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FOREIGN DIRECT INVESTMENTS AND RENEWABLE ENERGY SOURCES: LEGAL ANALYSIS OF CURRENT DEVELOPMENTS

By

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To my parents

FOREIGN DIRECT INVESTMENTS AND RENEWABLE ENERGY SOURCES: LEGAL ANALYSIS OF CURRENT DEVELOPMENTS

Important keywords: energy, investment, subsidy, dispute…

Abstract

The subject of this master thesis are the "Foreign direct investments and renewable energy sources: legal analysis of current developments". The topic is focused on the effects brought by incentivizing long-term investments in the energy sector and the possible 'scenarios' that could follow as an outcome.

In the introduction, the aim is to describe how the renewable energy sector usually depends on large, upfront investments, which take long period of time until the invested amount is returned. Given the substantial initial capital investment required, many countries (particularly those in the European Union) have enacted schemes, such as feed-in tariffs or other special rates, to encourage long-term investment. Investors in the renewable energy sector have a strong interest in the stability of this regulatory regime and every investor strongly values the continuity of any incentive schemes for renewable energy over the period of expected recovery. The paper also closely observes the impact and the meaning of protection from unwarranted government policy changes that could amount to expropriation or even to a denial of fair and equitable treatment.

An important milestone and the key to assurance of the future investors is the Energy Charter Treaty (ECT), originally concluded in the aftermath of the Cold War, with a purpose to integrate the former Soviet Union's resource-rich energy sectors into the European market. The role of the Treaty is briefly discussed as the ECT provides an international legal framework for energy cooperation, particularly in Europe. Since the past decade saw a significantly increased level of investment, including foreign investment as a result of international initiatives on the development of alternative energy sources, a significant number of countries have implemented government subsidies and support schemes to encourage investment in renewable energy. These measures were designed to encourage renewable resources usage and to gradually decrease the continued use of fossil fuels. The fact that companies are deciding to invest in RES definitely has a positive impact and surely is in line with the global measures and efforts to fight the global warming and the climate change, but this also has negative effects. As the number of RES investments arises, the number of disputes under the ECT arises as well and the thesis analyses several relevant cases against EU countries. Before concluding, the paper focuses on the changing role of the ECT derived from the recently arisen disputes and how this could impact the future of RES investments. The author finishes strong, by describing the bigger picture and gives her own input regarding the future of the topic.

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Introduction

As an introduction to the topic of this paper, let me briefly discuss the role of the foreign direct investments in general, as a starting point, which will later bring as to investments involving energy sources. A foreign direct investment (FDI) is an investment made either by a firm or by an individual, with an aim to establish foreign business operations or to acquire foreign business assets in a foreign company[1]. A crucial prerequisite for any FDI is that the foreign country in which the investor decides to invest is one with an open economy. Unlike the tightly regulated economies (closed economies), open economies usually offer a skilled workforce and above-average growth prospects for the potential investor. Another important feature of the FDIs is the fact that they tend to establish either effective control of or at least substantial influence over the decision-making of the foreign business.

"A lasting interest" in the foreign economy is the end goal that the potential investor seeks to obtain. *"This implies that a long term relationship exists between the investor and the enterprise, and that the investor has a significant influence on the way the enterprise is managed. Such an interest is formally deemed to exist when a direct investor owns 10% or more of the voting power on the board of directors (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise)."*[2]

The investments made in the renewable energy sector and in the energy sector in general are not an exempt to this preconditions. The potential investor that decides to invest in the energy sector has to be well aware that these types of investments require large, upfront funding, which then needs longer period of time in order to be recouped.[3] All these serious implications about investing in foreign economies and more significantly, about investing in the energy sector bring us to one characteristic, which has to be present in the economy of the foreign country. It has to do with the stability of the regulatory regime of the country and this is something of great importance for any FDI, therefore it is well examined before the destination of the investment is decided upon. Robust legal systems are the ones which maintain a high level of legal certainty and legal predictability. This 'high level' we speak of is not something that could be easily measured or specified, but it certainly is something that can be distinguished between countries. *"Legal certainty is a principle in national and international law which holds that the law must provide those subject to it with the ability to regulate their conduct."*[4]

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[1] Markets>International markets>Foreign Direct Investments (FDI) by James Chen, reviewed by Gordon Scott;
[2] European Commission>Eurostat>Structural business statistics>Global value chains>Foreign direct investments, available at https://ec.europa.eu/eurostat/web/structural-business-statistics/global-value-chains/fdi ;
[3] The Guide to Energy Arbitrations - Third Edition
"Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty", by Charles A Patrizia, Joseph R Profaizer, Samuel W Cooper and Igor V Timofeyev Paul Hastings LLP, available at https://globalarbitrationreview.com/chapter/1178836/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty ;
[4] "Introduction to law", Author: D.Bajaldziev, 2004;

So, the principle of legal certainty basically presents that for every participant in the law it is required that firstly, all laws and legal decisions are made public and are easily available. Secondly, the principle states that all laws and decisions are definite and clear, meaning they are understood by most of the population of the country. Thirdly, the principle suggests that retroactivity of laws and decisions must be limited, with an ultimate goal to protect the legitimate interests and expectations.

This leads us to the importance of the stability in the legal system, when it comes to energy investments. Namely, as investing in the renewable energy sector requires substantial initial capital funding, it is an interest for any potential investor that the regulatory regime of the foreign country has a proclaimed stability, as well as protection from unwarranted government policy changes that could sometimes lead to expropriation or even a denial of fair and equitable treatment. As we speak about safety and security of the legal system, another thing worth mentioning are the enacted schemes used by many countries, especially those in the European Union (EU). These are commonly known as feed-in tariffs or other special rates, which are primarily used with a target to encourage long-term investments in the energy sector.

A pivotal role in protecting the rights and freedoms of the potential investor plays the Energy Charter Treaty (ECT). The Treaty is the only binding multilateral instrument dealing with intergovernmental cooperation in the energy sector, and contains far-reaching undertakings for the contracting parties. The ECT includes provisions regarding investment protection, provisions on trade, transit of energy, energy efficiency and environmental protection and dispute resolution. The protection which the ECT provides for the investors is achieved by the implementation of the crucial provisions which cover the protection and fair treatment of the potential investor.[5] ECT provisions relating to investment promotion and protection apply to any investment of an investor of another Contracting Party associated with an "economic activity in the energy sector". They cover all economic activities concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of energy materials and products. They also include such services as construction of energy facilities, prospecting, consulting, management and design and activities aimed at improving energy efficiency.

[5] The Energy Charter Treaty, Trade Amendment and Related documents, pg.9 Guide to the Energy Charter Treaty, available at https://www.europarl.europa.eu/meetdocs/2014_2019/documents/itre/dv/energy_charter_/energy_charter_en.pdf ;

Background to foreign direct investments in the energy sector

The aim of this chapter is to introduce the nature and recent development of the energy investments and to outline some of the reasons why investors decided to turn to the energy sector. Moreover it describes the concept of RES ('renewable energy sources') and the rising interest of investing in RES.

