MODERNIZATION OF THE ENERGY CHARTER TREATY

The European Union’s Proposal for the Modernization of the Energy Charter Treaty

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After the European Court of Justice seminal decision in Achmea, where consent to investor-State arbitration enshrined in intra-EU bilateral investment treaties was found to be incompatible with the autonomy of the European Union (EU) legal order, the European Commission has presented a draft proposal for the modernization of the Energy Charter Treaty (ECT).

The proposal relies markedly on the new investment agreements concluded between the European Union and third states, mainly CETA and the agreements with Singapore and Vietnam. It puts forward some key amendments on substantive provisions, by creating regulatory space for sustainable development and transition to clean energy.

As regards the fair and equitable standard, the proposal adds that the ‘the tribunal may take into account whether a Contracting party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, upon which the investor relied in to make or maintain the covered investment’. This article focuses on the concept of ‘specific representation’, by asking whether it (still) encompasses promises made by the legislator, in order to access the impact that said provision might have on previous ECT arbitration case law concerning renewable energy and climate change.

Keywords: sustainable development, Energy Charter Treaty, legitimate expectations, specific representation, autonomy, investment treaties, fair and equitable treatment, energy transition

I Introduction

On 19 May 2020 the European Union submitted a text proposal for the modernization of the Energy Charter Treaty (onwards, ECT). As a first-generation investment treaty, the ECT uses language that gives leeway to a broad reading of investment protection standards, such as the fair and equitable treatment (onwards, FET). In recent years, several arbitral tribunals found Spanish and Italian regulatory changes on renewable energy support schemes to be in breach of FET, owing to the violation of investors’ legitimate expectations.

Some of the awards adopted what the legal scholarship called a *strict liability approach*, which is a conception of FET closer to the principle of good faith. It contrasts with the so-called *soft liability*, an approach focused on the ‘right to regulate’ and on the conditions that investors’ expectations must fulfill so they can be considered *legitimate.* Plus, arbitral awards rendered under Article 26 of the ECT did not rule out that legislative statements of general character might, under certain circumstances, generate ‘specific’ commitments and, consequently, legitimate expectations.

In this sense, the purpose of this text is to assess the impact of the EU’s modernization proposal on the way arbitral tribunals and legal scholarship have so far interpreted article 10 of the ECT.[1] Section 2 highlights the normative context of the modernization agenda, by scanning the recent developments on investor-state arbitration reform. Section 3 analyses the Court of Justice’s caselaw on the compatibility of said arbitration with the principle of the autonomy of EU legal order, particularly *Achmea, Komstroy* and *Opinion 1/17.* Section 4 overviews the proposed amendments to the FET standard as well as the new stipulations on sustainable development and regulatory powers. Section 5 focuses on the soft liability/strict liability approaches to FET and legitimate expectations, trying to give a straightforward answer to two questions: one, what changes will the proposed amendment engender; two, what is a ‘specific representation’ under the amended version of article 10.

II The Normative Context of the Reform

The ECT is an international agreement designed to foster East-West energy cooperation, which covers investment

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[1] Article 10(1) states presently the following: ‘Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party’.

protection, trade and transit rules to energy networks.[2] As an investment agreement, it encompasses all *economic activity in the energy sector*.[3] It pursues the goals of liberalizing and promoting investment in the energy sector by laying down legal standards and rules which are present in most investment agreements.[4]

Article 26 frames dispute resolution between investors and states – the so-called Investor-state dispute settlement (onwards, ISDS) – meaning that it gives investors the power to file a claim against a contracting party under a series of different arbitration rules (International Centre for Settlement of Investment Disputes Convention, ICSID additional facility rules, United Nations Commission On International Trade Law and Stockholm Chamber of Commerce).[5]

What is more, the ECT is markedly a 'brainchild' of the European Union. Signed by the two Communities, plus fifty-one states, including twenty-seven EU Member States and twenty-five non-EU Member States, it has its origins in the 'Lubber plan', a plan designed by the Dutch prime minister to complement the single market of energy. The European Council charged the European Commission with the task of drafting a proposal on behalf of the Member States. Thus, no doubts concerning EU's contribution to the existence of the ECT and to its future.[6]

The modernization of the ECT is on its way with multiple negotiation rounds already taken place in 2020 and 2021. The meetings discussed a list of topics such as the definition of investment and investor, the clarification of most constant protection and security, definition of FET and expropriation, sustainable development provisions and dispute settlement (particularly, frivolous claims, third party funding, transparency, and valuation of damages). The EU's text proposal on modernization, as we will see, addresses most of these topics.[7]

The EU's proposal aims to keep the ECT in pace with the other multilateral investment agreements (eg. EU-Canada comprehensive Economic and Trade Agreement, Comprehensive and Progressive Trade Agreement for trans-Pacific partnership, United States Mexico Canada Agreement).[8] The 'backlash' against investment treaty arbitration started with the disputes involving Argentina in the early 2000s. These awards highlighted the incoherence between the commercial features of said arbitration (e.g. confidentiality, arbitrators nominated by the parties to the dispute, competence-competence principle) and the fact that the disputes may deal with public interest issues, such as energy transition, climate change, hazardous waste disposal, use of insecticides in agriculture and tobacco plain-package policies.[9]

Unsurprisingly, the global effort of reform, presently led by UNCITRAL Working Group III, encompasses institutional issues, like the selection of arbitrators, the introduction of a standing mechanism instead of *ad hoc* arbitration, the creation of an appellate mechanism, and procedural and substantive issues, such as forum shopping, shareholder claims and reflective loss, interpretation of investment treaties by treaty parties and the drafting of investment protection standards in a way that ensures host states' 'regulatory space', conventionally called 'right to regulate'. According to Tan, «national policy space refers to the capacity of countries to set and implement domestic strategies to support sustainable development, including poverty reduction, economic growth, access to essential public services, climate change adaptation and mitigation and environmental protection».[10]

Investment agreements signed in the last decade should 'rebalance' investment arbitration in favour of Host States.

Needless to say, the EU is now probably the most preeminent architect of investment arbitration reform. The *Micula* case, where investors were awarded compensation for anticipated withdrawal of state aid considered incompatible with EU law,[11] and the rupture of Transatlantic Trade and Investment Partnership

[2] The ECT was signed on 17 Dec. 1994 and entered into force on 16 Apr. 1998.

[3] *See* Understandings regarding Art. 1(5) of the ECT, providing further insight on the meaning of 'Economic Activity in the Energy Sector'.

[4] On the origins of the ECT, *see* Rafael Leal-Arcas, *Introduction*, in *Commentary on the Energy Charter Treaty* (Rafael Leal-Arcas ed., Elgar 2018).

