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WHEN GREEN INCENTIVES GO PALE: INVESTMENT ARBITRATION AND RENEWABLE ENERGY POLICYMAKING

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I. INVESTMENT LAW AND RENEWABLE ENERGY

The use of renewable sources of energy, along with the implementation of eco-friendly technologies, plays a pivotal role in addressing the predicaments caused by climate change. States, the industry, international organizations, and other stakeholders have been striving to develop and employ new solutions that allow a shift from the current model, based on fossil fuel production and consumption, to one based on low-carbon options,[1] so as to ensure a sustainable future. This global quest for greener alternatives led to the emergence of an international market for renewable energy technologies and equipment.[2] Over the last decade this market attracted gigantic flows of capital.[3] Foreign direct investment is particularly welcome as it can not only provide fresh funds but also induce the transfer of knowledge and technology.[4] From a broader perspective,

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1. *See, e.g.*, ERIC SPIEGEL, NEIL MCARTHUR & ROB NORTON, ENERGY SHIFT: GAME-CHANGING OPTIONS FOR FUELING THE FUTURE (2009) – a general discussion about the changing attitudes towards renewable energy as the technology to create more sustainable living becomes more prevalent and easily available to the general public and state governments.

2. *See generally*, RENEWABLE ENERGY: A GLOBAL REVIEW OF TECHNOLOGIES, POLICIES AND MARKETS (Dirk Assmann et al. eds, 2006), offering an overview of the changes in technologies, policies and markets towards renewable energy.

3. *See, e.g.*, Omar Ellabban et al., *Renewable Energy Resources: Current Status, Future Prospects and their Enabling Technology*, 39 RENEWABLE & SUSTAINABLE ENERGY REV. 748, 758 (2014).

4. Gaëtan Verhoosel, *Foreign Direct Investment and Legal Constraints on Domestic*

foreign investment is a key component of any agenda for sustainable development.[5]

The financial viability of investments in renewable energies is frequently dependent upon public support.[6] All over the world, governments have designed and implemented renewable energy support mechanisms so as to encourage private investment, often in the form of subsidies and incentive tariffs.[7] Among the different available variants, feed-in-tariffs became especially popular.[8] Under this scheme, the electricity generated from renewable or high-efficiency cogeneration installations is paid at a fixed minimum price, generally set higher than the market

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Environmental Policies: Striking a Reasonable Balance Between Stability and Change, 29 LAW & POL'Y INT'L BUS. 451, 452 (1998); *see also* Anatole Boute, *The Potential Contribution of International Investment Protection Law to Combat Climate Change*, 27 J. ENERGY & NAT. RESOURCES L. 333, 334–35 (2009) (citing Int'l Inst. For Sustainable Dev. [IISD], *Foreign Investment: Making It Work for Sustainable Development* 6 (Sep. 2002), https://www.iisd.org/sites/default/files/publications/trade_ee_investment.pdf [hereinafter *The Potential Contribution*]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998); *see also* Valentina Vadi, *Balancing Human Rights, Climate Change and Foreign Investment Protection*, *in* CLIMATE CHANGE AND HUMAN RIGHTS: AN INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVE 189, 193 (Ottavio Quirico & Mouloud Boumghar eds., 2016).

5. Andrew Newcombe, *Sustainable Development and Investment Treaty Law*, 8(3) J. OF WORLD INVESTMENT & TRADE 357 (2007) (citing *Agenda 21: Report of the United Nations Conference on Environment and Development*, ¶ 2.23, U.N. Doc. A/CONF.151/26/Rev. 1, (June 14, 1992); *see also* Markus Gehring & Andrew Newcombe, *An Introduction to Sustainable Development in World Investment Law*, *in* 30 SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 3, 9 (Marie-Claire Segger et al. eds., 2011).

6. WORLD BANK, INCLUSIVE GREEN GROWTH: THE PATHWAY TO SUSTAINABLE DEVELOPMENT 20–22 (2012), http://siteresources.worldbank.org/EXTSDNET/Resources/Inclusive_Green_Growth_May_2012.pdf.

7. *See, e.g.*, Richard L. Ottinger & Rebecca Williams, *Renewable Energy Sources for Development*, 32 ENVTL. L. 331, 359–67 (2002); Bradford Gentry & Jennifer Ronk, *International Investment Agreements and Investments in Renewable Energy*, *in* FROM BARRIERS TO OPPORTUNITIES: RENEWABLE ENERGY ISSUES IN LAW IN POLICY 25, 59–77 (pre-publication draft), http://environment.yale.edu/publication-series/documents/downloads/0-9/11-03-Gentry_Ronk.pdf; Richard Ottinger et al., *Renewable Energy in National Legislation: Challenges and Opportunities*, *in* BEYOND THE CARBON ECONOMY: Energy LAW IN TRANSITION 183, 186–206 (Donald Zillman et al. ed. 2008).

8. *See, generally,* MIGUEL MENDONÇA, FEED-IN TARIFFS: ACCELERATING THE DEPLOYMENT OF RENEWABLE ENERGY (Routledge ed., 2007); MIGUEL MENDONÇA ET AL., POWERING THE GREEN ECONOMY: THE FEED-IN TARIFF HANDBOOK (Routledge ed., 2010) [hereinafter POWERING THE GREEN ECONOMY]; WILSON RICKERSON, U.N. ENVT. PROG. REP. ON FEED-IN TARIFFS AS A POLICY INSTRUMENT FOR PROMOTING RENEWABLE ENERGIES AND GREEN ECONOMIES IN DEVELOPING COUNTRIES (2012); DAVID JACOBS, RENEWABLE ENERGY POLICY CONVERGENCE IN THE EU: THE EVOLUTION OF FEED-IN TARIFFS IN GERMANY, SPAIN AND FRANCE (John J. Kirton & Miranda Schreurs, eds., 2012); TOBY COUTURE ET AL., A POLICYMAKER'S GUIDE TO FEED-IN TARIFF POLICY DESIGN, NATIONAL RENEWABLE ENERGY LABORATORY (2010), available at http://www.nrel.gov/docs/fy10osti/44849.pdf; ANNE HELD ET AL., FEED-IN SYSTEMS IN GERMANY, SPAIN AND SLOVENIA: A COMPARISON, (Energy Econ. Group et al., 2007), http://www.mresearch.com/pdfs/docket4185/NG11/doc44.pdf.

price and guaranteed over a specified period of time.[9]

Investments in the energy field are highly capital intensive and require a lengthy payback period.[10] Regulatory risks loom large – the possibility that the rules in force at the moment the investment was made are altered, threaten the ability of investors to recover and earn a profit on their investments.[11] Governments may decide to change the regulatory framework once investments take place and costs are "sunk."[12] Renewable energy support mechanisms are designed to attract capital flows into the renewable energy market; thus, they play a central role in determining both the period of time and the rate of return on the investment. Changes to economic mechanisms are a critical risk factor surrounding such investments, since the level of public support is the most important element influencing expected profits.[13] Therefore, investors seek to ensure the stability of the regulatory framework that underpins their investments and secure protection from unwarranted policy changes.

In order to attract cross-border investment, states must provide adequate security and protection to foreign investors, namely through the creation of adequate regulatory frameworks. These legal instruments generally take two forms: investment contracts and international investment treaties.[14] Investment contracts provide some consistency through the development of stabilization

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9. MENDONÇA, *supra* note 8, at 8. The European Commission describes this mechanism as follows:

> 'These systems are characterised by a specific price, normally set for a period of around several years, that must be paid by electricity companies, usually distributors, to domestic producers of green electricity. The additional costs of these schemes are paid by suppliers in proportion to their sales volume and are passed through to the power consumers by way of a premium on the kWh end-user price. These schemes have the advantages of investment security, the possibility of fine tuning and the promotion of mid- and long-term technologies (. . .).

Communication from the Commission: The Support of Electricity from Renewable Energy Sources. COM (2005) 627 Final, of 7 December 2005.

10. Yulia Selivanova, *The Energy Charter and the International Energy Governance,* 2012 EURO. Y.B. INT'L ECON. L. 307, 315.

11. RORY SULLIVAN & WILLIAM BLYTH, CLIMATE CHANGE POLICY UNCERTAINTY AND THE ELECTRICITY INDUSTRY: IMPLICATIONS AND UNINTENDED CONSEQUENCES, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469897 (last visited June 8, 2016); *see also* Boute, *supra* note 4, at 337–38; Nigel Bankes, *Decarbonising the Economy and International Investment Law,* 30(4) J. OF ENERGY & NAT. RESOURCES LAW 497, 502 (2012).

12. Mario E. Bergara et al., *Political Institutions and Electric Utility Investment: A Cross-Nation Analysis,* 40(2) CALIF. MGMT. REV. 18, 19 (1998); Ralf Dickel, *Impact of Liberalisation on Investment Performance in the Power Sector, in* ELECTRICITY TRADE IN EUROPE: REVIEW OF THE ECONOMIC AND REGULATORY CHALLENGES 69, 76 (Janusz Bielecki & Melaku Desta eds., 2004).

13. Boute, *supra* note 4, at 342; *see also* Anatole Boute, *A Comparative Analysis of the European and Russian Support Schemes for Renewable Energy: Return on European Experience for Russia,* 4(2) J. WORLD ENERGY L. & BUS. 157, 175 (2011) [hereinafter *A Comparative Analysis*]; ECONOMIST INTELLIGENCE UNIT, MANAGING THE RISK IN RENEWABLE ENERGY 10–11 (Oct. 2011), http://digitalresearch.eiu.com/risksandrenewables/report.

14. *See, generally,* Peter Cameron, *In Search of Investment Stability, in* RESEARCH HANDBOOK ON INTERNATIONAL ENERGY LAW 124 (Kim Talus ed., 2014) (discussing the various models of treaties and contracts for investment in renewable energy and the attempt to find a stabilizing choice).

clauses,[15] but often prove inadequate when dealing with sovereign states.[16] As a result, international investment agreements have become especially important over the past few decades. These legal instruments aim to create a "level playing field" for investments in the energy sector, and minimize non-commercial risks associated with such investments.[17] They can help lower regulatory and political risks, thus boosting investor confidence and increasing international investments into renewable sources of energy.[18]

The association between investment law and the energy market has a long history, taking into account the global nature of this area of business.[19] Like in many other fields of the economy, the significant increase in foreign investments into the energy market, which have taken place over the last decade, would have been more difficult without the existence of a transnational system of substantive and procedural guarantees.[20] Currently, the international legal framework governing foreign investments to the energy market consists of a vast network of international investment agreements supplemented by the general rules of international law. [21] These agreements include bilateral investment treaties ("BITs"), regional free trade agreements, and sectorial treaties including investment obligations.[22] While international investment agreements differ in many important respects, they are composed by two essential elements: first, they include a set of standards of promotion and protection of foreign investment; second, they provide for mechanisms on the settlement of any possible disputes between the foreign investor and the host state.[23]

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15. *See* Thomas Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation,* 31 TEX. INT'L L. J. 215 (1996) (examining stabilization clauses in international contracts); *see also* Peter D. Cameron, *Stability of Contract in the International Energy Industry*, 27 J. ENERGY & NAT. RESOURCES L. 305 (2009) (continuing the discussion on the importance of stability clauses in international contracts)[hereinafter *Stability of Contract*].

16. Bankes, *supra* note 11, at 498.

17. Kaj Hobér, *Investment Arbitration and the Energy Charter Treaty,* 1(1) J. INT'L. DISP. SETTLEMENT 153, 155 (2010).

18. BRADLY CONDON & TAPEN SINHA, THE ROLE OF CLIMATE CHANGE IN GLOBAL ECONOMIC GOVERNANCE 93 (Oxford Univ. Press ed., 2013).

19. Bankes, *supra* note 11, at 497.

20. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 23 (Oxford Univ. Press ed., 2008).

21. *See* ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 448–49 (Kluwer L. Int'l ed., 2009).

22. Examples of BITs include, *e.g.*, US-China BIT, US-Germany BIT, US-UK BIT. Examples of Regional FTAs include, *e.g.*, NAFTA, CAFTA, ASEAN FTA, EU FTA, etc. Examples of sectorial treaties including investment obligations include, *e.g.*, ECT, WTO, MAI.

23. *See e.g.*, Christoph Schreuer, *Investments, International Protection*, MPEPIL 1533, ¶¶ 13–15, 31, 44, 54, 110–112 (June 2013), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1533; *see also*, Marie-France Houde, *Most-Favoured-Nation Treatment in International Investment Law* 2–3, 11, 13 (Org. Econ. Cooperation & Dev. Publishing, Working Paper No. 2004/02, Sep. 2004), http://dx.doi.org/10.1787/518757021651; *see also*, Lise Johnson, Lisa Sachs & Jeffrey Sachs, *Investor-State Dispute Settlement Public Interest and U.S. Domestic Law*, 3-4, 8, 16 (Colum. Ctr. Sustainable Inv., Working Paper, May 2015),

Investment agreements are a form of international law that creates a series of obligations owed by the host state towards foreign investors.[24] The numbers of BITs and multilateral agreements entering into force have increased throughout the past few decades.[25] The Energy Charter Treaty[26] ("ECT"), a multilateral treaty signed in 1994 and entered into force in 1998, that establishes a legal framework to promote long-term cooperation in the energy field, is especially relevant.[27] The ECT currently has 54 member-states.[28] The ECT's investment provisions build upon the content of BITs as they have developed during the last half-century.[29]

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http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf.

