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FOREIGN INVESTMENT IN THE ENERGY SECTOR AND CLIMATE CHANGE:
An analysis of ISDS jurisprudence in the renewable energy sector

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A Antônio Nacarath,
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Abstract

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The energy sector is the leading emitter of greenhouse gases, and foreign investments can be a major source of finance for the energy transition. Recognizing the significance of this matter, this dissertation aims to contribute to the understanding of energy transition and foreign investment protection. This dissertation examined cases wherein investors resorted to Investor-State Dispute Settlement (ISDS) to redress reductions in incentives to renewable energy. By doing so, it aims to answer the question: Can international investment law prevent states from modifying their public policy towards renewable energy, reducing incentives? Arbitral cases involving investors in renewable energy against Italy and Spain, both EU member states, form the basis of this dissertation. Despite initially implementing supportive schemes for renewable energy, these countries later reduced incentives, prompting the cases under examination. The study examines eight cases against Italy and thirty-one against Spain, assessing objections to jurisdiction and admissibility, analysing the merits, and addressing developments after the dispatch of the awards. The intra-EU jurisdictional objection, which advocates for the inapplicability of ISDS among EU members, was dismissed in all but one case against Spain. However, its rationale plays a role in the enforcement of awards, as investors cannot enforce the arbitral awards within the EU. Investors obtained three favourable awards against Italy, amounting to EUR 37.5 million, and twenty-five favourable awards against Spain, totalling close to EUR 1.5 billion. However, investors have been facing challenges in enforcing the arbitral awards. The awards are subject to appeals as well as requests for rectification, annulment, and stays of enforcement. Investors also face hurdles in attempts to enforce the awards in domestic jurisdictions outside the EU, including anti-suit injunctions issued by courts of their countries. As of the end of 2023, investors in renewable energy, seeking to reverse incentive reductions that followed the 2008 financial crisis, still find themselves without the amounts awarded. This leads to the conclusion that international investment law has not effectively prevented Italy and Spain from reducing incentives for renewable energy, nor has it ensured adequate compensation for investors in similar situations.

Keywords: Renewable energy. ISDS. Enforcement of arbitral awards. Italy. Spain.

Resumo

NACARATE, João Paulo Melo. Foreign investment in the energy sector and climate change: An analysis of ISDS jurisprudence in the renewable energy sector. 243 p. Dissertação (Mestrado em Direito) - Faculdade de Direito, Universidade de São Paulo, 2024.

O setor de energia é o principal emissor de gases de efeito estufa e investimentos estrangeiros podem ser uma fonte importante de financiamento da transição energética. Reconhecendo a importância dessa questão, esta dissertação visa contribuir para a compreensão da transição energética e da proteção de investimentos estrangeiros. Este trabalho examinou casos em que investidores recorreram a mecanismos de solução de controvérsias entre investidores e estados (ISDS, na sigla em inglês) para remediar reduções nos incentivos à energia renovável. Ao fazê-lo, busca responder à pergunta: pode o direito internacional de investimentos impedir que os estados modifiquem sua política pública em relação à energia renovável, reduzindo os incentivos? Arbitragens de investidores em energia renovável contra Itália e Espanha, ambos Estados membros da UE, formam a base desta dissertação. Apesar de implementarem inicialmente esquemas de apoio à energia renovável, esses países posteriormente reduziram os incentivos, dando origem aos casos em exame. O estudo analisa oito casos contra a Itália e trinta e um contra a Espanha, avaliando objeções à jurisdição e admissibilidade, analisando o méritos e abordando desenvolvimentos após a emissão dos laudos arbitrais. A objeção jurisdicional intra-UE, que advoga pela inaplicabilidade de ISDS entre membros da UE, foi rejeitada em todos os casos contra a Espanha, exceto em um. No entanto, sua fundamentação desempenha um papel na execução das decisões, pois os investidores não podem fazer valer as decisões arbitrais dentro da UE. Os investidores obtiveram três decisões favoráveis contra a Itália, totalizando 37,5 milhões de euros, e vinte e cinco decisões favoráveis contra a Espanha, totalizando quase 1,5 bilhão de euros. No entanto, os investidores têm enfrentado desafios na execução das decisões arbitrais. As decisões estão sujeitas a apelações, bem como a pedidos de retificação, anulação e suspensões de execução. Os investidores também enfrentam obstáculos em tentativas de executar as decisões em jurisdições nacionais fora da UE, incluindo proibição de ajuizamento de ações emitidas pelos tribunais de seus países. Até o final de 2023, os investidores em energia renovável, buscando reverter reduções de incentivos que seguiram a crise financeira de 2008, ainda se encontram sem os montantes outorgados. Isso leva à conclusão de que o direito internacional de investimentos não impediu efetivamente a Itália e a Espanha de reduzirem os incentivos à energia renovável, nem garantiu uma compensação adequada para os investidores em situações semelhantes.

Palavras-chave: Energia renovável. ISDS. Execução de decisões arbitrais. Itália. Espanha.

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1. INTRODUCTION

Global warming is unequivocally a result of human activities, particularly greenhouse gas emissions, according to the Intergovernmental Panel on Climate Change (IPCC), (CALVIN et al., 2023, p. 4). The energy sector is consistently the highest emitter of greenhouse gases: in 1990, it was responsible for 31% of total emissions; in 2000, 33%; in 2010, 35%; and in 2019, 34% (DHAKAL et al., 2022, p. 238).[1] Therefore, to limit global warming, IPCC has stated that is necessary to enhance "rapid and deep reductions in energy system carbon dioxide (CO2) and greenhouse gas (GHG) emissions" (CLARKE et al., 2022, p. 615). In scenarios where global warming is limited to 1.5°C, net CO2 emissions of the energy system must fall by 35–51% in 2030 and by 87–97% in 2050 (PATHAK et al., 2022, p. 89).

A reduction of greenhouse gas emissions from energy systems requires the adoption of numerous strategies. These include, but are not limited to, diminishing fossil fuel consumption with minimal use of unabated fossil fuels, combined with carbon capture and storage in remaining fossil fuel systems. Additionally, these endeavours involve implementing CO2-neutral electricity systems, widespread electrification, and alternative energy carriers such as biofuels and low-emission hydrogen for applications that are less receptive to electrification. Furthermore, it entails measures to enhance energy efficiency, as well as greater physical, institutional, and operational integration across energy frameworks (SHUKLA et al., 2022 p. 28).

Mitigating greenhouse gas emissions, therefore, requires more than just investment in renewable energy. Nevertheless, solar and wind energy have the lowest cost and highest potential among the energy mitigation options (SHUKLA et al., 2022, p. 38). Among the ten mitigation options within the energy system, solar and wind energy have the highest potential for substantial net emission reductions (PATHAK et al., 2022, p. 123). [2] The potential contribution of renewable energy is remarkable, even in the context of mitigation options for all sectors. Among the 43 available mitigation options, solar energy has the highest potential to contribute to net emission reduction, followed by reduced forest and ecosystem conversion,

[1] The industry accounted for 21% of the emissions in 1990, 20% in 2000, 24% in 2010, and 24% in 2019. Agriculture, forestry, and other land use (AFOLU) accounted for 27% of the emissions in 1990, 25% in 2020, 22% in 2010, and 22% in 2019. Transport systems accounted for 13% of the emissions in 1990, 15% in 2000, 14% in 2010, and 15% in 2019. Buildings accounted for 8% of the emissions in 1990, 7% in 2000, 6% in 2010, and 6% in 2019. (DHAKAL et al., 2022, p. 238).

[2] The other mitigation options in the energy sector are bioelectricity, hydropower, geothermal energy, nuclear energy, carbon capture and storage (CCS), bioelectricity with CCS, reduce CH4 emission from coal mining, and reduce CH4 emission from oil and gas (PATHAK, 2022, p. 123).

and wind energy (PATHAK et al., 2022, p. 123).[3] Notably, a significant portion of solar and wind contributions come with costs lower than the reference values or within the range of 0–20 USD per tCO2-eq, in contrast to solutions whose cost may surpass 100 USD per tCO2-eq (CALVIN et al., 2023, p. 104).

Before exploring policies to promote renewable energy, two disclaimers merit attention: environmental concerns are not the only reason for advocating for renewable energy, and although renewable energy is more sustainable than other sources, it still has an tangible environmental impact. The following two sections address both these issues in turn (1.1 and 1.2). The third section concerns policies to support the energy transition, showing the diverse strategies and mechanisms employed in this pursuit (1.3). The following section assess the intersection of foreign investment and policies in renewable energy (1.4). The final section provides an overview of the dissertation's structure (1.5).

1.1 Reasons other than environmental concerns to promote wind and solar energy

Although environmental concerns are a significant factor in promoting renewable energy, there are additional reasons for investing in such alternatives. In this connection, the European Union's Directive 2001/77/EC mentioned that investments in these sources "can also create local employment, have a positive impact on social cohesion, [and] contribute to security of supply" (EUROPEAN UNION, 2001b, recital 1). Directive 2009/28/EC reinforced the previously mentioned benefits and added: "promoting technological development and innovation," facilitating "regional development, especially in rural and isolated areas," supporting "local or regional small and medium-sized enterprises," and enhancing "export prospects" (EUROPEAN UNION, 2009, recitals 1, 3, and 4).

[3] Besides the energy sector, mitigation options are grouped in the following sector agriculture, forestry, and other land use (AFOLU), buildings, transport, industry, and others. Mitigation options in agriculture, forestry, and other land use (AFOLU) are carbon sequestration in agriculture; reduce CH4 and N2O emission in agriculture; reduced conversion of forests and other ecosystems; ecosystem restoration, afforestation, reforestation; improved sustainable forest management; reduce food loss and food waste; and shift to balanced, sustainable healthy diets. Mitigation options in buildings are avoid demand for energy services; efficient lighting, appliances and equipment; new buildings with high energy performance; on site renewable production and use; improvement of existing building stock; and enhanced use of wood products. Mitigation options in transport are fuel-efficient light-duty vehicles; electric light-duty vehicles; shift to public transportation; shift to bikes and e-bikes; fuel-efficient heavy-duty vehicles; electric heavy-duty vehicles, including buses; shipping – efficiency and optimisation; aviation – energy efficiency; and biofuels. Mitigation options in industry are energy efficiency; material efficiency; enhanced recycling; fuel switching (electr, nat. gas, bioenergy, H2); feedstock decarbonisation, process change; carbon capture with utilisation (CCU) and CCS; cementitious material substitution; and reduction of non-CO2 emissions. Other mitigations options are reducing emission of fluorinated gas; reduce CH4 emissions from solid waste; and reduce CH4 emissions from wastewater (PATHAK, 2022, p. 123).

Directive 2018/2001/EC, in its turn, added even more benefits from investments in renewable energies, such as "sustainable energy at affordable prices," "technological and industrial leadership," "health benefits," and "regional development, especially in rural and isolated areas, in regions or territories with low population density or undergoing partial deindustrialisation" (EUROPEAN UNION, 2018b, recital 3).

Studies have substantiated these additional benefits of promoting renewable energy. Within the realm of economic advantages, one can highlight the trend of increased employment, especially within the high-skill labour market (LECOCQ et al., 2022, p. 444), as well as an increase in innovation, gauged by patent numbers (BLANCO et al., 2022, p. 1682).

The use of solar and wind energy reduces electric systems' reliance on the need for a consistent water supply (DENTON et al., 2022, p. 1752). Additionally, as renewable energy is often produced locally, it enhances domestic energy security and diminishes exposure to the volatility and unpredictability of the international fossil fuel market (DUBASH et al., 2022, p. 1385). This factor gained significance during the Russia-Ukraine conflict. If not for their prior investments in renewable energy, European nations could have faced even higher dependence on fossil fuel imports from Russia.

Clean energy sources also have notable health advantages, particularly for women and children (CALVIN et al., 2023, p. 31). Given that other forms of energy generally contribute to air pollution, investments in renewables have the potential to improve air quality (CLARKE et al., 2022, p. 623). Some studies have estimated the lives saved by transitioning to renewable energy sources and their positive effects on air quality (LWASA et al., 2022, p. 875). In specific places, the prospect of reducing local air pollution remains a more prominent concern for policymakers and the public than climate change mitigation when considering coal use regulations (CLARKE et al., 2022 p. 623).

1.2 Environmental impact of wind and solar energy

The environmental impact of renewable energy can be divided into two groups. The first results from the materials needed for construction and operations and occurs far from the plant installations, whereas the second pertains to areas near the installations.

The global transition towards renewable energy inherently requires materials designated as 'critical' by certain governments, including the United States and Australia. These materials are labelled as such due to their economic significance, national security implications, and their susceptibility to supply disruptions and price fluctuations. Examples of such materials

include rare earth elements, such as neodymium and dysprosium, which are vital for the production of permanent magnets in wind turbines, and cadmium, tellurium, selenium, gallium, and indium, all of which are essential for manufacturing solar photovoltaic systems (JARAMILLO et al., 2022, p. 1116).

Projections indicate that transitioning to a cleaner energy landscape strains supply chains of various essential metals and materials. In this sense, it is imperative to take measures that prioritise inclusive development for indigenous populations in regions affected by mining activities and that prevent the exploitation of child labour within these supply chains (KREIBIEHL et al., 2022, p. 1602). Moreover, it is necessary to mitigate the effects of increased mining such as deforestation and soil erosion (NABUURS et al., 2022, p. 769).

An additional approach for lowering the environmental impact of renewable energy involves recycling materials at the end of their life cycle. This approach facilitates the reclamation of valuable materials and prevents the accumulation of waste. Research indicates that recycling enables the reuse of 83% of photovoltaic module components, excluding plastics. While the current scale and impact of recycling might be modest, ongoing advancements in recycling technology bodes well for future outlooks (CLARKE et al., 2022, p. 632-633).

The environmental impacts of wind and solar technologies, including their CO2 emissions, are primarily concentrated during manufacturing, construction, and disposal at the end-of-life of wind turbines and solar plants. Consequently, although they can sometimes lead to significant local ecological effects, these technologies generally exhibit comparatively low overall environmental footprints (CLARKE et al., 2022, p. 637).

Offshore wind farms may affect migratory birds and other marine species. Onshore wind farms can also cause localised ecological impacts. These effects include changes in animal movements and bird and bat fatalities. Moreover, studies have detected alterations in surface temperatures near wind farms, leading to night-time warming. Furthermore, wind turbines introduce challenges, such as noise pollution and alteration of visual aesthetics, which can affect places of symbolic significance (CLARKE et al., 2022, p. 637).

Investigations and model simulations have explored whether extensive solar photovoltaic power installations can influence local and regional climates. Modelling studies have indicated that PV farms may have a cooling effect in urban environments (ranging from 0.11°C to 0.53°C) and a warming effect in rural areas (potentially up to 0.27°C) (CLARKE et al., 2022, p. 671).

Therefore, some countries require comprehensive environmental assessments of the effects of solar and wind power installations. Strategies to mitigate wind turbine disturbances

include mandatory shutdowns during active bird migration (CLARKE et al., 2022, p. 637), careful siting of turbines, enhanced blade visibility through painting to reduce collision fatalities, and coexistence of wind power and agriculture (BABIKER et al., 2022, p. 1034). Overall, the IPCC concluded that the environmental effects of renewable energy production remain primarily localised around production sources, with their significance found to be minor compared to the substantial mitigation advantages provided by renewable energy (CLARKE et al., 2022, p. 671).

1.3 Policies regarding the energy sector

Characterised by a higher degree of regulatory oversight than most other sectors, the energy domain mandates the maintenance of a constant equilibrium between public and private interests (CIMA, 2020, p. 816). Energy projects require considerable capital commitment over long periods, rendering them susceptible to significant political and regulatory risks (BANKES, 2012, p. 498). As a consequence of market failures and specificities in system domains within the energy sector, the development and introduction of novel technologies are frequently attributed, at least in part, to deliberate policy measures (BLANCO et al., 2022, p. 1667).

Policies on renewable energy, as outlined in recital 14 of Directive 2001/77/EC, include green certificates, investment aid, tax exemptions or reductions, tax refunds, and direct price support schemes, such as feed-in tariffs (an additional premium tariff added to the market rates) (EUROPEAN UNION, 2001b, recital 14). Feed-in tariffs are the dominant policy worldwide, with annual allocations reaching USD 150 billion (CLARKE et al., 2022, p. 629). For instance, Spain and Italy have adopted feed-in tariffs for renewable energy. Notably, the primary reason behind the cases brought against states by investors, which constitute the focus of this dissertation, was the alterations made to feed-in tariffs.

Such policies foster renewable energy production irrespective of whether the investment originates locally or abroad. The next section explores measures concerning foreign investments in wind and solar energy.

1.4 International law of foreign investments and policies in wind and solar energy

Foreign investment can be a source of financing for wind and solar energy projects. Within this context, the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda underscore foreign investment as a catalyst for the transition toward a sustainable green

economy. The latter even characterised it as “a central component of sustainability efforts” (BJORKLUND, 2019, p. 36).

In cases where a country is a signatory to treaties that safeguard foreign investment, their investments receive the protection set by those treaties, which often include recourse to investor-state dispute settlement mechanisms. A division of opinions exists concerning the role of the international law of foreign investment in the transition to a green economy.

GENTRY (2007 p. 74) and BANKES (2012 p. 510), for instance, posit that the protection provided by international law should contribute to mobilising foreign investment in the renewable energy sector. Furthermore, investor-state dispute settlement mechanisms can contribute to ecological transition. States can bring counterclaims in proceedings initiated by investors to enforce environmental laws against them, as in the case of Burlington v. Ecuador.[4] Conversely, investors could complain about the state’s non-compliance with environmental obligations in state-investor arbitrations and seek reparations when such violations affect their assets (CIMA; MBENGUE, 2021a, p. 219). VIÑUALES (2022 p. 422-428) stated that investor-state dispute settlement mechanisms, initially created to safeguard investments in fossil fuels, could also serve as a means of protecting renewable energy from the impact of regulatory framework fluctuations.

However, the prevalent perspective contends that international investment law restrains the state’s ability to adopt policies that promote energy transition (PATT et al., 2022, p. 1499). Fossil-fuel companies may pursue compensation through investor-state dispute settlement mechanisms, potentially hindering or delaying actions to combat climate change, as argue TIENHAARA (2018 p. 229), TIENHAARA; DOWNIE (2018 p. 452), BOS; GUPTA (2019 p. 8), VIÑUALES (2022 p. 407), and PATT et al. (2022 p. 1506). Some cases, such as

[4] Burlington consent to the jurisdiction over Ecuador’s counterclaims (ICSID, 2012. Burlington. Decision on Counterclaims, para 6). Ecuador argued that Burlington’s activities had resulted in significant environmental damage, specifically pertaining to soil contamination (para 267-748) , mud pits (para 749-834, , groundwater (para 835-880), and well site abandonment (para 881-888). The tribunal declared Burlington liable for the costs of restoring environment areas and ordered they payment of USD 39.2 million for environmental remediation, a fraction of the initial USD 2.8 billion claimed by Ecuador (para 52(iii) and 1099(A)(B), decision on counterclaims).

Rockhopper v. Italy[5], Westmoreland v. Canada[6], and Vattenfall v. Germany (I)[7] exemplify this path.

This is in line with Viñuales' suggestion, which proposes that investor-state dispute settlement mechanisms could be employed to safeguard renewable energy from the effects of regulatory framework fluctuations, this study investigates instances where investors in renewable energy seek to utilise the ISDS, initially established to safeguard investments in fossil fuels, to protect their assets from regulatory changes, specifically the reduction of incentives.

1.5 Structure of the Dissertation

This dissertation aims to examine cases in which investors in renewable energy resort to ISDS to answer the following question: Can international investment law prevent states from modifying their public policy towards renewable energy, reducing incentives?

First, this study looked for cases in databases of international arbitration where the claimant was an investor in renewable energy, the respondent was a state, and key information about the award was made available, particularly the amount awarded. It included a search in these four databases: the Energy Charter Treaty (ECT)'s list of cases (ECT. LIST OF CASES,

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[5] Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14. Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc, British companies, lodged a claim against Italy before an ICSID tribunal for breach of the prohibition of impairment of investment by unreasonable or discriminatory measures (Article 10(1)), fair and equitable treatment (FET) (Article 10(1)), and unlawful expropriation (Article 13(1)) under the ECT. The tribunal concluded that Italy's denial of a production concession for an oil field, despite a positive environmental compatibility assessment on August 7, 2015, amounted to a direct expropriation without compensation. The denial based on Law No. 208 of December 28, 2015, which eliminated the previous exceptions that allowed for the exploitation of "offshore liquid and gas hydrocarbons" within a 12-mile limit of the Italian coast. The tribunal's determination of the expropriation breach rendered the examination of the other claims unnecessary. As a result, the claimants were awarded EUR 184 million in damages, approximately EUR 6.7 million for decommissioning costs, plus interest (WU, 2023).

[6] Westmoreland Mining Holdings LLC, an American entity, initiated legal proceedings against Canada through an ICSID tribunal, citing an alleged breach of NAFTA Chapter Eleven. The claim stemmed from the impact of Alberta's Climate Leadership Plan, which aimed to phase out coal-fired electricity by 2030, on Westmoreland Mining Holdings' three coal mines. While Alberta provided compensation to the six affected coal-fired plants, the same was not extended to the coal mines. The ICSID tribunal concluded that it lacked jurisdiction over the presented claim. This was chiefly due to the tribunal's assessment that Westmoreland Mining Holdings LLC was not eligible to bring the claim as the legal successor to Westmoreland Coal Company (WCC) (IISD, 2022).

[7] Vattenfall AB, Vattenfall Europe AG, and Vattenfall Europe Generation AG, Swedish companies, initiated a legal proceeding against Germany through the ICSID. The companies alleged that the actions of Hamburg government authorities in relation to the administrative process for granting permits for a new power plant, under construction by Vattenfall Generation at the site of a former plant in Hamburg-Moorburg, violated Articles 10(1) (fair and equitable treatment, full protection and security, and prevention of arbitrary, unreasonable or discriminatory measures) and 13(1) (indirect expropriation) of the ECT. The dispute was ultimately resolved through a settlement agreement between the parties (UNCTAD, [n.d.]).

[n.d.]), the International Centre for Settlement of Investment Disputes (ICSID) case database (ICSID, [n.d.]), ITA Law database (ITALAW, [n.d.]), and UNCTAD's Investment Dispute Settlement database (UNCTAD, [n.d.]). Subsequently, two countries with the most significant number of cases were selected: Spain and Italy. The cases of these two countries are assessed in Chapters 4, 5, and 6.

Chapter 2 proceeds to examine the relevant legal framework for the analysis of cases. It begins with a broader overview of international law concerning foreign investment (2.1), followed by an analysis of the specific provisions of the Energy Charter Treaty (ECT) (2.2). It also deals with treaties addressing climate change and their stipulations to reduce greenhouse gas emissions (2.3), notably the United Nations Framework Convention on Climate Change (2.3.1), the Kyoto Protocol (2.3.2), and the Paris Agreement (2.3.3). It then presents European Union directives on renewable energy (2.4).

Chapter 3 presents the domestic legislation pertaining to renewable energy in Italy (3.1) and Spain (3.2). It examines the legislation that established incentives for investments in renewable energies, as well as the subsequent withdrawal of such incentives, which triggered the ISDS cases studied in this dissertation.

Chapter 4 investigates objections against the jurisdiction of tribunals and the admissibility of cases raised by both Italy and Spain. It assesses whether the tribunals had jurisdiction over all or part of the claims and examines the admissibility of these claims. Special attention is given to the intra-EU jurisdictional objection, the argument that ISDS mechanisms do not apply between investors from EU countries and EU countries. This objection is important not only because it was raised in virtually every case (although rejected in almost every instance) but also because its rationale is crucial in the enforcement of the awards.

Chapter 5 addresses the analysis of merits in the cases studied. It provides a summary of the eight investor-state arbitration cases against Italy as well as tables containing information on the rights claimed to have been violated by the investors, the claims that arbitrators dismissed, the accepted claims, and the amount of damages awarded for both Italy and Spain.

Chapter 6 examines the developments after the dispatch of the awards. It presents the petitions for annulment, supplementary decisions, stays of enforcement, as well as attempts to enforce the award in other countries. Due to the rationale behind the intra-EU objection, the courts of European countries have not enforced the awards, and in some cases, they have issued anti-suit injunctions against attempts to enforce the award outside the EU. The chapter indicates that no payment of the awarded amounts is known. In addition to the developments in specific

cases, the chapter also refers to measures taken by European institutions, efforts to reform the ECT, as well as withdrawals from the treaty.

After the examination of international and domestic law regarding the protection of investments in renewable energy and the cases brought against Italy and Spain, including the consequences following the issuance of the awards, Chapter 7 concludes the dissertation by asserting that international investment law, to a larger extent, has not prevented states from modifying their public policy towards renewable energy, reducing incentives.

2 INTERNATIONAL LAW REGARDING THE SUBJECT

To examine Investor-State Dispute Settlement (ISDS) cases brought by investors in the renewable energy sector against Italy and Spain, this study initiates its analysis by reviewing pertinent international law. This includes international law governing foreign investments, specific provisions outlined in the ECT, international agreements aimed at addressing climate change, and directives within the European Union (EU) related to renewable energy.

Section 2.1 offers an overview of foreign investment law, while Section 2.2 focuses on the ECT, which serves as the foundation for all cases examined in this dissertation. The subsequent sections review treaties addressing climate change and their provisions for greenhouse gas reduction: Section 2.3.1 discusses the United Nations Framework Convention on Climate Change, Section 2.3.2, the Kyoto Protocol, and Section 2.3.3, the Paris Agreement. The section dedicated to European Union directives on renewable energy further explores specific directives, with Section 2.4.1 addressing Directive 2001/77/EC, Section 2.4.2 covering Directive 2009/28/EC, and Section 2.4 about Directive (EU) 2018/2001."

2.1 The international law of foreign investment

Energy transition is a critical factor in mitigating greenhouse gas emissions, but it requires a sizeable investment. Foreign investments may play an essential role in this context. To provide legal certainty to this type of investment, in addition to protection from municipal law, many countries are party to bilateral and multilateral treaties that protect foreign investment. Some treaties allow investors to bring claims against states before an international arbitration tribunal.

During the 19th century, options for resolving investment disputes differed depending on the investors' nationality. Nationals could only resort to domestic remedies. Foreigners, in turn, in addition to resorting to the local judiciary, could receive diplomatic protection from their home states.

Local courts, however, had some drawbacks: the claims were generally limited to the contract or some specific provisions of domestic law; and there were severe doubts about the neutrality of the courts in actions against its state and the ability of courts to enforce monetary judgements against the state (KALICKI; MEDEIROS, 2008, p. 425).

In the context of diplomatic protection, the country would espouse claims made by one of its citizens. What began as a conflict between an individual and a state would then evolve into a dispute between two sovereign states. Consequently, this mechanism served as a political solution rather than a purely legal one. The decision to espouse a claim lay with the investor's home country; it was not the investor's right. In fact, espousal could occur even without the investor's consent.

Both investment-receiving and investment-issuing countries expressed their disapproval of this mechanism. Argentine jurist Carlos Calvo emerged as a prominent critic from investment-receiving countries. In 1863, he published "Derecho internacional teórico y practico de Europa y América", which argued that investment-exporting countries abused their power by misusing the institution of diplomatic protection to exert undue pressure on institutionally weaker countries.

According to this theory, investment-receiving countries started to require foreign investors to waive diplomatic protection when investing. The requirement to waive diplomatic protection in concession contracts became known as the Calvo Clause. The doctrine against the Calvo Clause argued that diplomatic protection is a state prerogative and, therefore, the investor could not decide to waive it. Despite this criticism, the Calvo doctrine had a significant political reception, and many countries adopted it, especially in Latin America, in the late 19th and early 20th centuries.

Critiques of diplomatic protection from capital-exporting countries have focused on politicization resulting from diplomatic protection. Disputes between foreign investors and governments, especially in the case of public service concessions or the exploitation of natural resources, were highly politicised and generated animosity against the countries that exercised diplomatic protection. Critics of diplomatic protection found domestic judicial channels to be an unappealing option due to concerns about the perceived lack of impartiality within the judicial systems of capital-receiving countries. International arbitration was, therefore, proposed as the solution to address these concerns – as a "technical" solution, it would be both "depoliticised" (in contrast to diplomatic protection) and "impartial" (as opposed to the legal systems of countries receiving capital).

Notably, the International Center for Settlement of Investment Disputes (ICSID) was established in 1966. The World Bank championed this idea because it believed that this kind of dispute resolution contributed to its objective of promoting international investment (ICSID, [n.d.]). Currently, 165 countries are parties to the treaty that created the ICSID (ICSID, [n.d.]).

The ICSID Convention serves as a mechanism designed specifically to safeguard foreign investment, rather than investment broadly defined. Article 25 of the ICSID Convention established the criteria for determining the eligibility of individuals or legal entities. According to this article, a “national of another Contraction State” can either be a natural person who holds the nationality of a contracting state other than the respondent state or a legal entity that possesses the nationality of another contracting state. Moreover, contracting parties can mutually agree to treat as a national of another state a legal entity incorporated in the host country but controlled by foreigners.

The Stockholm Chamber of Commerce (SCC) and the Permanent Court of Arbitration (PCA) are other institutions that can conduct international investor-state arbitration. In addition, parties can bring disputes before ad hoc arbitration tribunals, usually under the United Nations Commission on International Trade Law (UNCITRAL) rules.

Several bilateral and multilateral agreements on foreign investment protection have clauses for submitting investor-state disputes to the ICSID, SCC, or *ad hoc* arbitration tribunals. However, the discriminatory nature of international investment protection mechanisms has been criticised. In Spain, where the Supreme Court and the Constitutional Court supported the price cuts made by the executive branch, similar to those made in Italy, the Asociación Nacional de Productores de Energía Fotovoltaica (ANPIER) demands that national investors receive the same treatment as that given to foreign investors. The association claims that it is unacceptable that, in the same situation, the state compensates for the damage caused to large international investors but leaves its own citizens in ruin (NOCEDA, 2017).

As a rule, an investor who is the national of the state of investment can resort only to the domestic judicial system. Alternatively, they may seek recourse to an international court. Recourse to regional human rights systems is possible, insofar as state measures have violated some human rights of the investor, such as private property. However, human rights systems do not exist on every continent, and even when they do exist, not all countries are signatories to these mechanisms.

A foreign investor may seize the judicial system of the state of investment. Theoretically, they could also resort to a regional human rights protection system. Additionally, foreign investors can resort to investor-state dispute settlement mechanisms. Recourse to the jurisdiction of their state of nationality or any other state is not an alternative, since states enjoy immunity from jurisdiction in other states, at least for acts of empire, such as the creation or alteration of regulations.

Investors of renewable energy in Spain and Italy have challenged the changes in their sectors in domestic courts. In Spain, the Constitutional Court upheld the government's alterations, and the Italian Supreme Court of Cassation did so. These cases are not part of this study, which focuses only on international arbitration (other options for investors, such as diplomatic protection, domestic courts of other states, and human rights courts are not part of this study).

International arbitration and domestic judgements may differ in procedural and substantive laws. Each judicial system indicates procedural and substantive laws applicable to each case. The judicial system also determines the hierarchy of norms, whether domestic, European or international.

Article 10 of the Italian Constitution establishes that the country's legal order must comply with the generally recognised norms of international law. Therefore, customary international law prevails over ordinary domestic law. However, the country's constitutional court understands that international customs must be in accordance with the fundamental rights provided for in the constitution (SHAW, 2017, p. 132). Thus, a country's court can uphold domestic norms that are inconsistent with international law. The same is true for European legislation. Italy has already been held responsible by the country's highest court for maintaining domestic law inconsistent with European norms (EVANS, 2003, p. 234).

Accordingly, Italian courts reach decisions by referring to domestic, European, and international norms, if they are compatible with the Italian legal framework. In cases where Italian investors challenged the incentive cuts, the controversy reached the Italian Court of Cassation, which supported governmental measures, considering that the incentive cuts were constitutional. In line with its jurisprudence, the court believed that safeguarding legitimate expectations did not prevent legislative changes that could negatively affect investments (BELLANTUONO, 2017; COLCELLI, 2018).

In international arbitration, applicable substantive law is defined by treaties or determined ad hoc by the parties. In the cases examined in this study, treaties specified the relevant substantive laws. Article 42 of the ICSID states, "The court will settle the dispute in accordance with the rules of law agreed between the parties." In turn, Article 26 of the ECT provides that the established arbitration body "will decide the disputed issues in accordance with this Treaty and the applicable rules and principles of international law."

2.2 The Energy Charter Treaty

The Energy Charter Treaty (ECT) is a single example of a multilateral treaty focused on trade and investments in the energy sector (CIMA; MBENGUE, 2021b, p. 241). The end of the Cold War and the integration of Eastern European countries into the Western European economy provided the context for signing the charter in 1994. Its core objective is to "promote long-term cooperation in the energy field", benefiting from "complementarities" and generating "mutual benefits" (ECT, 1994, Article 2).

The treaty addressed the mismatch between energy consumption in Western European countries and energy production in the former Soviet countries. On the one hand, Western European countries would ensure their energy supply and safeguard their investments. On the other hand, former Soviet countries would attract the investment required to exploit their natural resources, access the European market for energy sales, and purchase energy industry-related equipment and services (VIÑUALES, 2022, p. 69-70). Consequently, Europe has diversified its energy supply mix, reducing its reliance on the Middle East (CIMA, 2020, p. 824).

Primarily ratified by European countries, the treaty's membership includes non-European countries, such as Afghanistan, Japan, Jordan, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, and Turkmenistan. Its membership amounts to 54 states[8] and two international organisations, the European Union and the European Atomic Energy Community (Euratom) (ECT, [n.d.]).

Before providing an overview of the agreement, it is pertinent to highlight that discussions on jurisdiction and admissibility frequently involve Articles 17 (denial of benefits), 21 (taxation measures), and 24(2) (fork-in-the-road clause). In the context of merits, the most invoked articles are 10(1) (fair and equitable treatment, protection and security, impairment clause, and umbrella clause) and 13(1) (expropriation).

First, the ECT disciplines the trade of energy in Articles 3 to 9. Parties shall "promote access to international markets" and "develop an open and competitive market, for Energy Material and Products and Energy-Related Equipment" (Article 3(1)). The charter explicitly states that none of its shall derogate, as between contracting parties which are WTO members, from the provisions of the WTO Agreements as applied between contracting parties (Article

[8] Afghanistan, Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, and Yemen. Belarus is shown as a member, but with the indication of provisional application suspended (ECT, [n.d.]).

4(1)). Moreover, it regulates trade-related investment measures (Article 5), competition (Article 6), transit (Article 7), technology transfer (Article 8), and access to capital (Article 9).

Subsequently, the treaty regulates investment promotion and protection in Articles 10 to 17. However, before the provisions on this matter, it is pertinent to consider the definition of investment provided in Article 1(6):

> Investment” means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
> (d) Intellectual Property;
> (e) Returns;
> (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.”

This is arguably one of the most comprehensive definitions of investment in contemporary treaties regarding investment promotion and protection (CIMA, 2020, p. 827). The tribunal in Blusun v. Italy referred to it as a “broad definition of ‘investment'" (“Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3,” 2016. Award, para 263).

Article 10(1), present in all the cases explored in this dissertation, offers the following provisions:

> 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.

Following this, the ECT provides guidelines regarding the process of making investments, spanning Articles 10(2) to 10(6). Articles 10(2) and 10(3) stipulate that contracting parties "shall endeavour to accord" treatment to investors from other contracting parties engaged in investment activities, which is "no less favourable than that which it accords to its own Investors" (commonly referred to as national treatment) or "to Investors of any other Contracting Party or any third state" (the most favoured nation principle), “whichever is the most favourable.”

Article 10(4) calls for the creation of a supplementary treaty that would extend the national treatment standard in Article 10(3) to the making of new investments made in accordance with that supplementary treaty, and which would specify conditions for applying such treatment. Article 10(5) establishes that the contracting parties "shall […] endeavour" to limit the exceptions to national treatment and most favoured nation treatment in the making of investments and progressively remove the restrictions affecting the investors of another contracting party. Article 10(6) creates a mechanism for contracting parties to voluntarily declare their commitment to refrain from introducing new exceptions to the national treatment or the most favoured nation principle for investors of other contracting parties. Additionally, it provides a mechanism allowing contracting parties to voluntarily extend these treatments to the investors of other contracting parties.

Consequently, save for the first sentence of Article 10(1) ("encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area"), all the provisions for the pre-investment phase are only exhortatory. Therefore, the ECT primarily imposes binding obligations only in the post-investment stage.

Article 10(7) establishes the obligation to accord to investments treatment "no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state […] whichever is the most favourable" (national treatment and most favourable nation principle).

Furthermore, the ECT regulates aspects related to the entry, stay, and work of natural persons (Article 11), and compensation for losses resulting from "war or other armed conflict, state of national emergency, civil disturbance, or other similar event" (Article 12).

Additionally, the ECT prohibits nationalisation and expropriation of foreign investments in the energy sector (direct expropriation) as well as "a measure or measures having an effect equivalent to nationalisation or expropriation" (indirect expropriation). These actions are prohibited unless they serve the public interest, are non-discriminatory, respect the due process of law, and include "prompt, adequate and effective compensation" (Article 13(1)). The treaty also governs transfers linked to investments (Article 14) and subrogations concerning indemnities and guarantees (Article 15).

Article 16 regulates the relationship between the ECT and other treaties. It states that if the contracting parties of the ECT are contracting parties in other international agreements concerning investment promotion and protection or dispute settlement, the provision more favourable to the investor or the investment shall prevail. Therefore, the ECT does not derogate

any provision or dispute resolution right that is more favourable to the investor or investment provided by the other treaty. Likewise, another treaty shall not derogate any provision or dispute resolution right provided by the ECT that is more favourable to the investor or investment.

Article 17 allows a contracting party to deny the benefits related to investment promotion and protection to a legal entity owned or controlled by nationals of a third state and takes substantial business activities within the other contracting party where it is incorporated. Additionally, Article 18 recognises the sovereign rights of states over energy resources, stipulating that the exercise of this authority must adhere to international law.

The ECT, under Article 19, establishes a comprehensive framework for the environmental responsibilities of its Contracting Parties. Article 19(1) mandates that each contracting party should minimise environmental impacts “in an economically efficient manner” when pursuing sustainable development and complying with obligations under international agreements. Contracting parties must take precautionary measures to prevent or minimise environmental degradation (Article 19(1)). It also enshrines the principle that the polluter must bear the cost of pollution (Article 19(1)).

Article 19(1)(a) underscores the obligation of each Contracting Party to integrate environmental considerations into the formulation and implementation of their energy policies. Article 19(1)(b) requires Contracting Parties to promote market-oriented price formation and ensure a fuller reflection of environmental costs and benefits within the energy sector. Article 19(1)(c) encourages cooperation among Contracting Parties in pursuit of environmental objectives outlined in the Charter. Article 19(1)(d) underscores the importance of improving energy efficiency, developing renewable energy sources, promoting cleaner fuels, and employing technologies that reduce pollution. Article 19(1)(e) mandates the promotion of the collection and sharing of “information on environmentally sound and economically efficient energy policies,” as well as “cost-effective practices and technologies.”

Public awareness is a key theme in Article 19(1)(f), emphasising the promotion of public understanding of the environmental impacts of energy systems. Article 19(1)(g) stipulates promotion and cooperation in the research, development, and application of energy-efficient and environmentally sound technologies, practices, and processes. Article 19(1)(h) prescribes the encouragement of favourable conditions for the transfer and dissemination of environmentally sound technologies while respecting Intellectual Property rights. Article 19(1)(i) requires transparent assessment before the installation of environmentally significant energy investment projects and the subsequent monitoring of their environmental impacts. Article 19(1)(j) instructs contracting parties to promote international awareness and information

exchange regarding relevant environmental programmes, standards, and their implementation. Finally, Article 19(1)(k) mandates the contracting parties, "upon request, and within their available resources," to engage in the development and implementation of appropriate environmental programs. This article reflects the conception of its negotiators that economic development and environmental protection can mutually reconcile (ROBERT-CUENDET, 2010a, p. 38).

Article 19(2) states that the Charter Conference should address disputes concerning the application or interpretation of the provisions of this article provided that no other suitable mechanisms for solving such disputes exist in other relevant international forums.

The ECT was signed in 1994 in the context of growing awareness of climate change, substantiated by events such as the United Nations Conference on the Human Environment, hosted in Stockholm in 1972, and the United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro in 1992, which resulted in the adoption of The United Nations Framework Convention on Climate Change (UNFCCC). Therefore, by this time, there was widespread awareness of the substantial contribution of fossil fuels to greenhouse gas emissions.

In its preamble, the ECT recalls "the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects;" and recognises "the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally agreed objectives and criteria for these purposes."

ROBERT-CUENDET (2010a p. 42) underscores of ECT alongside North American Free Trade Agreement (NAFTA) in simultaneously addressing both investment and environmental concerns within the same instrument. Nonetheless, the treaty faced significant criticism for the lack of meaningful differentiation between investments in renewable energy and fossil fuels (PATT et al., 2022, p. 1501). The wording of Article 19(1)(d) is merely exhortatory: it states that contracting parties shall "have particular regard […] to developing and using renewable energy sources, to promoting the use of cleaner fuels". Moreover, Article 19 has a specific dispute settlement mechanism (Article 19(2)) and is not subject to the investor-state dispute settlement mechanism of Article 26(2)(c).

Article 20 sets rules for transparency. Article 21 excludes taxation measures from the remit of the treaty with some exceptions. Article 22 extends the obligations of the contracting parties to state enterprises. Article 23 states that contracting parties shall take "reasonable

measures” to ensure the observance of the treaty by regional and local governments and other authorities. Furthermore, it highlights that investors can invoke the dispute settlement mechanisms provided by the treaty with respect to measures taken by regional and local governments as well as other authorities.

Article 24 provides exceptions to the application of the treaty. A contracting party may adopt or enforce measures “necessary to protect human, animal or plant life or health” (Article 24(2)(b)(i)), to acquire goods in short supply (Article 24(2)(b)(ii)) to benefit aboriginal people or social or economically disadvantaged individuals or groups (Article 24(2)(b)(iii)), to protect its “essential security interests” (Article 24(3)(a)), to ensure the non-proliferation of nuclear weapons (Article 24(3)(b)), and to maintain public order (Article 24(3)(c)).

Article 25 introduces an exception to the principle of the most favoured nation. Contracting parties do not have to extend to other contracting parties the advantages granted to a specific contracting party within an “economic integration agreement”.

Article 26 disciplines the settlement of disputes between an investor and a contracting party in relation to investment promotion and protection. Initially, it mandates an attempt at amicable settlement (Article 26(1)). Should this prove unsuccessful, after three months, the investor can opt to pursue the dispute through the courts or administrative tribunals of the contracting party (Article 26(2)(a)), engage in a previously agreed dispute settlement procedure (Article 26(2)(b)), or choose one of the investor-state dispute settlement mechanisms offered by the ECT (Article 26(2)(c)). Notably, as investor is required to select one of these avenues, this provision constitutes a fork-in-the-road clause.

The options provided by the ECT are the International Centre for Settlement of Investment Disputes (ICSID)[9] (Article 26(4(a)), a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) (Article 26(4(b)), and arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce (Article 26(4(c)). When resolving disputes under this mechanism, tribunals should apply the ECT and adhere to the applicable rules and principles of international law (Article 26(6)).

The ECT establishes the settlement of disputes between contracting parties (Articles 27 and 18), provides transitional measures (Articles 29 to 32), creates its institutions (Articles 33 to 37), and establishes final provisions (Articles 38 to 50). It is worth mentioning the sunset clause, according to which the stipulations of the ECT will continue to apply to investments

[9] Provided that both the contracting party of the investor and the contracting party to the dispute are parties do the ICSID Convention.

made by investors of one contracting party in another contracting party for 20 years following the withdrawal of the concerned contracting party (Article 47(3)).

2.3. Treaties on climate change

The forthcoming sections present an examination of three international treaties central to shaping the global response to climate change. The first treaty to be considered is the United Nations Framework Convention on Climate Change (UNFCCC), originating from the 1992 United Nations Conference on Environment and Development in Rio de Janeiro (Section 2.3.1). It marked a significant milestone by explicitly acknowledging that human activities were a leading contributor of climate change.

The next treaty to be considered is the Kyoto Protocol, a protocol to the UNFCCC, concluded in 1997, which established obligations for developed nations, enunciating specific targets for emission reduction, as well as obligations for all parties (Section 2.3.2). The next subsection reviews the Paris Agreement, another development under the umbrella of the UNFCCC, which was conceived in 2015 and seeks to amplify global endeavours in climate mitigation and adaptation (Section 2.3.3).

Though not explicitly focused on energy, these agreements, which establish objectives for addressing climate change more broadly, to some extent, contribute to shaping measures within the energy sector. Their influence on policies regarding the energy sector is evident in references to them in the European directives; these directives will be subsequently examined, following the analysis of the abovementioned climate change treaties.

2.3.1 The United Nations Framework Convention on Climate Change (UNFCCC)

In 1992, during the United Nations Conference on Environment and Development, hosted in Rio de Janeiro, the United Nations Framework Convention on Climate Change was opened for signature. In its preamble, the parties acknowledge that human activities have substantially increased the atmospheric concentrations of greenhouse gases, which intensify the natural greenhouse effect, and that “this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind” (UNFCCC, 1992). The parties note that developed countries have historically contributed the most to global greenhouse gas emissions, that per capita emissions in developing countries remain comparatively low, and that developing countries will increase their share of global

emissions to fulfil their social and development requirements. As a result, the response of countries would be in accordance with common but differentiated responsibilities, respective capabilities, and a consideration of social and economic conditions, which is a guiding principle of the treaty (Article 3(1)).

The treaty defined climate change as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable periods” (Article 1(1)). It aimed to attain the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system” (Article 2).

In order to do so, all parties committed to share national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol (Article 4(1)(a)); to formulate and implement measures to mitigate climate change by addressing anthropogenic emissions and removals as well as measures to adapt to climate change (Article 4(1)(b)); to promote and cooperate in the development and diffusion of technologies that reduce anthropogenic emissions (Article 4(1)(c)); to promote and cooperate in the conservation of sinks and reservoirs of greenhouses (Article 4(1)(d)); to cooperate in measures for adaptation (Article 4(1)(e)); to take climate change into consideration in other policies, including by use of impact assessments (Article 4(1)(f)); to promote and cooperate in scientific research, exchange of information, education and public awareness about climate change (Article 4(1)(g)(h)(i)(j)); and to communicate to the conference of the parties the implementation of these measures (Article 4(1)(j)).

In accordance with the principle of common but differentiated responsibilities, developed countries have made specific commitments. The list of developed countries, Annex I of the treaty, included all the current EU members except for Cyprus, Malta, Slovenia (countries that acceded to the EU in 2004), and Croatia (2023) (EUROPEAN UNION, [n.d.]). The developed countries committed to adopting policies and measures for the mitigation of climate change, by limiting their anthropogenic emissions of greenhouse gases and protecting their greenhouse gas sinks and reservoirs (Article 4(2)(a)); and to communicating policies and measures adopted as well as the projected reduction of anthropogenic emissions or removals, “with the aim of returning individually or jointly to their 1990 levels of these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol” (Article 4(2)(b)). Although the UNFCCC imposed obligations on developed countries, it did not set specific quantified targets for emission reduction, an endeavour subsequently undertaken by the Kyoto Protocol.

The treaty settled obligations regarding research and systematic observation (Article 5) and education, training, and public awareness (Article 6). It also established the Conference of Parties (CoPs) (Article 7), a secretariat (Article 8), subsidiary bodies (Articles 9 and 10), a financial mechanism (Article 11), a system of communication for its implementation (Article 12), a dispute resolution settlement mechanism (Articles 13 and 14), mechanisms of amendments (Articles 15 and 16), the possibility of adopting protocols (Article 17), and rules on voting (Article 18).

The agreement also allows participation by regional economic integration organisations (Article 20). In matters within their competence, such organisations shall cast votes equal to the number of their member states party to the convention, provided that the member states are not concurrently exercising their right to vote (Article 18(2)). In their instruments of ratification or accession, these organisations shall specify the scope of their authority concerning matters addressed by the Convention (Article 22(3)). The then European Economic Community declared that "the Community, alongside its Member States, is competent to take action aiming at the protection of the environment" and listed nine legal instruments related to the matters covered by the convention (EUROPEAN UNION, 1994b). Additionally, it declared that the organisation and its member states commit to limit anthropogenic CO2 emissions by the Community and its Member States, within the respective competence of each, and reaffirmed the objective to stabilise CO2 emissions by 2000 at 1990 levels (EUROPEAN UNION, 1994b).

2.3.2 Kyoto Protocol

On 10 December 1997, in Kyoto, parties of the United Nations Framework Convention on Climate Change (UNFCCC) concluded the Kyoto Protocol (KYOTO PROTOCOL, 1997). Following the principle of common but differentiated responsibilities, developed countries have made specific commitments. Annex B of the protocol identified all current members of the European Union as developed countries, with the exception of Cyprus and Malta. Croatia and Slovenia, which were not included in the developed country annex of the original UNFCCC, were included in the Annex of the Kyoto Protocol.

