

ZOOM IN

The question:

Renewable energy investment cases against Italy and Spain: Same issues, different scenarios?

Introduced by Gian Maria Farnelli and Marco Pertile

Given the high costs of infrastructures, the renewable energy sector is one of the most foreign investment-dependent economic sectors. Many States have thus enacted remuneration schemes aimed at attracting foreign investors, typically in the form of feed-in tariffs, ever since the late 1990s.

Starting from 2010, a number of EU States, amongst which Italy and Spain, have withdrawn their incentives regime and introduced new legislation, to the effect of altering the existing framework regulating the production of renewable energy. The modification of domestic legislation resulted into what has been defined as a veritable ‘renewable energy saga’,¹ with approximately 40 claims brought against Spain and 10 against Italy under the Energy Charter Treaty (ECT).

In all these cases, foreign investors argued that the regulatory framework introduced and/or modified by Italy and Spain frustrated the legitimate expectations and assumptions they relied upon when they made the investment, in breach of the fair and equitable treatment (FET) standard under article 10(1) of the ECT.

As it is well-known, breaches of legitimate expectations have been addressed in many investment proceedings. Tribunals have consistently applied legitimate expectations in protecting investors against the State’s modifications of the conditions established at the time of the investment, including the regulatory framework, adversely affecting its investment.

¹ I Reynoso, ‘Spain’s Renewable Energy Saga: Lessons for International Investment Law and Sustainable Development’ (27 June 2019) Investment Treaty News <www.iisd.org/itn/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/>.

However, the requirements for expectations to be legitimate and the extent of protection granted to investors are still subject to debate.

It is against the above background that QIL asked Sondra Faccio and Amélie Noilhac to analyse the case law stemming from arbitrations against Italy and Spain, respectively. Whilst the main focus of this Zoom-in is to highlight commonalities and differences in the tribunals' approaches on the FET standard, the contributions also emphasise the wider impact of these decisions on the debate on balancing the protection of the investors' legitimate expectations and States' regulatory freedom. In addition, Sondra Faccio, on the one hand, explores how arbitrators in Italian cases have devoted special attention to the effects of regulatory change upon the foreign investment in order to assess a breach of legitimate expectations, while Amélie Noilhac, on the other, stresses the consistency in the assessment of legitimate expectations in the Spanish cases.