24. *See, e.g.*, RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 58-66, 119-20 (Martinus Nijhoff Publ. ed., 1995); DOLZER, *supra* note 20; NEWCOMBE, *supra* note 21, at 449; M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 90–91, 101, 119 (Cambridge Univ. Press 3rd ed., 2010); JESWALD SALACUSE, THE LAW OF INVESTMENT TREATIES 191, 285, 353 (Oxford Univ. Press 2nd ed., 2015).

25. *International Investment Agreement Navigator*, UNCTAD (2015), http://investmentpolicyhub.unctad.org/IIA (reports there were less than 500 investment agreements prior to 1980. Today there are over 3,000).

26. *The Energy Charter Treaty*, 34 I.L.M. 360 (Dec. 17, 1994) [hereinafter *ECT*].

27. *Id.* at art. 3, 9.

28. *See* Hobér, *supra* note 17, at 154-55; Selivanova, *supra* note 10 (general discussion of the ECT and its framework in handling disputes); THE LEGAL COUNSEL OF THE IEA, THE ENERGY CHARTER TREATY: A DESCRIPTION OF ITS PROVISIONS (Int'l Energy Agency et al., 1994); JULIA DORÉ, THE ENERGY CHARTER TREATY: ORIGINS, AIMS, AND PROSPECTS xiv (Royal Inst. Int'l Aff. ed., 1995)(offering a detailed description of the ECT); THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE (Thomas Wälde ed., 1996); THOMAS WÄLDE, SUSTAINABLE DEVELOPMENT AND THE 1994 ENERGY CHARTER TREATY (Univ. of Dundee et al. ed., 1997); MIRIAN OMALU, NAFTA AND THE ENERGY CHARTER TREATY: COMPLIANCE WITH, IMPLEMENTATION, AND EFFECTIVENESS OF INTERNATIONAL INVESTMENT AGREEMENTS (Seymour J Rubin & Dean C. Alexander eds., 1999); ENERGY CHARTER SECRETARIAT, THE ENERGY CHARTER TREATY: A READER'S GUIDE 8 (Int'l Energy Charter, 2002); ENERGY CHARTER SECRETARIAT, THE ENERGY CHARTER TREATY AND RELATED DOCUMENTS: A LEGAL FRAMEWORK FOR INTERNATIONAL ENERGY COOPERATION (Int'l Energy Charter, 2004), http://www.ena.lt/pdfai/Treaty.pdf; *see also* Andrei Konoplyanik & Thomas Wälde, *Energy Charter Treaty and Its Role in International Energy*, 24 J. ENERGY NAT. RESOURCES L. 523, 542 (2006) (discussing the number of members that are part of international organizations); *see also* Justin D'Agostino & Oliver Jones, *Energy Charter Treaty: A Step Towards Consistency in International Investment Arbitration*, 25 J. ENERGY NAT. RESOURCES L. 225, 237 (2007) (discussing the membership of the ECT); INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY (Graham Coop & Clarisse Ribeiro eds., 2008); HAMSU YAHAYA, MULTILATERAL INVESTMENT TREATIES: IS THE ENERGY CHARTER TREATY AN EFFECTIVE INSTRUMENT FOR PROTECTING INTERNATIONAL INVESTMENTS? (Grin Verlag et al., eds., 2009); ENERGY DISPUTE RESOLUTION: INVESTMENT PROTECTION, TRANSIT AND THE ENERGY CHARTER TREATY (Graham Coop ed., 2011); THOMAS ROE & MATTHEW HAPPOLD, SETTLEMENT OF INVESTMENTS DISPUTES UNDER THE ENERGY CHARTER TREATY (James Dingemans ed., 2011); Yulia Selivanova, *The Energy Charter and the International Energy Governance*, *reprinted in* REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW: WTO, NAFTA AND ENERGY CHARTER 373 (Yulia Selivanova et al. eds., 2011) (discussion of the ECT and the governance between the members); Tarcisio Gazzini, *Energy Charter Treaty: Achievements, Challenges and Perspectives*, *in* FOREIGN INVESTMENT IN THE ENERGY SECTOR: BALANCING PRIVATE AND PUBLIC INTERESTS 105 (Eric de Brabandere & Tarcisio Gazzini, Brill & Nijhoff, eds., vol. 2, 2014).

29. *See* Hobér, *supra* note 17, at 155.

While there are differences between the scope and content of the different legal instruments, there is a shared core content: they normally include the obligation to treat foreign investors fairly and equitably; provide foreign investors full protection and security; and not to expropriate foreign investment except under certain conditions, including the payment of compensation.[30] Besides including a set of standards of promotion and protection of foreign investments, international investment agreements also contain procedural protections. They typically include dispute resolution clauses that enable foreign investors to initiate arbitration proceedings against the host state, known as "investor-state arbitrations."[31] For instance, Article 26 of the ECT provides investors with the opportunity to file arbitration claims directly against member-states for violations of protections under the treaty.[32] The investor is given the option of choosing among:

a) *Arbitration before the International Centre for Settlement of Investment Disputes (ICSID).* Established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), if the contracting party of the investor and the contracting party to the dispute are both parties to the ICSID Convention, or under the rules governing the Additional Facility of the ICSID, if the contracting party of the investor or the contracting party to the dispute, but not both, is a party to the ICSID Convention;[33]

b) *Arbitration under the Arbitration Institute of Stockholm Chamber of Commerce Rules*;[34] or

c) ad hoc arbitration under the Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules). In such disputes, the foreign investor brings a claim before the arbitral tribunal alleging that certain acts, or omissions of

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30. *See* NEWCOMBE ET AL., *supra* note 21, at 147.

31. *See, generally*, ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS (Norbert Horn et al. eds., vol. 19, 2004) (overview of arbitration on the international level with foreign investors); INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL INVESTMENT TREATIES AND CUSTOMARY INTERNATIONAL LAW (Todd Weiler ed., 2005); CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (Loukas Mistelis et al. eds., 2007); INTERNATIONAL INVESTMENT, PROTECTION AND ARBITRATION: THEORETICAL AND PRACTICAL PERSPECTIVES (Christian Tietje ed., 2008); CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION (Oxford Univ. Press ed., 2008); MARIEL DIMSEY, THE RESOLUTION OF INTERNATIONAL INVESTMENTS DISPUTES: CHALLENGES AND SOLUTIONS (Ingeborg Schwenzer ed., vol. 1, 2008); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Cambridge Univ. Press ed., 2009); THE FUTURE OF INVESTMENT ARBITRATION (Catherine Rogers & Roger Alford eds., 2009); EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION (Chester Brown & Kate Miles eds., 2011); THOMAS WEBSTER, HANDBOOK OF INVESTMENT ARBITRATION (Sweet & Maxwell ed., 2012); ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (Katia Yannaca-Small ed., 2010); TONY COLE, THE STRUCTURE OF INVESTMENT ARBITRATION (Routledge ed., 2013); LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE (Chiara Giorgetti ed., 2014); JOHAN BILLIET ET AL., INTERNATIONAL INVESTMENTS ARBITRATION: A PRACTICAL HANDBOOK (Maklu Pub. ed., 2016).

32. *ECT*, *supra* note 26, art. 26(4)(a)(ii).

33. *ECT*, *supra* note 26, art. 26(4)(c).

34. *ECT*, *supra* note 26, art. 26.

organs of the central government or local authorities, resulted in damages to his investment or violate the host state's obligations under an international investment agreement. If the host state is a party to the ECT or another international investment treaty and has consented to investor-state arbitration, the arbitral tribunal has jurisdiction to hear the claims of the investor against the state for violation of its obligations under the treaty.[35]

II. DISPUTES OVER CHANGES IN RENEWABLE ENERGY SUPPORT MECHANISMS

Over the years, arbitration has become the principal technique for resolving disputes in the energy sector.[36] International investments in energy represent a huge percentage of overall investments and, consequently, a substantial part of international commercial and investment disputes relates to this field.[37] Arbitration increases are well evidenced by the new era of "mega cases"[38] in the oil and gas industries.[39] While billion dollar claims were virtually unheard of twenty years ago, they are now ordinary.[40] As a result, energy-related dispute resolution, in particular international arbitration, is a growing area of practical and academic interest.[41] Specifically in the area of investor-state arbitration, Whitsitt and Bankes[42] arrange energy-related disputes into four categories: disputes involving significant economic or political structural adjustment in the host state; disputes triggered by the efforts of states seeking to claim an enhanced share of resource rents; disputes in which states seek to enhance the environmental or social regulatory regime within which existing investments operate; and disputes where the states seek to withdraw economic support mechanisms for a policy measure that was introduced to support a particular energy or environmental policy.[43]

The number of disputes fitting the latter category surged in the last two years.[44] With a view to increasing the production of clean energy, many countries

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35. Michael Feit, *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKELEY J. INT'L L. 142, 168–176 (2010); *see also* Catherine Yannaca-Small, *Definition of Investor and Investment in International Investment Agreements*, *in* INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS 7–100 (OECD Publishing ed. 2008).

36. A. Timothy Martin, *Dispute Resolution in the International Energy Sector: An Overview*, 4(4) J. WORLD ENERGY L. BUS. 332, 339 (2011).

37. ERIC DE BRABANDERE, THE SETTLEMENT OF INVESTMENT DISPUTES IN THE ENERGY SECTOR 130 (Eric de Brabandere & Tarcisio Gazzini eds., vol. 2, 2014) (citing Martin, *supra* note 36).

38. George Kahale, III, *Is Investor-State Arbitration Broken?* 9 TRANSNAT'L DISP. MGMT. 1, 28–32 (2012); *see also* Julian Cardenas Garcia, *The Era of Petroleum Arbitration Mega Cases*, 35 HOUS. J. INT'L L. 537 (2013) (discussing the Occidental v. Ecuador case in regard to mega cases).

39. Kahale, *supra* note 38, at 31.

40. Kahale, *supra* note 38, at 28; Garcia, *supra* note 38.

41. Alexandra Wawryk, *International Energy Law: an Emerging Academic Discipline, in* LAW AS CHANGE: ENGAGING WITH THE LIFE AND SCHOLARSHIP OF ADRIAN BRADBROOK 223, 224–25, 228 (Paul Babie & Paul Leadbeter eds., 2014).

42. Elizabeth Whitsitt & Nigel Bankes, *The Evolution of International Investment Law and Its Application to the Energy Sector*, 51 ALTA. L. REV. 207, 211 (2013).

43. *Id.* at 211, 213.

44. *Id.* at 213.

introduced incentives to encourage investment in the renewable energy sector.[45] As originally intended, the introduction of these mechanisms led a substantial number of companies and individuals making investments in this field.[46] While economic incentives attracted significant amounts of investment, several countries have began reducing or eliminating them. Since 2008, Spain has introduced several measures affecting the renewable energy sector.[47] In 2010, the Spanish government reduced feed-in tariffs in the solar energy sector and enacted measures that substantially cut some incentives granted to wind generation. Subsequently, the Spanish government imposed a limit on the feed-in tariffs of 25 years and imposed an annual cap on the number of hours of electricity the investors could sell at the above-market rates.[48]

In 2013, the Spanish government abrogated the feed-in tariff system altogether.[49] Fourteen domestic producers filed a suit against the Spanish government arguing that such measures generated legal uncertainty and had retrospective nature.[50] In a ruling handed down in January 2014, the Spanish Supreme Court rejected the claims holding that investors had assumed a regulatory risk, were highly sophisticated, and had access to quality technical and legal

45. *Id.*

46. *See* Onno Kuik & Sabine Fuss, *Renewables in the Energy Market: A Financial-Technological Analysis Considering Risk and Policy Options, in* FINANCIAL ASPECTS IN ENERGY: A EUROPEAN PERSPECTIVE 33 (André Dorsman et al. eds., 2011).