The treaty established that developed countries shall implement policies and measures for the enhancement of energy efficiency (Article 2(1)(a)(i)); protection and enhancement of sinks and reservoirs of greenhouse gases (Article 2(1)(a)(ii)); promotion of sustainable forms of agriculture (Article 2(1)(a)(iii)); promotion of renewable energy (Article 2(1)(a)(iv));

reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors (Article 2(1)(a)(v)); policies and measures which limit or reduce emissions of greenhouse gases (Article 2(1)(a)(vi)); measures to reduce emissions of greenhouse gases in the transport sector (Article 2(1)(a)(vii)); and reduction of methane through use in waste management or energy production (Article 2(1)(a)(viii)).

The treaty also established the limits of aggregate anthropogenic carbon dioxide equivalent emissions of greenhouse gases for developed countries, individually or jointly, to reduce their overall emissions by at least 5 per cent below 1990 levels in the commitment period from 2008 to 2012 (Article 3(1)). The goal for the European Community and for almost all the countries that are current members of the European Union was 92%. The exceptions were Croatia (95%), Hungary (94%), and Poland (94%), none of which, at the time, was part of the European Community.[10] Article 3(14) states further that developed countries shall fulfil their commitment in a manner that minimises adverse social, environmental, and economic impacts on developing countries. The treaty also regulates agreements among parties to jointly fulfil their commitments, including with regional economic integration organisations (Article 4).

The treaty also provides obligations to all parties to formulate cost-effective programmes to improve the quality of local emission factors, activity data or models for the periodic updating of national inventories of anthropogenic emissions (Article 10(1)(a)); formulate programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change (Article 10(1)(b)); cooperate in the promotion technologies, know-how, practices and processes pertinent to climate change (Article 10(1)(c)); cooperate in scientific and technical research and data collection related to the climate change (Article 10(1)(d)); cooperate in and promote education, training programmes, and public awareness of climate change (Article 10(1)(e)); include in national communications information on programmes and activities related to climate change (Article 10(1)(f)); take into consideration, in implementing the commitments in this Article 4 of the Protocol, Article 4 of the Convention (Articles 10(1)(g) and 11)).

The treaty also institutes clean development mechanisms, aiming to support developing countries in attaining sustainable development and aiding developed countries in achieving compliance with their reduction commitments (Article 12). The treaty sets rules for estimations of emissions (Articles 5, 7, and 8) and transfer and acquisition of emission reduction or removal by sinks of greenhouse gases (Article 6). It also states that *mutatis mutandis*

[10] Hungary and Poland joined the EU in 2004 and Croatia in 2013 (EUROPEAN UNION, [n.d.])

institutions created by the convention would serve the Protocol, such as the Conference of the Parties (Articles 9, 13, 16, and 16 bis), the secretariat (Article 14), subsidiary body (Article 15), and dispute settlement (Article 18). Similar to the UNFCCC, regional economic integration organisations can cast votes corresponding to the number of their member states participating in this Protocol, as long as their member states have not already exercise this right (Article 21(2)).

If a regional economic integration organisations and its member States decide to be part of the Protocol, they shall decide on their respective responsibilities under the Protocol, to be declared on ratification, acceptance, approval or accession (Article 23(2)(3)). In this regard, the European Community has declared its competence to engage in international agreements on preserving, protecting, and improving environmental quality; safeguarding human health; utilising natural resources prudently and rationally; and promoting measures at an international level to deal with environmental challenges (EUROPEAN UNION, 2002). It has further asserted that its commitment to emission reductions would be met through action by the community and its member states within the respective competence of each (EUROPEAN UNION, 2002).

2.3.3 The Paris Agreement

The Paris Agreement, concluded in Paris on 20 December 2015, to enhance the implementation of the United Nations Framework Convention on Climate Change (UNFCCC), sought to bolster the global response to climate change, as well as support sustainable development and endeavours to eliminate poverty (PARIS AGREEMENT, 2015, Article 2(1)). More specifically, it aimed to limit the rise in the global average temperature to well below 2°C above pre-industrial levels, and make a concerted effort towards restraining the temperature increase to 1.5°C above pre-industrial levels (Article 2(1)(a)); to augment the capacity to adapt to the adverse impacts of climate change, enhancing climate resilience (Article 2(1)(b)); and to align financial flows with a trajectory toward low greenhouse gas emissions and climate-resilient development (Article 2(1)(c)).

Parties to the Agreement should announce their nationally determined contributions to emission reductions to achieve the purpose as set out in Article 2 (Article 3). The parties' should make successive nationally determined contributions every five years; these should be progressive and reflect parties' highest possible ambitions, taking into account their common

but differentiated responsibilities and respective capabilities, considering diverse national circumstances (Article 4(3)(9)).

Regarding developing countries, the parties also recognise their need for support to fulfil their commitments under the Agreement (Article 3), and that this peak of emissions will take longer than the peak for developed countries (Article 4(1)). The treaty also states that developed countries will continue leading emission reductions (Article 4(4)) and that they should provide financial resources to support developing countries to adopt mitigation and adaptation measures (Article 9).

All parties must conserve and enhance the sinks and reservoirs of greenhouse gases (Article 5). Parties must also commit to adaptation measures to strengthen resilience, reduce vulnerability to climate change, and minimise the loss and damage resulting from the adverse effects of climate change (Articles 7 and 8).

The treaty established the possibility of voluntary cooperation, including transfers of mitigation outcomes, to achieve nationally determined contributions (Article 6). The treaty also deals with technology (Article 10), capacity-building (Article 11), education, training public awareness and participation (Article 12), transparency (Article 13), and the mechanisms of compliance (Article 15). The agreement established a conference of parties, chich would take place every five years (Articles 14 and 16). It stipulated further that the secretariat and a subsidiary body of the Convention would serve as the secretariat and subsidiary body of the Agreement (Articles 17, 18, and 19).

The treaty also incorporated the similar rule as in the UNFCCC and Kyoto Protocol that either the regional organisation or the countries present would exercise their voting rights, but not both (Article 25). According to Article 20, the European Union declared the extent of its competence regarding the matters governed by the treaty. It declared to have competence to enter into international agreements aimed at preserving, protecting, and improving environmental quality; safeguarding human health; promoting the rational use of natural resources; and promoting international measures to address environmental issues, especially climate change (EUROPEAN UNION, 2016). It also declared that its intended nationally determined contribution submitted on 6 March 2015 would be met through joint action by the Union and its member states within their respective areas of competence (EUROPEAN UNION, 2016).

2.4 The European Union and Renewable Energy

This section examines the most important EU legislation on renewable energy: Directive 2001/77/EC, Directive 2009/28/EC, and Directive 2018/2001. These directives have shaped the promotion of renewable energy in the European electricity market. Directives 2001/77/EC and 2009/28/EC set up the framework for domestic legal structures in Spain and Italy, which hold relevance for our case studies. Directive 2018/2001/EU updated the renewable energy framework. Although not pertinent to most of the cases studied in this dissertation, this directive indicates the evolution of the regulation of the matter, influenced by the same factual context that shaped the modifications in domestic law that raised the cases studied.

2.4.1 Directive 2001/77/EC

The first directive of significance to this study is Directive 2001/77/EC of the European Parliament and Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market. The directive aims "to promote an increase in the contribution of renewable energy sources to electricity production in the internal electricity market and to create a basis for a future Community framework thereof" (EUROPEAN UNION, 2001b, Article 1). It defines "renewable energy sources" as "renewable non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogases)" (Article 2(a)).

Member States should adopt measures that are "in proportion to the objective to be attained" to augment the consumption of electricity generated from renewable energy sources (Article 3(1)). Recital 14 of the directive mentions the mechanisms for attaining this goal: green certificates, investment aid, tax exemptions or reductions, tax refunds, and direct price support schemes. Additionally, Recital 17 highlights that more renewable energy production could lead to economies of scale and cost reduction.

The directive sets renewable energy targets of 12% for the community's gross energy consumption and 22.1% for its gross electricity consumption by 2010 (Article 3(4)). For Italy, the directive stipulated an increase in the share of renewable energy in gross electricity consumption from 16.0% in 1997 to 25.0% in 2010. Similarly, Spain's renewable share in electricity consumption should increase from 19.9% in 1997 to 29.4% in 2010 (Article 3(2) and Annex). However, this directive does not establish specific targets for gross energy consumption.

Moreover, each country should ensure that its targets are compatible with any national commitments arising from climate change agreements accepted by the Community under the

Kyoto Protocol to the UNFCCC (Article 3(2)). References to the Kyoto Protocol can also be found in Recitals 1, 3, and 6.

The directive mandates that Member States reduce regulatory and non-regulatory barriers to renewable energy production (Article 6(1)). Moreover, states should guarantee the transmission and distribution of electricity produced from renewable energy sources, and they may provide priority access to the grid for electricity produced from renewable energy sources (Article 7(1)).

To comply with this directive, Member States shall enact relevant laws, regulations, and administrative provisions before 27 October 2003 (Article 9).

2.4.2 Directive 2009/28/EC

The second directive pertinent to this study is Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. The new directive aimed to establish a common framework for promoting energy from renewable sources, and to set mandatory national targets for renewable sources in the gross consumption of energy (EUROPEAN UNION, 2009, Article 1).

As mentioned in Recital 7, for legal certainty and clarity, this directive retained a definition of renewable energy sources similar to its predecessor directive. While the definition and examples largely remained the same, there were minor adjustments, notably replacing "wave and tidal energy" in Directive 2001/77/EC with "ocean energy" and introducing "aerothermal" and "hydrothermal" energy (Article 2(a)).

The directive set a renewable energy target of 20% for community gross energy consumption in 2020 (Article 3(1)); Directive 2001/77/EC had set the target at 12% by 2010. In addition, Directive 2009/28/EC set a target for renewable sources of gross energy consumption. According to these provisions, Italy is required to raise its share from 5.2% in 2005 to 17% by 2020, while Spain is required to increase from 8.7% in 2005 to 20% by 2020 (Article 3(1) and Annex I).

It is worth noting that while Directive 2001/77/EC targeted a share of electricity consumption in each country, Directive 2009/28/EC addressed the proportion of gross energy consumption, which, as stated in Article 5, included electricity consumption, heating and cooling, and energy consumed in transport. This differentiation clarifies the countries' lower numerical goal for 2020 compared with the target for 2010.

Directive 2009/28/EC referenced the support mechanisms for renewable energy sources outlined in Recital 14 of Directive 2001/77/EC. Its sole innovation was to mention feed-in tariffs and premium payments as examples of direct price support schemes (Article 2(k)). Recital 25 underscored the importance of controlling the costs of national support schemes to ensure their proper functioning and maintain investor confidence.

As with the previous directive, it also referred to the Kyoto Protocol (Recital 1), addressed administrative procedures (Article 13), and grid access (Article 16).

In an innovation, Directive 2009/28/EC instructed Member States to promote energy efficiency and savings (Article 3(1)). It required a national renewable energy action plan for each Member State (Article 4) and regulated collaboration among different Member States and between them and third countries to achieve their national targets (Articles 3(3)(b), 6, 7, 8, 9, 10, and 11).

Member States should enact laws, regulations, and administrative provisions in alignment with this directive by 5 December 2010 (Article 27).

2.4.3 Directive (EU) 2018/2001

The subsequent directive governing renewable energy is Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources. It repealed Directive 2009/28/EC on 23 April 2009 (EUROPEAN UNION, 2018b, Article 37). Notably, it was the first directive to mention the 2015 Paris Agreement on Climate Change, a Protocol to the UNFCCC (Recital 2).

It aims to establish a common framework for the promotion of energy from renewable sources; set a binding target for the share of renewable energy sources in the European Union's gross energy consumption in 2030; and establish rules for electricity, heating, and cooling, as well as the transport sector (Article 1).

In pursuit of legal certainty and clarity, as mentioned in Recital 15, this directive retains the definition of renewable energy sources as its predecessor directives. The distinctions are minor: "aerothermal" is replaced with "ambient energy," specific mentions of solar thermal and solar photovoltaic exemplify instances of solar energy, and "tide, wave, and other ocean energy" replaced a more generic reference to ocean energy (Article 2(1)).

In terms of support scheme definitions, Directive (EU) 2018/2001 introduced minimal deviations. The sole innovation is the reference that premium payments within direct price support schemes may be either sliding or fixed (Article 2(5)).

It set the target for renewable energy in the European Union's gross energy consumption in 2030 at 32% (Article 3); Directive 2001/77/EC had set the target at 12% by 2010 (Article 3(4)), and Directive 2009/28/EC had set the target at 20% by 2020 (Article 3(1)).

This directive stipulated that support shames should provide incentives "in a market-based and market-responsive way" (Article 4(2)), thereby encouraging renewable energy producers to respond to market price signals (Article 4(3)). Adjustments in support schemes should not be carried out "in a way that negatively affects the rights conferred thereunder and undermines the economic viability of projects that already benefit from support" (Article 6(1)). Although adjustments to the level of support are permissible, they should adhere to the objective criteria outlined in the initial design of the support scheme (Article 6(2)).

The directive further established the obligations concerning support scheme planning and monitoring. Member States were required to publish a long-term schedule outlining expected support allocations for at least the subsequent five years (Article 6(3)). Additionally, they must assess the effectiveness of their support schemes at least every five years (Article 6(4)).

Within its recitals, there were further orientations for support schemes. Recital 19 suggested that Member States reduce overall support scheme costs through market-based mechanisms, such as tendering procedures. Recital 22 highlighted the importance of ensuring the proper functioning of national support schemes established by Directives 2001/77/EC and 2009/28/EC to maintain investor confidence. Recital 29 emphasised the importance of a predictable and stable policy regarding support schemes and advised against frequent or retroactive changes that may increase financing costs and overall renewable energy expenses. Moreover, Recital 29 states that "Member States should prevent the revision of any support granted to renewable energy projects from having a negative impact on their economic viability."

Following previous directives, it addressed administrative procedures (Article 15) and grid access (Articles 17 and 20). Similar to Directive 2009/28/EC, it regulated cooperation between different Member States and between them and third countries (Articles 9, 10, 11, and 12).

Observing the three directives, one can notice that Directive 2001/77/EC assigned primary responsibility to Member States for directive implementation. Its objective was "to create a basis for a future community framework thereof" (EUROPEAN UNION, 2001b, Article 1). Directive 2009/28/EC established "a common framework for the promotion of energy from renewable sources" (EUROPEAN UNION, 2009, Article 1), along with

regulating cooperation among Member States and third countries (Article 3(3)(b), and Articles 6, 7, 8, 9, 10, and 11). Similarly, Directive (EU) 2018/2001 established "a common framework for the promotion of energy from renewable sources" (EUROPEAN UNION, 2018b, Article 1) and regulated cooperation (Articles 9, 10, 11, and 12). However, it also imposed specific obligations on the union.

Recital 128 stated that its objective "cannot be sufficiently achieved by the Member States but can rather, because of the scale of the action, be better achieved at the union level." Consequently, it created obligations for the Commission, notably to support Member States through Union funds (Article 3(5)) and establish platforms that facilitate cooperation among Member States (Article 3(6)).

An additional innovation of this directive is the regulation surrounding adjustments in support schemes (as evidenced in Recitals 18, 22, and 29 as well as in Articles 6(2) and 6(3)). This was largely a response to the changes implemented in national support schemes after the previous directive, which gave rise to the cases examined in this dissertation. This directive chose to permit such modifications and to regulate them. Notably, the adjustments must not compromise the economic viability of projects currently benefiting from support (Article 6(2)) and must align with the objective criteria established during the original formulation of the support scheme (Article 6(3)).

3. DOMESTIC LEGISLATION REGARDING RENEWABLE ENERGY

After considering the international regulations on foreign investment in general and the specific provisions of the ECT, as well as the multilateral agreements addressing climate change and European directives on renewable energy, this study will examine Italy's and Spain's domestic legislation on renewable energy. Notably, it shows the creation of incentives for investments in renewable energies, both for domestic and foreign investors, and the subsequent reduction in these incentives, a phenomenon that triggers the ISDS cases studied in this dissertation. The reduction of incentives was carried out in the context of an economic crisis and the perception of "over-subsidization" of renewable energy (SELIVANOVA, 2018, p. 3)

The examination includes legal provisions of different hierarchies, from laws to the resolutions of administrative agencies. Albeit not exhaustive, this review considers the pieces of legislation that bear significance in most cases studied. For each country, the pieces of legislation are divided into legislations prior to Directive 2001/77/EC (3.1.1 for Italy's legislation and 3.2.1 for Spain's legislation), legislations subsequent to Directive 2001/77/EC (3.1.2 and 3.2.2), and legislations subsequent to Directive 2009/28/EC (3.1.3 and 3.2.3).

3.1 Italy

The norms overviewed in this section include laws (legge), legislative decrees (decreto legislativo), decree-law (decreto-legge), decrees, and other forms of government regulations. Laws undergo approval from both houses of the Italian Parliament, according to the country's Constitution (ITALY, 1947, Article 70) and are promulgated by the President of the Republic (Article 74). The government issues legislative decrees upon delegation by the Parliament, which specifies the principles, criteria, timeframes, and purposes of the legislative piece (Article 76). Decree-laws are issued by the government "in case of necessity and urgency." They have the force of law but require subsequent approval by the Parliament within 60 days, or they lose their effect (Article 77). Various authorities can issue decrees, which is a type of legislation with a lower legal rank than laws.

3.1.1 Legislation prior to Directive 2001/77/EC

This subsection examines Italy's legislative framework related to renewable energy that predates Directive 2001/77/EC. It starts with Legge 9 gennaio 1991, n. 9 (Law 9), e and Legge 9 gennaio 1991, n. 10 (Law 10). It includes Comitato Interministeriale dei Prezzi Deliberazione 6 29 April 1992 (CIP6/92) and Decreto Legislativo 16 marzo 1999, n. 79 (Legislative Decree 79), colloquially known as the Bersani Decree.

3.1.1.1 Legge 9 gennaio 1991, n. 9

The first Italian legislation regarding renewable energy mentioned in the cases analysed in this dissertation is Legge 9 gennaio 1991, n. 9 (Law 9, on 9 January 1991) ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 106). It set regulations for hydropower plants and transmission lines.

Regarding hydropower plants and power transmission lines, this legislation mandated that the government establish legislative decrees that delineate the responsibilities of the institutions engaged in executing the National Energy Plan. It also called for the formation of oversight committees to monitor the execution of the plan; the creation of procedures for authorisation, planning, and construction of new hydropower plants; and the development of power transmission lines for energy distribution. Furthermore, it outlined provisions for the efficient use of water resources and optimisation of hydropower generation (ITALY, 1991a, Article 1). This law also introduced regulations for conducting environmental impact assessments for hydropower plants (Article 2).

Within Article 22, this legislation set a legal framework for electricity generation plants utilising renewable and related sources. Specifically, it designated the Comitato interministeriale dei prezzi (CIP) (Interministerial Committee on Prices) to define incentivised pricing for new electricity production from renewable sources (Article 22(5)).

3.1.1.2 Legge 9 gennaio 1991, n. 10

Legge 9 gennaio 1991, n. 10 (Law 10, on 9 January 1991) set norms for the rational use of energy, energy saving, and the development of renewable energy sources. It aimed to improve energy transformation processes, reduce energy consumption, and increase the use of renewable energy sources in accordance with the European Economic Community's energy policy (ITALY, 1991b, Article 1(1)). It created a simplified authorisation procedure for energy production from renewable sources (Article 4(7)), as mentioned in CEF Energia BV ("CEF

Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 106). Furthermore, it mandated that subnational entities formulate regional plans that prioritise renewable energy (Article 5).

This law provided specific stipulations for small electric companies (Article 7). It created incentives to reduce energy consumption, improve energy efficiency, and promote renewable energy (Article 8), including the installation of photovoltaic plants (Article 8(1)(e)). It included hydroelectric power among renewable energy sources (Article 1(3)) and provided incentives for it (Article 14).

3.1.1.3 Comitato Interministeriale dei Prezzi Deliberazione 6 29 April 1992 (CIP6/92)

Based on Law 9, on 9 January 1991, Comitato Interministeriale dei Prezzi Deliberazione 6 29 April 1992 (Deliberation 6 of the Interministerial Committee on Prices, on 29 April 1992), established technical criteria for energy to qualify as a renewable source (ITALY, 1992, Title I). It determined the prices for newly generated electricity from renewable sources (Title II) and pre-existing electricity production (Title III). This regulation introduced a feed-in tariff for renewable energy production, imposing an obligation on distribution companies to procure all generated renewable energy without a capacity threshold on companies to qualify for the incentivised price ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 107).

3.1.1.4 Decreto Legislativo 16 marzo 1999, n. 79

Decreto Legislativo 16 marzo 1999, n. 79 (Legislative Decree 79, on 16 March 1999), often referred to as the Bersani Decree ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 108), granted priority to energy generated from renewable sources (ITALY, 1999, Article 3(3), 7(1)(c), and 11(4)), and set an obligation to guarantee the diversification of energy sources, including the use of renewable energy (Article 4(2)).

Moreover, it mandated that importers and generators of non-renewable energy sources must either inject a share of electricity generated by newly commissioned or repowered plants into the electricity grid (Article 11(1)) or acquire rights from other producers (Article 11(3)). Additionally, regions and autonomous provinces were required to offer incentives to encourage the development of renewable sources within their jurisdiction (Article 11(6)).

3.1.2 Italian legislation subsequent to Directive 2001/77/EC

Following Directive 2001/77/EC and preceding Directive 2009/28/EC, Italy enacted crucial pieces of legislation shaping its approach to renewable energy. Beginning with Decreto Legislativo 29 December 2003, n. 387, this legislative endeavour aimed to augment the share of renewable energy in electricity production, aligning with the targets set by Directive 2001/77/EC. The decree, alongside subsequent enactments such as Conto Energia I and Conto Energia II, introduced incentive frameworks for photovoltaic installations. These pieces of legislation provided the incentives whose withdrawal prompt the cases studied in this dissertation.

3.1.2.1 Decreto Legislativo 29 December 2003, n. 387

Decreto Legislativo 29 dicembre 2003, n. 387 (Legislative Decree 387, on 29 December 2003) intended to increase the share of renewable energy sources in electricity production, adopting measures to meet the national targets established by Directive 2001/77/EC, contributing to the creation of a framework for future European Community provisions in this field, and promoting the development of electricity microgeneration plants powered by renewable sources (ITALY, 2003, Article 1(1)).

It increased the renewable energy share in the electricity system by 0.35 in 2004, 2005, and 2006, above the targets set by Legislative Decree 79 on 16 March 1999 (Article 4(1)). Moreover, it stated that the decree would define additional increases from 2007 to 2012 (Article 4(1)).

This decree established specific provisions to be enacted by the Regulatory Authority for Energy, Networks, and Environment (Autorità per l'energia elettrica e il gas) for power plants whose capacity did not exceed 20 kW (Article 6(1)). It also stipulated that the Minister of Economic Development, in agreement with the Minister of Environment and Land Protection, should define the criteria for incentivising electricity production from solar energy (Article 7(1)). The regulation must provide a feed-in tariff that would gradually decrease over time to ensure fair remuneration for investment and operating costs (Article 7(2)(d)). The command of diminishing incentives and fair payment for operational costs reflected the expectation of reductions in solar panel costs, which would reduce the premium over the market price to incentivise the sector ("Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50," 2020, para 391).

This Legislative Decree also required regulations to establish a target for installed nominal power (Article 7(e)) and the maximum cumulative electricity capacity for all eligible installations (Article 7(2)(f)). It further specified that these incentives should not impact the state budget (Article 7(2)), shifting the costs to electricity consumers ("Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50," 2020, para 391).

Consistent with the preceding legislation, the decree permitted regions to adopt supplementary measures to promote renewable sources (Article 10(3)). It reaffirmed the obligation of priority usage and dispatch of renewable energy, initially established by Legislative Decree 79, on 16 March 1999 (Article 13).

From 2005 to 2012, the Minister of Economic Development, in agreement with the Minister of Environment and Land Protection, enacted incentive frameworks for photovoltaic plants known as "Conto Energia Decrees" based on the provisions of this Legislative Decree ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 110).

3.1.2.2 Conto Energia I (Decreto 28 luglio 2005)

According to Legislative Decree 387, on 29 December 2003, the Ministry of Economic Development, in agreement with the Minister of Environment and Land Protection, issued a decree to incentivise electricity from renewable sources: Decreto 28 luglio 2005, known as Conto Energia I. It provided distinct incentives for photovoltaic installations of nominal power below 20 kW (ITALY, 2005, Article 5) and between 20 kW and 50 kW (Article 6(2)).

It introduced a feed-in tariff for 20 years for plants submitting a request in 2005 and 2006 (Article 5(2)). For plants submitting a request in subsequent years, the feed-in tariffs for 20 years would decrease by 2% each year after 2006 (Article 5(2)(b)). For plants with up to 20 kW nominal power and submitting a request in 2005 and 2006, the feed-in tariff was 0.445 euro/kWh (Article 5(2)(a)). For plants with power between 20 and 50 kW under the same conditions, the feed-in tariff was 0.460 euro/kWh (Article 6(2)(a)). Meanwhile, for plants with nominal power ranging from 50 to 100 kW under similar circumstances, the feed-in tariff was 0.490 euro/kWh (Article 6(3)(a)) for 20 years. The following table shows the tariffs according to this decree.

Table 1 - Tariffs according to Conto Energia I

Power range [kW]	Submitting a request in 2005 and 2006	Submitting a request in 2007

1 ≤ P < 3	0.445	0.436
3 ≤ P < 20	0.445	0.436
20 ≤ P < 50	0.460	0.451
50 ≤ P < 100	0.490	0.480
Source: Articles 5 and 6 of Conto Energia I		

The decree also introduced a cap on the cumulative nominal power for applications. Above this limit, no feed-in tariff entitlement would apply (Article 7(6)). Failure to meet deadlines for commencing construction, completing construction, and commissioning installation resulted in the forfeiture of feed-in tariff rights (Article 8(6)).

This decree additionally established a national target of 300 MW for cumulative installed nominal photovoltaic power by 2015 (Article 11(1)), along with a maximum cumulative electrical power limit of 100 MW to access incentives. Beyond this limit, new plants would not receive feed-in tariffs (Article 12(1)). Plants with a nominal capacity below 50 kW had a cumulative limit of 60 MW (Article 12(2)), whereas those between 50 kW and 100 kW had a limit of 40 MW (Article 12(3)). These feed-in tariffs created an imbalance in favour of constructing sizeable renewable energy sources to be corrected by the subsequent decree.

3.1.2.3 Conto Energia II (Decreto 19 febbraio 2007 n. 387)

In 2007, the Minister of Economic Development, in agreement with the Minister of Environment and Land and Sea Protection, based on Legislative Decree 387, on 29 December 2003: Decreto 19 febbraio 2007 n. 387, known as Conto Energia II. The preamble of this decree emphasises that Legislative Decree 29 December 2003, No. 387, established the implementation of a decreasing tariff, with a duration that ensures fair remuneration for investment and operational costs (ITALY, 2007, preamble).

Furthermore, its preamble acknowledges that Conto Energia I introduced considerable administrative complexity and bias toward large installations. Hence, the aim was to introduce corrective measures into the mechanism by introducing a simplified, stable, and long-lasting system of access to incentives (preamble).

Conto Energia II only provided incentives to installations that have not benefited from the incentivising tariffs introduced by Conto Energia I (Article 4(1)). The decree stipulated the criteria (Article 4) and outlined the procedures for accessing the feed-in tariffs (Article 5).

Failure to meet the specified deadlines would render entities ineligible for incentives (Article 5(4)).

The decree classified installations into three groups: non-integrated photovoltaic systems, partially integrated photovoltaic systems, and photovoltaic systems with architectural integration (Article 2(1)(b1)-(b2)-(b3)). It established the feed-in tariffs for photovoltaic installations according to these types, provided that they were commissioned from 24 April 2007 (60 days after the publication of the decree, according to Article 10(1)) until 2008. The plants commencing in subsequent years would receive a 2% reduction for each calendar year after 2008 (Article 6(1)(2)). The duration of entitlement to the incentivised tariff remained for 20 years (Article 6(2)). The following table shows the feed-in tariffs for each plant type according to its date of commencing operations.

Table 2 – Feed-in tariffs according to Conto Energia II

	24 April 2007 to 31 December 2008			2009			2010		
Power Range [kW]	Non-integrated photovoltaic systems	Partially integrated photovoltaic systems	Photovoltaic systems with architectural integration	Non-integrated photovoltaic systems	Partially integrated photovoltaic systems	Photovoltaic systems with architectural integration	Non-integrated photovoltaic systems	Partially integrated photovoltaic systems	Photovoltaic systems with architectural integration
$1 \leq P < 3$	0.400	0.440	0.490	0.392	0.431	0.480	0.384	0.423	0.471
$3 \leq P < 20$	0.380	0.420	0.460	0.372	0.412	0.451	0.365	0.403	0.442
$P \geq 20$	0.360	0.400	0.440	0.353	0.392	0.431	0.346	0.384	0.423

Source: Article 6 of Conto Energia II for the first four columns and my own elaboration from the rule provided by Article 10 for the other columns.

Conto Energia II 10-folded Conto Energia I target, aiming at a cumulative nominal power of 3000 MW by 2016 (just one year after the year of the target of Conto Energia I) (Article 12(1)). It also multiplied the limit of the maximum cumulative power eligible for feed-in tariffs by 1200 MW (Article 13(1)). Additionally, it stipulated that all installations commencing operations within 14 months of reaching the 1200 MW limit would be eligible for feed-in tariffs (Article 13(2)).

3.1.3 Italian legislation subsequent to Directive 2009/28/EC

This section examines the pieces of legislation subsequent to Directive 2009/28/EC. The first legislation studied, the Salva-Alcoa Decree, which aimed to streamline bureaucratic procedures associated with authorization for the construction of photovoltaic plants. Subsequent legislations, albeit to varying degrees, have tended to curtail incentives for renewable energy. Set against the backdrop of economic crises, technological advancements resulting in cost reductions for renewable energy production, and a significant increase in renewable energy production which lead to a substantial burden to consummers in subsidizing these initiatives. The legislative pieces under consideration include Conto Energia III (issued on 6 August 2010), the Romani Decree, also known as Decreto Legislativo 3 marzo 2011, n. 28, Conto Energia IV (issued on 5 May 2011), the extension of the Robin Hood tax to renewable energy producers, Conto Energia V (issued on 5 July 2012), and Spalmaincentivi, a component of Decreto-Legge 24 giugno 2014, n. 91.

3.1.3.1 Salva-Alcoa Decree (Decreto-Legge 8 luglioo 2010, n. 105)

Legislative Decree 387/2003 (Section 3.2.1) established a simplified declaratory procedure for photovoltaic installations with a capacity below 20 kW (ITALY, 2003). Subsequently, Puglia Regional Law 31, on 21 October 2008, extended this simplified procedure to all plants below 1 MW in its region ("Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3," 2016, para 68). However, the central government challenged the constitutionality of this regional law, and the Italian Constitutional Court deemed it unconstitutional on 26 March 2010 ("Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3," 2016, para 92).

In response to this situation, Decreto-Legge 8 luglioo 2010, n. 105 (Decree-Law 105, on 9 July 2010) (ITALY, 2010a), was enacted, commonly known as the "Salva Alcoa Decree." Subsequently, Legge 13 agosto 2010, n. 129 (Law 129, on 13 August 2010) amended and converted Decreto-Decree-Law 105/2010 into law (ITALY, 2010c, Article 1(1)). Through an amendment introduced by Law 129, Decree-Law 105 allowed installations that surpassed national thresholds to qualify for incentives, provided that their construction adhered to regional regulations. They would be eligible to receive feed-in tariffs if they became operational within hundred and fifty days from the enactment of the law (Article 1-quarter (1)).

3.1.3.2 Conto Energia III (Decreto 6 agosto 2010)

The Minister of Economic Development, in agreement with the Minister of Environment and Land and Sea Protection, issued on Decree 6 August 2010, commonly referred to as “Conto Energia III”. The decree referred to the advancements in photovoltaic technology, especially the significant reduction in the costs of components and photovoltaic systems. It stated that it was necessary of reducing incentives to adhere to the principle of fair cost remuneration, as established by the aforementioned Article 7 of Legislative Decree no. 387 of 2003, and to stimulate innovation and further cost reduction. Furthermore, it stated that this reduction was crucial for maintaining the stability and certainty of the market (ITALY, 2010b, preamble).

The decree set the national objective of achieving a cumulative nominal photovoltaic power capacity of 8000 MW by 2020 (Article 3(1)). It also set the cumulative electrical power availability for this kind of installations eligible for incentivising tariffs at 3000 MW (Article 3(2)) for standard plants, 300 MW (Article 3(3)) for installations with innovative characteristics, and 200 MW (Article 3(4)) for concentrated plants. However, installations entering operation within 14 months after the exhaustion of the availability limits would still be eligible for incentivising tariffs (Article 3(6)).

The feed-in tariffs established in this decree applied to installations commencing operation in 2011, 2012, and 2013 (Article 1(2) and Article 8(2)). Article 8(2) presented a table of feed-in tariffs based on three criteria: the type of installation (whether installed on a building or not), power capacity range, and the date of operation. Installations on buildings are eligible for higher feed-in tariffs compared to other types of installations. The decree established six different ranges of incentives based on the power capacity range ($1 \leq P < 3$, $3 \leq P < 20$, $20 \leq P$

< 200, $200 \leq P < 1000$, $1000 \leq P < 5000$, and $P \geq 5000$, in kW); feed-in tariffs decreased as the power range increased.

The decree provided feed-in tariffs for three periods of initial operation (after 31 December 2010 to 30 April 2011, after 30 April 2011 to 31 August 2011, and after 31 August 2011 to 31 December 2011). Additionally, it introduced a rule for plants beginning operation in 2012 and 2013, consisting of a 6% reduction per year from the tariff received by plants that entered operation between 21 August 2011 and 31 December 2011. Consequently, early plants received higher incentives than later installations, resulting in a total of 60 different tariff combinations, as shown in the table.

Table 3 – Feed-in tariffs according to Conto Energia III

	Installations put into operation after 31 December 2010 and to 30 April 2011.		Installations put into operation after 30 April 2011 to 31 August 2011.		Installations put into operation after 31 August 2011 to 31 December 2011.		Installations put into operation in 2012		Installations put into operation in 2013	
Power Range	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems
[kW]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]
1 ≤ P < 3	0.402	0.362	0.391	0.347	0.380	0.333	0.357	0.313	0.336	0.294
3 ≤ P < 20	0.377	0.339	0.360	0.322	0.342	0.304	0.321	0.286	0.302	0.269
20 ≤ P < 200	0.358	0.321	0.341	0.309	0.323	0.285	0.304	0.268	0.285	0.252
200 ≤ P < 1000	0.355	0.314	0.335	0.303	0.314	0.266	0.295	0.25	0.277	0.235
1000 ≤ P < 5000	0.351	0.313	0.327	0.289	0.302	0.264	0.284	0.248	0.267	0.233
P ≥ 5000	0.333	0.297	0.311	0.275	0.287	0.251	0.27	0.236	0.254	0.222

Source: Article 8(2) of Conto Energia III.

The decree kept provisions stating that feed-in tariffs would be granted for 20 years and would remain constant throughout this incentive period (Article 8(4)).

Specific provisions within the decree were dedicated to innovative photovoltaic installations and concentrated solar power plants. For innovative photovoltaic installations, Article 11 established the requirements, while Article 12 detailed the incentive tariffs. Article 13 specified the requisites for concentrated solar plants, and Article 14 provided information on the incentive tariffs.

3.1.3.3 Romani Decree (Decreto Legislativo 3 marzo 2011, n. 28)

Decreto Legislativo 3 marzo 2011, n. 28. (Legislative Decree 28, on 3 March 2011) is often referred to as the 'Romani Decree' after the Italian Minister for Economic Development ("Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3," 2016, para 331). It transposed Directive 2009/28/EC into Italian law: it replicated the target of 17% in gross final energy consumption by 2020 (ITALY, 2011a, Article 3(1)) and established regulations to promote renewable energies on electricity, heating, cooling, and transport.

It changed the regulations on the installation of photovoltaic plants in rural areas. More specifically, these plants would qualify for feed-in tariffs only if their capacity was below 1 MW and they occupied less than 10% of the plot of the rural parcel where they sit (Article 10(4)). Furthermore, installations from a single owner must be at least 2 km apart. However, these amended conditions would apply to plants that obtained simplified authorisation and came into operation within one year of the decree's enactment (Article 10(6)).

The legislation also underwent a "reorganisation" and "enhancement" of existing support schemes with the objectives of fostering renewable energy production and achieving effectiveness, efficiency, simplification, and long-term stability in the support systems (Article 23(1)). Another aim was to reduce support costs for the final consumer (Article 23(1)). The approach to safeguard investments and account for the evolution of renewable energy was incremental (Article 23(2)). As observed in other legislative pieces, this legislative decree reaffirmed that support schemes should not create additional costs for the state budget (Article 23(4)).

It stated the general principles for the mechanism of incentives for electricity production from renewable sources: fair remuneration for investment and operational costs (Article 24(2)(a)), an incentive period that corresponded to the typical useful life of power

plants (Article 24(2)(b)), constant incentives throughout the period (Article 24(2)(c)), private contracts between the electricity system operator and the plant operator based on a standard contract defined by the regulatory authority to award the incentives (Article 24(2)(d)), incentives exclusively for new plants (Article 24(2)(e)), differentiation of incentives by energy source and power ranges considering specific costs (Article 24(3)(a)), and determination of incentives at the commissioning date. The decree set varying thresholds based on commissioning periods and energy types. It also introduced the option for plants exceeding these thresholds to receive incentives through auctions managed by the state-owned energy service system operator (Article 24(4)).

Decrees issued by the Minister of Economic Development in agreement with the Minister of Environment and Protection of Land and Sea would establish incentive values for plants commissioned after 1 January 2013. These decrees would also define auction-based incentives for different technologies and power ranges and outline the transition from old to new incentive mechanisms (Article 24(5)).

Electricity production from renewable sources initiated before 31 December 2012 would qualify for the existing mechanisms with some corrective measures (Article 25(1)). On the other hand, Article 25(10) stated that feed-in tariffs for plants brought into operation after 31 May 2011 would receive incentives set by a decree from the Minister of Economic Development in agreement with the Minister of the Environment and the Protection of the Sea. This decree would adhere to principles such as an annual limit for the cumulative electric power of photovoltaic plants eligible for incentivising tariffs; the determination of feed-in tariffs, taking into account the reduction in technology costs, installation costs, and incentives applied in European Union member states; and the provision of differentiated incentivising tariffs and quotas based on the nature of the location of the installation (Article 25(10)).

3.1.3.4 Conto Energia IV (Decreto 5 maggio 2011)

The Minister of Economic Development, in agreement with the Minister of the Environment and Land and Sea Protection, issued Decreto 5 maggio 2011, known as Conto Energia IV (Fourth Energy Account), based on the Legislative Decree 3 March 2011, no. 28 (Romani Decree 2011), which transposed Directive 2009/28/EC into Italian law.

In its preamble, it referred to the continuous evolution of technology, particularly the significant reduction in the costs of photovoltaic components and systems; the progressive reduction of tariffs in major European countries; the projection of economic competitiveness

of most efficient photovoltaic installations in a few years, which would render ongoing public support unnecessary; and an estimated annual cost burden of approximately EUR 3.5 billion on the electricity system charges, starting from 2011 (ITALY, 2011b, preamble).

This decree established feed-in tariffs for photovoltaic installations commencing operation between 31 May 2011 and 31 December 2016 (Article 1(2)). It set the indicative national installed power objective at 23,000 MW, corresponding to an estimated cumulative annual incentive cost ranging between EUR 6 and 7 billion (Article 1(2)). The support framework aimed for gradual increases in installed power aligned with forecasted annual expenditure (Article 2(1)). If the cost exceeded the indicative annual limits defined for each year or fraction of the year, additional reductions in feed-in tariffs would apply for the subsequent period (Article 2(2)).

The decree categorised photovoltaic facilities into three groups: generic plants (Article 4(1)(a)), installations integrated with innovative characteristics (Article 4(1)(b)) and concentrating facilities (Article 4(1)(c)). It further subdivided generic plants into small and large ones.

The decree established feed-in tariffs for both small (Article 4(3)) and large plants for the period from 1 June 2011 to 31 December 2012 (Article 4(2)). Feed-in tariffs for large installations were subject to reductions if annual cost limits exceeded the threshold (Article 4(2)), while small facilities would remain unaffected by such reductions (Article 4(3)). It mandated reductions in feed-in tariffs for small and large plants between 2013 and 2016 (Article 4(4)). The following table combines the tables of the decree’s annexes, showing the feed-in tariffs.

Table 4 – Feed-in tariffs according to Conto Energia IV

	June 2011		July 2011		August 2011		September 2011		October 2011		November 2011		December 2011		First semester of 2012		Second semester of 2012		From 2013 onwards	
Power Range	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems
	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]
$1 \leq P \leq 3$	0.387	0.344	0.379	0.337	0.368	0.327	0.361	0.316	0.345	0.302	0.320	0.281	0.298	0.261	0.274	0.240	0.252	0.221	0.375	0.346
$3 < P \leq 20$	0.356	0.319	0.349	0.312	0.339	0.303	0.325	0.289	0.310	0.276	0.288	0.256	0.268	0.238	0.247	0.219	0.227	0.202	0.352	0.329
$20 < P \leq 200$	0.338	0.306	0.331	0.300	0.321	0.291	0.307	0.271	0.293	0.258	0.272	0.240	0.253	0.224	0.233	0.206	0.214	0.189	0.299	0.276
$200 < P \leq 1000$	0.325	0.291	0.315	0.276	0.303	0.263	0.298	0.245	0.285	0.233	0.265	0.210	0.246	0.189	0.224	0.172	0.202	0.155	0.281	0.239
$1000 < P \leq 5000$	0.314	0.277	0.298	0.264	0.280	0.250	0.278	0.243	0.256	0.223	0.233	0.201	0.212	0.181	0.182	0.156	0.164	0.140	0.227	0.205
$P > 5000$	0.299	0.264	0.284	0.251	0.269	0.238	0.264	0.231	0.243	0.212	0.221	0.191	0.199	0.172	0.171	0.148	0.154	0.133	0.218	0.199

Sources: Annexes of Conto Energia IV.

Furthermore, it specified reductions for photovoltaic facilities integrated with innovative characteristics and concentrating installations for both periods (Article 4(5)(6)). The incentive period continued to be 20 years from commission (Article 12(2)).

3.1.3.5 The extension of the Robin Hood tax (Decreto-Legge 25 giugno 2008, n. 112) to renewable energy producers in August 2011

Decreto-Legge 25 giugno 2008, n. 112 (Decree-Law 112, on 25 June 2008) (ITALY, 2008) came into existence amid an economic crisis aggravated by the increase in energy prices. It entailed the argumentation of a profit tax on oil, gas, and traditional energy companies, colloquially known as the "Robin Hood" tax ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 171-172). This decree-law sought to maintain the net indebtedness of public administration and the ratio of public debt to GDP within targets (Article 1(1)(a)). Additionally, it aimed to stimulate GDP growth through energy efficiency and diversification, among other measures (Article 1(1)(b)).

The Decree-Law mandated the Council of Ministers to approve a "National Energy Strategy," to achieve, through market mechanisms, diversification of energy sources as well as diversification of geographical areas of supply (Article 7(1)(a)), improvement of the competitiveness of the national energy system and development of infrastructure (Article 7(1)(b)), promotion of renewable energy sources and energy efficiency (Article 7(1)(c)), as well as the promotion of environmental sustainability and reduction of greenhouse gas emissions in energy production and use (Article 7(1)(f)). Like previous legislation, this decree-law emphasised that its implementation should not impose financial burdens on public finances (Article 7(4)).

Regarding taxation, the decree-law raised the corporate income tax rate by 5.5%, from 27.5% to 33%, for companies with annual gross incomes exceeding 25 million. Renewable energy producers were initially exempt from the Robin Hood tax because they did not benefit from price surges in conventional energy sources ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 172-173).

However, in August 2011, the tax, currently set at 38%, was extended to all energy producers, including those in the renewable energy sector, with gross annual income exceeding 10 million and taxable income exceeding 1 million. In June 2013, the Robin Hood tax started

to include enterprises with gross annual income exceeding 3 million and taxable income exceeding 300,000. The extension of the Robin Hood tax for the renewable energy sector faced a legal challenge. On February 11, 2015, the Italian Constitutional Court ruled that the tax extension to renewable energy producers was unconstitutional, albeit without a retroactive effect ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 174-177).

3.1.3.6 Conto Energia V (Decreto 5 luglio 2012)

Based on Article 25(1) of Legislative Decree No. 28 of 3 March 2011 (Romani Decree 2011), the Minister of Economic Development, in agreement with the Minister of the Environment and Land and Sea Protection, issued Decreto 5 luglio 2012 (Decree 5 July 2012), commonly referred to as Conto Energia V (Fifth Energy Account).

The decree preamble highlighted the necessity to intervene promptly due to the cumulative annual cost of photovoltaic incentives exceeding 5.6 billion euros by the end of March 2012. It mentioned the overall progress towards achieving the 17% target of renewables in gross energy consumption by 2020. However, it emphasised the necessity to "give impetus to the heat and transport sectors and energy efficiency" as Italy was ahead of schedule in the electricity sector. Indeed, Italy had a renewable capacity of 94 TWh in 2011, with a target of 100 TWh in 2020. The preamble also mentioned the significance of technological advancements, economies of scale, and declining photovoltaic installation costs, resulting in accelerated growth of installations and a subsequent rise in support costs (ITALY, 2012, preamble).

Furthermore, the preamble noted a reduction in incentives for photovoltaic energy in other European countries due to mounting support costs and diminishing installation expenses. It stressed the importance of aligning Italian incentives with those of other European nations and referred to the additional costs associated with nonprogrammable renewable energy sources, such as photovoltaics, required to maintain the security and stability of the electricity system. It noted the importance of predefining annual resources for photovoltaic incentives through a registration-based reservation system. It also found it "appropriate and fair" for feed-in tariff beneficiaries to contribute to the administration costs of the incentive system.

This decree introduced mechanisms to regulate feed-in tariffs after reaching an indicative cumulative annual cost of incentives of 6 billion euros (Article 1(1)). It granted direct access to feed-in tariffs for photovoltaic installations with a capacity exceeding 12 kW, but not

surpassing 20 kW (Article 3(1)(g)). Other plants could access these tariffs by registration (Article 3(2)). The power and type of installation would determine the incentive tariff (Article 5(1)). The following table shows the feed-in tariffs according to this decree.

Table 5 - Tariffs according to Conto Energia V

	Conto V					
	Until December 31, 2013		Until December 31, 2014		After December 31, 2014	
Power Range	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems	Photovoltaic Systems Installed on Buildings	Other Photovoltaic Systems
[kW]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]	[EUR/kWh]
$1 \leq P < 20$	0.500	0.200	0.300	0.100	0.150	0.050
$P \geq 20$	0.400	0.200	0.200	0.100	0.100	0.050
Source: Article 5(1) of Conto Energia V.						

Producers would pay an administrative fee of EUR 0.05 for each kWh starting from 1 January 2013 (Article 10(4)) to cover management, verification, and monitoring costs. Furthermore, the decree restated the prohibition on the creation of new charges on the state budget (Article 20(2)).

On the same day as the Fifth Energy Account, Resolution AEEG 281/2012/R/EFR ("Resolution 281") imposed on renewable energy producers imbalance costs due to excess electricity generation from non-programmable energy plants, such as photovoltaic plants ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 168). A substantial addition of photovoltaic capacity to an electricity system tends to increase the overall system imbalance as it cannot control its production to match supply with demand ("ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5," 2020, para 167). After Resolution AEEG 281/2012/R/EFR, Resolution AEEG 493/2012/R/EFR ("Resolution 493") established the method for charging renewable energy producers ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 168).

These resolutions were later found unlawful by Consiglio di Stato due to their failure to differentiate between programmable and non-programmable energy sources, resulting in reimbursement to renewable energy producers. Resolution AEEG No. 522/2014/R/EEL, on 23

October 2014 (“Resolution 522”), reinstated the payment of imbalance costs by producers, effective from January 2015 (“CEF Energia BV v. Italian Republic, SCC Case No. 158/2015,” 2019, para 169-170).

3.1.3.7 Spalmaincentivi (Decreto-Legge 24 giugno 2014, n. 91)

The President issued Decreto-Legge 24 giugno 2014, n. 91 (Decree-law 91, on 24 June 2014), regarding a wide range of issues, including the agricultural sector, environmental protection, development of businesses, and containment of costs impacting electricity tariffs (ITALY, 2014a, preamble). Widely known as the “Competitiveness Decree” (“Decreto Competitività”), this legislation addressed various issues. Article 26 focused on the feed-in tariffs for electricity generated by photovoltaic installations and earned the name “incentive spreading” (“Spalmaincentivi”) or “tariff bill-cut” (“taglia-bollette”) (“CEF Energia BV v. Italian Republic, SCC Case No. 158/2015,” 2019, para 164). The Decree-Law was approved by Law 116/2014 of 11 August 2014, with some alterations (ITALY, 2014b, Article 1(1)).

