribunals have held that industry practices also constitute a relevant factor to consider when it comes to determining the scope of foreign investors' legitimate expectations.

This view was expressed rather early on by the *LG&E* tribunal, which specified that "the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns."[114]

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[111] *Id.*
[112] *Duke Energy*, at ¶ 340.
[113] *Mamidoil*, at ¶ 625; Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award, ¶¶ 987 and 1011 (Jul. 26, 2018), IIC 1428 (2018) [hereinafter *Gavrilovic*].
[114] *LG&E*, at ¶ 130.

Most notably, when assessing the decision by Ecuador to implement tax increases on oil companies as a result of the substantial increase in world oil prices, the *Perenco* tribunal held that "a consideration of legitimate expectations should include a consideration of industry practices and expectations."[115] In the specific context of the oil industry, the *Perenco* tribunal found that:

> "Given the oil industry's typically expected returns and its experience with governmental responses to market changes, it would be unsurprising to an experienced oil company that given its access to the State's exhaustible natural resources, with the substantial increase in world oil prices, there was a chance that the State would wish to revisit the economic bargain underlying the contracts."[116]

The above two investor-State awards make it clear that, just like a foreign investor cannot ignore the host State's background, such investor must also consider industry practices and corresponding business risks. Thus, when assessing the exact scope of the foreign investor's legitimate expectations at the time of investment, tribunals must take into account such industry practices and business risks.

Interestingly, in the wake of *LG&E* and *Perenco*, the award rendered in the *Philip Morris* case seems to take that reasoning a step further. In this case concerning the adoption and enactment by Uruguay of what is usually referred to as "plain packaging" laws,[117] the tribunal held the following:

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[115] Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, ¶ 588 (Sep. 12, 2014), IIC 657 (2014) [hereinafter *Perenco*].
[116] *Id.*
[117] In general terms, plain packaging laws (i) prohibit different packaging or presentations for cigarettes and (ii) mandate the use of graphic images purporting to illustrate the adverse health effects of smoking.

> "The present case concerns the formulation of general regulations for the protection of public health. There is no question of any specific commitment of the State or of any legitimate expectation of the Claimants vis-à-vis Uruguayan tobacco control regulations. Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed, and certainly no commitments of any kind were given by Uruguay to the Claimants or (as far as the record shows) to anyone else."[118]

This finding can be read as going further than *LG&E* and *Perenco* insofar as it implies that foreign investors active in certain industry sectors, i.e., manufacturing and distributing "harmful products", can have no legitimate expectation that adverse regulations will not be enacted by the host State. In this context, the industry sector and the corresponding business risks become relevant not to determine the extent to which a foreign investor's expectations can be deemed legitimate (or reasonable), but rather to negate the very possibility that such legitimate expectations exist in the first place in such industry sector. The use of the rather undetermined notion of "harmful products" raises questions about the specific scope that should, and in fact will, be given to the finding of the *Philip Morris* tribunal. A broad interpretation of "harmful products" could possibly encompass a wide range of industry sectors. For example, in light of the major threat that climate change and global warming pose to the environment and to human communities, it may be argued that oil and gas should be considered as "harmful products" so as to exclude the existence of legitimate expectations. Without going that

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[118] *Philip Morris*, at ¶ 429.

far, there are an entire range of products that, just like cigarettes, may be considered harmful for the human health and for which the finding made in *Philip Morris* would be applicable by analogy.[119]

In conclusion, these few cases seem to indicate a continuing trend towards greater consideration of the industry sector and business risks associated therewith in accordance with the underlying rationale that BITs should not serve as an "insurance against business risk".[120] If this trend were to continue in the future, the likely consequence would consist in the narrowing of the scope of expectations that can be considered as legitimate and reasonable in certain specific industry sectors. Finally, with regard to the *Philip Morris* case, it remains to be seen whether the approach adopted by the tribunal constitutes an outlier applicable only in very specific circumstances, such as the tobacco industry, or whether the scope of this case will be expanded to encompass other industry sectors manufacturing products that may be considered harmful, in particular for human health or the environment.

1.3.5. The Foreign Investor's Due Diligence

As mentioned above, investor-State tribunals have found that the social, political, and economic background of the host State, and, in certain instances, the business risks associated with specific industry practices constituted relevant factors in the assessment of the investor's legitimate expectations. The logical corollary is that investor-State tribunals have in principle considered whether the foreign investor exercised due

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[119] *E.g.*, Methanex Corporation v. United States of America, Ad Hoc Tribunal (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005), IIC 167 (2005); Chemtura Corporation v. Government of Canada, Permanent Court of Arbitration (UNCITRAL), Award (Aug. 2, 2010), IIC 451 (2010); William Clayton and others v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015), IIC 688 (2015).
[120] *MTD Equity*, at ¶ 178; *see also EDF v. Romania*, at ¶ 217.

diligence when planning and making its investment. More specifically, due diligence has been particularly relevant in cases in which the foreign investor alleged that subsequent regulatory changes enacted by the host State breached its legitimate expectations, despite the absence of specific "stabilization" commitments from the State. In this context, tribunals have very often assessed whether the investor performed a due diligence regarding the existing legal and regulatory framework, as well as possible modifications to such framework, at the time of the investment.

The issue of a foreign investor's reasonable due diligence first came up in the *MTD Equity* case. In its award, the *MTD Equity* tribunal found that the foreign investor (i) had not contacted any specialist in urban development prior to the deal closing, (ii) had failed to appreciate possible conflicts of interests, and (iii) had paid the price for the land upfront and without any link to the progress of the project on the assumption that the latter would move ahead.[121] In this regard, the *MTD Equity* tribunal specified the following:

> "The BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen. Their choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permit, are risks that the Claimants took irrespective of Chile's actions."[122]

[121] *MTD Equity*, at ¶¶ 176-177.
[122] *Id.*, at ¶ 178.

As a result of the investor's failure to conduct due diligence when making the investment, the tribunal concluded that the investor should bear 50% of the damages suffered, thus reducing the compensation due by the host State accordingly.[123] In the wake of the *MTD Equity* case, the fact that the foreign investor's due diligence constitutes a relevant element to factor in the assessment of FET claims has never been called into question. However, investor-State tribunals put forward differing views as to the specific role (**Section 1.3.5.1**), and appropriate due diligence standard (**Section 1.3.5.2**) when adjudicating FET claims.

1.3.5.1. The Role of Due Diligence: Balancing Factor or Strict Requirement?

A review of the ISDS jurisprudence regarding the FET standard, and more specifically legitimate expectations, evidences that investor-State tribunals have adopted differing views as to the specific role that due diligence should play in adjudicating FET claims. First, a group of tribunals have held that the investor's due diligence was to be considered as a *balancing factor* when assessing either (i) the legitimacy and reasonableness of an investor's expectations, or (ii) the existence of a contributory fault by the investor justifying a reduction of the damages awarded. This approach has been clearly set out in the *Gavrilovic* award:

> "An evaluation of the reasonableness of an investor's expectations will also take into account the due diligence performed before effecting the investment."[124]
>
> "The reasonableness of Mr Gavrilovic's expectation is additionally complicated by the absence of any evidence of due diligence being

[123] *Id.*, at ¶ 243.
[124] *Gavrilovic*, at ¶ 986.