47. *See* Arif Hyder Ali, *In the Eye of the Storm: Spain's Nexus to Investment Disputes*, 18 SPAIN ARB. REV. 5 (2013); PABLO DEL RIO & PERE MIR-ARTIGUES, A CAUTIONARY TALE: SPAIN'S SOLAR PV INVESTMENT BUBBLE 1 (Global Subsidies Initiative & Int'l Inst. for Sustainable Dev., Feb. 2014), https://www.iisd.org/gsi/sites/default/files/rens_ct_spain.pdf; Mejia, *The Protection of Legitimate Expectations and Regulatory Change: The Spanish Case*, 21 SPAIN ARB. REV. 113 (2014); CECILIA OLIVET & PIA EBERHARDT, PROFITING FROM CRISIS: HOW CORPORATIONS AND LAWYERS ARE SCAVENGING PROFITS FROM EUROPE'S CRISIS COUNTRIES 7, 26–31 (The Transnat'l Inst. Mar. 7, 2014), https://corporateeurope.org/sites/default/files/profiting-from-crisis_0.pdf; Jose Luis Iriarte & Lupicinio Rodriguez, *The increasing number and methods of arbitration claims brought against Spain for its renewable energy measures*, WORLD ARB. REP. 26 (2014), http://www.weil.com/~/media/files/pdfs/WWAR_Newsletter_Spring2014.pdf; Charles Patrizia et al., *Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty, in* THE GUIDE TO ENERGY ARBITRATIONS 73, 74–76 (J. William Rowley et al. eds., 2015); Joseph M. Tirado, *Renewable Energy Claims Under the Energy Charter Treaty: An Overview*, 13(3) OIL GAS & ENERGY L. INTEL. 1, 6–7 (2015); Daniel Behn & Ole Kristian Fauchald, *Governments Under Cross-fire? Renewable Energy and International Economic Tribunals*, 12(2) MANCHESTER J. INT'L ECON. L. 117, 121–22 (2015); Thomas Dromgool & Daniel Enguix, *The Fair and Equitable Treatment Standard and the Revocation of Feed in Tariffs – Foreign Renewable Energy Investments in Crisis-Struck Spain*, in LEGAL ASPECTS OF SUSTAINABLE DEVELOPMENT: HORIZONTAL AND SECTORIAL POLICY ISSUES 389, 391–400 (Volker Mauerhofer ed.,2016); Daniel Behn et al., *Promoting Renewable Energy in the EU: Shifting Trends in Member State Policy Space* 9–10 (PluriCourts, Working Paper No. 15–23, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2704333.

48. Joseph Tirado & Jerry Bloom, *Renewable Energy Reforms in Europe: Growing Threats to International Investors*, LEXOLOGY (2014), http://cdn2.winston.com/images/content/8/4/v2/84476/IA-RenewableEnergyReformEurope-6-9-2014.pdf.

49. *Id.*

50. *Id.*; *see also* OLIVET, *supra* note 47, at 6–7, 26, 28, 30–31.

advice.[51] In the court's view, investors were not entitled to expect that the economic regime regulating the retribution of their investments would remain unchanged.[52] In June 2016, the Spanish Supreme Court rendered another decision, holding that the 2014 government decree reducing subsidies in the renewable energy sector did not violate the Spanish Constitution or European Union law.[53]

Other European governments have enacted legislative measures, which have impacted the renewable energy market. In 2011, the Czech Republic introduced a new 26% retroactive tax on all producers of solar energy and modified its feed-in tariffs policy.[54] Between 2010 and 2013, the Italian government reduced feed-in tariffs and eliminated incentives granted to photovoltaic plants situated in agricultural land.[55] In June 2013, the Romanian Government excluded some photovoltaic plants from the government's support scheme.[56] In 2014, Bulgaria imposed a 20% fee on income from wind and solar power installations and limited the volume of electricity purchased at feed-in tariff rates.[57] Other countries like Slovakia, Latvia, Greece, Belgium, the United Kingdom, and France have also made significant modifications to their support schemes.[58]

National policies for the promotion of renewable energy generation have been introduced by European states in an effort to achieve national binding targets mandated under the Renewable Energy Directive.[59] Economic support mechanisms were seen as indispensable to kick-start investments in renewable energies due to the high cost of production. While renewable energy promotion is at the very heart of the European Union's environmental policy,[60] the European Union has also been changing its approach to economic support mechanisms. The Communication from the European Commission "Guidelines on State Aid for Environmental Protection and Energy 2014-2020," published in 2014, recommends that subsidies and exemptions become phased out in a degressive way.[61]

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51. *See Supreme Court Backs Cuts to the Solar Power Producers' Earnings*, EL PAÍS (Jan. 21, 2014), http://elpais.com/elpais/2014/01/21/inenglish/1390306709_143350.html; Iriarte, *supra* note 47, at 27.

52. Iriarte, *supra* 47, at 29.

53. *See* Reyes Rincón, *Spain's Supreme Court Backs Renewable Energy Cuts*, EL PAÍS (June 2, 2016), http://elpais.com/elpais/2016/06/02/inenglish/1464860925_523010.html?id_externo_rsoc=LK_CC.

54. *See* Anna De Luca, *Withdrawing Incentives to Attract FDI: Can Host Countries put the Genie Back in the Bottle?*, COLUMBIA U. ACAD. COMMONS 2 (Issue No. 125, 2014), http://ccsi.columbia.edu/files/2013/10/No-125-De-Luca-FINAL.pdf; Behn & Fauchald, *supra* note 47, at 123–124; Patrizia et al., *supra* note 47, at 76–77; Tirado, *supra* note 47, at 8; Behn, *supra* note 47, at 11–12.

55. Tirado & Bloom, *supra* note 48, at 8–11; Behn, *supra* note 47, at 12–14.

56. Tirado & Bloom, *supra* note 48.

57. Angel Bangachev, *New Rules for Wind and Solar Energy Producers in Bulgaria*, LEXOLOGY (Jan. 9, 2014), http://www.lexology.com/library/detail.aspx?g=8e409dc6-4c5e-470d-9599-4b7feac75905; Vadi, *supra* note 4, at 197.

58. Behn, *supra* note 47, at 6.

59. Council Directive 2009/28/EC, 2009 O.J. (L 140) 16–62.

60. Dromgool & Enguix, *supra* note 47, at 390.

61. *Guidelines on State aid for environmental protection and energy 2014-2020,* at 1–55, COM

Several European countries have made legislative changes to their renewable energy markets, which has resulted in the surfacing of numerous arbitral proceedings where investors claim that such measures breach the protection afforded by international investment agreements, namely the ECT.[62] According to figures from the ICSID, as of December 31, 2015, 17% of all ICSID cases regarded electric power and other sources of energy.[63] Forty two percent of the new cases registered in 2015 related to electric power and other sources of energy, with the ECT being the legal instrument invoked in 33% of the cases.[64] In at least twenty cases initiated in 2015, investors challenged legislative reforms in the renewable energy sector.[65] As of June 15, 2016, 43 cases had been initiated relating to changes in economic support programs in the renewable energy market.[66] This number, however, may not be totally accurate. Arbitral proceedings

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(June 28, 2014).

62. *See* Tirado & Bloom, *supra* note 48; *see also* Patrizia, *supra* note 47, at 32–33.

63. ICSID Secretariat, *The ICSID Caseload – Statistics*, Issue 2016-1 (2016), https://icsid.worldbank.org/apps/icsidweb/resources/pages/icsid-caseload-statistics.aspx.

64. *Id.* at 26.

65. UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2015*, 6 (June 8, 2016), http://investmentpolicyhub.unctad.org/Upload/ISDS%20Issues%20Note%202016.pdf.

66. Cases administered by the ICSID: EVN AG v. Republic of Bulgaria, ICSID Case No. ARB/13/17 (Dec. 2, 2013); RREEF Infrastructure (G.P.) Limited & RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30 (June 6, 2016); Antin Infrastructure Services Luxembourg S.à.r.l. & Antin Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31(Aug. 7, 2014); Eiser Infrastructure Limited & Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36 (July 28, 2014); Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain ICSID Case No. ARB/14/1(July 18, 2014); Blusun S.A., Jean-Pierre Lecorcier & Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3 (June 12, 2014); NextEra Energy Global Holdings B.V. & NextEra Energy Spain Holdings B.V. v. Kingdom of Spain ICSID Case No. ARB/14/11 (Jan. 23, 2015); InfraRed Environmental Infrastructure GP Limited & others v. Kingdom of Spain, ICSID Case No. ARB/14/12 (Nov. 26, 2014); RENERGY S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18 (Feb. 13, 2015); RWE Innogy GmbH & RWE Innogy Aersa S.A.U. v. Kingdom of Spain ICSID Case No. ARB/14/34 (Nov. 4, 2015); Stadtwerke München GmbH, RWE Innogy GmbH, & others v. Kingdom of Spain, ICSID Case No. ARB/15/1 (Dec. 16, 2015); STEAG GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/4 (Oct. 25, 2016); 9REN Holding S.a.r.l v. Kingdom of Spain, ICSID Case No. ARB/15/15 (Feb. 8, 2016); BayWa r.e. Renewable Energy GmbH & BayWa r.e. Asset Holding GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/16 (Nov. 6, 2015); ENERGO-PRO a.s. v. Republic of Bulgaria, ICSID Case No. ARB/15/19 (Feb. 9, 2016); Cube Infrastructure Fund SICAV & others v. Kingdom of Spain, ICSID Case No. ARB/15/20 (Dec. 8, 2015); Mathias Kruck & others v. Kingdom of Spain ICSID Case No. ARB/15/23 (Jan. 19, 2016); KS Invest GmbH & TLS Invest GmbH v. Kingdom of Spain ICSID Case No. ARB/15/25 (Dec. 7, 2015); JGC Corporation v. Kingdom of Spain, ICSID Case No. ARB/15/27 (Jan. 4, 2016); Cavalum SGPS, S.A. v. Kingdom of Spain, ICSID Case No. ARB/15/34 (Jan. 22, 2016); E.ON Finanzanlagen GmbH & E.ON Iberia Holding GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/35 (Jan. 21, 2016); OperaFund Eco-Invest SICAV PLC & Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36 (Mar. 28, 2016); Silver Ridge Power BV v. Italian Republic, ICSID Case No. ARB/15/37 (Pending until Jan. 16, 2017); SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38 (Feb. 16, 2016); Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40 (May 18, 2016); Hydro Energy 1 S.à.r.l. & Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42 (May 3, 2016); Holdings S.à.r.l. & others v. Kingdom of Spain, ICSID Case No. ARB/15/44 (Mar. 31, 2016); Landesbank Baden-Württemberg & others v. Kingdom of Spain, ICSID

may be administered by institutions that, differently from the ICSID, do not disclose the initiation of proceedings publicly. Furthermore, they may also be conducted *ad-hoc*, with no supervising institution. Due to this lack of transparency, the exact number of disputes already initiated is unknown and the legal basis on which such claims are made is not totally clear. In any case, it is safe to say that we are witnessing a boom in renewable energy arbitration under the ECT, particularly in Europe. The implementation of the "Guidelines on State Aid for Environmental Protection and Energy 2014-2020" may create further tension between national, European and international legal systems and result in additional arbitral proceeding against member states in the near future.[67]

The anatomy of these cases is substantially different from the prototype of energy-related disputes submitted to arbitration in the past. For years, states have enacted regulations to protect the environment by limiting environmentally detrimental investments.[68] Commentators have expressed concern that investors could initiate arbitral proceedings, claiming that climate-related regulatory measures breached relevant investment treaty provisions.[69] Such cases posed a risk

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Case No. ARB/15/45 (June 7, 2016); Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50 (Oct. 19, 2016); Eurus Energy Holdings Corporation & Eurus Energy Europe B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/4 (May 2, 2016); ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, & InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5 (July 26, 2016). Cases administered by the Permanent Court of Arbitration under the UNICTRAL rules: Antaris Solar & Dr. Michael Göde v. Czech Republic (PCA Case Repository, May 8, 2013); Cases administered by the Arbitration Institute of the Stockholm Chamber of Commerce: Charanne & Construction Investments v. Kingdom of Spain, Case No. 62/2012 (Arb. Inst. Stockholm Chamber of Comm., 2013); Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain (Arb. Inst. Stockholm Chamber of Comm., registered 2013); S.à.r.l. v. Kingdom of Spain (Arb. Inst. Stockholm Chamber of Comm., registered June 2013); Greentech Energy Systems & Novenergia v. Italian Republic (Arb. Inst. Stockholm Chamber of Comm., registered July 7, 2015); Alten Renewable Energy Developments BV v. Kingdom of Spain (Arb. Inst. Stockholm Chamber of Comm., registered March 2015). Ad hoc cases under the UNCITRAL Rules: PV Investors v. Kingdom of Spain (UNCITRAL, registered Nov. 2011); Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, & Radiance Energy Holding S.A.R.L. v. Czech Republic (UNCITRAL, registered May 8, 2013); Voltaic Network GmbH v. Czech Republic (UNCITRAL, registered May 8, 2013); ICW Europe Investments Limited v. Czech Republic (UNCITRAL, registered May 8, 2013); Photovoltaik Knopf Betriebs-GmbH v. Czech Republic (UNCITRAL, registered May 8, 2013); WA Investments-Europa Nova Limited v. Czech Republic (UNCITRAL, registered May 8, 2013); Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, & JSW Solar (zwei) v. Czech Republic (UNCITRAL, registered June 2013).