[5] On Art. 26, *see* Francisco Dias Simões, *Art. 26 – Settlement of Disputes Between an Investor and a Contracting Party*, in *Commentary on the Energy Charter Treaty* 338–358 (Rafael Leal-Arcas ed., Elgar 2018).

[6] April Lacson, *What Happens Now: The Future of Intra-E.U Investor-State Dispute Settlement Under the Energy Charter Treaty,* 51 New York U. J. Int'l Pub. L. & Pol. 1327, 1329 (2019).

[7] *See*, https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf.

[8] Respectively, Comprehensive Economic and Trade Agreement, Comprehensive and Progressive Agreement for Trans-Pacific Partnership and United States Mexico and Canada Agreement.

[9] *See* for instance, Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007).

[10] Celine Tan, *55. National Policy Space,* in *Encyclopedia of Law and Development* 207–210 (Koen De Feyter ed., Elgar 2018). Lukas Stifter & August Reinisch, *Expropriation in the Light of the UNCTAD Investment Policy Framework for Sustainable Development,* in *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* 81–96 (S. Hindelang & M. Krajewski eds, Oxford 2016), define the right to regulate on the following terms: 'the sovereign right of each country to establish both entry conditions as well as operational conditions for foreign investments in the interests of the public good and to minimize potential negative effects' (at 83).

[11] *Micula v. Romania*, ICSID Case no. ARB/05/20, Award, 11 Dec. 2013.

(onwards, TTIP) negotiations with the United States,[12] were the propelling force behind the EU's ambitious reform agenda.

Before further analysis,[13] one of the axes of the reform was to reaffirm the Member States' right to regulate and to achieve legitimate policy objectives, such as public health safety, environment, public morals and the promotion and protection of cultural diversity (eg. Article 8.9 CETA).[14] Additionally, the EU has managed to densify the content of the FET standard, by adopting a closed list of situations that might constitute a breach of the standard – eg. 'fundamental breach of due process', 'manifest arbitrariness' (Article 8.10 CETA, Article 2.4 of the Agreement UE-Singapore and Article 2.5 of the Agreement EU-Vietnam).

The new investment treaties concluded by the EU also have an annex on expropriation, narrowing down the concept of indirect expropriation, i.e of measures having *equivalent effect* to direct expropriations.[15]

Most of these changes were already present in the North American and Canadian investment treaties and are far from being 'disruptive' under an investment treaty law perspective. Differently, the EU's proposal regarding ISDS holds 'systemic' features, as Roberts put it.[16] Indeed, the EU has made the case for the introduction of an Investment Court System (onwards, ICS), a two-tier standing mechanism (first instance tribunal and appellate tribunal), with full-time adjudicators being randomly appointed to each dispute. This would address concerns regarding the lack of consistency of arbitration awards and the perceived bias of party appointed arbitrators.[17]

The idea, as the Commission explained, was to 'transform the system towards one which functions more like traditional court systems, by making the appointment to serve as arbitrators permanent, to move towards assimilating their qualifications to those of national judges and to introduce an appeal system'. We addressed the system with further detail elsewhere.[18] It is worth mentioning, though, that the EU has managed to include the ICS in the treaties concluded with Canada, Singapore and Vietnam, launching at the same time negotiations for a convention establishing a multilateral court for the settlement of investment disputes. There is no appellate system in any of the existing treaties.[19]

[12] The evolution of events is well documented. Both the Council of the European Union's negotiating directives for new investment agreements and the Commission's initial proposal for the settlement of investment disputes contained references to the traditional ISDS system. Disapproval of investment arbitration led the Commission to suspend TTIP negotiations to carry out a public consultation, which resulted in the Concept Paper *Investment in TTIP and beyond – the path for reform* (Jan. 2015). In Sept. 2015, under pressure from the European Parliament's Socialists and Democrats group, and following a proposal made by M. Krajewski to the German Economy Minister, the Commission reformulated and made public the new proposal on the investment chapter of TTIP, which already included a standing mechanism.

[13] *See* Dorieke Overduin, *Investment Chapter in CETA: Groundbreaking or Much Ado About Nothing?*, in *International Arbitration and EU Law* 338–359 (José R. Mata Dona & Nikos Lavranos eds, Elgar 2021), Luca Pantaleo, *Investment Disputes Under CETA: From Gold Standard to Best Practices?,* Eur. Bus. L. Rev. 163, 184 (2017), Damien Nyer, *The Investment Chapter of the EU-Canada Comprehensive Economic and Trade Agreement*, 32 J. Int'l Arb. 697, 710 (2015).

[14] *See also* Council of the European Union, *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union and Its Member States*, Brussels, 27 Oct. 2016 (available online), especially point 2 ['CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion of cultural diversity'].

[15] Annex 8-A (Expropriation) of CETA also lays down, on § 3, an 'except in rare circumstances clause' ['For greater certainty, except in rare circumstances when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations']. *See* annex B point 4 b) of the US model BIT, Annex B.13(1) of Canada model BIT and Annex 14.B of USMCA, for similar provisions.

[16] Anthea Roberts, *Incremental, Systemic and Paradigmatic Reform of Investor-State Arbitration,* 112 Am. J. Int'l L. 410 (2018).

[17] On this issue, Giorgios Dimitropoulos, *Investor-State Dispute Settlement Reform and Theory of Institutional Design,* 9 J. Int'l Dispute Settlement 535 (2018), Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators* (Martinus Nijhoff 2017).

[18] *See* Marta Vicente, *O Direito administrativo dos negócios: standards de proteção do investimento estrangeiro*, Tese no âmbito do Doutoramento em Direito, Direito Público, orientada pela Senhora Professora Doutora Suzana Maria Calvo Loureiro Tavares da Silva e apresentada à Faculdade de Direito da Universidade de Coimbra 2020, Coimbra; Felicitas Diethelm, *ISDS-Regeln im CETA zwischen der EU und Kanada: Aspekte der Weiterentwicklung gegenüber früheren ISDS- Regelungen,* 17 SchiedsVZ - German Arb. J. 309 (2019); August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 J. Int'l Econ. L. 761 (2016), Catherine Kessedjian & Lukas Vanhonnaeker, *Les différends entre les investisseurs et États hôtes par un tribunal arbitral permanent. L'exemple du CETA*, Revue Trimestrielle de Droit Européen 633 (2017).

[19] The EU opted not to include ICS in its proposal on the modernization of the ECT. However, the proposal anticipates the establishment of a multilateral dispute settlement mechanism, until the entry of force of which Art. 26 continues to apply. Meanwhile, the EU and its Member States invite the other Contracting Parties to the Energy Charter Treaty to consider the introduction of an Investment Court System, similar to the

III Issues of Compatibility with the Principle of Autonomy of EU Law

Previous lines provide the context shaping the modernization of the ECT. But that context is also being framed by the Court of Justice of the European Union case-law on the autonomy of the EU legal order. Consequences of that case-law to the ECT are clearer at the present timem.