> performed before the execution of the Purchase Agreement. In the circumstances, the Tribunal considers that a reasonable and legitimate expectation that an investor would be able to register ownership over the claimed properties would be grounded in extensive investigation into the precise properties and plots owned by each of the Five Companies, taking into account the corporate changes that had occurred and, in particular, the transitioning corporate and ownership systems under Croatian law. No evidence of any such investigation being performed has been adduced by the Claimants."[125]

Second, certain tribunals have adopted a stricter approach and held that the investor's due diligence constituted a *strict requirement* for an investor to be entitled to bring an FET claim. While the *MTD Equity* award falls within the first category, i.e., the investor's lack of due diligence was a balancing factor that led to a 50% reduction of the damages awarded, the *Parkerings* case constituted the first instance of a tribunal adopting the second approach. In *Parkerings*, the Tribunal seemed to consider that the exercise of due diligence by the foreign investor constituted a prerequisite for the investor to have a right of protection of its legitimate expectations:

> "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."[126]

While investor-State tribunals adopting the strict approach come to the conclusion that due diligence is a necessary (but not sufficient) prerequisite, the broad approach

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[125] *Id.*, at ¶ 1012.
[126] *Parkerings,* at ¶ 333 (emphasis added).

considering due diligence as a balancing factor may lead to the exact opposite conclusion, namely that the existence of due diligence is completely irrelevant in the specific circumstances of the case. A prime example of the lack of relevance that due diligence can have in the broad approach can be found in the *PV Investors* award:

> "It is in [the context of whether the investor's expectations were reasonable from an objective viewpoint] that the arguments and submissions in respect of the investor's due diligence must be viewed. For the Tribunal, this debate lacks relevance for present purposes. Indeed, whether the Claimants engaged in diligence or not and whether that diligence was 'due' or not, cannot alter the fact that on the basis of the law and the jurisprudence the Claimants knew or should have known that changes to the regulatory framework could happen. As a consequence, expectations that they would not happen cannot be deemed legitimate."[127]

As can be seen from the above, the *PV Investors* tribunal considered that the existence of due diligence by the investor, or lack thereof, was irrelevant because the investor could in any event not hold legitimate expectations that changes to the regulatory framework would not occur. Whereas the existence of due diligence can become irrelevant if the investor's claimed expectations cannot be considered legitimate based on all other circumstances of the case, the opposite must also hold true. As mentioned by Born's dissent in the *Wirtgen* case, "[d]ue diligence is only relevant if it would have provided the [investors] with information that contradicted their

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[127] *PV Investors*, at ¶ 613.

asserted expectations."[128] In other words, whether the foreign investor performed a due diligence only becomes relevant to the extent that such due diligence would have undermined the legitimacy of the investor's expectations resulting from all the other surrounding circumstances.

Interestingly, while investor-State tribunals have adopted different approaches regarding the role of investors' due diligence in the context of legitimate expectations, none of them has sought to justify a specific approach based on treaty language, let alone customary international law. In fact, tribunals did not provide a legal basis for their position regarding whether due diligence had to be considered as a balancing factor or as a strict requirement.

1.3.5.2. The Appropriate Due Diligence Standard

While a debate remains as to the exact role that the investor's due diligence should play in assessing legitimate expectations, tribunals have been faced with another issue relating to such diligence, namely what due diligence standard should be adopted and required from foreign investors.

In general, investor-State tribunals have often used rather vague terms to characterize the due diligence to be performed by the foreign investor at the time of the investment. Tribunals have interchangeably described the due diligence that a foreign

[128] Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen, and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic, PCA Case No. 2014-03, Dissenting Opinion, ¶ 98 (Oct. 11, 2017), IIC 1311 (2017) [hereinafter *Wirtgen (Dissent)*].

investor had to perform as "appropriate"[129], "adequate"[130], "reasonable"[131], "real"[132], "diligent"[133], "proper"[134], or "rigorous"[135].

More recently, in the context of disputes relating to the modification of incentive programs for the development of renewable energy (i.e., feed-in tariffs)[136] by certain European States, in particular Italy and Spain, a few tribunals have articulated the applicable due diligence standard in more detail. In the *SunReserve* case, arising out of claims brought by a Luxembourg investor owning photovoltaic plants against Italy in connection with a series of governmental decrees cutting tariff incentives for some solar power projects, the tribunal expressly set forth the standard of due diligence expected from the investor:

> "This placement of the burden of proof [on the investor] is in line with investment arbitration case law. The standard of due diligence that investors are expected to adhere to should meet the threshold of what *a 'prudent investor' would 'reasonably' do to know about regulatory framework in question*. This standard of reasonable due diligence, as opposed to 'extensive legal investigation', has found the endorsement of many tribunals […]."[137]

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[129] *Masdar*, at ¶ 494.
[130] *Novenergia*, at ¶ 679; *InfraRed,* at ¶ 361
[131] *Novenergia*, at ¶ 679; *SunReserve*, at ¶ 714; *FREIF*, at ¶ 552.
[132] *Antaris,* at ¶ 434; *OperaFund*, at ¶ 486.
[133] *Charanne*, at ¶ 505; *FREIF*, at ¶¶ 552-553.
[134] *Foresight*, at ¶ 379.
[135] *Stadtwerke*, at ¶ 264.
[136] A feed-in tariff is a policy tool designed to promote investment in renewable energy sources. This usually means promising small-scale producers of the energy – such as solar or wind energy – an above-market price for what they deliver to the electric grid.
[137] *SunReserve*, at ¶ 714 (emphasis added)

Investor-State tribunals in the *Isolux*,[138] *Antin*,[139], *SolEs*,[140] *Belenergia,*[141] and *Stadtwerke*[142] cases adopted a similar due diligence standard. Therefore, while early arbitral awards used vague terms, such as adequate, reasonable or appropriate, and remained rather unspecific as to the exact standard of due diligence required from foreign investors, there is a recent trend towards a more specific and clear definition of such standard. Under the emerging case law from investor-State tribunals, the due diligence of a foreign investor will be assessed against the *objective* standard of a *reasonable and prudent investor* placed *in the same circumstances at the time of the investment*. While it remains to be seen whether this standard will be widely adopted by tribunals, there are already some indications of crystallization, in particular insofar as a line of cases endorsing this standard has developed going from *Isolux* to *SunReserve* through *Antin*, *SolEs*, *Belenergia*, and *Stadtwerke*.

However, despite this trend and early ossification of the standard, there remains a number of outstanding issues that have been touched upon only by certain investor-State tribunals, and for which no principled and consistent approach has been suggested, let alone agreed upon.