67. Ernesto Bonafé & Gökçe Mete, *Escalated Interactions Between E.U. Energy Law and the Energy Charter Treaty*, 9(3) J. WORLD ENERGY L. BUS. 174, 185–86 (2016).

68. *See generally* Thomas Waelde & Abba Kolo, *Environmental Regulation, Investment Protection and Regulatory Taking in International Law*, 50 INT'L & COMP. L.Q. 811 (2001); HELD ET AL., *supra* note 8; Nii Lante Wallace-Bruce, *Global Investments and Environmental Protection: The Battle Lines are yet to Emerge!*, 49(2) NILR 195, 197–8 (2002); Julie A. Soloway, *Environmental Regulation as Expropriation: The Case of NAFTA's Chapter 11*, 33 CAN. BUS. L.J. 92 (2000); KEVIN ROSNER, INCENTIVE MECHANISMS FOR PUBLIC-PRIVATE INVESTMENT IN RENEWABLE ENERGY PROJECTS IN FRONTIER ECONOMIES (SEI, Technical Report 2016-01, Feb. 2016).

69. Lise Johnson, *International Investment Agreements and Climate Change: The Potential for Investor-State Conflicts and Possible Strategies for Minimizing it*, 39 ENV'T L. REP. 11147, 1150 [hereinafter Johnson, *International Investment Agreements*].

that international investment agreements could have a constraining effect ("regulatory chill") on climate change mitigation measures and restrain the host-state's policy space significantly.[70] The adoption of climate change-related regulatory measures can affect the economic interests of private actors, by requiring (or not requiring) technological upgrades and specific economic behavior.[71] Foreign investors can argue that such measures violate investment treaty provisions, in particular, the prohibition of unlawful expropriation, and the fair and equitable treatment standard.[72]

Differently, the new wave of disputes refers to cases where states are reducing or eliminating the economic incentives which they introduced years ago in order to lure investments into the renewable energy market.[73] Investors are complaining that such regulatory changes diminish or exhaust the commercial viability of their investments.[74] Host states argue that support mechanisms have proven too popular (and therefore, more expensive than anticipated); that they became too generous because the production costs for the new technology have decreased significantly; or that they simply cannot afford these initiatives due to the ongoing financial crisis.[75] The crux of the question is whether investors can seek compensation under

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70. *See, e.g.*, Soloway, *supra* note 68, at 92, 95, 104. ERIC NEUMAYER, GREENING TRADE AND INVESTMENT: ENVIRONMENTAL PROTECTION WITHOUT PROTECTIONISM 68–78 (Earthscan Publ. ed., 2001); Kevin R. Gray, *Foreign Direct Investment And Environmental Impacts – Is The Debate Over?*, 11(3) REV. EUR. COMMUNITY & INT'L ENV'T L. 306, 310–11 (2002); Wallace-Bruce, *supra* note 68, at 195, 211–13; Jacob Werksman, Kevin A. Baumert & Navroz K. Dubash, *Will International Investment Rules Obstruct Climate Protection Policies? An Examination of the Clean Development Mechanism*, 3(1) INT'L ENVTL. AGREEMENTS POL. L. & ECON. 59 (2003)(discussing the Kyoto Protocol and how disputes are solved both in and outside of court and the effect on the international arena); Ole K. Fauchald, *International Investment Law and Environmental Protection*, 17(1) Y.B. INT'L ENVTL L. 3, 8, 29 (2007); Stephan Schill, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?* 24(5) J. INT'L ARB. 469 (2007); Johnson, *International Investment Agreements*, *supra* note 70, at 11147, 1150, 1152–53; Kate Miles, *Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes*, 1 CLIMATE L. 63 (2010) (discussing the various international mechanisms implemented to regulate climate change and the conflicts that have arisen between foreign investors and host-states); Kate Miles, *Sustainable Development, National Treatment and Like Circumstances in Investment Law*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 265 (Marie-Claire Segger et al. eds., 2011); Cristina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment Through International Investment Arbitration*, 30 AM. U. INT'L L. REV. 383, 422 (2015); Albert Cho & Navroz Dubash, *Will Investment Rules Shrink Policy Space for Sustainable Development? Evidence from the Electricity Sector* 38 (World Resources Inst., Working Paper, Sep. 5, 2003), http://www.iisd.org/pdf/2003/trade_investment_rules.pdf; Aaron Cosbey et al., *Clean Energy Investment. Project Synthesis Report* 8, 61, 70 INT'L INST. FOR SUSTAINABLE DEV. (July 2008), http://www.iisd.org/pdf/2008/cei_synthesis.pdf.

71. Vadi, *supra* note 4, at 193.

72. *Id.* at 194; Schill, *supra* note 70, at 470–76.

73. Patrizia, *supra* note 47, at 1.

74. De Luca, *supra* note 54, at 1–2; Behn & Fauchald, *supra* note 47, at 120.

75. Bankes, *supra* note 11, at 502; Whitsitt, *supra* note 42, at 213–14; James Prest, *The Future of Feed-in Tariffs: Capacity Caps, Scheme Closures and Looming Grid Parity*, 2012(1) RENEWABLE ENERGY L. & POL'Y Rev. 25, 34–6 (2012); DEL RIO, *supra* note 47, at 12–14; Ioannis Glinavos, *Solar Eclipse: Investment Treaty Arbitration and Spain's Photovoltaic Troubles*, *in* LESSONS FROM THE GREAT RECESSION: AT THE CROSSWORDS OF SUSTAINABILITY AND RECOVERY 251, 254 (Constantin

investment treaties when governments encourage investment via economic support schemes, but decide to reduce or eliminate them after the investment has been made. Again, we may have a clash between energy-related policies and investment law.[76]

These disputes raise a classic problem in investment arbitration: how to strike a balance between foreign investors' reliance on the regulations that underpin their long-term investments and the host state's right to adapt regulations to new needs.[77] The introduction of changes to economic support mechanisms typically involves governmental measures adopted for public purposes, whether for financial or other reasons.[78] The host state intervenes as the regulation of energy production, distribution, and consumption is a key element of national economic law and policy.[79] The novelty in this new wave of disputes is that challenged measures work against the protection of the environment, while in the past they were eco-friendly.[80] The crux of the question is the following: to what extent can investors expect that the level of incentives granted initially will be protected by investment treaties throughout the life of the investment?

III. BETWEEN INVESTMENT PROTECTION AND NATIONAL REGULATORY SPACE

Over the last decade, governments around the world have implemented policies designed to encourage private investment in renewable sources of energy.[81] For various reasons, some of them have recently decided to introduce changes to those policies. Incentives and other benefits are easy to grant but difficult to withdraw. Economic support mechanisms may be reasonable in the initial phases of development because of the environmental and social benefits of renewable energy. However, they also have disadvantages. Feed-in tariffs, for instance, can lag behind the technology change they create, thus generating windfall profits and over-subsidizing the renewable industry.[82] As a result, the regulatory framework underpinning these incentives becomes outdated. This leads to a paradoxical situation: while feed-in tariffs are frequently praised for creating certainty, they themselves become uncertain.[83]

Trying to adjust to new scenarios, governments may decide to interfere with

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Gurdgiev et al. eds., vol. 18, 2016).

76. *See, e.g.*, JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW: AN AMBIGUOUS RELATIONSHIP, 17–23 (James Crawford & John S. Bell eds., 2012).

77. *See* DOLZER, *supra* note 20, at 145–49.

78. VIÑUALES, *supra* note 76, at 30, 50; *see also* Gray, *supra* note 70, at 311–13.

79. Markus Krajewski, *The Impact of International Investment Agreements on Energy Regulation*, 2012 EUR. Y.B. OF INT'L ECON. L. 343, 345.

80. *See* Rachel A. Nathanson, *The Revocation of Clean-Energy Investment Economic-Support Systems as Indirect Expropriation Post-Nykomb: A Spanish Case Analysis*, 98 IOWA L. REV. 863, 865 (2013).

81. RICKERSON, *supra* note 8, at 2, 24, 63, 187.

82. Lincoln L. Davies & Kirsten Allen, *Feed-in Tariffs in Turmoil*, 116 W. VA. L. REV. 937, 940 (2013).

83. *Id.* at 941.

the amount and duration of the support mechanism. Feed-in tariffs guarantee renewable energy producers a fixed price for their energy over a fixed period of time.[84] Even though such incentives are designed to reduce financial risk, the truth is that they are not immune from political risk. As a result, relying on this type of mechanism makes renewable energy investors particularly vulnerable to policy changes.[85] The cases mentioned above illustrate this possibility. While support schemes may help to attract foreign investments, subsequent changes to regulatory frameworks affecting foreign investors might be challenged under international investment law.

International investment agreements impose certain standards regarding the protection afforded by host states to foreign investors. However, in some situations, these canons may conflict with the regulatory power of the host state. The disciplines of international investment law may "chill" governments from enacting regulations that might affect foreign investments – in the cases under analysis, by changing the structure of economic incentives that supported investments in renewable energies.[86] Fundamentally, the notion of regulatory chill suggests that the investment law and arbitration system may impact the normal course of policy development and implementation.[87] In some circumstances, governments may fail to modify, enact, or enforce new regulatory measures because they are afraid of a perceived risk of having to face arbitration proceedings.[88]

The protection afforded to investors under international investment agreements is not absolute. Arbitration tribunals have in the past acknowledged the host state's sovereign right to regulate.[89] Host states may try to argue that the substantial modification or withdrawal of economic support mechanisms was justified by objectives of public policy, namely, the state's right to adapt the level and duration of support to avoid overcompensation of investments.[90] However, such arguments may be used to disguise attempts to reduce public debt or decrease energy prices for consumers in advance of upcoming elections, imposing the financial burden on investors.[91]

While investor-state arbitral proceedings are generally confidential, making it difficult to have a clear picture of the claimants' arguments, they will probably

84. COUTURE ET AL., *supra* note 8, at vii, xi, 7, 11, 19, 22–23, 34, 50.

85. Kim Talus, *Introduction: Renewable Energy Disputes in Europe and Beyond: An Overview of Current Cases*, 13(3) OIL GAS & ENERGY L. INTELLIGENCE (2015).

86. Whitsitt, *supra* note 42, at 213–14, 223–24.

87. *Id.* at 211, 213.

88. *See* Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 806 (Chester Brown & Kate Miles eds., 2011).

89. Whitsitt, *supra* note 42, at 215, 219, 229–30.

90. Boute, *supra* note 4, at 176 (citing Case 201/08, Plantanol GmbH & Co. KG v. Hauptzollamt Darmstadt 2009 E.C.R. I-08343); Anatole Boute, *Combating Climate Change through Investment Arbitration*, 35 FORDHAM INT'L L.J. 613, 648 (2012) (citing Plantanol GmbH & Co. KG v. Hauptzollamt Darmstadt, 2009 E.C.R. I-08343) [hereinafter Boute, *Combating Climate Change*].

91. Boute, *Combating Climate Change*, *supra* note 90, at 648.

focus on two standards of protection typically found in international investment agreements: the prohibition of expropriation and the principle of fair and equitable treatment.[92]

Among the different investment disciplines, protection against expropriation is a principal cause of action for investors.[93] While the language of treaties varies, they generally protect investors from measures involving the transfer of title or outright physical seizure of an investor's property (direct expropriation); but also from measures that are not considered direct takings but permanently destroy the economic value of the investment or deprive the owner of its ability to control it in a meaningful way (indirect expropriations).[94] The possibility of a direct expropriation seems only plausible in cases where there is a deprivation of a foreign investor's acquired rights and the transfer of ownership rights to the state or a third person through the revocation of feed-in tariffs.[95] Allegations of indirect expropriation are much more likely, as indirect expropriation is by far the most common form of expropriation in international investment law.[96]

However, drawing the line between the right of host state to regulate in the public interest and indirect expropriation is quite challenging. According to the "sole effect" doctrine followed by some tribunals, the "effect" of the governmental action on the investment is the preponderant factor in assessing whether there has been an expropriation.[97] From this perspective, the policy objectives pursued by the challenged regulatory measures do not alter the legal character of the taking, requiring compensation in any case. Differently, other tribunals have followed the "police powers" theory, which recognizes the host states' right to regulate in the public interest and takes this power into account when assessing the impact of these measures on the investment.[98] Arbitration panels have taken into account the nature, objectives, and character of the measures challenged in order to distinguish between indirect expropriations and valid regulatory interventions of the host state, which are not subject to compensation.[99] Specifically, in the energy sector, recent decisions have focused on striking a balance between the host state's right to regulate in the public interest and the protection of investor's rights by

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92. De Luca, *supra* note 54, at 1; Mejia, *supra* note 47, at 130; Patrizia, *supra* note 47, at 77.

93. *See* Christoph Schreuer, *The Concept of Expropriation Under the ECT and Other Investment Protection Treaties*, *in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 108 (Clarisse Ribeiro ed., 2006); August Reinisch, *Expropriation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 407 (Peter Muchlinski et al. eds., 2008); ENERGY CHARTER SECRETARIAT, EXPROPRIATION REGIME UNDER THE ENERGY CHARTER TREATY (2012), http://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Expropriation_2012_en.pdf.