1.1 Definition and nature of "investment" and "investor"

On one hand, in an economic sense[6], an investment is the purchase of goods that are not consumed today but are used in the future to create wealth. From a financial point of view, an investment is a monetary asset purchased with the idea that the asset will provide income in the future or will later be sold at a higher price for a profit.

On other hand, under the ECT an "*investment"*[7] means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- *tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;*
- *a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;*
- *claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;*
- *Intellectual Property;*
- *Returns;*
- *Any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.*

Whereas the ECT defines the "investor" as a "natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law", or as a "company or other organization organized in accordance with the law applicable in that Contracting Party", with respect to a contracting party.

[6] INVESTING > INVESTING ESSENTIALS, Investment, By JAMES CHEN, reviewed By GORDON SCOTT https://www.investopedia.com/terms/i/investment.asp ;

[7] The Energy Charter Treaty, Trade Amendment and Related documents, PART I, DEFINITIONS AND PURPOSE, ARTICLE 1, DEFINITIONS (pg.27);

1.2. Recent development and promotion of energy investments

One important fact about renewable energy is that in the past couple of years we have seen a dramatic increase in the amount of electricity generated from renewable resources, principally wind and solar. Figures from the US Federal Energy Regulatory Commission show that renewables now account for 17 per cent of operating generating capacity in the United States and over 65 per cent of new capacity. What is more, global goals and mandates for renewable energy continue to grow. The goal is 100 per cent in Hawaii by 2045; 75 per cent in Vermont by 2032; and 50 per cent in California by 2030. Elsewhere, Germany has set itself a target of 80 per cent by 2050.

Energy investments have been supported both from the governments of most countries and from the scientists and environmentalists. It has been clearly concluded that all countries around the world need to decarbonize their power sectors as a crucial part of meeting the emissions reduction targets contained in their nationally determined contributions to the Paris Agreement on climate change. The Intergovernmental Panel on Climate Change (IPCC) has stated that "virtually full" de-carbonization of the power sector by around 2050 is necessary to meet the Paris Agreement's target of capping global temperature rise at 1.5°C, and also to meet the less ambitious 2°C target.[8] As the impact of the climate change has a global impact and is evidently inevitable for all countries, most governments have decided to help and support domestic companies which are willing to make a "green" investment. The offered support was well acknowledged from the end of the investors, as more reforms were to follow and later the energy subsidies were introduced. Very briefly, energy subsidies are measures that keep prices for consumers below market levels or for producers above market levels, or reduce costs for consumers and producers.[9] Energy subsidies come in different forms, such as direct cash transfers to producers, consumers, or related bodies, as well as indirect support mechanisms, such as tax exemptions and rebates, price controls, trade restrictions, and limits on market access.

It is expected that in most cases subsidy reform and energy efficiency are closely linked and mutually supportive. In fact, the subsidy reforms which one country decides to implement and to make available for the prospective investors, make the energy efficiency itself more attractive. The effect goes other way around, as the energy efficiency achieved by the usage of subsidies makes the subsidy reform more politically feasible. Another advantage of the energy subsidies is that they positively affect the employment and social benefits, simply because are used to maintain the employment in periods of economic transition.

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[8] "What is "de-carbonization" of the power sector?", The Grantham Research Institute on Climate Change and the Environment, 29th of January, 2020, available at https://www.lse.ac.uk/granthaminstitute/explainers/what-is-decarbonisation-of-the-power-sector-why-do-we-need-to-decarbonise-the-power-sector-in-the-uk/ ;

[9] "Harmful Tax Competition: An Emerging Global Issue", Book by Organization for Economic Co-operation and Development (OECD, 1998), available at https://books.google.mk/books/about/Harmful_Tax_Competition.html?id=mYTWAgAAQBAJ&printsec=frontcover&source=kp_read_button&redir_esc=y#v=onepage&q&f=false ;

The main goal of the energy subsidies is the environmental improvement, to reduce pollution, including different emissions, and to fulfill international obligations (e.g. Kyoto Protocol[10]).

1.3. Development of the energy sector in Europe

The main drivers of the energy transition in Europe have been the CO2 reduction targets (80% to 95 % in 2050, 40% in 2030 and 20% in 2020), the Renewable Energy Directive (RED) and ensuring of Member states' policies. The additional role in the gradual development of the energy sector in Europe is played by the Emission Trading Systems (ETS) and by the national and regional economic support.

This is how the member states of the EU have been encouraged to change their energy related behavior (both citizens and industries) and it is expected to lead to fundamental changes. As climate change is something the whole world struggles with, Europe is no exception, [11]whether we are talking about the EU, the EAEU, or any other European country, the energy sector is undergoing rapid transformation in response to the climate change agenda. And the climate change agenda is changing on an increasingly frequent basis. Alternative energy production resources (wind power, biomass, hydropower, solar energy, etc…) attract the interest of European investors and are supported by the governments, since they have huge employment and export potential. [12]There are a wide range of different support mechanisms being used to stimulate renewable energy uptake, including quota systems, feed-in tariffs, green certificates or a combination.

Most member states now recognize that political support is necessary to overcome the barriers that prevent a more rapid uptake of renewable technologies. These include: provision of fair and guaranteed access to electricity markets; financial measures to stimulate investment in renewable energy projects; fiscal measures that reflect the external costs and benefits of energy from renewable sources (particularly through carbon or energy taxes); and practical support from local public authorities in the siting and implementation of projects.

Further developments in this direction has been for example The European platform for CITIZEN investment in renewable ENERGY (CITIZENERGY), which promotes the participation of consumers as 'prosumers' – people who themselves produce the energy they consume. The online platform is based on the fact that Renewable energy is inevitably

[10] See, e.g., Kyoto Protocol of 11 December 1997 and Directive 2003/87/EC (establishing the EU Greenhouse Gas Emissions Trading Scheme). Both entered into force in 2005. The European Union in particular has either required or encouraged its member states to set up support mechanisms for electricity generation from renewable sources. See K. Talus, 'Introduction: Renewable Energy Disputes in Europe and Beyond: An Overview of Current Cases', 12 Transnat'l Disp. Mgmt., May 2015, at 3-4.

[11] "The Future of Energy in Europe", https://www.sustaineurope.com/the-future-of-energy-in-europe.html

[12] "Renewable Energy Sector in the EU: its Employment and Export Potential", A Final Report to DG Environment;

decentralized, which allows regionalized energy production and it lets European citizens to participate in the future of Europe's energy mix.

The interest in energy investment in Europe has risen significantly in the past decade and it continues to rise, as investors and industries are finding more creative and affordable ways to attract funding and to implement future projects.

1.4. Tax incentives vs. subsides

As previously mentioned, the government also plays a vital role when it comes to energy investments and their boost. By having the authority to manage the tax system in one country, the government can decide which industry would be 'cheaper' to invest in. As the primary expenses are significant when investing in energy projects, lower taxes could be quite persuasive for the investor/s.