The first of these issues resides in whether the foreign investor's own expertise as well as financial resources should be taken into consideration when assessing the due diligence performed. While almost all investor-State tribunals have been silent on this

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[138] Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain, SCC Case No. V 2013/153, Award, ¶ 781 (Jul. 12, 2016), IIC 979 (2016) [hereinafter *Isolux*].
[139] *Antin*, at ¶ 537.
[140] *SolEs*, at ¶ 429.
[141] Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award, ¶ 584 (Aug. 6, 2019), IIC 1597 (2019) [hereinafter *Belenergia*].
[142] *Stadtwerke*, at ¶ 264.

issue, the *Antin* tribunal seemed to acknowledge that the foreign investor's subjective expertise could be relevant:

> "Accordingly, the Tribunal must consider when the investment was made, what the circumstances were at that time and the information that the investor had or should reasonably have had, had it acted with the requisite degree of diligence (considering its expertise). In carrying out this assessment, tribunals must attempt to place themselves at the time of the investment and consider the information and conditions available at such time, and to refrain from appraising the investor's expectations with the benefit of hindsight."[143]

In other words, the *Antin* award seems to suggest that the appropriate due diligence standard would be the prudent and reasonable investor placed in the same circumstances *and with similar expertise and resources*. Besides this mention between bracket in *Antin*, no investor-State tribunal has addressed this issue, so that it is impossible to draw any final conclusions.

The second issue revolves around whether the exact same standard of due diligence can be applied irrespective of the surrounding circumstances, such as (i) the business sector in which the foreign investor is active, (iii) the sources of profits that such investor forecast for its investment, (iii) the political and socioeconomic conditions in the host State, or (iv) the existence of specific representations by the host State. Recently, several investor-State tribunals seemed to imply that the due diligence standard required from foreign investors might differ based on the surrounding circumstances of the case. On the one hand, two tribunals held that a more stringent due

[143] *Antin*, at ¶ 537.

diligence standard should apply in certain specific circumstances while, on the other hand, a more lenient standard seemed to receive some support in other circumstances.

With regard to the "enhanced" due diligence standard, the recent awards issued in *Charanne* and *InfraRed*, both relating to the modification of Spain's regulatory regime regarding feed-in tariffs for solar energy, held that a stricter due diligence standard was applicable due to the nature of the solar energy business and its main sources of profits. In particular, the *InfraRed* tribunal, relying on *Charanne*, held the following:

> "The Tribunal notes that the Parties seem to agree that that [sic] the plants in which Claimants invested derive the overwhelming majority of their revenue from state subsidies. It is equally uncontested that the regime of state subsidies (i.e. the '*Special Regime*' under the EPA of 1997 or the '*specific remuneration*' under the EPA of 2013) is heavily regulated. In these circumstances, the Tribunal is inclined to follow the approach taken by the tribunal in *Charanne* and hold Claimants to a stricter due diligence standard in keeping with both the nature of the sector in which they invested and with their own expectations as regards the main source of profit (i.e. state subsidies)."[144]

In light of the above, there are at least two factors that might justify the adoption of a stricter due diligence standard. First, the fact that the business sector in which the investment was made is "heavily regulated".[145] Second, the fact that, at the time of the investment, the investor expected the main sources of profits to come from subsidies or other incentive programs, which are by essence subject to the State's power to regulate.

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[144] *InfraRed*, at ¶ 370.
[145] *Id.*

Turning to the adoption of a lower due diligence standard, the *Cube* tribunal seemed to endorse such a lowering in the case of specific representations made by the host State. In the *Cube* case, the foreign investors had not obtained a detailed legal advice confirming the absence of regulatory risks, in particular the risk of a significant change of the regulatory regime with retroactive effect, but there had been oral discussions and a more circumscribed legal advice, which cast no doubt upon the stability of the regulatory regime. In these circumstances, the majority of the *Cube* tribunal made the following observations:

> "After careful consideration, the majority of the Tribunal considers that the right to rely upon the representations made in this case do not depend on there being evidence of any particular form or scale of legal due diligence by external advisors. … Whether an investor's initial assumptions about the legal position, based on its reading of the law and of any associated official statements, (a) is correct and not contradicted by the legal reports that address the question of regulatory stability, or (b) is incorrect (or non-existent) and changes when the correct position is revealed by legal reports, does not affect the investor's entitlement to rely upon official representations, provided that the investor has given careful consideration to the legal position and has acted in reliance upon representations by the State concerning the stability of the regulatory regime."[146]

In the above-cited paragraph, the majority in *Cube* appears to endorse the view that, when the host State makes specific representations to a foreign investor regarding the

[146] *Cube*, at ¶ 396.

stability of the applicable regulatory regime, the investor is entitled to rely on these representations and the scope of its due diligence regarding such regulatory regime can be reduced accordingly. In other words, the prudent and reasonable investor should not be expected to second-guess representations made by the host State and engage in an extensive and full-fledged due diligence regarding the conformity of such representations with the actual regulatory regime.

Moreover, the *Cube* tribunal held that when a co-investor is so closely involved in the decision to invest that the investment can be considered as a joint venture between co-investors, each co-investor can rely on (i) the representations addressed by the host State to its co-investors and on (ii) the due diligence conducted by them in this respect.[147]

In conclusion, in some of the most recent investor-State disputes, certain tribunals have been inclined to slightly modulate the due diligence standard required from the foreign investor, either by raising or lowering it, based on an assessment of the surrounding circumstances. That said, considering that (i) only two investor-State tribunals addressing the specific issue of the discontinuance of feed-in tariffs in the renewable energy sector have endorsed the adoption of a higher due diligence standard, and (ii) only one tribunal has suggested lowering the due diligence standard in certain very specific circumstances, it is difficult to conclusively determine whether there is an emerging and long-lasting trend at play. More specifically, it remains to be seen whether the adoption of a more stringent due diligent standard will gain traction in the coming years and be applied to a larger variety of heavily regulated industries or rather remain circumscribed to the narrow and fact-specific issue of feed-in tariffs in the

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[147] *Id.*, at ¶ 406.

renewable energy sector. In this regard, it is interesting to compare this new development with another recent, namely the consideration of the specificities of a given industry sector when assessing the investor's legitimate expectations. As mentioned above, in their assessment of legitimate expectations, the *Perenco* and *Philip Morris* tribunals considered the specificities of the oil and tobacco industries, respectively.[148] Altogether, these parallel developments are likely indicative of a larger trend among investor-State tribunals in line with which greater consideration is given to certain surrounding circumstances (i.e., political and socio-economic background of the host State, specificities of the industry sector), including when it comes to assessing the degree of due diligence require from the investor.

