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Article

# Contribution of Fair and Equitable Treatment to the protection of renewable energy investments

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**Abstract:** With the increasing climate change crisis, the ongoing global energy security challenges, and the prerequisites for the development of sustainable and affordable energy for all, the need for renewable energy resources has been highlighted as a global aim of mankind. However, the worldwide deployment of renewable energy calls for large-scale financial and technological contributions which many States cannot afford. This exacerbates the need for the promotion of foreign investments in this sector, and protecting them against various threats. International Investment Agreements (IIAs) offer several substantive protections that equally serve foreign investments in this sector. Fair and Equitable Treatment (FET) clauses are among these. This is a flexible standard of treatment whose boundaries are not clearly defined so far. Investment tribunals have diverse views of this standard. Against this background, this article asks: What are the prominent international renewable energy investment threats, and how can FET clauses better contribute to alleviating these concerns? Employing a qualitative method, it analyses the legal aspects and properties of FET and concludes that the growing security and regulatory threats have formed a sort of modern legitimate expectations on the part of renewable energy investors who expect host states to protect them against such threats. Hence, IIAs and tribunals need to uphold a definite and broadly applicable FET approach to bring more consistency and predictability to arbitral awards. This would help deter many unfavourable practices against investments in this sector.

**Keywords:** climate change; Fair and Equitable Treatment; international investment agreements; legitimate expectations; renewable energy; security; stability

## 1. Introduction

As the world grapples with the severe threats posed by climate change, global warming, and the sustainable energy crises, there is a broad consensus that renewable energy sources play a crucial role in addressing these challenges (Aqib and Zaman, 2023; Khan and Imran, 2023; Kuşkaya et al., 2023). Numerous international instruments advocate for sustainable energy as a global objective[1]. These instruments frequently call for a global acceleration of renewable energy adoption, recognising that its rapid deployment and widespread use can have long-term positive impacts on environmental, economic, and energy crises (Global Commission on the Geopolitics of Energy Transformation, 2019; Khan and Imran, 2023; Niftiyev et al., 2024). However, the energy transition requires billions of dollars, recoverable only in the long term (International Energy Agency, 2017). Therefore, most developing countries, particularly the fossil fuel-based economies that struggle with policy barriers, underdeveloped institutional frameworks,

inadequate regulations, and an imbalance between supply and demand, find it difficult to pursue their energy transition goals on their own (Niftiyev, 2024).

Renewable energy investments are particularly likely to need stable regimes to be profitable/sustainable given the huge sunk costs companies must face when embarking on them. And this turns the protection and promotion of foreign investments into a necessity for this sector (Qian and Ghaziani, 2024). Although many governments are adopting incentives to ensure required investments are made in this sector (Masini and Menichetti, 2012), investment security remains a critical factor for foreign investors, particularly in long-term, capital-intensive renewable energy projects (Directive EU2018/2001, 2018; Komendantova, Schinkoa and Patt, 2019). Equally important is the stability of the investment environment, prompting foreign investors to demand stabilisation clauses or guarantees that shift even commercial risks onto the host state and safeguard their investments (The LSE-Oxford Commission on State Fragility, Growth and Development, 2018).

For several decades, capital-exporting States opposed various sovereignty-centred arguments put forth by capital-importing countries, and insisted on the aggressive protection of foreign investments in the international arena (Sornarajah, 2021). Today, contemporary Sustainable Development Goals (SDGs), the imperative to utilize renewable energy sources in response to global climate change, and various energy security concerns have once again revitalised the same pro-foreign investment approaches. In other words, to boost the worldwide deployment of renewable energies, there needs to be a sort of preferential treatment of foreign investments in this sector, moving beyond traditional State-centric approaches (Kuşkaya, et al. 2023; Rodríguez, 2023). This perspective is supported by scholars such as Schefer in her recent theory of 'The Strong Responsibility to Protect (R2P*)' which is quite different from the well-known theory of the Responsibility to Protect in the context of public international law. According to this new concept, all States have a responsibility to promote climate-friendly activities and pursue low-carbon economies by adding a normative layer to the investment law system, shifting existing obligations towards climate stabilisation and ensuring full protection of investments in renewable energy and other low-carbon technologies (Schefer, 2016).