Considering the law with modifications, it altered the payment of feed-in tariffs starting in the second half of 2014 onwards. It established monthly payments of 90% of the estimated average annual output, with adjustments based on actual production by 30 June of the following year (Article 26(2)). Additionally, starting from 1 January 2015, producers with installations with nominal power exceeding 200 kW would have to choose one of the three options of feed-in tariffs:

a) The feed-in tariff is granted for 24 years, commencing from the operation of the installations, with an incentive reduction of 17% if the remaining period is equal to or exceeds 19 years. The discount percentage increases by 1% for each year, and the remaining period decreases until it reaches a 25% reduction for the 12 remaining years (Article 26(3)(a) and Annex 2);

b) The feed-in tariff is granted for 20 years, with an initial period with a reduced incentive and a second period with an incentive restored. The percentages of restructuring would be established by a decree of the Minister of Economic Development to allow, in the event of adherence by all eligible parties, savings of at least 600 million euros per year for the period 2015-2019, compared to the disbursement provided with the current tariffs (Article 26(3)(b));

c) The feed-in tariff is granted for 20 years, reduced by 6% for installations with a nominal power exceeding 200 kW and up to the nominal power of 500 kW, 7% for installations

with a nominal power exceeding 500 kW and up to the nominal power of 900 kW, and 8% for installations with a nominal power exceeding 900 kW. (Article 26(3)(c)). Without communication, this option applies (Article 26(3)).

The following table compares the feed-in tariffs provided by Conto Energia I, II, III, IV, and V, according to the power range and commencement period.

Table 6 - Comparison of feed-in tariffs from Conto I to Conto V

		1 ≤ P < 3	3 ≤ P < 20	20 ≤ P < 50	50 ≤ P < 100	100 ≤ P < 200	200 ≤ P < 1000	1000 ≤ P < 5000	P ≥ 5000
Conto I	01/01/2005-31/12/2006	0.445	0.445	0.460	0.490	0.490	0.490	0	0
	01/01/2007-23/04/2007	0.436	0.436	0.451	0.480	0.480	0.480	0	0
Conto II	24/04/2007-31/12/2008	0.400	0.380	0.360	0.360	0.360	0.360	0	0
	01/01/2009-31/01/2009	0.392	0.372	0.353	0.353	0.353	0.353	0	0
	01/01/2010-31/01/2010	0.384	0.365	0.346	0.346	0.346	0.346	0	0
Conto III	01/01/2011-30/04/2011	0.362	0.339	0.321	0.321	0.321	0.314	0.313	0.297
	01/05/2011-31/08/2011	0.347	0.322	0.309	0.309	0.309	0.303	0.289	0.275
	01/09/2011-31/12/2011	0.333	0.304	0.285	0.285	0.285	0.266	0.264	0.251
	01/01/2012-31/12/2012	0.313	0.286	0.268	0.268	0.268	0.25	0.248	0.236
	01/01/2013-31/12/2013	0.294	0.269	0.252	0.252	0.252	0.235	0.233	0.222
Conto IV	01/06/2011-31/06/2011	0.344	0.319	0.306	0.306	0.306	0.291	0.277	0.264
	01/07/2011-31/07/2011	0.337	0.312	0.300	0.300	0.300	0.276	0.264	0.251
	01/08/2011-31/08/2011	0.327	0.303	0.291	0.291	0.291	0.263	0.250	0.238
	01/09/2011-30/09/2011	0.316	0.289	0.271	0.271	0.271	0.245	0.243	0.231
	01/10/2011-31/10/2011	0.302	0.276	0.258	0.258	0.258	0.233	0.223	0.212
	01/11/2011-30/11/2011	0.281	0.256	0.240	0.240	0.240	0.210	0.201	0.191

	01/12/2011-31/12/2011	0.261	0.238	0.224	0.224	0.224	0.189	0.181	0.172
	01/01/2012-30/06/2012	0.24	0.219	0.206	0.206	0.206	0.172	0.156	0.148
	01/07/2012-31/12/2012	0.221	0.202	0.189	0.189	0.189	0.155	0.140	0.133
	01/01/2013-31/12/2013	0.346	0.329	0.276	0.276	0.276	0.239	0.205	0.199
Conto V	11/07/2012-31/12/2013	0.200	0.200	0.200	0.200	0.200	0.200	0.200	0.200
	01/01/2014-31/12/2014	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100
	01/01/2015-31/01/2015	0.050	0.050	0.050	0.050	0.050	0.050	0.050	0.050
Source: My own elaboration from information from provided by Conto Energia I, II, III, IV, and V.									

3.2 Spain

In Spain, the different Acts of Parliament and Royal Decree-Laws have the status of laws, while Royal Decrees are regarded as regulations and are hierarchically subordinate to Acts of Parliament and Royal Decrees. Challenges and revisions of Royal Decrees can be undertaken through administrative court bodies, unlike Royal Decree-Laws, which are not subject to such proceedings. Ministerial Orders and Resolutions may further develop or complement Royal Decrees, holding a lower hierarchical position ("Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012," 2016, para 90-91).

3.2.1 Legislation prior to Directive 2001/77/EC

This subsection explores Spain's legislative framework concerning renewable energy before Directive 2001/77/EC. It begins with Ley 54/1997 (Electricity Law 54/1997), enacted on 27 November, which aimed to liberalize the electric sector and introduced the "Special Regime" which included renewable energy producers. Following that, Royal Decree 2818/1998, issued on 23 December 1998, regulated and complemented the provisions of Law 54/1997.

3.2.1.1 Electricity Law 54/1997

Electricity Law 54/1997 of 27 November provided the legal framework for the regulation of the electrical sector with the objective, stated in its preamble, of ensuring the electrical supply, at a guaranteed quality, and at the lowest cost possible, all while not forgetting environmental protection, which becomes particularly important given the characteristics of this economic sector (SPAIN, 1997, preamble). With this law, the operation of the national electrical system ceases to be carried out by the government through a majority public-owned company. The liberalisation process was implemented through the vertical segmentation of activities, specifically in the generation of electrical energy, in which the right to free installation was recognised; transportation and distribution allowed widespread access of third parties to the networks fostering competition. This followed the principle that network ownership does not guarantee exclusive use, as stated in the law's preamble.

This law distinguished between an "Ordinary Regime" (Articles 21 to 26) and a "Special Regime" (Articles 27 to 31) of energy production. The "Special Regime", according to Article 27, included energy from facilities that utilise cogeneration or other forms of electricity production associated with non-electrical activities (Article 27(1)(a)); renewable energies, biomass or biofuels (Article 27(1)(b)); and plants that use non-renewable waste materials as the primary energy source (Article 27(1)(c)). In all cases, the installation capacity could not exceed 50 MW (Article 27(1)).

Article 30.2 established the rights of the special regime, such as priority access to transmission and distribution grids. Article 30.4 establishes that the remuneration of the special regime would be complemented with the payment of a premium, to be regulated by a royal decree by the Council of Ministers. This compensation is intended to cover investment costs and operational costs that cannot be recovered through the sale of energy.

Moreover, in additional provision 25, the law referred to the goal set by the European Union (20% by 2020) and maintained the commitment of the Plan de Fomento de las Energías Renovables of 12% by 2010.

3.2.1.2 Royal Decree 2818/1998

Royal Decree 2818/1998 was issued on 23 December 1998 to regulate Law 54/1997. Its preamble stated that for facilities based on renewable energy and waste, there is no time limit for incentives established, given the need to internalise its environmental benefits. The

need for incentives was a consequence of its characteristics and level of technology, whose high costs prohibit them from competing in an open market (SPAIN, 1998, preamble).

The purpose of this Royal Decree was to provide regulatory development, regarding the special regime, for Law 54/1997, of 27 November, including the tariffs and premiums of the special regime (Article 1). Article 2 categorised plants according to the source of energy: solar, wind, geothermal, wave, tidal, hydroelectric, biomass, and waste.

The decree provided an alternative to renewable plants whose capacity did not surpass 50 MW, other than submitting offers to the wholesale market. They could sell their production to distributors at the average hourly final price of the electric production market, complemented, if applicable, by a premium or an incentive (Article 23). Article 28 provided the premium for renewable production or the possibility of opting for a fixed regulated price. Article 32 established that premiums would be revised every four years, "taking into account the evolution of the electricity market price, the qualifying installations' demand coverage, and their impact on the technical management of the energy system".

3.2.2 Spanish legislation subsequent to Directive 2001/77/EC

Between Directive 2001/77/EC and Directive 2009/28/EC, Spain issued important pieces of legislation on renewable energy. Similar to Italy during this period, Spain introduced incentives for renewable energy producers, the withdrawal of which serves as a catalyst for the cases examined in this dissertation. This subsection examines Royal Decree 436/2004, Royal Decree-Law 7/2006, Royal Decree 661/2007, and Royal Decree 1578/2008.

3.2.2.1 Royal Decree 436/2004

To ensure that renewable energy sources reached the goal of 12% of the total energy demand in Spain in 2010, as stated by Law 54/1997, Royal Decree 436/2004 was issued on 12 March 2004. Its objectives were to update and consolidate the regulatory provisions for electricity production under the special regime, as outlined in Law 54/1997, of 27 November, on the electricity sector, and to establish a long-standing economic framework for facilities under the special regime, with an objective and transparent remuneration calculation methodology (SPAIN, 2004, Article 1(a)(b)). It would apply to the facilities outlined in Article 27.1 of Law 54/1997, which were classified into categories, groups, and subgroups, based on

the primary energy sources used, production technologies employed, and energy efficiency achieved (Article 2).

This Royal Decree created two different retribution mechanisms: selling electricity to the electricity distribution company, with the sale price of electricity expressed as a regulated tariff, uniform for all scheduling periods (Article 22(a)), or selling electricity on the market, with the sale price of electricity being the price freely negotiated plus a premium and, if applicable, an incentive (Article 22(b)). Article 23 concerned the regulated tariff, which would be a percentage of the average or reference electricity tariff given to the installations of Article 22(a). Article 24 concerned the premium and Article 25 concerned the incentive; in both cases, it would be a percentage of the average or reference electricity tariff, varying according to the group, subgroup, and capacity of the installation, applied to the installations of Article 22(b). Article 33 set the regulated tariff, premium, or incentive as shown in the table.

Table 7 - Tariffs according to Royal Decree 436/2004

Article	Category and Group	Type of Energy	Installed Capacity	Tariff (1st 25 Years)	Tariff (After 25 Years)	Premium (1st 25 Years)	Premium (After 25 Years)	Incentive
33.1	b.1.1	Solar Photovoltaic	≤ 100 kW	575%	460%	-	-	-
33.2	b.1.1	Solar Photovoltaic	> 100 kW	300%	240%	250%	200%	10%
33.3	b.1.2	Solar Thermal	Any	300%	240%	250%	200%	10%
34.1	b.2.1	Wind Energy	≤ 5 MW	90%	80%	40%	-	10%
34.2	b.2.1	Wind Energy	> 5 MW	90% (1st 5 yrs), 85% (Next 10 yrs)	80%	40%	-	10%
34.3	b.2.2	Wind Energy	≤ 5 MW	90%	80%	40%	-	10%
34.4	b.2.2	Wind Energy	> 5 MW	90% (1st 5 yrs), 85% (Next 10 yrs)	80%	40%	-	10%

Source: Article 33 of Royal Decree 436/2004.

This decree established thresholds for review of the tariffs, incentives, and premiums: when photovoltaic reaches 150 MW of installed capacity, solar thermal reaches 200 MW of installed capacity (Article 33) or when wind energy reaches 13,000 MW (Article 34). Moreover, a revision would take place in 2006 and every four years onwards (Article 40).

3.2.2.2 Royal Decree-Law 7/2006

Royal Decree-Law 7/2006, issued on 23 June 2006, adopted urgent measures in the energy sector, amending Law 54/1997. Its preamble stated that it was necessary to adequately remunerate electricity and to provide greater flexibility in the policy for setting premiums and incentives for electricity production in the special regime which would facilitate the necessary pending regulatory developments to address the ambitious environmental energy policy objectives of the Government (SPAIN, 2006, preamble). Its second final provision established that the government must develop a remuneration system for special regime installations within six months.

3.2.2.3 Royal Decree 661/2007

Royal Decree 661/2007, issued on 25 May 2007, replaced Royal Decree 436/2004, updating the regulation for electricity generation under the special regime. In its preamble, besides environmental concerns, as stated in the previous royal decree, it mentioned the reduction of the external dependency on energy. It also mentioned the goal set by Directive 2001/77/CE that at least 29.4% of the electricity produced in Spain would be renewable sources by 2010 (SPAIN, 2007, preamble).

According to Article 1, its objective was to establish a legal and economic framework for the activity of electricity production under a special regime, replacing Royal Decree 436/2004 and establishing a transitory economic regime for facilities included in the regime defined under RD 436/2004.

It maintained two different retribution mechanisms: receiving a regulated tariff, uniform for all scheduling periods (Article 24(a) and Article 25) or selling the electricity on the market plus premium (Article 24(b) and Article 27). It created the possibility of voluntary adhesion to time-based pricing (Article 26), for installations that opt for regulated tariffs. It also provided a complement for efficiency to installations between 50 and 100 MW (Article 28).

Table 8 - Tariffs according to Royal Decree 661/2007

Group	Subgroup	Type of Energy	Power	Term	Regulated Tariff (EUR/kWh)	Reference Premium (EUR/kWh)	Upper Limit (EUR/kWh)	Lower Limit (EUR/kWh)
b.1	b.1.1	Solar Photovoltaic	≤100 kW	First 30 years	44.0381	-	-	-
		Solar Photovoltaic	100 kW < P ≤ 10 MW	First 30 years	41.7500	-	-	-
		Solar Photovoltaic	10 < P ≤ 50 MW	First 30 years	22.9764	-	-	-
b.1.2	-	Solar Thermal	-	First 25 years	26.9375	0		-
	-	Solar Thermal	-	After that	21.5498	0		-
b.2	b.2.1	Wind Energy	-	First 20 years	7.3228	0		-
	-	Wind Energy	-	After that	6.1200	0		-

Source: Article 36 of Royal Decree 661/2007.

Article 22 established that a deadline of no less than one year should be set when 85% of the targets for each subgroup are achieved. Article 37 set the target for photovoltaic energy at 371 MW and for thermal solar energy at 500 MW. Article 38 sets the target for wind energy at 20,155 MW. Additionally, Article 44(1) establishes an annual review process for regulated tariffs and premiums for wind and solar energy.

3.2.2.4 Royal Decree 1578/2008

Royal Decree 1578/2008, issued on 27 September, focused only on photovoltaic energy. Its preamble acknowledges that the growth in the installed capacity of photovoltaic energy exceeded expectations. By August 2007, 85% of the target for 2010, set by Royal Decree 661/2007, issued on 25 May, had already been surpassed. The preamble also cautioned that excessive compensation could significantly impact the costs of the electricity system and discourage investment in research and development (SPAIN, 2008, preamble).

Article 1 established an economic regime for photovoltaic facilities that missed the deadline for receiving the regulated tariff provided by Article 36 of Royal Decree 661/2007, issued on 25 May. Article 2 specifies that the decree applies to photovoltaic installations registered definitively after 29 September 2008. It outlines a pre-allocation registry in successive "calls" (Article 4(3)), with decreasing regulated tariffs values (Article 11(3)). The first call should have the following regulated tariffs value (Article 11(1)).

Table 9 – Feed-in tariffs according to Royal Decree 1578/2008

Type		Regulated Tariff (cEUR/kWh)
Type I	Subtype I.1	34.00
	Subtype I.2	32.00
Type II		32.00

Source: Article 11(1) of Royal Decree 1578/2008.

The regulated tariff would be maintained for a maximum period of twenty-five years (Article 11(5)). Article 12 establishes that regulated tariffs would be subject to revision according to Article 44(1) of Royal Decree 661/2007, two years after the call.

3.2.3 Spanish legislation subsequent to Directive 2009/28/EC

The Spanish legislation subsequent to Directive 2009/28/EC witnessed a deliberate reduction in the incentives formerly provided to renewable energy producers. Concerns over the tariff deficit's and the sustainability of the overall system shaped the legislation of this period, which includes Royal Decree-Law 6/2009, Royal Decree 1565/2010, Royal Decree-Law 14/2010, Law 2/2011, Royal Decree-Law 1/2012, Law 15/2012, Royal Decree-Law 2/2013, Royal Decree-Law 9/2013, Law 24/2013, and Royal Decree 413/2014.

3.2.3.1 Royal Decree-Law 6/2009

Royal Decree-Law 6/2009, which addresses the adoption of urgent measures in the energy sector and the approval of the social bonus was issued on 30 April 2009. Its preamble acknowledged that Law 54/1997 had liberalised the electric sector but highlighted that the commercialisation was significantly impacted by the regulated tariff system. The difference between regulated tariffs and energy prices generated harmful effects that undermined the foundations of the liberalisation of the electric system. It stated that in the current international financial crisis context, the growing tariff deficit was jeopardising the financial stability of companies in the electricity sector and the sustainability of the system itself. It also noted that the deficit was passed on to future generations through the recognition of long-term receivables (SPAIN, 2009, preamble).

Against this backdrop, this act would establish limits to contain the increase in the tariff deficit, define a path towards its progressive elimination from 2013, and create an interim financing mechanism. Beyond the economic impact of the tariff deficit, the preamble also mentioned that an increase in renewables could jeopardise the sustainability of the electric system in the short term from a technical standpoint, because the operation of the electric system relies on maintaining a proper balance between manageable and non-manageable generation.

By amending the twenty-first additional provision of Law 54/1997, Article 1 stated that from 2013 access tolls would be sufficient to cover the total costs of regulated activities, eliminating the deficit (twenty-first additional provision (1)). The law also imposed limits on the deficit until its elimination. It established that for the years 2009, 2010, 2011, and 2012, the revenue deficit in the settlements of the regulated activities of the electricity sector will not exceed 3,500 million euros, 3,000 million euros, 2,000 million euros, and 1,000 million euros,

respectively. (Twenty-first additional provision (3)) It also created a securitisation fund for finance the tariff deficit (Twenty-first additional provision (4)).

3.2.3.2 Royal Decree 1565/2010

Royal Decree 1565/2010, issued on 19 November 2010, modifed the technical requirements of Royal Decree 661/2007 (SPAIN, 2010, Article 1), Royal Decree 1110/2007 (Article 2), and 1578/2008 (Article 3). One of the technical modifications was the introduction of the requirement that the plant has to be composed of new or non-used equipment to qualify for the special regime (Article 1).

3.2.3.3 Royal Decree-Law 14/2010

Royal Decree-Law 14/2010 was issued on 23 December 2010. In its preamble, it refers to Royal Decree-Law 6/2009, which established limits to contain the increase in the tariff deficit until 2012 and, starting from 2013, the principle of sufficiency of access fees to meet the entire costs of regulated activities. The preamble of Royal Decree-Law 14/2010 lists various unforeseen circumstances that impacted the tariff deficit since the approval of Royal Decree-Law 6/2009. These factors included the global economic crisis, which resulted in a significant drop in electricity demand. Other circumstances included favourable weather conditions that led to increased electricity production from renewable sources. These factors, combined with the increase in fossil fuel prices in 2010, let to a decrease in operating hours and income for the ordinary regime (SPAIN, 2013c, preamble).

It amended Article 15 of Law 54/1997, issued on 27 November, on the Electricity Sector, adding that: “The remuneration for regulated activities shall be financed through the revenues collected from access fees to the transmission and distribution networks paid by consumers and producers” (Own translation) (Article 1).

It maintained limits to the tariff deficit set by Royal Decree-Law 6/2009 for the years 2009 and 2010, which were EUR 3.5 billion, and EUR 3 billion, respectively. However, it increased the limits to tariff deficit for 2011 and 2012, compared to the Royal Decree-Law 6/2009: from 2 to 3 billion euros in 2011, and from 1 to 1.5 billion euros in 2012” (Article 1). Moreover, it created a limitation of operating hours for photovoltaic installations, based on the climatic solar zone where the installation is located (First Additional Provision), and it imposed

an access fee for electricity producers to be paid to the transmission and distribution networks of 0.5 EUR/MWh, form 2011 (First Transitional Provision).

3.2.3.4 Law 2/2011

Law 2/2011 on sustainable economy, issued on 4 March 2011, was a very comprehensive law, including reforms in the public sector (SPAIN, 2011, Title I), reforms aimed at directly improving the competitiveness of the Spanish economic fabric (Title II), and provisions related to various aspects of environmental sustainability such as energy model, emissions reduction, sustainable transportation, and housing (Title III). Its preamble mentioned "the international financial and economic crisis, the most severe in many decades", and indicated that the set of actions to mitigate the economic and social consequences of this crisis entailed a very significant fiscal disbursement.

It aimed to make structural reforms to create conditions that favoured sustainable economic development (Article 1). It defined a sustainable economy as "a pattern of growth that reconciles economic, social, and environmental development in a productive and competitive economy" that promotes high-quality employment, equal opportunities, and social cohesion while ensuring environmental respect and the rational use of natural resources (Own translation). It also added that "This approach allows meeting the needs of the current generation without compromising the ability of future generations to meet their own needs" (Own translation).

Article 3 set general principles to guide the actions of public authorities within their respective areas of competence to promote the sustainability of the Spanish economy, including the principle that energy savings and efficiency should contribute to sustainability by reducing costs, lessening energy dependency, and preserving natural resources.

Article 77 established the principles of energy policy: it should ensure supply security, economic efficiency, and environmental sustainability; comply with community regulations; and be aligned to objectives and international efforts in the fight against climate change (Article 77(1)). Moreover, government should promote diversification of energy supply sources, efficient development of smart infrastructure and networks, transparency and competitiveness in energy markets, sufficient remuneration, increased incorporation of renewable energies, and energy savings and efficiency policies (Article 77(3)).

Article 78 set a minimum national objective of 20% renewable energy participation in gross final energy consumption in 2020. Moreover, it established the adoption of measures of

energy savings and efficiency to reduce primary energy demand compared to a trend scenario without these measures.

The law also set provisions for energy planning (Articles 79 and 80); cooperation between central and regional administration (Article 81); promotion of research, development, and innovation (Article 82); transparency for consumers (Article 83); reduction in administrative procedures (Article 84); measures on energy savings by public administrations (Article 85); and monitoring and evaluation of these provisions (Article 86).

3.2.3.5 Royal Decree-Law 1/2012

Royal Decree-Law 1/2012, issued on 27 January 2012, revoked economic incentives for new electric energy production installations from cogeneration, renewable energy sources, and waste. It stated that the growth enabled by the technologies included in the special regime has far exceeded the installed power targets by 2010, which resulted in an imbalance between production costs and premium values (SPAIN, 2012a, preamble).

It mentioned that Royal Decree-Law 6/2009 established limits to contain the increase in the tariff deficit until 2012, and established the principle of sufficient access fees from 2013 onwards. It also mentioned various unexpected circumstances, such as demand reduction in 2010, increased electricity production from renewable sources due to favourable weather conditions, and a consequent increase in the deficit. It referred to Royal Decree-Law 14/2010, which provided urgent measures to address the tariff deficit in the electricity system, but stated that these measures were insufficient, jeopardizing the ultimate goal of eliminating the tariff deficit from 2013. It stated that the installed generation capacity at this time was sufficient to ensure the coverage of the expected demand for the coming years and that the complex economic and financial situation advises the temporary removal of incentives for the construction of new installations until the elimination of the tariff deficit (preamble).

It suppressed the economic incentives for electric energy production (Article 1(a)) and suspended the registry to grant incentives (Article 1(b)). It applied to installations of special regime that, at the date of entry into force of this royal decree-law, were not registered in the Pre-allocation of Remuneration Register provided for in Article 4.1 of Royal Decree-Law 6/2009 of 30 April. This included special regime installations using photovoltaic technology that, at the date of entry into force of this royal decree-law, were not registered in the Preallocation of Remuneration Register provided for in Article 4.1 of Royal Decree 1578/2008 of 26 September, as well as to ordinary regime installations that, at the date of entry into force

of this royal Decree-Law, do not have administrative authorisation granted by the Directorate General of Energy Policy and Mines (Article 2). Furthermore, it superseded economic incentives for new installations provided by 661/2007 (Article 3) and suspended the pre-allocation of remuneration procedure (Article 4).

3.2.3.6 Law 15/2012

Law 15/2012 was issued on 27 December 2012. In its preamble, it stated that it aimed to harmonise the tax system with a more efficient and environmentally friendly use, in line with the fundamental principles governing fiscal, energy, and environmental policies within the European Union. It comprised the internalisation of environmental costs associated with electricity production and incentives for energy efficiency (SPAIN, 2012b). This introduced three new taxes: the tax on the value of electricity production, on the production of spent nuclear fuel and radioactive waste from nuclear electricity generation, and on the storage of spent nuclear fuel and radioactive waste in centralised facilities, in addition to the establishment of a fee for using continental waters for electricity production and the modification of tax rates for natural gas and coal. Specifically, it stated that the tax on the value of electricity production was in line with the aim of achieving budgetary balance. It was a direct tax on electricity production (Article 1) at a rate of 7% (Article 8).

Moreover, this law capped the contribution of the state budget to the electricity system. It will include the estimated revenue from the taxes and fees created by this law, plus the estimated revenue from the auction of greenhouse gas emission rights, limited to 500 million euros (Additional Provision Two).

3.2.3.7 Royal Decree-Law 2/2013

Royal Decree-Law 2/2013 was issued on 1 February 2013. Its preamble stated that the special regime's cost growth was a result of an increase in operating hours beyond what was expected, an increase in remuneration due to indexation to the Brent price, and a toll decrease due to a significant drop in demand. Given the economic crisis, an increase in access tolls would impact households and the competitiveness of businesses, both already in a delicate situation (SPAIN, 2013a, preamble).

To address these issues, the legislation replaced the indexation to the Brent price with an inflation index, the Consumer Price Index (CPI) at constant taxes, excluding unprocessed

food and energy products (Article 1). Additionally, Article 2 amended Royal Decree 661/2007, eliminating the premiums for certain groups of installations. Moreover, Article 3 prohibited installations that had chosen to sell their energy in the market from switching back to regulated prices.

3.2.3.8 Royal Decree-Law 9/2013

Royal Decree-Law 9/2013 was issued on 12 July 2013. In its preamble, it stated that the tariff deficit became structural over time, and that between 2004 and 2012, the revenue generated from consumer tolls increased by 122%, while regulated costs increased by 197%. On 10 May 2013, the cumulative debt exceeded EUR 26 billion. The preamble considered this an unsustainable situation that required urgent, immediate measures. Due to the difficult economic situation, the energy prices in the daily market were reduced, and 2013 was facing unusual weather conditions with significantly higher rainfall and wind conditions than historical averages, which increased the energy production of wind installations. Both situations contributed to an increase in the tariff deficit (SPAIN, 2013b, preamble).

Royal Decree-Law 9/2013 amended Law 54/1997, establishing that installations may receive specific remuneration in addition to the remuneration for the electricity sold, valued at market prices. This remuneration would be composed of two parts: an incentive for investment, a payment per unit of installed capacity to cover the investment costs that cannot be recovered through the sale of electricity, and an operating payment to cover the difference between the operating costs and the revenue from the participation in the market (Article 1). The incentive for investment was set at 10,000 EUR/MW/year (Article 7). The reasonable return before taxes would be based on the average yield in the secondary market of ten years preceding the entry into force of this Royal Decree-Law for government bonds, which increased by 300 basis points (First Additional Provision). It repealed Royal Decree 661/2007 and Royal Decree 1578/2008.

3.2.3.9 Law 24/2013

Law 24/2013 was issued on 26 December 2013. Its preamble referred to the structural tariff deficit stemming from the growth of costs without corresponding revenue for the system. The situation was aggravated by the lack of electricity demand growth, a consequence of the economic crisis. It mentioned that tariff's increase of 122% between 2004 and 2012 was insufficient to cover the system's costs, despite positioning electricity prices in Spain well above

the European Union average. It also points out that the accumulated debt of the electrical system now exceeded EUR 26 billion and the structural deficit reached EUR 10 billion annually (SPAIN, 2013c, preamble).

It pointed out that Law 54/1997 from 27 November provided a remuneration system for regulated activities that lacked the flexibility to adapt to ongoing changes in the electrical system. It referred to legislative measures to redress the tariff deficit such as Royal Decree-Law 14/2010, Royal Decree-Law 1/2012 from January 27, Royal Decree-Law 2/2013, and Royal Decree-Law 9/2013. The preamble also mentioned that the continuous regulatory changes had distorted the normal operation of the electrical system. Thus, a comprehensive reform of the sector became necessary to restore long-lost financial sustainability to the system." The preamble also stated the objective of the law, which was to ensure a stable supply of electricity at minimal cost, engender the financial sustainability of the system, foster competition, and provide an environmentally friendly framework.

To engender financial sustainability, the law stated that any regulatory measure that increases costs or reduces revenues in the electrical sector must include equivalent reductions in other cost items or equivalent increases in revenues to maintain balance (Article 13). It mentioned the revenues of the electrical system: access tolls to the transport and distribution networks paid by consumers and producers; charges for energy exports to non-EU countries, intended to cover the remuneration for transport and distribution; grants from the state budget to cover the specific remuneration regime to promote energy generation from renewable sources and the extra cost of production in electrical systems in non-peninsular territories; and any other revenue explicitly attributed by a legal or regulatory standard (Article 13).

Law 24/2013 also established regulatory periods of six years. According to Article 14, parameters for the remuneration of transport, distribution, and production from renewable energy sources with a specific remuneration regime would consider the cyclical state of the economy, electrical demand, and adequate profitability for these activities for regulatory periods lasting six years.

Although the special regime was extinguished, a specific regime was allowed – Article 23 stated that, as a rule, electricity producers shall submit offers to sell electricity through the market operator, and reference retailers shall submit offers to purchase electricity from the market operator. Article 24 allowed exemptions from the offer system, such as forward purchase contracts, financial contracts with electricity as the underlying asset, as well as bilateral contracts directly made between consumers and producers, between producers and retailers, and between retailers themselves. Article 25 provided another exception to the offer

system, allowing the government to establish procedures to ensure the operation of electricity production units that use local sources of primary energy. Article 26 maintained priority access to the grid for producers of electricity from renewable energy sources. Article 27 dealt with the register for the specific remuneration regime granted to electricity production installations from renewable energy sources, cogeneration, and waste.

3.2.3.10 Royal Decree 413/2014

Royal Decree 413/2014 was issued on 6 June 2014 to regulate the activity of electricity production from renewable energy sources, cogeneration, and waste. It states that previous regulations created such a favourable framework for renewable energy producers that the installed capacity rapidly surpassed expectations, which, when combined with the progressive reduction of technological costs, required corrections in the regulatory framework to ensure reasonable profitability for the producers, and financial sustainability of the system (SPAIN, 2014, preamble).

Article 11 regulated the specific remuneration scheme to promote energy production from renewable energy sources, highly efficient cogeneration, and waste, in addition to the remuneration provided by the market. It applies only to production facilities that do not reach the minimum level required to cover their costs or achieve a reasonable return, as referenced to a standard facility. This remuneration would be determined through a competitive bidding procedure. Article 15 divided the regulatory system into two three-year sub-regulatory periods, at the end of which a review of remuneration parameters would take place.

Article 16 provided rules for investment remuneration of the standard facility to compensate for investment costs that have not yet been recovered according to the net asset value for a standard facility. Article 17 provided rules for operational remuneration to meet the estimated operating costs per unit of energy generated for the standard facility. Both additional remunerations cease once the installations reach the end of their lifespan, at which point they would continue to sell their energy to the market, without additional incentive.

4 JURISDICTION AND ADMISSIBILITY

This chapter examines the objections raised against the jurisdiction of arbitral tribunals and the challenges related to the admissibility of claims. However, it first provides an overview of the specific cases examined within this dissertation.

4.1 Cases studies

The study is limited to cases where (1) the host State initially granted incentives for investments in renewable energy but later revoked or reduced such incentives, (2) both the host State and the investor's home country were signatories to treaties aimed at safeguarding and fostering foreign investments, incorporating provisions for international arbitration, (3) the investor initiated proceedings before an international arbitration tribunal, and (4) key information of the award was made publicly available.[11]

The search was carried out in database such as the ECT's list of cases (ECT. LIST OF CASES, [n.d.]), the International Centre for Settlement of Investment Disputes (ICSID) case database (ICSID, [n.d.]), ITA Law database (ITALAW, [n.d.]), and UNCTAD's Investment Dispute Settlement database (UNCTAD, [n.d.]).

There are 12 investor-state arbitration cases concerning investments in renewable energies against Italy. Among these, four are still pending, while eight already have a final award. Table 10 shows the cases with a final award, with the indication of the arbitral institution: International Center for Settlement of Investment Disputes (ICSID) or Arbitration Institute of the Chamber of Commerce (SCC). While an *ad hoc* tribunal utilising rules from the United Nations Commission on International Trade Law (UNCITRAL) was available as an option, no investor opted for this approach. Table 10 also contains information on the applicant's nationality. Table 11 shows the pending cases.

Table 10 – Cases against Italy with a final award

Forum	Case	Nationality of the claimant
ICSID	Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40	Luxembourg

[11] Almost all cases have a public award. Cases such as CSP and Gilatz are exceptions, but at least the information of the amount awarded was made public, which allowed them to be considered in this study.

	Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3	Belgium, France, Germany
	ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italy, ICSID Case No. ARB/16/5	Germany, Austria
	Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50	Belgium
	Silver Ridge Power BV v. Italian Republic, ICSID Case No. ARB/15/37	Netherlands
SCC	CEF Energia BV v. Italian Republic, SCC Case No. 158/2015	Netherlands
	Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095	Denmark, Luxembourg
	Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016	Luxembourg
Source: ("Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3," 2016; "CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019; "Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50," 2020; "ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5," 2020; "Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," 2018; "Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37)," 2021; "Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016," 2020)		

Table 11 – Cases against Italy without a final award

Forum	Case	Nationality of the claimant
ICSID	Encavis and others v. Italian Republic (ICSID Case No. ARB/20/39)	Germany, Italy
	Hamburg Commercial Bank AG v. Italy, ICSID Case No. ARB/20/3	Germany
	Veolia Propreté SAS v. Italian Republic, ICSID Case No. ARB/18/20	France
	VC Holding II S.à.r.l. and others v. Italy, ICSID Case No. ARB/16/39	Germany, Germany, Germany, UK, Luxembourg, Luxembourg, Germany, Germany, Germany, Germany, Germany, Luxembourg
Source: ("Encavis et al. v. Italy, ICSD Case No ARB/20/39," [n.d.]; "Hamburg Commercial Bank AG v. Italian Republic, ICSID Case No. ARB/20/3," [n.d.]; "VC Holding II S.a.r.l. and others v. Italian Republic, ICSID Case No. ARB/16/39," [n.d.]; "Veolia Propreté SAS v. Italian Republic ICSID Case No. ARB/18/20," [n.d.])		

There are 51 investor-state arbitration cases concerning investments in renewable energies against Spain. Among these, 19 are still pending, 30 already have a final award, and 2 were discontinued. Table 12 shows the cases with a final award, with the indication of the arbitral institution: 22 cases in the International Center for Settlement of Investment Disputes (ICSID), 6 cases in the Arbitration Institute of the Chamber of Commerce (SCC), and 1 in the Permanent Court of Arbitrage (PCA) with the rules of the United Nations Commission on International Trade Law (UNCITRAL) was an option, no investor chose this path. Table 10 also contains information on the applicant's nationality. Table 11 shows the pending cases 16 in ICSID, 3 SCC and 1 ad hoc with UNCITRAL rules. Moreover, Table 12 presents the discontinued cases.

Table 12 – Cases against Spain with a final award

Forum	Case	Nationality of the claimant
ICSID	9REN Holding S.à.r.l. v. Spain, ICSID Case No. ARB/15/15	Luxembourg
	Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain, ICSID Case No. ARB/13/31	Luxembourg, Netherlands
	BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16	Germany
	Cube Infrastructure Fund SICAV and others v. Spain, ICSID Case No. ARB/15/20	Luxembourg, and France
	Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36	United Kingdom, and Luxembourg
	Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Spain, ICSID Case No. ARB/16/4	Japan~~, and Netherlands~~
	Gilatz Spain S.L., Aharon Naftali Biram, Redmill Holdings Ltd., and Sun-Flower Olmeda GmbH v. Spain, ICSID Case No. ARB/16/17	Germany, United Kingdom, and Germany
	Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42	Luxembourg, and Sweden
	Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Spain, ICSID Case No. ARB/16/18	Luxembourg, and Netherlands
	InfraRed Environmental Infrastructure GP Limited and others v. Spain, ICSID Case No. ARB/14/12	United Kingdom
	JGC Corporation v. Spain, ICSID Case No. ARB/15/27	Japan
	Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1	Netherlands
	Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23	Germany
	NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain, ICSID Case No. ARB/14/11	Netherlands

	OperaFund Eco-Invest SICAV PLC and Schwab Holding v. Spain, ICSID Case No. ARB/15/36	Malta, and Switzerland
	RENERGY S.à.r.l. v. Spain, ICSID Case No. ARB/14/18	Luxembourg
	RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain, ICSID Case No. ARB/13/30	United Kingdom, and Luxembourg
	RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain, ICSID Case No. ARB/14/34	Germany, and Spain
	Sevilla Beheer B.V. and others v. Spain, ICSID Case No. ARB/16/27	Netherlands
	SolEs Badajoz GmbH v. Spain, ICSID Case No. ARB/15/38	Germany
	Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Spain, ICSID Case No. ARB/15/1	Germany
	STEAG GmbH v. Spain, ICSID Case No. ARB/15/4	Germany
	Watkins Holdings S.à.r.l. and others v. Spain, ICSID Case No. ARB/15/44	Netherlands, and Luxembourg
SCC	Charanne B.V. and Constructions Investments S.à.r.l v. Spain, SCC Case No. V (062/2012)	Netherlands, and Luxembourg
	CSP Equity Investment S.à.r.l. v. Spain, SCC	Luxembourg
	Foresight Luxembourg Solar 1 S.à.r.l. and others v. Spain, SCC Case No. 2015/150	Luxembourg, Denmark, and Italy
	FREIF Eurowind Holdings Ltd. v. Spain, SCC Case No. 2017/060	United Kingdom
	Green Power K/S and Obton A/S v. Spain, SCC Case No. 2016/135	Denmark, Denmark
	Isolux Infrastructure Netherlands B.V. v. Spain, SCC Case V (2013/153)	Netherlands
	Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain, SCC Case No. 2015/063	Luxembourg
PCA with rules of UNCITRAL	The PV Investors v. Spain, PCA Case No. 2012-14	Luxembourg, Netherlands, and Germany

Source: ("9REN Holding S.à.r.l. v. Spain, ICSID Case No. ARB/15/15," 2019; "Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain, ICSID Case No. ARB/13/31 ," 2018; "BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16 ," 2021; "Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012," 2016; "CSP Equity Investment S.à.r.l. v. Spain, SCC," 2021; "Cube Infrastructure Fund SICAV and others v. Spain, ICSID Case No. ARB/15/20 ," 2019; "Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36," 2017; "Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Spain, ICSID Case No. ARB/16/4," 2022; "Foresight Luxembourg Solar 1 S.à.r.l. and others v. Spain, SCC Case No. 2015/150," 2018; "FREIF Eurowind Holdings Ltd. v. Spain, SCC Case No. 2017/060," 2021; "Gilatz Spain S.L., Aharon Naftali Biram, Redmill Holdings Ltd., and Sun-Flower Olmeda GmbH v. Spain, ICSID Case No. ARB/16/17," 2021; "Green Power

K/S and Obton A/S v. Spain, SCC Case No. 2016/135," 2022; "Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42," 2020; "Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Spain, ICSID Case No. ARB/16/18," 2023; "InfraRed Environmental Infrastructure GP Limited and others v. Spain, ICSID Case No. ARB/14/12," 2019; "Isolux Infrastructure Netherlands B.V. v. Spain, SCC Case V (2013/153)," 2016; "JGC Corporation v. Spain, ICSID Case No. ARB/15/27," 2021; "Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1," 2018; "Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23," 2023; "NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain, ICSID Case No. ARB/14/11," 2019; "Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain, SCC Case No. 2015/063," 2018; "OperaFund Eco-Invest SICAV PLC and Schwab Holding v. Spain, ICSID Case No. ARB/15/36," 2019; "RENERGY S.à.r.l. v. Spain, ICSID Case No. ARB/14/18," 2022; "RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain, ICSID Case No. ARB/13/30," 2019; "RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain, ICSID Case No. ARB/14/34," 2020; "Sevilla Beheer B.V. and others v. Spain, ICSID Case No. ARB/16/27," 2023; "SolEs Badajoz GmbH v. Spain, ICSID Case No. ARB/15/38," 2019; "Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Spain, ICSID Case No. ARB/15/1," 2019; "STEAG GmbH v. Spain, ICSID Case No. ARB/15/4," 2021; "The PV Investors v. Spain, PCA Case No. 2012-14," 2020; "Watkins Holdings S.à.r.l. and others v. Spain, ICSID Case No. ARB/15/44," 2020)

Case Triodos v. Spain, SCC Case No. 2017/194 is not studied in this dissertation because the award was redacted and no key information could be found in the ISDS database[12].

Table 13 – Cases against Spain without a final award

Forum	Case	Nationality of the claimant
ICSID	Canepa Green Energy Opportunities I S.á.r.l. and Canepa Green Energy Opportunities II S.á.r.l. v. Spain, ICSID Case No. ARB/19/4	Luxembourg
	Cavalum SGPS, S.A. v. Spain, ICSID Case No. ARB/15/34	Portugal
	DCM Energy GmbH & Co. Solar 1 KG and others v. Spain, ICSID Case No. ARB/17/41	Germany, and Switzerland
	E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v. Spain, ICSID Case No. ARB/15/35	Germany
	EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L. v Spain, ICSID Case No. ARB/18/42	Switzerland
	European Solar Farms A/S v. Spain ICSID Case No. ARB/18/45	Denmark
	Itochu Corporation v. Spain, ICSID Case No. ARB/18/25	Japan

[12] Italaw offers the redacted award ("Triodos v. Spain, SCC Case No. 2017/194," 2022); ECT and UNCTAD database inform that the case is pending ("Triodos SICAV II v. Spain, SCC Case No. 2017/194," [n.d.]; "Triodos SICAV II v. Spain, SCC Case No. 2017/194," [n.d.]).

	KS Invest GmbH and TLS Invest GmbH v. Spain, ICSID Case No. ARB/15/25	Germany
	Landesbank Baden-Württemberg and others v. Spain, ICSID Case No. ARB/15/45	Germany
	Mitsui & Co., Ltd. v. Spain, ICSID Case No. ARB/20/47	Spain
	Portigon AG v. Spain, ICSID Case No. ARB/17/15	Germany
	Sapec S.A. v. Spain, ICSID Case No. ARB/19/23	Belgium
	Spanish Solar 1 Limited and Spanish Solar 2 Limited v. Spain, ICSID Case No. ARB/21/39	Ireland
	VM Solar Jerez GmbH and others v. Spain, ICSID Case No. ARB/19/30	Germany
	WOC Photovoltaik Portfolio GmbH & Co. KG and others v. Spain, ICSID Case No. ARB/22/12	Germany
UNCITRAL	EDF Energies Nouvelles v. Spain, UNCITRAL	France
Source: ("Canepa Green Energy Opportunities I S.á.r.l. and Canepa Green Energy Opportunities II S.á.r.l. v. Spain, ICSID Case No. ARB/19/4," [n.d.]; "Cavalum SGPS, S.A. v. Spain, ICSID Case No. ARB/15/34 ," [n.d.]; "DCM Energy GmbH & Co. Solar 1 KG and others v. Spain, ICSID Case No. ARB/17/41," [n.d.]; "E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v. Spain, ICSID Case No. ARB/15/35," [n.d.]; "EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L. v Spain, ICSID Case No. ARB/18/42," [n.d.]; "European Solar Farms A/S v. Spain ICSID Case No. ARB/18/45," [n.d.]; "Itochu Corporation v. Spain, ICSID Case No. ARB/18/25," [n.d.]; "KS Invest GmbH and TLS Invest GmbH v. Spain, ICSID Case No. ARB/15/25," [n.d.]; "Landesbank Baden-Württemberg and others v. Spain, ICSID Case No. ARB/15/45," [n.d.]; "Mitsui & Co., Ltd. v. Spain, ICSID Case No. ARB/20/47," [n.d.]; "Portigon AG v. Spain, ICSID Case No. ARB/17/15," [n.d.]; "Sapec S.A. v. Spain, ICSID Case No. ARB/19/23," [n.d.]; "Spanish Solar 1 Limited and Spanish Solar 2 Limited v. Spain, ICSID Case No. ARB/21/39," [n.d.]; "VM Solar Jerez GmbH and others v. Spain, ICSID Case No. ARB/19/30," [n.d.]; "WOC Photovoltaik Portfolio GmbH & Co. KG and others v. Spain, ICSID Case No. ARB/22/12," [n.d.])		

Table 14 – Cases against Spain discontinued

Forum	Case	Nationality of the claimant
SCC	Alten Renewable Energy Developments B.V. v. Spain, SCC	Netherlands
	Solarpark Management GmbH & co and Atum I KG v. Spain, SCC Case No. 2015/163	Germany
ICSID	TS Villalba GmbH and others v. Spain, ICSID Case No. ARB/21/43	Germany
Source: ("Alten Renewable Energy Developments B.V. v. Spain, SCC," 2022; "Solarpark Management GmbH & co and Atum I KG v. Spain, SCC Case No. 2015/163," 2015; "TS Villalba GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/21/43," 2022)		

The next subsections address the jurisdictional and admissibility objections in the cases with a final award (Tables 10 and 12).

4.2 Jurisdictional objections

This section presents the claims against the jurisdiction of the arbitral tribunals in three subsections. The first subsection concerns the intra-EU jurisdictional objection, more specifically the argument that ISDS does not apply between investors from EU countries and EU countries. Although this argument was rejected in almost every case, it is significant as some aspects of its rationale are very important to the enforcement of the awards. The second subsection will address the other jurisdictional objections raised by Italy. The third, is other jurisdictional objections raised by Spain.

4.2.1 Intra-EU jurisdictional objection

It is noteworthy that among the 37 cases examined in this dissertation, only two involved claimants who were not nationals of another EU member state: JGC v. Spain and Eurus v. Spain, both of which had Japanese claimants[13]. In all other instances, claimants held the nationality of an EU member country, and the respondent state contested the jurisdiction of the arbitration tribunal based on the inter-EU objection. Throughout these cases, the European Commission participated as an "amicus curiae," presenting arguments closely aligned with those advanced by the respondent states. Apart from Green Power, the arbitral tribunals consistently rejected this objection. Despite some variation in emphasis and gradual enrichment over time, the argumentation of the respondent states remained notably coherent across all cases, allowing for a collective presentation of different aspects of the argument throughout the cases.

The analysis of the intra-EU objection includes an examination of various dimensions, including the alleged nonexistence of diversity of areas (4.2.1.1), the alleged implicit disconnection clause (4.2.1.2), the incompatibility of ISDS with provisions of EU law (4.2.1.3)

[13] Even in these two case the intra-EU objection was, at some time, mentioned. In JGC, Spain objected to the jurisdiction of the tribunal arguing that “EU law and principles are international law applicable to the ruling on this dispute for the purpose of Article 26(6) of the ECT and EU law prevents this dispute from being submitted to arbitration (the “EU law Jurisdictional Objection” or the “Achmea Objection”)” (“JGC v. Spain, ICSID Case No. ARB/15/27. Decision on Jurisdiction, Liability, and Quantum,” 2021, para 383(a)). The country would object to the jurisdiction of the arbitral tribunal until publication the Court of Justice of the European Union render its opinion about the 'CETA' agreement with Canada, pending at the date of submission. (para 385). However, Spain withdrew this jurisdictional objection (para 386). In Eurus, initially, there were two claimants: Eurus Europe, an enterprise incorporated in the Netherlands, and Eurus Japan, an enterprise incorporated in Japan. Spain had objected to the jurisdiction based on the intra-EU argument for Eurus Europe (para 152), but this enterprise withdrew from the case (para 29).

and the incompatibility of ISDS with the state aid rules (4.2.1.4). This section also examines the principle of primacy of EU Law (4.2.1.5), an alleged "inter se modification of ECT by the Lisbon treaty (4.2.1.6) and the argument that EU law is more favourable to investors than the ECT (4.2.1.7). Two judgements from the Tribunal of Justice of the European Union that were invoked in these cases are examined, notably Aechmea (4.2.1.8) and Komstroy (4.2.1.9). The objection based on jurisdictional risks for the enforceability of awards is also scrutinised (4.2.1.10). Finally, the Green Power case, the single case in which the arbitral tribunal considered that it lacked jurisdiction over the case due to the intra-EU objection will be examined (4.2.1.11).

4.2.1.1 "On the nonexistence of diversity of areas"

Since the first case, Spain argued that the European Union, as Regional Economic Integration Organisation ("REIO"), is a contracting party of the ECT and the investors of member-states of the European Union are, to the effects of Article 26 of the ECT, investors of the European Union; therefore, the is no diversity of territories required by Article 26 of the ECT ("Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012," 2016, para 427). This argument was rejected. In Charanne, the tribunal highlighted that, although the EU is party to the ECT, its member states remain contracting parties (para 429) and concluded that the dispute regarded an investment made by investors from Netherlands and Luxembourg in Spain's territory, rejecting the claim of lack of diversity of territories (para 432). Spain invoked this allegation in other cases as well as Italy and it was always rejected, often citing the Charanne case. For instance, in "Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain ICSID Case No. ARB/13/31 " (2018 para 222), "Masdar Solar & Wind Cooperatief U.A. v. Spain ICSID Case No. ARB/14/1" (2018 para 320), and "Blusun S.A. Jean-Pierre Lecorcier and Michael Stein v. Italian Republic ICSID Case No. ARB/14/3" (2016 para 301).