A tax incentive is a government measure that is intended to encourage individuals and businesses to spend money or to save money by reducing the amount of tax that they have to pay. Though it is difficult to estimate the effects of tax incentives, they can, if done properly, raise the overall economic welfare through increasing economic growth and government tax revenue (after the expiration of the tax holiday/incentive period). However, tax incentive can cause negative effects if they are not properly designed and implemented.[13] According to a 2020 study of tax incentives in the United States, "states spent between 5 USD and 216 USD per capita on incentives for firms." There is some evidence that this leads to direct employment gains but there is not strong evidence that the incentives increase economic growth.[14]

On the other hand, a subsidy or government incentive is a form of financial aid or support extended to an economic sector (business, or individual) generally with the aim of promoting economic and social policy. Subsidies come in various forms including: direct (cash grants, interest-free loans) and indirect (tax breaks, insurance, low-interest loans, accelerated depreciation, rent rebates).[15]

To receive tax incentives, firms must meet certain requirements from the government. The qualifications often depend on the tax incentive's purpose, which might be creating new jobs, spurring private investment, or increasing research and development. After all, government officials use incentives to promote their particular agendas. Politicians can attempt to steer business practices with incentives because incentives encourage firms to engage in a specific

[13] Easson, Alex; Zolt, Eric. "Tax Incentives" (PDF), Law Review;

[14] Slattery, Cailin; Zidar, Owen (2020). "Evaluating State and Local Business Incentives". Journal of Economic Perspectives. 34 (2): 90–118. doi:10.1257/jep.34.2.90. ISSN 0895-3309;

[15] "Is That a Good State/Local Economic Development Deal?", A Checklist (2014-06-03), Naked Capitalism;

activity by lowering the firm's cost of that activity, making the return on investment more attractive.[16]

It is evident that in the past couple of years, even decades, the tax incentives and subsidies in favor of energy investments, have been regarded as attractive by the opposite party. Many energy projects have been encouraged by the fact that the initial or the overall costs would be much lower. Profit is the primary goal of every business idea and lower taxes or government help could be crucial sometimes.

[16] "Tax Incentives and Subsidies: Two Staples Of Economic Development", By Mr. Jacob Bundrick, available at https://uca.edu/acre/2016/08/19/tax-incentives-and-subsidies-two-staples-of-economic-development/ ;

Legal disputes under the Energy Charter Treaty

Disputes arising in the energy sector have long been the subject of international adjudication. As global demand for energy increased, foreign investment became crucial to allow the exploration and development of states with abundant energy resources that may not otherwise have had the capital to do so. To encourage such foreign investment, as recognized by the canon of bilateral and multilateral investment treaties, a stable framework offering binding protections for foreign investors alongside a system of adjudicating disputes became essential.[17]

2.1. Brief introduction to the ECT and its purpose

After the end of the Cold War and motivated in part by the desire to facilitate the development of energy resources in former Soviet Union countries, promote energy security and encourage economic integration, a collection of states met to establish a model for energy cooperation.[18] The result of these discussions was the European Energy Charter, a non-binding declaration by which states confirmed their mutual objectives to cooperate in energy-related trade, efficiency, environmental protection and other areas.[19] The signatories further agreed to negotiate in good faith a binding agreement to implement their shared objectives.[20] On this basis, states negotiated what would become the Energy Charter Treaty (ECT). The ECT, which entered into force on 16 April 1998, is a multilateral treaty designed to create a stable framework to stimulate economic growth and liberalize international investment and trade in the energy sector.[21]

With the passage of time and the increased utilization of the ECT as the basis for international arbitration, the parties to and subject matter of ECT arbitrations have evolved. While early cases frequently named central and eastern European states as respondents, more recently the focus has shifted westwards, with a majority of cases initiated against western European states.[22] Recent cases have also tended to arise out of alleged defects in or changes to regulatory frameworks encouraging the exploration and development of renewable energy.[23] Consequently, there has

[17] The Energy Charter Treaty, Cyrus Benson, Charline Yim and Victoria Orlowski, 'The development of the Energy Charter Treaty';
[18] Thomas Roe & Mathew Happold, "Settlement of Investment Disputes Under the Energy Charter Treaty" (2011), pp. 8-9;
[19] European Energy Charter, Title 1 (Objectives);
[20] European Energy Charter, Title 3 (Specific Agreements);
[21] See Preamble and Article 2 (Purpose of the Treaty) ('This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementaries and mutual benefits, in accordance with the objectives and principles of the Charter.');
[22] Graham Coop, "Energy Charter Treaty 20 Year Anniversary: 20 Years of the Energy Charter Treaty", ICSID Review, Vol. 29, No. 3 (2014), pp. 516-17.
[23] Charles A. Patrizia, Joseph R. Profaizer, Samuel W. Cooper, and Igor V. Timofeyev, "Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty", Global Arbitration Review, 2 October

been a parallel shift in the nature of the parties to the dispute and the underlying resources. The clearest representation of this trend can be seen with Spain, which has been named as a respondent in over 30 ECT cases relating to renewable energy, in particular arising from Spain's reduction or elimination of incentives offered to renewable energy producers.[24] Anticipated developments in ECT arbitration are discussed further below. First, we provide a basic overview of jurisdictional issues that frequently arise in ECT arbitrations as well as the substantive protections the treaty affords to investors.

The ECT is the only binding multilateral instrument dealing with intergovernmental cooperation in the energy sector, and contains far-reaching undertakings for the contracting parties. The ECT includes provisions regarding investment protection, provisions on trade, transit of energy, energy efficiency and environmental protection and dispute resolution.[25] The scope of an international arbitral tribunal's jurisdiction derives from the parties' consent to arbitrate. By signing the ECT, *'contracting parties'* (i.e., states or inter-governmental organizations party to the ECT) provide their 'unconditional consent' to submit disputes arising between a contracting party and an investor of another contracting party to international arbitration in accordance with the provisions of Article 26.[26] This is subject to two potential limitations: contracting parties may exclude their unconditional consent where the investors had previously submitted their dispute to the courts of the contracting party or in accordance with a previously agreed dispute settlement procedure;[27] and contracting parties may further exclude from their consent disputes arising from the last sentence of Article 10(1), the *'umbrella clause'*.[28] Arbitration relies on mutual consent, and the ECT requires an investor to provide its written consent to submit its dispute to arbitration which typically occurs in its request for arbitration.[29]

The ECT contains a standard cooling-off period of three months before an investor can initiate international arbitration. While respondents have raised objections on account of a claimant's alleged failure to satisfy the three month amicable settlement period, these efforts have generally been unsuccessful.[30] Further, where a contracting party has withheld its consent to allow an

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2015, available at https://globalarbitrationreview.com/chapter/1178836/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty#footnote-067 ;

[24] See International Energy Charter, List of all Investment Dispute Settlement Cases, available at http://www. energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/ ;

[25] "Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty", by Graham Coop;

[26] Article 26(3) (a);

[27] Article 26(3) (b) (i);

[28] Article 26(3) (c); Article 10(1) *('Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.'*).