International Investment Agreements (IIAs) play a critical role in facilitating the flow of foreign investments needed to support the energy transition and mitigate the risks associated with these projects (Leal-Arcas and Nalule, 2021; Mbengue and Raju, 2014). Although similar protections and guarantees can be incorporated into investment contracts, embedding such protections within IIAs provides a higher level of protection (Ho, 2018). However, most IIAs do not offer pro-renewable energy investment protections, highlighting the need for their evolution in this respect (Bucharest Energy Charter Declaration, 2018; Denters, 2012; Schill, 2015). To adequately meet the investment demands of this sector, IIAs should address renewable energy development as a priority, paired with a range of strong protective standards. These agreements often combine obligations with both direct and indirect effects (Tienhaara and Downie, 2018). Often, the Minimum Standard of Treatment (MST), and particularly the Standard of Fair and Equitable Treatment (FET), is central to protecting foreign investments (Subedi, 2020). While the role of Full Protection and Security (FPS) and expropriation clauses is crucial in protecting

foreign investments, FPS provisions remain to be among the most complex and ambiguously worded treaty clauses (Schill, 2012), and the threshold for finding expropriation is quite high, with various dimensions of indirect expropriation still unclear (Ortino, 2019; Pharaon, 2021). On the other hand, Investor-State tribunals may render these protections ineffective through restrictive interpretations. Therefore, uncertainty arises as foreign investors in long-term, capital-intensive renewable energy projects within heavily regulated environments often assess regulatory risks in advance, knowing that changes in the investment environment might significantly impact their expected returns (Giannopoulos, 2021).

Unfortunately, the content of FET lacks an exhaustive definition either, making its protections fluctuating in nature and highly controversial among governments and scholars which results in divergent and sometimes contradictory arbitral awards (Emami, 2021). Nevertheless, its flexibility allows FET to evolve incrementally, sanctioning new forms of interference with investment rights, particularly given that FET provisions appear in the vast majority of IIAs and are more investor-friendly than other treaty clauses (Di Lollo, 2023; Ho, 2018). It is for the same reason that FET claims encompass a greater number of investment disputes, sparing investors from the challenges associated with other standards of investment protection (Ho, 2018). However, as greater specificity in investment law leads to increased legal security, the concept of FET must evolve and be clarified, not only to better protect current investments but also to provide more predictability and confidence for prospective renewable energy investors (Fernández, 2017; Schill, 2012). This is necessary given the high and increasing number of energy investment disputes, driven by the growing number of medium and small scale renewable power plants (Miljenić, 2018).

To date, IIAs have generally received little attention from sector specific research. This is particularly true for the legal relationship between FET clauses and foreign investment in renewable energy. Much of the existing literature highlights the relationship between FET clauses and the protection of investments in this sector. For instance, Dromgool and Ybarra Enguix have focused on the application of FET in the cases of revocations of Feed-in Tariffs (FITs) in the Spanish saga of renewable energies (Dromgool and Ybarra Enguix, 2016). Similarly, Matteotti and Payosova analyzed the role of FET in terms of meeting Governments' policy space and right to regulatory the renewable energy sector in their territories. In their research, they tried to provide recommendations to establish a reasonable balance between the interests of renewable energy investors and States (Matteotti and Payosova, 2017). Another notable example is the recent research conducted by Jack Biggs. He examined investors' legitimate expectations under the FET, in the context of European renewable energy disputes. His article focuses on host States' commitments, highlighting that reneging on them can generate liability for breaching the FET (Biggs, 2021). However, the existing literature approaches the relationship between FET obligations and foreign investments in renewable energy in a limited manner, either confined by geographical boundaries or focused solely on national legislation concerns. As a result, a comprehensive analysis of the features of FET clauses as incorporated in various IIAs, and their implications for renewable energy investment protection, has not been adequately addressed yet. This brings us to the main

question of this article: What are the prominent international renewable energy investment concerns, and how can FET clauses better contribute to alleviating them? Therefore, the objective of this article is to single out the relevant FET approaches favourable to renewable energy investments. By reviewing recent IIAs and arbitral awards, it provides valuable insights into the role of FET in protecting foreign investments in the renewable energy sector, and offers recommendations for enhancing the current international investment law framework.

## 2. Materials and methods

This research employs a descriptive and qualitative methodology. Adopting a descriptive method, it seeks to provide a comprehensive understanding of renewable energy investment concerns, FET obligation and its implications. Using a deductive approach to qualitative content analysis, we pursue a thematic analysis of the FET clauses within IIAs. That is, deriving conclusions from the content of these agreements, rather than referring to the actual outcomes of such obligations here and there. However, referring to some arbitral awards and interpretations of FET clauses in practice, the research also benefits from bottom-up reasoning. To this end, the research has scanned and used more than 140 primary and secondary sources, including books, journal articles, research papers, and reports. Revolving around the Strong Responsibility to Protect (R2P*) theory, the findings prove the assumption that incorporating tailored FET clauses into IIAs can, directly and indirectly, enhance the protection of foreign investments in the renewable energy sector. This is achieved by addressing gaps in investment protection and strengthening investors' arguments. The evolution of FET would require host states to do more than simply observe investors' rights. States would need to proactively ensure good governance (bonum regimen), which involves several key practices, such as transparency, participation, accountability, responsiveness, effectiveness, and the rule of law (e.g., procedural fairness and reasonable administration of measures) (Mitchell et al., 2016; Schefer, 2016).