Briefly, the autonomy of the EU legal order posits that international agreements cannot undermine the essential characteristics of EU law – i.e its particular 'constitutional structure' – by conferring other body apart from the CJEU the right to interpret or to assess the validity of EU law in a binding fashion.[20]

The ECT is a mixed agreement, meaning an international agreement concluded by the EU, its Member States and third states. Therefore, two issues of compatibility with EU law are involved. On the one hand, as no formal disconnection clause is laid down in the treaty, disputes between an EU investor and an EU Member State (so called intra-EU investment disputes) are not prevented, meaning the objections held by the CJEU on *Achmea* regarding the compatibility of ISDS clauses with the autonomy of EU legal order might apply *mutatis mutandis* to Article 26 of the ECT.[21] On the other, the ECT is part of the EU's commercial policy with third states. Again, safeguarding the autonomy of the EU legal order, as established by the Court of Justice in *Opinion 1/17*, requires standards capable of obstructing host states' right to regulate (mainly, expropriation clause and FET) to be carefully drafted.

Both problems are decidedly beyond the scope of this text. Still, it is worth stressing that the *Achmea* ruling has had no impact (so far) from an international law standpoint, as arbitral tribunals, including those set under article 26 ECT, keep claiming jurisdiction over intra-EU investment disputes.[22] Plus, despite EU Member States having issued a declaration stating that the findings of *Achmea* encompass *all intra-EU investor-state arbitration*, Article 26 ECT included, the Agreement for the termination of bilateral investment treaties between the Member States of the European Union, which entered into force on 29 August 2020 overtly states that it does not cover intra-EU proceedings on the basis of article 26 ECT.[23]

Article 26(4) allows the tribunal to decide the issues in dispute *in accordance with the Treaty and applicable rules and principles of international law.* Contrary to some intra-EU bilateral Investment Treaties, including the one under scrutiny in *Achmea*, it does not mention domestic law as applicable law.[24] Thus, one might wonder whether the disputes which the arbitral tribunal is called on to resolve are liable to relate to the interpretation and application of EU law. However, as pointed out in *Achmea*, EU law has a hybrid nature, since it operates simultaneously as the internal law of the Member States (owing to the principle of direct effect) and as international law applicable between the latter.[25] An international tribunal constituted under Article 26 is not part of the judicial system of the MS, meaning that it will not be able to request a preliminary ruling to the Court of Justice.

Notwithstanding, the Court of Justice has followed AG Spuznar's opinion,[26] by ruling in *Komstroy* that Article 26 ECT, allowing an EU investor to file a claim against an EU Member State in an arbitral tribunal, violates the autonomy of EU legal order.[27] It is one thing to say that Article 26 ECT is to be found incompatible with EU primary law. This is a statement of fact, not an endorsement of the Court of Justice's position.[28] Another is to plead, grounded on that understanding, that a) ECT

one included in CETA, as an alternative to the investor-state arbitration pursuant to Art. 26 of the ECT.

[20] Tobias Lock, *The European Court of Justice and International Courts* 77 (Oxford University Press 2015); K. Lenaerts, J. Gutiérrez-Fons & S. Adam, *Exploring the Autonomy of the European Union Legal Order,* 81 ZaörRV 47, 61 (2021).

[21] Case C-284/16, *Achmea*, 06 Mar. 2018, ECLI:EU:C:2018:158.

[22] *See* Quentin Declève & Isabelle Van Damme, *13 Investment Arbitration Under Intra-EU BITs»,* in *International Arbitration and EU Law* 291–319 (§ 13.65) (José R. Mata Dona & Nikos Lavranos eds, Elgar 2021). *See* recently, *Eskosol v. Italian Republic*, ICSID Case no. ARB/15/59, *Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection on the Innaplicability of the Energy Charter Treaty to Intra EU-disputes*, 07 May 2019, § 152 ss.

[23] *See also* Hungary's declaration, dated 16 Jan. 2019 declaring that the Achmea judgment does not encompass ECT's Art. 26 investor-state arbitration, (https://2015-2019.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf#!DocumentBrowse) (accessed 10 July 2021).

[24] Asserting this line of argument, Gloria M. Alvarez, *Redefining the Relationship Between the Energy Charter Treaty and the Treaty of Functioning of the European Union: From a Normative Conflict to Policy Tension,* 33 ICSID Rev. 560, 572 (2018).

[25] Case C-284/16, Achmea, § 41. Stressing the hybrid nature of EU law in terms of applicable law, Declève & Van Damme, *supra* n. 22, at § 13.51. The EU's proposal on the modernization of the ECT addresses this question by adopting the solution put forward in Art. 8.31 of CETA, i.e by stressing that the domestic law of a contracting party shall not be part of the applicable law. Plus, where a tribunal is required to ascertain the meaning of a provision of the domestic law of a contracting party as matter of fact, it shall follow the prevailing interpretation of that provision given by the courts or authorities of that Contracting party.

[26] *See Conclusion de l'Avocat Génerale Maciej Szpunar presentées le 3 mars de 2021*, affaire C-741/19, République de Moldavie contre Société Komstroy, venant aux droits de la société Energoalians, particularly § 89.

[27] Case C-741/19, *Komstroy LLC*, ECLI:EU:C:2021:655, 02 Sept. 2021, § 52 ss. Following the same path of reasoning, *see* Case C-109/2020, *Republiken Polen v. PL Holdings Sàrl*, ECLI:EU:C:2021:875, 26 Oct. 2021.

[28] Endorsing the Court of Justice's decision in *Achmea, see* David Amariles, *Reconciling International Investment Law and European Union Law in the Wake of Achmea,* 69 Int'l & Comp. L. Q. 907 (2020).

arbitral tribunals should refuse jurisdiction over intra-EU investment disputes; b) ECT arbitral awards should not be recognized nor enforced by domestic courts.[29]

In *Opinion 1/17*, ruling on the validity of CETA, the Court of Justice amplified its broad reading of the autonomy of EU legal order. Contrary to *Achmea*, there was no chance CETA tribunals would be called to apply or interpret EU law (owing to Article 8.31 CETA). Plus, the absence of direct effect enshrined in Article 30.6 CETA removes the option of bringing a complaint before a domestic court, meaning that individuals and companies will not be able to challenge the validity of EU legislation under the CETA in domestic courts.[30] So, apparently, the autonomy of EU legal order would not be jeopardized.