[29] Article 26(4). See, e.g., Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award, 26 March 2008 (Amto Final Award), §§ 45-47;

[30] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction (redacted), 6 June 2016 (RREEF Decision on Jurisdiction), ¶ 231; Amto Final Award, § 58; Gabriel Stati, Ascom Group S.A., Terra Raf Trans Trading Ltd v. Kazakhstan, SCC Case No. 116/2010, Award, 19 December 2013 (Stati Award), ¶¶ 828-30. See also Mohammad Ammar Al-Bahloul v. Tajikistan, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability (Al-Bahloul Partial Award), ¶¶ 155-56;

investor the option to submit to arbitration disputes that have already been submitted to a local forum or alternative dispute resolution mechanism, there is a fork-in-the-road provision.[31]

In other words, the investor can elect only one avenue of dispute resolution set forth in Article 26(2), and is precluded from arbitrating the dispute before alternative fora. To trigger this bar, ECT tribunals have required respondents to establish that the dispute allegedly initiated elsewhere has the same parties, causes of action and object (the 'triple identity test').[32] In Charanne v. Spain, the tribunal observed that evidence the companies were part of the same group was insufficient to establish that there was a 'substantial identity of the parties' under the first part of the test.[33]

[31] The Energy Charter Treaty, Cyrus Benson, Charline Yim and Victoria Orlowski, 'The development of the Energy Charter Treaty', available at https://globalarbitrationreview.com/chapter/1178835/the-energy-charter-treaty ;
[32] Charanne B.V. and Construction Investments S.A.R.L. v. The Kingdom of Spain, SCC Case No. 062/2012, Final Award, 21 January 2016 (Charanne Final Award), ¶ 408; Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (Hulley Interim Award), ¶ 597; Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction, 30 November 2009 (Yukos Universal Interim Award), ¶ 598; Veteran Petroleum Trust (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (Veteran Petroleum Interim Award), ¶ 609.
[33] Charanne Final Award, ¶ 408.

2.2. Intra-EU disputes

A topic of increasing prominence in ECT arbitration has been the exercise of tribunals' jurisdiction over intra-European Union (EU) disputes – namely claims brought by an investor of one EU contracting party against another EU contracting party. The European Commission (the Commission) has been vocal in its opposition to intra-EU investment treaties and considers them to be contrary to EU law. Similarly, respondents from EU member states have raised a number of objections to an ECT tribunal's jurisdiction on this basis.[34]

In Charanne, Spain (and the Commission as amicus curiae) argued that neither it nor the investors' home states (the Netherlands and Luxembourg) consented to submit intra-EU disputes to international arbitration.[35] First, Spain contested whether there was '*diversity of territories'* between the investor and the contracting party as required under Article 26 of the ECT, arguing that both territories were part of the EU.[36] In rejecting this argument, the tribunal emphasized that Spain's position ignored that individual member states of the EU have their own legal standing in an action based on the ECT. Second, Spain advanced an argument made by the Commission that there was an *'implicit disconnection clause for intra-EU relations.'*[37] Dismissing this second defense, the tribunal stated that the terms of the ECT are clear and contain no explicit or implied disconnection clause to disassociate EU member states from the terms of the ECT.[38] Lastly, the tribunal dismissed Spain's contention that Article 344 of the Treaty on the Functioning of the European Union prohibited the arbitration of the dispute.[39] In RREEF, the tribunal considered similar objections raised by Spain,[40] and in dismissing Spain's objection was guided by the overarching conclusion that the ECT is its *'constitution'*, which *'prevails over any other norm . . . apart from those of ius cogens'*, including EU law.[41] The RREEF tribunal observed that to the extent possible, where two treaties are applicable, they must be interpreted in such a way as not to contradict each other.[42]

It bears observing here that the findings of the RREEF tribunal stand in contrast to those of the tribunal in "Electrabel", which found that there is no general principle under international law compelling the harmonious interpretation of different treaties[43] (although the tribunal found in the context of the ECT and EU law, various factors compelled that these two legal orders be read

[34] The Energy Charter Treaty, Cyrus Benson, Charline Yim and Victoria Orlowski, 'The development of the Energy Charter Treaty' (pg.36).
[35] Charanne Final Award, ¶ 424.
[36] Id. ¶ 427.
[37] The Energy Charter Treaty, Cyrus Benson, Charline Yim and Victoria Orlowski, 'The development of the Energy Charter Treaty' (pg.36).
[38] Id. ¶¶ 434-38.
[39] Id. ¶¶ 441-45.
[40] RREEF Decision on Jurisdiction, ¶¶ 37-56.
[41] Id. ¶¶ 74-75. See also Id. ¶¶ 76-90.
[42] Id. ¶ 76.
[43] Electrabel Decision on Jurisdiction, ¶¶ 4.130, 4.173.

in harmony).[44] While the tribunal observed that the EU legal order and the ECT are not inconsistent or contradictory,[45] it nonetheless found that if there were material inconsistencies, EU law would prevail over the ECT.[46]

[44] Id. ¶¶ 4.167, 4.146-4.166.
[45] Id. ¶¶ 4.167, 4.172, 4.196.
[46] Id. ¶¶ 4.189, 4.191.

2.3. Fair and equitable treatment to foreign investors (FET)

"Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favorable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party." [47]

The FET is a standard which is of great importance for any energy investment, by a foreign investor in a foreign country. The investor seeks to be fairly treated in a situation that could arise between them and the host country. The above article, simply put means that every foreign investor has to be granted with the right to be fairly and equitable treated and compensated. This is a standard set not only within the ECT, but also through many other conventions or investment legislation. For example, article 43.2 of the Model PSC of Gabon of April 17, 1991 states*: "Any nationalization or total or partial expropriation of the contractor's right shall entail fair and equitable compensation in accordance with the internationally known standards and principles."*[48]

The fair and equitable treatment article is also known as one of the critical protections to investors in the investor – state framework, along with full protection and security (Article 10(1)), the prohibition against unreasonable and discriminatory measures (Article 10(1)) and the prohibition against unlawful expropriation (Article (13)). Most commonly, the FET is related to the investor's legitimate expectations and this also has to do with the bona fide (good faith) principles under the customary international law. Simply put, this means that *'a State cannot induce an investor to make an investment generating legitimate expectations, to later ignore the commitments that had generated such expectations'.*[49]

Although everything about the FET and its implementation looks quite simple, in reality is isn't exactly so. What is always up for debate is the degree to which such legitimate expectations must arise from explicit representations. Some tribunals have observed that legitimate expectations can be based on the legal order or regulatory framework of the host state or implicit assurances[50],

[47] Energy Charter Treaty, PART III 'INVESTMENT PROMOTION AND PROTECTION', Article 10 PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS;

