

Niclas Landmann

Legitimate Expectations and Fair- and-Equitable-Treatment under the Energy Charter Treaty

A Comparative Analysis of the Renewable Energy Cases



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Studies in International Investment Law

edited by

Prof. Dr. Marc Bungenberg, LL.M., Universität des Saarlandes

Prof. Dr. Dr. h.c. Stephan Hobe, LL.M., Universität zu Köln

Prof. Dr. August Reinisch, LL.M., Universität Wien

Prof. Dr. Andreas R. Ziegler, LL.M., Universität Lausanne

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*To my parents
I will always owe you my heartfelt gratitude*

Preface

This thesis was accepted as a doctoral dissertation by the Faculty of Law of Cologne University in September 2021. Arbitral jurisprudence and legal literature up until February 2021 were taken into account.

This work could not have been realised without the support of numerous people. I would like to take this opportunity to express my sincere gratitude.

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Rodenbach, October 2021, Niclas Landmann

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Table of Abbreviations

AEEG	Italian <i>Autorità per l'energia elettrica e il gas</i>
AU	Italian <i>Autorizzazione Unica</i>
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement between the EU and Canada of 30 October 2016
CJEU	Court of Justice of the European Union
CNE	Spanish National Energy Commission
CNE Reports	Public Reports issued by CNE
COMESA	Investment Agreement for the Common Market for Eastern and Southern Africa of 23 May 2007
CPI	Consumer Price Index
CSP	Concentrated Solar Power
CSR	Corporate Social Responsibility
Destinazione Italia	Italian LD No. 145/2013 of 23 December 2013
Decree	
DIA	Italian <i>Denuncia di Inizio Attiviti</i>
EC	European Commission
ECHR	European Charter of Human Rights
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EL	Spanish Energy Law of 27 November 1997
Energy Account	Series of so-called “Conto Energia” decrees implemented by the Italian Ministry of Economic Development
ERO	Czech Energy Regulatory Office
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIP	Feed-in Premium
FIT	Feed-in Tariff
FPS	Full Protection and Security
FTA	Free Trade Agreement
GSE	Italian <i>Gestore dei Servizi Energetici</i>
GSE Convention	Private contract concluded between renewable energy producers and the GSE

Table of Abbreviations

IBA	International Bar Association
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	International Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 14 October 1966
IDEA	Spanish Institute for Energy Diversification and Savings
IEA	International Energy Agency
IFC	International Finance Corporation
IIA	International Investment Agreement
ILC	International Law Commission
Intra-EU dispute	Dispute between an investor from the EU and a Member State of the EU
IPA	Investment Protection Agreement
ISDS	Investor-State Dispute Settlement
LD	Italian Legislative Decree
Mauritius Convention	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration of 10 December 2014
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North America Free Trade Agreement
NEL	Spanish New Energy Law of 26 December 2013
OECD	Organisation for Economic Co-operation and Development
PANER 2011-2020	Spanish National Action Plan for Renewable Energy 2011-2020
PCIJ	Permanent Court of International Justice
PER 2005-2010	Spanish Plan for Renewable Energies 2005-2010
PPA	Power Purchase Agreement
PV	Photovoltaic
RAIPRE	Administrative Registry for Electrical Power Generating Units
RD	Spanish Royal Decree
RDL	Spanish Royal Decree Law
Romani Decree	Italian LD 28/2011 of 3 March 2011
Spalma Incentivi Decree	Italian LD 91/2014, converted into law by Law 116/2014 of 11 August 2014

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TVPEE	Tax on the value of the production of electrical energy, introduced by Spanish Law 15/2012 of 21 April 2012.
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Executive Summary

The Fair and Equitable Treatment Standard (FET) has been a highly undetermined concept ever since investors began relying on it as an individual protective right under international investment agreements (IIAs). The notion of legitimate expectations emerged in the early 2000s as a key aspect of the FET Standard and to counter the vagueness that coincides with it. This development has greatly benefitted from the cases against the Argentine Republic in the aftermath of its financial crisis between 1998-2002. While arbitral jurisprudence on the notion of legitimate expectations has developed immensely during this phase, the application of the standard is still characterized by legal uncertainty. Legal uncertainty, in turn, does not only adversely affect investors in their business decisions and states in their right to regulate but also undermines the legitimacy of investment law and its dispute resolution mechanisms as a whole. This legal uncertainty partly derives from the issue that the notion of legitimate expectations is now firmly rooted in international investment law but has seen inconsistency in its application in arbitral jurisprudence.

The question, therefore, is whether the new generation of arbitral decisions, emerging under the renewable energy cases under the Energy Charter Treaty (ECT), follow a system of soft precedent, which allows the further refinement of the requirements for the investors' legitimate expectations. This analysis focuses on 1) the conduct presented by the host states which has been qualified as grounds for legitimate expectations, 2) the level of due diligence which arbitral tribunals required from investors, and 3) the intensity of the state's measures that eventually violated the reliance of the investors. Within this analysis, the focus is set on the highly controversial question of whether the legal framework may serve as a basis for legitimate expectations. The case is made that recent arbitral jurisprudence accepted the legal framework as a basis for some sort of legitimate expectations. The intensity of the expectations is then determined by the additional conduct of the state based on the particular facts of the individual case. A sufficiently specific legal framework may invoke the expectations in investors that it will not be fundamentally and drastically altered which would undermine the premises on which sufficiently diligent investors based their business decisions. If the host states make supporting representations that are mapping out a certain policy with re-

Executive Summary

gard to an individual or a group of investors, the expectations may further be narrowed down. The investors, on the other hand, must assess the economic environment in the host state carefully and consider warning signs that may indicate a change in trend in the host state's conduct, which may eventually result in the alteration or abolishment of the prevailing legal framework. Since states are afforded a wide margin of discretion by their right to regulate, the legal framework can never be interpreted as a freezing-commitment. The right to regulate derives from state sovereignty and must duly be considered when evaluating a state's actions. Therefore, the measures implemented in the host state must also have a significant impact on the profitability of the investment. Regarding the profitability, which internal rates of return tribunals deem "reasonable" in context of the commitments of the host states and their legitimate aim to reduce excessive gains to the detriment of the public, are also analysed.

The analysis of the case law aims to demonstrate that arbitral jurisprudence, despite the different possible outcomes in light of the individual facts or the case, has formed a common understanding of certain subcategories of the notion of legitimate expectations in many respects. Lastly, it is argued that the acceptance of the legal framework as a basis for a minimum standard of protection against regulatory change is not unduly restricting the states' right to regulate and maintains a sizable margin of discretion.