In *Opinion 1/17*, the Court of Justice reaffirmed the substantive or self-referential dimension of autonomy, already present in *Kadi* and *Opinion 2/13* (on EU's accession to the European Convention on Human Rights), by pointing that the fact that a tribunal standing outside the EU judicial system might call into question the level of protection of a public interest established by the EU legislator, thereby forcing EU institutions or its Member States to amend or withdraw said legislation, «*undermines the capacity of the Union to operate autonomously within its unique constitutional framework*».[31]

Why, then, did the Court of Justice find no incompatibility between CETA and the autonomy of EU legal order? Interestingly, relying on its own interpretation of CETA provisions concerning the right to regulate (Articles 8.9.1 and 8.9.2), necessity clauses (Article 28.3.2), the FET standard and the expropriation clause (Articles 8.10 and 8.12), the Court concluded the Parties to the Treaty ensured that CETA «*tribunals have no jurisdiction to call into question the choices democratically made within a Party*».

This is a remarkable statement: as Cremona puts it, «the Court predicated its finding of compatibility [of CETA] on *its own determination of the scope of (and limits to) the tribunal's jurisdiction*, declaring that CETA tribunal has no jurisdiction to declare the level of protection of a public interest established by EU measures incompatible with CETA» (our italics).[32] Saying it differently, the Court relies on the way the Parties drafted certain clauses (which are clauses either ensuring or limiting the Host State's right to regulate) to conclude that CETA tribunals are not allowed to assess the *balance* struck by EU's internal legislative process between investors' rights and the public interest. Safeguarding the autonomy of the EU legal order requires drafting said clauses in a way that preserves host states right to regulate and lowers the intensity of review that CETA tribunals may carry out.[33]

In this light, the EU's proposal on the modernization of the ECT is not just a way to keep the ECT in pace with other multilateral investment agreements: it is the only way to preserve the autonomy of EU legal order and, consequently, the compatibility of investment agreements with EU primary law.

IV The EU's Proposal on the Modernization of the ECT

The EU's proposal relies closely on CETA investment chapter. Therefore, doubts about the impact of said provisions on the outcome of arbitral awards are fairly the same. Notwithstanding, special reference should be made to provisions regarding third party funding,[34] the incorporation of UNCITRAL transparency rules and sustainable development.[35] Despite the language employed ('shall'), Overduin has a point in saying that the provisions on sustainable development are closer to a recital: 'even inserted in the body of treaty, the text does not confer a concrete actionable right to investors or States (…)'.[36]

[29] On this point, *see* Alexander Reuter, Taking Investors' rights seriously: the Achmea and CETA Rulings of the European Court of Justice do not bar intra-EU investment arbitration, 80 *ZaöRV* 379 (2020). On the case-law, *see* the compelling arguments posited in *UP and CD Holding Internationale v. Hungary*, ICSID Case no. ARB/13/35, Award, 09 Oct. 2018, § 222 and *Belenergia v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 06 Aug. 2019, § 324. Recent developments on the question of recognition and enforceability are discussed in Olivier van der Haegen & Maria-Clara Van den Bosche, *16. Procedural Issues: Annulment, Recognition and Enforcement of Investment Treaty Awards (ICSID and non-ICSID)*, in *International Arbitration and EU Law* 360 (José R. Mata Dona & Nikos Lavranos eds, Elgar 2021).

[30] Marise Cremona, *The Opinion Procedure Under Article 218 (11) TFEU: Reflections in the Light of Opinion 1/17*, 4 Europe & World: A L. Rev., Special issue: Collection of Reflection Essays on Opinion 1/17 (2020), https://www.scienceopen.com/document?vid=08a7f1a9-ed57-4631-bbea-33dd05d024c6 (accessed 10 July 2021).

[31] *Opinion 1/17*, 30 Apr. 2019, § 148 ss.

[32] Cremona, *supra* n. 30. About Opinion 1/17, *see also* Laurens Ankersmit, *Regulatory Autonomy and Regulatory Chill in Opinion 1/17*, 4 Europe & the World: A L. Rev. Special issue: Collection of Reflection Essays on Opinion 1/17 (2020), https://www.scienceopen.com/document_file/70262072-57d6-4cbf-8466-864ebc8a192a/ScienceOpen/EWLR-4-7.pdf (accessed 10 July 2021).

[33] In this sense, Federico Ortino, *Defining Indirect Expropriation: The Transatlantic Trade and Investment Partnership and the (Elusive) Search for 'Greater Certainty'*, 43 Legal Issues Econ. Integration 351 (2016).

[34] The provision states: 'Where there is third party funding the disputing party benefiting from it shall notify to other disputing party and to the tribunal the name and address of the third-party funder and its beneficial owner'. About third-party funding, *see* Case C-78/18, *European Commission v. Hungary*, 18 June 2020, ECLI:EU:C:2020:476. *See also* Art. 8.26 of CETA.

[35] The proposed articles are: 'Sustainable development – context and objectives', 'Sustainable development – right to regulate and levels of protection' and 'Sustainable development – multilateral environmental agreements and labour conventions', 'Sustainable development – climate change and clean energy transition', 'Sustainable development – responsible business practices', 'Sustainable development – impact assessment'.

[36] Overduin, *supra* n. 13, at 345.

In our view, the provisions on sustainable development produce two results.

One, they bring the United National Framework Convention on Climate Change [37] goals and the Paris Agreement obligations into the ECT. This is not a 'friendly reminder'. It means that, onwards, the public interest of effectively implementing climate change goals and environmental agreements is also an interest the ECT is bound to pursue. No need, thus, of using article 31 Vienna Convention on the Law of Treaties systemic interpretation provisions to take into consideration climate change goals in energy investment disputes.[38]

Two, the proposal recognizes the right of each contracting party *to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labour protection* it deems appropriate. The Court of Justice, in *Opinion 1/17* (although ruling on CETA), explained how these provisions should be interpreted: it means that arbitral tribunals cannot call into question the choices democratically made by the EU legislator.

The most relevant amendment concerns the FET standard (article 10 ECT). As previously stated, the amendment lays down a list of situations that may consist in a breach of the FET standard. Given the closed character of the list, situations involving the frustration of investors' legitimate expectations might only embody 'manifest arbitrariness'.

Plus, «when applying the above fair and equitable treatment obligation a tribunal *may take into account* whether a contracting party made a *specific representation* to an investor to induce a covered investment that created a legitimate expectation upon which the investor relied in deciding to make or maintain the covered investment, but that the contracting party subsequently frustrated» (our italics). This provision has the advantage of codifying two well-established elements of the FET standard – the specific character of the representations and the fact that said representations were induced by the host state's activity. But it does not elaborate on the type of act enshrining such promise nor whether that representation can be pull out of a set of legal norms, be they legislative or administrative.[39]

On the other hand, new article on regulatory measures clarifies that «[F]or greater certainty, the provisions of Part III of the Treaty shall not be interpreted as a commitment from a Contracting Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits».