[48] Model Production Sharing Contract of Gabon between the Republic of Gabon and International Companies, March 17, 1991, Basic Oil Laws and Concession Contracts, Barrows Supplement (South and Central Africa), Supp. No. 118, at 57;

[49] Charanne Final Award, ¶ 486;

[50] Al-Bahloul Partial Award, ¶ 202; Mamidoil Award, ¶ 731;

others have looked for statements and commitments, potentially in the form of a stabilization clause[51], that a regulatory environment would not change.[52]

In "*Electrabel"*, the tribunal found that *'while specific assurances given by the host State may reinforce the investor's expectations, such assurances are not always indispensable,'* and rather will make a difference when assessing the investor's knowledge and of the reasonability and legitimacy of its expectations.[53] The tribunal then added that in the absence of such a specific representation, *'the investor must establish a relevant expectation based upon reasonable grounds.'*[54]

We can easily conclude that interpreting the FET is barely simple in most cases, this is why tribunals have difficulty in sharing a general opinion regarding this matter. Nonetheless, I believe that a smart investor conducts a robust legal analysis before deciding to invest in a foreign country and therefore they must be familiar with their rights and with the rights of the state. In my opinion, on one hand the investor must have a clear and relevant picture of their expectations and on the other hand, the host-state has to act reasonably when interfering in this regard.

[51] *A clause often included in a host government agreement (HGA) or other international investment agreement that addresses how changes in law following the execution of the HGA are to be treated and the extent to which these changes modify the rights and obligations of the foreign investors under the HGA. A stabilization clause is a means for foreign investors to mitigate or manage the political risks associated with their project.* (THOMSON REUTERS, PRACTICAL LAW);

[52] Charanne Final Award, ¶ 490.

[53] Electrabel Decision on Jurisdiction, ¶ 7.78; Electrabel Award, ¶ 155.

[54] Electrabel Award, ¶ 155.

2.4. The prohibition on expropriation

Another prominent critical protection provided by the ECT is the prohibition against unlawful expropriation (Article 13.). This is considered as a widely known standard under the international law and it is therefore thoroughly discussed and regulated in the Charter.

Namely, the ECT provides that expropriation is unlawful unless the following four requirements are satisfied:

- *it is done in the public interest;*
- *it is not discriminatory;*
- *it is carried out under due process of law; and*
- *it is accompanied by the payment of prompt, adequate and effective compensation.*[55]

In this context, it is relevant to mention that there have been many cases under the ECT, where (direct) expropriation was tackled. Good example is the *Kardassopoulous v. Georgia*, where the tribunal found that Georgia had committed a so called *'classic case of direct expropriation'*, by taking away the claimant's concession to distribute oil and gas in Georgia, transferring them to a state-owned entity, and failing to provide compensation or due process of law.[56]

Another point worth discussing is the following part of the Article 13*, 'a measure or measures having effect equivalent to nationalization or expropriation'.*[57] This basically has to do with the cases of indirect expropriation, which are very much discussed and considered by the ECT tribunals. Yukos (Oil Company) shareholders v. Russia is an adequate example when assessing the indirect expropriation, since the company claimed that Russia breached Articles 10(1) and 13(1) of the ECT by expropriating Yukos.[58] What the tribunal found was that the primary goal of Russia had to do with Yukos' tax treatment and Russia did not aim to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets.[59] The observation of the tribunal was that Russia's measures were 'in effect a devious and calculated expropriation'.[60]

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[55] Article 13(1) of the Energy Charter Treaty (ECT);
[56] Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶¶ 387-408;
[57] Article 13(1);
[58] Hulley Enterprises Limited (Cyprus) v. The Russian Federation (PCA Case No. AA 226); Yukos Universal Limited (Isle of Man) v. Russian Federation (PCA Case No. AA 227); and Veteran Petroleum Limited (Cyprus) v. Russian Federation (PCA Case No. AA 228);
[59] Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 226, Final Award, 18 July 2014 (Hulley Final Award), ¶ 756; Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 (Yukos Universal Final Award), ¶ 756; Veteran Petroleum Trust (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 228, Final Award, 18 July 2014 (Veteran Petroleum Final Award), ¶ 756. See also Hulley Final Award, ¶¶ 757-59, 1579; Yukos Universal Final Award, ¶¶ 757-59, 1579; Veteran Petroleum Final Award, ¶¶ 757-59, 1579;
[60] Hulley Final Award, ¶ 1037; Yukos Universal Final Award, ¶ 1037; Veteran Petroleum Final Award, ¶ 1037;

The conclusion of the tribunal stated that although Russia had not *'explicitly expropriated'* Yukos or the holdings of its shareholders, the measures taken by the country were *'equivalent to nationalization or expropriation'*, which is very much in breach of Article 13 of the ECT.[61]

In conclusion to this chapter, it is evident to always anticipate that not every case will precisely guide us to an Article or postulate of the ECT (or any other regulation) which might be broken by a certain party. Extensive analysis and analytical approach is a go to method when assessing energy investment cases of this caliber, and the case Yukos v. Russia shows us exactly this, we have to look beyond the doings of the concerned parties in order to conclude the consequences of their actions.

[61] Hulley Final Award, ¶¶ 1580-85; Yukos Universal Final Award, ¶¶ 1580-85; Veteran Petroleum Final Award, ¶¶ 1580-85. The tribunal did not go on to examine claims that Russia violated Article 10 of the ECT. Hulley Final Award, ¶ 1449; Yukos Universal Final Award, ¶ 1449; Veteran Petroleum Final Award, ¶ 1449;

Arbitrations involving renewable energy in Europe

Investing in renewable energy has been a hot topic for quite some time, since governments around the world have committed to lowering their CO2 emissions, in a bid to combat climate change. With limited supplies of fossil fuels and growing concern over their environmental impact, renewable sources of energy are gaining big momentum, as they are expected to produce most of the new energy produced across the world over the next few decades.

Europe has not been an exception to this global trend and the number of investors interested in funding energy projects has grown dramatically in the past decade. Expectedly, shortly after the 'hassle' to land a profitable energy project had started, companies begun to invest in foreign countries and this initiated relevant consequences for our subject. Cases concerning ECT breaches started to line up, as the tribunals were discussing and getting to relevant awards to each of these arbitrations.

In this chapter I will briefly analyze European countries where striking cases concerning investment arbitration occurred, in order to provide a global picture of the general investment 'climate' in the continent.