To better achieve this goal, the article suggests establishing more inclusive language in IIAs and adopting a broader arbitral approach to meeting modern legitimate expectations in the light of the energy transition requirements. Additionally, referring to relevant arbitral awards can equip tribunals with the right interpretation of FET in this context, leading to enhanced consistency and predictability of arbitral awards, which in turn increases the confidence among foreign investors in the renewable energy sector.

## 3. Results

### 3.1. FET provisions within the scope ratione materiae of IIAs

The Standard of FET is a fundamental principle in international investment law, deeply embedded in customary international law (Subedi, 2020). Although the very first IIAs did not include a stipulation for 'fair and equitable treatment', this clause has eventually become an integral part of IIAs. Currently, approximately 90% of

IIAs contain an FET clause (Investment Policy Hub, 2024; Ortino, 2019; Palombino, 2018).

While FET follows a similar pattern in most IIAs, it remains a controversial standard of investment protection due to its lack of a commonly accepted architecture (Emami and Gul, 2021). The ambiguity surrounding what constitutes ‘fair and equitable treatment’ is challenging, as these terms are vague and open to different interpretations, leading to various legal issues (De Nanteuil, 2020). For example, it is unclear whether FET is confined to MST or provides broader protection (Emami, 2021; Whitsitt and Bankes, 2013). This controversy arises partly because many IIAs address both FET and FPS under the umbrella of MST. For instance, Article 14.6(1) of the United States-Mexico-Canada Agreement (USMCA) states, ‘Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security’[2]. Although the primary purpose of FET is to fill gaps left by expropriation rules and protect investments against the direct and indirect taking of property, it is often interpreted in conjunction with FPS, Non-discrimination, Umbrella Clauses, etc.[3], and it is generally agreed that transparency, non-discrimination, proportionality, stability, fair procedure, and investor’s legitimate expectations are key elements in defining its scope (Stepanov, 2018; Whitsitt and Bankes, 2013). However, concepts like ‘legitimate expectations’ remain poorly defined (Jus Mundi, 2024; Stepanov, 2018). On the other hand, the significance of the investor’s due diligence is growing in determining whether an investor’s legitimate expectations deserve protection under FET. And yet, there remains a lack of consensus on the necessary level of due diligence, even in cases with very similar facts (Levashova, 2020).

To avoid this cycle of uncertainty, some states have drafted a new generation of IIAs that contain a new type of FET clause specifying a list of measures considered to breach FET[4]. Perhaps the most notable example of such provisions can be found in Article 9 of the Netherlands Model BIT (2019). It is an exemplary clause that can avoid ambiguities and establish a broader level playing field for the FET standard. Interestingly, the agreement obliges the parties to cooperate in reviewing ‘the content of the obligation to provide fair and equitable treatment’ and to complement the ‘list through a joint interpretative declaration’ (The Netherlands Model BIT, 2019, art. 9.3). To bring additional consistency to arbitral practice, it also calls upon tribunals to consider all legitimate expectations arising from representations made by the host State and its contracts (The Netherlands Model BIT, 2019, art. 9.4). However, Model BITs are not legally binding instruments; rather, they provide guidance to parties for consideration in future negotiations. It remains to be seen how this will work in practice.

For another example, consider the USMCA and the US Model BIT, which state that FET and FPS obligations do not require treatment beyond what is mandated by the customary international law minimum standard of treatment (USMCA, 2018, art. 14.6(2); The US Model BIT, 2012, art. 5(2)). Although it is still doubtful that the exact effect of such clauses is contingent upon the precise formulations in the applicable IIAs, these restrictive clauses can potentially limit broad interpretations of

FET. This is because 'a treaty shall be interpreted [...] in accordance with the ordinary meaning to be given to the terms of the treaty [...]' (VCLT, 1969, art. 31.1).