Onwards, it might be harder to argue that the FET standard (under the ECT) requires host states to preserve '*the stability of the regulatory framework*' based on which the investment was made. CETA's Joint Interpretative Instrument highlights that «governments may change their laws, regardless of whether this may negatively affect an investor's expectations of profits».

That said, after paying careful attention to the way ECT arbitral tribunals interpret article 10 in cases involving legislative changes and the frustration of investors' legitimate expectations, the next section seeks to find an answer to the following questions: a) What changes will the proposed amendment engender?; b) What is a 'specific representation' under the amended version of article 10?

V FET, Legitimate Expectations and Legislative Promises

FET is currently the most important standard of investment treaty arbitration.[40] It is a non-contingent standard,[41] «reflecting recognizable components such as transparency, consistency, stability, predictability, conduct in good faith and the fulfilment of an investor's legitimate expectations».[42] Of course, this is a broad reading of the standard, not fully endorsed by all investment regimes, particularly by those that opted to link the FET standard with the international minimum standard on the treatment of aliens (eg. North American Free Trade Agreement, USMCA).[43] Anyway, neither CETA nor EU's proposal on the modernization of the ECT choose to endorse such equation. Though trying to narrow down the content of the FET, the European Union negotiators seem to favour a

[37] The United Nations Framework Convention on Climate Change.

[38] On systemic interpretation in investment disputes, *see* Gebhard Bücheler, *Proportionality in Investor-State Arbitration* 151–169 (Oxford University Press 2015); Julian Scheu, *Systematische Berücksichtigung von Menschenrechten in Investitionsschiedsverfahren* (Nomos 2017).

[39] On this issue, *see* Caroline Henckels, *Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP,* 19 J. Int'l Econ. L. 27, 35 (2016); Jose Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New Gold Standard?,* 47 Victoria U. Wellington L. Rev. 503, 525 (2016).

[40] Christian Schreuer, *Fair and Equitable Treatment in Investment Practice*, 6 J. World Investment & Trade 357 (2005).

[41] Eric de Brabandere, *States' reassertion of control over International Investment Law in (Re)Defining 'Fair and Equitable Treatment' and 'Indirect expropriation',* in *Reassertion of Control Over the Investment Treaty Regime* 285, 287 (A. Kulick ed., Cambridge University Press 2017). Meaning that, contrary to non-discrimination and the most-favoured nation clause, its content is not contingent upon the way host states treat their own investors.

[42] *Murphy Exploration v. The Republic of Ecuador*, UNCITRAL, Final Award, 10 Feb. 2017, § 206.

[43] Worth remembering that Art. 1105 of NAFTA and Art. 14.6 of USMCA equate the FET standard to the international minimum standard on the treatment of aliens. Applying the standard under NAFTA dispute settlement provisions, *see Bilcon v. Government of Canada*, UNCITRAL Arbitration Rules, Award on Jurisdiction and Liability, 17 Mar. 2015, § 439, and *Mesa Power v. Government of Canada*, PCA Case No. 2012–17, UNCITRAL Arbitration Rules, Award, 24 Mar. 2016, § 505.

standard located above the customary international law.[44]

The fact is that the FET standard affords protection *vis-à-vis* legislative changes, either by imposing the stability of the overall framework and Host States' *non venire contra factum proprium* or by endorsing the principle of legitimate expectations.[45] The link between these two elements is not straightforward. Several authors interpret the caseload as squeezing out of FET two different obligations, what Ortino calls 'soft liability' and 'strict liability'.[46]

5.1 The 'soft liability' approach on FET

According to the 'soft liability' approach, the FET standard protects investors through the principle of legitimate expectations.

Said principle relies deeply on the conditions upon which investors' expectations might be understood as 'legitimate'. To assess whether an expectation is legitimate, investment tribunals have put forward two important concepts: specific commitments and due diligence.

Legitimate expectations require specific commitments by the host states. It is not entirely clear whether expectations based solely on the regulatory framework might engender a specific commitment. For instance, in *Crystallex*, a case involving the withdrawal of a mining concession on Venezuela, the arbitral tribunal clarified that 'a legitimate expectation may arise in cases where the Administration has made a promise or representation to an investor (…) and which later was frustrated by the conduct of the administration'.[47] According to this view, a specific commitment is a commitment made by the Host state *vis-a-vis* a sole investor or a particular set of investors by way of an individual decision (administrative act) or a contract.[48]

From another perspective, specific commitments are not necessarily individual commitments. Hinging on the European Court of Justice's reading of legitimate expectations, the fact that a commitment is specific is not contingent upon the legal nature of the representation.[49] It rather depends on the circumstances upon which the investment is made and on the host state's conduct in inducing said investment. In this sense, as in *Micula*, «the promise, the assurance or representation may have been issued generally or specifically, but it must have created a specific and reasonable expectation in the investor».[50] Legislative promises, in the sense explored *infra*, might embody a specific commitment.[51]

An expectation is legitimate provided the regulatory change is unpredictable. However, unpredictability is an objective concept, not hinging upon the investor's 'conjectures' or 'hints' on whether the regulatory framework will not be changed. Legitimate expectations

[44] Alvarez, *supra* n. 39, at 525.

[45] *See* for instance, *Olin v. State of Lybia*, ICC Case no. 20355/MCP, Final Award, 04 Apr. 2016, § 304, Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR *v.* The Kingdom of Spain, SCC Case No. 2015/063, Final Arbitral Award, 15 Feb. 2018, § 648, and *Jürgen Wirtgen*, § 407.

[46] Federico Ortino, *The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have we Come?,* 21 J. Int'l Econ. L. 845, 848 (2018). In this sense, Bücheler, *supra* n. 38, at 200; Eric de Brabandere, *(Re)calibration, Standard-Setting and the Shaping of Investment Law and Arbitration,* 59 Boston College L. Rev. 2607, 2619 (2018).

[47] *Crystallex v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award, 04 Apr. 2016. § 547; also *PSEG v. Republic of Turkey*, ICSID Case no. ARB/02/5, Award, 19 Jan. 2007, § 241.