4.2.1.2 "The alleged implicit disconnection clause"

Spain also argued for an implicit disconnection clause among EU members ("Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012," 2016, para 433). The tribunal rejected this claim because it considered that the parallelism with Article 27 of the ECT, which regards disputes between states, was not pertinent (para 435). It stated that

neither Article 267 of the Treaty on the Functioning of the European Union (TFEU) nor any other norm of the European Union prohibits investor-state dispute settlement (para 435). The customs union also did not constitute an implicit disconnection clause (para 436).

Based on article 31 of the Vienna Convention on the Law of Treaties (VCLT), which posits that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," the tribunal concluded that the text of the ECT is clear enough and does not justify any additional interpretation to include an implicit disconnection clause (para 437). Moreover, the tribunal considered that there was no need for a disconnection clause, whether implicit or explicit, because the purpose of such a clause was to solve a conflict between the ECT and the TFEU, but no such conflict existed between those agreements (para 438).

In accordance with the findings of the tribunal, BASEDOW (2020 p. 19) concluded that, at least from a historical perspective, the Commission's claim that the Energy Charter Treaty is not meant to apply in intra-European Union relations is inaccurate, given that the European Union consciously accepted this possibility by withdrawing the demand for a disconnection clause.

4.2.1.3 "On the compatibility of the ECT Dispute Settlement Mechanism with EU law"

To assess the compatibility of the ECT dispute settlement mechanism with EU law, the tribunal in Charanne examined (i) whether Article 344 of the Treaty on the Functioning of the European Union applied to arbitration between an investor and a State, and if so, (ii) whether the dispute at that time related to the interpretation or application of European treaties in the terms of Article 344 and (iii) "whether there is any rule on EU public order preventing the settling of the dispute through arbitration" ("Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012," 2016, para 440).

Article 344 of the Treaty on the Functioning of the European Union (TFEU) reads: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein" (EUROPEAN UNION, 2007, Article 344).

With regard to this Article, the tribunal stated that "[t]his provision literally refers to agreements concerning disputes between Member States, and not between a private party and a Member State." (para 441) To reinforce its conclusion, the tribunal mentioned the case Electrobel v. Hungary, which considered that, as the EU signed the ECT, it accepted the

settlement mechanism of Article 26 of this treaty (para 445). With this negative answer to the first question, the tribunal did not see a need to proceed to answering the second question (para 447).

Addressing the third question, regarding public order rules that prohibit arbitration, the tribunal referred to the pending state aid investigation procedure by the European Commission on the Spanish renewable energy support scheme but concluded that it did not preclude its jurisdiction. The tribunal noted that such issue should be considered when determining the merits of the case, and, as the tribunal was seated in Stockholm, also by the judge who is responsible for assessing the validity of the award (para 449). Therefore, it rejected the jurisdictional objection (para 450).

4.2.1.4 State aid

The argument concerning state aid appeared in more detail in other cases. In Novenergia II, Spain argued that the dispute affects EU law, as the Tribunal was called upon to decide on state aid for renewable energies in Spain, something that has the potential to distort competition in the common electricity market ("Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain, SCC Case No. 2015/063," 2018, para 457). However, the tribunal rejected this jurisdictional objection, arguing that "the present dispute does not concern matters which are governed by EU law. It rather concerns certain alleged breaches of the ECT by the Kingdom of Spain" (para 465).

In Foresight, Spain stated that, according to the European Commission State Aid Decision, on 10 November 2017,[14] any compensation that the tribunal determines that it pays

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This decision stated: (160) As a preliminary point, the Commission observes that most of the investors that have brought cases against Spain are based in other Member States of the Union. The Commission considers that any provision that provides for investor-State arbitration between two Member States is contrary to Union law […] (164) In any event, there is also on substance no violation of the fair and equitable treatment provisions. As explained above at section 3.5.2, in the specific situation of the present case Spain has not violated the principles of legal certainty and legitimate expectations under Union law. In an intra-EU situation, Union law is part of the applicable law, as it constitutes international law applicable between the parties to the dispute. As a result, based on the principle of interpretation in conformity, the principle of fair and equitable treatment cannot have a broader scope than the Union law notions of legal certainty and legitimate expectations in the context of a state aid scheme. In an extra-EU situation, the fair and equitable treatment provision of the ECT is respected since no investor could have, as a matter of fact, a legitimate expectation stemming from illegal State aid. […]
(165) The (165) Commission recalls that any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, such as in Eiser v Spain, or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation (EUROPEAN UNION, 2017).

to the claimant would constitute state aid, whose exclusive competence to authorise is of the European Commission ("Foresight Luxembourg Solar 1 S.à.r.l. and others v. Spain, SCC Case No. 2015/150," 2018, para 217). However, the tribunal stated that "Article 26(6) ECT applies to the merits of the case and not to jurisdiction. The Tribunal must determine its jurisdiction exclusively in accordance with the jurisdictional requirements of the ECT" (para 218). As a result, it rejected this objection (para 219).

4.2.1.5 Primacy of EU Law

As shown in a subsection above, in Charanne, the tribunal assessed the compatibility of the ECT and EU law. In other cases, the tribunals had to deal with the argument of the primacy of EU law while deciding about jurisdiction. In Isolux, Spain argued that in case of incompatibility between the ECT and EU law and that, in case of conflict, the latter should have primacy over the former ("Isolux Infrastructure Netherlands B.V. v. Spain, SCC Case V (2013/153)," 2016, para 622). However, the tribunal considered that a potential incompatibility between ECT and EU law shall be addressed when deciding the applicable law, but it does not affect the tribunal's jurisdiction. (para 644).

In Cube Infrastructure, Spain invoked the doctrine of the primacy of EU law, which was applied by the European Court of Justice for decades and was enshrined in Declaration No. 17 concerning primacy, an annexe to the Final Act of the Intergovernmental Conference that adopted the Treaty of Lisbon ("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," 2019, para 85). About this doctrine, the tribunal stated the following:

> 130. To say that EU law is a part of international law and yet has supremacy over other, non-EU components of international law is, in the view of the Tribunal, to mischaracterize EU law and confuse questions belonging to two different legal orders. The EU treaties are, certainly, international agreements of a kind familiar in international law, binding as between the States Parties; but they also function as the constitution of an autonomous community. The rules established by EU secondary legislation are essentially supra-national regulations rather than part of the corpus of international law as such. Similarly, EU law has supremacy within the EU legal system over the national laws of the States that are Members of the EU and accordingly subscribe to the EU legal system. But EU law is only one among several regional, and many national, legal systems; and it is international law that regulates relations between these different legal systems. Within the system of international law, EU law does not have supremacy, and has no hierarchical priority over the laws of non-Member States, or over rules of international law, including the ECT. […]
> 132. Nothing in this Decision does seek to derogate from any provisions of EU law, and the Tribunal does not construe any provision of EU law so as to derogate from the principles set out in Parts III and V or the right to dispute settlement set out in the ECT. Article 16 ECT establishes that the ECT Contracting Parties, including both the Respondent and the EU, did not agree that EU legal rules take precedence over any

> incompatible rules of whatever other source, and that the ECT jurisdictional clause would become inapplicable should any inconsistency be found. Rather, Article 16(2) ECT establishes that they agreed the contrary. (para 130-132)

4.2.1.6 "Alleged inter se modification of ECT by the Lisbon Treaty"

As stated in the above subsection, in Charanne, Spain argued that there was an implicit disconnection clause among EU members in the ECT. In other cases, it continued to advance this argument but added an alternative argument. In NextEra, for instance, Spain argued that Article 26 of the ECT was superseded by the provisions of later EU treaties, in the sense of Articles 41 or 30 of the Vienna Convention on the Law of Treaties ("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," 2019, para 345). The Treaty of Lisbon entered into force in 2009. However, the tribunal rejected the notion that it was an amendment according to Article 41(1(b) of the Vienna Convention or an "application of successive treaties relating to the same subject matter" according to Article 30(4)(a) (para 352).

The same happened in cases against Italy. In Greentech, first, the tribunal refused the alleged *ab initio* intention to exclude intra-EU disputes, mentioning RREEF Infrastructure v. Spain and Eiser Infrastructure v. Spain ("Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," 2018, 337-343). Then, the Tribunal addressed Italy's alternative contention: "The Lisbon Treaty in 2007 was a legitimate inter se agreement whereby EU Member States removed intra-EU disputes from the scope of ECT Article 26." This argument relied on the interpretative frameworks provided by the Vienna Convention on the Law of Treaties, as a successive treaty relating to the same subject matter (Article 30 of the Vienna Convention on the Law of Treaties) or as an agreement to modify multilateral treaties between certain parties only (Article 41 of the Vienna Convention on the Law of Treaties) (para 344)

The tribunal determined that the ECT and the Lisbon Treaty did not share the same subject matter, rendering Article 30 of the VCLT inapplicable (para 346). Moreover, it stated that "as there is no conflict with EU law, if the Tribunal were to apply VCLT Article 30(4)(a), referring to Article 30(3), the Tribunal would conclude that the ECT applies to its full extent, not limited in any way by EU law." (para 351).

With regard to Article 41 of the VCLT, relating to an agreement to modify multilateral treaties between certain parties only, the tribunal was not persuaded by the respondent's

argument that the Lisbon Treaty would not "be incompatible with the effective execution of the object and purpose of the treaty as a whole", article 41(1)(b)(i), and restated it understanding that there was no conflict between the ECT and EU law, which rendered unnecessary determine whether or not the Lisbon Treaty was incompatible with the effective execution of ECT (para 354).

4.2.1.7 EU law is more favourable to investors

Article 16 of the ECT stipulates that in cases where multiple international agreements on investment protection are applicable, the ECT does not derogate from provisions of the other agreement or any right to dispute resolution offered by it. Conversely, the other agreement should not nullify any provision of the ECT that is more advantageous to the investor or any right to dispute resolution under the Treaty.

In Renergy, Spain argued that Article 26 of the ECT did not establish an order of preference for dispute settlement mechanisms and so it did not establish that arbitration would be more favourable to the investor ("RENERGY S.à.r.l. v. Spain, ICSID Case No. ARB/14/18," 2022, para 273). However, the tribunal considered that "at least some of the provisions of Part III and Part V of the ECT are more favourable to investors and investments with respect to ECT intra-EU claims" (para 382). Moreover, it stated that "this potential collision of norms may have to be handled differently from the point of view of EU law, does not change this assessment" (para 382) and concluded that "If the Tribunal thus had to resolve a conflict of laws regarding its jurisdiction, Article 16 ECT would decide that conflict in favour of Article 26 ECT" (para 383).

In a similar vein, in Greentech, the tribunal stated that it was "not persuaded that the EU treaties offer EU investors a more favourable treatment with respect to either substantive protections or dispute resolution compared to the treatment accorded under ECT Parts III and V." Moreover, it agreed with the following claimants' statement: "Article 16 cannot be used to deny a benefit that the ECT affords to investors" ("Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," 2018, para 340).

4.2.1.8 The Achmea Judgement:

The Achmea judgement, a preliminary ruling of the Court of Justice of the European Union, was invoked in many cases by Italy and Spain. The next subsection provides a summary of the case, which is followed by a subsection that discuss its role in the cases studied.

4.2.1.8.1 Summary of the case

The Achmea judgement is a preliminary ruling of the Court of Justice of the European Union referred by the Federal Court of Justice of Germany about an arbitral case between Achmea, an enterprise from the Netherlands, and the Slovak Republic ("Slovak Republic v Achmea BV, CJUE Case C-284/16," 2018, para 1 and 2).

In 1991, the Netherlands and Czech and Slovak Federative Republic concluded a bilateral treaty agreement, which entered into force in 1992 (para 2 and 3). In 1993, the Slovak Republic succeeded the Czech and Slovak Federative Republic in the rights and obligations concerning this bilateral investment treaty (para 6). In 2004, the Slovak Republic acceded to the EU (para 6). Also in 2004, Slovak Republic opened its health system to operators from other EU member-states (para 7) but reversed the liberalisation in 2006 and 2007 (para 8).

Achmea, an enterprise from the Netherlands, initiated the case against Slovak in 2008, based on the 1991 bilateral investment treaty (para 9). According to the bilateral investment treaty, the tribunal should apply the UNCITRAL arbitration rules and "is itself to choose its seat and consequently the law applicable to the procedure governing judicial review of the validity of the award by which it puts an end to the dispute before it" (para 51). In this case, the tribunal elected to establish its seat in Germany (para 10).

The Slovak Republic objected to the jurisdiction of the tribunal, arguing that its accession to the EU rendered the recourse to an arbitral tribunal incompatible with EU law, but the tribunal dismissed this objection (para 11). Subsequently, the Slovak Republic brought an action to set aside the award before the Higher Regional Court of Frankfurt am Main, which dismissed the action (para 11). The Slovak Republic appealed to the Federal Court of Justice of Germany (para 12), which referred a series of questions to the Court of Justice of the European Union a preliminary ruling:

> '(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?
> If Question 1 is to be answered in the negative:
> (2) Does Article 267 TFEU preclude the application of such a provision?

If Questions 1 and 2 are to be answered in the negative:
(3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?'

The Court of Justice of the European Union recalled that an international agreement cannot affect the allocation of powers set by the EU treaties or the autonomy of the EU legal system (para 32). According to the tribunal, EU law was autonomous with regard to domestic legislation of member states and international law, due to the very nature of that law: "It stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and the Member States themselves" (para 33). According to the tribunal, to preserve the autonomy of EU law, the treaties established a judicial system "to ensure consistency and uniformity in the interpretation of EU law" (para 35).

To answer the questions referred to it, the Court of Justice of the European Union had to decide, first, whether the arbitral tribunal may be called on to interpret or apply EU law (para 39); second, whether the arbitral tribunal is situated within the judicial system of the EU (para 43); and, third, whether the arbitral award made by such tribunal is subject to review by a court of a Member State, "ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling." (para 50)

About the first step, the tribunal considered that the tribunal may be called to interpret or apply EU law because the bilateral investment treaty set as applicable law "the law in force of the contracting party concerned and other relevant agreements between the contracting parties" and the EU law may be regarded as both (para 40-42).

As the second step is concerned, the court found that the arbitral tribunal is not part of the judicial system of the Netherlands or Slovakia (para 45 and 46). Therefore, it cannot make a reference to the Court for a preliminary ruling (para 49).

Regarding the third step, the Court of Justice of the European Union recalled that the bilateral investment treaty states that the decision of the arbitral tribunal provided is final (para 51). The law applicable to the procedure governing judicial review of the validity of the award is the law of the place the arbitral tribunal chooses to seat (para 51). In the specific case, the tribunal chose to seat in Germany, whose law allows German courts to a limited review of the arbitral award, regarding "the validity of the arbitration agreement under the applicable law and the consistency with public policy of the recognition or enforcement of the arbitral award." (para 52 and 53).

The Court of Justice stressed that the bilateral investment treaty was concluded not by the EU but by member states and that its Article 8 could hamper the principle of mutual trust between Member States and the judicial system established by the Treaties, which ensure a cohesive interpretation by the preliminary ruling procedure (para 58).

Therefore, it concluded that: "In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law" (para 59) and that:

> "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept. (para 60)

Having answered Questions 1 and 2 of the referring tribunal, the Court of Justice of the European Union saw no need to answer Question 3 (para 61).

4.2.1.8.2 Achmea in the Renewable Energy Arbitration Cases

The Achmea case is first referred to in Novenergia II, as a pending case before the Court of Justice of the European Union, a prejudicial question regarding the compatibility between EU law and a bilateral investment treaty signed in 1991 by the Netherlands and Slovakia" ("Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain, SCC Case No. 2015/063," 2018, para 421).

In Masdar, Spain requested the reopening of the arbitral procedure based on the Achmea judgement, rendered on the same day of the request, 6 March 2018 ("Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1," 2018, para 669). However, the tribunal considered that "the Achmea Judgment has no bearing upon the present case" (para 678). According to the tribunal, the Achmea Judgement concerned a specific bilateral treaty and, more generally, other bilateral agreements concluded between member-states, which was not the case of ECT (para 679). As a result, it rejected Spain's request to reopen the arbitral procedure (para 683).

In Foresight, the tribunal agreed with the findings of Masdar ("Foresight Luxembourg Solar 1 S.à.r.l. and others v. Spain, SCC Case No. 2015/150," 2018, para 220). In Greentech, the tribunal concluded that the Achmea judgement did not have a preclusive effect to prevent its jurisdiction over the present dispute ("Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," 2018, para 395). The tribunal pointed, first, that the source of its jurisdiction is Article 26 of the ECT, not an intra-European BIT (para 396). Second,

it asserted that the reference to international law in the ECT Article 26(6) “cannot be stretched to include EU law, absent doing violence to the text”. “Principles of international law” referred to the article consist of public international law, not EU law (para 397). Third, it stated that the Court of Justice of the European Union in the Achmea case “was careful to confine its ruling to agreements 'concluded between Member States’” and highlighted that the ECT includes the EU as a signatory and 25 states which are not EU members (para 398).

4.2.1.9. Komstroy Judgement

Similar to Achmea judgement, Komstroy Judgement is a preliminary ruling of the Court of Justice of the European Union, invoked in many cases studied. First, it is summarised; then its role in the cases under examination is discussed.

4.2.1.9.1 Summary of the case

The facts that gave rise to the case were:

> 8. In performance of a series of contracts concluded in 1999, Adrenergic, a Ukrainian producer, sold electricity to Energoalians, a Ukrainian distributor, which resold that electricity to Derimen, a company registered in the British Virgin Islands, which in turn resold that electricity to Moldtranselectro, a Moldovan public undertaking with a view to exporting it to Moldova. The volumes of electricity to be supplied were agreed each month directly between Moldtranselectro and Ukrenergo. The same electricity was thus supplied by Ukrenergo to Moldtranselectro over the course of 1999 and 2000, with the exception of the months May to July 1999, in accordance with the ‘DAF Incoterms 1990 ’conditions, that is to say, to the border between Ukraine and the Republic of Moldova, on the Ukrainian side.
> 9. Derimen paid Energoalians the full amounts due for the electricity purchased, whilst Moldtranselectro only partially settled the amounts due to Derimen for that electricity.
> 10 On 30 May 2000, Derimen assigned to Energoalians the claim that it had against Moldtranselectro.
> 11 Moldtranselectro settled its debt to Energoalians in part, by assigning to it claims that it held. Energoalians attempted unsuccessfully to obtain payment of the remainder of that debt, a sum of 16 287 185.94 United States dollars (USD) (approximately EUR 13 735 000), by bringing proceedings before the Moldovan courts and subsequently the Ukrainian courts (“Republic of Moldova v Komstroy LLC, successor in law to the company Energoalians, CJEU Case C-741/19,” 2021, para 8-11).

Against this backdrop, Energoalians brought a case against the Republic of Moldova before an arbitral tribunal under the ECT, whose award was rendered on 25 October 2013 (para 12 and 13). The arbitral tribunal, seated in Paris, held that it had jurisdiction over the claims, found that the Republic of Moldova violated the provisions of ECT, and established an amount of money to be paid to Energoalians (para 13).

On 25 November 2013, the Republic of Moldova requested the annulment of the award before the Court of Appeal of Paris, invoking a violation of an obligatory public policy provision, specifically regarding the jurisdiction of the arbitral tribunal, as stipulated in Article 1520 of the French Code of Civil Procedure (para 14). The Court of Appeal annulled the arbitral award on 12 April 2016, on the ground that the arbitral tribunal had wrongly held jurisdiction. The case concerned the selling of electricity without any economic contribution made by the enterprise in Moldova. Such a claim could not be regarded as an 'investment' according to the ECT and, consequently, the arbitral tribunal lacked jurisdiction (Komstroy 15).

Komstroy, the successor in law to Energoalians since 6 para 2014, appealed to the Court of Cassation of Paris, which, on 28 March 2018, annulled the judgement of the Court of Appeal of 12 April 2016, on the ground that this court had added a condition to the definition of investment that does not exist in the ECT (para 16). Before the Court of Appeal, the Republic of Moldova argued that the arbitral tribunal should have declined jurisdiction because the sale of electricity did not qualify as investment in the meaning of the ECT and, even if that constitute an investment, it was not an investment of a company of a contracting party (as the company was registered in the British Virgin Islands) and that the sale of electricity was not made in the "area" of Moldova, but on the Ukrainian side of the border (para 17). The Court of Appeal of Paris decided to stay the proceedings and refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

> '[(1)] Must [Article 1(6) ECT] be interpreted as meaning that a claim which arose from a contract for the sale of electricity and which did not involve any economic contribution on the part of the investor in the host State can constitute an "investment" within the meaning of that article?
> [(2)] Must [Article 26(1) ECT] be interpreted as meaning that the acquisition, by an investor of a Contracting Party, of a claim established by an economic operator which is not from one of the States that are Contracting Parties to that treaty constitutes an investment?
> [(3)] Must [Article 26(1) ECT] be interpreted as meaning that a claim held by an investor, which arose from a contract for the sale of electricity supplied at the border of the host State, can constitute an investment made in the area of another Contracting Party, in the case where the investor does not carry out any economic activity in the territory of that latter Contracting Party?' (para 20)

The Council of the European Union, the Hungarian, Finnish and Swedish Governments and Komstroy considered that the Court of Justice of the European Union did not have jurisdiction over the questions referred by the Court of Appeal of Paris, because the EU law does not apply to the dispute as both parties to that dispute are external to the EU (para 21). The Court conceded that, in principle, it lacks jurisdiction to interpret an international agreement in the context of a dispute not covered by EU law, particularly in a dispute between an investor of a non-member State and another non-member State (para 28).

However, the Court pointed, first, that if a provision of an international law can apply both to situations falling within and outside the scope of EU law, it is in the interest of the

European Union that such a provision is interpreted uniformly (para 29). This is the situation in the case brought before it (para 30 and 31). Second, the court noted that the ad hoc tribunal based on the UNCITRAL rules seated in Paris (para 32), which implied the application of French law as the "lex fori" to the dispute (para 33). The establishment of the seat of arbitration on the territory of a Member State entails the application of the EU law and, if the national court submitted questions about the interpretation of the EU law to the Court of Justice of the European Union, it must deliver a ruling (para 34 and 35).

The court acknowledged that in the judgements Andersson and Wåkerås-Andersson (1999) and Salzmann (2003), it held that the mere fact that the question referred for a preliminary ruling originated from a court or tribunal of a Member State was insufficient justification for it to exercise jurisdiction to interpret the Agreement on the European Economic Area of 2 May 1992 (para 36). However, the Court stated that those judgements concerned situations in a period before the accession of the concerned countries to the European Union (para 37). As a result of this reasoning, the court found that it had jurisdiction to provide answers to the questions referred to (para 38).

About the first question, the Court stated:

> 39. By its first question, which must be considered having regard to the subject matter of the dispute in the main proceedings relating to the jurisdiction of the ad hoc arbitral tribunal which made the award referred to in paragraph 13 of the present judgment, the referring court asks, in essence, whether Article 1(6) and Article 26(1) ECT must be interpreted as meaning that the acquisition, by an undertaking of a contracting party to that treaty, of a claim arising from a contract for the supply of electricity, which is not associated with an investment, held by an undertaking of a third State to that treaty against a public undertaking of another Contracting Party to the same treaty, may constitute an 'investment', within the meaning of those provisions, even though that claim did not involve any economic contribution on the part of the acquirer in the area of the host Contracting Party.
> 40. In order to answer that question, it is necessary, first of all, as several Member States which have participated in the proceedings have observed, to specify which disputes between one Contracting Party and an investor of another Contracting Party concerning an investment made by the latter in the area of the former may be brought before an arbitral tribunal pursuant to Article 26 ECT.
> 41. In that regard, it must be stated that, although the fact that the dispute at issue in the main proceedings, based on Article 26(2)(c) ECT, is between an operator from one third State and another third State does not preclude, for the reasons stated in paragraphs 22 to 38 of the present judgment, the Court's jurisdiction to answer those questions, it cannot be inferred that that provision of the ECT also applies to a dispute between an operator from one Member State and another Member State. (para 39-41)

The Court restated many findings of the Achmea case: that an international agreement cannot affect the allocation of powers set by the EU treaties or the autonomy of the EU legal system (Achmea 32 apud Komstroy 41); that EU law is autonomous with regard to the domestic legislation of member states and international law (Achmea 33 apud Komstroy 42); the treaties have established a judicial system to ensure consistency and uniformity in the interpretation of EU law, ensuring its autonomy (Achmea 35 and 36 apud Komstroy 45); that the preliminary

ruling procedure provided for in Article 267 TFEU is a keystone of this system (Achmea 37 apud Komstroy 46).

The Court concluded that the arbitral tribunal does not constitute a component of the judicial system of a Member State (para 52). Without qualifying as a court 'of a Member State' within the meaning of Article 267 TFEU, an arbitral tribunal is not entitled to make a reference to the Court for a preliminary ruling (para 53). It still had to verify whether an arbitral award made by such a tribunal is subject to review by a court of a Member State that can submit a preliminary rule to the Court (para 54).

According to Article 26(8) of the ECT, arbitral awards are final (para 55). To "ad hoc" tribunals established under the UNCITRAL rules the "lex fori" applies "to the proceedings before the referring court, whose purpose was the judicial review of the arbitration award made by that tribunal." (para 56). However, the Court highlighted that "such judicial review can be carried out by the referring court only in so far as the domestic law of its Member State so permits" (para 57).

The Court stated the "preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves" (para 65). Therefore, "Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State" (para 66).

After this reasoning, the tribunal answered the first question of the referring court considering that "a mere supply contract is a commercial transaction which cannot, in itself, constitute an 'investment' within the meaning of Article 1(6) ECT" (para 79). Having answered the first question, there was no need to answer the other two questions (para 86). Last, it provided the operative paragraph:

> On those grounds, the Court (Grand Chamber) hereby rules:
>
> Article 1(6) and Article 26(1) of the Energy Charter Treaty, signed at Lisbon on 17 December 1994, approved on behalf of the European Communities by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997, must be interpreted as meaning that the acquisition, by an undertaking of a Contracting Party to that treaty, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State against a public undertaking of another Contracting Party to that treaty, does not constitute an 'investment 'within the meaning of those provisions.

4.2.1.9.2 Komstroy in the renewable energy arbitration cases

Renergy case

Spain invoked the Komstroy judgement in the Renergy case, only eight days after the sentence was rendered ("RENERGY S.à.r.l. v. Spain, ICSID Case No. ARB/14/18," 2022, para 115). In Renergy, the tribunal dismissed the argument that it should decline jurisdiction because EU law may be applied in the merits of the case or because its decision on the merits may affect matters of EU law within the exclusive jurisdiction of the Court of Justice of the European Union or the European Commission (para 342). It does not need to resort to the EU to determine its jurisdiction, which is determined by Article 26 of the ECT and Article 25 of the ICSID Convention (para 343). Moreover, it stated that, even if suspension or amendment was the effect of the Achmea and Komstroy Judgements, they would come too late, as the parties had consented to the request (para 348).

About the Achmea and Komstroy cases, the tribunal came to the following conclusion:

> 355 Given that, under the ECT, EU Member States undertake to accept the jurisdiction of an arbitral tribunal in the case of claims by individuals from other EU Member States, and given that that arbitral tribunal
> (i) is not a court in the sense of the EU Treaties,
> (ii) cannot request a preliminary ruling from the CJEU and
> (iii) its decisions are removed from review by national courts of the EU, the Tribunal found it appropriate to base its analysis on the assumption that the Achmea Judgment means that, from an EU-internal point of view, the arbitration clause of the ECT is incompatible with the "principle of sincere cooperation" embodied in Article 4(3) and, as a consequence, Articles 267 and 344 TFEU "preclude" the clause. In the TEU, Tribunal's view, the Komstroy Judgment, which appears to structure its argument exactly along these lines, confirms this interpretation.
> 356 In the Tribunal's view, the Achmea and Komstroy Judgments thus mean that from an internal EU law perspective, EU Member States should not have entered into the ECT in its current form and may even mean that EU Member States should try to amend their obligations thereunder (an interpretation of the necessary process that also finds an expression in the existence and content of the EU Member States Declarations). However, it is doubtful to this Tribunal whether, in such a scenario, the Achmea or Komstroy Judgment, from an internal EU law perspective, could mean that the obligations of EU Member States under the ECT are void, invalidated, or could not have been validly entered into, as the Respondent seems to argue. It is furthermore uncertain whether the CJEU assumes that its judgments do have, or could have, such an effect.
> 357 Therefore, it is not apparent whether EU law, as interpreted by the Achmea and Komstroy Judgments, from an EU-internal point of view, has the legal consequences for an ECT Tribunal that the Respondent attributes to it (para 355-357).

The tribunal found no points of contact with EU law through which the EU-internal reading of the law and the ECT could become relevant to this ECT Tribunal decision on its jurisdiction (para 358 and 359). Moreover, it stated that "The ECT […] is […] unaffected by judgements and evolving legal interpretations in another legal order such as the EU, as well as in national legal orders, no matter how forcefully those orders argue their applicability" (para 359).

Sevilla

In the Sevilla case, after a citation of the questions posed by the Paris Court of Appeal to the Court of Justice of the European Union, the tribunal stated:

> 666. The Tribunal observes that none of these questions concerned the alleged incompatibility of intra-EU investor-State dispute settlement clauses with the TFEU. The Tribunal further notes that neither of the parties to the Komstroy v. Moldova arbitration is an EU Member State or a national of an EU Member State. Despite these circumstances and in addition to answering the questions posed to it by the Paris Court of Appeal, the CJEU found that "Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State". This conclusion however was not set out in the operative paragraph of the Komstroy Judgment, which only addressed the questions referred to the CJEU for a preliminary ruling: […]
> 667. Therefore, the CJEU's finding regarding the incompatibility between Article 26(2)(c) of the ECT and EU law can only be considered as an "obiter dictum" ("Sevilla Beheer B.V. and others v. Kingdom of Spain, ICSID Case No. ARB/16/27. Decision on Jurisdiction, Liability and Principles of Quantum," 2022, para 666-667).

The tribunal recalled that the principle of "compétence de la compétence" entitles it to provide its interpretation of the jurisdictional requirements of the ECT and does not have to follow the Court of Justice of the European Union in this respect (para 668). Moreover, it stated that the Komstroy judgement does not provide an analysis of the provisions of the ECT from the perspective of international law, only from the perspective of the EU law (para 669). As a result, the tribunal upheld its stance concerning the applicability of Article 26 of the ECT within an intra-EU context, notwithstanding the findings presented in the Komstroy Judgement (para 676).

4.2.1.10 Enforceability of the award

In the Sevilla case, Spain argued that any judgement issued by the tribunal might be considered State aid under EU law and, as such, would not be enforced by EU Member States' national courts on grounds of public policy. The tribunal rejected the argument, stating that issues related to enforceability are not pertinent to addressing the intra-EU objection ("Sevilla Beheer B.V. and others v. Kingdom of Spain, ICSID Case No. ARB/16/27. Decision on Jurisdiction, Liability and Principles of Quantum," 2022, para 677).

In Belenergia, Italy argued that, after the Achmea judgement, there was a risk of non-recognition and non-enforcement of the award despite the obligation of tribunals under arbitration rules such as the ICC Arbitration Rules and the LCIA Arbitration Rules to render enforceable awards. The tribunal considered that Italy's concerns were unfounded and rejected the jurisdictional objection because the arbitration was based on the ICSID Convention, a self-

contained system, independent from national legal systems and subject to limited annulment grounds that established unconditional recognition, with only enforcement of pecuniary obligations being subject to the law of the place of enforcement ("Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40," 2019, para 338).

4.2.1.11 Green Power

Considering all the cases studied in this dissertation, Green Power was the single one in which the tribunal declined its jurisdiction due to the intra-EU objection. As seen in the previous sections, this objection was raised in all cases whose claimants were investors from other EU countries. Through time, some arguments were added to the objection, notably the judgements of Achmea and Komstroy. However, in all cases except Green Power, the tribunal rejected this objection and asserted its jurisdiction. This is true regardless of the instance of the arbitral tribunal: ICSID, SCC or ad hoc tribunal under the UNCITRAL rules. It has a significant potential to affect future decisions on jurisdiction by arbitral tribunals as well as to affect the enforcement of awards already made in cases whose respondent state and the investor are from the EU.

The award, issued on 16 June 2022, rejected the jurisdictional objection *ratione personae* in which Spain argued that there was no dispute between "a Contracting party" and "an investor of another Contracting Party", as both Spain and Denmark were part of the EU, which as a Regional Economic Integration Organization ("REIO") was part of the ECT ("Green Power K/S and Obton A/S v. Spain, SCC Case No. 2016/135," 2022, para 185-186).
However, the tribunal accepted the jurisdictional objection *ratione voluntatis*.

The tribunal stated that the claimants could have opted for an ICSID arbitration, but they chose instead to conduct the proceedings under the SCC, with a seat in Stockholm and the application of Swedish arbitration law as the *lex arbitri*, in the absence of any contrary agreement between the parties (para 162- 165). The *lex arbitri* is relevant to the arbitral proceedings *strictu sensu,* to annulment and set aside proceedings, and to law applicable to jurisdictional matters (para 164). As EU law is an integral part of the legal systems of all member states, as confirmed by the Achmea and Komstroy cases, it is also applies when determining the tribunal's (para 166 and 172).

The tribunal made some preliminary considerations. It stated that the resolution of this objection "must overcome the binary logic of an either 'insider' or 'outsider' perspective with respect to EU law and focus on the situation as it appears to the Tribunal" (para 332) and that

"The analysis must be conducted at a finer-grained level whereby certain questions are governed by the combined operation of certain specific norms, whether from international or domestic law" (para 332-333).

After the preliminary considerations, it analysed the ECT. It stated that Article 26 of the ECT had to be interpreted following the rules of treaty interpretation of Article 31 of the VCLT (para 337). The tribunal examined the ordinary meaning of the terms of Article 26 of the ECT but stated that considering only the ordinary meaning would "ignore the complexities of this case" (para 339-343).

It analysed the context, considering the text of the treaty and instruments made in connection with the conclusion of the treaty. Notably, it examined Declaration 5, which was included in the Final Act of the European Energy Charter Conference in connection with Article 25 ECT, by the European Communities and its Member States. This declaration asserts that the purpose of Article 25 ECT, as understood by the EU and its Member States, was 'to safeguard the preferential treatment resulting from the wider process of economic integration resulting from the Treaties establishing the European Communities' (para 350-363).

The Tribunal understood the internal electricity market as part of a wider process of economic integration, which also included "State aid, the freedoms of movement envisioned in the EU Treaties, and the need for autonomy and the primacy of EU law" (para 358). Moreover, the tribunal observed that:

> 350. […] the sixth paragraph of this Statement specifically notes: 'Given that the Communities' legal system provides for means of such action [claims brought by an investor], the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation'. This is a clear and unequivocal indication that the EU saw the EU legal system as the natural means of dispute settlement of investor claims, and therefore withheld its unconditional consent to arbitration. […]
> 360. […] the fifth paragraph of the Statement recalls, in an unqualified manner, that '[t]he Court of Justice of the European Communities, as the judicial institution of the Communities, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the Communities, which under certain conditions may be invoked before the Court of Justice. 'This portion of the Statement, which was issued specifically in connection with the possibility of investor-State arbitration, leaves no doubt as to the understanding, since the conclusion of the ECT, that the CJEU remains competent to 'examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder'. The Tribunal understands this sentence as expressing, at the time of ratification of the ECT, a similar position as the one taken by the CJEU in its Achmea Judgment and its Komstroy Judgment with respect to Articles 267 and 344 TFEU. Both decisions are examined later in this Award (infra paragraphs 416-445). (para 350-363)

Next, the tribunal examined subsequent agreements and subsequent practices. More specifically, it analysed three declarations: (i) the Declaration of the EU Commission on behalf of the EU, 20 May 2015, made at the time of signing the International Energy Charter; (ii) the

Declaration of the Representatives of the Governments of Member States of 15 January 2019 on the legal consequences of the Judgement of the Court of Justice in Achmea and on investment protection in the European Union (made by representatives of Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, and the United Kingdom; and (iii) the Declaration of the Representatives of the Governments of the Member States, of 16 January 2019 on the enforcement of the judgement of the Court of Justice in Achmea and on investment protection on the European Union (made by representatives of Finland, Luxembourg, Malta, Slovenia, Sweden) (para 365).

According to the tribunal, the first declaration emphasised that intra-EU investment disputes were subject to a special regime of dispute settlement (para 368). The second declaration could be considered a subsequent agreement or a subsequent practice, but only for a subset of the ECT parties, which included Spain, the respondent state, and Denmark, the country of the investor, but not Sweden, the country of the "lex fori". The tribunal considered it as an authentic interpretation that "the reasoning of the Achmea Judgement is fully applicable to the ECT" (para 370-372). The tribunal considered that the third declaration did not provide "clear interpretive guidance" (para 387).

The next step for the tribunal was systemic integration: following Article 31(3)(c) of the VCLT, which states that the interoperation would take into account "any relevant rules of international law applicable in the relations between the parties" (para 388) The tribunal concluded that EU law can be considered "relevant" law in the sense of the mentioned article, which "considers the relevant rules applicable between the parties as a vector of interpretation of a treaty, not of its modification" (para 393-394).

However, the tribunal considered "inconclusive" its examination of systemic interpretation (para 398). The tribunal interpreted Article 26 of the ECT in light of the ECT's object and purpose but also found it inconclusive (para 399-405). The tribunal analysed the preparatory work and circumstances of conclusion, highlighting that these are supplementary means of interpretation, and concluded that it was "of limited use" (para 406-411). Regarding its analysis of the ECT more generally, the tribunal concluded that "interpreting Article 26 ECT without resorting to EU law is inconclusive in the circumstances of this case" (para 412).

The tribunal then continued its analysis by applying the relevant norms of EU law, including an assessment of the relevance of the Achmea Judgement and the Komstroy Judgement. The tribunal highlighted that ICSID cases such as Infracapital v. Spain, Sevilla Behera v. Spain, Masdar v. Spain, and Vattenfall v. Germany have a different reasoning than

the present case, due to the relevance for jurisdictional matters of the applicable law that follows the selection of the seat in an EU Member State (para 439). It stated that the Court of Justice of the European Union judgements are interpretations of the law, and rejected the Infracapital tribunal's conclusion that it would be incorrect to decline jurisdiction over the case based on the Komstroy Judgement, which was issued several years after the arbitral case was initiated (para 440).

Moreover, it concluded that the Achmea Judgement leads to a "clear answer" to the question of jurisdictional objection *ratione voluntatis*, which was further confirmed in the Komstroy Judgement: "Spain's offer to arbitrate under the ECT is not applicable in intra-EU relations and hence there is no offer of arbitration that the Claimants could accept" (para 445).

The tribunal highlighted the following Articles of the Treaty on the Functioning of the European Union (TFEU) 107, 108(2), 267 and 344 as relevant provisions of EU law, to "be applied - either as part of international law or as part of the law applicable to the arbitration agreement pursuant to the Swedish *lex arbitri* - to assess the validity of the Respondent's unilateral offer to arbitrate intra-EU investment disputes under Article 26 ECT" (para 447).

Article 107 prohibits state aid that distorts or threatens to distort competition within the internal market, "in so far as it affects trade between Member States" (EUROPEAN UNION, 2007, Article 107(1)). However, certain exceptions are permitted, such as aid having a social character (Article 107(2)(a) or to compensate for damage caused by natural disasters or exceptional events (Article 107(2)(b)). It also provides some exceptions that may be considered compatible with the internal market such as aid to promote the development of certain economic activities or certain economic areas (Article 107(3)(c)) and aid to promote culture and heritage conservation (Article 107(3(d)). The European Commission's assessment of state aid is governed by Article 108(2).

Article 267 establishes that the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties as well as the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Article 344 forbids Member States from submitting a dispute concerning the interpretation or application of the treaties to any method different from what was established by the treaties.

Concerning state aid, the tribunal noted that the Court of Justice of the European Union and the European Commission had considered that Spain's support scheme for renewable energy to fell under the EU regime governing State aid ("Green Power K/S and Obton A/S v. Spain, SCC Case No. 2016/135," 2022, para 448) . More specifically, the tribunal cited that, in Decision SA.40348 2014/N of 10 November 2017, the European Commission stated:

'The Commission recalls that any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme [i.e. the Special Regime, being RD 661/2007 and RD 1578/2008] by the notified scheme would constitute in and of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, such as in Eiser v. Spain, or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation.'517 (emphasis added by the Green Power tribunal) (para 450).

Moreover, the tribunal rejected the claimant's argument that Spain was estopped from invoking the State aid defence, considering that "it overlooks the nature of State aid determinations as a matter of public policy under EU law, which is also recognised by the ECT" (para 455). The tribunal concluded that:

Moreover, even if the Tribunal were to consider that matters of State aid are not essential for the present case or cannot be legitimately raised, it would still lack jurisdiction as a result of the autonomy and primacy of the EU legal order and Spain is precluded under Articles 267 and 344 TFEU to offer to submit to arbitration a dispute with investors from another EU Member State, such as the Claimants. (para 456).

It also stated that the primacy of EU law in the relations between EU Member States, was not a concern of "lex specialis" or of "lex posteriori", but one of lex superior, consistent with the long-term interpretation of the Court of Justice of the European Union, restated in the Komstroy Judgement (para 469).

As a result, the tribunal concluded

477. It is therefore the unanimous view of the Tribunal that the same considerations apply to the offer to arbitrate by Spain under Article 26 ECT. Seated in an EU Member State, it likewise cannot apply the consent to arbitrate by the Respondent and affirm its jurisdiction. Following the reasoning of the CJEU Grand Chamber in the Achmea Judgment and subsequently confirmed in the Komstroy Judgment, this Tribunal considers that the offer of the Respondent, as an EU Member State, to arbitrate under Article 26 ECT a dispute with investors of another EU Member State which would, of necessity, require this Tribunal to interpret and apply the EU Treaties, is precluded. Therefore, there is no unilateral offer by the Respondent which the Claimants could accept.
(c) Conclusion on the jurisdictional objection *ratione voluntatis*
478. Based on the foregoing reasons, the jurisdictional objection *ratione voluntatis* raised by the Respondent is sustained, and the Tribunal does not have jurisdiction to hear the claims brought by the Claimants (para 477-478).

4.2.2 Other jurisdictional objections in cases against Italy

This section examines other jurisdictional objections raised in cases against Italy.

4.2.2.1 Taxation measures (Article 21) in cases against Italy

Several cases brought against Italy have challenged the legality of certain measures, including the Robin Hood tax, the reclassification of PV facilities as immovable property,

administrative fees, and imbalance costs. Italy has argued that these measures fall under the category of taxation measures, which were, according to Article 21 of the ECT exempt from the ISDS mechanism provided by the treaty.

The interpretation of the Robin Hood tax and the reclassification of PV facilities as immovable property has been consistent. In their respective cases, Greentech, CEF Energia, SunReserve, and ESPF all included these measures, and the tribunal consistently ruled that these were taxation measures falling outside its jurisdiction.

4.2.2.1.1 Administrative fee

The interpretation regarding administrative fees has not been consistent. Italy questioned the jurisdiction of the tribunal regarding administrative fees in Greentech, CEF Energia, SunReserve, ESPF, and Silver Ridge. In all cases but CEF Energia, the tribunal concluded that the administrative fee, created by Conto Energia V, was not a tribute under Article 21 of the ECT.

In the CEF Energia case, the tribunal agreed with the respondent's argument that the definition in Article 21(7) of the ECT was very wide, including "any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein" ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 196). The tribunal also agreed with the definition of tax measure by the Italian Constitutional Court, notably: "1) dutifulness of the withdrawal, 2) absence of exact reciprocity between the parties, and 3) connection of the withdrawal to the public spending by linking this to an economically significant prerequisite" (para 198).

The tribunal considered the administrative fees imposed on all photovoltaic operators for a given service rendered by a public body a taxation measure. The fact that they were directed towards photovoltaic operators and not the public at large did not detract them from their tax nature. This understanding was corroborated by the Italian jurisprudence that considered tax garbage taxes: fees for service rendered, charged on homeowners or tenants, irrespective of the utilisation of the service (para 199). Being partly captured by Article 21, they were outside the tribunal's jurisdiction (para 200). Although the award of the CEF Energia case was rendered after the Greentech case, respectively dispatched on 16 January 2019 and 23 December 2018, no reference was made to the previous award because at that time the procedures were already closed (para 48).

In Greentech, the tribunal considered that the fee was not a tax ("Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," 2018, para 243). It pointed out that (1) as the administrative fee was established to cover the cost of managing the incentive system, there was a degree of reciprocity; (2) the respondent did not deny that value-added taxes were charged on the administrative fee; and (3) the administrative fee was not collected for the general revenue of Italy (para 244).

In SunReserve, the tribunal considered the following criteria to qualify a measure as a tax measure: (1) the payment must be mandatory; (2) the payment cannot be made in exchange for any specific benefit, service or activity provided by public institutions i.e. the relationship cannot be of reciprocity; and (3) the payment is made as a contribution to public spending ("Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016," 2020, para 520). The administrative fee satisfied the first criterion but failed to satisfy the second criterion (para 526-533). The tribunal mentioned two other indicators that the administrative fee was not a tax: it was excluded from the jurisdiction of Italian tax courts and there was value added tax charged on it. Moreover, the tribunal mentioned the findings in Greenwich (para 535). As the administrative fee failed in the second criterion, the tribunal did not have to examine the third criterion (para 537).

In ESPF, the tribunal dismissed the claim that administrative fee was a taxation measure. It pointed out that it was not imposed to raise general revenue for the state; tax authorities were not involved in collecting it; it was subject to corporate income tax; and it was not subject to double-taxation treaties under Italian law ("ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5," 2020, para 357). No reference was made to the previous case.

In the Silver Ridge case, both parties agreed that taxes must (1) be laid down in a law or other binding State regulation, (2) there cannot be reciprocity between the payment and service offered by the State, and (3) the payment contributes to the general public spending. ("Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37)," 2021, para 304). They recognised that there was "no strict reciprocal or synallagmatic relationship between the payments made to the GSE [State-owned energy service system operator] and the services offered by it" and that the administrative fee did not cover the management costs of the system (para 307). However, citing Greentech v. Italy, the tribunal considered that there was a sufficient degree of reciprocity to not qualify the payments in question as taxes (para 307).

Moreover, the tribunal in Silver Ridge stated that "the CEF Energia v. Italy tribunal nonetheless concluded that these fees were taxes, without however explaining how this result

is compatible with accepting the existence of a robust element of reciprocity between the payments made and the services received" (para 309). Moreover, it mentioned that "ESPF Beteiligungs GmbH et al. v. Italy tribunal has recently adopted the same view as CEF Energia v. Italy" (para 309), however, the tribunal in this case considered that the administrative fee was not a taxation measure, contrary to the conclusions of CEF Energia.

Therefore, where administrative fees are concerned, there has been a lack of consistency, with different tribunals reaching different conclusions regarding the qualification of the administrative fee as a taxation measure under Article 21 of the ECT.

4.2.2.1.2 Imbalance costs

Italy questioned the jurisdiction of the tribunal regarding the payment of imbalance costs in Greentech, CEF Energia, Belenergia, SunReserve, and ESPF cases. Contrary to the administrative fee, this issue arose in Belenergia, but not in Silver Ridge. In all other cases mentioned in this paragraph, both issues arose. The interpretation regarding the payment of imbalance cost, as the interpretation regarding administrative fee, was not consistent. In CEF Energia and Beleneria cases, the tribunals concluded that it qualified as a taxation measure under Article 21 of the ECT, remaining outside the tribunals' jurisdictions. In Greentech, SunReserve and ESPF cases, the tribunals considered that it did not qualify as a taxation measure, and they had jurisdiction to decide the claim raised by the claimants.

In CEF Energia, the tribunal applied *mutatis mutandis* the analysis that it made of the administrative fee to the payment of imbalance costs, including the acceptance of the definition of tax provided by the Italian Constitutional Court. Therefore, it concluded that it was a taxation measure under Article 21 of the ECT and remained outside the jurisdiction of the tribunal ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 202).

In the Belenergia case, the tribunal considered that, as Article 21(7)(a)(i) says that "[the term taxation measures 'includes'] any provision relating to taxes of the domestic law of the Contracting Party," the provision is not exhaustive and should not be interpreted in a restrictively way ("Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40," 2019, para 373). The tribunal considered that this payment was established by law, as required by the Italian Constitution for taxes and satisfied the criteria of the Italian Constitutional Court for a taxation measure: (1) was mandatory, (2) non-reciprocal, and (3) linked to public spending (para 374-375). Moreover, the tribunal rejected the claimant's argument that it was not a bona fide taxation measure (para 376), citing Isolux v. Spain, in which the tribunal stated that it is

not easy to rebut the presumption that taxation measures are bona fide (para 377). As a taxation measure, the tribunal lacked jurisdiction over this claim (para 379).