Promisingly, most IIAs do not include such restrictive clauses[5]. Non-restrictive provisions grant tribunals the latitude to broadly interpret the scope of FET, potentially favouring foreign investors by overlapping with or encompassing other standards of treatment (Jus Mundi, Fair and Equitable Treatment, 2024). The versatile nature of (non-restrictive) FET clauses means their interpretation is easily influenced by other soft and hard law provisions of the agreement, as they unveil the parties' intentions and the extent to which they initially expected the covered investments to enjoy FET (Rodríguez, 2023; VCLT, 1969, art.31.1). Furthermore, in the absence of a restrictive FET, foreign investors may have the chance to invoke a Most Favoured Nation (MFN) clause in the agreement, and benefit from a broader FET protection available in other IIAs signed by the host state (De Nanteuil, 2020; Ho, 2018).

### 3.2. Analysing FET in the light of arbitration practice

It is generally acknowledged that multiple layers of legal protection enhance adherence to the rule of law and better serve investors, as the threat of compensation acts as a deterrent not only to the host states but also to potential non-State actors (Betz et al., 2021; Tienhaara and Downie, 2018; Voss, 2011). Today, FET is the most frequently invoked standard in investment disputes, and the majority of successful claims are based on violations of FET clauses (Balcerzak, 2023; Ortino, 2019). These clauses are often non-restrictive, leaving it to tribunals to determine their boundaries and breaches in each case (Stepanov, 2018; Subedi, 2020). In international investment arbitration, FET first became controversial in American Manufacturing v Zaire, where the tribunal discussed a State's violation of its FET obligation (American Manufacturing & Trading, Inc v Republic of Zaire (Award), 1997; Emami, 2021). However, it was first in Metalclad v Mexico that a tribunal applied the concept to a wider range of circumstances (Metalclad Corporation v *The* United Mexican States (Award), 2000, pp. 100–104). FET has rapidly evolved since then and is now considered the 'golden rule' of investment treaties, as it is one of the most powerful tools an investor can wield against various governmental actions and omissions[6]. It is estimated that Investor-State claims based on the FET standard have so far achieved a success rate of around 37% (Bonnitcha et al., 2017; Salacuse, 2015).

FET is particularly appealing to renewable energy investors seeking compensation for actions taken by host states, as it serves as an all-encompassing tool that addresses gaps and supports investors' arguments regarding breaches of other investment protection standards (Herdegen, 2016; Weeramantry, 2021). For example, most Investor-State tribunals, when finding indirect expropriation, also determine that the State's measures were illegitimate, unfair, or inequitable (Hamamoto, 2016). In other words, when the threshold for proving expropriatory measures of a host state is too high, FET has the potential to offer additional protection to investors against such unfavourable treatments (Pharaon, 2021; Practical Law, 2018). A notable example is Cube Infrastructure v Spain, where the

tribunal unanimously dismissed all claims based on expropriation and umbrella clauses but held that the respondent breached the legitimate expectations for photovoltaic investments and that the 2013–2014 measures breached the investors' legitimate expectations concerning hydro investments. Thus, the tribunal found that the FET standard under the Energy Charter Treaty (ECT) had been breached (Cube Infrastructure v Spain (Decision on Jurisdiction, Liability, 2019, pp. 490–503); Cube Infrastructure v Spain (Award), 2019, p. 48).

However, this is not always the case. As the Tribunal in PSEG v Turkey has rightly stated, 'Because the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable [...]' (PSEG v Turkey (Award), 2007, p. 239). For instance, some tribunals consider the investor's own conduct as a potential limitation to their legitimate expectations[7]. Thus, investors have a duty of due diligence to reasonably assess risks, including the political, cultural, and socioeconomic conditions of the host state, as well as foreseeable amendments to the regulatory framework during the investment's life cycle (De Brabandere, 2017; Simoes, 2017). This is particularly important for renewable energy investments, which are often planned for long-term operation in such a heavily regulated sector[8]. However, such approaches to legitimate expectations, as an element of FET, further exacerbate the ambiguities in its application.

In fact, FET remains amorphous not only due to the indeterminacy of IIAs' literature but also because of divergent interpretations and applications of this standard. Numerous arbitral decisions have rejected FET claims for various reasons while holding host states liable for breaches of other standards of treatment[9]. Among all the standards of investment protection, FET is perhaps the most elusive; hence, there is an urgent need for a well-developed understanding of this standard in arbitration practice (Whitsitt and Bankes, 2013). A consistent approach to FET would enhance the predictability of the investment environment for foreign investors, positively affecting their risk-profit assessments and increasing their confidence (Schill, 2012; Tienhaara, 2008). Therefore, IIAs and arbitral tribunals both play a crucial role.