II. Proportionality

Considering that virtually all legal orders, whether domestic or international, are faced with the need to adjudicate conflicts between different interests and rights, the development of the law has witnessed the emergence of principles and tools to resolve such conflicts. One of these tools is the principle of proportionality, which is known and applied in many different domestic (e.g., Germany, United States, Switzerland) and international (e.g., European Court of Human Rights, European Court of Justice) legal systems.[149]

Against this background, it could seem legitimate to expect that the principle of proportionality would have found its way into investment arbitration rather easily. Yet, its adoption in the context of the FET standard has been rather hesitant. Indeed, if the concept of legitimate expectations rapidly became the dominant element of the FET

[148] *See supra* Section 1.3.4.2.
[149] Gebhard Bücheler, *Proportionality in Investor-State Arbitration* 35, 50, 68, 74 (2015).

standard and nowadays occupies a prominent position in most, if not all, investor-State disputes, the application of the principle of proportionality in such disputes is still in its relative infancy. However, over the last few years, foreign investors have increasingly relied on proportionality, either as a separate and independent ground for an FET breach or as a component of their claims for breach of legitimate expectations. As a consequence, recent investor-State awards often encompass at least some sort of proportionality analysis. In the following sections, I will begin by briefly discussing the slow start of the principle of proportionality and its relative absence from early investor-State awards (**Section 2.1**). In a second step, I will present the *Occidental II* case,[150] which really constitutes the foundational case when it comes to proportionality in investment arbitration (**Section 2.2**). Finally, I will review the recent increase in the reliance on the principle of proportionality by foreign investors as a complement to the traditional claims for breach of legitimate expectations (**Section 2.3**).

2.1. The Slow Start of the Principle of Proportionality

Before turning to the recent cases in which the principle of proportionality is expressly addressed by arbitral tribunals, it is interesting to review the early investor-State disputes, in particular the numerous cases arising from the Argentine financial crisis in the early 2000s.

The context in which these early cases arose can be summarized as follows. In the 1990s, Argentina decided to privatize some previously state-run public services, in particular the transportation and distribution of gas. This privatization was implemented through various laws and decrees, in particular the Gas Law of 1992, and through a

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[150] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012), IIC 561 (2012) [hereinafter *Occidental II*].

bidding process by which foreign investors could acquire shares in newly created companies. The regulatory framework enacted by Argentina in relation to the gas sector provided three main benefits: (i) foreign investors were allowed to calculate tariffs in US dollars and convert them in Argentina peso at the time of billing; (ii) a tariff review based on the US Producer Price Index (PPI adjustment) was to be performed every six months; and (iii) foreign investors could request the revision of the tariffs every five year to ensure a reasonable rate of return. In addition to this specific framework, Argentina had also adopted the Convertibility Law in 1991 establishing a fixed exchange rate of 1:1 between the US dollar and the Argentine peso.

However, due to a variety of factors, the Argentina economic situation began to deteriorate in the late 1990s. Between 1998 and 2003, the crisis only worsened with bank runs, a deep economic recession, a sharp increase of the unemployment rate and a galloping inflation. As a response to the crisis, the Argentine government took various measures affecting the gas sector, in particular (i) the suspension, and then abolition, of the semi-annual tariff review based on US PPI; and (ii) the abolition of the fixed exchange rate between the US dollar and the Argentine peso. As a result, foreign investors initiated arbitration under various BITs against Argentina alleging *inter alia* that the measures breached the FET standard.

Interestingly, when assessing whether Argentina breached the FET standard, most investor-State tribunals acknowledged that the emergency measures adopted by Argentina and interfering with the foreign investors' interests had to be weighed against the public interests at stake. For example, in *BG Group*, the tribunal held the following:

> "The duties of the host State must be examined in the light of the legal and business framework as represented to the investor at the time that it

> decides to invest. This does not imply a freezing of the legal system, as suggested by Argentina. Rather, in order to adapt to changing economic, political and legal circumstances the State's regulatory power still remains in place. As previously held by tribunals addressing similar considerations, '… *the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well*.'"[151]

When addressing changes to the Argentine regulatory regime in the water sector (and not in the gas sector) implemented during the financial crisis, the *Suez* tribunal similarly recalled the principle according to which:

> "In interpreting the concept of fair and equitable treatment, the Tribunal must also bear in mind that the Concession by its terms was subject to the regulatory authority of the Argentine State, which had a reasonable right to regulate. Thus in interpreting the meaning of fair and equitable treatment to be accorded to investors, the Tribunal must *balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service*."[152]

As can be seen from the above, most investor-State tribunals addressing the legality of the Argentine emergency measures under the FET standard adopted some sort of balancing approach between, on the one hand, the foreign investors' legitimate expectations resulting from the regulatory regime in place at the time of the investment and, on the other hand, the public interests underlying Argentina's measures.

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[151] *BG Group*, at ¶ 298.
[152] *Suez*, at ¶ 236 (emphasis added).

While the necessity to perform a balancing exercise between competing interests when assessing claims for breach of the FET standard was widely acknowledged in the Argentine cases, the first mention of such necessity can be traced back to the earlier *Saluka* case. Ever since then, investor-State tribunals have constantly referred to the following passage of the *Saluka* award to support the adoption of a balancing approach:[153]

> "No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well."[154]

While *Saluka* prompted the adoption of a balancing approach, early investor-State tribunals, including the ones adjudicating the Argentine cases, did neither refer to the principle of proportionality, nor make explicit use of a formal proportionality analysis as known and applied in various domestic legal systems. In fact, the only tribunal that expressly mentioned proportionality at the time but did not in any way conduct a detailed proportionality analysis was the *Continental* tribunal.[155]

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[153] *BG Group*, at ¶ 298; *El Paso*, at ¶ 358; Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, ¶ 537 (Apr. 8, 2013), IIC 585 (2013) [hereinafter *Arif*]; *Perenco*, at ¶ 560; Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-2, Award, ¶ 6.81 (Mar. 15, 2016), IIC 841 (2016) [hereinafter *Copper Mesa*]; Flemingo DutyFree Shop Private Limited v. Republic of Poland, Ad Hoc Tribunal (UNCITRAL), Award, ¶ 551 (Aug. 12, 2016), IIC 883 (2016) [hereinafter *Flemingo*]; *Novenergia*, at ¶ 657; *Antaris*, at ¶ 360(9); *Cube*, at ¶ 411; *9REN*, at ¶ 254; *SolEs*, at ¶ 318; *Belenergia*, at ¶ 572; *PV Investors*, at ¶ 582; *Hydro Energy*, at ¶¶ 582-583; *SunReserve*, at ¶ 686.

[154] *Saluka*, at ¶ 305.

[155] *Continental*, at ¶ 227: "In conformity with the concept of "necessity" discussed above, we consider that the Government's effort to struck an appropriate balance between that aim and the responsibility of any government towards the country's population: it is self-evident that not every sacrifice can properly be imposed on a country's people in order to safeguard a certain policy that would ensure full respect

For the purpose of this Essay, i.e., assessing how the principle of proportionality was or was not used and developed over time by investor-State tribunals in connection with the FET standard, there are two main takeaways from the early ISDS cases, including the Argentine cases. First, while recognizing the necessity to adopt a balancing approach in the context of assessing legitimate expectations, tribunals did not resort to an exhaustive proportionality analysis and, in fact, barely mentioned the principle of proportionality. Second, the principle of proportionality was certainly not considered as constituting a separate and independent ground for claims of breach of the FET standard. Indeed, even the less formal balancing approach espoused by investor-State tribunals was performed in the context of the alleged frustration of the investor's legitimate expectations.