94. U.N. CONF. ON TRADE & DEV., EXPROPRIATION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, at 5–12, U.N. Doc. UNCTAD/DIAE/IA/2011/7, U.N. Sales No. E.12.II.D.7 (2012), http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf [hereinafter EXPROPRIATION].

95. Dromgool & Enguix, *supra* note 47, at 402.

96. DOLZER, *supra* note 20, at 101.

97. *Id.* at 112.

98. *Id.*

99. EXPROPRIATION, *supra* note 95, at 78–90.

incorporating notions of reasonableness or proportionality into the decision making process.[100]

According to some authors, it might be possible for investors to invoke the non-expropriation standard successfully.[101] This scenario seems more likely in cases where the economic support measure is completely eliminated. However, it can also be argued that feed-in tariffs merely entitle investors to fixed prices and that these may not be traded independently from the main electricity transaction. From this perspective, since these incentives are incapable of independent economic exploitation and investors will likely not lose control of their installations, any interference may not be considered expropriation.[102] The revocation of feed-in tariffs will normally not amount to an indirect expropriation, since the investors usually still retain control of their power plants and receive the profits of the electricity output.[103] It is uncertain whether arbitral tribunals will conclude that changes to support mechanisms deprive investors of the use and benefit of their investment to such an extent as to constitute an indirect expropriation.

The threshold for establishing an indirect expropriation is high.[104] Given the stringent requirements for the qualification of regulatory measures as "indirect expropriation", investors will probably turn to the fair and equitable treatment standard.[105] This is the most frequently invoked standard and also the most promising against the revocation of economic support mechanisms.[106] Still, the content of the fair and equitable treatment standard is contentious and may vary depending on the precise way in which it is expressed.[107] Notwithstanding its

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100. Whitsitt, *supra* note 42, at 230.

101. *See* Thomas Wälde & Kaj Hobér, *The First Energy Charter Treaty Arbitral Award*, 5 TRANSNAT'L DISP. MGMT. 15 (2005); Boute, *Combating Climate Change*, *supra* note 90, at 631–35; Iriarte, *supra* note 47, at 26-29.

102. Boute, *Combating Climate Change*, *supra* note 90, at 658; Vyoma Jha, *Trends in Investor Claims Over Feed-in Tariffs For Renewable Energy*, INV. TREATY NEWS (July 19, 2012), https://www.iisd.org/itn/2012/07/19/trends-in-investor-claims-over-feed-in-tariffs-for-renewable-energy.

103. Boute, *supra* note 4, at 363; Dromgool & Enguix, *supra* note 47, at 402.

104. Boute, *Combating Climate Change*, *supra* note 90, at 631; Bankes, *supra* note 11, at 507-08.

105. *See generally* DOLZER, *supra* note 20, at 130; Catherine Yannaca-Small, *Fair and Equitable Treatment Standard In International Investment Law* (Org. for Econ. Co-operation & Dev., Working Paper No. 2004/03, 2004); Christoph Schreuer, *Fair and Equitable Treatment (FET): Interactions with Other Standards, in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 63 (Graham Coop & Clarisse Ribeiro eds., 2008) [hereinafter Schreuer, *Fair and Equitable Treatment*]; U.N. CONF. ON TRADE & DEV., FAIR AND EQUITABLE TREATMENT: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, U.N. Doc. UNCTAD/DIAE/IA/2011/5, U.N. Sales No. E.11.II.D.15 (2012); ROLAND KLÄGER, 'FAIR AND EQUITABLE TREATMENT' IN INTERNATIONAL INVESTMENT LAW (2013).

106. Boute, *supra* note 4, at 333; Boute, *Combating Climate Change*, *supra* note 90, at 613; U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2010: INVESTING IN A LOW-CARBON ECONOMY, at 137, U.N. Sales No. E.10.II.D.2 (2010), http://unctad.org/en/Docs/wir2010_en.pdf; Nigel Bankes et al., *International Trade and Investment Law and Carbon Management Technologies*, 53 NAT. RES. J. 285, 318 (2013).

107. *See* Schreuer, *Fair and Equitable Treatment, supra* note 106, at 65; Rufolf Dolzer, *Fair and*

elusive nature, arbitral tribunals and commentators generally agree that transparency, stability, non-discrimination, due process, and the investor's legitimate expectations are all key ingredients in defining the fair and equitable standard.[108]

Several arbitral tribunals have concluded that the host state has an obligation to maintain a stable and predictable legal and business framework in line with the investor's legitimate expectations.[109] Legitimate expectations and the protection of a stable and predictable legal and business environment are closely linked as they both relate to the investment framework, which investors legitimately expect.[110] Two different approaches have been used in arbitral practice to determine when investor expectations are reasonable.[111] The first approach requires the host state to have made clear assurances to the investor regarding the specific business relationship; under the second, more permissive approach, expectations can be created based on assurances provided in generally applicable laws of a country, and more generally, upon the existing framework at the time of the investment.[112] The latter interpretation is frequently used in investment claims regarding changes in a host state's legal framework.[113] Tribunals will have to analyze the legal nature of the normative framework establishing incentives.[114] Investors may find it more difficult to obtain protection when their expectations arise out of general legislative provisions that are not protected from subsequent amendments, and there are no specific guarantees of stability specifically addressed to investors.[115]

The fair and equitable treatment standard provides an important tenet of investment protection. Investors build their business cases on the basis of these economic support schemes. Since public support is vital, support schemes and tariff commitments often constitute the essential foundations of the investment.[116] Investors make decisions on the financial viability of the investment relying upon the implementation of support incentives by host states. Therefore, it is not surprising when an investor expects and relies upon the predictability and stability of these mechanisms.[117] The modification or withdrawal of support mechanisms

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Equitable Treatment: Today's Contours, 12 SANTA CLARA J. INT'L L. 7, 7–33 (2014); Patrick Dumberry, *The Protection of Investor's Legitimate Expectations and the Fair and Equitable Treatment Standard Under NAFTA Article 1105*, 31(1), J. INT'L ARB. 47, 47–49 (2014).

108. *See* MCLACHLAN ET AL., *supra* note 31, at 234; DOLZER, *supra* note 20, at 119; André von Walter, *The Investor's Expectations In International Investment Arbitration*, *in* INTERNATIONAL INVESTMENT LAW IN CONTEXT 175 (Christina Knahr & August Reinisch, eds., 2007); Roland Kläger, *'Fair and Equitable Treatment' and Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 241, 251 (Marie-Claire Segger et al. eds., 2011).

109. Krajewski, *supra* note 79, at 358–59.

110. *Id.* at 359; *see also* DOLZER, *supra* note 20, at 113.

111. DUGAN ET AL., *supra* note 31, at 513.

112. *Id.* at 513.

113. Whitsitt, *supra* note 42, at 223-24.

114. Dromgool & Enguix, *supra* note 47, at 391.

115. De Luca, *supra* note 54, at 1–2.

116. Boute, *supra* note 4, at 364.

117. Cameron, *supra* note 15, at 326; Dromgool & Enguix, *supra* note 47, at 402.

might constitute a substantial change of the regulatory conditions and legitimate expectations contemporary to the investment.[118] In assessing whether the legitimate expectations of the investor have been met, arbitral tribunals examine the law at the time when the investment was made and any specific representations made by the host State to the investor.[119]

Another element that arbitral tribunals consider is the investor's own conduct, namely, whether they diligently assessed the risks associated with their investment.[120] Investors are under a duty of due diligence to reasonably assess the risk, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural, and historical conditions prevailing in the host State. Thus, the investor's own conduct constitutes a general limitation to his legitimate expectations.[121]

Investors should not reasonably expect that the circumstances existing at the time the investment was made would remain unchanged. Some tribunals have acknowledged that legal and economic frameworks are not immutable and must necessarily evolve.[122] In order to determine whether the frustration of the foreign investor's expectations is justified and reasonable, the host state's legitimate right to regulate domestic matters in the public interest must also be taken into consideration.[123] From this perspective, the legitimate expectations and the requirement of stability of the legal framework do not affect the host state's right to exercise its sovereign regulatory powers, per se.[124] In the cases under discussion, states may invoke their right to adapt their support regimes in order to avoid overcompensation.[125] The defendant state's right to regulate may establish a limitation to the protective scope of the fair and equitable treatment standard.[126]

However, the exercise of the host state's legitimate right to regulate in the public interest should not be accepted when the main goal of its measures was to reduce an energy tariff deficit which was, at least in part, its own fault.[127] While international investment law is not supposed to force countries to keep in place subsidy programs that are inefficient and unintended in their consequences, renewable energy investors may legitimately expect the maintenance of an "economic equilibrium", at least in terms of the viability of their business.[128] If tribunals find that revocation measures constitute a breach of legitimate expectations and, hence, a violation of the fair and equitable treatment standard,

118. Boute, *supra* note 4, at 364; Mejia, *supra* note 47, at 131.

119. DOLZER, *supra* note 20, at 134.

120. Dromgool & Enguix, *supra* note 47, at 405–08.

121. *Id.* at 409.

122. *See, e.g.*, Saluka Investments BV *(Neth.)* v. Czech Republic (UNCITRAL), Partial Award, ¶ 305 (Perm. Ct. Arb., Mar. 17, 2006).

123. Boute, *Combating Climate Change*, *supra* note 90, at 647–61; Patrizia, *supra* note 47, at 79.

124. DOLZER, *supra* note 20, at 148–49.

125. Boute, *Combating Climate Change*, *supra* note 90, at 648.

126. *Id.*

127. Dromgool & Enguix, *supra* note 47, at 414.

128. *Id.* at 415.

they may decide to award a compensation that takes into account the losses of the investors, the inappropriate regulation of the state, and the financial limitations of the country due to the crisis.[129] Ultimately, arbitral tribunals have to balance the legitimate and reasonable expectations of the investor against the right of states to intervene in the public interest.[130] Reality is in perennial flux. Arbitral tribunals assess the suitability of the parties behavior to changing conditions, namely by examining the reasonableness and correctness of the legal framework initially set forth by the state and its interest in adjusting regulatory structures to new social and economic conditions.[131] In the end, disputing parties should demonstrate that their expectations (either of maintenance of the economic mechanisms, or of their adjustment to new conditions) are legitimate, and that implies that they are anchored in the reality that surrounded the investment and supervening developments.

IV. CHARANNE V. SPAIN: A FIRST VICTORY FOR THE HOST STATE

To date, only one award has been rendered in disputes relating to alterations to economic support programs in the renewable energy market.[132] On January 21, 2016, the tribunal in *Charanne and Construction Investments v. Spain* ruled in favor of the validity of the host state's regulatory changes.[133] The case regarded the legislation passed by Spain in 2010, scaling back the incentives offered to investors in the photovoltaic sector.[134] The claimants alleged that such regulatory measures breached the standards of protection provided for in the ECT, namely the protection against expropriation and the fair and equitable treatment standard.[135]

First, the investors argued that Spain, after having attracted its investment in the area of solar photovoltaic generation through a series of government incentives, changed the regulatory framework, thereby causing damages to the investments.[136] The claimants submitted that the regulations introduced in 2010 had such a brutal impact on the economic value of their investment that this reduction in value constituted an indirect expropriation of the value and returns of the investment, even though their ownership rights were not affected.[137] Since the claimants' investment was not in returns of the photovoltaic installations, but in shares in a company that generated and sold electricity produced by photovoltaic solar plants, the tribunal held that the measures taken had to totally or partially deprive the

129. *Id.*

130. *Id.* at 411–14.

131. *Id.*

132. *See* Charanne B.V. v. The Kingdom of Spain, Arb. No. 062/2012, Final Award (Jan. 21, 2016) [hereinafter Charanne B.V. v. Spain, Award].

133. The original award (in Spanish) and an English translation (by MENA Chambers) are available at http://www.italaw.com/cases/2082. Charanne B.V. v. El Reino de España, Arb. No. 062/2012, Laudo Final (Jan. 21, 2016); Charanne B.V. v. Spain, Award, *supra* note 132; *see* Bonafé, *supra* note 67, for an analysis of the award.

134. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶80, 96, 146, 148–49.

135. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 277.

136. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 80.

137. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶ 280, 283–84.

claimants of their rights as shareholders in order to constitute indirect expropriation.[138] The tribunal found that claimants' essential complaint was a loss of profitability of the photovoltaic installations, which in turn reduced the value of their shares.[139] The tribunal emphasized that, notwithstanding the measures, the investors continue to be shareholders in the company and that the company continued to operate and earn revenue.[140] Although the profitability had been seriously affected, it was not as serious as to be characterized as an expropriation. Tribunal simple diminution in value of shares cannot constitute an indirect expropriation.[141]

The investors also argued that Spain's 2010 regulations constituted a failure to create stable conditions for investments, including the obligation to accord fair and equitable treatments, as they created a context of instability and lack of clarity in the regulatory regime.[142] In addition, claimants submitted that Spain's actions caused them to have legitimate expectations that the regulatory regime would not be modified, and that no contract with Spain was necessary to demonstrate this.[143] The tribunal commenced its analysis by emphasizing that it was restrained by the claimants' own pleadings, which expressly excluded the subsequent regulations from the tribunal's consideration.[144] As a result, it limited itself to considering only the 2010 Regulations. The tribunal found that in that limited context, it was unable to assess the evolution of the regulatory framework and thus unable to conclude that Spain had breached its obligation to maintain regulatory stability under Article 10(1) of the ECT.[145]

In relation to the lack of clarity in the regulations, the tribunal noted that the claimants had not alleged that there was anything ambiguous or difficult to understand about the 2010 Regulations.[146] As to the question of claimants' legitimate expectations, the tribunal espoused the general principle of good faith in international customary law that a state cannot induce an investor to make an investment, generate legitimate expectations and then later ignore commitments that generated those expectations.[147] The Tribunal held that the legitimate expectations on the part of the investor must: (a) be analyzed using an objective standard (based on the circumstances), and not the mere subjective belief held by an investor; (b) be reviewed according to the relevant circumstances, which were those prevailing at the time the investment was made; and (c) be reasonable.[148] Additionally, when determining whether the regulatory framework existing at the

138. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 460.
139. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 463.
140. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 462.
141. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 465.
142. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶ 479–80.
143. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶ 296–301.
144. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶ 481–83.
145. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶ 480–84.
146. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 485.
147. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 486.
148. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶ 494–95.

time the investment was made created legitimate expectations, the tribunal made the following observations:

> (a) A State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances and the public interest;[149]
>
> (b) The fair and equitable treatment protection standard does not contemplate that the law existing at the time the investment is made will be frozen or will never change;[150] and
>
> (c) An investor cannot have a legitimate expectation in the absence of a specific commitment on the part of the State made specifically to the investor(s) that existing regulations are immutable and will not be modified in order to adapt to market needs and the public interest.[151]

The tribunal found that the host state had not infringed investors' legitimate expectations, because no specific commitments had been given to them.[152] The tribunal was of the view that neither the pre-2010 Regulations, nor the literature distributed by the Spanish government to encourage investment could be seen as specific commitments.[153] Furthermore, the tribunal found that although regulations may have limited reach, in that they might be directed to a certain portion of the population, this alone is not sufficient to elevate them to the status of a State's specific commitment.[154] An example of a specific commitment to claimants may have been in the form of a stabilization clause in the regulations or a declaration for the benefit of the investors that the regulatory framework would not be modified.[155] Finally, the tribunal opined that in order to determine whether there had been a breach of the fair and equitable standard of treatment relating to modifying regulations that had been in existence at the time of the creation of the investment, an investor had to demonstrate that the regulations were made irrationally, contrary to public interest or that they were disproportionately applied.[156]

Although the 2010 Regulations could prejudice the interests of the electricity generators, they were based on objective criteria and could not be considered irrational or arbitrary.[157] As the main functions of the 2010 Regulations were to try to limit the tariff deficit, control the rising cost of electricity to the Spanish consumer and implement safety measures in relation to the voltage in the system, it could not be said that the 2010 Regulations were not applied in the public interest.[158] As a result, the tribunal found that the investors had not demonstrated a

149. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 500.
150. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶ 501–03.
151. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 499.
152. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 490.
153. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶ 492, 496–97.
154. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 493.
155. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 490.
156. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 514.
157. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 534.
158. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶ 517, 535.

breach of Spain's obligation to accord fair and equitable treatment.[159]

The arbitrator, Guido Santiago Tawil, issued a dissenting opinion on the issue of the claimant's legitimate expectations.[160] Whilst he shared the majority's position that the finding of a violation of an investor's legitimate expectations should be based on an objective standard (and not the subjective view of the investor at the time the investment is made), he believed that this must be done on an analysis of the facts on a case by case basis.[161] Specifically, he opined that a finding that legitimate expectations had been created was not limited to situations where there was a specific commitment, whether of contractual nature or based in declarations or specific conditions granted by the host State.[162] In Mr. Tawil's view, legitimate expectations could also be derived from a host state's legal regime existing at the time the investment is made.[163] He noted that when an investor fulfills all the current regulatory requirements in order to obtain a specific and determinable benefit, a host State's subsequent disregard of the investment violates his legitimate expectations.[164]

Mr. Tawil believes that Spain's special regulatory regime was specifically designed to foster a strong incentive to invest (so that the state's objective in promoting the industry could be fulfilled), and was directed to a precise group of investors with the means to invest, on the basis that the investor could benefit from the regime for a definite period of time.[165] He further noted that the existence of these elements, namely, (i) rules created to foster investment in renewable energy, directed at a specific number of possible investors, and (ii) a brief time period in which the benefit was to be obtained, was sufficient to show that legitimate expectations on the part of the Claimants.[166] He found that once the claimants made the investment and fulfilled all of the requirements to obtain the benefits, then it did not seem legally acceptable to recognize the host State's prerogative to modify or eliminate the benefit without any legal consequences.[167] Mr. Tawil disagreed with the tribunal that this was incompatible with a State's right to modify its laws, as a State never loses that right.[168] However, if in the process of exercising that right, the State infringes legitimate expectations, he was of the view that it should provide adequate compensation.[169]

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159. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 539.

160. Charanne B.V. v. The Kingdom of Spain, Arb. No. 062/2012 (Dec. 21, 2015) (Arb. Prof. Dr. Guido Santiago Tawil, dissenting) [hereinafter Charanne B.V. v. Spain, Dissent]. Original (in Spanish) and English translation (by MENA Chambers) are available at http://www.italaw.com/cases/2082. Charanne B.V. c. El Reino de España, Arb. No. 062/2012 (Dec. 21, 2015) (Arb. del Prof. Guido Santiago Tawil, opinión disidente).

161. Charanne B.V. v. Spain, Dissent, *supra* note 160, ¶ 4.

162. Charanne B.V. v. Spain, Dissent, *supra* note 160, ¶¶ 4–5.

163. Charanne B.V. v. Spain, Dissent, *supra* note 160, ¶ 5.

164. Charanne B.V. v. Spain, Dissent, *supra* note 160, ¶ 12.

165. Charanne B.V. v. Spain, Dissent, *supra* note 160, ¶¶ 7–8.

166. Charanne B.V. v. Spain, Dissent, *supra* note 160, ¶ 9.

167. Charanne B.V. v. Spain, Dissent, *supra* note 160, ¶ 10.

168. Charanne B.V. v. Spain, Dissent, *supra* note 160, ¶ 11.

169. Charanne B.V. v. Spain, Dissent, *supra* note 160, ¶ 11.

This award is the first decision regarding legislative alterations to economic support programs in the renewable energy market.[170] Although the award is only binding for the disputing parties and not on arbitral tribunals in other pending cases, it offers important insights into how standards of investment protection might be interpreted and applied in similar disputes. The majority's decision is consistent with other arbitral tribunals' findings regarding the requirements for indirect expropriation or violations of legitimate expectations.[171] The decision also addresses the circumstances in which, in the absence of a specific undertaking, a host country may exercise its sovereign right to regulate without violating its international investment law obligations.[172] Since Spain had not made any specific commitments to the investors with respect to the stability of the incentives regime, the investors could not have expected that the renewable incentives regulatory framework would remain unchanged for the lifetime of a photovoltaic plant.[173] In the tribunal's view, the obligation to provide fair and equitable treatment to foreign investors under the ECT does not require freezing regulatory frameworks or limiting changes to regulations.[174] The arbitral panel held that investors did not demonstrate any principle of international law that prohibits a state from imposing new rules when it never signed a contract stipulating otherwise.[175] The tribunal held that the changes introduced by Spain were reasonable, proportional, made in the public interest, and not retroactive.[176] Such changes maintained all the fundamental characteristics of the regulatory regime at the time of the investment, namely the right to a subsidized tariff through the photovoltaic plant's life.[177]

An important aspect of the decision involves the relationship between investors' expectations and due diligence. In a highly regulated industry such as energy, investors must exhaustively analyze the applicable framework before they make their investment.[178] It is necessary to carry out a due diligence analysis of the legal framework of the host country on the part of the investors, in order to shape expectations.[179] The tribunal found that an investor had a duty to conduct due diligence of the legal framework of the investments, and that if the claimants would have done so, they should have expected the possibility of changes to the

170. Bonafé, *supra* note 67, at 174–75.

171. *See* CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, ¶ 277 (May 12, 2005); Continental Casualty Co. v. Argentina, ICSID Case No. ARB/03/9, Award, ¶ 258 (Sept. 5, 2008); Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Award, pt. VII, ¶ 7 (Nov. 25, 2015).

172. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 500.

173. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 499.

174. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶ 503–04.

175. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 548.

176. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 539.

177. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 533.

178. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 507.

179. Monica Feria-Tinta, *First Investor-State Arbitration Award In the Spanish Renewables Cases Handed Down In Favour of Spain*, 20 ESSEX STREET, http://www.20essexst.com/sites/default/files/u58/Jan2016%20-%20MFT2_1.pdf (last visited Nov. 21, 2016).

regulatory regime.[180] In the words of the tribunal:

> At least that is the level of care that would be expected of a foreign investor in a highly regulated as the energy sector, where a preliminary and comprehensive legal framework applicable to the sector analysis is essential to proceed with the investment.[181]

The degree of investor diligence operates as a factual or interpretive element in light of which the appropriateness of State action is to be assessed or, relatedly, the scope of protection of investment protection standards is to be determined.[182] From this perspective, investor diligence is a key consideration in assessing the "reasonableness" or "legitimacy" of the expectations that could potentially be protected by the fair and equitable treatment clause.[183] "[I]nvestors have a due diligence obligation, which covers not only. . .the basic regulations applicable to foreign investment transactions. . .but also. . .the entire legal framework potentially applicable to the investment, and even. . .the potential changes of such framework that are foreseeable at the time the investment is made."[184]

While the Charanne award offers important lessons, it should be stressed that it focused only on the 2010 legislative changes, and did not take into consideration further changes introduced to the legal framework.[185] In fact, the more significant legislative amendments introduced by Spain after 2010 are the subject separate claims filed more recently.[186] As a result, this award should not be seen as decisive for the outcome of the other renewable energy cases against Spain.[187] According to Behn, the key to understanding the outcomes in these cases will be in the distinctions between when the claims were initiated and against which state.[188] The earlier cases will probably be claiming violations of the ECT according to very different legislative and regulatory changes compared to the later cases. The timing of claim initiation will be critical and is likely to create substantial differences in outcomes.[189] It is also likely for later claims to be more successful, as they are be based on the more severe regulatory changes.[190] Referring to the Charanne award,

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180. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 507.

181. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 507.

182. Jorge E. Viñuales, *Investor Diligence In Investment Arbitration: An Overview of Sources and Arguments*, *in* GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION: SOURCES AND ARGUMENTS (Andrea Gattini ed.) (forthcoming 2016).

183. *Id.*

184. VIÑUALES, *supra* note 76, at 354–55.

185. Charanne B.V. v. Spain, Award, *supra* note 132, ¶¶ 481-83.

186. *See* list of disputes *supra* note 55.

187. Ramona Volciuc-Ionescu, *Energy Charter Treaty Claims: Spain Wins First Solar Case in Arbitration*, LEXOLOGY (Jan. 28, 2016), http://www.lexology.com/library/detail.aspx?g=56483dbf-aa32-4f52-a415-1f52492ad218.

188. Daniel Behn, *Spain Wins First PV Solar Arbitration: A Word of Caution in Using this Case to Predict Outcome in the more than Three Dozen Cases to Come*, U. OSLO: PLURICOURTS BLOG (Jan. 27, 2016, 9:43 AM), http://www.jus.uio.no/pluricourts/english/blog/daniel-friedrich-behn/2016-01-26-arbitration-spain.html.