## 4. Discussion

It is possible to identify a range of risks associated with renewable energy investments. As renewable energy sources gain importance and a larger share in the global energy mix, security concerns are prioritised (Komendantova et al., 2011; Stegen et al., 2012). These projects are increasingly exposed to physical threats (Jasiunas et al., 2021; Narayanan, et al. 2020). In Northern Africa and the Middle East alone, insurgent attacks on energy infrastructure average around 350 incidents per year (NATO Review, 2018). Similarly, cyber attacks targeting energy infrastructure are increasingly encroaching on investment projects at unprecedented magnitudes (IFRI, 2017; Smith, 2021; US Department of Energy, 2018; World Economic Forum, 2020). These attacks can pose serious challenges to renewable energy projects, causing loss of production and revenue, damage to assets and infrastructure, leakage of sensitive commercial information, and other safety and environmental risks (Accenture, 2020; Renews, 2020). As a result, host states are

facing modern legitimate expectations from foreign investors to take adequate measures against emerging security threats to energy projects posed by other States or non-State actors. These expectations are further exacerbated by the growing emphasis on the human rights approach to energy, which is emerging as a universal human rights norm that condemns practices limiting or denying access to energy (Duvic-Paoli, 2021; Ngai, 2012; Roscini, 2010; Wewerinke-Singh, 2022).

FET and FPS clauses provide foreign investors with two major substantive protections that have the potential to safeguard their investments against such threats (Betz et al., 2021). However, only about 84% of IIAs contain an FPS clause, and some agreements make no reference to it whatsoever (Investment Policy Hub, 2024; Ortino, 2019). On the other hand, investment tribunals have applied FPS inconsistently to investment disputes, often rendering it nugatory (Ghaziani and Ghaziani, 2022). As a result, FPS claims have achieved only around a 13% success rate in Investor-State arbitration so far (Bonnitcha et al., 2017). It is interesting to know that various tribunals have interpreted FET as encompassing or being equivalent to FPS. Thus, FET obligations can serve as catch-all claims that are likely to succeed when FPS clauses are either absent or ineffective[10]. However, physical and cyber threats are not the only concerns regarding renewable energy investments. Particularly in long-term renewable energy projects, investors typically conduct risk assessments. Factors such as the unpredictability of laws, government instability, and lack of transparency and commitment significantly contribute to their reluctance to invest. Similarly, about 40% of investors may even withdraw from established investments or cancel planned projects when faced with an unstable legal and regulatory environment (Kher and Chun, 2020). This situation is the bane for BOT investments in the renewable energy (Adetiloye, 2014; Franck, 2005). Therefore, foreign investors often insist on stabilisation clauses or contractual mechanisms to protect their investments and ensure their benefits (The LSE-Oxford Commission on State Fragility, Growth and Development, 2018). To address these concerns, some IIAs, in addition to the FET clause, emphasise the need to improve the investment environment. For instance, Article 5(3) of the Japan-Kenya BIT (2016) encourages the parties 'to take appropriate measures to further improve the investment environment in its Area for the benefit of investors of the other Contracting Party and their investments'.

Examining arbitral decisions, the cases of legitimate expectation regarding regulatory stability often involve contractual commitments in which host states are obligated to grant subsidies and maintain them for a certain period. The tribunal in Continental Casualty v Argentine has rightly confirmed this by stating that

> Unilateral modification of contractual undertakings by governments, notably when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors deserve clearly more scrutiny, in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance (Continental Casualty v Argentine (Award), 2008, p. 261).

However, the success of stability claims based on FET largely depends on the architecture of the applicable IIA's provisions. For example, the ECT being the largest IIA and the only energy-specific multilateral treaty, contains a non-restrictive

FET clause that grants tribunals a relatively broad margin of interpretation. Moreover, it supports regulatory stability by incorporating an umbrella clause that clearly requires the host State to 'observe any obligations it has entered into with an Investor or an Investment of an Investor' (ECT, 1994, art. 10.1). This obligation is echoed by Article 22(1), which mandates States to 'ensure' the compliance of State enterprises with such investment obligations (Zannoni, 2020). This combination of obligations elevates contractual breaches to treaty breaches enforceable under the ECT. Despite proposals for modernising the ECT and adopting a restrictive FET clause (International Arbitration Report, 2022; Kuzhatov, 2022), the existing mixture of obligations retains the legal potential to garner broad support for the regulatory expectations of renewable energy investors. Therefore, it appears that the inefficacies of the agreement's FET protections lie more with investment tribunals, which have often been reluctant to interpret these provisions broadly in the absence of contractual obligations to the contrary (Matteotti and Payosova, 2017). For instance, in Eiser v Spain, the tribunal admits that

> [FET] standard does not give a right to regulatory stability per se. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability (Eiser v Spain (Award), 2017, p. 362).