In other cases, the tribunals did not consider the payment of imbalance costs as a taxation measure. In Greentech, the tribunal noted that the payment of imbalance costs related to electricity dispatching services, a specific service; was not allocated to the State's general revenue; it was subject to value-added tax and corporate income tax and Italy did not treat it as a tax ("Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," 2018, para 252). Therefore, despite its mandatory nature similar to municipal waste services fee, it did not constitute a Taxation Measure under Article 21 of the ECT (para 252).

In SunReserve, the tribunal considered the same three criteria it used in the analysis of the administrative fee: (1) the payment must be mandatory; (2) no reciprocity; and (3) the contribution to public spending ("Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016," 2020, para 520). As the administrative fee, the payment of the imbalance cost satisfied the first criteria but failed to satisfy the second criteria (para 540-542). The tribunal referred to the findings of the Greentech case to support its conclusion (para 542). As in the administrative fee claimed, the failure in the second criterion eliminated the need to examine the third criterion (para 544).

In ESPF, the tribunal dismissed the claim of administrative fee along with the imbalance costs in the same paragraph, considering that they were not taxation measures to increase the general revenue of the state; tax authorities were not involved in collecting them; they were subject to corporate income tax; and they were not subject to double-taxation treaties under Italian law ("ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5," 2020, para 357).

Therefore, the interpretation regarding the payment of imbalance cost lacks consistency. In two cases, the tribunals considered it a taxation measure but, in three other cases, the tribunals had a different interpretation. The following table summarises the information about jurisdictional claims regarding taxation measures.

Table 15 – Tax Objections Against Italy

Jurisdiction	Robin Hood tax	The reclassification of PV facilities as immovable property	Administrative fee	The payment of imbalance costs
Blusun				
Greentech	It constitutes a taxation measure under ECT Article 21 and falls outside the scope of the Tribunal's jurisdiction (para 175).	It constitutes a taxation measure under ECT Article 21 and falls outside the scope of the Tribunal's jurisdiction (para 175).	It does not constitute a Taxation Measure under ECT Article 21, and the tribunal has jurisdiction to decide the claim asserted by Claimants (para 243-244).	It does not constitute a Taxation Measure under ECT Article 21, and the tribunal has jurisdiction to decide the claim asserted by Claimants (para 251-252).
CEF	It constitutes a taxation measure under ECT Article 21 and falls outside the scope of the Tribunal's jurisdiction (para 52).	It constitutes a taxation measure under ECT Article 21 and falls outside the scope of the Tribunal's jurisdiction (para 52)	It constitutes a taxation measure under ECT Article 21 and falls outside the scope of the Tribunal's jurisdiction (para 52)	It constitutes a taxation measure under ECT Article 21 and falls outside the scope of the Tribunal's jurisdiction (para 52)
Belenergia				It constitutes a taxation measure under ECT Article 21 and falls outside the scope of the Tribunal's jurisdiction (379)
SunReserve	It constitutes a taxation measure under ECT Article 21 and falls outside the scope of the Tribunal's jurisdiction (para 562).	It constitutes a taxation measure under ECT Article 21 and falls outside the scope of the Tribunal's jurisdiction (para 562).	It does not constitute a Taxation Measure under ECT Article 21, and the tribunal has jurisdiction to decide the claim asserted by Claimants (para 562)	It does not constitute a Taxation Measure under ECT Article 21, and the tribunal has jurisdiction to decide the claim asserted by Claimants (para 562)
Eskosol				
ESPF	It constitutes a taxation measure under ECT Article 21 and falls outside the scope of the Tribunal's jurisdiction (para 355)	It constitutes a taxation measure under ECT Article 21 and falls outside the scope of the Tribunal's jurisdiction (para 356)	It does not constitute a Taxation Measure under ECT Article 21, and the tribunal has jurisdiction to decide the claim asserted by Claimants (para 357)	It does not constitute a Taxation Measure under ECT Article 21, and the tribunal has jurisdiction to decide the claim asserted by Claimants (para 357)
Silver Ridge			It does not constitute a Taxation Measure under ECT Article 21, and the tribunal has jurisdiction to decide the claim asserted by Claimants (para 304-309)	

Jurisdiction	Robin Hood tax	The reclassification of PV facilities as immovable property	Administrative fee	The payment of imbalance costs
Source: Generated by the author; data compiled from the cases, summarized in this section. The paragraphs of the decisions, from which the information was extracted, are indicated in parentheses.				

4.2.2.2 Further objections

Besides the intra-EU jurisdictional objection and taxation measures, Italy advanced other claims against the jurisdiction of the tribunals, notably: that the arguable investment was not an investment according to the definition of the ECT; the lack of foreign control; failure to try an amicable settlement; non-compliance with the fork-in-the-road provision; and Calvo clause.

Not a protected investment

In Blusun, Italy argued that the claimants' project had a speculative character and did not qualify in the investment definition provided by the ECT. The tribunal stated that the ECT had a "broad definition of 'investment'" ("Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3," 2016, para 263). Italy failed to demonstrate the illegality of the project and the tribunal concluded that, even if the project may have been initially speculative, it ceased to be due to substantive investment in the sub-stations and the rings (para 268-269).

Lack of foreign control

In Eskosol, Italy contested the jurisdiction of the tribunal over the case due to the lack of foreign control of the investment ("Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50," 2020, para 238). On the date of the state measures that were alleged to have violated ECT obligations, Eskosol was controlled by Blusun, a Belgian company. However, when Eskosol registered the claim, it was in liquidation proceedings supervised by an Italian court, and the receiver appointed by the local court was an Italian national (para 224). The tribunal considered that the bankruptcy receiver did not exercise such authority on his behalf but on behalf of the shareholders (para 234) and denied this Italian claim (para 238).

Failure to try an amicable settlement

In some cases, Italy requested the exclusion of jurisdiction of some of the issues brought before the tribunals, arguing that they were not part of the amicable settlement attempt made by the investor before bringing the case to the ISDS.

In Greentech, Italy asked for the exclusion of reimbursement of inflation-adjusted amounts of tariff incentives received under Conto I; technical rules regarding modifications to

PV plants, including an obligation to notify the distributor of certain modifications; Italian Constitutional Court Decision No. 10 of 11 February 2015 declaring the Robin Hood tax unconstitutional, with application *ex nunc*; and the reduction of portions of PV plants deemed immovable (“Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095,” 2018, para 208). However, the tribunal concluded that the claimants’ letters were sufficiently broad to request an amicable settlement of the present dispute under Article 26(1)-(2) of the ECT. It considered that the measures Italy asked to exclude were related to the same subject matter as other measures referred to in the letters. Moreover, it stated that this understanding was consistent with decisions by other tribunals, “flatly rejecting a formalistic approach toward the notice of dispute, which need not be exhaustive” (para 213). In Silver Ridge, the tribunal mentioned this finding in Greentech and dismissed the Italian claim (“Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37),” 2021, para 275 and 283).

In CEF, Italy objected to the jurisdiction of the tribunal in some measures due to the lack of an attempt at amicable settlement, but this claim was dismissed (“CEF Energia BV v. Italian Republic, SCC Case No. 158/2015,” 2019, para 52).

In Belenergia, Italy questioned the jurisdiction over imbalance costs as they were not present in the first letter of an amicable solution, failing to attend the waiting period to be brought to the tribunal (“Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40,” 2019, para 360). The tribunal dismissed the claim (para 368). Although the resolution regarding imbalance costs post-dated the first letter of amicable solution, the tribunal considered that a reference in the letter to imbalance cost was sufficient to satisfy the time requirement (para 363-364).

In SunReserve and ESPF, Italy asked for the exclusion of the Robin Hood tax and the reclassification of PV facilities as immovable property because they had not satisfied the requisites of an amicable settlement. As the tribunals qualified both acts as taxation measures, outside its jurisdiction, it considered that it was no longer necessary to assess this Italian claim (“ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5,” 2020, para 379 and 388; “Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016,” 2020, para 583).

Fork-in-the-road

In Greentech, Italy argued that the conditions for “unconditional consent to the submission of a dispute to international arbitration” under Article 26(3)(a) were not fulfilled because the claimants had “previously submitted the dispute” (Art. 26(3)(b)(i)) “to the courts

or administrative tribunals of the Contracting Party to the dispute" (Art. 26(2)(a)) ("Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," 2018, para 195-196). Italy argued that the conditions of the "triple-identity test" (which consists of the identity of parties, cause of action, and object of the dispute), were met, "since the domestic cases were instituted by Claimants' subsidiaries, the 'measures at stake are exactly the same as in these proceedings', and the grounds include alleged violations of ECT Article 10" (para 197). However, the tribunal considered that Italy failed to show that the claimants had previously submitted the present dispute to Italian courts or administrative tribunals and dismissed the jurisdiction objection (para 205).

In Belenergia, the fork-in-the-road clause was intermingled with the Calvo clause: "Italy submits that the Tribunal lacks jurisdiction because the broad terms of the choice of forum clause conferring exclusive jurisdiction upon Rome courts under the GSE [State-owned energy service system operator] Conventions would trigger the fork-in-the-road rule under Articles 26(2) and 26(3) ECT." The tribunal considered that the fork-in-the-road provision is triggered by "the mere existence of a forum selection clause in a contract" as this provision regards a "previously submitted" dispute or the "resubmission" of the same dispute to ISDS (para 341).

Calvo clause

The contract between the Italian energy distributor and energy producers contained an exclusivity of forum clause, designating the Courts of Rome as the sole venue for dispute resolution[15]. While neither the agreement itself, the parties involved, nor the tribunals explicitly labelled this provision a "Calvo clause", this study will operate from the standpoint that it, in essence, operated as one. The Calvo clause, most commonly employed by Latin American countries against North American and European investors, originally mandated the exclusive use of domestic remedies for foreign investors, thereby hindering diplomatic protection. The exclusivity of forum clause in the contract between the Italian distributor and energy producers, beyond excluding diplomatic protection aimed to safeguard against ISDS as well. Since the Calvo clause essentially restricted dispute resolution to local remedies, avoiding international dispute settlement mechanisms, this study considers it appropriate to characterise it as a Calvo

[15] The contracts contained the following clause: "For any dispute arising out of or in relation to the interpretation and implementation of this Agreement and the documents referred to herein, the Parties agree to the exclusive jurisdiction of the Courts of Rome" ("Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37)," 2021, para 254).

clause. Furthermore, it is desirable to classify in such a manner, given that Latin Americans' contributions to international law often go unrecognised.

Italy contested the jurisdiction of the tribunals based on the Calvo clause in Greentech ("Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," 2018, para 172), CEF ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 52), Belenergia ("Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40," 2019, para 359), SunReserve ("Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016," 2020, para 283), ESPF ("ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5," 2020, para 359 and 377), and Silver Bridge ("Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37)," 2021, para 239). According to Italy, the provision of exclusive jurisdiction rendered the requirement for unconditional consent under Article 26 of the ECT not satisfied (para 252). Article 26(3)(b) specifies that contracting parties do not give unconditional consent if "the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)". Article 26(2) provides that "the Investor party to the dispute may choose to submit it for resolution: […] (b) in accordance with any applicable, previously agreed dispute settlement procedure […]".

The tribunal in Silver Ridge, consistent with other tribunals, agreed that the Calvo clause in contracts could potentially qualify as a "previously agreed dispute settlement procedure" within the meaning of Article 26(2)(b) of the ECT (para 255). However, the tribunal upheld the claimant's argument that, according to chapeau of Article 26(2), the investor ultimately retains the right to decide the dispute settlement mechanism (para 256). The tribunal added that it would be doubtful whether, if a case was brought by the claimant to the competent domestic courts, it would be the same case. The domestic court probably would assess the compliance of contractual clauses, while arbitral tribunals would assess violations of the ECT (para 263). Therefore, the tribunal dismissed the jurisdictional objection (para 264).

The same outcome occurred in all other cases in which this objection was raised: Greentech ("Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," 2018, para 172), CEF ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 52), Belenergia ("Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40," 2019, para 359), Sun Reserve ("Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016," 2020, para 577), and ESPF ("ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5," 2020, para 377).

Conclusion about other claims regarding jurisdiction in cases against Italy

Italy's jurisdictional objections regarding the speculative character of the investment, the lack of foreign control, failure to try an amicable settlement, the fork-in-the-road clause, and the Calvo clause were all rejected by the tribunals. The only jurisdictional objection that was accepted was regarding taxation measures, albeit with some differences among the cases.

4.2.3 Other Jurisdictional Objections in Cases Against Spain

This subsection evaluates jurisdictional challenges raised by Spain, aside from the intra-EU objection.

4.2.3.1 Objections accepted

Taxation measures

In Isolux, Spain objected to the tribunal's jurisdiction over Law 15/2012. While there was no dispute that Law 15/2012 was regarded as a taxation measure ("Isolux Infrastructure Netherlands B.V. v. Spain, SCC Case V (2013/153)," 2016, para 722), the claimant argued that it was not a *bona fide* tax because due to a stark contradiction between its stated purpose and its effects (para 735). The preamble of the law stated that its objective was "Armonizar nuestro sistema fiscal con un uso más eficiente y respetuoso con el medio ambiente y la sostenibilidad" ("harmonising our fiscal system with a more efficient and environmentally friendly use, and with sustainability", own transaltion) but according to the claimant, none of its provisions actually pursued this objective (para 736). The tax increase was applied to all sources of energy, without differentiation between fossil and renewable origins and according to the claimants, its actual aim was to reduce the tariff deficit (para 737-738).

The tribunal stated that it is not easy to disprove the presumption that a tax measure is *bona fide* (para 739). Even if the measure's actual intent was to raise state revenue, which aligns with the purpose of any tax, it could not be classified as a bad faith measure (para 740). As a result, the tribunal declined jurisdiction over the dispute regarding the tax introduced by Law 15/2012 (para 741).

In Eiser, in a very similar claim, the claimant added that Spain imposed the taxation measures in bad faith because "Spain presumably knew that it could not legally reduce the subsidies it promised in RD 661/2007" ("Eiser Infrastructure Limited and Energia Solar

Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36," 2017, para 267). This new argument did not change the reasoning, and, as in Isolux, the tribunal dismissed the claim (para 272).

Entities organised under the laws of Spain have no standing to bring ECT claims under the UNCITRAL Rules

In The PV Investor, Spain argued that the tribunal lacks jurisdiction in respect of 62 out of the 88 claimants, as they were entities incorporated in Spain and had no standing to bring claims in a UNCITRAL arbitration under Article 26 of ECT ("The PV Investors v. Spain, PCA Case No. 2012-14," 2020, para 239). According to Spain, the ECT provided only one exception to the rule requiring diversity of nationality between the investor and the respondent state, as outlined in Article 26(7): a legal entity whose nationality, before a dispute arises, is controlled by investors of another Contracting Party (para 241).

According to Spain, this exception was confined to arbitrations brought before ICSID and did not apply to arbitrations brought before ad hoc tribunals under the UNCITRAL Rules or the Stockholm Chamber of Commerce (SCC) (para 242). Besides the ordinary meaning of the text, Spain argued that this interpretation is confirmed by the *travaux préparatoires* of the ECT (para 243).

The tribunal concurred that the ordinary meaning of the text plainly limited the exception to ICSID tribunals (para 261). They further found it consistent with the treaty's object and purpose, noting that allowing claimants to choose one arbitral system over another was not discriminatory (para 262-265). Regarding the claimant's request that the tribunal consider the most favoured nation clause in the ECT and a provision of the Spain-Colombian bilateral investment treaty to establish jurisdiction (para 281), the tribunal held that domestic enterprise could not benefit from the most favourable nation treatment and rejected the claimants argument (para 286-288). As a result, the tribunal concluded that it lacked jurisdiction over 62 Spanish entities but affirmed jurisdiction with regard to the other claimants (para 289).

4.2.3.2 Objections dismissed

Not a protected investor

Spain argued that the claimants were "cascarones vacíos" ("empty shells") through which two Spaniards funnelled their investments ("Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012," 2016, para 412). However, the tribunal countered that

ECT provides juridical criteria for identifying the nationality of legal entities, specifically based on the place of enterprise's constitution, and not on economic considerations (para 415). Moreover, the tribunal highlighted that Article 17, regarding the denial of benefits, excludes from the ISDS juridical persons controlled by shareholders of countries not party to the ECT. This exclusion, however, does not apply to legal entities controlled by the host country's own nationals (para 416). Therefore, the objection was dismissed (para 418).

Not a protected investment

In Isolux, Spain argued that the object of the case was not an investment according to the ECT. The tribunal considered that the criteria set in the case Salini c. Morocco has an objective definition of investment, notably: an initial commitment; a certain duration; a risk; and a contribution to the economic development of the host State (para 685). The tribunal considered that the claimant's investments were investments protected by the ECT (para 688) and rejected the jurisdictional objection (para 693).

Fork-in-the-road

Spain argued that the tribunal in Charanne lacked jurisdiction as the investors had started cases in the domestic judicial system. However, the tribunal considered that Spain failed to prove the identity of the parties and dismissed the claim ("Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012," 2016, para 407-410). In FREIF Eurowind, Spain argued that the triple identity test was too strict and was not found in the wording of the ECT ("FREIF Eurowind Holdings Ltd. v. Spain, SCC Case No. 2017/060," 2021, para 416). The tribunal rejected this argument, considering that the triple identity test is consistent with the principles of interpretation of treaties under Article 31 of the Vienna Convention on the Law of Treaties (para 417). The tribunal, thus, concluded that Spain failed to prove the identity of parts and rejected the jurisdictional objection (para 421 and 428).

Abuse of process

Spain argued that the constitution of the enterprise, established in the Netherlands, was intended to fraudulently accede the ISDS mechanism provided by the ECT, as the investors from Spain and Canada could not access the mechanism themselves ("Isolux Infrastructure Netherlands B.V. v. Spain, SCC Case V (2013/153)," 2016, para 694) However, the tribunal concluded that the juridical restructuring of the investments that included the constitution of

the enterprise in the Netherlands predated the underlying dispute and rejected the jurisdictional objection (para 704-705).

Cooling Off Period according to Article 26(2)

In Eiser, Spain argued that the claimants did not observe the three-month waiting period before initiating arbitration regarding three of the measures, namely Law 24/2013, RD 413/2014, and Order IET/1045/2014 ("Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36," 2017, para 299). The claimants argued that these measures are part of a single dispute concerning the modifications of RD 661/2007 (para 311). The tribunal considered that the notification and request for negotiations that the claimants made, and their observance of the three months, was enough to satisfy the requirements of Article 26(2) and rejected the jurisdictional objection (para 320).

Ratione Personae (conduct of Claimant attributable to a State)

Spain argued that the conduct of the claimant was attributable to the United Arab Emirates, and specifically to Abu Dhabi, which was not a party to the ECT ("Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1," 2018, para 145). The tribunal considered that it "has little hesitation in dismissing this objection to its jurisdiction" (para 166). The respondent was not exercising any public function prerogative nor was the State of Abu Dhabi exercising control of its investment decisions (para 170-172). The tribunal rejected this jurisdictional objection (para 177).

Denial of benefits

In the case Masdar, Spain argues that it gave timely and adequate notice of its intention to deny benefits according to Article 17(1) of the ECT ("Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1," 2018, para 206). However, the tribunal considered that Spain failed to demonstrate that claimants had no substantial business activity in the Netherlands, resting with no basis for a denial of benefits under Article 17(1) of the ECT (para 254 and 256).

Aggregation of proceedings

In the PV Investors, Spain argued that the tribunal lacked jurisdiction to deal with multiple claims in one single proceeding, because the country had not consented to it as Article 26 of the ECT provides for consent to arbitrate, but not for consent to arbitrate in multi-party

proceedings ("The PV Investors v. Spain, PCA Case No. 2012-14," 2020, para 34). The tribunal considered that the reference in Article 26 to "an Investor" in the singular does not bar jurisdiction over a multiplicity of claimants (para 99). Moreover, it considered that the nature of the consent to arbitration in ECT renders unnecessary "specific" or "additional" to multiple claims, a finding that is corroborated by the treaty jurisprudence (para 100-103). As a result, the tribunal rejected Spain's jurisdictional objection (para 114).

Failure to make prima facie showing that they have suffered financial harm

In The PV Investors, Spain objected to the jurisdiction of the tribunal arguing that the claimants failed to make a prima facie demonstration of the financial harm they have suffered ("The PV Investors v. Spain, PCA Case No. 2012-14," 2020, para 208). However, the tribunal reviewed the claimants' statements of claim and considered that, for jurisdictional purposes, the facts as asserted by the Claimants could potentially amount to violations of the FET and rejected this jurisdictional objection (para 232-237).

Lack of jurisdiction "ratione temporis"

In STEAG, Spain argued that the tribunal lacked jurisdiction *ratione temporis* because all investments concerned were made when the dispute was foreseeable and a significant part of them were made when the dispute already existed. The investments took place between 2012 and 2014, when the claimant should be aware that, no later than the first half of 2013, Spain would approve measures affecting all electricity system operators and altering the existing remuneration model for renewable energies ("STEAG GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/4. Decision on Jurisdiction, Liability and Principles of Quantum," 2020, para 335).

Given that the ECT does not define "dispute", the tribunal adopted the definition provided by the Permanent Court of International Justice in the Mavrommatis case: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (para 378). According to the tribunal, it would not have jurisdiction *ratione temporis* over any dispute that arose before investment was made (para 380).

However, the tribunal considered that the defendant's unilateral statements, which were not even contested or discussed by the claimant, did not constitute disagreements on points of fact or law for these purposes. Moreover, it stated that an announcement is not a legal act and does not affect the rights or legal situations of the parties in any way. Therefore, it

concluded that there was no dispute between Steag and the Defendant before the investment date and dismissed the jurisdictional claim (para 382-386).

Conclusion about other claims regarding jurisdiction in cases against Spain

The jurisdictional objections regarding taxation measures and the lack of standing of Spanish entities to bring ECT claims under the UNCITRAL Rules were accepted by the tribunals. Other objections were rejected, such as not qualifying as a protected investor or a protected investment, fork-in-the-road, abuse of process, non-compliance with the cooling off period, objection *ratione personae* (conduct of Claimant attributable to a State), denial of benefits, aggregation of proceedings, failure to make prima facie showing that they have suffered financial harm, and lack of jurisdiction *ratione temporis*.

The next table summarizes the jurisdictional objections raised by Spain other than the intra-EU objection. It also indicates when the objection was accepted.

Table 16 - Summary of Spain's jurisdictional objections

Case	Fork-in-the-road 26(3)(b)(i)	Claimants are not investors according to Article 1(7)	Not a protected investment according to Article 1(6)	Abuse of process	Taxation measures according to Article 21	Failure to Refer to the Competent Tax Authorities	Cooling Off Period according to Article 26(2)	Ratione Personae (conduct of Claimant attributable to a State)	Denial of benefits according to Article 17	Aggregation of proceedings	Failure to make prima facie showing that they have suffered financial harm	Entities organised under the laws of Spain have no standing to bring ECT claims under the UNCITRAL Rules	Lack of jurisdiction "ratione temporis"
Charanne B.V.	410	418											
Isolux		674	693	705	Accepted (741)	Accepted (758)							
Eiser			231 and 249		Accepted (272)	Accepted (296)	320						
Novenergia II					Accepted (525)								
Masdar			202		Accepted (295)			177	256				
Antin			274		Accepted (323)		353						
Foresight					Accepted (247)								
Cube		202			Accepted (233)								

NextEra		211	206		Accepted (373 and 383)				271				
9REN		188			Accepted (207). However, the tax will be considered in the context of the other measures to assess if it amounted to expropriation (208).				182				
SolES Badajoz					Accepted (277)								
InfraRed					Accepted (319)								
OperaFund					Accepted (405 and 415)								
Stadtwerke					Accepted (176)								
RREEFF		127 and 147	160		Accepted (197)								
RWE					Accepted (393)								
Watkins					Accepted (274)								

The PV Investors	342									114	237	Accepted (289)	
Hydro Energy					Accepted (522								
BayWa					Accepted (314)								
FREIF Eurowind	428				Accepted (379)								
Steag				393	Accepted (334)	Accepted (415)							386
JGC					Accepted (465)								
Renergy		586	445		Accepted (495)								
Eurus					Accepted (180)								
Infracapital					Accepted (1-2)								
Sevilla					Accepted (703)								
Mathias Kruck					Accepted (4)								

Cases presented in chronological order of the final award. The paragraphs of the decisions, from which the information was extracted, are indicated in parentheses. When the objection was accepted, there is such indication. In all other cases, the objection was rejected. Source: ("9REN Holding S.à.r.l. v. Spain, ICSID Case No. ARB/15/15," 2019; "Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain, ICSID Case No. ARB/13/31 ," 2018; "BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16. Decision on Jurisdiction, Liability and Directions on Quantum," 2019; "Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012," 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," 2019; "Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36," 2017; "Eurus Energy Holdings Corporation v. Kingdom of Spain (ICSID Case No. ARB/16/4). Decision on Jurisdiction and Liability," 2021; "Foresight Luxembourg Solar 1 S.à.r.l. and others v. Spain, SCC Case No. 2015/150," 2018; "FREIF Eurowind Holdings Ltd. v. Spain, SCC Case No. 2017/060," 2021; "Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Spain, ICSID Case No. ARB/16/18. Decision on Jurisdiction, Liability and Directions on Quantum," 2021; "InfraRed Environmental

4.3 Admissibility Objections

After the scrutiny of jurisdictional objections, this section examines the admissibility objections: first, the admissibility objections articulated by both Italy (4.3.1), followed by those advanced by Spain (4.3.2). Notably, none of the admissibility objections were accepted by the arbitral tribunals. Furthermore, this section emphasizes the difficulty in distinguishing between jurisdictional and admissibility aspects within the framework of these cases.

4.3.1 Admissibility Objections in Cases Against Italy

Regarding Italy's admissibility objections, particular focus is given to the Calvo Clause and the absence of attempts at an amicable solution, given the complexities intertwined with jurisdictional objections. Subsequently, additional admissibility objections are explored.

4.3.1.1 Admissibility objections regarding Calvo Clause and lack of amicable solution attempt

Italy raised admissibility objections based on the Calvo Clause or lack of amicable solution attempts in six cases: CEF, Belenergia, SunReserve, Eskosol, ESPF and Silver Ridge. In CEF, Italy raised the Calvo Clause and the lack of attempt at an amicable solution for some measures first as objections to jurisdiction and, in a further alternative, the lack of attempt at an amicable settlement as the reason to decline the admissibility of the case ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 52). Both requests were declined.

In Belenergia, Italy considered that the Calvo Clause and the lack of an attempt at an amicable solution were reasons to decline jurisdiction or to decline admissibility but its argument was dismissed in both situations ("Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40," 2019, para 164, 359, and 369). In this case, there was a discussion about the distinction between jurisdictional and admissibility objections. Italy argued that this distinction is "blurring" (para 250). The tribunal did not differentiate the concept. About the Calvo Clause, it stated that: "Based on the foregoing, the Tribunal dismisses Italy's jurisdictional objection that the choice of forum clause under the GSE [State-owned energy service system operator] Conventions bars ECT jurisdiction over Belenergia's claims and finds that Belenergia's

umbrella clause claim under Article 10(1) ECT is admissible". Concerning the lack of amicable settlement attempt it stated that: "the Tribunal dismisses Italy's jurisdictional/admissibility objection" (para 369). In this connection, the case is another example of the lack of clear distinction between the two concepts that FONTANELLI (2017) and ZIYODILLAYEV (2017) point out.

In Sun Reserve, Italy requested the tribunal to decline jurisdiction for taxation measures, no amicable solution attempt and Calvo Clause and, "in a further alternative", to decline admissibility due to the lack of amicable solution attempt ("Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016," 2020, para 285). The tribunal decided to determine objections relating to jurisdiction and admissibility simultaneously "to the extent they overlap." (para 503). The tribunal found that the exclusive jurisdiction clauses in the distribution of energy contracts did not prevent the tribunal's jurisdiction nor render the claim inadmissible.

As shown in the section about jurisdiction, the tribunal did not have to decide whether the lack of amicable settlement prevented the jurisdiction or admissibility because the measures concerned were exempt because they were considered taxation measures (para 583).

In ESPF, Italy requested that if the tribunal rejects its jurisdictional objection, it should decline admissibility due to the Calvo Clause ("ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5," 2020, para 392). The tribunal concluded that its "findings on the jurisdictional objections related to these claims is equally applicable to Italy's objections based on admissibility. The objection as to the admissibility of these claims is dismissed" (para 395).

In Silver Ridge, Italy requested the tribunal to decline jurisdiction due to the lack of attempt at an amicable solution and Calvo Clause or, "in a further alternative", to decline admissibility based on these same reasons ("Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37)," 2021, para 147). As Calvo Clause is concerned, the tribunal said that it "rejects the Respondent's second jurisdictional objection. The result would not be different were this objection construed as a challenge to the admissibility of the claim in question" (para 264). The same text was used regarding the lack of amicable settlement: "The Tribunal rejects the Respondent's third objection to its jurisdiction. The result would not be different were this objection construed as a challenge to the admissibility of the claim in question" (para 283). The tribunal stated that

> "Having dismissed all the Respondent's jurisdictional objections – and seeing no reason to take up the Respondent's submissions on unenforceability of the award, on exclusive forum clauses and on the

requirement of prior request for amicable settlement as a separate matter of admissibility (see paras. 237, 264 and 283) –, the Tribunal finds that the Centre has jurisdiction and that the Tribunal has competence to decide the claims made by the Claimant" (para 313).

Here again, there was a lack of differentiation between jurisdiction and admissibility.

In CEF, Belenergia, SunReserve, Eskosol, ESPF and Silver Ridge cases, Italy requested the tribunals to decline admissibility based on the Calvo Clause or lack of amicable solution attempt. The respondent's claims were consistently dismissed, and the tribunal admitted all the cases. Another consistency was the lack of differentiation between jurisdiction and admissibility objections. Italy's objections were not consistent: in two cases, it raised objections to jurisdiction and admissibility regarding amicable solution and the Calvo Clause (Belenergia and Silver Ridge); in two cases it raised jurisdiction and admissibility objections regarding amicable solution and only jurisdiction objections regarding the Calvo Clause (CEF and SunReserve), and in one case it raised jurisdiction and admissibility objection based on Calvo Clause but only jurisdiction objection based on amicable solution (ESPF). The next table shows this information.

Table 17 - Amicable solution and Calvo Clause as jurisdictional or admissibility objections

Case	Amicable solution Article 26(1)-(2)	Calvo Clause Article 26(2)(b)
CEF	Jurisdiction and admissibility	Only jurisdiction
Belenergia	Jurisdiction and admissibility	Jurisdiction and admissibility
SunReserve	Jurisdiction and admissibility	Only jurisdiction
ESPF	Only jurisdiction	Jurisdiction and admissibility
Silver Ridge	Jurisdiction and admissibility	Jurisdiction and admissibility
Source: Generated by the author; data compiled from the cases, whose complete reference was provided in the section.		

4.3.1.2 Other Admissibility Objections Against Italy

Italy raised other admissibility objections in Blusun and Eskosol. In Blusun, Italy argued that the case should be inadmissible because the claimants lacked "clean hands" because

the project was illegal as it had deceived authorities on its actual size and did not conduct an environmental impact assessment ("Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3," 2016, para 272). They claimed that the project was illegal, as the claimants had deceived authorities on its actual size and they had failed to conduct an environmental impact assessment (para 273-274). The tribunal refused the claim of illegality, as approvals had been given for the construction of the plants, and an environmental impact assessments were not required for small solar plants. The tribunal considered that it was "too late" for Italy to raise that such assessments were required due to the aggregative character of the project (para 276).

In Eskosol, Italy requested the decline of admissibility based on the "res judicata" principle and the duplication of proceedings, as the dispute was substantially the same as the Blusun case ("Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50," 2020, para 239-240). It also requested that the tribunal decline admissibility based on abuse of rights, arguing that the investor had "abused of its right by duplicating requests for redress under the ECT by taking benefit of the possibility *in abstracto* to access arbitration separately in its own name and through its local company" (para 257).

The tribunal acknowledged that if its decision favoured Eskosol and the amount was sufficient to distribute to shareholders, Blusun would indirectly benefit, "despite previously failing in its direct claim against Italy." According to the tribunal, "the awkwardness of this outcome" was the result of "the odd circumstances of this case, where a majority shareholder and the company in which it holds shares did not have aligned interests and did not coordinate their respective litigations." However, this situation was not considered "a reason in principle to strip a current litigant of a right to arbitration that the ECT expressly grants it, to pursue claims on its own behalf" (para 267). Therefore, the tribunal denied Italy's objections to admissibility (para 268). Therefore, all admissibility objections were rejected by the tribunals.

4.3.2 Admissibility Objections Against Spain

In Isolux, Spain asserted that the tribunal did not have jurisdiction due to lack of *ratione voluntatis*, contending that the claimant concurred to the circumstances giving rise to the denial of benefits, which constituted a jurisdictional objection under Article 17 of the ECT ("Isolux Infrastructure Netherlands B.V. v. Spain, SCC Case V (2013/153)," 2016, para 706-707). This objection considered two questions: whether it was an admissibility or a

jurisdiction objection and whether the procedures of denial of benefits had retroactive effect (para 709-710).

The tribunal clarified that, if it was an admissibility objection, it should be assessed at the outset of the merits, provided that the tribunal found that it has jurisdiction over the claims (para 709). The tribunal considered it an objection of admissibility, referencing two other arbitral tribunals that had similarly classified a denial of benefits as an admissibility objection (para 711-713).

The tribunal stated that it could examine the second question within the merits; however, it considered that it was simpler to decide it immediately. It concluded that the denial of benefits could not have retroactive effect (para 715). Therefore, the tribunal reclassified the jurisdictional objection as an admissibility objection and rejected it (para 716).

In Eiser, the tribunal concluded that given the claimants' satisfaction of negotiation requests and adherence to the waiting time, "the Tribunal need not decide whether compliance with the requirements of Article 26 is jurisdictional, as Respondent would have it, or poses a question of admissibility, as Claimants contend" ("Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36," 2017, para 321).

In RREEF, the respondent objected to the jurisdiction of the tribunal on the grounds that the claimants had failed to notify the dispute to the respondent and observe the three-month cooling-off period, set out in Article 26 of the ECT ("RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain, ICSID Case No. ARB/13/30," 2019, para 222). The claimants argued that this was an admissibility objection, not a jurisdictional objection (para 224). The tribunal agreed that it was an admissibility objection and stated that:

> the consequence of an inadmissible submission precisely is that the court or tribunal seized cannot exercise jurisdiction in respect of it – with, it is true, a significant difference when compared with a finding that it has no jurisdiction: when the circumstances at the origin of the inadmissibility of the claim have changed, it can be submitted a new and the court or tribunal concerned may exercise jurisdiction on the new claim.

To decide about the admissibility, the tribunal expressed the following parameter: if the additional claims change the character of the case, the new claims must be declared inadmissible; if not, the objection must be rejected (para 226). The tribunal concluded that the measures taken by Spain after the request for arbitration did not change the general character of the case, deeming it admissible (para 231).

In Eurus, Spain contended that the claimant's failure to notify the competent tax authorities rendered the claim inadmissible. However, the tribunal considered that the sole

consequence of such failure was that the tribunal itself had to notify the competent tax authorities ("Eurus Energy Holdings Corporation v. Kingdom of Spain (ICSID Case No. ARB/16/4). Decision on Jurisdiction and Liability," 2021, para 204). As a result, it dismissed the objection (para 205).

5. MERITS

The preceding chapters of this study has conducted an examination of the legal framework, both on the international and domestic fronts, as well as an analysis of jurisdictional and admissibility objections in the ISDS cases involving Italy and Spain. The current chapter assesses the merits of these cases. The first subsection evaluates the eight investor-state arbitration cases against Italy while the second subsection presents information on the cases against Spain. A third subsection provides concluding remarks about the merits of the cases.

5.1 Merits in Cases against Italy

This section assesses the eight investor-state arbitration cases against Italy, in chronological order of awards' dispatch. Following the analysis of each case, a concise summary table is presented.

5.1.1 Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB 14 3

On 4 February 2014, the first case against Italy was brought before an ICSID Tribunal by the claimants: Blusun S.A. ('Blusun'), a Belgium enterprise, and its owners Jean-Pierre Lecorcier, from France, and Michael Stein, from Germany ("Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3," 2016, para 1-5). On 27 December 2016, the award was dispatched to the parties.

The claimants' project aimed at connecting 120 photovoltaic plants, each one generating almost 1 MW, to each other and two substations for connection to the national grid (para 53). If completed, it would have been the largest solar park in Europe (para 376(a)). The photovoltaic plants were initially developed by 12 local companies that had, in 2008 and 2009, acquired certain rights over the land where the plants would be built, as well as construction permits, and permits for connecting each plant to the local medium-voltage grid (para 54).

The success of the project relied on obtaining individual approval for small plants of less than 1 MW. However, its economic viability hinged on aggregating those plants into a large array with a capacity of up to 124 MW (para 376(b)). The project companies purchased the land at an above-market price for agricultural land, assuming they would manage to receive

feed-in tariffs at a time when the certainty of obtaining these incentives was unclear (para 376(d)).

The Project never received the financing necessary (para 376(e)). The building of two plants was stopped by the Commune and, despite the prompt lifting of the stop order, never resumed (para 376). The failure to make the 20% down payment for the first tranche of panels predated the Romani Decree of 3 March 2011 (para 390). As a result, “no solar panels were ever installed or (*a fortiori*) connected” (para 376(f)). The Claimants attributed the failure of the Project to legal instability in Italy, which began with the Constitutional Court's decision on 26 March 2010 and culminated in the Municipality's intervention in January 2012 (para 375).

They assert that measures taken by (1) the Italian Constitutional Court, (2) the Italian Government, and (3) the Commune violated the fair and equitable treatment under Article 10(1) of the ECT, or amounted to measures similar to nationalization or expropriation under Article 13(1) of the ECT.

The claimants invested approximately EUR 35.5 million (para 196) and claimed damages of EUR 187.8 million taking March 2010 as the valuation date, should the Tribunal conclude that the Constitutional Court's decision infringed upon the ECT; EUR 229.5 million taking January 2011 as the valuation date, should the Tribunal consider that all the other measures but the Constitutional Court's decision violate the ECT; EUR 133.5 million taking May 2011 as the valuation date, “if the Tribunal considers that only the series of administrative errors and the direct interference by the local authority breached the ECT” (para 192).

Legal instability and breach of the fair and equitable treatment standard: ECT Article 10(1)

Measures taken by the Italian Constitutional Court

The claim against the Italian Constitutional Court arose from its declaration of the Puglia Regional Law 31/2008 of 21 October 2008 as unconstitutional, on 26 March 2010. Legislative Decree 387/2003 determined a simplified declaratory procedure called “Declaration of Commencement of Activity” (“Denuncia di Inizio Attività” or DIA) for photovoltaic installations with capacity below 20KW (Blusun 67). Puglia Regional Law 31/2008 of 21 October 2008 extended this simplified procedure to all installations below 1 MW (para 68). The Italian Government challenged the constitutionality of Puglia’s law, and the Italian Constitutional Court upheld its claim (para 92).

Law 129/2010, on Salva-Alcoa law, permitted the construction of plants initiated in accordance with regional laws, whose thresholds exceeded the levels set out by Legislative

Decree n 387 of 29 December 2003, provided that the operation of the plants starts within one hundred and fifty days from the date of entry into force of the present Law (para 93).

The arbitral tribunal decided that neither the Constitutional Court decision nor its aftermath breached the first sentence of Article 10(1) of the ECT (para 330). The tribunal pointed out that the claim was "duly filed" and "plainly arguable", and it also predated the claimants' investment; therefore, "the claimants took the risk that the challenge might succeed, and that this might cause delay over the Project and its financing." Moreover, the decision "did not result in a loss of rights" and "the Government did not fail to act with due diligence" (para 329).

Measures taken by the Italian Government

The claim against the government's actions centred on the Romani Decree and the Fourth Energy Account. These measures imposed a 13% reduction in feed-in tariffs for the Puglia Project, which the tribunal acknowledge as "while not drastic, was capable of having a serious effect on the economics of the Project" (para 340). Moreover, the reduction of allowance of the use of rural land from 50% to 10% "had a particular impact on investors, such as the Claimants, who had already acquired the land and who found themselves in the position of having to acquire much more land to support the same size of plant" (para 341).

The deadline shift from 31 December 2016 to 31 May 2012 for receiving feed-in tariffs from the Third Energy Account, stipulated by the Romani Decree, combined with financial difficulties in one of its subsidiaries, compelled the shareholders to split the Project and construct 27 solar plants instead of the initially planned 113 (para 113). Subsequently, the claimants attempted to sell the two substations; however, they ultimately chose to abandon the Project on December 18, 2012 (para 124).

Regarding the interpretation of Article 10, the tribunal asserted that "to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment" "incorporates the fair and equitable treatment standard under customary international law and as applied by tribunals". It emphasised that this standard "preserves the regulatory authority of the host state to make and change its laws and regulations to adapt to changing needs, including fiscal needs, subject to respect for specific commitments made". Therefore, "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". However, modifications should "not [be] disproportionate to the aim of the legislative amendment and should have due regard to the reasonable reliance interests of recipients" (para 319).

The tribunal added that market expectation "is not a basis for shifting risks to the public sector, i.e. the state budget". Moreover, "Circumstances change and in the absence of specific commitments, the risk of change is for entrepreneurs to assess and assume" (para 373).

The tribunal applied the standard of legal stability incorporated in the first and second sentence of Article 10(1) of the ECT to the Romani Decree and the Fourth Energy Account and noted that:

> "(a) The reduction in FITs was quite substantial, but was not in itself crippling or disabling. Moreover, it was a response to a genuine fiscal need, given the large take-up under the earlier Energy Accounts.
> "(b) The reduction in incentives was proportionately less than the reduction in the cost of photovoltaic technology during 2010, and left Italian subsidy levels higher than those in Germany, France and Spain.
> "(c) The principle of guaranteed tariffs for a 20-year period was maintained.
> "(d) So too was the criterion for qualification for FITs, viz., connection to the grid.
> "(e) The grace period for grid connection to preserve the pre-existing tariff level, viz., 12 months, was reasonable.
> "(f) The Fourth Energy Account, applying to photovoltaic plants connected to the grid between 1 June 2011 and 31 December 2016, made some allowance for projects that could not meet the cut-off of 12 months.
> "(g) Leaving aside questions of administration (dealt with below), the provision for a register of large plants eligible for feed-in tariffs contributed to legal security.
> "(h) The limits on the use of agricultural land were motivated by valid rural planning concerns, although their specific impact on the Puglia Project is a matter to which the Tribunal will return (see paragraphs 403-408)" (para 342).

Having said that, the tribunal concluded that "the Romani Decree and the Fourth Energy Account, taken overall, were not disproportionate, did not violate specific commitments made to the promotors of PY plants, and did not breach Article 10(1), first sentence of the ECT" (para 343).

Measures taken by the Commune

On 17 November 2011, a local police inspection was conducted at a subsidiary of claimants. Subsequently, on 25 November 2011, the local prosecutor informed the municipality of Brindisi that "the situation as observed by the police constituted a criminal offense violating zoning regulations" (para 116). There was a possibility that a single plant had been fraudulently divided into several smaller plants to avoid exceeding the 1 MW electrical power threshold (para 117). In January 2012, the municipality of Brindisi issued a stop-work order on the construction of plants in the project. However, the Regional Administrative Court suspended the order's effects on January 13, 2012. Subsequently, on March 7, 2012, the Regional Administrative Court annulled the municipality's decisions (para 119).

Similar to the claims against measures by the Italian Constitutional Court and the government, the Tribunal concluded that the measures taken by the commune did not breach the ECT, nor were they indicative of 'legal instability.' It stated that: "The order was temporary

in effect, was legally motivated, and was dealt with by due process of law and with reasonable promptness". Furthermore, the tribunal also asserted that "It was not arbitrary or discriminatory but fell well within the range of legal risk of an industrial enterprise, in particular one based on debatable regulatory grounds" (para 360).

The Expropriation Claim: ECT Article 13

The claimants' alternative claim was that "the Italian measures resulted in the indirect expropriation of the investment, given its total loss of value" (para 396). The tribunal dismissed the claim that "non-discriminatory laws ostensibly passed in the public interest" changed the rules of incentives, which "combined with operational decisions made by the investors and the lack of prearranged Project financing, meant that the Project remained radically incomplete, never qualified for feed-in tariffs, and inevitably went into liquidation". It concluded that "the situation was not analogous, still less tantamount to expropriation of the Project by Italy" (para 401).

As a result, the tribunal dismissed all claims brought by the claimants (para 423).

5.1.2 Greentech Energy Systems A S, et al v. Italian Republic, SCC Case No. V 2015 095

On 7 July 2015, the second case against Italy was initiated before an SCC Tribunal by the claimants: Greentech Energy Systems A/S ("Greentech"), an enterprise incorporated in Denmark; NovEnergia II Energy & Environment (SCA) SICAR ("NovEnergia") and NovEnergia II Italian Portfolio SA ("NIP"), both incorporated in Luxembourg ("Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," 2018, para 1-3). The final award was rendered on 23 December 2018.

The three companies owned 134 photovoltaic plants in Italy through investments made from 2008 to 2013 (para 11). Claimants argue that "Italy accorded their investments unfair and inequitable treatment, failed to observe obligations entered into with respect to their investments, and unlawfully impaired their investments through unreasonable or discriminatory measures, in breach of Article 10(1) of the Energy Charter Treaty ("ECT")". As a result, they requested declaratory relief and damages in the amount of EUR 25.06 million (para 12).

Claims that the tribunal upheld

Where the tariff reductions under the Spalma-incentivi Decree were concerned, the tribunal found that: "At the time of investing, Claimants had been led to believe, reasonably,

that the incentive tariffs would remain the same as promised in the Conto Energia decrees, GSE [State-owned energy service system operator] letters and GSE Agreements throughout a twenty-year period" (para 447). It recognized that "the investor might need to live with some minor adjustments", however "nothing alerted the Claimants that they would need to accept changes of the magnitude imposed by the Spalma-incentivi Decree" (para 448). It also recognized that "Italy faced 'a situation of economic difficulty'" but it did not reach the level of "force majeure" (para 451). Therefore, the tribunal found that Italy defeated the claimants' legitimate expectations and violated the FET clause (para 453-455).

The tribunal decided that Italy violated its obligation to provide transparent and consistent conditions for investments, under ECT Article 10(1) (para 457), and failed to "encourage and create ... transparent conditions for Investors of other Contracting Parties…." (para 258), breached the ECT's impairment clause (para 462), and the umbrella clause (para 464).

Claims that the tribunal dismissed

Still, with regard to the tariff reductions under the Spalma-incentivi Decree, the tribunal did not find evidence of bad faith nor that the Spalma-incentivi Decree was a discriminatory or disproportionate measure (para 460-462).

Italy did not provide explicit or implicit promises that changes in payment terms would not be made and, therefore, the tribunal dismissed the claim regarding the payment term change under the Spalma-incentivi Decree (para 477).

Similarly, regarding the minimum guaranteed price, Italy provided no explicit or implicit assurance that claimants would continue to receive it beyond 2013, as they had from 2008 to 2013. (para 501). The tribunal found that the modification of the Minimum Guaranteed Price Scheme did not violate the prohibition of inconsistent and non-transparent treatment (para 503), the good faith standard (para 504), the impairment clause (para 505) or the umbrella clause (para 506).

The tribunal also determined that the cancellation of the inflation adjustment did not violate legitimate expectations, the "transparency" standard or the umbrella clause (para 518-520).

The tribunal found no violation of legitimate expectations regarding the administrative fee or the imbalance costs. These costs were foreseeabile and the absence of their mention in the Conto Energia decrees or contracts with the State-owned energy service system operator did not ensure legitimate expectations that photovoltaic producers would not be responsible for

such costs (para 536). The Tribunal further determined that such costs did not breach the principle of good faith (para 536) the impairment clause (para 537) or the umbrella clause (para 538).

Damages

The tribunal decided that, due to the breach of the FET standard, impairment clause, and umbrella clause under ECT Article 10(1), Italy shall pay the claimants damages that amount to EUR 11.9 million plus interest, with EUR 7.4 million awarded to Greentech and EUR 4.5 million awarded to NovEnergia (para 570 and 594).

5.1.3 CEF Energia BV v. Italian Republic, SCC Case No. 158 2015

On 20 November 2015, CEF Energia BV, a Dutch company, filed another case against Italia before an SCC Tribunal, whose final award was rendered on 16 January 2019.

CEF Energia acquired three companies that held photovoltaic plants. In January 2010, the claimant purchased Megasol, a 13 MW photovoltaic plant that was connected to the grid in May 2011 and received the contract with the state-owned energy service system operator in November 2011, confirming its right of feed-in tariffs under Conto II ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 151). In December 2010, claimant acquired a 70% controlling stake in Phenix S.r.l. ("Phenix"), a 24 MW plant, connected to the grid in April 2011, which, in November 2011, received the contract with the state-owned energy service system operator confirming that it was eligible for the feed-in tariff under Conto III (para 156).

In March 2012, the claimant bought Enersol, a multi-section photovoltaic plant of approximately 48 MW. The section connected to the grid in April 2011 received an incentive tariff under Conto III, confirmed by a contract with the state-owned energy service system operator in November 2011. The sections connected in July 2011 and August 2011 benefited from feed-in tariff under Conto IV, confirmed in March 2012 and the first quarter of 2012, respectively. Therefore, this was the only acquisition that post-dated the relevant contracts with the State-owned energy service system operator (para 161).