189. *Id.*

190. *Id.*; *3 Takeaways From the First Spanish Solar Arbitration Award*, GLOBAL INVESTMENT PROTECTION (Feb. 2, 2016), http://www.globalinvestmentprotection.com/index.php/3-takeaways-from-

Behn argues that it would have been unreasonable to expect – absent a specific contractual guarantee between the investor and the state – that the regulatory and legislative environment governing solar projects would remain static and completely unchanged for the life of the project.[191] However, the author believes that legislative changes introduced later on, namely in 2013 and 2014, are more likely to be considered as breaches of the ECT.[192]

The outcome of the Charanne case is an important victory for host states like Spain who face several claims before international tribunals on fairly similar facts.[193] This is the first decision that analyzes the key problems arising from changes to economic support mechanisms and helps to shed some light on the validity of such measures under international law. However, it should be kept in mind that other respondent states like the Czech Republic and Bulgaria have adopted slightly different types of measures. Therefore, the takeaways from this award cannot simply be applied automatically and fully to the other solar energy disputes.[194] For now, the major lesson offered by the Charanne award is that a breach of international investment treaties in this context will not be as straight-forward as some investors may have initially imagined.[195]

V. IMPLICATIONS FOR RENEWABLE ENERGY POLICYMAKING

Energy projects entail large-scale, long-term capital investments. Because renewable energies are not mature technologies, their development depends upon public support. Economic support mechanisms need to be maintained in the form presented at the time the investment is made in order for it to be profitable.[196] Investment decisions in the energy market are surrounded by risks of ex post regulatory changes by the host state. Feed-in tariffs and similar economic support mechanisms paved the way for the expansion of the market for green energy but became a victim of their own success. In response to overgrowth within the market, several countries have decided to scale down, or eliminate, such incentives after the investment costs were already sunk.[197] In times of financial crunch feed-tariffs become especially easy targets because they are more visible than other government subsidies.[198]

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the-first-spanish-solar-arbitration-award.

191. Behn, *supra* note 188.

192. *Id.*

193. *See* list of cases *supra* note 66.

194. *3 Takeaways From the First Spanish Solar Arbitration Award*, *supra* note 190.

195. Behn, *supra* note 188.

196. Edna Sussman, *The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 515, 528 (Marie-Claire Segger et al. eds., 2011).

197. Sussman, *supra* note 196.

198. Victor Mallet, *Shadow Falls across Spanish solar energy industry*, FINANCIAL TIMES (June 1, 2010, 3:00 AM), http://www.ft.com/cms/s/0/9ec9a138-6d15-11df-921a-00144feab49a.html?ft_site=falcon&desktop=true#axzz4RL9y7LFM; Leah Stokes, *The Politics of Renewable Energy Policies: The case of Feed-in-tariffs in Ontario, Canada*, 56 ENERGY POL'Y 490, 497 (2013).

Changes to regulatory frameworks might have a significant impact on what until recently seemed like an unstoppable move towards a low-carbon model of development, jeopardizing the credibility of renewable energy policies and generating high investment uncertainty.[199] These measures may affect the support for renewable energy in both the present and future. Governments may cut agreed subsidies for projects built or under construction but also decide not to grant any support for new projects.[200] If investors have the perception that governments might act opportunistically and change the "rules of the game" after the investment has been made, they will most likely factor in a risk premium in future projects, increasing the costs of eco-friendly policies.[201]

Changes introduced by several countries to their economic support mechanisms have triggered a wave of international arbitral proceedings.[202] Foreign investors are challenging such measures claiming that they reduce the profitability of their investments in a way that is inconsistent with the obligations borne by host states under international investment agreements.[203] Investment canons such as the prohibition of expropriation and fair and equitable treatment have, in theory, the potential to adequately protect investors from the negative effects of such decisions.[204] Modification or withdrawal of incentives can be qualified as "partial expropriation" or a violation of the fair and equitable treatment standard by frustrating an investor's legitimate expectation to benefit from public support.[205] If the impact on investors' rights and legitimate, reasonable expectations are significant, states might find it difficult to justify their actions based on public policy considerations- such as budgetary constraints or short-term economic harm.[206]

The network of international investment agreements built over the past few decades has fundamentally altered the legal framework for investors and host states in the energy sector.[207] Furthermore, the resort to the investor-state arbitration mechanism for the settlement of disputes gave arbitration panels a role

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199. *Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy*, at 9, COM (2010) 639 final (Nov. 10, 2010), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0639&from=EN; *A Comparative Analysis*, *supra* note 13, at 174; DEL RIO, *supra* note 47, at 21.

200. Mallet, *supra* note 198; Gerard Marata et al., *Renewable Energy Incentives in the United States and Spain: Different Paths – Same Destination?*, 28(4) J. OF ENERGY AND NAT. RESOURCES L. 481, 499 (2010).

201. Boute, *Combating Climate Change*, *supra* note 90, at 615.

202. *See* list of cases *supra* note 66.

203. *See* JOHN A. VANDUZER ET AL., INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS 10 (2013) (describing investor concerns over the risk of arbitrary and discriminatory treatment by host states).

204. Lise Johnson & Oleksandr Volkov, *State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law*, INVESTMENT TREATY NEWS (Jan. 2014), https://www.iisd.org/itn/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law/.

205. Boute, *Combating Climate Change*, *supra* note 90, at 651–52.

206. *Id.* at 652.

207. *See generally* Whitsitt, *supra* note 42.

to play in national and international energy policymaking. Arbitral tribunals perform a supranational review of state acts, scrutinizing the conduct of public entities against the standards of treatment prescribed in international investment agreements.[208] The outcome of these proceedings may limit the future legislative and administrative freedom of maneuver of states, affecting their ability to pursue public welfare policies.[209] Investor-state arbitration panels have been dealing with a greater amount of energy disputes, and particularly climate-related issues. While some years ago investors were claiming that states had enacted environment-friendly regulations in a way that was detrimental to their investments, the new wave of disputes refers to cases were states are reducing or eliminating the economic incentives which they introduced years ago in order to encourage investments in the renewable energy market.[210] This new category of disputes basically results from the move from the old to the new production matrix.[211] In both sets of cases, the protections afforded to foreign investors by international investment agreements have the potential to interfere in domestic decision-making on climate-related issues. International investment agreements protect investors in general, both those who invest in renewable-energy projects and those who invest in carbon-intensive industries. Both scenarios will most likely feature in future investment arbitration proceedings.[212]

Arbitral tribunals in charge of settling renewable energy disputes have a complex task ahead of them. As final awards are rendered, they have the potential to provide guidance for pending cases and similar disputes that will surely arise in the future,[213] further defining the parameters of the host states' regulatory powers with respect to renewable energy investments.[214] "[U]nderstanding how arbitrators are giving effect to the protections for investors, while at the same time balancing the interests of host states to regulate in the public interest," will play a decisive role in future renewable energy policymaking.[215]

Tribunals will have to balance the expectations of investors against the right of states to intervene in the public interest and adjust regulatory structures according to the specific circumstances that surround those cases. This assessment will likely focus on whether governments act with consistency, transparency, and reasonableness when modifying or eliminating the existing incentives regime, and, above all, whether investors have reasonable and legitimate expectations that were breached as a result of the state's measures.[216]

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208. *Id.* at 209.

209. *Id.* at 209–10.

210. *Id.*

211. Jorge E. Viñuales, *Foreign Investment and the Environment in International Law: The Current State of Play*, *in* RESEARCH HANDBOOK ON ENVIRONMENTAL AND INVESTMENT LAW (Kate Miles ed.) (forthcoming 2016).

212. Miles, *supra* note 70, at 86.

213. Nathanson, *supra* note 80, at 865.

214. Patrizia, *supra* note 47, at 83.

215. Whitsitt, *supra* note 42, at 208.

216. Patrizia, *supra* note 47, at 78.

As divergent interpretations persist about when the investors' expectations deserve protection under the fair and equitable treatment standard, any evaluation will be deeply dependent upon the specific circumstances and facts of each particular case.[217] Past arbitral practice allows for diverging interpretations of the existing investment standards. This divergence is explained by three different reasons. "First, different international investment agreements adopt different languages and formulate investment standards in diverse ways. . .[218] Second, these legal instruments normally have a wide scope of application and are not specifically designed for investments in a particular area or industry.[219] [Lastly], there is no. . . binding precedent in investment arbitration."[220] Arbitral tribunals can interpret the applicable investment treaties differently and apply them to the specific facts of the case according to their own appreciation.[221] This underlines the importance of the specific nature and circumstances of each dispute for the decision. While international investment tribunals do not create precedent that is binding upon other tribunals, some of the standards of investor protection are actually primarily shaped by prior rulings and not by reference to other sources of international law or state practice.[222] Investment treaty arbitration has developed a strong, albeit persuasive – that is, non-binding – system of precedent.[223] Still, the approach of different international investment arbitrators to similar issues can vary considerably, creating a degree of uncertainty regarding the outcome of international investment disputes.[224]

This lack of certainty raises the question of the necessity to create a specific investment regime for low-carbon investments. The last decades witnessed the emergence of what can be called "International Energy Investment Law",[225] mainly composed of bilateral investment treaties and the ECT. These international instruments afforded a certain degree of certainty and security to investors, significantly increasing the availability of funds for investment in renewable energy projects.[226] Against a background of financial crisis, the present wave of disputes makes the call for a widely adopted multi-lateral energy investment treaty all the more urgent. Investment treaty analysis and climate change concerns have developed since the drafting of the ECT and political changes and realignments have occurred which may require some fine-tuning or adjustments in the ECT

217. Cameron, *supra* note 14, at 312-13; Patrizia, *supra* note 47, at 80.

218. Fernando Dias Simões, *The Role of Investment Arbitration in Water Services Governance*, WATER POLICY (2016), http://wp.iwaponline.com/content/ppiwawaterpol/early/2016/11/28/wp.2016.032.full.pdf.

219. *Id.*

220. *Id.*

221. Boute, *Combating Climate Change*, *supra* note 90, at 652.

222. *Id.*

223. STEPHAN SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC Law 18 (Stephan Schill ed., 2010).

224. CONDON, *supra* note 18, at 93.

225. Krajewski, *supra* note 79, at 352–54.

226. Sussman, *supra* note 196, at 528.

provisions.[227]

The Energy Charter Secretariat has been discussing the benefits of a non-binding declaration and/or an interpretative note on the promotion of low-carbon investments.[228] It is argued that such a statement would improve legal certainty in the application of the ECT, reducing the normative and political risks and investment related disputes.[229] Moreover, a clear political statement on low-carbon investments by the Energy Charter Conference would send an important signal to the international community and to investors on its commitment to sustainable development and climate change mitigation. The overall objective being the protection and balance the interests of ECT members and of international investors.[230]

Some authors go farther and argue that the current system is problematic, as it allows foreign investors to initiate arbitration against the host state without having first consulted and received some sort of an authorization from their home government.[231] In the cases against Spain, it is reported that a number of foreign states have notified the Spanish authorities, more or less officially, of their concern regarding the commercial interests of their nationals.[232] From this perspective, foreign investors should first seek at least the opinion of its home government, and preferably its assent, before initiating an international conflict that can grow well beyond the economic dispute that originated it. The relative lack of practical effect of many investor-state disputes calls into question whether state-to-state dispute settlement would be more efficient.[233]

In the European context, economic support mechanisms for the promotion of renewable energy have led not only to the wave of investment arbitration but also to market distortions and state aid investigations.[234] According to Behn and Fauchald, this is the result of two major sets of conditions.[235] On the one hand, external conditions, namely, the global financial recession and the unanticipated

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227. *Id.* at 532.

228. *See* Energy Charter Secretariat, *Energy Charter 2013 Annual Report* 25–26, http://www.energycharter.org/fileadmin/DocumentsMedia/AR/AR_2013_en.pdf (last accessed Dec. 10, 2015); *see also* Energy Charter Secretariat, *Energy Charter 2014 Annual Report* 19, http://www.energycharter.org/fileadmin/DocumentsMedia/AR/AR_2014_en.pdf (last accessed Dec. 10, 2015).

229. *See* Energy Charter Secretariat, *Energy Charter 2013 Annual Report* 25–26, http://www.energycharter.org/fileadmin/DocumentsMedia/AR/AR_2013_en.pdf (last accessed Dec. 10, 2015); *see also* Energy Charter Secretariat, *Energy Charter 2014 Annual Report* 19, http://www.energycharter.org/fileadmin/DocumentsMedia/AR/AR_2014_en.pdf (last accessed Dec. 10, 2015).

230. *Energy Charter 2013 Annual Report*, *supra* note 228, at 26.

231. Iriarte, *supra* note 47.

232. *Id.*

233. Ramon Torrent et al., *Reforming the Present International Legal Framework for Foreign Direct Investment (FDI): Basic Elements for an Analytical and Policy Framework* 6–7 (Legal Studies Research Paper No. 2015-25, 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570596.