3.1. Spain

To this date a total of 47 claims have been made against Spain (cases where Spain is a "Respondent State"), 31 of which are still pending, 1 of which were discontinued, 12 of which were decided in favor of the Investor and finally 3 of which were decided in favor of the State. Claimants are most frequently investors coming from Luxembourg, Germany and Netherlands. What follows is a brief analysis of 2 cases where Spain is the respondent state and a conclusion with a forecast for the most recent pending cases.[62]

"Charanne B.V. and Construction Investments v. Spain" was the very first decision involving solar incentives in Europe, where the claimants were investors whose home states were Luxembourg and Netherlands.[63]Relevant about this case is that the majority dismissed entirely the claims of both companies, which had jointly invested in solar generation, which was based on an incentive programme established by the Spanish government ("Respondent state"). The incentive programme consisted of feed-in tariffs for a 25-year period, with an attractive rate for the power, all while the companies were given the permission to distribute all of the energy produced to the grid. Later on the Spanish government firstly amended the programme in a way

[62] United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Investment Dispute Settlement Navigator for Spain, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/197/spain ;

[63] Charanne B.V. and Construction Investments v. Spain, SCC Arb. No.062/2012;

which limited the amount of electricity that could be supplied and secondly, added a new charge for the grid access.

The main argument of the claimants is that these amendments reduced their ROI (return on investment) and expropriated part of the value of their investment in breach of Article 13 of the ECT. Additionally, they argued that the amendments make a violation to the standard of fair and equitable treatment (FET) and deny their legitimate expectations as investors, which is in contradiction to ECT Article 10(1) and Article (12).

All of the claims were dismissed by the majority with the following argumentation. The claim for indirect expropriation was dismissed on the ground that the claimants had failed to show that the investor(s) had been deprived of all or part of its investment. This claim failed because the programme and the contracts remained in place, despite the fact that the rate of return had been reduced. Furthermore, the majority held that the government actions did not breach the investor's legitimate expectations, since the claimants had not received any specific promises or commitments from Spain. Commitments to specific individuals and investors were not created by the incentive programme as well. In order to support this statement, the tribunal also noted that the materials provided to the investors in 2007 did not say that the feed-in tariff would stay the same for the regulatory lives of the solar plants.

This brings us to the point which was made in the beginning of this thesis, where I emphasized the importance of a robust analysis of the legal framework made by the investor, way before the investment took place in the foreign country. The case of Charanne is a perfect example for this and that is precisely why the majority concluded that in order to exercise the right of legitimate expectations, the claimants must show that they had first made a diligent analysis of the legal framework for the investment. Logically, the tribunal found that if the claimant had done that, it would have discovered that amendments to the feed-in tariff programme were permitted under established Spanish domestic law.

The dissenting arbitrator disagreed with this judgement and argued that the domestic law might not always be the right test. The conclusion of the arbitrator stated that legitimate expectations can arise where states grant incentives to a specific category of persons in exchange for their investment. The arbitrator found that regardless of the state's regulatory power under domestic law, a breach of an investor's legitimate expectations should result in compensation.[64]

In the case 9REN Holding S.À.R.L. v. The Kingdom of Spain, the company's claims arose out of a series of energy reforms undertaken by the Spanish Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.[65] In response to Spain's changes to its energy sector regulations between 2010 and 2014, 9REN commenced an arbitration against Spain on March 31, 2015

[64] The Guide to Energy Arbitrations - Third Edition, "Arbitrations Involving Renewable Energy", by Gordon E Kaiser and JAMS, available at https://globalarbitrationreview.com/chapter/1178844/arbitrations-involving-renewable-energy .

[65] 9REN HOLDING S.À.R.L., Claimant v. THE KINGDOM OF SPAIN, Respondent (ICSID Case No. ARB/15/15) AWARD, available at https://www.italaw.com/sites/default/files/case-documents/italaw10565.pdf .

claiming breaches of the FET standard, impairment[66] and umbrella clauses[67] (ECT Art. 10), and expropriation (ECT Art. 13).[68]

On one hand, 9REN contended that firstly, the Royal Decrees (RDs) 2007 and 2008 guaranteed stability and non-revocation of the benefits of FIT and certain premium rates throughout the lifetime of facilities registered before September 29, 2008. Secondly, the reforms introduced by Spain should be interpreted contextually as aiming at attracting investors and thirdly, Spain dismantled the scheme under the RDs, because of which 9REN had originally invested, forcing 9REN to sell its investment.

On the other hand, Spain countered that they had the right and the duty to regulate its energy sector in the public interest, exercising its sovereign authority. The country claimed that 9REN knew or should have known about the changes brought by the reforms had it performed proper due diligence prior investing. Finally, Spain stated that the reforms were also aimed at ensuring the economic sustainability of the Spanish Electricity System (SES).

Deciding upon the FET breach, the tribunal concluded that Spain frustrated 9REN's legitimate expectations, given that Spain's representation of benefits under RD 2007 was clear and specific and 9REN's expectations of tariff stability were reasonable and legitimate. However, it noted that the frustration of legitimation expectations does not necessarily mean a violation of the FET standard (para. 308). Here, the tribunal analyzed other factors, including the financial vulnerability of 9REN's projects, with *"heavy up-front capital costs"* (para. 311), locked in the long term, and the fact that Spain alone was to benefit from the rising energy prices, but the burden of falling prices was borne by the investors. According to the tribunal such one-sided treatment violated FET under the ECT.

As for the expropriation claims, the tribunal held that the loss in value of 9REN's shares in Spanish companies did not constitute an expropriation (paras. 369–372). The tribunal's clarification was that 9REN did not have any right to revenue from electricity sold to SES, but that the downstream operating companies did. Although the value of 9REN's shares was impacted by the regulatory changes, Spain never denied any payments, and 9REN never alleged loss of control of shares. Therefore, the tribunal dismissed the expropriation claim. Spain was ordered to pay damages of EUR 41.76 million plus interest compounded annually and legal and other costs of EUR 4.609 million, since the country violated FET under ECT Art. 10(1) through the frustration of legitimate expectations.

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[66] Energy Charter Treaty, Article 10(1), *'…no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.';*

[67] *In the context of a bilateral investment treaty (BIT), a clause that obliges the host state to observe specific undertakings towards its foreign investors. … Investors often rely on an umbrella clause as a catch-all provision to pursue claims when a host state's actions do not otherwise breach the BIT;*

[68] "Spain held liable for breach of FET under the ECT for frustrating legitimate expectations of 9REN, a Luxembourg-based renewable energy investor, by Yashasvi Tripathi", available at https://cf.iisd.net/itn/2019/09/19/spain-held-liable-for-breach-of-fet-under-the-ect-for-frustrating-legitimate-expectations-of-9ren-a-luxembourg-based-renewable-energy-investor-yashasvi-tripathi/ ;

As discussed earlier, 31 of the total cases under the ECT against Spain involving energy investments are still pending. Nearly all of these investments are about investing in renewable energy (solar power plant/photovoltaic power plants/wind power plants/hydro power plants) and a significant number of the claims arose out of the same series of energy reforms as we previously saw in the case 9REN Holding S.À.R.L. v. The Kingdom of Spain.[69]

We cannot judge other cases based on the circumstances and facts that were encountered while deciding over this one case, but it can be concluded that Spain made a serious breach towards 9REN and the fact that the company managed to prove this legally, certainly has encouraged investors to seek their right to be treated fairly and equally by the host state.