The claimant argued that Italy violated the Umbrella Clause claims; FET claims; obligation to provide transparent legal framework claims; and unreasonable measures and impairment (para 180).

Claims that the tribunal upheld

Where the FET standard was concerned, the Tribunal found it useful to quote the summary made by the tribunal in Antaris (para 185), which was:

> "360. As is usual in these cases; the Parties have adduced many published awards (in this case more than 50) on the interpretation or application of the FET ("fair and equitable treatment") standard, and the FPS ("full protection and security") and non impairment standards. Most of them are well-known, and, although formulations of the principles differ in detail, it is only necessary to summarize the present state of international law and practice in these general propositions (several of which overlap with each other):
> "(1) There will be a breach of the FET standard where legal and business stability or the legal framework has been altered in such a way as to frustrate legitimate and reasonable expectations or guarantees of stability.
> "(2) A claim based on legitimate expectation must proceed from an identification of the origin of the expectation alleged, so that its scope can be formulated with precision.
> "(3) A claimant must establish that (a) clear and explicit (or implicit) representations were made by or attributable to the state in order to induce the investment, (b) such representations were reasonably relied upon by the Claimants, and (c) these representations were subsequently repudiated by the state.
> "(4) An expectation may arise from what are construed as specific guarantees in legislation.
> "(5) A specific representation may make a difference to the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectation, but is not indispensable to establish a claim based on legitimate expectation which is advanced under the FET standard.
> "(6) Provisions of general legislation applicable to a plurality of persons or a category of persons, do not create legitimate expectations that there will be no change in the law; and given the State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.
> "(7) An expectation may be engendered by changes to general legislation, but, at least in the absence of a stabilization clause, they are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change.
> "(8) The requirements of legitimate expectations and legal stability as manifestations of the FET standard, do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.
> "(9) The host State is not required to elevate the interests of the investor above all other considerations, and the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders.
> "(10) Except where specific promises or representations are made by the State to the investor, the latter may not rely on an 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.
> "(11) Protection from arbitrary or unreasonable behaviour is subsumed under the FET standard.
> "(12) It will also fall within the obligation not to impair investments by "unreasonable ... measures" (Article 10(1), ECT) or "arbitrary ... measures (Article 2(2), Czech Republic/Germany BIT).

> "(13) The investor is entitled to expect that the State will not act in a way which is manifestly inconsistent or unreasonable (i.e. unrelated to some rational policy)" (Antaris apud CEF Energia 185).

When the claimant acquired Megasol and Phenix, they had not been connected to the grid nor received the contract with the State-owned energy service system operator, confirming the feed-in tariffs. "[A]t the very best" the tribunal said, "its intention was to complete plants which would, at a point in the future, be connected to the grid, and be compliant with the necessary requirements under the applicable Conto" (para 187). Therefore, "investment rights had not yet crystallised" and "Tribunal finds that Claimant cannot assert an FET claim" (para 188-189).

The situation was different in the case of Enersol, whose acquisition post-dated the connection to the grid and the contract with the State-owned energy service system operator. In this case, the tribunal found that "Claimant's investment in Enersol enjoyed crystallised rights to incentives" (para 190). Considering the four Contos and Romani Decree; the tariff recognition letters; the connections to the national grid; and the contract with the State-owned energy service system operator, the tribunal found that the claimant could expect "to receive incentives, in constant currency, for a twenty-year period" and that "could not be amended save by mutual agreement" (para 217). Therefore, the claimant enjoyed legitimate expectations within the meaning of Article 10(1) of the ECT in respect of its Enersol investment that was breached by the Spalma-incentivi Decree (para 234 and 244).

Claims that the tribunal dismissed

However, one specific aspect of the claim regarding legitimate expectations was not upheld. The Tribunal noted that the claimant did not provide sufficient evidence to support their argument that the respondent had offered explicit or implicit promises or guarantees that such a change in payment terms would not be implemented (para 234).

The tribunal also dismissed the Umbrella Clause claim, as it considered that "the obligations which Respondent entered into with Claimant's Investments (i.e. Megasol, Phenix, and Enersol) were, as a matter of Italian law, subject to unilateral modification by Respondent" (para 254). It also dismissed the claim regarding a failure to provide a transparent legal framework and unreasonable impairment claims. The tribunal pointed out that "the rationale for the measure [Spalmaincentivi] was reasonable" (para 259).

Damages

The tribunal decided that, based on an 'actual -vs- counterfactual' analysis, Italy should compensate the claimant for its investment in Enersol in the amount of EUR 9,600,000.00 (para 284).

5.1.4 Belenergia S.A. v. Italian Republic, ICSID Case No. ARB 15 40

On 7 August 2015, Belenergia S.A., a company incorporated under the laws of Luxembourg, brought the case before ICSID, which dispatched the award to the parties on 6 August 2019 ("Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40," 2019, para 2 and 7).

Between September 2011 and December 2013, Belenergia made investments in ten Italian photovoltaic companies, holding a 100% share in nine of them and a 59% share in the remaining one. Collectively, these companies managed a total of 20 PV plants, with nineteen of them having a nominal capacity just below 1MW (para 145-146). All received feed-in tariffs (para 153). Moreover, nine out of ten Belenergia's PV companies benefited from minimum prices (para 160).

The claimant argued that Italy breached its obligations under Articles 10(1), (2) and (3) ECT (para 163). As a result, Belenergia claimed EUR 6,9 million in damage for losses caused by the adjustment of feed-in tariffs: (para 481), EUR 8,8 million by the adjustment of the guaranteed minimum price (para 486), EUR 1,2 million for compensation for direct costs (legal due diligence, technical due diligence, banking fees) (para 490), and EUR 1,8 million on opportunity cost resulting from difficulties in equity financing other projects (para 491); in a total of EUR 18,7 million claimed in compensation.

The FET obligation under Article 10(1) of the ECT

The tribunal considered that the 6% to 8% reduction to feed-in tariffs adopted in the Spalma-Incentivi Decree of 24 June 2014 was consistent with reductions of incentives previous to Belenergia's first investment in Italy in September 2011 and, therefore, it could not have breached Belenergia's legitimate expectations (para 594). Moreover, the Tribunal considered that a "prudent" investor would have taken into account the disparity in incentives provided by Italy compared to other European countries like France and Germany. Despite Italy having higher solar irradiation levels, its incentives were still higher than those in other countries (para 596). As a result, the Tribunal considered the reducing feed-in tariffs to be "reasonable, justifiable and proportionate to Italy's policies in the PV sector" (para 606).

The umbrella clause under Article 10(1) ECT

The tribunal dismissed the claim of violation of the umbrella clause because it did not find commitments that could "be interpreted as creating obligations specifically 'entered into with' Belenergia" (para 618-619).

The most constant protection and security obligation under Article 10(1) ECT

The Tribunal accepted that the most constant protection and security obligation might "extend beyond the protection of physical security in certain situations". However, the tribunal stated that it does not "protect investments against the state's right to legislate or regulate in a manner that negatively affects them" and dismissed the claim (para 621-623).

The provisions prohibiting unreasonable and discriminatory measures under Articles 10(1), (2) and (3) ECT.

The tribunal found justifiable differentiated treatment to offer special treatment for smaller plants as well as public entities and schools (para 631-633). Therefore, it dismissed Belenergia's claim on unreasonable and discriminatory measures under Articles 10(1), (2) and (3) of ECT (para 634).

As a result, the tribunal dismissed all of Belenergia's claims on the merits (para 635).

5.1.5 SunReserve Luxco Holdings et al. v. Italy SCC Arbitration V 2016 32

On 26 August 2016, SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L, and SunReserve Luxco Holdings III S.À.R.L, all of which are companies incorporated under the laws of Luxembourg and all of which form part of the same corporate structure, brought this case before the SCC. The final award was rendered on 25 March 2020 ("Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016," 2020, para 3, 7, and 183).

In 2010, claimants invested more than EUR 100 million to acquire and develop nine photovoltaic plants (para 183). Seven plants received feed-in tariffs from the Second Energy Account, with four of them also receiving minimum guaranteed prices; the other two plants received feed-in tariffs under the Third Energy Account (para 210).

The Claimants asserted that the Respondent violated the ECT by promising fixed incentive tariffs and minimum guaranteed prices but later reneging on these promises through

various regulatory actions, culminating in the Spalma-incentivi Decree of 1 January 2015 (para 278). According to them, Italy failed to treat their investments fairly and equitably, impaired their investments through unreasonable or discriminatory measures, and violated the ECT's Umbrella Clause (para 279); with damages estimated at EUR 40.89 million (para 280).

Legitimate expectations

To assess whether Italy had frustrated the investors' legitimate expectations, the tribunal first determined that the relevant point in time for the claimants' decision to invest in Italy was the date when they had acquired shares in the companies that operated or developed the photovoltaic plants (para 768). This decision was contrary to the claimants' argument, which contended that the relevant point in time should be the date when the plants entered into operation (para 745). Despite recognising that the contract with the State-owned energy service system operator was backdated to this date, the tribunal dismissed the date of entry into operation as the decisive factor for evaluating the legitimate expectations (para 784).

Among the nine plants owned by the claimants, only one plant had an acquisition date following the issuance of the contract with the State-owned energy service system operator (para 777). Consequently, for the remaining eight plants, the claimants could not have relied upon any expectations from the contract with the State-owned energy service system operator, since they did not exist at the time of their investments (para 778 and 839). The State-owned energy service system operator acted as the "implementing body" of the Conto Energia Decrees, responsible for verifying "compliance with the provisions of this decree" before issuing the tariff confirmation letters. As such, its role was not entirely devoid of discretion, contrary to the claimants' argument (para 782).

Therefore, the claimants' legitimate expectations of fair remuneration for 20 years only met the threshold of objective knowledge and certainty in the case of the plant whose acquisition post-dated the contract with the State-owned energy service system operator (para 840). In the next step, the tribunal assessed whether Italy frustrated the investor's legitimate expectations with the enactment of the Spalma-incentivi Decree, on 11 August 2014 (para 841).

The tribunal found that Italy did not frustrate the claimants' legitimate expectations for fair remuneration because (1) the reduction of 8% did not "result in an unfair remuneration" (para 852); (2) photovoltaic plants experienced a decrease in operating costs (para 856); (3) the value obtained from selling photovoltaic plants in 2016 indicated that they still retained fair remuneration (para 865); (4) a comparison of the incentive tariffs in Italy with other European countries showed that Italy's tariffs were often greater, even after the remodulation (para 867);

and, (5) the plant with lower operating costs and higher returns, the one whose acquisition post-dated the contract with the State-owned energy service system operator, suffer less with the impact of the Spalma-incentivi Decree (para 870). Based on these findings, the tribunal dismissed the claim that Italy, through the Spalma-incentivi Decree, frustrated legitimate expectations regarding the plant acquired after the contract with the State-owned energy service system operator (para 871).

The Tribunal rejected the claim that there were legitimate expectations that the Administrative Management Fee and Imbalance Costs would not be imposed (para 874). It further concluded that the minimal impact of these costs on operating expenses did not constitute a frustration of the Claimants' legitimate expectations of fair remuneration (para 885). Additionally, the Tribunal denied the existence of legitimate expectations that the minimum guaranteed prices would remain consistent in terms of range or eligibility criteria (para 889).

Impairment measures

The Tribunal reasoned that the claimants failed to demonstrate a significant enough impact on their investments to qualify as impairment. The Claimants did not successfully establish the measures implemented by Italy as being unreasonable (para 951-953) or discriminatory (para 954-956). As a result, the Tribunal rejected the claim of a breach of the Impairment Clause by Italy (para 958).

Umbrella Clause

In considering the claim related to the Umbrella Clause, the Tribunal examined whether the measures the claimants relied upon established obligations falling within its scope. The legislative acts, represented by the Conto Energia Decrees, were found to be directed towards all electricity producers utilizing photovoltaic conversion, not to “a small and well-defined class of investors”. As a result, these acts did not satisfy the privity requirement for specific investors (para 999). Additionally, the contract with the state-owned energy service system operator was characterised as an "accessory" in nature, limiting their capacity to create obligations beyond those originating from primary legislative acts (para 1002-1003). The claim was dismissed (para 1010).

As a result, the tribunal dismissed all of SunReserve’s claims on the merits (para 1043).

5.1.6 Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB 15 50

On 11 December 2015, before the Blusun award was dispatched to the parts, on 27 December 2016, Eskosol S.p.A. in liquidazione, an Italian company, with an 80% shareholding by Blusun S.A. (“Blusun”), a Belgium company, initiated the case before an ICSID Tribunal, that dispatched the awards to the parties on 4 September 2020 (“Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50,” 2020, para 2 and 6).

In 2010, Eskosol acquired 12 companies that owned land in Italy for the construction of 120 photovoltaic plants. These plants were designed with a nominal capacity of "just below" 1 MW, which enabled them to qualify for simplified permitting procedures and higher tariff levels specifically available for small PV plants. However, to secure external financing, Eskosol aimed at consolidating these 120 individual 1 MW plants into a unified project (para 122). The construction costs of the entire project, which, besides the 120 plants, included two substations, and their connection to the grid, ranged from EUR 380 million to EUR 400 million, with 80% of the total expected to be financed through bank loans (para 123).

Eskosol contracted for the construction of the plants to be operational between April 2011 and November 2011 but failed to pay the constructor (para 134 and 141). The claimant contended that the uncertainty stemming from the Romani Decree and the tariff reduction under Conto Energia IV rendered its project "economically unviable," and hindered it from obtaining funding (para 169). Not even one of the 120 PV plants planned was built (para 446).

In November 2013, Eskosol was declared insolvent. However, Blusun and Messrs. Lecorcier and Stein allegedly did not cooperate with Eskosol's bankruptcy proceedings and initiated an ICSID claim against Italy under the ECT (the Blusun case) without informing the receiver or the judge supervising the Eskosol bankruptcy proceedings (para 175). As of 2014, the company had incurred sunk costs of approximately EUR 39.2 million and had debts amounting to around EUR 14.7 million. (para 176).

The claimant argued that Italy’s actions and omissions, especially the Romani Decree and Conto Energia IV, were “unfair and inequitable”; “unreasonable”; “have failed to protect Eskosol’s Investments”; violated the “umbrella clause”; and “have effectively expropriated Eskosol’s Investments without prompt, adequate and effective compensation”. Based on these claims, the claimant seeks compensation for lost profits, amounting to at least EUR 196.7 million, or reimbursement for its sunk costs, totalling at least EUR 37.9 million (para 92).

Unreasonable measures

The tribunal pointed out that the enactments on which Eskosol based its claims were consequences of three interrelated policy objectives: to provide feed-in tariffs “without any cost

to the state budget," to ensure "a fair return on the investment and operating costs," and to implement decreasing tariff structure (para 391). In 2011, it was evident that past incentive tariffs had prompted greater photovoltaic expansion anticipated, coupled with a significant decline in solar panel costs (para 397). Therefore, the tribunal concluded that it was hardly irrational for Italy to recalibrate its support scheme that, since the beginning, "had been based on a principle of regulated (not market-based) 'fair returns'" (para 398). Moreover, the unexpected increase in returns for a larger number of photovoltaic plant beneficiaries of feed-in tariffs would impose a heavier financial burden on Italian consumers (para 399).

Therefore, the Tribunal denied that the Romani Decree or Conto Energia IV violated the prohibition on arbitrary and unreasonable conduct which is embedded in ECT Article 10(1)'s provision for fair and equitable treatment (para 402). The tribunal also dismissed the claim that the 10% threshold for photovoltaic construction in rural areas was unreasonable (para 403), irrational (para 404) or disproportionate (para 415).

Legitimate expectations

Concerning the alleged violations of legitimate expectations regarding stability and consistency, it is worth mentioning the tribunal's reasoning:

> "The bottom line remains that nothing in Conto Energia III purported to extend any rights to would-be developers or operators of future plants, before their actual completion and commissioning. There was no provision extending rights to entrepreneurs who hoped to build PV plants within a particular time period; or to operators who were in the process of arranging financing based on such plans; or to those who held DIA permits, authorizing construction to begin whenever financing was ready; or to those who built electrical substations with the intention one day of connecting these to future PV plants" (para 448).

Umbrella clause

The Tribunal rejected the notion that laws of general applicability qualify under ECT's umbrella clause and dismissed this claim (para 462-463).

Expropriation

As no plant went into operation and received the right of the incentive tariffs under Conto Energia III, Eskosol lacked valid property rights that would allow it to claim the enhanced value of its assets through participation in the Conto Energia III tariff regime (para 472). Therefore, the expropriation was dismissed (para 473).

Constant protection and security

The tribunal concluded that the claim regarding constant protection and security (Article 10(1)) should be dismissed, irrespective of the interpretation of its content. This dismissal applies whether one adopts the original customary understanding of constant protection and security, which is limited to physical provision (para 479), or if one considers a broader concept encompassing "legal security," given that Italy did offer channels for investors to seek judicial remedies (para 480).

As a result, the tribunal dismissed all of Eskosol's claims (para 490).

5.1.7 ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB 16 5

The Claimants were ESPF Beteiligungs GmbH ("ESPF"), an institutional fund incorporated under the laws of Germany; ESPF Nr. 2 Austria Beteiligungs GmbH ("ESPF 2"), an institutional fund incorporated under the laws of Austria; and InfraClass Energie 5 GmbH & Co. KG ("ICE 5"), a retail fund established under the laws of Germany ("ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5," 2020, para 4). On 29 January 2016, they brought the case against ICSID, which delivered the award to the parties on 14 September 2020 (para 8).

ESPF made investments of over EUR 120 million in a total of 244 plants, collectively possessing a capacity of 23 MW (para 138). Certain investments were made before being eligible for feed-in tariffs, including three PV projects with all plants eventually qualifying under Conto II for incentive tariffs (para 132-133). Another project consisted of 96 plants qualifying under Conto II and the remaining 17 under Conto III (para 133). On the other hand, some investments were made when the plants had already qualified for feed-in tariffs, with three plants under Conto II (para 135) and one under Conto III (para 134). 241 of these plants also benefited from Minimum Guaranteed Prices under the Off-Take Regime (para 137).

ESPF 2, on the other hand, invested EUR 168 million in 10 plants, with an aggregate capacity of 44 MW (para 142). These plants were divided between those that qualified under Conto III (para 139) and those qualifying under Conto IV (para 140).

Finally, ICE 5 made investments totalling EUR 110.9 million in 102 plants, having a combined capacity of 22 MW (ESPF 147). These plants were distributed across the qualification periods of Conto II (ESPF 143, 144), Conto III (ESPF 143), and Conto IV (ESPF 145).

The Claimants made claims related to various measures, including the Spalma-incentivi Decree, the reduction of Minimum Guaranteed Prices under the Off-Take Regime, the imposition of Administration Fees and Imbalance Costs, the "Robin Hood Tax" and the Reclassification of PV Facilities as "Immovable Property," impacting IMU and TASI Charges (para 148). They argued that these measures violated the FET standard, the Impairment Clause and the Umbrella Clause in Article 10(1) of the ECT (para 431).

Claims that the tribunal upheld

The tribunal found that the claimants had legitimate expectations to receive the incentive tariffs for 20 years. The Conto Energia Decrees, the contract with the state-owned energy service system operator, all specify the tariff rates for which a qualifying producer is entitled for the term of 20 years and make no reference to a rate of return, the calculation of costs or a profit, or other form of regulated return to producers. Further, the Conto Energia Decrees do not refer to the modification, adjustment or remodulation of the specific tariff rates set out therein (para 463).

The majority of the Tribunal concluded that at the time of their investments, the Claimants had legitimate expectations that their photovoltaic plants would benefit from the specific tariff rates outlined in the Conto Energia Decrees for 20 years, and therefore, it was unfair for the Respondent to reduce the feed-in tariffs with the Spalma-incentivi Decree (para 566).

It is worth mentioning that the majority of the Tribunal found that there was no significant difference in the claimants' expectations, regardless of whether they invested in already commissioned plants or plants under development. This is because their entitlement to the specific tariff under the relevant Conto Energia Decree was established when a particular plant became operational, not when the contract with the State-owned energy service system operator was executed (para 542). Hence, it dismissed the “timing test” argument, as argued by the Respondent in reliance on the CEF v. Italy (para 543).

The tribunal found that modifications to the incentive tariffs did breach the Umbrella Clause, as the Conto Energia Decrees and contract with the State-owned energy service system operator together created specific obligations that Italy entered into with the investors (para 816).

Claims that the tribunal dismissed

On administrative fees and imbalance costs, the tribunal concluded that since there was no specific promise or commitment regarding these charges, there was no legitimate expectation by the producers that these charges would not be imposed. Additionally, the tribunal noted that the amounts involved were not substantial and did not appear to be disproportionate or unreasonable (para 617).

The tribunal rejected the claimant's argument concerning the minimum guaranteed price for several reasons. These included the fact that calculations and adjustments were made on an annual basis, the State-owned energy service system operator had the authority to modify its provisions, and there was an absence of any specific commitment to maintain the minimum guaranteed prices (para 637-638).

After addressing the FET claims, the tribunal proceeded to consider the impairment claim and concluded, by a majority, that Italy's unilateral modification of the tariff rates was unreasonable, breaching the Impairment Clause (para 707). However, the tribunal rejected the Impairment Clause claim concerning the Administration Fee, Imbalance Costs (para 712) and the modifications made to the minimum guaranteed price scheme (para 720).

The tribunal found that the imposition of administration fees and imbalance costs (para 825) as well as modifications in the minimum guaranteed prices (para 826) did not breach the Umbrella Clause.

Damages

As a result, the tribunal stated the damages at EUR 16 million (para 915).

5.1.8 Silver Ridge Power BV v. Italian Republic, ICSID Case No. ARB 15 37

On 29 July 2015, Silver Ridge Power BV, a company incorporated under the laws of the Netherlands, brought a case before the ICSID, which dispatched the award on February 26, 2021 ("Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37)," 2021, para 2). The Dutch company invested EUR 470 million in ten Italian companies that operated the 25 photovoltaic plants, with a total installed capacity of 130 megawatts (para 107-108). 7 plants received incentives tariffs under Conto Energia II; 4 under Conto Energia III; 12 under Conto Energia IV; and 2 under Conto Energia V (para 110).

The claimant contended that the Romani Decree, the Fifth Energy Account, the introduction of an administrative management fee, and the Spalma-incentivi Decree constituted violations of Article 10(1) of the ECT, first, second, and last sentences. Additionally, it was

argued that the Fifth Energy Account had consistently breached Article 13(1) of the ECT (para 144).

The Tribunal viewed the contract with the State-owned energy service system operator as accessory contracts that did not fall within the scope of the ECT's umbrella clause as obligations "entered into" with the Claimant's investments (para 385). Neither did Legislative Decree No. 387/2003, the Romani Decree, the Second, Third, Fourth and Fifth Energy Accounts or the pertinent tariff recognized by the contract with the State-owned energy service system operator (para 386).

The Spalma-incentivi Decree

Where the fair and equal treatment is concerned, the tribunal found no guarantee anywhere in the pertinent legislative acts or administrative decrees that the incentive regime would be maintained in all its aspects throughout the 20 years (para 435). Considering the Respondent's response to the challenges and the economic difficulty it faced, the Tribunal found that the adoption of the Spalma-incentivi Decree could be considered reasonable in pursuit of legitimate public policy objectives (para 452) that, while considerable, were not unforeseeable (para 457), excessive or disproportionate (para 465-469). Therefore, legitimate expectations of the claimant were not frustrated, and the fair and equitable treatment claim based on the Spalma-incentivi Decree was rejected (para 474).

The Romani Decree and the Fourth Energy Account

The claimant argued that the Romani Decree and the Fourth Energy Account prevented it from obtaining financing for Project Vega, but the Tribunal found that the claimant had not provided sufficient evidence to establish a causal link between the legal acts and the project's failure. As a result, the tribunal dismissed the claim (para 532).

The Fifth Energy Account

The tribunal found that the changes brought by the Fifth Energy Account were reasonable, foreseeable, and proportionate. They did not constitute a fundamental or radical alteration of the applicable legal framework and therefore did not frustrate the claimant's legitimate expectations or violate the fair and equitable treatment clause (para 607).

The claimant argued that the dramatic decrease in the value of the Frosinone plants had an effect equivalent to an indirect expropriation in the meaning of Article 13(1) of the ECT (para 608). However, the tribunal considered that the FIT reduction did not annihilate,

effectively neutralize or factually destroy the Claimant's investment in the Frosinone plants, dismissing the claim (para 611).

Concerning the introduction and amendment of the administrative management fee, the tribunal emphasized that it constituted a relatively low amount, not exceeding half of a per cent of the incentives received by the claimant (para 624). The tribunal found these actions to be reasonable, foreseeable, and proportional (para 625), leading to the dismissal of the claim (para 627).

Consequently, all claims were ultimately dismissed (para 629).

5.1.9 Summary of Merits against Italy

Table 18 - Alleged Breaches and Breaches Found Against Italy

	(10.1) Fair and equitable treatment	(10.1) Unreasonable or discriminatory measures	(10.1) Stable, equitable, favourable and transparent conditions	(10.1) Most constant protection and security	(10.1) Umbrella clause	(13.1) Indirect expropriation	(10.2)-(10.3) Discriminatory measures	Conclusion
Belenergia S.A. v. Italy, ICSID Case No. ARB/15/40	Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed	No breach found
Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italy, ICSID Case No. ARB/14/3	Breach alleged, but dismissed		Breach alleged, but dismissed			Breach alleged, but dismissed		No breach found
CEF Energia B.V. v. Italy, SCC Case No. 158/2015	Breach alleged and found	Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged, but dismissed			Breach found: fair and equitable treatment
Eskosol S.p.A. in liquidazione v. Italy, ICSID Case No. ARB/15/50	Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged, but dismissed		No breach found
ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italy, ICSID Case No. ARB/16/5	Breach alleged and found	Breach alleged and found			Breach alleged and found			Breaches found: fair and equitable treatment, unreasonable or discriminatory measures, and umbrella clause
Greentech Energy Systems A/S, NovEnergia II Energy & Environment (S.C.A.) SICAR, and NovEnergia II Italian	Breach alleged and found	Breach alleged and found	Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged and found			Breaches found: fair and equitable treatment, unreasonable or discriminatory

Portfolio S.A. v. Italy, SCC Case No. 095/2015								measures, and umbrella clause
Silver Ridge Power B.V. v. Italy, ICSID Case No. ARB/15/37	Breach alleged, but dismissed				Breach alleged, but dismissed	Breach alleged, but dismissed		No breach found
Sun Reserve Luxco Holdings S.à.r.l., Sun Reserve Luxco Holdings II S.à.r.l. and Sun Reserve Luxco Holdings III S.à.r.l. v. Italy, SCC Case No. 132/2016	Breach alleged, but dismissed	Breach alleged, but dismissed			Breach alleged, but dismissed			No breach found
	8 breaches alleged. 3 breaches found.	6 breaches alleged. 2 breaches found.	3 breaches alleged. No breach found.	4 breaches alleged. No breach found.	7 breaches alleged. 2 breaches found.	3 breaches alleged. No breach found.	1 breach alleged. No breach found.	

Source: Generated by the author; data compiled from (ECT. LIST OF CASES, [n.d.]).

Table 19 - Claimed Amount and Awarded Amount Against Italy

Cases*	Amount claimed (EUR million)	Amount awarded (EUR million)	Amount awarded in % of the amount claimed
Belenergia S.A. v. Italy, ICSID Case No. ARB/15/40	19.2	0.0	0.0
Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italy, ICSID Case No. ARB/14/3	187.8	0.0	0.0
CEF Energia B.V. v. Italy, SCC Case No. 158/2015	10.3	9.6	93.2
Eskosol S.p.A. in liquidazione v. Italy, ICSID Case No. ARB/15/50	196.7	0.0	0.0
ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italy, ICSID Case No. ARB/16/5	28.6	16	55.9
Greentech Energy Systems A/S, NovEnergia II Energy & Environment (S.C.A.) SICAR, and NovEnergia II Italian Portfolio S.A. v. Italy, SCC Case No. 095/2015	25.1	11.9	47.5
Sun Reserve Luxco Holdings S.à.r.l., Sun Reserve Luxco Holdings II S.à.r.l. and Sun Reserve Luxco Holdings III S.à.r.l. v. Italy, SCC Case No. 132/2016	40.9	0.0	0.0
Average of all cases	72.7	5.4	7.4
Average of cases with no amount awarded	111.2	0.0	0.0
Average of cases with any amount awarded	21.3	12.5	58.6
Subtotal of cases with no amount awarded	444.6	0.0	0.0

Subtotal of cases with any amount awarded	64.0	37.5	58.6
Total	508.6	37.5	7.4
* With the exception of Silver Ridge Power B.V. v. Italy. In the paragraph 146(c) of the award, one reads that the amount of damages will be proven at the hearing, and this information was not found.			
Source: Generated by the author; data compiled from (ECT. LIST OF CASES, [n.d.]).			

Table 20 - Summary of the awards of the cases against Italy

Forum	Case	Nationality of the claimant	Award
ICSID	Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40	Luxembourg	The tribunal had jurisdiction, admitted the case, but dismissed all the claims.
	Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3	Belgium, France, Germany	The tribunal had jurisdiction, admitted the case, but dismissed all the claims. ICSID annulment proceeding dismissed.
	ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italy, ICSID Case No. ARB/16/5	Germany, Austria	The tribunal had jurisdiction, admitted the case, and considered that Italy violated the fair and equitable treatment principle, protection against unreasonable or discriminatory measures, and the umbrella clause (all in Article 10(1)). It set the damages at EUR 16 million.
	Eskosol S.p.A. in liquidazione v. Italian	Belgium	The tribunal had jurisdiction, admitted the case, but dismissed all the claims.

	Republic, ICSID Case No. ARB/15/50		
	Silver Ridge Power BV v. Italian Republic, ICSID Case No. ARB/15/37	Netherlands	The tribunal had jurisdiction, admitted the case, but dismissed all the claims.
SCC	CEF Energia BV v. Italian Republic, SCC Case No. 158/2015	Netherlands	The tribunal had jurisdiction, admitted the case and dismissed all claims but the violation of fair and equitable treatment (Article 10(1)). It set the damages at EUR 9.6 million. The claimants have requested the enforcement of the award in the United States.
	Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095	Denmark, Luxembourg	The tribunal had jurisdiction, admitted the case, and dismissed all claims but the violation of fair and equitable treatment (Article 10(1)). It set the damages at EUR 11.9 million. The claimants requested the enforcement of the award in the United States.
	Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016	Luxembourg	The tribunal had jurisdiction, admitted the case, but dismissed all the claims.
Source: Generated by the author; data compiled from the cases, whose complete reference was provided in the section.			

5.2 Merits in the Cases against Spain

Out of the 31 cases with a final award against Spain, 30 are examined in this subsection. Green Power is the single case with a final award not analysed here because, as the tribunal considered that it lacked jurisdiction due the intra-EU objection, it has not analysed the merits of the case. The substantial volume of cases against Spain with analysis of rendered it impractical to conduct an individual examination of each, as it was done for the cases against Italy. Nonetheless, a condensed summary tables for the Spanish cases are provided, showing the alleged violations, accepted claims by tribunals (if applicable), and the amounts claimed and awarded.

Table 21 - Alleged Breaches and Breaches Found Against Spain

Table 7 – Breaches alleged, and breaches found against Spain									
	(10.1) Fair and equitable treatment	(10.1) Unreasonable or discriminatory measures	(10.1) Stable, equitable, favourable and transparent conditions	(10.1) Most constant protection and security	(10.1) Umbrella clause	(10.12) Effective means for the assertion of claims and the enforcement of rights	(13.1)Indirect expropriation	(10.1) No less favourable treatment than that required by international law	Breaches in each case
9REN Holding S.à.r.l. v. Spain, ICSID Case No. ARB/15/15	Breach alleged and found	Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed				Breach found: fair and equitable treatment
Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain, ICSID Case No. ARB/13/31	Breach alleged and found	Breach alleged, but dismissed			Breach alleged, but dismissed				Breach found: fair and equitable treatment

BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16	Breach alleged and found			Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed		Breach found: fair and equitable treatment
Charanne B.V. and Constructions Investments S.à.r.l v. Spain, SCC Case No. V (062/2012)	Breach alleged, but dismissed					Breach alleged, but dismissed	Breach alleged, but dismissed		No breach found
CSP Equity Investment S.à.r.l. v. Spain, SCC	Breach alleged, but dismissed						Breach alleged, but dismissed		No breach found
Cube Infrastructure Fund SICAV and others v. Spain, ICSID Case No. ARB/15/20	Breach alleged and found	Breach alleged, but dismissed			Breach alleged, but dismissed		Breach alleged, but dismissed		Breach found: fair and equitable treatment

Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36	Breach alleged and found	Breach alleged, but dismissed			Breach alleged, but dismissed		Breach alleged, but dismissed		Breach found: fair and equitable treatment
Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Spain, ICSID Case No. ARB/16/4	Breach alleged and found	Breach alleged, but dismissed		Breach alleged, but dismissed			Breach alleged, but dismissed		Breach found: fair and equitable treatment
Foresight Luxembourg Solar 1 S.à.r.l. and others v. Spain, SCC Case No. 2015/150	Breach alleged and found	Breach alleged, but dismissed			Breach alleged, but dismissed		Breach alleged, but dismissed		Breach found: fair and equitable treatment

FREIF Eurowind Holdings Ltd. v. Spain, SCC Case No. 2017/060	Breach alleged, but dismissed	Breach alleged, but dismissed			Breach alleged, but dismissed				No breach found
Gilatz Spain S.L., Aharon Naftali Biram, Redmill Holdings Ltd., and Sun-Flower Olmeda GmbH v. Spain, ICSID Case No. ARB/16/17									
Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Spain, ICSID Case No. ARB/15/42									

Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Spain, ICSID Case No. ARB/16/18	Breach alleged and found	Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged, but dismissed			Breach alleged, but dismissed	Breach found: fair and equitable treatment
InfraRed Environmental Infrastructure GP Limited and others v. Spain, ICSID Case No. ARB/14/12	Breach alleged and found	Breach alleged, but dismissed		Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed		Breach found: fair and equitable treatment
Isolux Infrastructure Netherlands B.V. v. Spain, SCC Case V (2013/153)	Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed			Breach alleged, but dismissed		No breach found
JGC Corporation v. Spain, ICSID Case No. ARB/15/27	Breach alleged and found	Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged, but dismissed				Breach found: fair and equitable treatment
Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1	Breach alleged and found	Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed				Breach found: fair and equitable treatment

Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23	Breach alleged and found	Breach alleged, but dismissed			Breach alleged, but dismissed		Breach alleged, but dismissed		Breach found: fair and equitable treatment
NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain, ICSID Case No. ARB/14/11	Breach alleged and found	Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed				Breach found: fair and equitable treatment
Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain, SCC Case No. 2015/063	Breach alleged and found	Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed		Breach found: fair and equitable treatment

OperaFund Eco-Invest SICAV PLC and Schwab Holding v. Spain, ICSID Case No. ARB/15/36	Breach alleged and found	Breach alleged, but dismissed		Breach alleged, but dismissed	Breach alleged, but dismissed				Breach found: fair and equitable treatment
RENERGY S.à.r.l. v. Spain, ICSID Case No. ARB/14/18	Breach alleged and found	Breach alleged, but dismissed		Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed		Breach found: fair and equitable treatment
RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain, ICSID Case No. ARB/13/30	Breach alleged and found	Breach alleged, but dismissed			Breach alleged, but dismissed				Breach found: fair and equitable treatment
RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain, ICSID Case No. ARB/14/34	Breach alleged and found	Breach alleged and found			Breach alleged, but dismissed				Breaches found: fair and equitable treatment, and unreasonable or discriminatory measures

Sevilla Beheer B.V. and others v. Spain, ICSID Case No. ARB/16/27	Breach alleged and found	Breach alleged, but dismissed							Breach found: fair and equitable treatment
SolEs Badajoz GmbH v. Spain, ICSID Case No. ARB/15/38	Breach alleged and found				Breach alleged, but dismissed		Breach alleged, but dismissed		Breach found: fair and equitable treatment
Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Spain, ICSID Case No. ARB/15/1	Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed				No breach found

STEAG GmbH v. Spain, ICSID Case No. ARB/15/4	Breach alleged and found			Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed		Breach found: fair and equitable treatment
The PV Investors v. Spain, PCA Case No. 2012-14	Breach alleged and found	Breach alleged, but dismissed	Breach alleged, but dismissed	Breach alleged, but dismissed					Breach found: fair and equitable treatment
Watkins Holdings S.à.r.l. and others v. Spain, ICSID Case No. ARB/15/44	Breach alleged and found	Breach alleged, but dismissed	Breach alleged, but dismissed		Breach alleged, but dismissed				Breach found: fair and equitable treatment

Total	28 breaches alleged. 23 breaches found.	23 breaches alleged. 1 breach found.	9 breaches alleged. No breach found.	11 breaches alleged. No breach found.	22 breaches alleged. No breach found.	1 breach alleged. No breach found.	14 breaches alleged. No breach found.	1 breach alleged. No breach found.	
In CSP, as no amount in damages was awarded, it was inferred that all claims were dismissed.									
In Gilatz, the award was not found to extract such information, but some violation was found, as an amount in damages was awarded.									
The tribunal's decision in Hydro Energy does not fit into this classification. In paragraph 770(3) of the Decision on Jurisdiction, Liability and Directions on Quantum, the tribunal stated: the Tribunal declares that the Respondent might (or would) be in breach of ECT, Article 10(1), if and to the extent that the remuneration of each of the plants in the Ondina and Xana portfolios failed to accord with a reasonable post-tax rate of return in the small-hydro market in Spain on the basis of WACC plus 1%, with the risk-free rate being the Spanish 10 year bond rate of 4.398%.									
Source: Generated by the author; data compiled from (ECT. LIST OF CASES, [n.d.]), completed with information brought direct from the awards, when they were not available at the site									

Table 22 - Claimed Amount and Awarded Amount Against Spain

Cases*	Amount claimed (EUR million)	Amount awarded (EUR million)*	Amount awarded in % of the amount claimed
9REN Holding S.à.r.l. v. Spain, ICSID Case No. ARB/15/15	52.2	41.8	80.1
Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain, ICSID Case No. ARB/13/31	238.0	112.0	47.1
BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16	61.9	22.0	35.5
Charanne B.V. and Constructions Investments S.à.r.l v. Spain, SCC Case No. V (062/2012)	17.8	0.0	0.0
CSP Equity Investment S.à.r.l. v. Spain, SCC	1188.2	0.0	0.0
Cube Infrastructure Fund SICAV and others v. Spain, ICSID Case No. ARB/15/20	74.1	33.7	45.5
Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36	298.0	128.0	43.0
Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Spain, ICSID Case No. ARB/16/4	173.0	106.2	61.4
Foresight Luxembourg Solar 1 S.à.r.l. and others v. Spain, SCC Case No. 2015/150	50.0	39.0	78.0
FREIF Eurowind Holdings Ltd. v. Spain, SCC Case No. 2017/060	124.0	0.0	0.0
Gilatz Spain S.L., Aharon Naftali Biram, Redmill Holdings Ltd., and Sun-Flower Olmeda GmbH v. Spain, ICSID Case No. ARB/16/17	68.0	47.3	69.6
Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Spain, ICSID Case No. ARB/15/42	132.1	30.9	23.4
Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Spain, ICSID Case No. ARB/16/18	50.7	24.9	49.1
InfraRed Environmental Infrastructure GP Limited and others v. Spain, ICSID Case No. ARB/14/12	75.7	28.2	37.3
Isolux Infrastructure Netherlands B.V. v. Spain, SCC Case V (2013/153)	68.9	0.0	0.0

JGC Corporation v. Spain, ICSID Case No. ARB/15/27	161.0	23.5	14.6
Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1	260.0	64.5	24.8
Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23	67.5	15.0	22.2
NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain, ICSID Case No. ARB/14/11	521.4	290.6	55.7
Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain, SCC Case No. 2015/063	61.3	53.3	86.9
OperaFund Eco-Invest SICAV PLC and Schwab Holding v. Spain, ICSID Case No. ARB/15/36	42.0	29.3	69.8
RENERGY S.à.r.l. v. Spain, ICSID Case No. ARB/14/18	141.0	32.9	23.3
RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain, ICSID Case No. ARB/13/30	441.0	59.6	13.5
RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain, ICSID Case No. ARB/14/34	273.0	28.1	10.3
Sevilla Beheer B.V. and others v. Spain, ICSID Case No. ARB/16/27	38.5	6.8	17.7
SolEs Badajoz GmbH v. Spain, ICSID Case No. ARB/15/38	81.8	40.5	49.5
Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Spain, ICSID Case No. ARB/15/1	423.0	0.0	0.0
STEAG GmbH v. Spain, ICSID Case No. ARB/15/4	79.0	27.7	35.1
The PV Investors v. Spain, PCA Case No. 2012-14	1160.0	91.1	7.9
Watkins Holdings S.à.r.l. and others v. Spain, ICSID Case No. ARB/15/44	123.9	77.0	62.1
Average of all cases	218.2	48.5	22.2
Average of cases with no amount awarded	364.4	0.0	0.0
Average of cases with any amount awarded	189.0	58.2	30.8
Subtotal of cases with no amount awarded	1821.0	0.0	0.0

Subtotal of cases with any amount awarded	4725.1	1453.9	30.8
Total	6547.0	1453.9	22.2
* With the exception of OperaFund Eco-Invest SICAV PLC and Schwab Holding v. Spain, due to the amount awarded was in USD.			
** In Antin, the damages were later rectified to EUR 101 million.			
*** Eiser was annulled.			
Source: Generated by the author; data compiled from (ECT. LIST OF CASES, [n.d.]).			

Table 23 - Summary of the awards of the cases against Italy

Forum	Case	Nationality of the claimant	Award
ICSID	9REN Holding S.à.r.l. v. Spain, ICSID Case No. ARB/15/15	Luxembourg	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 41.8 million.
	Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain, ICSID Case No. ARB/13/31	Luxembourg, Netherlands	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 112 million. The damages were later rectified t0 EUR 101 million.
	BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16	Germany	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 22 million.
	Cube Infrastructure Fund SICAV and others v. Spain, ICSID Case No. ARB/15/20	Luxembourg, and France	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 33.7 million.
	Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36	United Kingdom, and Luxembourg	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 128 million. The case was later annulled.

	Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Spain, ICSID Case No. ARB/16/4	Japan~~, and Netherlands~~	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 106.2 million.
	Gilatz Spain S.L., Aharon Naftali Biram, Redmill Holdings Ltd., and Sun-Flower Olmeda GmbH v. Spain, ICSID Case No. ARB/16/17	Germany, United Kingdom, and Germany	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the ECT. It set the damages at EUR 47.3 million. The award was not made public.
	Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Spain, ICSID Case No. ARB/15/42	Luxembourg, and Sweden	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the Article 10(1). It set the damages at EUR 30.9 million.
	Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Spain, ICSID Case No. ARB/16/18	Luxembourg, and Netherlands	The tribunal had jurisdiction, admitted the case, and considered that Spain violated Article 10(1). It set the damages at EUR 24.9 million.
	InfraRed Environmental Infrastructure GP Limited and others v. Spain, ICSID Case No. ARB/14/12	United Kingdom	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 28.2 million.
	JGC Corporation v. Spain, ICSID Case No. ARB/15/27	Japan	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 23.5 million.
	Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1	Netherlands	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 64.5 million.
	Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23	Germany	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 15.0 million.
	NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain, ICSID Case No. ARB/14/11	Netherlands	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 290.6 million.

	OperaFund Eco-Invest SICAV PLC and Schwab Holding v. Spain, ICSID Case No. ARB/15/36	Malta, and Switzerland	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 29.3 million.
	RENERGY S.à.r.l. v. Spain, ICSID Case No. ARB/14/18	Luxembourg	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 32.9 million.
	RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain, ICSID Case No. ARB/13/30	United Kingdom, and Luxembourg	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 59.6 million.
	RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain, ICSID Case No. ARB/14/34	Germany, and Spain	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the protection against unreasonable or discriminatory measures, and the fair and equitable treatment principle. It set the damages at EUR 28.1 million.
	Sevilla Beheer B.V. and others v. Spain, ICSID Case No. ARB/16/27	Netherlands	The tribunal had jurisdiction, admitted the case, and considered that Spain violated legitimate expectations and protection against unreasonable or discriminatory measures. It set the damages at EUR 6.8 million.
	SolEs Badajoz GmbH v. Spain, ICSID Case No. ARB/15/38	Germany	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 40.5 million.
	Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Spain, ICSID Case No. ARB/15/1	Germany	The tribunal had jurisdiction, admitted the case, but dismissed all the claims.
	STEAG GmbH v. Spain, ICSID Case No. ARB/15/4	Germany	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 27.7 million.
	Watkins Holdings S.à.r.l. and others v. Spain, ICSID Case No. ARB/15/44	Netherlands, and Luxembourg	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 77 million.
SCC	Charanne B.V. and Constructions Investments S.à.r.l v. Spain, SCC Case No. V (062/2012)	Netherlands, and Luxembourg	The tribunal had jurisdiction, admitted the case, but dismissed all the claims.

	CSP Equity Investment S.à.r.l. v. Spain, SCC	Luxembourg	The tribunal had jurisdiction, admitted the case, but dismissed all the claims. Award not made public. Information retrieved from ("CSP Equity Investment S.à.r.l. v. Spain, SCC," 2021)
	Foresight Luxembourg Solar 1 S.à.r.l. and others v. Spain, SCC Case No. 2015/150	Luxembourg, Denmark, and Italy	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 39 million.
	FREIF Eurowind Holdings Ltd. v. Spain, SCC Case No. 2017/060	United Kingdom	The tribunal had jurisdiction, admitted the case, but dismissed all the claims.
	Isolux Infrastructure Netherlands B.V. v. Spain, SCC Case V (2013/153)	Netherlands	The tribunal had jurisdiction, admitted the case, but dismissed all the claims.
	Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain, SCC Case No. 2015/063	Luxembourg	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 53.3 million.
PCA with rules of UNCITRAL	The PV Investors v. Spain, PCA Case No. 2012-14	Luxembourg, Netherlands, and Germany	The tribunal had jurisdiction, admitted the case, and considered that Spain violated the fair and equitable treatment principle. It set the damages at EUR 91.1 million.
Source: Generated by the author; data compiled from the cases, whose complete reference was provided in the section.			

5.3 Conclusions regarding the awards

Italy

Out of the eight investor-state disputes initiated against Italy, three were favourable to the investors (37.5%). In the remaining five cases (Belenergia, Blusun, Eskosol, Silver Ridge, and Sun Reserve), the arbitral tribunals dismissed all claims brought by the investors. Among these, damages amounting to EUR 444.6 million were claimed in four cases, with the amount claimed by Silver Ridge not specified.[16]

In three cases (CEF, ESPF, and Greentech), the tribunals considered that Italy had violated at least one of the investors' rights enshrined in the ECT. The total amount claimed in these cases was EUR 64.0 million, and the awarded amount reached EUR 37.5 million, constituting 58.6% of the total claimed. Considering all the cases with available data, the amount claimed was EUR 508.6 million , with only EUR 37.5 million (7.4% of the claimed amount) awarded.

In line with the findings of ROBERT-CUENDET (2010b p. 362), which state that arbitration cases without disputes over fair and equitable treatment are rare, in all cases against Italy, a violation of this standard was argued. In the three cases favourable to the investors, the arbitral tribunals found that Italy had it had been violated. Additionally, in ESPF and Greentech, the tribunals found further violations of protection against unreasonable or discriminatory measures and the umbrella clause alongside the FET.

Blusun and Eskosol stood out from the other cases due to the absence of operational energy installations. Both cases were closely linked, with Blusun having an 80% share in Eskosol, which was in bankruptcy when it initiated its case. Both cases concerned the project of 120 PV plants, each one generating almost 1 MW, and two substations ("Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3," 2016, para 53; "Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50," 2020, para 123). The Project never received the financing necessary and none of the projected plants were built ("Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3," 2016, para 376(e)). The tribunals did not consider the legislative changes were responsible for the failure of the project, and all the claims were dismissed (para 423). The arbitral tribunal reached a similar conclusion regarding the failure to secure financing for Project Vega, a component of the Silver Ridge case, and

[16] In the paragraph 146(c) of the award, one reads that the amount of damages will be proven at the hearing, and this information was not found.

dismissed this claim ("Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37)," 2021, para 532).

In the remaining 6 cases, investors owned renewable energy installations and had a contract with the State-owned energy service system operator, receiving reduced feed-in tariffs from the Italian government. However, only three cases saw arbitral tribunals concluding that Italy had violated rights enshrined in the ECT.

Inconsistencies emerged when comparing the cases. In three cases – CEF, ESPF, and Greentech – the arbitral tribunals determined that the changes imposed by Spalma-incentivi Decree had frustrated the claimants' legitimate expectations and violated the FET clause ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 234 and 244), ("ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5," 2020, para 566), ("Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," 2018, para 455). However, in three other cases – Belenergia, Silver Ridge, and Sun Reserve – the arbitral tribunals concluded that the reduction of feed-in tariffs under the Spalma-incentivi Decree did not breach the investors' legitimate expectations: "Belenergia S.A. v. Italian Republic ICSID Case No. ARB/15/40" (2019 para 594), "Silver Ridge Power BV v. Italian Republic ICSID Case No. ARB/15/37)" (2021 para 474), and "Sun Reserve Luxco Holdings SRL v. Italy SCC Case No. 132/(2016" 2020 para 852 and 871).