234. Behn & Fauchald, *supra* note 47.

235. *Id.* at 127.

decline in the cost of solar panels.[236] On the other hand, an internal condition – the regulatory structure established to implement support schemes. While the external conditions were unanticipated, regulatory structures were inflexible and unable to quickly respond to changing market conditions.[237] Because investments were originally over-incentivized, when regulators and legislators realized that feed-in tariffs were unsustainable, it was too late and drastic emergency-type measures were required to control new investment in the sector.[238]

This is recognized by the European Commission itself, who has stated that:

> [R]igid national support schemes were generally unable to adapt rapidly enough to . . . falling costs, raising profits and creating a rate and scale of installations in some countries almost excessive in a time of general economic crisis. The result has been sudden and unpredictable changes to a number of national support schemes, which will . . . curtail investment . . .[239]

The European Commission recognizes that:

> Given the prominent role that financial support schemes play in developing renewable energy today, and given the growing prominence (and cost) of renewable energy use in the electricity sector, urgent efforts are needed to reform support schemes to ensure that they are designed in a cost effective, market-oriented manner. The Commission's guidance is necessary to ensure that support schemes are adjusted regularly and quickly enough to take account of falling technology costs and to ensure reforms make renewable energy producers part of the energy market . . . to ensure such market interventions are correcting market failures and not adding or maintaining market distortions . . . Many national reforms have had a negative impact on the investment climate. Most critical have been changes that reduce the return on investments already made. Such changes alter the legitimate expectations of business and clearly discourage investment, at a time when significantly more investment is needed.[240]

The European Commission's concern with renewable energy disputes is eloquently evidenced by its own involvement in the arbitral proceedings.[241] In *Charanne and Construction Investments v. Spain*, the European Commission was permitted to file an amicus curiae brief.[242] The European Commission is also reported to have sought leave to intervene in other proceedings against Spain[243]

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236. *Id.*

237. *Id.*

238. *Id.*

239. *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Renewable Energy Progress Report*, at 5, 175, COM (Mar. 27, 2013).

240. *Id.* at 9.

241. Charanne B.V. v. Spain, Award, *supra* note 132.

242. Charanne B.V. v. Spain, Award, *supra* note 132, ¶ 56.

243. Namely, Antin Infrastructure Services Luxembourg S.à.r.l. & Antin Energia Termosolar B.V.

and the Czech Republic,[244] but there is no further information available. Non-disputing party applications have been filed to intervene in other energy-related ICSID cases against Spain[245] and Italy,[246] yet it remains unclear whether the European Commission has filed these applications.

The European Commission seeks authorization to take part in the arbitral proceedings in order to clarify issues concerning the scope and content of European Law, which are connected to the disputes. Being the "Guardian of the Treaties", the European Commission possesses a vested interest in becoming involved in such arbitrations and helping the tribunal to elucidate potential conflicts of legal rules and principles.[247] In the different proceedings against the Czech Republic being arbitrated under the UNCITRAL Rules, the European Commission is reported to have raised a conflict with the provisions of European Union Law. According to the Commission, former benefits and incentives accorded to solar investors could constitute state aid that needed to be eliminated in order for the Czech Republic to remain in compliance with European Union

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v. Kingdom of Spain, ICSID Case No. ARB/13/31(Aug. 7, 2014); Eiser Infrastructure Limited & Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36 (July 28, 2014); and Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain (Arb. Inst. Stockholm Chamber of Comm., registered 2013); *see* Luke Peterson, *European Commission Wades into Solar Arbitrations Against Spain, Intervening in One Case a Week Before Final Hearing*, INVESTMENT ARBITRATION REPORTER (Nov. 17 2014), https://www.iareporter.com/articles/european-commission-wades-into-solar-arbitrations-against-spain-intervening-in-one-case-a-week-before-final-hearings; Valentina Vadi, Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?, 48(5) VANDERBILT J. OF TRANSNT'L L. 1285, 1341 (2015).

244. Antaris Solar & Dr. Michael Göde v. Czech Republic (PCA Case Repository, May 8, 2013); Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, & Radiance Energy Holding S.A.R.L. v. Czech Republic (UNCITRAL, registered May 8, 2013); Voltaic Network GmbH v. Czech Republic (UNCITRAL, registered May 8, 2013); ICW Europe Investments Limited v. Czech Republic (UNCITRAL, registered May 8, 2013); Photovoltaik Knopf Betriebs-GmbH v. Czech Republic (UNCITRAL, registered May 8, 2013); WA Investments-Europa Nova Limited v. Czech Republic (UNCITRAL, registered May 8, 2013); *see* Luke Peterson, *Brussels' Latest Intervention Casts Shadow Over Investment Treaty Arbitrations Brought by Jilted Solar Energy Investors*, INVESTMENT ARBITRATION REPORTER (Sept. 8, 2014), http://www.iareporter.com/articles/brussels-latest-intervention-casts-shadow-over-investment-treaty-arbitrations-brought-by-jilted-solar-energy-investors; Pietro Ortolani, *Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance*, 6 J. INT'L DISP. SETTLEMENT 118, 126 (2015).

245. RREEF Infrastructure (G.P.) Limited & RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30 (June 6, 2016); Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain ICSID Case No. ARB/14/1(July 18, 2014); NextEra Energy Global Holdings B.V. & NextEra Energy Spain Holdings B.V. v. Kingdom of Spain ICSID Case No. ARB/14/11 (Jan. 23, 2015); InfraRed Environmental Infrastructure GP Limited & others v. Kingdom of Spain, ICSID Case No. ARB/14/12 (Nov. 26, 2014); RENERGY S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18 (Feb. 13, 2015); *see* Decisions on Non-Disputing Party Participation, ICSID, https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Decisions-on-Non-Disputing-Party-Participation.aspx.

246. Blusun S.A., Jean-Pierre Lecorcier & Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3 (June 12, 2014).

247. Christina Knahr, *The New Rules on Participation of Non-Disputing Parties in ICSID Arbitration: Blessing or Curse?*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 319, 320 (Chester Brown & Kate Miles eds., 2011).

law.[248] The intervention of the European Commission in the proceedings may, naturally, raise the technical complexity of the proceedings due to the potential conflict between obligations arising under BITs and under European Union law.[249]

Greater policy coordination between the European Union and its member states is needed.[250] The European Commission is currently working to devise a European policy on renewable energy promotion.[251] In this regard, the design of support schemes is of paramount importance. While economic support mechanisms have demonstrated important successes, they have also evidenced a number of policy failures.[252] Feed-in tariffs are useful support mechanisms, but should not be irreversible. These tools must inevitably adapt to changing circumstances, namely varying costs. However, this is no easy task. Governments may face significant political resistance if they decide to change or terminate feed-in tariffs. Investors always resist any change to regulatory structures that affects these mechanisms and impacts their investments. As incentives become a key piece in the overall system, the renewables industry may gain more political suasion, making the problem even harder to solve.[253]

The current wave of disputes may be the consequence of insufficient planning and administrative capabilities. It should be seen as a serious warning for governments to act cautiously when implementing policies that may have important implications for international investment.[254] Governments need to understand renewable energy policies in general – and financial support mechanisms in particular – as a permanent exercise of re-evaluation and re-adaptation. Markets change continuously, and so does the market for renewable energy sources. Policies need to adapt accordingly. The challenge is for policymakers to adjust quickly and adequately to ever-changing markets in order to maximize their regulatory frameworks' efficacy and efficiency. Governments should be aware that making long-term commitments to attract investment may result in expensive international arbitration claims in the future. Feed-in tariffs must be designed prudently to allow for flexibility when market conditions change. Well-designed schemes are in the best interest of both governments and investors, because the alternative is an explosion of disputes where everyone loses except the arbitration industry.[255] Governments should factor in some flexibility into the regulatory structure so as to eliminate the risk of legitimate policy decisions giving rise to legal disputes, while at the same time providing adequate assurances to

248. Peterson, *supra* note 244; Vadi, *supra* note 243, at 1340–41.

249. Knahr, *supra* note 247, at 320.

250. Behn, *supra* note 47, at 2, 6.

251. *Id.* at 2.

252. *Id.*

253. Davies, *supra* note 82, at 998.

254. Behn & Fauchald, *supra* note 47, at 138.

255. Kyla Tienhaara, *Does the Green Economy Need Investor–State Dispute Settlement?*, INVESTMENT TREATY NEWS (Nov. 15, 2015), https://www.iisd.org/itn/2015/11/28/does-the-green-economy-need-investor-state-dispute-settlement/ (last visited Dec. 10, 2016).

investors.[256] Policymakers need to design feed-in tariff schemes that are flexible enough to accommodate changes in the market without disrupting the stability of the regime itself. Those who fail to strike this balance risk regulatory collapse.[257]

Nevertheless, it should also be added that regulatory risks associated with renewable energy investment are also evolving. As renewable energy develops and matures, its costs will sooner or later fall below the price of conventionally produced electricity. Once this "tipping point" has been reached, feed-in tariffs will have delivered their promise, and will only be needed on a limited basis, if at all.[258] As a result, they will be increasingly unnecessary to entice investment in renewable energies. When this moment comes, investment disputes resulting from the elimination of such incentives will disappear as well.[259]

Disagreements in the international energy industry normally lead to high profile disputes. Once a controversy arises, parties seek to exhaust all options to reach a settlement before resorting to arbitration. Many disputes are amicably settled before an arbitral award is rendered. The cases that do reach the award stage are more likely to reflect investor-state relationships that are beyond repair.[260] The astounding amount of disputes currently pending before arbitral tribunals signals a failure by governments in adjusting their regulatory structures without destabilizing the market for renewable energies. Regardless of the final outcome of these disputes, they indicate a significant level of conflict between host states and investors. Monitoring the evolution of these disputes is especially difficult since part of the information is confidential or otherwise unavailable.[261] Whether parties will be able to avoid further confrontation and reach to reasonable settlements remains to be seen.

In any case, it is important to ensure that bridges between states and investors are not burned. The transition to a low-carbon model of development requires long-term cooperation between parties.[262] Countries will continue to strive to design and implement energy policies that allow them to face climate change. Investors are essential partners in this process, and governments need to be able to encourage them to make their contribution in future ventures. In designing new policies or adjusting existing ones, governments need to take into account that the legal framework that supports renewable energy investment is not confined to national regulations. The legal obligations borne by states towards investors encompass obligations in domestic law (contract and administrative law) but also in international law, namely international investment law.[263] The challenge for governments is to strike a balance between regulation that discourages foreign

256. Jha, *supra* note 102.
257. Davies, *supra* note 82, at 998.
258. POWERING THE GREEN ECONOMY, *supra* note 8, at xxiii.
259. Tienhaara, *supra* note 256.
260. *Stability of Contract*, *supra* note 15, at 313.
261. Viñuales, *supra* note 211.
262. Tienhaara, *supra* note 255.
263. *Id.*

investment and foreign investment protection that discourages regulation.[264]

Countries need to adopt a holistic approach to renewable energy policymaking so as to avoid possible clashes between different legal frameworks. The different layers of regulation applicable to investments in renewable energies all serve to protect investments in this field. Legal instruments, international investment law in particular, can help to mobilize the huge investments required to transform the energy sector to cleaner forms of generation.[265] The challenge is to shape national policies in ways that do not breach the rights of foreign investors under international investment agreements. This can only be achieved if host states are truly aware of the scope of their obligations to foreign investors when they design and implement their renewable energy policies.[266] This requires a clear understanding of the disciplines of international investment law and how they may limit or impact upon national regulation.

Investment standards of protection may have a chilling effect on the domestic regulatory space. While in the past concerns have been voiced that arbitration awards could end up crystallizing environmentally detrimental rules, now they may ultimately have an environmentally friendly freezing effect. Governments should be cognizant of the commitments that they undertake under international investment treaties. In particular, the fair and equitable treatment standard narrows down the discretionary space of host states.[267] Its application may inhibit necessary adjustments and changes in the legal framework, which the investor did not expect or which are seen as irrational or unjustifiable by the investment tribunals.[268] The risk that host state measures may conflict with investment-backed expectations may, however, be substantially reduced by governments if they ensure regulatory transparency and due process.[269]

States can also reduce the risk of overly broad interpretations of investment disciplines by using more precise language in new investment agreements or include explicit language that allows them to justify changes to regulatory frameworks by reference to broad social or environmental objectives. However, both of these measures only apply to future disputes. As for existing international investment agreements, states can provide authoritative interpretive guidance as to the terms of the treaty. A good example of this approach is the interpretive note issued by the three member-states to the North American Free Trade Agreement (NAFTA) in relation to the fair and equitable treatment standard.[270]

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264. CONDON, *supra* note 18, at 93.

265. CONDON, *supra* note 18, at 93.

266. *Id.*

267. Krajewski, *supra* note 79.

268. *Id.* at 360.

269. Åsa Romson, *International Investment Law and the Environment*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 37, 40 (Marie-Claire Segger et al. eds., 2011).

270. *North American Free Trade Agreement (NAFTA), Notes of Interpretation of Certain Chapter 11 Provisions*, GLOBAL AFFAIRS CANADA, http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta-interpr.aspx?lang=eng (last accessed Dec. 10, 2015).

The numerous claims over changes in economic support mechanisms that have surfaced in the past few years provide evidence that states to rethink and reshape their renewable energy policies. The determination of what is reasonable for the investor to expect is important for any reform of legal frameworks. Shifts in both policy and the development of countries make this determination different from country to country.[271] The creation of efficient and sustainable markets for renewable sources of energy is a tremendous financial and legal challenge. This endeavor can only be achieved through a thorough knowledge of the functioning and possible implications of the economic mechanisms and legal frameworks that underpin foreign investments in the renewable energy market.

271. Romson, *supra* note 269, at 40.

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