2.2. *Occidental II* – Proportionality as an Element of the FET Standard

When it comes to the principle of proportionality as an independent and separate element of the FET standard, the foundational case is *Occidental II*. The relevant facts of the case are the following. In 1999, Occidental entered into a participation contract with Petroecuador, the national oil company of Ecuador, regarding the exploration and exploitation of a certain region in the Amazon, i.e., Block 15. The participation contract provided that, if Occidental wanted to assign rights and obligations under the contract to a third party, prior approval and authorization by both Petroecuador and the relevant ministry were required. In 2000, Occidental concluded a farmout agreement with AEC, another oil company without seeking prior approval and authorization from Petroecuador and the relevant ministry. On May 15, 2006, the Ecuadorian ministry of

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towards international obligations in the financial sphere, before a breach of those obligations can be considered justified as being necessary under the BIT. *The standard of reasonableness and proportionality do not require as much.*" (emphasis added).

energy terminated the participation contract by governmental decree (the "***Caducidad* Decree**") in accordance with Article 74 of Ecuador's Hydrocarbons Law and ordered Occidental to turn over all its assets relating to Block 15.

When assessing Occidental's claim that Ecuador breached the FET standard, the *Occidental II* tribunal examined the proportionality of the *Caducidad* Decree. In this regard, the tribunal held that:

> "[…] there is a growing body of arbitral law, particularly in the context of ICSID arbitrations, which holds that the principle of proportionality is applicable to potential breaches of bilateral investment treaty obligations. In the present case, the Treaty provides at Article II.3(a) that investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. The obligation for fair and equitable treatment has on several occasions be interpreted to import an obligation of proportionality."[156]

The tribunal's finding that the principle of proportionality formed part of the FET standard relied on the following two considerations. First, the principle was used in a "variety of international law settings", including (i) by WTO Panels when assessing countermeasures taken in trade disputes under the General Agreement on Tariffs and Trade ("**GATT**"),[157] and (ii) by the European Court of Justice and the European Court of Human Rights when reviewing administrative actions.[158] Second, and more importantly, the principle had been applied by previous investor-State tribunals, in

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[156] *Occidental II*, at ¶ 404.
[157] *Id.*, at ¶ 402.
[158] *Id.*, at ¶ 403.

particular *Tecmed*, *MTD Equity*, *LG&E* and *Azurix*. However, none of the four investor-State awards mentioned in the *Occidental II* award actually held that the principle of proportionality formed an integral part of the FET standard.

In *MTD Equity*, the tribunal merely noted that the parties agreed with Judge Schwebel's statement that the FET standard was "a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, non-discrimination, and proportionality".[159] Moreover, the *MTD Equity* tribunal did not perform a proportionality analysis to reach its decision, but rather relied on the concept of legitimate expectations as set forth in *Tecmed*.

As to *Tecmed*, *LG&E* and *Azurix*, while these tribunals discussed and applied the principle of proportionality, they did so in the context of expropriation claims (and not in connection with the FET standard). For example, the *Tecmed* tribunal found that "[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measures."[160] Both the *LG&E* and *Azurix* tribunals referred to this finding made by the *Tecmed* tribunal when assessing expropriation claims.[161]

In conclusion, while the principle of proportionality had undoubtedly been applied by courts and tribunals in various contexts relating to international law, the *Occidental II* award was a precursor when it comes to its application as an independent element of the FET standard.

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[159] *MTD Equity*, at ¶ 109.
[160] *Tecmed*, at ¶ 122.
[161] *LG&E*, at ¶ 195; Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 311 (Jul. 14, 2016), IIC 24 (2006) [hereinafter *Azurix*].

2.3. The Recent Resurgence of the Principle of Proportionality

Despite the *Occidental II* award, investor-State tribunals have not shown a particular willingness to assess the principle of proportionality as an independent and separate element of the FET standard for a quite long time. As a matter of fact, the principle of proportionality was barely mentioned, and certainly not assessed or applied as an independent element, until *Charanne*.

The *Charanne* case, followed by most of the investor-State disputes relating to the regulatory changes enacted by Spain in relation to the solar energy industry, brought the issue of the relationship between the principle of proportionality and the FET standard to the forefront. In this regard, investor-State tribunals had to address the following two main questions: (i) whether the principle of proportionality constitutes an independent element of the FET standard (as implied by the *Occidental II* tribunal) (**Section 2.3.1**); and (ii) what standard the principle of proportionality requires (**Section 2.3.2**).

2.3.1. The Nature of the Principle of Proportionality

As mentioned above, *Charanne* was the first case in which the principle of proportionality came to the forefront of the investor's claim for breach of the FET standard after *Occidental II*. With regard to the first issue, the *Charanne* tribunal held the following:

> "In fact, an investor has a *legitimate expectation* that, when modifying the existing regulation based on which the investment was made, *the*

> *State will not act* unreasonably, *disproportionately* or contrary to the public interest."[162]

In other words, the *Charanne* tribunal considered that a foreign investor has a legitimate expectation that the host State will not engage in acts, such as modifying laws and regulations, incompatible with the principle of proportionality. Therefore, under this approach, proportionality is construed as a legitimate expectation of investors and not as an independent element of the FET standard. In the wake of the *Charanne* award, several investor-State tribunals adopted a similar approach and resorted to the principle of proportionality to assess whether there was a breach of the investor's legitimate expectations.

However, other tribunals found that proportionality was not to be construed as part of the investor's legitimate expectations, but rather constituted a separate and independent element of the FET standard.[163] In other words, the reason for which the host State's acts had to comply with the principle of proportionality derived directly from the State's obligation to treat investors fairly and equitably under the applicable BIT, and not from the investors' legitimate expectation that the host State would act in a proportionate manner. For example, the *Muszynianka* tribunal held that:

> "States are free to modify the legal regime applicable at the time of the investment to the extent they do so within the limits prescribed by FET. Accordingly, *regardless of the investor's expectations, FET bars*

[162] *Charanne*, at ¶ 514 (emphasis added).
[163] *RREEF*, at ¶ 260; *Hydro Energy*, at ¶ 573; Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic, PCA Case No. 2017-08, Award, ¶ 466 (Oct. 7, 2020) [hereinafter *Muszynianka*].