[48] Also *Charanne v. El Reino de* España, Instituto de Arbitraje de la Câmara de Comercio de Estocolmo, Laudo Final, 21 Jan. 2016 ['492. El Tribunal examinará a continuación si dicho marco regulatorio era tal como para generar expectativas legítimas de que no sería modificado como lo fue en 2010. El Tribunal, sin embargo, no acepta el argumento según el cual dichas normas puedan constituir o ser equivalentes a un compromiso especifico; 493. Aunque los RD 661/2007 y 1578/2008 estuvieran dirigidos a un grupo limitado de inversores, eso no los convierte en compromisos especificamente dirigidos a cada uno de ellos. Las normas en discusión no pierden, por su alcance especifico, la naturaleza general que caracteriza cualquier medida legislativa o reglamentaria. Convertir una norma reglamentaria, por ela carácter limitado de las personas que puedan estar sujetas a la misma, en un compromiso específico tomado por el Estado hacia cada uno de dichos sujetos, constituiria una limitación excesiva a la capacidad de los Estados de regular la economia en función del interés general'].

[49] *See* Bücheler, *supra* n. 38, at 200–201; Teerawat Wongkaew, *The Transplantation of Legitimate Expectations in Investment Treaty Arbitration,* in *The Role of the State in Investor-State Arbitration* 69, 83 (S. Lalani & R. Polanco eds, Martinus Nijhoff 2015).

[50] *Micula v. Romania*, ICSID Case no. ARB/05/20, Award, 11 Dec. 2013, § 671; also *El Paso v. La República Argentina*, Caso CIADI no. ARB/03/15, Laudo, 31 Oct. 2011, § 375 [«It seems that two types of commitments might be considered 'specific': those specific as to their addressee and those specific regarding their object and purpose»]; *Dissenting Opinion of Mr Gary Born in Antaris Solar v. Czech Republic*, PCA Case no. 2014–01, Award, 02 May 2018, § 46: '(…) the decisive question is not the form of a state's representations but whether the content and character of those expectations that the State will abide by its commitments»]; *Parkerings v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 Sept. 2002, § 331 [«(…) Finally, in the situation where the host-state made no assurance or representation, *the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate* (…)' – our italics]; 9RenHoldings *v.* Kingdom of Spain, ICSID Case no. ARB/15/15, Award, 31 May 2019, § 295. Na doutrina & Julien Cazala, *La protection des attentes légitimes de l'investisseur dans l'arbitrage internationale,* Revue Internationale de Droit Économique 5, 14 (2009); Mark Jacob & Stephan Schill, *Fair and Equitable Treatment: Content, Practice, Method*, in *International Investment Law* 700, 727 (M. Bungenberg, J. Griebel, S. Hobe & A. Reinisch eds, Bloomsbury T&T Clark, 2015).

[51] In this sense, Diego Zannoni, *The Legitimate Expectation of Regulatory Stability Under the Energy Charter Treaty,* 33 Leiden J. Int'l L. 451, 458 (2020).

cannot arise from subjective considerations of the investor.[52] They must be examined as the expectations at the time the investment is made. Defining what an investor should know from an objective standpoint requires due diligence. A prudent investor is the one who knows the host state's case law on a given economic sector, who has recourse to legal counseling,[53] who has nearly perfect knowledge of the evolution of the regulatory framework, particularly regarding the compatibility of the latter with EU law. The requisite degree of diligence varies according to the investor's expertise,[54] but arbitral tribunals have set aside investments bearing speculative features, even when said investments were the result of the Host state's poor regulation or inefficiency.[55]

Additionally, the soft liability approach focuses on the *right to regulate*, i.e on the legitimacy and reasonableness of the legislative changes. Accordingly, '[I]t is each State's undeniable right and privilege to exercise its sovereign legislative power'.[56] Thus, by stressing the right to regulate and the public interests underneath such regulatory changes, legitimate expectations are expected to adjust investors' protection to the specificities of a given context (eg. environmental, health or public policy emergencies, economic crisis).

Put it simply, in line with EU law,[57] legitimate expectations based upon a specific representation are only a relevant factor in assessing whether or not the Host State violated the FET standard.[58] In order to deserve protection, said expectations must be balanced against the host state's right to regulate, meaning that, under said approach, the FET standard only protects investors against *unreasonable and disproportional* regulatory changes, particularly against changes that affect the economic viability of the investment.[59]

5.2 The 'strict liability' approach on FET

The strict liability approach was first developed by tribunals dealing with the Argentinian cases of early 2000′.[60] It claims that regulatory regimes specifically created to induce investment in a given sector cannot be radically altered – *stripped of its key features* – in ways that affect investors who invested in reliance on said regimes,[61] *irrespective of whether these regulatory changes are*

[52] EDF *v. Romania*, ICSID Case no. ARB/05/13, Award, 08 Oct. 2009, § 219; *Antin Infrastructures v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, § 536–538. Also, Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration – Substantive Principles* 317 (2d ed., Oxford University Press 2017).

[53] *Belenergia v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 06 Aug. 2019, § 585.

[54] *Antin Infrastructures v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, § 537. In *Cube Infrastructure Fund v. Kingdom of Spain*, ICSID Case no. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 15 Feb. 2019, § 401, the arbitral tribunal placed some limits on the ability of due diligence to prevent legitimate expectations, by arguing that '[C]laimants were professional investors, used to evaluating risk, and did in fact procure legal advice from Spanish counsel, even though no detailed written opinion was filed in these proceedings. The respondent (in case, the Kingdom of Spain) has not shown that any more exhaustive legal analysis would have been produced any different understanding of the Spanish measures (…)'.

[55] Particularly, *Antaris Solar v. Czech Republic*, PCA Case no. 2014–01, Award, 02 May 2018, § 431–435 ["The Tribunal considers that Dr Göde actions were essentially opportunistic, and that the investment protection regime was never intended to promote and safeguard those who, in the words of the Respondent, 'pile in' to take advantage of laws which they must know may be in a state of flux caused by investors of that type. In the words of the Respondent, the Claimants had 'a speculative hope – as opposed to an internationally-protected expectation']. The case dealt with changes made by the Czech's legislator to laws regulating the production of energy through renewable sources. The incentive regime encompassed an initial five-year tax exemption, a fifteen-year feed-in-tariff (FiT) model (with mandatory minimum levels of return) and the so-called brake-rule, the effect of which was that the FiT granted to photovoltaic plants could not be reduced more than 5% with respect to FiT granted to photovoltaic plants put in operation in the previous year. In 2010, Czech legislator announced the repeal of the 5% rule for those solar plants connected to the grid from 2011 onwards. This increased the number of preliminary applications for connection to the grid for solar installations. As a consequence, the Czech legislator enacted the solar levy, amounting to 26% of payments to 2010 photovoltaic powerplants.

[56] Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR *v.* The Kingdom of Spain, SCC Case No. 2015/063, 15 Feb. 2018, § 646; *Antaris Solar v. Czech Republic*, PCA Case no. 2014–01, Award, 02 May 2018, § 360.