[69] *See Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain (ICSID Case No. ARB/19/4); European Solar Farms A/S v. Kingdom of Spain (ICSID Case No. ARB/18/45); EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L. v. Kingdom of Spain (ICSID Case No. ARB/18/42); Itochu Corporation v. Kingdom of Spain (ICSID Case No. ARB/18/25); DCM Energy GmbH & Co. Solar 1 KG and others v. Kingdom of Spain (ICSID Case No. ARB/17/41); Portigon AG v. Kingdom of Spain (ICSID Case No. ARB/17/15); Sevilla Beheer B.V. and others v. Kingdom of Spain (ICSID Case No. ARB/16/27); Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain (ICSID Case No. ARB/16/18); Sun-Flower Olmeda GmbH & Co KG and others v. Kingdom of Spain (ICSID Case No. ARB/16/17); Eurus Energy Holdings Corporation v. Kingdom of Spain (ICSID Case No. ARB/16/4); Landesbank Baden-Württemberg and others v. Kingdom of Spain (ICSID Case No. ARB/15/45); Watkins Holdings S.à r.l. and others v. Kingdom of Spain (ICSID Case No. ARB/15/44); Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain (ICSID Case No. ARB/15/42); SolEs Badajoz GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/38); OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Spain, ICSID Case No. Arb/15/36; E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v. Spain, ICSID Case No. ARB/15/35; Cavalum SGPS, S.A. v. Spain, ICSID Case No. ARB/15/34; JGC Corp. v. Spain, ICSID Case No. ARB/15/27; KS Invest GmbH and TLS Invest GmbH v. Spain, ICSID Case No. ARB/15/25; Matthias Kruck, et al. v. Spain, ICSID Case No. ARB/15/23; Cube Infrastructure Fund SICAV, et al. v. Spain, ICSID Case No. ARB/15/20; BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16; 9REN Holding S.a.r.l v. Spain, ICSID Case No. ARB/15/15; STEAG GmbH v. Spain, ICSID Case No. ARB/15/4; Stadtwerke München GmbH, RWE Innogy GmbH, et al. v. Spain, ICSID Case No. ARB/15/1; RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain, ICSID Case No. ARB/14/34; RENERGY S.à.r.l. v. Spain, ICSID Case No. ARB/14/18; InfraRed Environmental Infrastructure GP Limited, et al. v. Spain, ICSID Case No. ARB/14/12; NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain, ICSID Case No. ARB/14/11; Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1; Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36; Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain, ICSID Case No. ARB/13/31; and RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain, ICSID Case No. 13/30; see also Talus, supra note 3, at 7;Tirado, supra note 4, at 17-19; Clovis Trevino, 'An Update on Renewable Energy Claims Against Spain', Inv. Arb. Rep., 9 June 2015; Douglas Thomson, 'New Solar Claim Means More Pain for Spain', Global Arbitration Review, 12 May 2015; Clovis Trevino, 'Spain Round-Up: Even as European Commission Throws up Red Flags, Two New Claims Land at ICSID, and Tribunal Members Are Finalized in Another', Inv. Arb. Rep., 27 January 2015;*

3.2. The Czech Republic

The first dispute concerning an energy investment in the Czech Republic was initiated in 2013, by a German investor who invested in the photovoltaic sector of the country. The reason for commencing the procedure was the fact that allegedly the country imposed amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants.[70] The situation in the Czech Republic differs from the Spanish one, in many ways, firstly, investors started to choose the country as a host country of their investments pretty recently. Secondly, speaking from a statistical aspect, there are 6 disputes which were decided in favor of the State, whereas none of them were decided in favor of the Investor and finally 1 dispute is still pending.[71]

What points out in the case of the Czech Republic is reason for the initial commencement of all the disputes against the country, both the resolved ones and the one that is still pending. All claims arose out of amendments to the pre-existing incentive regime applicable to renewable energy, including the introduction of a levy on electricity generated (a so called *"Solar Levy"),* allegedly adopted in order to diminish windfall profit to producers (that became possible due to significant fall in costs of solar panels) and reduce burden on energy consumers.[72] This was implemented despite the fact that in 2005, the country introduced a feed-in tariff for solar-generated electricity sold directly to electrical grid operators, guaranteeing that the tariff could not be decreased by more than 5 per cent a year.

A case which most recently caught the attention of the public was the one where Antaris GmbH ("Antaris"), a limited liability company incorporated under the laws of Germany, and Dr Michael Göbe ("Dr Göbe"), a German national and the ultimate beneficial owner of Antaris (Claimant) started a procedure against the Czech Republic.[73]

The Claimant claimed that the respondent breached the invoked investment treaties by repealing incentive arrangements to attract investors in photovoltaic power generation, which was not in line with its guarantees. The incentive regime comprised of the following three statutes: (1) the Act on Income Tax, which in the relevant sections provided for exemption from income tax for the year in which solar facilities were put into operation and the following five years; (2) the 2005 Act on Promotion that provided for a period of 15 years for recovery of investor's

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[70] Jarrod Hepburn, 'Czech Solar Arbitrations Set To Proceed, as Constitutional Court Upholds Retroactive Levy', Inv. Arb. Rep., 13 June 2012;

[71] United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Investment Dispute Settlement Navigator for the Czech Republic, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/55/czechia .

[72] *Luke Eric Peterson, 'Brussels' Latest Intervention Casts Shadow over Investment Treaty Arbitrations Brought by Jilted Solar Energy Investors', Inv. Arb. Rep., 8 September 2014; see generally Tirado, supra note 4, at 7-8 & nn.35-39 (discussing regulatory changes in the Czech Republic).*

[73] *See Antaris Solar GmbH, et al. v. Czech Republic (UNCITRAL; registered in 2013); see also Luke Eric Peterson, 'Solar Investors File Arbitration Against Czech Republic, Intra-EU BITs and Energy Charter Treaty at Center of Dispute', Inv. Arb. Rep., 15 May 2013.*

investment through the feed-in-tariff, and setting forth a maximum annual reduction of 5% of the feed-in-tariff for photovoltaic plants, among others; and (3) the 2005 Technical Regulation, as amended in 2007 and 2009, that provided technical and economic parameters for assuring the 15-year pay-back period through the support of the feed-in-tariff, and the 2009 Pricing Regulation.[74]

What triggered this was the significant drop in the price of photovoltaic panels, which began in 2008 and then accelerated in 2009. During this period of time, electricity transmission and distribution companies started to receive a significantly increased number of preliminary applications for connection to the grid for solar installations. That was highly undesirable, as:

(1) it would increase the price of renewable support paid by consumers; (2) it would lead to higher profits for solar investors compared to other producers of renewable electricity; and (3) it would threaten the stability of the grid due to the unpredictable and volatile nature of solar electricity production.[75]