> unreasonable, discriminatory, or *disproportionate reforms*, adopted contrary to due process."[164]

While the debate as to whether the State's obligation to act in compliance with the principle of proportionality results (i) directly from its obligation to accord fair and equitable treatment to foreign investors, or (ii) from its obligation not to frustrate their legitimate expectations might raise interesting questions from an academic perspective, it does not have much practical implications. Indeed, investor-State tribunals considering proportionality as a legitimate expectation held by foreign investors have made it clear that such proportionality expectation exists irrespective of any specific commitment from the host State. This is perfectly illustrated by the following finding made in *Blusun*:

> "*In the absence of a specific commitment*, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and 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 interest of recipients who may have committed substantial resources on the basis of the earlier regime."[165]

If the investor's expectation that the State will act proportionately does not arise from specific commitments, assurances or representations, this expectation may be considered as a general expectation that all investors may legitimately hold. Therefore,

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[164] Muszynianka, at ¶ 466 (emphasis added).
[165] *Blusun*, at ¶ 372 (emphasis added).

whether the State's obligation to comply with the principle of proportionality arises from the FET standard itself or from general legitimate expectations that all investors have, the practical consequences for the application of proportionality seem *prima facie* to be negligible. Under both approaches, the proportionality obligation will apply to any and all acts of the State. This specific point was highlighted by the *Eiser* tribunal:

> "Whether viewed as basis for reasonable expectations, or as a statement of a State's obligations under ECT, the principle is the same."[166]

However, because the investor's legitimate expectations depend on a wide range of circumstances (i.e., the host State's background, the industry sector, and the investor's due diligence), framing the principle of proportionality as a general expectation, and not as an independent element of the FET standard, might nonetheless have certain practical implications. Indeed, the question arises as to whether, in certain very specific cases, these various circumstances could be of such nature as to lower, or make illegitimate, the investor's expectation of proportionality. For example, consider the situation in which the foreign investor makes an investment in a State (i) that has recently experienced significant political and economic changes, and (ii) in which the new government has already indicated that certain regulatory regimes applicable to specific industry sectors would be rethought from top to bottom and undergo sweeping reforms (without detailing further what those reforms may be). In this very specific context, it might not be reasonable and legitimate for the foreign investor to hold an expectation that any reform to come would necessarily be proportionate, as the overall circumstances make it likely that the regulatory regime will be radically altered.

[166] *Eiser*, at ¶ 370.

By contrast, if the State's obligation to act proportionately at all times results directly from the FET standard, such obligation would arguably also apply in this specific case.

In light of the foregoing, there is undoubtedly an emerging trend among investor-State tribunals to consider the host State's compliance with the principle of proportionality. That said, the exact nature of such principle remains subject to controversy, and the way in which this issue will eventually be settled might have practical consequences for the scope of proportionality in peculiar cases.

2.3.2. The Proportionality Standard

The second issue that investor-State tribunals have been faced with revolves around which standard or test should be applied when conducting a proportionality analysis. In this regard, one of the first investor-State awards to expressly set forth the applicable test for proportionality was issued in *Electrabel*:

> "The test for proportionality has been developed from certain municipal administrative laws, and requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved."[167]

Thus, for the host State's conduct to meet the proportionality test suggested by the *Electrabel* tribunal, such conduct must satisfy three requirements: (i) suitability, i.e., whether the measure is suitable to achieve a legitimate policy objective; (ii) necessity, i.e., whether the measure is necessary to achieve that objective; and (iii) proportionality *stricto sensu*, i.e., the conduct is not excessive considering the relative weight of the interests involved. Recently, these three requirements were

[167] Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Award, ¶ 179 (Nov. 25, 2015), IIC 759 (2015) [hereinafter *Electrabel (Award)*]; *see also Hydro Energy*, at ¶ 573.

addressed in further detail by the tribunal in *RWE Innogy* and *Muszynianka*. With regard to suitability, the *Muszynianka* tribunal held that "[a] State measure is deemed suitable if it is rationally connected to the objective it pursues by being capable of advancing or having a causal relationship with that objective".[168] As to the necessity of a measure, the *RWE Innogy* tribunal clarified that it consisted of determining "whether there were any less restrictive means reasonably available to the State for meeting the given objective".[169] In this regard, the *Muszynianka* tribunal clarified that the identification of an alternative measure do not necessarily mean that the necessity requirement is not met, as such measure must also be "available and equally effective".[170] Finally, proportionality *stricto sensu* "requires weighing the effects of a State measure on investor's rights or interests and the significance of the purpose pursued by the measure."[171] More specifically, proportionality *stricto sensu* is not fulfilled "when a measure imposes an excessive burden on an investor's rights in relation to the aim of the measure."[172]

With regard to the suitability and necessity requirements, it is worth emphasizing that certain tribunals, such as *RREEF*, have considered the suitability and the necessity of measures adopted by the host State under the concept of reasonableness.[173] While it goes beyond the scope of this Essay to discuss in detail the standard of reasonableness developed by the ISDS jurisprudence, it suffices to say that this standard (i) is in principle considered to form part of the FET standard[174] (or of the concept of legitimate

[168] *Muszynianka*, at ¶ 567.
[169] *RWE Innogy*, at ¶ 554.
[170] *Muszynianka*, at ¶ 571.
[171] *Id.*, at ¶ 573.
[172] *Id.*, at ¶ 574.
[173] *RREEF*, at ¶ 464.
[174] *RREEF*, at ¶ 260; *Hydro Energy*, at ¶ 573.

expectations),[175] and (ii) overlaps with the principle of proportionality in many aspects (and is even addressed together with proportionality by certain tribunals).[176] When referring to the standard of reasonableness, investor-State tribunals have often cited the finding of the *AES Summit* tribunal,[177] according to which:

> "There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.
>
> A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.
>
> […] A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented."[178]

Based on this formulation of the standard of reasonableness in *AES Summit*, it is not difficult to see how this reasonableness standard overlaps and is closely interconnected with the principle of proportionality as set forth in *Electrabel.*

After having reviewed the three prongs that investor-State tribunals generally assess when performing a proportionality analysis, i.e., suitability, necessity and proportionality *stricto sensu*, it might be worth looking in more detail at how each of these requirements has been assessed by tribunals. In this regard, the suitability and

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[175] *PV Investors*, at ¶ 582.
[176] *RREEF*, at ¶¶ 437-472; *Hydro Energy*, at ¶ 573.
[177] *RWE Innogy*, at ¶ 644; *Muszynianka*, at ¶ 545; *Stadtwerke*, at ¶ 318.
[178] *AES Summit*, at ¶¶ 10.3.7-10.3.9.

necessity requirements do not call for any particular comments. By contrast, it is interesting to briefly review how investor-State tribunals have addressed the issue of proportionality *stricto sensu* in recent awards. In the specific context of subsidies granted by host States to foreign investors producing renewable energy, several tribunals have assessed the proportionality *stricto sensu* through an assessment of the impact of the disputed measures on the rate of return earned by the investor through its investment.[179] For example, the *Stadtwerke* tribunal held that:

> "Having already assessed the general reasonableness and proportionality of the measures, the Tribunal will nonetheless consider whether the impact upon the Claimants' investment specifically was reasonable or proportionate through an assessment of the rate of return earned by the Claimants' investment before and after the disputed measures."[180]

Finally, the renewed focus on the principle of proportionality, and to a certain extent on the concept of reasonableness, has brought with it increased mentions of the "margin of appreciation" that State enjoys when balancing competing interests. While a detailed analysis of the concept of margin of appreciation (sometimes also referred to as deference) goes beyond the scope of this Essay, two points are worth highlighting.