However, due to the intrinsic long-term nature of most renewable energy projects, it is doubly important to provide fixed levels of support that mitigate the risks in the long run (Simoes, 2017; Mbengue and Raju, 2014). Therefore, to create a relatively stable environment and guarantee the investors a fair return on their investments, many governments are implementing renewable energy investment support mechanisms, such as FITs, quota obligations, tax exemptions, investment grants, etc. (Balcerzak, 2023). These measures play a central role in determining both the period and the rate of return on investments (Simoes, 2017). Thus, they create a sort of modern legitimate expectations beyond what is usually required by customary international law (Sornarajah, 2021; Maynard, 2016). As a result, more investors may have legitimate claims of host states' violation of FET if the government has failed to meet their expectations without good cause. These expectations can arise from investment contracts, representations made by government officials, or the State's existing regulatory frameworks (Stepanov, 2018; Khumon, 2016). In this way, FET would help guarantee the concept of good governance in favour of renewable energy investments (Schefer, 2016).

It is promising to know some tribunals have found FET to have a broader functional value, generally tending to uphold the stability of contracts between host States and foreign investors, regardless of the existence of a stabilisation clause (Gjuzi, 2018)[11]. For instance, the tribunal in SA v Argentine referred to Article 5(1) of the Argentina-France BIT and clearly stated that: 'If the parties to the BIT had intended to limit the obligation to "physical interferences", they could have done so by including words to that effect in the section' (SA v Argentine (Award), 2007, para. 7.4.15). This approach to FET is significant, particularly since renewable energy investors often argue that host state measures have altered the investment environment to the detriment of their interests (Balcerzak, 2023). In fact, as several developing States that most need to attract foreign investments into their renewable

energy sectors intermittently suffer from economic or political crises, they may fail to fulfil their investment-related undertakings. For instance, following the economic crises of the late 1990s, the Argentine government was unable to meet its economic obligations and initiated a range of emergency measures that caused losses to both national and foreign investors (Bernasconi-Osterwalder, Brewin and Maina, 2020). Consequently, over 50 investment cases were filed against Argentina (Martinenko and Gryshko, 2017). Similarly, in Spain, the government's revocation of many FITs led to numerous Investor-State compensation claims (Nathanson, 2013)[12].

As FET is often employed in arbitrations to restrict host states' exercise of sovereign powers in a manner that accords a level of protection to foreign investments (Di Lollo, 2023; Giannopoulos, 2021), host states have a duty to exercise reasonable care and take appropriate measures to protect foreign investments from harm, even if such harm is caused by actions not directly attributable to the State itself (Jus Mundi, Full Protection and Security (FPS), 2024). Although tribunals have rejected a strict liability standard in this context, there is still no consensus on the level of due diligence required from States to fulfil their obligation of reasonable care. As a result, this continues to be an objective criterion (Leite, 2016)[13].

Such ambiguities may lead to inconsistent arbitral awards and unpredictability in investment outcomes. Therefore, some scholars have supported adopting a subjective approach to due diligence, applying diligentia quam in suis instead of diligens pater familias. That is, liability contingent upon the level of treatment the host state customarily provides in its own domestic affairs, rather than the level of treatment that may be expected from a reasonable State (Hausmaninger, 1985; Monebhurrun, 2020). The proponents argue that variations in economic development, wealth, effectiveness of territorial control, capacities, and resilience of host states should not be overlooked when construing liability in investment disputes. In other words, considering the reality of the host state's situation, these factors should be taken into account rather than applying a uniform standard of treatment (Crawford and Brownlie, 2019; Douglas, 2014). For instance, the tribunal in CME v Czech Republic adopted a similar approach by stating that 'a government is only obliged to provide protection which is reasonable in the circumstances' (CME v Czech Republic (Partial Award), 2001, pp. 353–354). Some IIAs have also endorsed similar approaches by clearly pinning the FET obligation of the host States to their level of development[14]. However, imposing differentiated FET standards on States does not align with the holistic idea of a renewable energy transition for all. This is particularly concerning as adopting such approaches may encourage renewable energy investors to exclusively invest in economies, often developed countries, that possess the reliable resources needed to overcome potential physical, cyber, or economic challenges (China Law Insight, 2013; Malik, 2011).