Another inconsistency arose regarding the relevance of the date of investment. In CEF, the tribunal ruled that investors did not have legitimate expectations and that there was therefore no breach of the FET clause concerning plants that, at the time of purchase, had not been connected to the grid nor had received contracts for feed-in tariffs from the state-owned energy service company ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," 2019, para 187-189).

A different outcome occurred in the case of Enersol, whose acquisition postdated the connection to the grid and the contract with the State-owned energy service system operator. In this case, the tribunal found that "Claimant's investment in Enersol enjoyed crystallised rights to incentives" (para 190). A similar interpretation emerged in SunReserve, where the tribunal said that the light-out status of nine plants owned by the claimants predated the State-owned energy service system operator and therefore no legitimate expectation could exist at the time of the investment ("Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016," 2020, para 777, 778, and 839). In ESPF, the tribunal diverged from this interpretation, and found no significant difference in the claimants' expectations, regardless of whether they

invested in already commissioned plants or plants under development in the "timing test" of the case CEF ("ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5," 2020, para 543).

Spain

Out of the 30 cases brought against Spain with a final award, 25 were favourable to the investors, representing 83.3% of the total. In the 23 cases favourable to the investors with information provided in table 21, all tribunals found that Spain had violated the FET. In the single case of RWE, the tribunal determined that Spain had also violated the prohibition of unreasonable or discriminatory measures. All other claims were dismissed, including: violation of the obligation to create stable, equitable, favourable, and transparent conditions (9 instances); most constant protection and security (11 instances); umbrella clause (22 instances); no less favorable treatment than that required by international law (1 instance); effective means for the assertion of claims and the enforcement of rights (1 instance); and indirect expropriation (14 instances). The total amount claimed against Spain exceeded EUR 6.5 billion, while the total amount awarded was close to EUR 1.5 billion, representing 22.2% of the amount claimed.

The following table compares the two countries.

Table 24 - Comparison between Italy and Spain

	Italy	Spain
Total of cases	8	30
Total of cases favourable to the investors	3	25
% of favourable cases	37.5	83.3
Total of amount claimed	508.6	6547.0
Total of amount awarded	37.5	1453.9
% of amount awarded in relation to amount claimed	7.4	22.2
Average claimed of all cases	72.7	218.2
Average awarded of all cases	5.4	48.5

6. AFTER THE AWARD

To answer the question of whether international investment law can prevent states from modifying their renewable energy policies and, consequently, reduce incentives for investment in this sector, this study has comprehensively reviewed the international and domestic legal framework concerning investments in renewable energy. Additionally, it has assessed 8 investor-state dispute settlement (ISDS) cases brought against Italy and 30 against Spain, both of which have implemented significant renewable energy policies. To further explore the research question, the study delves into the post-award developments in three cases favourable to investors against Italy and the 25 cases favourable to investors against Spain.

As seen in Chapter 4, on jurisdiction and admissibility, the arbitral tribunals did not accept the intra-EU jurisdictional objection. Consequently, the tribunals analysed the merits, but the rationale besides the intra-EU jurisdictional objection has repercussions on the enforcement of arbitration awards. When countries fail to comply with the obligation to pay compensation to investors, the latter can apply for enforcement of the judgement in other countries. However, the courts of European countries have declined to enforce the awards in these cases due to the interpretation that these ISDS proceedings are illegal under European law. This interpretation has been upheld in both the Achmea case, which involved a bilateral treaty, and the Komstroy case, which involved the ECT.

Several factors could affect the enforcement of awards. Disputes surrounding state immunity for execution may obstruct the enforcement of awards (BJORKLUND; VANHONNAEKER; MARCOUX, 2021, p. 506). Countries may use post-award remedies, combined with a stay of enforcement, to delay the enforcement of awards (ONWUAMAEGBU, 2023, p. 279).

The mechanism chosen for arbitration may play a significant role: ICSID operates as a self-contained regime with its own rules for the enforcement of awards, established within its treaty. In contrast, other arbitral tribunals rely on the lex fori for the enforcement of awards. Consequently, the choice of the seat can determine whether the interpretation of the Court of Justice of the European Union, considering arbitration invalid intra-EU, applies (SCHEU; NIKOLOV, 2021, p. 171). SCHEU; NIKOLOV (2020 p. 15-19) consider that neither awards issued by ICSID nor by other arbitral tribunals are likely to be enforced by courts in the EU. In courts outside the EU, their analysis differentiates whether the award was issued by an ICSID tribunal or not, and if it was issued by a non-ICSID tribunals, whether the tribunal had a seat in the EU or outside it. They state that ICSID awards are likely to remain enforceable outside the

EU . Awards issued by other tribunals will depend on the seat of the tribunal. If the tribunal has a seat in the EU, as the EU is part of the lex fori, tribunals outside the EU may refuse enforcement, arguing the non-validity of the award. By contrast, for awards by tribunals placed outside of the European Union, none of the grounds for refusing enforcement is fulfilled: the arbitration agreement remains valid, and there will be no possibility of invoking incompatibility with EU law in annulment proceedings at the place of arbitration (SCHEU; NIKOLOV, 2020, p. 20-21).

This section examines these post-award developments. The first subsection (6.1) focuses on the cases against Italy, while the second subsection (6.2) addresses the cases against Spain. In both subsections, the cases are presented chronologically, based on the order in which the awards were issued. The third subsection (6.3) assesses other actions taken by the European Union on the matter, and the fourth subsection (6.4) discusses the withdrawal from the ECT and efforts to modernise the treaty.

The investigation into enforcement is primarily based on documents uploaded in ISDS databases, particularly italaw.com. Searches in databases of domestic judicial systems were not included in the scope of this study.

6.1 Developments after the award in the cases against Italy

This section examines the post-award developments in cases against Italy. It starts with the assessment of Blusun case, the single case of annulment request by the claimants. Subsequently, it scrutinizes three cases favourable to the investor with developments after the awards available in the database. Finally, it presents concluding remarks about these developments.

6.1.1 Blusun

In Blusun, whose award favoured Italy, the claimants requested the annulment of the award based on ICSID Convention Article 52(1)(b). However, the ad hoc committee to decide on the annulment decided that the tribunal did not fail in its duty to state the reasons for the award ("Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3. Decision on Annulment," 2020, para 246). It found no excess of powers by the tribunal, let alone a manifest excess of powers. (para 286). It was not persuaded that the

tribunal made a serious departure from a fundamental rule of procedure (para 321). As a result, it denied the request for annulment (para 339).

6.1.2 Greentech: appeal and attempt to enforce

On 23 December 2018, the arbitral award on Greentech was dispatched. Italy appealed to the Svea Court of Appeal to set aside or invalidate the award, and, on 28 March 2019, the Sweden Court stayed the execution of the award ("Italian Republic v Athena Investments A/S (earlier Greentech Energy Systems A/S). Svea Court of Appeal, Case no T 3229-19.," 2019). On 12 November 2021, the court decided to inform the CJEU that the request for a preliminary ruling was not maintained ("Italian Republic v Athena Investments A/S (earlier Greentech Energy Systems A/S). Svea Court of Appeal, Case no T 3229-19.," 2021). No other decision about this case was found in the database ("Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095," [n.d.]).

On 5 April 2019, the investors requested the enforcement of the award before the Supreme Court of the State of New York County of New York: Commercial Division ("GREENTECH ENERGY SYSTEMS A/S (NOW KNOWN AS ATHENA INVESTMENTS A/S) at al. v ITALIAN REPUBLIC. SUPREME COURT OF THE STATE OF NEW YORK. Petition to Confirm Foreign Arbitral Award," 2019). However, in a joint decision concerning both CEF and Greentech, the United States District Court for the District of Columbia stayed the execution of the award due to the set-aside proceedings taking place in Sweden. The procedure would be stayed until further notice from the court, which might request updates regarding the status of the set-aside matter ("CEF ENERGIA, B.V., et al., v. Italian Republic. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, No. 19-cv-3443 (KBJ)," 2020).

6.1.3 CEF

The award on CEF was rendered on 16 January 2019. Italy requested the Svea Court of Appeal to set aside or declare the award invalid; in a decision on 23 April 2019, the Court stayed the enforcement of the award ("Italian Republic v CEF Energia B.V. Svea Court of Appeal, Case no T 4236-19," 2019). No subsequent decision of the Svea Court of Appeal was found in the databases of ISDS cases ("CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," [n.d.]).

On 16 April, CEF Energia requested the enforcement of the award before the Supreme Court of the State of New York County of New York: Commercial Division ("CEF Energia BV v. Italian Republic, SUPREME COURT OF THE STATE OF NEW YORK. Petition to Confirm Foreign Arbitral Award," 2019). On 2 October 2019, Italy requested the removal of the case from the United States District Court to the Southern District of New York ("CEF ENERGIA, B.V. v. THE ITALIAN REPUBLIC, UNITED STATES DISTRICT COURTFOR THE SOUTHERN DISTRICT OF NEW YORK. NOTICE OF REMOVAL," 2019). On 23 July 2020, the United States District Court for the District of Columbia, in a joint decision concerning both CEF and Greentech, stayed the execution of the award due to the set-aside proceedings that are taking place in Sweden ("CEF ENERGIA, B.V., et al., v. Italian Republic. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, No. 19-cv-3443 (KBJ)," 2020).

6.1.4 ESPF

In ESPF, whose award was dispatched on 14 September 2020, Italy requested for the annulment of the award. However, on 31 July 2023, the "ad hoc" committee to decide on the annulment concluded that Italy had failed to show that the tribunal had exceeded its powers, let alone in a manifest way ("ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5. Decision on Annulment," 2023, para 265). Moreover, it considered that Italy also failed to demonstrate that the tribunal failed to provide reasons for its decisions (para 346) or that it breached a fundamental rule of procedure (para 381). Therefore, it rejected the application for annulment (para 397).

6.1.5 Summary of developments after the award in the cases against Italy

Table 25 - Developments after the award in cases against Italy

Case	Request for reconsideration or for annulment?	Attempts to enforce the award in the US?
Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italy, ICSID Case No. ARB/14/3	Annulment request by the investors dismissed.	

CEF Energia B.V. v. Italy, SCC Case No. 158/2015	Appeal to the Svea Court of Appeal, which is pending.	Yes.
ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italy, ICSID Case No. ARB/16/5	Annulment request dismissed.	
Greentech Energy Systems A/S, NovEnergia II Energy & Environment (S.C.A.) SICAR, and NovEnergia II Italian Portfolio S.A. v. Italy, SCC Case No. 095/2015	Appeal to the Svea Court of Appeal, which is pending.	Yes.
Source: Generated by the author; data compiled from the cases, whose complete reference was provided in the section.		

At the moment, no information about the payment of any of the awards studied in this dissertation was found. GAILLARD; MITREV PENUSHLISKI (2021), which gathered data until 31 December 2019, found no payment made by Italy for ISDS awards related to renewable energies . No other similar subsequent study was found.

6.2 Developments after the award in the cases against Spain

This subsection assesses the developments after the award in 19 cases favourable to investors in litigations against Spain. At the end, a summary of these developments is provided as well as some concluding remarks.

6.2.1 Eiser

6.2.1.1 Attempt to enforce the award in the United States

On 4 May 2017, the tribunal issued the award on Eiser. The investors required the enforcement of the award in the United States. On 27 June 2017, the same court ordered that the pecuniary obligations in the award shall be recognized as if it were a final judgement of its own and that Spain shall pay the petitioners the sum awarded with the interest established ("Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, the United States District Court for the Southern District of New York, Civil Action No. 17-CV-3808 (LAK)," 2017). On the next day, Spain requested to vacate this decision ("Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, the United States District Court for the Southern District of New York, Civil Action No. 17-CV-3808 (LAK). Motion to Vacate," 2017). On 13 February 2020, the United States District Court

for the District of Columbia stayed the enforcement of the award until the annulment decision by the ad hoc committee constituted by ICSID ("Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, the United States District Court for the District of Columbia, Civil Action No. 18-1686 (CKK)," 2020a).

6.2.1.2 Attempt to enforce the award in Australia

On 24 February 2020, in a joint decision for Eiser and Anti cases, the Federal Court of Australia decided that Spain should pay EUR 128 million to the investors of the Eiser case and EUR 101 million to the investors of the Antin Case ("Eiser Infrastructure Ltd v Kingdom of Spain, Federal Court of Australia, [2020] FCA 157," 2020). Spain invoked jurisdictional immunity but the tribunal found that Spain was not immune and granted the relief sought by the applicants ("Eiser Infrastructure Ltd v Kingdom of Spain, Federal Court of Australia, [2020] FCA 157," 2020).

6.2.1.3 Annulment proceeding

On 21 July 2017, Spain requested the annulment of the award, issued on 4 May 2017, and on 11 June 2020, the committee rendered its decision on the annulment. Spain argued that the award should be annulled based on the improper constitution of the tribunal, a serious departure from fundamental rules of procedure, manifest excess of power, and failure to state reasons ("Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36. Decision on annulment," 2020, para 7). To assess if the constitution of the tribunal was improper, the committee first addressed the question of whether the right to raise this issue was waived due to the concerned party not bringing it up promptly enough. The committee stated that it was "uncontested among the Parties that Dr. Alexandrov did not disclose the relationship he had with the Brattle Group and, in particular, with Mr. Lapuerta" (para 188) and considered that the investors failed to prove that Spain was aware of the relationship, concluding that Spain did not waive its right to object (para 190).

Secondly, it tackled the question of whether, if the issue was raised in a timely manner, the party seeking annulment had demonstrated that a reasonable assessment of the case's facts would lead a third party to perceive a clear and apparent lack of impartiality with regard to Dr Alexandrov, the arbitrator appointed by the investors, and Mr Lapuerta, one of the Brattle Group damages experts selected by the investors. Dr. Alexandrov worked at Sidley Austin, holding a position as partner and co-chair of the firm's international arbitration practice between

May 2002 and August 2017. The tribunal of the Eiser case was constituted in July 2014, with the Award issued in May 2017. Notably, Dr Alexandrov was appointed as an arbitrator in four cases where the Brattle Group was engaged by the appointing party, including Blusun v. Italy and SolEs Badajoz v. Spain where Mr. Lapuerta was the testifying expert. Additionally, he served as counsel for the party that also contracted Brattle Group in at least eight other cases, with two cases overlapping with the Eiser case and three cases with Mr. Lapuerta as testifying expert. Furthermore, there was one undisclosed investor-state and commercial arbitration in which Sidley Austin acted as counsel for parties engaging the Brattle Group as experts, with Mr. Lapuerta serving as the testifying expert in the commercial arbitration. (para 205).

The committee considered that Dr Alexandrov had an obligation to disclose the relationship with Mr Lapuerta and concluded that a reasonable third party would perceive a clear appearance of bias on the part of Dr Alexandrov through an objective evaluation of the facts (para 228-229).

The Committee concluded that the right to an arbitrator's independence and impartiality is a fundamental procedural rule and identified a departure from such a fundamental procedural rule in the constitution of Eiser's tribunal (para 239-242). Moreover, the Tribunal considered it unfeasible for an annulment committee to uncover the inner workings of a tribunal's deliberations or poll its arbitrators, as each member is expected to have influenced the others with their perspectives and analyses during the deliberation process. Therefore, it was not necessary to prove that Dr Alexandrov's lack of impartiality or independence materially affected the Award (para 246). The committee concluded that the undisclosed relationship might have materially affected the award (para 253).

Moreover, the committee stated that, as guardians of the ICSID system, annulment committees must set high standards for disclosure obligations concerning conflicts of interest among arbitrators who simultaneously serve as legal representatives in investment disputes (para 255). As a result, the committee unanimously annulled the award for an improper constitution of the tribunal and a serious departure from a fundamental rule of procedure (para 255 and 273). It considered it unnecessary to address the other grounds for annulment raised by Spain (para 256).

PAUKER; WINSTON (2021) considered this annulment unprecedented, unreasonable, and questionable. According to these writers, the full annulment of the sentence, considering the proceedings that began in 2013, at significant costs to the parties, was unreasonable. Moreover, the lack of opportunity given to the arbitrator to refute the allegations raised against him rendered the annulment questionable (PAUKER; WINSTON, 2021).

On 26 July 2020, the investors submitted an application under ICSID Article 49(2), which states that "upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award".

Against this background, the claimants requested the committee to decide on four questions that it allegedly have omitted to decide on the annulment preceding. First, the reason the committee failed to address the requirement of bias towards a party. Second, the reason the committee failed to address the *travaux préparatoires* of the ICSID Convention and the relevant cases on the remedy that Spain could have used. Third, the reasons to annul the award as a whole, including the findings on jurisdiction and liability, due to Dr. Alexandrov's alleged bias towards a quantum expert. Fourth, the reasons the committee failed to determine if Dr. Alexandrov's alleged bias may have had a material effect on the award ("Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36. Application Pursuant to Article 49(2) of the ICSID Convention," 2020, para 7).

The petitioners expressed concern with the public statements of the committee's president that, according to them, "suggest a preoccupation with creating 'systemic' change by imposing a new standard for disqualification specifically for those arbitrators who also act as counsel in investor-state cases" (para 5). They pointed out that the president conducted a marketing webinar in which the decision was discussed and that a partner of the president's law firm liked the Spain announcement of the case on LinkedIn (para 6). As a request for relief, besides answering the four questions, the petitioners solicited the committee to "as part of the supplementary decision, make any consequent adjustments to the Decision in light of the conclusions reached on the omitted questions" (para 109). Until the submission of this dissertation, there was no decision on this application ("Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36," [n.d.]).

It is worth mentioning that in the two other cases studied in this dissertation where Dr Alexandrov was an arbitrator and Mr Lapuerta was an expert, Blusun and SolEs Badajoz, the respondent state requested annulment, but the committee dismissed the request.

6.2.1.4 Developments in the United States court after the annulment

On 5 August 2020, after receiving the information that the petitioners applied to Article 49(2) of the ICSID Convention to seek relief from the ad hoc committee's decision on

annulment, the United States District Court for the District of Columbia issued an order. First, it lifted its stay on the matter rendered on 13 February 2020, as the ad hoc committee issued a decision. Second, it denied without prejudice the respondent's motion to dismiss, considering significant factual changes since it was originally filed. Third, the court denied as moot the Respondent's Motion to Strike or Disregard Petitioners' "Supplemental Filing" in response to the European Commission's Amicus Brief. Fourth, it requested the parties to file a further Joint Status Report, providing factual updates and indicating their intent to file further motions ("Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, the United States District Court for the District of Columbia, Civil Action No. 18-1686 (CKK)," 2020b). No other decision in this regard was found in the database ("Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36," [n.d.]).

6.2.2 Novenergia

6.2.2.1 Request for Rectification, Clarification, and Supplement of the Final Award

On 13 March 2018, Spain submitted a Request for Rectification, Clarification, and Supplement of the Final Award. The tribunal responded on 9 April 2018, addressing Spain's requests ("Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain, SCC Case no. V 2015/063. Procedural Order No. 17," 2018).

Regarding the first issue, Spain sought clarification on six matters related to the applicability of EU law and its connection to the ECT provisions. The tribunal concluded that the Final Award already provided clear explanations on these aspects and required no further interpretation. Spain also requested the supplementation of the Final Award to include specific factual circumstances and the tribunal's application of the Fair and Equitable (FET) standard of the ECT. The tribunal acknowledged Spain's concerns but clarified that the Final Award had referenced relevant circumstances in its reasoning, even if not exhaustively ("Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain, SCC Case no. V 2015/063. Procedural Order No. 17," 2018).

Spain further sought a correction of alleged errors in the damage's calculation. The tribunal noted Spain's disagreement with the damages assessment but stated that Spain had not identified any clerical or computational errors within its jurisdiction for correction. Another request concerned the rectification or clarification of a particular section of the Final Award related to damages. The tribunal explained that its mention of Charanne was for establishing

general criteria, and the quantum of damages had been independently determined based on the specific circumstances of this case, leading to the dismissal of Spain's request (idem).

Finally, Spain petitioned the tribunal to clarify or interpret a specific section of the Final Award regarding the abolition of essential characteristics of the regulatory framework for long-term investments. The tribunal considered this request as an appeal on the merits, beyond its post-award authority. Moreover, it found the section to be clear and in need of no further clarification or interpretation, resulting in the dismissal of the request (idem).

6.2.2.2 Attempt to enforce the award in the United States

On 16 May 2018, Novenergia requested the enforcement of the award before the United States District Court for the District of Columbia ("Novenergia II v.The Kingdom of Spain. The United States District Court for the District of Columbia Civil Action No. 1:18-cv-01148. Petition to Confirm Foreign Arbitral Award," 2018). The Court received an expert declaration in support of Spain ("Novenergia II v.The Kingdom of Spain. The United States District Court for the District of Columbia Civil Action No. 1:18-cv-01148. Expert Declaration," 2018), a brief of the European Commission on behalf of the European Union as "amicus curiae" in support of Spain ("Novenergia II v.The Kingdom of Spain. The United States District Court for the District of Columbia Civil Action No. 1:18-cv-01148. Brief of the European Commission," 2019) and a brief of Mol Hungarian Oil and Gas PLC as "amicus curiae" in support of petitioners ("Novenergia II v.The Kingdom of Spain. The United States District Court for the District of Columbia Civil Action No. 1:18-cv-01148. Brief of amicus curiae in support of petitioners," 2018).

On 27 January 2020, the court granted a temporary stay of proceedings until the decision of the set-aside proceedings in Sweden ("Novenergia II v.The Kingdom of Spain. The United States District Court for the District of Columbia Civil Action No. 1:18-cv-01148. Memorandum Opinion," 2020; "Novenergia II v.The Kingdom of Spain. The United States District Court for the District of Columbia Civil Action No. 1:18-cv-01148. Order," 2020).

6.2.2.3 Annulment proceeding

On May 17, 2018, the Svea Court of Appeal suspended the enforcement of an arbitration award, following a summons by the Kingdom of Spain. Spain sought the annulment of the award and requested its temporary non-enforcement ("Novenergia II – Energy &

Environment (SCA), SICAR v. Kingdom of Spain, SCC Case no. V 2015/063. Procedural Order No. 17," 2018).

On April 25, 2019, the Svea Court of Appeals declined Spain's request for the Court of Appeal to seek a preliminary ruling from the Court of Justice of the European Union ("The Kingdom of Spain v. Novenergia II - Energy & Environment (SCA). Svea Court of Appeal, SICAR, B 124550.," 2019). Spain's request aimed to clarify whether Article 26 of the ECT is applicable between EU member states and, if so, whether it is compatible with EU primary law . On 27 May 2020, the Svea Court of Appeals declined Spain's request for the Court of Appeal to seek a preliminary ruling from the Court of Justice of the European Union. However, it provided the opportunity for the European Commission to submit a written statement ("The Kingdom of Spain v. Novenergia II - Energy & Environment (SCA). Svea Court of Appeal, SICAR, B 124550.," 2020a).

The Svea Court of Appeals stated that the EU Court of Justice, in rulings like Achmea, Komstroy, and PL Holdings, had stated the inapplicability of arbitration clauses in international investment protection agreements between EU Member States. This general stance was further affirmed in the EU Court of Justice Opinion 1/20 of June 16, 2022, regarding the modernization of the ECT. Furthermore, it highlighted that the judgement in Komstroy was not time-limited, implying that the ECT should be interpreted in line with Komstroy from its beginning. As a result, an arbitration agreement based on Article 26 of the ECT could never have been established ("The Kingdom of Spain v. Novenergia II - Energy & Environment (SCA). Svea Court of Appeal, SICAR, B 124550.," 2020b).

PL Holdings also demonstrated that arbitration clauses in international investment protection agreements between Member States contradicted fundamental EU principles, including mutual trust, sincere cooperation, and the autonomy of EU law. The EU Court of Justice's position means that Spain and Novenergia could not have opted for arbitration to resolve their disputes either in advance or afterwards. Therefore, the conclusions of the appellate court provided grounds for declaring the arbitration award invalid (idem).

The investors argued that the annulment of the award would violate Novenergia's rights under the European Convention and its First Additional Protocol, notably the right to a fair trial and property protection. However, the Court of Appeals assumed that the EU Court of Justice's interpretation of the ECT aligns with the European Convention. As a result, the court decided to declare the award invalid (idem).

The investors appealed to Sweden's Supreme Court. To hear this type of appeal considered, permission to appeal must be provided. Such permission can be granted when it is

crucial for the general application of the law that the Supreme Court reviews the appeal. Additionally, permission to appeal may be granted in extraordinary cases, specifically when there are exceptional grounds for the Supreme Court's review. The Supreme Court has reviewed the materials but found no justification for granting permission to appeal, as of 3 July 2023 ("The Kingdom of Spain v. Novenergia II - Energy & Environment (SCA). The Supreme Court of Sweeden, Doc. ID 266496," 2023).

6.2.3 Masdar: request for a supplementary decision, for annulment and attempt to enforce the award in the US

On 16 May 2018, the award on Masdar was dispatched. On 29 June 2018, Spain requested a Supplementary Decision ("Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1. Decision on the Respondent's Request for a Supplementary Decision," 2018, para 1). Spain argued that the tribunal had omitted to decide on four key questions, namely: whether EU Law applies to the dispute; determination of the date of the investment; disclosure of the Dissenting Opinion on the valuation method; and disclosure of the Damages Valuation Model (para 9).

With regard to the first question, the tribunal decided that it had decided based on the ECT, but found no incompatibility between the ECT and the EU law (para 55). Concerning the second question, the tribunal stated that it had addressed it in the award (para 58). About the third question, the tribunal affirmed that there was no dissenting opinion on the valuation method (para 60). Regarding the fourth question, the tribunal stated that it had detailed the damages valuation model in the award (para 64- 65). As a result, the tribunal found no reason to supplement the award and dismissed the request on 29 November 2019 (para 66).

On 28 September 2018, before the decision regarding the request for a supplementary decision, the investors requested the enforcement of the award before the United States District Court for the District of Columbia ("Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, United States District Court District of Columbia, Petition to Enforce Arbitral Award," 2018). On 28 March 2019, Spain requested the annulment of the award to an ICSID Committee ("Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1. Procedural Order No. 3," 2020, para 3). On 18 September 2019, the United States District Court for the District of Columbia stayed the proceedings, upholding Spain's request until the decision on the annulment proceeding ("Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, United States District Court District of Columbia," 2019).

6.2.4 Antin

6.2.4.1 Attempt to enforce the award in the United States

On 15 June 2018, the award on Antin was dispatched. On 27 July 2018, the investors requested the enforcement of the award before the United States District Court for the District of Columbia ("Infrastructure Services Luxembourg S.A.R.L., Energia Termosolar B.V., v. Kingdom of Spain, THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, Petition to Enforce Arbitral Award," 2018).

6.2.4.2 Request for rectification of the award

On 28 July 2018, Spain requested a rectification of the award ("Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain, ICSID Case No. ARB/13/31. Decision on Rectification of the Award," 2019, para 3). Spain argued that the tribunal had committed clerical errors in calculating the amount of damages (para 12-16). On 29 January 2019, the tribunal accepted part of the claim and rectified the total amount in damages from EUR 112 million to EUR 101 million (para 40).

6.2.4.3 Annulment proceeding

On 22 May 2019, Spain requested the annulment of the award ("Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain, ICSID Case No. ARB/13/31. Decision on Annulment," 2021, para 7). Spain argued that the tribunal manifestly exceeded its powers, deciding that it had jurisdiction over an intra-EU dispute and awarding damages for measures that the tribunal itself had declared not incompatible with the ECT (para 123), a claim the committee dismissed (para 176).

Spain also argued that there was a serious departure from a fundamental rule of procedure, as it was prevented from submitting the European Commission's Decision C(2017)7384, dated 10 November 2017, and the judgement on Achmea (para 177). The committee dismissed the claim, and stated that "given the Tribunal's views, the Committee

does not see how the statements of EU law in EC Decision 7384 and the Achmea judgment would have changed the Tribunal's overall analysis" (para 206).

Spain argued that the tribunal failed to state its reasons for the non-application of EU law, its conclusions on liability, and the quantification of damages (para 207). The committee found that the tribunal had provided reasons for its findings (para 229). Having dismissed all claims, the tribunal rejected the request for annulment (para 268).

6.2.4.4 Attempt to enforce the award in Australia

Before Spain requested annulment, on 17 April 2019, the investor requested the enforcement of the award before the Federal Court of Australia ("Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain, FEDERAL COURT OF AUSTRALIA, [2019] FCA 1220," 2019, para 1). On 1 August 2019, the Court stayed the enforcement proceeding (para 41).

On 24 February 2020, in a joint decision for Eiser and Anti cases, the Federal Court of Australia ordered that Spain pay EUR 101 million to the investors of the Antin Case. However, the court allowed appeal and this order was set aside by a decision on 1st February 2021. On 25 June 2021, the Court ordered the payment of EUR 101 million ("Eiser Infrastructure Ltd v Kingdom of Spain, Federal Court of Australia, [2020] FCA 157," 2020). On 18 March 2022, the High Court of Australia granted Spain a special leave to appeal ("Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain, the High Court of Australia," 2022). Spain's appeal, which referred to judgements Achmea and Komstroy, was dismissed on 12 April 2023 ("Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain, the High Court of Australia," 2023, para 78-80).

6.2.4.5 Attempt to enforce the award in the United Kingdom

On 29 June 2021, the award was registered "as if it had been a judgment of the High Court" in the High Court of Justice Business and Property Courts of England and Wales Commercial Court (Queen's Bench Division) ("Infrastructure Services Luxembourg S.À.R.L.(formerly Antin Infrastructure Services Luxembourg S.à.r.l.) v. Kingdom of Spain. The High Court of Justice Business and Property Courts of England and Wales Commercial Court (Queen's Bench Division). Claim No. CL-2021-000362," 2022). The European Commission requested to be a party to the case ("Infrastructure Services Luxembourg

S.À.R.L.(formerly Antin Infrastructure Services Luxembourg S.à.r.l.) v. Kingdom of Spain. The High Court of Justice Business and Property Courts of England and Wales Commercial Court (Queen's Bench Division). Claim No. CL-2021-000362," 2023).

6.2.5 Foresight: attempt to enforce the award in the US and appeal to the Svea Court of Appeal

On 14 November 2018, the award on Foresight was dispatched. On 14 December 2018, the investors requested the enforcement of the award before the Supreme Court of the State of New York County of New York ("Foresight Luxembourg Solar et al v. Kingdom of Spain. The Supreme Court of the State of New York County of New York. Petition to Confirm the Arbitration Award.," 2018). On 3 May 2019, the European Commission on behalf of the European Union sent a brief as "amicus curiae" in support of Spain ("Foresight Luxembourg Solar et al v. Kingdom of Spain. The Supreme Court of the State of New York County of New York. Brief of the European Commission," 2019). On 30 March 2030, the United States District Court for the Southern District of New York granted the motion to transfer the case to the United States District Court for the District of Columbia ("Foresight Luxembourg Solar et al v. Kingdom of Spain. United States District Court Southern District of New York," 2020).

With regard to Foresight, it is known that there is an appeal to the Svea Court of Appeal by a decision to grant the European Commission the opportunity to submit written observations and the reject of a request for a preliminary ruling from the Court of Justice of the European Union ("Kingdom of Spain V. 1. Athena Investments A/S (formerly Greentech Energy Systems A/S), 2. Foresight Luxembourg Solar 1 S.à.r.l.,AT AL. SVEA COURT OF APPEAL," 2020).

6.2.6 9REN

6.2.6.1 Annulment proceeding

On May 31, 2019, the tribunal rendered its decision in the 9REN case. Subsequently, on April 3, 2020, Spain filed a formal petition for the annulment of the aforementioned decision and sought a provisional stay ("9REN Holding S.a.r.l v. Kingdom of Spain, ICSID Case No.

ARB/15/15. Decision on Annulment," 2022, para 6). The ruling on the annulment request was delivered on November 17, 2022.

Spain sought the annulment of the 9REN decision based on what it considered a manifest excess of powers by the Tribunal and a failure by the Tribunal to state reasons (para 45). According to Spain, the 9REN Tribunal exceeded its powers by incorrectly asserting jurisdiction, granting excessive compensation considering the tribunal's decisions on liability, and failing to apply European Union (EU) law (para 46).

Furthermore, Spain contended that the 9REN decision should be annulled because the tribunal failed to state reasons on critical matters, including the applicability of EU law, jurisdictional objections related to denial of benefits, findings of liability regarding ECT violations, and the quantification of damages (para 74).

The European Commission's Written Submission, as a Non-Disputing Party, asserted, among other key points, the relevance of the Court of Justice of the European Union's (CJEU) judgement in the Komstroy case. In this case, the CJEU indicated that Article 26(2)(c) of the ECT should not apply to disputes between a Member State and an investor of another Member State. Additionally, the Commission argued that Spain should not make any payment under the Award until the European Commission had rendered a final decision on the compatibility, or lack thereof, of such a payment (para 146).

In his expert report, Professor Hindelang underscored that Spain's payment of the Award in contravention of its obligations under Article 108(3) of the Treaty on the Functioning of the European Union (TFEU) and the relevant implementation legislation would render Spain liable under EU law. Furthermore, he emphasized that the European Commission possessed the authority to compel Spain to recover any amounts paid under the Award without the Commission's approval. In the event Spain could not recover these payments, the Commission had the power to initiate an infringement proceeding against Spain before the CJEU, which may result in monetary penalties. (para 181)

The committee clarified that Article 26 of the ECT provides investors with an option for arbitration to resolve disputes with host States, to which the host States have given unequivocal consent. The EU submitted a Statement to the Secretariat of the ECT regarding the application of that provision to the EU as a Regional Economic Integration Organization (REIO). Although the Statement preserves the authority of the CJEU to interpret and apply the ECT, it does not exclude arbitration as a mechanism for resolving disputes between Member States and investors from other Member States (para 260). Consequently, Spain's request for annulment based on the Tribunal's alleged excess of authority was rejected (para 261).

Regarding Spain's claim that the tribunal exceeded its powers by not ensuring that the compensation amount did not include the 7% Transmission of Value Added Tax on Electricity (TVPEE) tax, the committee found no evidence to support this claim (para 279). Consequently, it concluded that there are no valid grounds for the annulment of the decision based on a manifest excess of authority (para 280).

With regard to the claim of a failure by the tribunal to provide adequate reasoning, the committee noted that Spain bore the burden of proving that the Claimant lacked substantial business activities in Luxembourg, preventing the tribunal from having jurisdiction. The committee stated that the tribunal did indeed address the matter and its authority does not extend to reviewing the tribunal's assessment of the evidence leading to its conclusion in this regard (para 293). Therefore, Spain's request for annulment on this ground was rejected (para 294).

Concerning the reasons for Spain's liability, the committee conceded that "the wording might not be arguably the best model of clarity", but it noted that the tribunal provided its reasons and dismissed the claim (para 304). A similar conclusion was reached regarding the reasoning for the assessment of damages (para 313).

For the reasons mentioned above, the Committee unanimously decided to dismiss Spain's application for annulment and automatically terminated the stay of enforcement of the decision in accordance with ICSID Arbitration Rule 54(3) (para 331).

6.2.6.2 Attempt to enforce the award in the United States

On 25 June 2019, subsequent to Spain's request for the annulment of the award, but prior to the resolution of the annulment decision, the investors requested the enforcement of the award in the United States District Court for the District of Columbia ("9REN Holdings S.À.R.L. v. Kingdom of Spain, United States District Court for the District of Columbia. Complaint," 2019). On 30 September 2019, the court granted Spain's motion to suspend the proceedings until the annulment decision was reached ("9REN Holdings S.À.R.L. v. Kingdom of Spain, United States District Court for the District of Columbia," 2020). Following the ICSID Committee's decision rejecting the annulment action on 7 December 2022, the District Court lifted the stay of proceedings and ordered their continuation.

6.2.6.3 Attempt to enforce the award in Australia

On 26 March 2020, according to the information contained in a case before the Luxembourg Court, the investors initiated an exequatur action with the Federal Court in Sydney to secure recognition of the arbitral award in Australia. On 22 April 2020, the Federal Court in Sydney stayed the Australian enforcement proceedings of the Arbitral Award, which have since been pending ("Kingdom of Spain v. 9REN Holding S.àr.l.. the District Court of and in Luxembourg," 2023, para 10). [17]

6.2.6.4 Anti-suit injunction

Given this situation, and given that the company was incorporated in Luxembourg, Spain brought a case before the District Court of and in Luxembourg to stop the pursuit of the enforcement of the award in other jurisdictions. Spain's petition referenced a 2017 Commission Decision, stipulating that compensation granted by an arbitration tribunal due to Spain's modifications to the notified Spanish Scheme 2007 through the Spanish Scheme 2013 would inherently constitute State aid. However, arbitration tribunals lack jurisdiction to authorize the grant of State aid, as this is an exclusive competence of the Commission. The Commission emphasizes that its decision is a component of Union law, binding for arbitral tribunals applying European Union law ("Kingdom of Spain v. 9REN Holding S.àr.l.. the District Court of and in Luxembourg," 2023, para 11).

Spain also referenced the Achmea and Komstroy decisions, arguing that arbitration clauses in investment treaties, including the ECT, are void when applied to member states in intra-EU disputes. Furthermore, it contended that intra-EU investment arbitration procedures violated the principle of European Union law's autonomy and State jurisdictional immunity. Consequently, any sum awarded through such procedures becomes irrecoverable, as individuals subject to European law could not have consented to such arbitration and, consequently, could not have waived their immunity (para 14-15).

Spain also argued that a payment that violates European Union state aid law may trigger the imposition of sanctions against the Member State (para 16), and that such aid remains illicit regardless of the jurisdiction where the order for payment is issued and executed. Consequently, the investors' attempt to enforce the arbitral award constituted an abuse of right that necessitates prevention and cessation (para 20).

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[17] Information about this attempt of enforcement of award in Australia was found only in a document before the the District Cout of and in Luxembourg.

As a result, Spain sought a court order for 9REN Holding S.àr.l. to immediately cease from enforcing ICSID Arbitral Award No. ARB/15/15, dated May 31, 2019, given the null and void nature of the Arbitral Award and its classification as illegal State aid (operative part of the petition).

After Spain's anti-suit request in Luxembourg on 22 December 2022, the investor requested an anti-anti-suit injunction in the United States on 17 January 2023. The request aimed to halt Spain's legal action in Luxembourg and compel Spain to cease any foreign litigation that could disrupt or prolong the resolution of 9REN's petition to confirm the arbitral award under the 1965 ICSID Convention ("9REN Holdings S.À.R.L. v. Kingdom of Spain, United States District Court for the District of Columbia," 2023).

6.2.6.5 Developments in the United States Court Regarding the Anti-Suit Injunction

On February 15, 2023, the United States District Court for the District of Columbia issued a decision regarding the anti-anti-suit request. It noted that Spain did not provide prior notice of its anti-suit injunction intentions in Luxembourg. It concluded that the relief Spain sought in Luxembourg did not merit comity, as it was specifically designed to interfere with and terminate 9REN's petition before the United States court. Spain can seek a declaration from Luxembourg courts regarding its interpretation of EU law. However, it may not impede 9REN's ability to petition this court for relief under United States law. Therefore, the court enjoined Spain from pursuing actions in Luxembourg or any other foreign litigation that may interfere with or obstruct 9REN's petition and ordered Spain to withdraw its requests in Luxembourg that relate to the proceedings before the United States court ("9REN Holdings S.À.R.L. v. Kingdom of Spain, United States District Court for the District of Columbia. Memorandum Opinion," 2023).

In its decision of 20 April 2023, the United States District Court for the District of Columbia denied the investors' motion for contempt and sanctions and Spain's motion for a stay of the proceedings and a stay of the preliminary injunction pending appeal ("9REN Holdings S.À.R.L. v. Kingdom of Spain, United States District Court for the District of Columbia. Order," 2023). On the same day, the United States Court of Appeals for the District of Columbia Circuit found that the cases of Nextera, 9REN Holding, and Blasket (related to the award PV Investors) met the criteria for alignment and consolidated their appeals ("Nextera Energy Global Holdings B.V. and Nextera Energy Spain Holdings B.V., 9REN Holding

S.A.R.L., Blasket Renewable Investments LLC v. Kingdom of Spain. United States Court of Appeals for the District of Columbia Circuit," 2023).

6.2.7 NextEra

6.2.7.1 Annulment proceeding

On 31 May 2019, the tribunal issued the award on NextEra. On 26 September 2019, Spain applied for annulment ("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 Annulment," 2022, para 10). On 18 March 2022, the committee issued its decision on annulment.

Spain argued that the tribunal had manifestly exceeded its powers by issuing an award even in the absence of investor status, non-existence of an actual investment, and the absence of a direct relationship with Spain. Additionally, Spain argued that the tribunal had improperly established requirements to reject Spain's denial of benefits and conferred international protection to those who did not have clean hands, thereby violating jus cogens and the principle that international arbitration cannot shield fraudulent actions. Furthermore, Spain raised concerns about the tribunal's adjudication of a dispute between an alleged investor of an EU Member State and an EU Member State, arguing that it misapplied international rules, including the ECT and EU law. They also disputed the tribunal's assessment of legitimate expectations and the awarding of damages, claiming that the tribunal contradicted its own conclusions on quantum (para 54)

Spain also argued that the tribunal failed to state the rationale behind its consideration of an investment and the investors' status under the ECT. Additionally, the tribunal purportedly did not provide a defensible reason for rejecting Spain's denial of benefits defence, asserting jurisdiction over an investment tainted by unclean hands, claiming jurisdiction over a dispute involving an alleged investor of an EU Member State and an EU Member State, for disregarding international rules such as the ECT and EU law, endorsing legitimate expectations of subsidy continuities contrary to EU law, determining the date of the investment, establishing liability, awarding damages, and assessing evidence. Spain claimed further that the tribunal did not address or comment on the falseness of a document (para 54).

Additionally, Spain contended that the tribunal committed a serious departure from fundamental rules of procedure by admitting documents, expert reports, memorials and witness

statements from investors outside the established deadlines. Spain also raised concerns about multiple procedural breaches related to assessing evidence, condemning Spain on grounds not expressed by the investor in their memorials, and relying on false documents in reaching its decision (para 54).

Despite all these arguments, the committee rejected all of Spain's claims and dismissed the request for annulment of the award (para 533).

6.2.7.2 Attempt to enforce the award in the United States

On 3 June 2019, the investors requested the enforcement of the arbitral award before the United States District Court for the District of Columbia ("Nextera Energy Global Holdings et al v. Kingdom of Spain, United States District Court for the District of Columbia.. Petition," 2019). On 30 September 2020, the Court stayed its procedures until the decision on annulment ("Nextera Energy Global Holdings et al v. Kingdom of Spain, United States District Court for the District of Columbia.," 2020). The decision was rendered on 18 March 2022, contrary to the annulment.

6.2.7.3 Anti-Suit Injunction

On 22 December 2022, Spain applied for an anti-suit injunction before the District Court of Amsterdam to suspend the proceedings before the United States District Court for the District of Columbia ("Kingdom of Spain v. Nextera Energy Global Holdings B.V., District Court of Amsterdam. Application for anti-suit injunction," 2022).

6.2.7.4 Developments in the United States Court regarding the anti-suit injunction

On 12 January 2023, the investors applied for an anti-suit injunction before the United States District Court for the District of Columbia against the attempt of Spain to have an anti-suit injunction before the District Court of Amsterdam ("Nextera Energy Global Holdings et al v. Kingdom of Spain, United States District Court for the District of Columbia. Anti-suit injunction.," 2023). On 15 February 2023, the court partially granted the investors' request: enjoining Spain from seeking an interlocutory decree or any other relief in the action before the Dutch court to suspend, hold in abeyance, or withdraw any proceedings before the American court; from pursuing any other foreign litigation with a similar purpose; to withdraw its requests

for relief before the Dutch court ("Nextera Energy Global Holdings et al v. Kingdom of Spain, United States District Court for the District of Columbia.," 2023).

On 20 April 2023, the United States Court of Appeals for the District of Columbia Circuit decided that the cases of Nextera, 9REN Holding, and Blasket (related to the award PV Investors) aligned the appeals ("Nextera Energy Global Holdings B.V. and Nextera Energy Spain Holdings B.V., 9REN Holding S.A.R.L., Blasket Renewable Investments LLC v. Kingdom of Spain. United States Court of Appeals for the District of Columbia Circuit," 2023).

6.2.8 Cube

6.2.8.1 Annulment proceeding

On 15 July 2019, the tribunal issued the award on Cube. On 12 November 2019, Spain requested its annulment and a provisional stay of its enforcement ("Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No. ARB/15/20. Decision on the Continuation of the Provisional Stay of Enforcement of the Award," 2020, para 2). On 17 April 2020, the committee decided not to continue the stay of the enforcement (para 141). On 28 March 2022, the committee rejected the request for annulment ("Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No. ARB/15/20. Decision on Annulment," 2022, para 504). Spain had argued that the tribunal had manifestly exceeded its powers; had failed to express its reasons; and there had been a serious departure from a fundamental rule of procedure, based on Article 52(1)(b), (d) and (e) of the ICSID Convention (para 75). The committee rejected the claim of manifest excess of power (para 235), failure to state reasons (para 381), and serious departure form a fundamental rule of procedure (para 471).

6.2.8.2 Attempt to enforce the award in the United States

On June 23 2020, before the decision of the annulment proceeding, the investors in the Cube case filed a complaint in the United States District Court for the District of Columbia to enforce the Award ("Cube Infrastructure Fund Sicav et al. v. Kingdom of Spain, United States District Court for the District of Columbia. Civil Action No. 1:20-cv-01708. Complaint," 2020). Spain sought to invalidate the Award on several grounds: lack of subject-matter jurisdiction under the FSIA, foreign sovereign compulsion doctrine, lack of full faith and credit

for the Award, and "forum non conveniens" ("Cube Infrastructure Fund Sicav et al. v. Kingdom of Spain, United States District Court for the District of Columbia. Civil Action No. 1:20-cv-01708. ," 2023).

The central issue in Spain's challenge, according to the American court, was the existence of a valid arbitration agreement with the plaintiffs. The plaintiffs established the three required jurisdictional facts for the FSIA arbitration exception: the ECT governing the arbitration, the formal request for arbitration, and the ICSID Tribunal's Award. As a result, the burden of persuasion shifted to Spain (idem).

Spain argued that EU law prevented it from making an offer to arbitrate matters involving EU law, rendering any international arbitration agreement void. Spain mentioned the Achmea and Komstroy judgements as evidence that the EU law forecloses Spain from agreeing to arbitrate under a treaty that removes jurisdiction from the courts of EU Member States (idem).

Nonetheless, the American court determined that both the ECT and the ICSID evidenced a delegation of arbitrability questions to the arbitrators, implicitly rejecting Spain's claim. Additionally, the court rejected Spain's remaining three claims. Consequently, the court recommended to the United States District Court for the District of Columbia that Spain's motion to dismiss be denied, while granting the plaintiffs' motion for summary judgement. As of the date of the submission of this dissertation, no other decision regarding this case have been made available (idem).

6.2.9 SolEs Badajoz: annulment proceeding

The award in SolEs Badajoz GmbH v. Kingdom of Spain was rendered on 31 July 2019. On 1 April 2020, Spain requested the annulment of the award ("SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38. Decision on Annulment," 2022, para 7).
Spain argued that the tribunal manifestly exceeded its powers, failed to state the reasons on which it was based, and committed a serious departure from a fundamental rule of procedure (para 51). However, the tribunal rejected Spain's request in a decision dispatched to the parties on 16 March 2022 (para 338).

6.2.10 InfraRed

6.2.10.1 Annulment proceeding

On 2 August 2019, the tribunal rendered its award on InfraRed. On 29 November 2019, Spain requested the annulment of the award ("InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12. Decision on Annulment (English)," 2022, para 5).

Spain argued that the tribunal had manifestly exceeded its powers by protecting those with unclean hands and who, therefore, were not entitled to protection; by disregarding the application of international *ius cogens*, conferring protection despite the fraud; by rejecting the intra-EU objection; by disregarding the application of applicable international law, including the ECT and EU law; and by incorrectly assessing legitimate expectations (para 94).

It also argued that the award should be annulled based on the failure to state reasons for determining some factual information; covering installed capacity of less than 50MW; asserting its jurisdiction between an alleged investor from an EU Member State and an EU Member State; disregarding the application of applicable international law, including the ECT and EU law; deciding on the date of the investment; the findings on liability; considering the investors' expectations about the immutability of the regulatory framework; the date of the investment and the date of valuation; and the evaluation of the evidence (para 94).

Moreover, Spain requested the annulment based on a serious breach of essential procedural requirements in assessing the evidence and a manifest error of assessment by awarding damages contrary to its findings on quantum (para 94). The committee dismissed the request for annulment (para 815).

6.2.10.2 Attempt to enforce the award in the United States

On 25 March 2020, the investors requested the enforcement of the award before the United States District Court for the District of Columbia ("Infrared Environmental Infrastructure Limited, et al. v. Kingdom of Spain, United States District Court for the District of Columbia. Complaint," 2020). On 29 June 2021, the court stayed the proceedings of the case ("Infrared Environmental Infrastructure Limited, et al. v. Kingdom of Spain, United States District Court for the District of Columbia," 2021). On 6 February 2023, the investors requested their substitution for Blasket, an American enterprise that now held full title to the arbitral award ("Infrared Environmental Infrastructure LIMITED, et al. v. Kingdom of Spain, United States District Court for the District of Columbia. Motion for Substitution," 2023).