First, a back-and-forth movement can be identified in terms of the emphasis that investor-State tribunals have placed on the deference that should be granted, or the margin of appreciation that should be left, to domestic authorities. While the early investor-State tribunals, in particular in NAFTA cases, consistently outlined the fact

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[179] *Stadtwerke*, at ¶¶ 327-356; Eurus Energy Holdings Corporation v. Kingdom of Spain, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, ¶ 361 (Mar. 17, 2021) [hereinafter *Eurus*].
[180] *Stadtwerke*, at ¶ 327.

that they had to grant a certain deference to decisions made by authorities of the host State,[181] subsequent awards tended to place less emphasis on the notion of deference to the host State's domestic authorities. However, beginning with the *Philip Morris* award, the concept of margin of appreciation left to domestic authorities has begun to come back to the forefront:

> "The Tribunal agrees with the Respondent that the 'margin of appreciation' is not limited to the context of the ECHR but 'applies equally to claims arising under BITs,' at least in contexts such as public health. The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases, respect is due to the 'discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith … involving many complex factors.'"[182]

Interestingly, in *Philip Morris*, the dissenting arbitrator, Gary Born, rejected the application of the concept of margin of appreciation on the basis that (i) it constituted "a specific legal rule" that could not "be transplanted to the BIT", and (ii) there already existed "well-considered legal rules" serving "similar purposes […] in a more nuanced and balanced manner."[183]

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[181] Robert Azinian, Kenneth Davitian and Ellen Baca v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, ¶ 99 (Nov. 1, 1999) IIC 22 (1999) [hereinafter *Azinian*]; *S.D. Myers*, at ¶ 263; Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, ¶ 126 (Oct. 11, 2002), IIC 173 (2002) [hereinafter *Mondev*]; ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award, ¶ 190 (Jan. 9, 2003), 6 ICSID Rep 470 (2004) [hereinafter *ADF Group*].

[182] *Philip Morris*, at ¶ 399.

[183] Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/17, Concurring and Dissenting Opinion, ¶ 87 (Jul. 8, 2016), IIC 844 (2016) [hereinafter *Philip Morris (Dissent)*].

However, despite Born's dissent, the trend has been accentuated by the string of cases against Spain, Italy and Czech Republic relating to the discontinuance of generous incentive programs previously adopted to attract investors in the renewable energy sector.[184] More specifically, the *RWE Innogy* tribunal expressly indicated that the margin of appreciation expanded beyond cases involving public health or essential security interests:

> "[…] The Tribunal considers that this must be appropriate in the current legal and factual context, and it does not accept that allowing some margin of appreciation would only be suitable in cases involving public health or essential security interests."[185]

In light of the foregoing, there seems to be an emerging trend towards the resurgence of the notion of deference in another form, i.e., under the guise of the concept of margin of appreciation.

Second, considering the emergence of the notion of margin of appreciation in connection with the standards of reasonableness and proportionality, it might be useful to attempt to capture what the scope and content of this notion are. While it remains difficult, if not impossible, to propose a single and unitary definition, the *PV Investors* award encompasses a rather exhaustive description of what the concept of margin of appreciation entails:

> "Moreover, it is also recognized that States, as the entities tasked with balancing the often competing interests involved, enjoy a margin of appreciation in the field of economic regulation. This means that an

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[184] *Antaris*, at ¶ 360(7); *RREEF*, at ¶ 242; *RWE Innogy*, at ¶ 553.
[185] *RWE Innogy*, at ¶ 553.

> arbitral tribunal asked to review general economic regulation will normally not second-guess the State's choices; it will not review de novo whether they are well-founded, nor assess whether alternative solutions would have been more suitable. Governments often have to make controversial choices, which especially those directly affected may view as mistaken, based on misguided economic theory, placing too much emphasis on certain social values over others. It is not the task of an investment treaty tribunal to evaluate the policy choices that often underpin economic decisions. This being so, the margin of appreciation accorded to the State cannot be unlimited; otherwise the substantive treaty provisions would be rendered wholly nugatory. In the Tribunal's view, the limits of the State's power are drawn by the principles of reasonableness and proportionality, which must guide a tribunal's assessment of the allegedly harmful changes in the legislation."[186]

In conclusion, the principle of proportionality, together with the similar standard of reasonableness and the concept of margin of appreciation left to the host States, has recently come back to the spotlight in investor-State disputes based on alleged breaches of the FET standard. Interestingly, the current development of the principle of proportionality seems to share many common features with the earlier development of the concept of legitimate expectations in the early 2000s. First, the ossification of the principle of proportionality is occurring at a rapid pace with almost all investor-State tribunals addressing this principle in a form or another. Second, just like the legal sources of the concept of legitimate expectations remained uncertain until the *Total*

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[186] *PV Investors*, at ¶ 583.

award, the exact legal sources from which the principle of proportionality derives its validity under international law are still subject to disagreement: certain tribunals consider proportionality as an independent element of the FET standard, whereas others approach proportionality as a legitimate expectation of foreign investors. Third and finally, investor-State tribunals heavily refer to findings and statements made in previous awards in order to justify their own conclusions regarding the principle of proportionality.

III. Conclusion

When it comes to international law issues, practitioners and scholars alike know all too well that we live in a world of uncertainty. In this respect, the development of the scope and content of the FET standard by investor-State tribunals over the last decades, in particular regarding legitimate expectations and proportionality, is (perhaps unsurprisingly) no exception to this rule. Considering that most, if not all, of the investor-State disputes are highly fact-sensitive and entail circumstances that vary widely, it is sometimes difficult to discern legal principles that can be generalized and applied throughout a large set of disputes. This issue is further exacerbated by the fact that BITs and FTAs often contain vague formulations, such as fair and equitable treatment, which provide very little interpretative guidance to investor-State tribunals.

That said, the present Essay constitutes an initial, and necessarily incomplete, attempt at (i) identifying how investor-State tribunals participated to the development of the FET standard, in particular its scope and content, and at (ii) seeing the forest for the trees. In this regard, and as outlined on reiterated occasions in this Essay, it might often be illusionary to identify a single consistent and principled approach adopted by investor-State tribunals. The reality of the field of foreign investment law as it currently

stands is that there is still a relatively high level of fragmentation. However, the identification of various approaches and the execution of a detailed and methodical comparison between such approaches are in and of themselves valuable. As a matter of fact, this creates an opportunity to think deeper about the advantages and disadvantages of each of these approaches. In the end, it is only if these approaches are clearly identified and methodically compared that meaningful suggestions for the reform of the ISDS system can be made and that this system can be adapted to become a better dispute resolution mechanism.