The differentiated approach to FET is not the only limitation regarding this standard. As previously noted, IIAs may impose restrictions on the scope of FET in various ways. For instance, the UK-EU Trade Agreement excludes the right to 'protection of undisclosed information' under section 5 of chapter 2 from the general provisions of the 'enforcement of intellectual property rights' (chapter 3, section 1), including fair and equitable treatment (Trade and Cooperation Agreement between

the EU and the UK, 2020, part 2, title V, arts. IP.34-IP.38). Another example can be found in Article 3(3) of the Denmark-Turkey BIT (1990). According to this provision, the ‘protection of investment’, including its FET clause, ‘shall have no effect in relation to international agreements entered into by either of the Contracting Parties: (a) Relating to any existing or future customs union, regional economic organisations or similar international agreements; (b) relating wholly, or mainly to taxation’.

It is important to note that the exclusion of taxation measures from the protection of FET may pose a particular threat to renewable energy investments. As an increasing number of governments introduce tax incentives and exemptions for renewable energy projects, the risk that the rules in force at the establishment stage might be altered, or possible competition with other investors benefitting from additional tax incentives, potentially threaten the interests of the investors (Balcerzak, 2023; Simoes, 2017).

Whether a differentiated FET or a restrictive FET clause is applied, both deprive covered investments of the comprehensive protections that the FET standard potentially provides. Nonetheless, such approaches enhance the consistency of arbitral awards and predictability for prospective investors. This is significant since consistency is a frequently cited yet elusive goal in the law of foreign investment, while certainty and predictability are fundamental to attracting foreign investments, particularly in long-term renewable energy projects (Butler and Subedi, 2017; Dimsey, 2008; UNCTAD, 2009).

At the bottom, it is interesting to know that some enthusiastic scholars and a few tribunals have endeavoured to interpret FET as a new umbrella clause (Blanco, 2019; Voss, 2011). Despite objections to adopting such a broad interpretation (Coulombe, 2014; Ho, 2018), applying FET in this manner could elevate contractual disputes to Investor-State arbitration. This would enable the sanctioning of the host state under international law, serving as a strong deterrent to its interferences or omissions in providing reasonable protection for renewable energy projects (Miljenić, 2018; Zannoni, 2020). This approach is particularly significant given that only around 40% of IIAs contain an umbrella clause, with some explicitly excluding such disputes from the scope of consent to arbitration (Jus Mundi, Umbrella Clause. (2024)[15].

Finally, it is important to note that some IIAs contain complementary provisions that specifically call for more favourable treatment of renewable energy investments. For instance, Article 16.5(c) of the EU-Japan EPA (2018) stipulates that the parties ‘shall strive to facilitate trade and investment in goods and services of particular relevance to climate change mitigation, such as those related to sustainable renewable energy and energy efficient goods and services, in a manner consistent with this Agreement’. Although these trends are usually in soft law, they unequivocally demonstrate the original intention of the parties to provide preferential treatment, stability and protection for all covered renewable energy investments against the host states’ adverse discriminatory and arbitrary measures (VCLT, 1969, art 31.1-2). As a result, they concretise modern legitimate expectations regarding renewable energy investments (Gjuzi, 2018). There are a few cases where tribunals

have found a broad interpretation of FET in the light of the IIA's preamble or other soft law provisions. As the tribunal in *SGS v Pakistan* rightly stated:

> A treaty interpreter must of course seek to give effect to the object and purpose projected by that Article and by the BIT as a whole. That object and purpose must be ascertained, in the first instance, from the text itself […] and the rest of the BIT (SGS v Pakistan (Decision of the Tribunal on Objections to Jurisdiction), 2003, p. 165).

Similarly, in *El Paso v Argentine*, the tribunal held that: 'As indicated in the preamble, the object and purpose of the BIT between Argentina and the US is to promote and improve the investment climate between the Contracting Parties, notably by establishing some stability regarding the status of investments' (El Paso v Argentine (Award), 2011, paras. 583, 599, 600, 614). This approach aligns with the principle of effet utile (Klamert, 2014). Given the highly elastic nature of FET, such soft law provisions will potentially serve renewable energy investments by extending FET protections beyond the traditional boundaries to accommodate modern sustainability requirements, including pro-renewable energy investment privileges.

## 5. Conclusion

The findings of this research demonstrate that emerging security threats against renewable energy projects, on one hand, and unstable regulatory practices of host states, on the other, have created a sort of modern legitimate expectations among foreign investors. These investors expect responsive security against emerging threats and a stable investment environment. As not all IIAs contain the necessary protections, adequately applying FET in these cases is crucial. As a versatile standard, FET has the potential to address gaps where other substantive standards are absent or practically ineffective.