[57] On the principle of legitimate expectations under EU Law, *see* Vicente, *supra* n. 18, particularly Ch. 4.

[58] *9REN Holdings*, § 308.

[59] *Eiser Infastructure v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 04 May 2017; *Saluka v. The Czech Republic*, UNCITRAL Arbitration Rules 1976, Partial Award, 17 Mar. 2006, § 306; *Total v. Argentine Republic*, ICSID Case no. ARB/04/1, Decision on Liability, 27 Dec. 2010, § 333 ['The fair and equitable treatment of the BIT has been objectively breached by Argentina's actions, in view of their negative impact on the investment and their incompatibility with the criteria of economic rationality, public interest (after having duly considered the need for and responsibility of governments to cope with unforeseen events and exceptional circumstances), reasonableness and proportionality (…). Hence, the fair and equitable treatment standard has been breached through the setting of prices that do not remunerate the investment made nor allow reasonable profit of prices that do not remunerate the investment made nor allow reasonable profit to be gained contrary to the principles governing the activities of privately owned generators under Argentina's own legal system (…)'].

[60] *See* for instance, *Enron v. Republic of Argentina*, ICSID Case no. ARB/01/3, Award, 22 May 2007, § 260; *LG v. Republic of Argentina*, ICSID Case No. ARB/02/1, Award, Decision on Liability, 03 Oct. 2006, § 124; *Sempra v. Republic of Argentina*, ICSID Case no. ARB/02/16, Award, 28 Sept. 2007, § 299.

[61] *Antin Infrastructures v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, § 532; *Eiser Infastructure v.*

conceived as reasonable (in light of the public interest) and whether a reasonable rate of return is preserved.

It is worth stressing that the strict liability does not protect investors *vis-a-vis* any regulatory changes made by the host state. Said approach targets situations where the host state decides to implement a 'mid-stream switch in the regulatory paradigm'. As put in *Cube:*

> [A] regulatory paradigm is the set of rules that establish a broad playing field in which investors incur particular risks in exchange for the possibility of associated returns. *A mid-stream switch refers to the introduction of new rules that fundamentally change the risk and return profiles for investments that were created under the original paradigm and that are still in use* (our italics).[62]

Secondly, under the strict liability approach, a violation of the FET standard is not contingent upon investments becoming unprofitable. Put differently, even if regulatory changes do not affect the profitability of a given investment, Host State's conduct narrowing the margins of profit may still transgress the FET standard. This is so because the decision as to what is fair remuneration, while in the hands of Respondent, is established at the time the investment was implemented.[63]

Thirdly, the strict liability approach is attached to the concept of induction. Owing to the principle of good faith, FET prevents host states from dramatically alter a regulatory regime specifically put forward to attract investment. The idea of keeping the *legislative promises* the investor has relied on when deciding to invest has played a key role in the renewable energy cases involving Spain[64] and Italy,[65] two streams of cases ruled under Article 10 of the ECT.

This is because, according to arbitral tribunals, Article 10(1) of the ECT must be interpreted in accordance with Article 31 of the VCLT, particularly in accordance with the objectives and principles of the ECT. Several provisions of the Charter endorse the idea that Article 10(1) contains an obligation, not merely a recommendation, for the host states to encourage and create stable, equitable, favourable and transparent condition for Investors.[66] As put in *Eiser:*

> having in mind the context, the object and purpose of the ECT, the Tribunal concludes that the obligation laid down in article 10(1) of providing fair and equitable treatment encompasses an obligation to provide stability regarding the essential features of the regulatory framework in light of which the investors decided to make long-term investments.[67]

So, one important conclusion to be drawn from the case law involving article 10 of the ECT is that the context, purpose and language of the treaty are not irrelevant when determining the content of the FET standard.

To sum up, the strict liability approach establishes a *presumption of regulatory excess*: whenever the Host states dramatically changes the regulatory framework upon which the investor relied on when deciding to invest, said conduct transgresses the obligations the FET standard imposes on host states, by violating the principle of good faith and the obligation to ensure the stability of the regulatory framework.[68]

Kingdom of Spain, ICSID Case No. ARB/13/36, Award, 04 May 2017, § 382.

[62] *Cube Infrastructure Fund v. Kingdom of Spain*, ICSID Case no. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 15 Feb. 2019, § 427.

[63] *CEF Energia v. The Italian Republic*, SCC Arbitration V (2015/158), Award, 16 Jan. 2019, § 245.

[64] The cases dealt with the measures enacted by the Spanish legislator between 2010 and 2013 regarding changes to the so-called 'Special Regime' of renewable energy production. This regime was based on the ability of energy producers to sell their energy at a regulated fixed tariff (or at market price plus premium) during a defined amount of time. In view of the tariff deficit and the escalation of the 2008 financial crisis, Spain enacted a series of decree-laws in 2010 and in 2013 which had disruptive effects over renewable energy investments, particularly over photovoltaic powerplants. In between, but after the first requests for arbitration having been triggered, Spanish authorities created a tax on the value of the production of electrical energy (TVPEE), a 7% levy on the income of all electricity produced and fed into the national grid during a calendar year, independently of that electricity being 'green' or not.

[65] *See Belenergia v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 06 Aug. 2019, § 373 (on imbalance costs); *CEF Energia v. The Italian Republic*, SCC Arbitration V (2015/158), Award, 16 Jan. 2019, § 199 (on administrative fees); *Greentech Energy Systems v. The Italian Republic*, SCC Arbitration V (2015/095), Final Award, 23 Dec. 2018; *Eskosol v. Italian Republic*, ICSID Case no. ARB/15/59, Award, 04 Sept. 2020. The awards dealt with legislative and administrative measures on photovoltaic plants during the financial crisis. In addition to the well-known 'Spalmaincentivi' (Decree-Law no. 91/2014, 24 June 2014 (later converted into Law), which retrospectively changed ongoing incentive tariffs, Italy extended the Robin Hood Tax (initially, a windfall profits tax on oil, gas and traditional energy companies) to all energy producers; imposed administrative fees on photovoltaic producers; reclassified photovoltaic plants as immovable property, thereby subjecting them to IMU and TASI charges; and required renewable energy producers to pay imbalance costs as of 1 Jan. 2013.

[66] *Antin Infrastructures v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, § 516 ss.

[67] *Eiser Infastructure v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 04 May 2017, § 382 (the translation is ours).

[68] An even stricter version of the strict liability seems to emerge in *Greentech Energy Systems v. The Italian Republic*, SCC Arbitration V (2015/095), Final Award, 23 Dec. 2018, § 450, a case against Italy: 'While Italy Republic submitted that its "right to regulate" must be balanced against the needs to protect investors' legitimate expectations, such arguments appear to

5.3 The impact of the amended version of article 10 on the application of the FET standard under the ECT

As pointed out, previous lines were aimed at enabling an answer to the following questions: What is a 'specific representation' under the amended version of article 10? What changes will the proposed amendment engender?