Spain opposed the motion for substitution ("Infrared Environmental Infrastructure LIMITED, et al. v. Kingdom of Spain, United States District Court for the District of Columbia. Opposition to Motion for Substitution," 2023).

6.2.11 OperaFund: rectification, annulment proceeding and attempt to enforce in Switzerland

On 6 September 2019, the award was rendered and, on 28 October 2019, it was rectified by the Tribunal's Decision on Rectification of the Award ("OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36. Decision on Annulment," 2023, para 1). [18] On 25 February 2020, Spain requested the annulment (para 9). It argued that the tribunal manifestly exceeded its powers; committed a serious departure from a fundamental rule of procedure, and failed to state reasons (para 63). On 2 March 2023, the committee rejected Spain's request (para 620).

The investors requested the enforcement of the award in Switzerland, however, on 17 March 2023, the Swiss Federal Tribunal upheld a decision of the Regional Court of Bern-Mittelland and dismissed the request for enforcement of the award ("A.________ A, v. Staat B.________. Swiss Federal Tribunal 5A_406/2022," 2023).

6.2.12 RREEF

6.2.12.1 Annulment proceeding

On 11 December 2019, the tribunal rendered its award on RREEF. On 8 April 2020, Spain applied for the annulment of the award and a provisional stay of its enforcement. On 28 October 2020, the committee decided to continue the stay of enforcement ("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 Stay of Enforcement of the Award," 2020). Spain requested the annulment of the award arguing that the tribunal manifestly exceeded its powers by improperly declaring its jurisdiction over an intra-EU dispute, and failed to apply EU law to the merits of the dispute ("RREEF Infrastructure (G.P.) Limited and

[18] The information about the rectification was only found in the decision on annulment.

RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30. Decision on Annulment," 2022, para 6).

The committee rejected the claim of manifest excess of power (para 51) and of failure to apply EU law (para 153). In the hearing, Spain added the claim of failure to state reasons (para 154), which was dismissed (para 158). As a result, the committee dismissed Spain's request for annulment of the award (para I).

6.2.12.2 Attempt to enforce the award in the United States

In an attempt to enforce the award in the United States District Court for the District of Columbia, a petition was filed seeking to replace RREEF with Blasket in the legal action. This substitution was sought as Blasket held the full rights to the arbitral award ("RREEF Infrastructure (G.P.) Limited; RREEF Pan-European Infrastructure Two Lux S.A.R.L. v. Kingdom of Spain, United States District Court for the District of Columbia. Civil Action No. 1:19-cv-03783-CJN. Motion for Substitution," 2023). Spain expressed opposition to this substitution ("RREEF Infrastructure (G.P.) Limited; RREEF Pan-European Infrastructure Two Lux S.A.R.L. v. Kingdom of Spain, United States District Court for the District of Columbia. Civil Action No. 1:19-cv-03783-CJN. Opposition to Motion for Substitution," 2023).

6.2.13 RWE

6.2.13.1 Annulment proceeding

The tribunal rendered an award on RWE on 30 December 2019. On 19 April 2021, Spain requested the annulment of the award ("RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain (ICSID Case No. ARB/14/34)," [n.d.]). The committee granted Spain a provisional stay in the enforcement of the award ("RWE RENEWABLES GMBH &RWE RENEWABLES IBERIA S.A.U. v.KINGDOM OF SPAIN. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, Civil Action No. 1:21-cv-03232 (JMC)," 2023).[19]

[19] The reference to the stay of enforcement of the award was found only in an order of the United States Court for the District of Columbia.

6.2.13.2 Attempt to enforce the award in the United States and Anti-suit injunction in Germany

On December 9 2021, the investor requested the enforcement of the arbitral award in the United States District Court for the District of Columbia ("RWE RENEWABLES GMBH &RWE RENEWABLES IBERIA S.A.U. v.KINGDOM OF SPAIN. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, Civil Action No. 1:21-cv-03232 (JMC)," 2023).

On 22 December 2022, Spain initiated an anti-injunction lawsuit in the Regional Court Essen, Germany. In this lawsuit, Spain sought an order from the court requiring the petitioners to suspend, hold in abeyance, or withdraw any ongoing proceedings before the American court ("Kingdom of Spain v. RWE Renewables GmbH, Higher Regional Court Hamm," 2023).

On 24 March 2023, the investors presented a motion for preliminary injunction and temporary restraining order to the United States District Court for the District of Columbia. The petitioners requested the U.S. court to enjoin Spain from pursuing any relief in the German action or other foreign litigations. They also asked for an order to compel Spain to withdraw its requests for relief in the German lawsuit ("Rwe Renewable Gmbh& RWE Renewables Iberia S.A.U. v. Kingdom of Spain, United States District Court for the District of Columbia, Civil Action No. 1:21-cv-03232 (JMC)," 2023).

On 4 April 2023, the Regional Court Essen made a decision to not issue a final judgement on the request for a temporary court decree without a trial. Moreover, it ordered that the respondents were temporarily prohibited, until the Senate issued a final judgement on the request for a temporary court decree, from initiating or continuing any court proceedings in the United States of America in which they sought to prevent the petitioner from making or enforcing claims against the respondents in the Federal Republic of Germany. The Senate trial was scheduled for 2 May 2023 ("Kingdom of Spain v. RWE Renewables GmbH, Higher Regional Court Hamm," 2023).

On 13 April 2023, the United States District Court for the District of Columbia recognized that if the proceedings in this Court continued simultaneously with the ICSID annulment proceedings, the parties would likely need to address the same matters in two separate forums. This would escalate litigation costs and could lead to contradictory outcomes. Consequently, the court stayed its proceedings until a decision on annulment was reached ("Rwe Renewable Gmbh& RWE Renewables Iberia S.A.U. v. Kingdom of Spain, United

States District Court for the District of Columbia, Civil Action No. 1:21-cv-03232 (JMC),” 2023).

6.2.14 Watkins

6.2.14.1 Request for rectification of the award

On 21 January 2020, the award of Watkins was dispatched. On 6 March 2020, Spain submitted a request for rectification of the award and a request for a stay of enforcement (“Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44. Decision on Rectification of the Award,” 2020, para 2) Spain argued that the tribunal failed to take into account damages caused to the Claimants prior to the date of valuation in its assessment of damages (para 44). However, the tribunal found that this request had no merit and rejected it (Watkins Decision on Rectification of the Awardpara 54).

Spain also argued that the tribunal, while assessing the damages, did not exclude the impact of the 7% levy outside the tribunal’s jurisdiction (para 45). The tribunal stated that it rightly excluded the 7% levy (para 57) and rejected the request (para 65). Regarding the stay of enforcement, the tribunal held that it did not have jurisdiction to grant it (para 80).

6.2.14.2 Annulment proceeding

On 21 July 2020, ICSID received from Spain the Annulment Application of the Award. Spain also requested the stay of enforcement of the Award (“Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44. Decision on Annulment,” 2023, para 13). Spain claims that the Tribunal acted in excess of powers by improperly exercising jurisdiction in a case involving European investors and a European Union member state (an 'intra-EU' dispute) and by disregarding EU law, notably the European regulations on State aid (para 60).

The Committee highlighted that the Tribunal took into account the decision in Achmea (para 93). The Committee noted that the decision in Komstroy came after the award and, as a result, was not presented to the Tribunal. Therefore, it could not be used to substantiate Spain's claim of a purported manifest excess of powers (para 95). According to the Committee, the Tribunal adequately exercised its authority to establish its jurisdiction by carefully considering the ICSID Convention, Article 26 of the ECT, and general international law (para 110).

Moreover, the Committee considered that the Tribunal did not apply EU law to the merits of the claims because it had deemed the ECT the principal legal basis, which dispelled any argument of non-compliance with the applicable laws that resulted in excess of powers (para 122). The Committee found that the Tribunal was consistent with its position that EU law had minimal or no bearing on the matters (para 144).

In relation to the claim that the tribunal failed to state the reasons on which the award was based, the Committee found sufficient reasoning for the tribunal's decisions regarding the fair and equitable standard (para 158), legitimate expectations (para 172), Article 44(3) of RD 661/2007 as a commitment to stabilization (para 183), specificities of wind energy (para 188), and the reasonableness and proportionality of the measures (para 208). Regarding the investment date, the Committee stated that the Tribunal's omission of a specific finding did not justify the annulment of the Award, as it would not have a significant bearing on the overall result, including the magnitude of the economic consequences of the breaches (para 178).

Spain also contested the tribunal's calculation of damages. In response, the Committee noted that even if its interpretation of regulatory risk differed from that of the Tribunal, it should typically defer to the Tribunal since the Tribunal had the opportunity to fully evaluate the evidence presented. Acting otherwise would essentially transform the Committee into an appellate body reviewing the Tribunal's decision, a role the Committee could not assume (para 231). Concerning the actual value of the investment, the Committee states that "the Tribunal's reasoning, albeit brief, is clear and its logic is able to be followed", therefore not constituting a basis for annulling the award (para 240).

Addressing the 7% levy in the rectification process, the Committee considered that the tribunal had made an error, but it stated that: "the Tribunal's error in computation remains, merely a mistake, and not one that comes within the meaning of Article 52(1) (e) – for failure to state reasons" (para 257). The Committee restated that it was not an appellate body to correct an error that has been identified and, therefore, could not make a partial annulment relating to the quantification of damages (para 303).

The Committee also dismissed the claim that the Tribunal made a serious departure from a fundamental rule of procedure (para 270) or that it breached the right to be heard (para 290) or treatment of evidence (para 297). Therefore, it dismissed all the claims for annulment (para 299).

6.2.14.3 Attempt to enforce the award in the United States and anti-suit injunction

Watkins requested the execution of the award in the United States. Spain requested a stay of proceedings, but the United States District Court for the District of Columbia decided against doing so on 7 June 2023 ("Watkins Holdings S.À R.L. Watkins (NED) B.V. v. Kingdom of Spain. United States District Court for the District of Columbia, Civil Action No. 1:20-CV-01081-BAH," 2023). Although no decision from a Luxembourg court was located in the database ("Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44," [n.d.]), an American court's decision references an anti-suit injunction initiated by Spain in Luxembourg ("Watkins Holdings S.À R.L. Watkins (NED) B.V. v. Kingdom of Spain. United States District Court for the District of Columbia, Civil Action No. 1:20-CV-01081-BAH," 2023).

6.2.15 PV Investors

6.2.15.1 Spain's appeal to Switzerland's Federal Supreme Court

On 28 February 2020, the tribunal issued the award in PV Investors. On April 27 2020, Spain submitted an appeal to Switzerland's Federal Supreme Court seeking to set aside the award, with a request for suspensive effect ("A.________, v. ________, Federal Supreme Court of Switzerland, 4A_187/2020," 2021, para C). The UNCITRAL ad hoc tribunal, based in Geneva, allowed Spain to appeal to the Federal Supreme Court (para 2). Spain argued that the arbitral tribunal violated its right to be heard by failing to take into account new jurisdictional objections and that it violated the principle of procedural public policy by misapplying the principle of "res judicata" (para 5.1).

The Swiss court considered that Spain's failure to directly contest Procedural Order No. 19 precluded its right to invoke jurisdictional objections (para 5.2.2). Moreover, it considered the appeal inadmissible to the extent that it concerned the Arbitral Tribunal's jurisdiction (para 5.2.2). With regard to the misapplying of the principle of "res judicata" and a consequent denial of justice, the tribunal considered this plea erroneous (para 6.2.2). As a result, the appeal was dismissed to the extent that it was deemed admissible (para 1).

6.2.15.2 Anti-suit injunction

Spain requested an anti-suit injunction in the Netherlands ("Judgment of the Amsterdam District Court," 2023).

6.2.15.3 Attempts to enforce the award in the United States

On 10 December 2021, two of the investors in PV Investors requested the enforcement of the award before the United States District Court for the District of Columbia. In the petition, it was stated that Spain did not have immunity from jurisdiction because this was a proceeding to confirm an arbitral award under the New York Convention. Spain, the United States, and Switzerland (the seat of the award), were all parties to the Convention (PV Investors Petition https://www.italaw.com/sites/default/files/case-documents/italaw170724.pdf 5 and 28). The investors requested the court to confirm Spain's obligation to pay EUR 15.4 million in damages to AES and EUR 11.1 million as damages to Ampere, plus interest ("AES Solar Energy Coöperatief U.A., Ampere Equity Fund B.V. v. Kingdom of Spain, United States District Court for the District of Columbia. Petition," 2021).

The European Commission participated as amicus curiae ("AES Solar Energy Coöperatief U.A., Ampere Equity Fund B.V. v. Kingdom of Spain, United States District Court for the District of Columbia. Brief of the European Commission," 2022). Furthermore, the Court received the opinion of experts: Professor Steffen Hindelang ("AES Solar Energy Coöperatief U.A., Ampere Equity Fund B.V. v. Kingdom of Spain, United States District Court for the District of Columbia. Expert Declaration of Steffen Hindelang," 2022), Conor Quigley ("AES Solar Energy Coöperatief U.A., Ampere Equity Fund B.V. v. Kingdom of Spain, United States District Court for the District of Columbia. Expert Declaration of Conor Quigley," 2022), and Andrea K. Bjorklund ("AES Solar Energy Coöperatief U.A., Ampere Equity Fund B.V. v. Kingdom of Spain, United States District Court for the District of Columbia. Expert Declaration of Andrea K. Bjorklund," 2022).

On 2 March 2023, the investors submitted a motion for substitution, replacing AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V., the initial petitioners, Assignee Blasket Renewable Investments LLC ("Blasket") ("AES Solar Energy Coöperatief U.A., Ampere Equity Fund B.V. v. Kingdom of Spain, United States District Court for the District of Columbia. Motion for Substitution," 2023). However, on 3 March, the District Court of Amsterdam received a request prevented AES and AEF from seeking enforcement of an arbitral award at the District Court of Columbia, in the United States, citing potential evasion of binding EU state aid rules ("Kingdom of Spain v. AES Solar Energy Coöperatief U.A, District Court

of Amsterdam. Petition," 2023). On 6 March 2023, Spain submitted its opposition to the motion for substitution in the American court, arguing that was an attempt to evade the Dutch courts'jurisdiction and that it would not facilitate the conduct of the litigation ("AES Solar Energy Coöperatief U.A., Ampere Equity Fund B.V. v. Kingdom of Spain, United States District Court for the District of Columbia. Opposition to Motion for Substitution," 2023). On 7 March 2023, Blasket, an American company, substituted the two European companies in the case ("AES Solar Energy Coöperatief U.A., Ampere Equity Fund B.V. v. Kingdom of Spain, United States District Court for the District of Columbia. Memorandum Opinion," 2023).

In its decision on jurisdiction, the District Court of Columbia stated that three elements were required to establish its jurisdiction: an agreement to arbitrate, an arbitral award, and a treaty governing the award. Initially, the petitioners satisfied the requisites: the ECT served as the arbitration agreement, they held an award, and the New York Convention governed the award. This placed the burden of contesting jurisdiction on Spain ("AES Solar Energy Coöperatief U.A., Ampere Equity Fund B.V. v. Kingdom of Spain, United States District Court for the District of Columbia. Memorandum Opinion," 2023).

According to the court, the text of the ECT, combined with subsequent interpretations by the parties, prohibits tribunals formed under its jurisdiction from disregarding EU law, invalidating the alleged arbitration agreement between an EU Member State signatory and other EU nationals. As demonstrated in the Komstroy case, the arbitration agreement between Spain and the companies was invalid under EU law. In this sense, to the court, the tribunal lacked authority to adjudicate the dispute and the award was "ultra vires". As Spain lacked the legal authority to make an offer to arbitrate, there was no arbitration agreement, one of the requisites to the jurisdiction of the court. As Spain did not waive its jurisdictional immunity, the court could not establish jurisdiction (idem) On 29 March 2023, the court dismissed the case ("AES Solar Energy Coöperatief U.A., Ampere Equity Fund B.V. v. Kingdom of Spain, United States District Court for the District of Columbia. Order," 2023). The decision of this court is consistent with the conclusions of SCHEU; NIKOLOV (2020 p. 20-21), suggesting that courts outside the EU may refuse to enforce awards issued by non-ICSID tribunals with a seat in the EU due to their invalidity under the lex fori.

On 20 April 2023, the United States Court of Appeals for the District of Columbia Circuit consolidated the appeals in the cases of Nextera, 9REN Holding, and Blasket (related to the award PV Investors) ("Nextera Energy Global Holdings B.V. and Nextera Energy Spain Holdings B.V., 9REN Holding S.A.R.L., Blasket Renewable Investments LLC v. Kingdom of Spain. United States Court of Appeals for the District of Columbia Circuit," 2023).

6.2.15.4 Attempts in other jurisdictions

One of the investors of the case PV investors, requested the enforcement of the award before Colombia's Supreme Court of Justice. On 30 August 2022, the court dismissed the request due to the lack of jurisdiction. According to the tribunal, the issue brought before it was not one of the exceptions that would allow the tribunal to accept a case against a foreign State ("Swiss Renewable Power Partners S.A.R.L. v. Reino de España, Corte Suprema de Justicia, AC3869-2022," 2022).

A similar request was also made before Brazil's Superior Court of Justice. On 8 March 2023, the court stated that as the homologation solicitation was contested by Spain, the process should be distributed to its Special Court ("Swiss Renewable Power Partners S.A.R.L v. Reino da Espanha, Superior Tribunal de Justiça, Homologação de Decisão Estrangeira No 7061 - EX (2022/0207938-8)," 2023).

6.2.16 Hydro Energy: attempt to enforce the award in the US and annulment proceeding

On 5 August 2020, the tribunal rendered its award in Hydro Energy. On 20 September 2021, the investors requested the enforcement of the award before the United States District Court for the District of Columbia ("Hydro Energy 1, S.à.r.l., Hydroxana Sweden AB v. Kingdom of Spain, United States District Court for the District of Columbia. Petition," 2021). On 24 February 2022, Spain requested the dismissal of the petition arguing that petitioners were using the courts of the United States "to avoid decisions of European courts about European law as applied to European disputes" and added that "[u]nder principles of sovereign immunity and international comity, they cannot." Moreover, it stated that the arbitral tribunal lacked jurisdiction, as the ECT could not be applied between members of the EU. Spain contended that enforcing the award would be tantamount to providing state aid without the European Commission's approval,, potentially violating a decision of the Court of Justice of the European Union, contraty to international comity ("Hydro Energy 1, S.à.r.l., Hydroxana Sweden AB v. Kingdom of Spain, United States District Court for the District of Columbia. Motion to Dismiss the Petition," 2022). On 17 March 2022, in the proceedings, the European Commission took part as "amicus curiae" in support of Spain ("Hydro Energy 1, S.à.r.l., Hydroxana Sweden AB v. Kingdom of Spain, United States District Court for the District of Columbia. Brief of the European Commission," 2022). On 28 June 2022, the court stayed the proceedings pending

a decision on annulment ("Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42. Decision on Annulment," 2023).

On 30 September 2020, Spain had requested the annulment of the arbitral award ("Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42. Decision on Annulment," 2023, para 11). It argued that the arbitral tribunal manifestly exceeded its powers by failing to apply EU law when deciding jurisdiction and merits (para 86). Spain also argued that the tribunal failed to state its reasons (para 385). However, the tribunal dismissed the claim in its entirety (para 446).

6.2.17 BayWa: annulment proceeding and attempt to enforce the award in the US

The award on BayWa was rendered on 25 January 2021. On 24 May 2021, Spain requested the annulment of the award ("BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16. Decision on Annulment," 2023, para). Spain argued that the arbitral tribunal had exceeded its powers by asserting jurisdiction over an intra-EU dispute and failed to properly apply EU law (para 46). Spain argued that the tribunal failed to state its reasons (para 64). Moreover, Spain argued that there was a serious departure from fundamental rules of procedure, as Spain did not have the right to be heard and there was no equal treatment of the parties, notably by the rejection of the incorporation into the record by Spain of the Declaration of the Representatives of the Governments of the Member States, of 15 January 2019, on Achmea judgement; and the improper denial of the European Commission's intervention as "amicus curiae" (para 72). The committee dismissed the claims of manifest excess of powers (para 195), failure to state reasons (para 202), and serious departure from a fundamental rule of procedure (para 220), dismissing Spain's request for annulment (para 235), on a decision dispatched on 8 May 2023.

On 12 August 2022, during the proceedings of annulment, the investors requested the enforcement of the award before the United States District Court for the District of Columbia ("BayWa r.e. AG v.Kingdom of Spain, United States District Court for the District of Columbia. Petition," 2022).

6.2.18 STEAG

On 17 August 2021, the tribunal issued the award in STEAG. On 15 December 2021, Spain applied for an annulment of the award and requested a provisional stay of enforcement,

under Article 52(5) of the ICSID ("STEAG GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/4. Decision on Stay of Enforcement," 2020, para 7). On 18 August 2022, the ad hoc committee continued provisional stay of enforcement of the award provided that Spain, within sixty days presents to STEAG and the Committee a letter of guarantee issued by an internationally recognized bank for 50% of the compensation granted in the award (EUR 13,837,500) receivable upon presentation of a Decision of the Committee rejecting the Application for Annulment (para 128).

6.2.19 Infracapital: rectification of the award

On 2 May 2023, the award on Infracapital was issued. On 15 June 2023, Spain applied for rectification of the award. On 26 September 2023, the tribunal rendered its decision on rectification. Both Spain and the investors requested for rectification of the award. The investors requested the additioning of the word "not" in paragraph 129 of the award ("Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18. Decision on Rectification," 2023, para 27); Spain requested the correction of the amount awarded from EUR 24.9 million to EUR 15.7 million, arguing that the amount initially awarded was not consistent with the Tribunal's own findings (para 40-41). The tribunal considered that Spain's request was tantamount to a re-evaluation, which could not be made by a rectification (para 61). The tribunal acknowledged that there was a clerical mistake in paragraph 129 that should be rectified (para 81). As a result, it dismissed Spain's request and upheld the investors' request (para 91).

6.2.20 Summary of developments after the award in the cases against Spain

Table 26 - Development after the award in cases against Spain

Case	Appeal, request for reconsideration or request for annulment?	Attempts to enforce the award in the US?	Attempts to enforce the award in other jurisdictions?	Anti-suit injunction?
9REN Holding S.à.r.l. v. Spain, ICSID Case No. ARB/15/15	Annulment request dismissed.	Yes.	Yes, Australia.	Yes, in Luxembourg.
Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain, ICSID Case No. ARB/13/31	Award rectified: the total amount in damages was reduced from EUR 112 million to EUR 101 million. Annulment request dismissed.		Yes, Australia and the United Kingdom	
BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16	Annulment request dismissed.	Yes.		
Cube Infrastructure Fund SICAV and others v. Spain, ICSID Case No. ARB/15/20	Annulment request dismissed.	Yes.		
Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36	Award annulled, based on failure of on arbitrator to disclose the relationship advocacy firm and damages expert.	Yes.	Yes, Australia.	
Foresight Luxembourg Solar 1 S.à.r.l. and others v. Spain, SCC Case No. 2015/150	Appeal to the Svea Court of Appeal, which is pending.	Yes.		
Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Spain, ICSID Case No. ARB/15/42	Annulment request dismissed.	Yes.		
Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Spain, ICSID Case No. ARB/16/18	The rectification request from Spain was rejected, whereas the request from the investors was granted.			
InfraRed Environmental Infrastructure GP Limited and others v. Spain, ICSID Case No. ARB/14/12	Annulment request dismissed.	Yes.		

Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1	Request for Supplementary Decision, which was dismissed. Decision on annulment pending.	Yes.		
NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain, ICSID Case No. ARB/14/11	Annulment request dismissed.	Yes.		Yes, in the Netherlands.
Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain, SCC Case No. 2015/063	Request for Rectification, Clarification, and Supplement of the Final Award, which was dismissed. Award annulled, based on intra-EU objection.			
OperaFund Eco-Invest SICAV PLC and Schwab Holding v. Spain, ICSID Case No. ARB/15/36	The award was rectified, but the decision of rectification was not found. Annulment request dismissed.		Yes, Switzerland.	
RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain, ICSID Case No. ARB/13/30	Annulment request dismissed.	Yes.		
RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain, ICSID Case No. ARB/14/34	Decision on annulment pending.	Yes.		Yes, in Germany.
SolEs Badajoz GmbH v. Spain, ICSID Case No. ARB/15/38	Annulment request dismissed.			
STEAG GmbH v. Spain, ICSID Case No. ARB/15/4	Decision on annulment pending.			
The PV Investors v. Spain, PCA Case No. 2012-14	Appeal to Switzerland's Federal Supreme Court, which was dismissed.	Yes, but it was dismissed based on the intra-EU objection.	Yes, Brazil and Colombia.	Yes, in the Netherlands.
Watkins Holdings S.à.r.l. and others v. Spain, ICSID Case No. ARB/15/44	Request for rectification of the award and request for annulment were dismissed.	Yes.		Yes, in Luxembourg.

Source: Generated by the author; data compiled from the cases, whose complete reference was provided in the section.

Despite comprehensive searches, no information was found on the payment of any of the awards that have been studied in this dissertation. While such information can be difficult to obtain, various sources strongly suggest that the payments were not made. GAILLARD; MITREV PENUSHLISKI (2021), analysing data gathered until 31 December 2019, found no payment made by Spain for ISDS awards related to renewable energies. Until then, Spain only had made one payment regarding in Maffezini v Spain, a case concerning investment in the production and distribution of chemical products based on a bilateral investment treaty with Argentina ("Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7," 2020; GAILLARD; MITREV PENUSHLISKI, 2021, para 4). No other similar subsequent study was found. However, news articles suggest that no payments have been made for any such awards, such as MORCILLO (2023) and PEÑA (2023).

6.3 Other European Union actions with regard to the matter

This dissertation has already addressed certain actions undertaken by the European Union, including the European Commission's participation as "amicus curiae" in international arbitrations and certain domestic proceedings concerning the enforcement of arbitral awards. The judgements of the Court of Justice of the European Union in the Achmea and Komstroy cases have also been discussed. Other noteworthy actions by the European Union include the issuance of guidelines by the European Commission, decisions by the European Commission and ongoing investigations related to state aid, and resolutions passed by the European Parliament.

6.3.1 Guidelines

The European Commission issued three guidelines related to the matter under the name of "Community guidelines on State aid for environmental protection": in 1994 (EUROPEAN UNION, 1994a), 2001 (EUROPEAN UNION, 2001a), and 2008 (EUROPEAN UNION, 2008). Another guideline was issued in 2014, under the name of "Guidelines on State aid for environmental protection and energy 2014-2020" (EUROPEAN UNION, 2014). These guidelines serve as the legal basis for the assessment by the European Commission of the State aid schemes submitted by the member states (EUROPEAN UNION, 2017, para 91).

6.3.2 Decision about state aid

Spain's support scheme for renewable energy established in 2007 had never been notified to the European Commission for approval under state aid rules (EUROPEAN UNION, 2021). On 22 December 2014, Spain notified the European Commission about the support scheme for renewable energy established in 2013 (EUROPEAN UNION, 2017, para). On 10 November 2017, the Commission rendered its decision.

The commission considered that the support scheme constituted state aid according to Article 107(1) of the Treaty on the Functioning of the European Union (para 88). It considered that Spain breached the stand-still obligation of Article 108(3) of the Treaty on the Functioning of the European Union, as it had implemented the scheme before the European Commission decision and, therefore, "The aid granted until the adoption of this decision is unlawful aid" (para 89). The European Commission assessed the compatibility of the aid with the guidelines on environment and energy state (para 93) and concluded that "the distortion of competition caused by the notified scheme is balanced by the positive contribution to common policy objectives" (para 135).

In its decision, the European Commission expressed opinions with regard to the ECT. It stated that "any provision that provides for investor-State arbitration between two Member States is contrary to Union law" and highlighted that such dispute settlement mechanism violates "the general principles of Union law of primacy, unity and effectiveness of Union law, of mutual trust and legal certainty" (para 160). Regarding the payment of arbitral awards, the European Commission stated:

> (165) The Commission recalls that any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, such as in Eiser v Spain, or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation (para 165).

6.3.3 Communication from the Commission to the European Parliament and the Council

On 19 July 2018, the European Commission issued a Communication to the European Parliament and the Council regarding the Protection of intra-EU investment. The Commission referred to the celebration of bilateral investment treaties and the ECT, which provide the

remedy of investor-state arbitration tribunals. It highlighted that the EU has undertaken substantial reform of these agreements in the external context. Moreover, the Commission called the member states to terminate intra-EU bilateral investment treaties and committed itself to monitoring the progress in this endeavour (EUROPEAN UNION, 2018a).

It stated that the bilateral investment treaties are incompatible with EU law, which was confirmed by the Achmea judgement, and added that the case is relevant to the interpretation of the ECT. The Commission asserted that, if Article 26 of the ECT is correctly interpreted, it does not allow intra-EU ISDS. The rationale applied by the Court in Achmea should be extended to the ECT because, similar to intra-EU bilateral investment treaties, it provides for disputes to be resolved by a body outside the EU judicial system. Furthermore, the Commission emphasized that the EU's status as a party to the treaty did not alter this conclusion (EUROPEAN UNION, 2018a).

6.3.4 Investigation

In a press release on 19 July 2021, the European Commission informed that it had started an in-depth investigation against the payment of the compensation determined in the award of Antin (EUROPEAN UNION, 2021). It informed its preliminary view: “the arbitration award would constitute State aid, as it grants Antin an advantage equivalent to those provided for by the non-notified 2007 Spanish scheme”. In the press release’s list of doubts that concern the Commission, one reads:

> Whether the arbitration award could lead to discrimination among investors based on nationality and on their ability to access international arbitration since Spanish investors are precluded from bringing an action before an arbitration tribunal for the modifications to the 2007 scheme (EUROPEAN UNION, 2021).

It is worth mentioning that this concern is one of the main criticisms directed at ISDS, as mentioned in section 2.1 of this dissertation. Until the submission of this dissertation, no information about the conclusion of such an investigation was found.

6.3.5 European Parliament Resolution of 23 June 2022 on the Future of EU International Investment Policy

On 23 June 2022, the European Parliament issued a resolution addressing the future of the EU's international investment policy. Specifically, in reference to the ECT, the resolution underscored its status as "the most litigated investment agreement in the world today." The

Parliament endorsed the EU's position to exclude fossil fuels from the investment protection mechanism during the ECT's modernization process. Moreover, it expressed concern about limited access to the negotiating texts compared to other treaty negotiations (EUROPEAN UNION, 2022, para 39).

The Parliament called on the European Commission to ensure that a revised ECT upholds states' regulatory rights. Particularly, it urged the immediate prohibition of fossil fuel investors from suing contracting parties with policies aiming to phase out fossil fuels. Furthermore, it emphasized that investment protection should apply exclusively to genuine investors, excluding purely financial or speculative entities (para 42).

The Parliament urged the Commission and Member States to coordinate an exit from the ECT and to establish an agreement excluding the application of the sunset clause between willing contracting parties (para 42). Article 47(3), ECT’s sunset clause, stipulates that the treaty provisions continue to apply to investments for 20 years following a party's withdrawal. Even if an agreement about the sunset clause is concluded, disputes over its legality will likely emerge.

The Parliament welcomed the clarification provided by the Komstroy judgement, which indicated that ISDS provisions of the ECT do not apply to intra-EU parties and noted “with great concern that the Achmea ruling did not deter arbitration tribunals from continuing to hear intra-EU investment disputes” (para 43). The Parliament pointed out that the enforcement of arbitral awards in EU courts is difficult, but mentioned the possibility of enforcement in other courts, with the risk of seizing the assets of the EU or EU member state (para 44).

6.3.6 Proposition of a coordinated withdrawal

On 7 July 2023, the European Commission proposed a coordinated EU withdrawal from the ECT including the EU, its member states, and Euratom. The Commission affirmed that the treaty is no longer compatible with the EU’s climate ambitions, including its commitments under the European Green Deal and the Paris Agreement. Moreover, the Commission withdrew its previous proposal to update the ECT as it did not reach the required majority among member states (EUROPEAN UNION, 2023).

The communication of the Commission quoted the Executive Vice-President for the European Green Deal, Frans Timmermans: “It’s time for Europe to withdraw from this Treaty, and to put all of our focus on building an efficient and competitive energy system that promotes

and protects renewable energy investments" (EUROPEAN UNION, 2023). No mention was made to the fact that the largest amount of the arbitration cases based on the ECT originates from producers of renewable energy, not from fossil fuel producers.

6.4 The ECT: withdrawals and proposal for modernisation

On 31 December 2014, Italy officially notified the Portuguese government, as the depositary of the treaty, of its withdrawal. Given the one-year notice period, the withdrawal would become effective from January 1, 2016 (ITALY, 2014c). However, due to the sunset clause, Italy is still subject to the ISDS mechanisms for the next 20 years with regard to investments made during the time it was party to the agreement.

One can find information about the withdrawal of Spain in some sources. For instance a document before the District Court of and in Luxembourg, in the request for an anti-suit injunction in 9REN reads that "the ECT has been denounced by many Member States. Spain (on October 12, 2022) and Luxembourg (on November 11, 2022) have announced their withdrawal from this agreement" ("Kingdom of Spain v. 9REN Holding S.àr.l.. the District Court of and in Luxembourg," 2023). One can also find it in the press (MATHIESEN, 2022; MOUTERDE, 2022; PLANELLES, 2022). However, no information could be found in the official website of the treaty (ECT. SPAIN, [n.d.]).

Discussions on modernising the Energy Charter Treaty (ECT) began in November 2017, with the Energy Charter Conference establishing a subgroup to facilitate the process. Subsequent meetings took place in 2018 and 2019. Negotiation rounds for the modernization of the ECT spanned over several years. Between 2010 and 2015 fifteen negotiation rounds were carried out. On 24 June, the contracting parties of the ECT announced that they had reached an agreement in principle, concluding the negotiations for a modernised ECT (ECT. MODERNISATION OF THE TREATY, [n.d.]).

The new treaty would offer a "flexibility mechanism" that would allow contracting parties to exclude the protection of investment in fossil fuels given their energy security concerns and climate goals. More precisely, the EU and the UK would exclude investments related to fossil fuels from investment protection under the ECT. This exclusion would apply to both existing investments, commencing 10 years from the entry into force of the relevant provisions, and new investments made after 15 August 2023 (ECT. MODERNISATION OF THE TREATY, [n.d.]).

The definition of investor would include the requirement of substantial business activities to be demonstrated by evidence such as physical presence, employment of staff, turnover generation or payment of taxes. The definition of "Fair and Equitable Treatment" (FET) would include a list of measures constituting a violation of its standard, including the frustration of investors' legitimate expectations and the circumstances that give rise to such expectations. The definition of indirect expropriation would exclude non-discriminatory measures adopted to ensure legitimate policy objectives, such as public health, climate change mitigation and adaptation (ECT. MODERNISATION OF THE TREATY, [n.d.]).

The new version of the treaty would allow the denial of benefits to be invoked after the commencement of an arbitral proceeding. Wording about the right to regulate would be added in the preamble and some provisions of the treaty besides a new stand-alone article about it. This article would explicitly mention that the protection of the environment, including climate change mitigation and adaptation, is a legitimate goal for regulation. The text of the new treaty would explicit recognise contracting parties' urgent need to effectively combat climate change, referencing obligations under multilateral environmental agreements, such as the UNFCCC and the Paris Agreement (ECT. MODERNISATION OF THE TREATY, [n.d.]).

Furthermore, a new article would "clarify" that Articles 7 (Transit), 26 (Investment dispute settlement), 27 (disputes between Contracting Parties), and 29 (trade with non-WTO members) do not apply among contracting parties that are members of the same Regional Economic Integration Organisation. It is worth mentioning that the communication opted for the word "clarify". The European Union is the only such organisation that is party to the ECT (ECT. MODERNISATION OF THE TREATY, [n.d.]). As mentioned in the previous section, the European Commission withdrew its support for this modernization attempt as it did not reach the required majority among member states (EUROPEAN UNION, 2023)

7. CONCLUSION

The energy sector is currently one of the highest emitters of greenhouse gases. However, foreign investments can serve as a significant source of finance for the transition to more renewable forms of energy. Recognising this issue's importance, this dissertation seeks to contribute to a deeper understanding of the relationship between energy transition and foreign investment protection.

Through a comprehensive examination of cases in which investors utilised Investor-State Dispute Settlement (ISDS) to redress reductions in incentives to renewable energy, this dissertation answers the question: can international investment law prevent states from modifying their public policy towards renewable energy, thus reducing incentives? Cases involving Italy and Spain have demonstrated that the answer is overwhelmingly negative. International investment law has not prevented these countries from altering their public policy or providing effective compensation to investors in such situations.

Promoting renewable energy is one of the most effective strategies for mitigating greenhouse gas emissions. It is an alternative for countries to achieve their commitments under multilateral treaties on climate change, most notably the United Nations Framework Convention on Climate Change (UNFCCC) (1992), the Kyoto Protocol (1997), and the Paris Agreement (2015). For EU members, besides multilateral agreements, reducing greenhouse gas emissions is also an obligation imposed by directives such as Directive 2001/77/EC and Directive 2009/28/EC .

Both Italy and Spain initially implemented support schemes for renewable energy. In Italy, Legge 9 gennaio 1991, n. 9 and Legge 9 gennaio 1991, n. 10 provided some incentives for renewable energy even before the UNFCCC and the European Directives. To transpose Directive 2001/77/EC, Decreto Legislativo 29 dicembre 2003, n. 387 established that the regulation must provide a feed-in tariff that should not impact the state budget, shifting costs to electricity consumers. The regulations, known as "Conto Energia Decrees", based on the provisions of this Legislative Decree, were enacted from 2005 to 2012. Conto Energia I (Decreto 28 luglio 2005) and Conto Energia II (Decreto 19 febbraio 2007 n. 387) provided feed-in tariffs for 20 years, settling the support scheme for renewable energy producers.

However, after the economic crisis of 2008, Italy started to modify its support scheme to reduce incentives. Conto Energia III (Decreto 6 agosto 2010) was the first regulation to promote a significant reduction in feed-in tariffs. Romani Decree (Decreto Legislativo 3 marzo

2011, n. 28) , which transposed Directive 2009/28/EC into Italian law, aimed to ensure long-term stability in the support systems and to reduce support costs for final consumers. It also provided that the regulation would adhere to principles such as an annual limit for the cumulative electric power of photovoltaic (PV) plants eligible for incentivising tariffs. The extension of the Robin Hood tax (Decreto-Legge 25 giugno 2008, n. 112) , in August 2011, to renewable energy producers was part of the incentive reduction. Conto Energia IV (Decreto 5 maggio 2011) and Conto Energia V (Decreto 5 luglio 2012) continued the reduction of incentives for PV energy due to mounting support costs and diminishing installation expenses. Spalmaincentivi (Decreto-Legge 24 giugno 2014, n. 91) , widely known as the "Competitiveness Decree" ("Decreto Competitività"), further reduced feed-in tariffs for electricity generated by PV installations and earned the name "incentive spreading" ("Spalmaincentivi").

In Spain, Electricity Law 54/1997 created a "Special Regime" of energy production, which included renewable energy, that would have priority access to the transmission and distribution grids and a complementation of remuneration, to be regulated by a royal decree. Royal Decree 2818/1998 provided a premium feed-in tariff for renewable production or the possibility to opt for a fixed regulated price. Royal Decree 436/2004 provided incentives for 25 years. Royal Decree-Law 7/2006 aimed to provide greater flexibility for setting premiums and incentives for electricity production in the special regime. Royal Decree 661/2007 , issued on 25 May 2007, updated the feed-in tariffs.

Royal Decree 1578/2008 , issued on 27 September, was a response to the higher-than-expected growth in installed capacities of PV energy, limiting the installations that could qualify for the tariff provided by Royal Decree 661/2007. Royal Decree-Law 6/2009 , issued on 30 April 2009, defined a path to the progressive elimination of tariff deficits from 2013. Royal Decree-Law 1/2012 , issued on 27 January 2012 eliminated economic incentives for new electric energy production installations. Law 15/2012 , issued on 27 December 2012, introduced new taxes in the energy sector.

Royal Decree-Law 2/2013 , issued on 1 February 2013, replaced the indexation to the Brent price with an inflation index. Royal Decree-Law 9/2013 , issued on 12 July 2013, amended Law 54/1997, establishing that installations may receive specific remuneration in addition to the remuneration for the electricity sold, valued at market prices. Law 24/2013 , issued on 26 December 2013, stated that any regulatory measure that increases costs or reduces revenues in the electrical sector will have to include equivalent reductions in other cost items or equivalent increases in revenues to maintain balance. The special regime was extinguished,

but a specific regime was allowed. Royal Decree 413/2014 , issued on 6 June 2014, regulated the specific remuneration scheme to promote energy production from renewable energy sources, highly efficient cogeneration, and waste, in addition to the remuneration provided by the market. As was the case with Italy, Spain initially established a support scheme for renewable energy but later scaled back certain incentives, leading to several cases of international arbitration.

This study focused on eight concluded cases against Italy (Belenergia, Blusun, CEF Energia, ESPF, Eskosol, Greentech, Silver Ridge, and Sun Reserve) and 30 cases against Spain (9REN, Antin Infrastructure, BayWa, Charanne, CSP, Cube, Eiser, Eurus, Foresight, FREIF, Gilatz, Hydro Energy, Infracapital, InfraRed, Isolux, JGC, Masdar, Mathias Kruck, NextEra, Novenergia, OperaFund, RENERGY, RREEF, RWE, Sevilla, SolEs Badajoz, Stadtwerke, STEAG, The PV Investors, and Watkins).

Concerning objections to jurisdiction and admissibility, the most relevant aspect was the intra-EU jurisdictional objection, the argument that ISDS does not apply between investors from EU countries and EU countries. This argument was rejected in almost every case, with the sole exception of *Green Power v. Spain*. However, its rationale is very important to prevent the enforcement of the awards. The intra-EU objection includes the alleged nonexistence of diversity of areas, the alleged implicit disconnection clause, the incompatibility of ISDS with provisions of EU law particularly with state aid rules, the incompatibility with the principle of primacy of EU Law, the alleged *inter se* modification of ECT by the Lisbon treaty, the argument that EU law is more favourable to investors than the ECT, and the risks of rendering a non-enforceable award. The judgements of the Tribunal of Justice of the European Union on the cases Achmea and Komstroy were invoked.

The Achmea judgement was a preliminary ruling of the Court of Justice of the European Union referred by the Federal Court of Justice of Germany about an arbitral case between Achmea, an enterprise from the Netherlands, and the Slovak Republic. The Court of Justice of the European Union recalled that an international agreement cannot affect the allocation of powers set by the EU treaties or the autonomy of the EU legal system and that, to preserve the autonomy of the EU law, the treaties have established a judicial system "to ensure consistency and uniformity in the interpretation of EU law." The court found that the arbitral tribunal is not part of the judicial system of the Netherlands or Slovakia and, therefore, it cannot make a reference to the Court for a preliminary ruling. As a result, ISDS provided by bilateral investment treaties were against the EU law.

The Komstroy judgement also was a preliminary ruling request by the Court of Appeal of Paris. Komstroy was the successor of Energoalians, which won an arbitral case based on ECT against Moldova. The country requested the annulment of the award in France. The Court restated many findings of the Achmea case. The Court stated the "preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves." Therefore, "Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State."

Despite all this argumentation, with some variation in each case, most arbitral tribunals rejected the intra-EU objection. The only exception was Green Power v. Spain. The tribunal highlighted that the claimants could have opted for an ICSID arbitration, but they chose to conduct the proceedings under the SCC, with a seat in Stockholm and the application of Swedish arbitration law as the *lex arbitri*. As the EU law is part of all its member state law, an understanding confirmed in the Achmea and Komstroy cases, it is also applicable to determine the jurisdiction of the tribunal.

Analysing the merits, three out of eight cases against Italy favoured investors, with awarded amounts totalling EUR 37.5 million. In contrast, 25 out of 30 cases against Spain favoured investors, with awarded amounts close to EUR 1.5 billion. Yet, investors have not received these amounts, facing challenges in enforcement.

With regard to the merits, three out of the eight cases against Italy were favourable to the investors. In the three cases, the amount awarded reached EUR 37.5 million, which is 7.4% of the EUR 508.6 million claimed in the cases with data available. In these cases, the arbitral tribunals also concluded that Italy had violated the FET. In two of them, the tribunals considered that Italy had also violated the protection against unreasonable or discriminatory measures, and the umbrella clause.

In the 30 cases brought against Spain with a final award, 25 were favourable to the investors, with 23 cases having information that could be obtained from international databases. From these 23 cases (whose information is included in table 21), the tribunals found that Spain violated the FET in all of them. In only one case, the tribunal also considered that besides the FET, Spain had violated the prohibition of unreasonable or discriminatory measures. The total amount claimed against Spain exceeded EUR 6.5 billion, while the amount awarded was close to EUR 1.5 billion, or 22.2% of the amount claimed.

However, investors have still not received the amounts awarded after the dispatch of the award. Italy appealed to the Svea Court of Appeal in the two cases held at the SCC, which

are still pending a decision. In these two cases, the investors have attempted to enforce the award in the US. In the other case, Italy requested the annulment of the ICSID award, but it was dismissed. No information was found about the payment of the awards.

Spain appealed two of the cases before the SCC. In one of them, the decision is still pending. In the other one, the award was annulled based on the intra-EU objection. In the cases before the ICSID, eleven of Spain’s requests of annulment were dismissed, three are still pending, and one was annulled, for reasons other than the intra-EU objection. In the case before the PCA, with UNCITRAL rules, Spain appealed to a court in Switzerland, whose decision is pending. Spain also requested the rectification of five awards: three were rejected, one reduced the amount of damages awarded, and one decision on rectification was not found. Moreover, Spain had one request for a supplementary decision dismissed.

Investors in 13 cases against Spain have attempted to enforce the award in the United States. In one of these cases, the court decided to dismiss the request based on the intra-EU objection, a decision that may yet be appealed. There was also an attempt to enforce the award in other countries: three attempts in Australia, as well as one in Brazil, Colombia, the United Kingdom, and Switzerland. As a reaction to these attempts, in five cases, Spain requested anti-suit injunctions: one in Germany, two in Luxembourg, and two in the Netherlands. These requests were followed by anti-anti-suit injunction requests in the United States courts. As a result, there currently exist several cases against Italy and Spain, with different attempts of enforcement and no clear information about the payment of any of the awards.

An effort to amend the ECT started in 2017, and in 2022 reached an agreement in principle. However, the European Commission withdrew its support for this modernisation attempt as it did not reach the required majority among member states. The European Commission considers illegal any compensation to renewable energy producers awarded by an arbitral tribunal. The European Parliament called on the European Commission and Member States to coordinate an exit from the ECT and to establish an agreement excluding the application of the sunset clause between willing contracting parties. Subsequently, the European Commission proposed a coordinated EU withdrawal from the ECT including the EU, its member states, and the European Atomic Energy Community (Euratom). Italy withdrew from the ECT on 1st January 2016 and no information about Spain’s decision to withdraw in 2022 was found.

As of the end of 2023, investors in renewable energy who sought to reverse incentive reductions following the 2008 financial crisis still find themselves without the amounts awarded. They cannot enforce the awards in any country of the European Union and, despite

the attempts to enforce the awards in other jurisdictions, have not managed to receive the amounts awarded. Even in jurisdictions outside the EU, they face the risk of being unable to enforce the award due to the interpretation that the ECT does not apply to intra-EU members, as happened in the *PV Investors v. Spain* case. As a result, one can assert that international investment law has not effectively prevented Italy and Spain from reducing incentives for renewable energy, nor has it ensured effective compensation for investors in such circumstances.

At least two limitations must be acknowledged in drawing this conclusion. First, all cases analysed were based on the ECT. Second, the majority of investors were from European countries. Nonetheless, the protection of the ECT is considered to be comprehensive, as mentioned in section 2.2. The fact that it is the most litigated treaty of investment protection and that 25 out of the 30 cases against Spain were favourable to the investors indicates that its standing as a very protective agreement has merits. Therefore, it is plausible to argue that, although the study focused on a specific treaty, this conclusion likely extends to other, potentially less protective treaties.

The other argument to limit this conclusion regards the fact that most of the investors were from EU countries. However, attempts to enforce the awards in a jurisdiction outside the EU, which are not binding on the interpretation of the Court of Justice of the European Union with regard to the illegality of ISDS intra-EU, have not resulted in actual payments to investors. Even investors from Japan have not received the amounts awarded yet, and even if they eventually do receive the award, the process would have been much more difficult and fraught with obstacles than the promise of ISDS suggests.

In line with Viñuales' observations, investors in renewable energy are trying to profit from a legal framework initially designed to safeguard fossil fuel investments to protect their interests. Despite their attempts, the international law of foreign investment has proven ineffective in delivering compensation when states reduce incentives for renewable energy. Investors face prolonged proceedings marked by inconsistencies in decisions, frequent annulment proceedings, non-payment by states, and protracted attempts to enforce awards in other jurisdictions. Anti-suit injunctions obtained by the host state in the investors' country of nationality further add to the complexity.

As the renewable energy sector continues to adapt and develop, strong legal frameworks will be critical in allowing us to work towards a future in which environmental obligations and investor interests can find a balanced coexistence.

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