Yet, as this article has shown, the contribution of FET to this agenda boils down to two major factors: The architecture of FET clauses and the approach of arbitral tribunals to FET, whether such clauses are present or absent. To fully realise FET's potential in the modern context of renewable energy investment protection, relevant language must be incorporated during the drafting stage. Restrictive FET provisions, such as Article 14.6(2) of the USMCA and Article 5(2) of the US Model BIT, which limit FET obligations to the customary international law minimum standard of treatment, potentially offer a less protective shield against host state interferences and/or omissions. Treaty trends that exclude certain monetary or intellectual property aspects from the umbrella of FET are among these. Furthermore, the inclusion of pro-renewable energy development clauses is significant, as they indicate the original intention of the parties to favourably treat renewable energy investments. These clauses have the potential to realise investors' interests through FET provisions and to solidify their arguments before tribunals. Although most IIAs have so far shied away from this, it is preferable for future IIAs to adopt provisions similar to Article 16.5(c) of the EU-Japan EPA.

Generally, the interpretation of the scope of FET by arbitral tribunals has so far been inconsistent and sometimes contradictory, with tribunals yet to provide clear guidelines articulating the boundaries of its protections. The contrasting

interpretations held by the tribunals in SA v Argentine, Azurix Corp v Argentine (I), and Eiser v Spain are evidence of this. Similarly, the so-called differentiated approach to FET adopted, for instance, by the tribunal in CME v Czech Republic appears inconsistent with the holistic idea of a renewable energy transition for all, as developing economies need to be thoroughly liable for their undertakings to attract even further renewable energy investments.

Overall, broadly applying FET obligations is necessary to maintain its purpose in the light of growing renewable energy security and stability expectations that tribunals and states perhaps could not have contemplated decades ago. This evolution would require host states to proactively protect investments. Governmental restraint alone is insufficient, and the duties of host states must extend beyond the passive recognition of investors' rights to proactively ensuring FET. The approaches of the tribunals in Continental Casualty v Argentine and *SA v Argentine* are promising in this context, as they have more or less considered incorporating the concept of good governance and its key parameters of accountability, responsiveness, fairness, and reasonable administration of measures into the scope of the FET obligation.

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## Notes

1. E.g., Paris Agreement [2016] OJ L 282.
2. E.g., The US Model Bilateral Investment Treaty (2012) art. 5(1).
3. E.g., Interocean Oil Development Company and Interocean Oil Exploration Company v Nigeria (Award) (ICSID, ARB/13/20, 6 October 2020) p. 357.
4. E.g., Comprehensive Economic and Trade Agreement between Canada and the EU [2016] OJ L 11, 14.1.2017 (CETA) art. 8.10.2.
5. E.g., Agreement between Turkey and China concerning the Reciprocal Promotion and Protection of Investments (signed 29 July 2015, entered into force 11 November 2020) art. 2(2); Energy Charter Treaty [1994] 2080 UNTS 100 (ECT) art. 10.1.
6. E.g., Petrobart Limited v The Kyrgyz Republic (Award) (SCC, 126/2003, 29 March 2005) pp. 75–82.
7. E.g., Plama Consortium Limited v Bulgaria (Award) (ICSID, ARB/03/24, 27 August 2008) pp. 219–222.
8. E.g., Charanne BV and Construction Investments SARL v Spain (Final Award) (SCC, 062/2012, 21 January 2016) pp. 507.
9. E.g., Técnicas Medioambientales Tecmed, S A v The United Mexican States (Award) (ICSID, ARB (AF)/00/2, 29 May 2003).
10. E.g., National Grid Public Limited Company v Argentine (Award) (Ad Hoc Tribunal UNCITRAL, 1:09-cv-00248-RBW, 3 November 2008) pp. 181–89.
11. E.g., Azurix Corp v Argentine (I) (Award) (ICSID, ARB/01/12, 14 July 2006). pp. 406–408.
12. E.g., The PV Investors v Spain (Award) (PCA, 2012–2014, 28 February 2020).
13. E.g., Asian Agricultural Products Ltd v Sri Lanka (Award) (ICSID, ARB/87/3, 27 June 1990). p. 77.

[14] E.g., Investment Agreement for the COMESA Common Investment Area (adopted 23 May 2007, not yet in force) art 14(3).

[15] E.g., Agreement on the Promotion and Reciprocal Protection of Investments between Colombia and The Swiss Confederation (signed 17 May 2006, entered into force 6 October 2009) art. 11.3.

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