Considering the first question, it is the author's point of view that the new provisions on 'Regulatory measures' and on the FET standard do not rule out the possibility that the regulatory framework might *per se* (i.e, without any further act by the administration) give rise to a 'specific representation'.

Firstly, it is worth stressing that the amended version of article 10 openly admits that the protection of legitimate expectations is part of the FET standard (see article 10(2) of CETA). Secondly, interpreting point 2 in conjunction with point 1, it seems fair to conclude that a situation where host states frustrate investors' legitimate expectations may, under certain circumstances, ascend to 'manifest arbitrariness' and, therefore, to a breach of the FET standard.

It is true, though, that the new article on 'regulatory measures' stresses that Part III of the ECT (Investment promotion and protection) shall not be interpreted as comprising a *stability clause*, i.e a binding promise by the host state that legal and regulatory framework under which the investment was made will remain intact. But if the EU negotiators wanted to exclude specific commitments based on legislative promises, they would have stated that in plain language. Additionally, said exclusion would go against the way the principle of legitimate expectations operates under EU law, which further evinces that, under the amended version of the ECT, legislative promises are still possible.[69]

The second question is more complex.[70]

We wonder whether the new version of article 10, combined with the provisions on 'regulatory measures' and 'sustainable development', clearly rejects the strict liability approach on legitimate expectations. Worth remembering that the latter approach was used in recent cases about withdrawal of renewable energy support schemes, which were decided under the ECT. According to the case law, the FET standard under the ECT requires a given amount of regulatory stability, which means that altering the *regulatory paradigm* (significant changes) put forward to induce the investment bears an almost irrefutable *presumption of excess*, irrespective of whether the investment remains profitable.[71]

It is the author's point of view that the *presumption of regulatory excess* will be harder to sustain under the modernized version of the ECT. Firstly, emphasis put on regulatory measures and sustainable development provides Host states' legislators leeway to argue that a given *regulatory paradigm* must be replaced. Thus, provided investments remain profitable (even if, owing to the regulatory changes, returns are kept below the financial equation upon which the investment was made), '*manifest arbitrariness*' will be difficult to demonstrate.

Yet, renewable energy disputes in Italy and Spain bear some special features, since regulatory changes were not set – at least directly – to achieve climate change or energy transition goals. One can claim that energy justice and sustainable development requires energy transition to be designed fairly, in order to prevent some renewable energy producers to receive remuneration in excess.[72] But it is one thing to withdraw a regulatory regime because a given energy technology is environmentally unsustainable or undermines climate change objectives. It is quite another to withdraw renewable energy subsidies owing to financial justifications, even if remotely associated with long-term energy justice goals.[73]

miss the point in this context. The repeated and precise assurances to specific investors amounted to guarantees that the tariffs would remain fixed for two decades. Italy effectively waived its right to reduce the value of the tariffs'.

[69] Also, Zannoni, *supra* n. 51, at 458: 'As a practical matter, in today's market economies, modern states cannot negotiate contracts with large numbers of private actors, and therefore rely on the ability to make binding commitments and provide guarantees to private parties, including investors, by way of legislative or regulatory instruments. To deny states this power would gravely obstruct a state's governance and regulation and undermine the rule of law (…). In the light of the above, it seems that where a state is found to have provided undertakings or commitments to a class of investors regarding a specified treatment for a prescribed period of time in its general legislation, a legal right of stability arises from these undertakings or commitments no less than where the state has made a specific stabilization commitment to an individual investor (…)'.

[70] Inconclusively, Alvarez, *supra* n. 39, at 525: 'Whether the CETA's FET clauses actually closes the door on expansive interpretation remains to be seen'.

[71] *RREEF Infrastructures v. Kingdom of Spain*, ICSID Case no. ARB/13/30, Decision on Responsibility and on the principles of quantum, 30 Nov. 2018, elaborates on this point in § 587: '(…) Moreover, the Tribunal also considers that, in particular circumstances of the case, the Claimant had legitimate expectations that the return on their investment would be above the mere level of the WACC since the Respondent attracted investments in the renewable energy sector by raising hope of above-average profits'.

[72] Raphael J. Heffron & Darren McCauley, *17. Beyond Energy Justice: Towards a Just Transition,* in *Research Handbook on Global Climate Constitutionalism* 310 (Jordi Jaria-Manzano & Susana Borrás eds, Elgar 2019).

[73] Under EU law, it is worth mentioning the recital 16 of the Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, stressing the importance of renewable energy support schemes to energy transition, OJ L 328/83, 11 Aug. 2018, 'Support schemes for electricity from renewable sources or "renewable electricity" have been demonstrated to be *an effective way of fostering deployment of renewable electricity* (…). Together with steps by which to make the market fit for increasing shares of renewable energy, such support *is a key element of increasing the market integration of renewable electricity*, while taking into account the different capabilities of small and large producers to respond to market signals' (our italics).

Thus, it is the author's view that regulatory regimes *inducing investments in energy transition*, later radically altered by the Host state owing to *non-environmental justifications* may amount to a situation of '*manifest arbitrariness*'. In this scenario, strict liability approach on legitimate expectations might still operate under the revised version of article 10 of the ECT.

VI Conclusions

Our conclusion is three-folded:

First, the importance of the EU's proposal for the modernization of the ECT should not be downplayed. Section 3 demonstrated what is at stake: following the Court of Justice's rulings in *Achmea* and *Opinion 1/17*, amending the ECT is the only way to preserve the autonomy of EU legal order. It is worth stressing, though, that the proposed amendments might not be enough to ensure the ECT's compatibility with EU primary law. In fact, contrary to the investment treaties with third states, the proposal does not establish an Investment Court System, although it addresses such possibility.

Second, it is the author's view that the renewed version of article 10.2 does not rule out that general legislation may amount, under certain conditions, to a specific commitment, generating legitimate expectations to be protected under the FET standard. Indeed, the EU negotiator could have openly rejected said interpretation, by demanding the administrative origin of the specific commitment. The fact that it opted not to do so reveals that the regulatory framework may *per se* be the source of legitimate expectations.

Finally, under the amended version of article 10, it will be harder to make the case for the strict liability approach on the FET standard. Article 10.1 lays down a closed list of situations amounting to the breach of FET, including 'manifest arbitrariness'. Notwithstanding article 10.2, we believe that, given the emphasis placed on the right to regulate and sustainable development, regulatory changes (even radical ones) with environmental or energy transition purposes will not amount to 'manifest arbitrariness'.