TABLE OF CASES

9REN Holding S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/15/15, Award (May 31, 2019);

ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), 6 ICSID Rep 470 (2004);

AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award (Sep. 23, 2010), IIC 455 (2010);

Antaris GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01, Award (May 2, 2018), IIC 1413 (2018);

Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31, Award (Jun. 15, 2018), IIC 1439 (2018);

Robert Azinian, Kenneth Davitian and Ellen Baca v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999) IIC 22 (1999);

Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (Jul. 14, 2016), IIC 24 (2006);

BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, (Dec. 2, 2019), IIC 1724 (2019);

Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award (Aug. 6, 2019), IIC 1597 (2019);

BG Group Public Limited Company v. Argentine Republic, Ad Hoc Tribunal (UNCITRAL), Final Award (Dec. 24, 2007), IIC 321 (2007);

Blusun S.A., Jean-Pierre Lecorcier, and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award (Dec. 27, 2016), IIC 1317 (2016);

Cavalum SGPS, S.A. v. Kingdom of Spain, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (Aug. 31, 2020);

Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain, SCC Case No. 062/2012, Final Award (Jan. 21, 2016), IIC 758 (2016);

Chemtura Corporation v. Government of Canada, Permanent Court of Arbitration (UNCITRAL), Award (Aug. 2, 2010), IIC 451 (2010);

CME Czech Republic B.V. v. Czech Republic, Ad Hoc Tribunal (UNCITRAL), Partial Award (Sep. 13, 2001), 9 ICSID Rep 121 (2006);

CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), IIC 65 (2005);

Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sep. 5, 2008), IIC 336 (2008);

Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-2, Award (Mar. 15, 2016), IIC 841 (2016);

Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum (Feb. 19, 2019), IIC 1593 (2019);

Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008), IIC 333 (2008);

EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009), IIC 392 (2009);

Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award (May 4, 2017);

Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Award (Nov. 25, 2015), IIC 759 (2015);

Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012), IIC 567 (2012);

El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), IIC 83 (2006);

Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007), IIC 292 (2007);

Eurus Energy Holdings Corporation v. Kingdom of Spain, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, (Mar. 17, 2021);

Flemingo DutyFree Shop Private Limited v. Republic of Poland, Ad Hoc Tribunal (UNCITRAL), Award (Aug. 12, 2016), IIC 883 (2016);

Foresight Luxembourg Solar 1 S.à.r.l. and others v. Kingdom of Spain, SCC Case No. V 2015/150, Final Award (Nov. 14, 2018);

FREIF Eurowind Holdings Ltd. v. Kingdom of Spain, SCC Case No. V 2017/060, Final Award (Mar. 8, 2021);

Frontier Petroleum Services Ltd. v. Czech Republic, Permanent Court of Arbitration (UNCITRAL), Final Award (Nov. 12, 2010), IIC 465 (2010);

Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (Sep. 16, 2003), IIC 116 (2003);

Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award (Jul. 26, 2018), IIC 1428 (2018);

Glamis Gold, Ltd. v. United States of America, Ad Hoc Tribunal (UNCITRAL), Award (Jun. 8, 2009), IIC 380 (2009);

Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award (Sep. 22, 2014), IIC 660 (2014);

Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42, Decision on Jurisdiction Liability and Directions on Quantum (Mar. 9, 2020);

InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award (Aug. 2, 2019), IIC 1641 (2019);

Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain, SCC Case No. V 2013/153, Award (Jul. 12, 2016), IIC 979 (2016);

Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen, and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic, PCA Case No. 2014-03, Dissenting Opinion (Oct. 11, 2017), IIC 1311 (2017);

Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen, and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic, PCA Case No. 2014-03, Final Award (Oct. 11, 2017), IIC 1311 (2017);

LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), IIC 152 (2006);

Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award (Mar. 30, 2015), IIC 682 (2015);

Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award (May 16, 2018), IIC 1375 (2018);

Metaclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), IIC 163 (2001);

Methanex Corporation v. United States of America, Ad Hoc Tribunal (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005), IIC 167 (2005);

Micula and others v. Romania, ICSID Case No. ARB/05/20, Award (Dec. 11, 2013), IIC 621 (2013);

Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), IIC 173 (2002);

Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013), IIC 585 (2013);

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004), IIC 174 (2004);

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment (Mar. 21, 2007), IIC 177 (2007);

Murphy Exploration & Production Company – International v. Republic of Ecuador, PCA Case No. 2012-16, Partial Final Award (May 6, 2016), IIC 852 (2016);

Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic, PCA Case No. 2017-08, Award (Oct. 7, 2020);

National Grid PLC v. Argentine Republic, Ad Hoc Tribunal (UNCITRAL), Award (Nov. 3, 2008), IIC 178 (2006);

NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles (Mar. 12, 2019);

Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain, SCC Case No. 2015/063, Final Arbitral Award (Feb. 15, 2018), IIC 1369 (2018);

Occidental Exploration and Production Company v. Republic of Ecuador, LCIA Case No. UN3467, Final Award (Jul. 1, 2004), IIC 202 (2004);

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012), IIC 561 (2012);

OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36, Award (Sep. 6, 2019), IIC 1627 (2019);

Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (Sep. 11, 2007), IIC 302 (2007);

Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (Sep. 12, 2014), IIC 657 (2014);

Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/17, Award, (Jul. 8, 2016), IIC 844 (2016);

Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/17, Concurring and Dissenting Opinion (Jul. 8, 2016), IIC 844 (2016);

Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), IIC 338 (2008);

RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum (Nov. 30, 2018), IIC 1537 (2018);

RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (Dec. 30, 2019), IIC 1716 (2020);

Salini Costruttori S.p.a. and Italstrade S.p.a. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (Jul. 23, 2001), 6 ICSID Rep 398 (2004);

Saluka Investments BV v. Czech Republic, Permanent Court of Arbitration (UNCITRAL), Partial Award (Mar. 17, 2006), IIC 210 (2006);

S.D. Myers, Inc. v. Government of Canada, Ad Hoc Tribunal (UNCITRAL), Partial Award (Nov. 13, 2000), 40 ILM 1408 (2001);

Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sep. 28, 2007), IIC 221 (2005);

SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award (Jul. 31, 2019);

Stadtwerke München GmbH, RWE Innogy GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award (Dec. 2, 2019);

Suez, Sociedad General de Aguas de Barcelona S.A. and others v. Argentine Republic, ICSID Case No. ARB/13/19, Decision on Liability (Jul. 30, 2010), IIC 443 (2010);

SunReserve Luxco Holdings S.à.r.l. and others v. Italian Republic, SCC Case No. V 2016/32, Final Award (Mar. 25, 2020), IIC 1644 (2020);

Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 10 ICSID Rep 130 (2007);

The PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Final Award (Feb. 28, 2020), IIC 1653 (2020);

Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability (Dec. 27, 2010), IIC 484 (2010);

Toto Costruzioni Generali S.P.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Award (Jun. 7, 2012), IIC 545 (2012);

Ulysseas, Inc. v. Republic of Ecuador, Permanent Court of Arbitration (UNCITRAL), Final Award (Jun. 12, 2012), IIC 548 (2012);

Waste Management Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), IIC 270 (2004);

Watkins Holdings S.à.r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award (Jan. 21, 2020);

William Clayton and others v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015), IIC 688 (2015).