It is evident that in the case of the Czech Republic the new legislation had changed the incentive regime entirely but this was implemented with respect to the *"reasonable vacatio legis period"*[76], which is usually followed by press releases or relevant articles. Providing an adequate vacatio legis by the host state, when enforcing a new law is crucial for all the relevant foreign investors that could be affected by the change. Briefly the following happened, when it was decided on the legislative changes, in 2010 the 5 % rule was abolished for solar plants connected to the grid from 2011 onwards. A levy on revenues generated by photovoltaic power plants was enacted also in 2010 and was applicable from January 1, 2011 onwards for photovoltaic plants put into operation between January 1, 2009 and December 31, 2010, whereas all incentives were cancelled for electricity generated by solar power plants placed into service after January 1, 2014. Additionally, the income tax exemption was repealed from January 1, 2011, and the 2005 Act on Promotion was abolished two years later.[77]

When addressing the issues provided by the claimant, the tribunal first focused on the characterization of the amendments to the incentive regime and if those constituted tax for the purpose of Art. 21(1) of the ECT.[78] It was concluded that in order to prove whether a putative tax measure qualifies under Art. 21 of the ECT it is required first to characterize it in nature and

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[74] PCA CASE № 2014-01 IN THE MATTER OF AN ARBITRATION pursuant to THE ENERGY CHARTER TREATY and THE AGREEMENT BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE CZECH AND SLOVAK FEDERAL REPUBLIC ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS SIGNED ON OCTOBER 2, 1990, IN FORCE AS OF OCTOBER 2, 1992 between (1) ANTARIS GMBH (GERMANY) (2) DR MICHAEL GÖDE (GERMANY) (the "Claimants") and THE CZECH REPUBLIC (the "Respondent", and together with the Claimants, the "Parties") AWARD, available at https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf ;

[75] N. Charalampidou; "Range of Disputes under the Energy Charter Treaty" OGEL 5 (2018), available at www.ogel.org/article.asp?key=3798 ;

[76] *(Latin: absence of law) is a technical term in both Catholic canon law and civil law which refers to the period between the promulgation of a law and the time the law takes legal effect;*

[77] OGEL 5 (2018) - OGEL/TDM/ArbitralWomen - Strategic Considerations in Energy Disputes, available at www.ogel.org/journal-browse-issues-toc.asp?key=78 ;

[78] Peterson, 'In Shadow of Mass Solar Claims', supra note 24; Tirado, supra note 4, at 20;

substance under domestic law and then to apply the inner limits of the said provision.[79] Later on, it was found by the tribunal that the Czech Supreme Administrative Court decision of July 10, 2014 was authoritative on the issue of characterization of the solar levy and the said levy was not a tax for the purpose of prohibiting double taxation. Furthermore, the tribunal noted that the solar levy lacked the undisputed element of non-equivalence, which was an essential feature for distinguishing taxes from fees under domestic law. The tribunal had also elaborated its stance regarding the formally correct mechanism for reduction of the support of renewable energy sources from photovoltaic plants, as it came to the conclusion that it could not be legally contested. It was also noted that in the past other tribunals had limited the application of Art. 21 of the ECT to state actions directed at raising general revenue of the state. It was pointed out that ECT tribunals are obliged to make substantive determination of the measure in question, in light of the relevant facts and circumstances and not simply adopt the state's own formal interpretation of a certain measure. In this case against the Czech Republic the tribunal found that said levy's primary aim was a reduction in the level of feed-in-tariffs payable to certain solar investors, without an initial intention to increase the revenue. The purpose of the tax was to reduce the risk of claims against the state under international law, without an indication of a respondent acting in bad faith, the tribunal found.

As second, the tribunal turned to the claims concerning the legitimate expectation and arbitrary or unreasonable behavior. The tribunal concluded that the respondent had a rational objective, when reducing excessive profits and sheltering consumers from excessive electricity price rises, and that the respondent's actions were neither arbitrary nor irrational. Another thing that the tribunal agreed with, was the speculative hope that the claimant had, as it was described by the respondent. What the claimant in this case should have had was an Internationally-protected expectation, which was legitimate and reasonable. The claimant should have been aware of the fact that the investment protection regime was never intended to promote and safeguard those who "piled in" to take advantage of laws possibly in state of flux caused by investors of that type.[80]

When analyzed in details it is easily to notice that the Czech Republic has won every case up until now and that no investor had managed to prove them wrong. All active cases until now have been initiated because of a potential breach arising out of the previously mentioned amendments to the pre-existing incentive regime for the renewable energy sector, including the introduction of a levy on electricity generated from solar power plants. The outcome of all previous arbitrations is the same, as it had been decided that no breaches were found and that all

[79] Antaris Solar GmbH (Germany) and Dr Michael Göde (Germany) v The Czech Republic - PCA Case No 2014-01 - Award - includes Dissenting Opinion of Mr Gary Born; Declaration of Judge Tomka - 2 May 2018, by by Natalia Charalampidou, available at https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=21044#citation .

[80] PCA CASE № 2014-01 IN THE MATTER OF AN ARBITRATION pursuant to THE ENERGY CHARTER TREATY and THE AGREEMENT BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE CZECH AND SLOVAK FEDERAL REPUBLIC ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS SIGNED ON OCTOBER 2, 1990, IN FORCE AS OF OCTOBER 2, 1992 between (1) ANTARIS GMBH (GERMANY) (2) DR MICHAEL GÖDE (GERMANY) (the "Claimants") and THE CZECH REPUBLIC (the "Respondent", and together with the Claimants, the "Parties") AWARD, available at https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf .

claims were dismissed at the merits stage of the case. Another mutual characteristic of these cases is the fact that all investors claimed the same type of breaches: fair and equitable treatment; minimum standard of treatment, including denial of justice claims; full protection and security, or similar; and arbitrary, unreasonable and/or discriminatory measures;[81]

Contrary to this, the "Natland tribunal"[82], found that the Czech Republic breached the ECT's fair and equitable treatment standard. This happened in 2017 and it was stated in a partial award on jurisdiction and liability, as the final outcome of the case is still pending.

All in all the tribunals have been very consistent when deciding upon the Czech cases. Even Gary Born who gave a dissenting opinion on the final decision for the Antaris case[83], said that he agreed with many of the Tribunal's conclusion. Another thing he pointed out was that in his opinion the tribunal had limited the scope of protection provided by the FET standard and that this is the main reason why he chose to dissent.[84] It is debatable if this dissenting opinion will have an effect on future decisions concerning energy investment disputes in the Czech Republic.

[81] See Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. Czech Republic (UNCITRAL; commenced in 2013); Voltaic Network GmbH v. Czech Republic (UNCITRAL; commenced in 2013); ICW Europe Investments Limited v. Czech Republic (UNCITRAL; commenced in 2013); Photovoltaik Knopf Betriebs-GmbH v. Czech Republic (UNCITRAL; commenced in 2013); WA Investments-Europa Nova Limited v. Czech Republic (UNCITRAL; commenced in 2013);

[82] Natland and others v. Czech Republic G.I.H.G. Limited, Natland Group Limited, Natland Investment Group NV, and Radiance Energy Holding S.A.R.L. v. The Czech Republic (PCA Case No. 2013-35);

[83] Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01;

[84] Dissenting Opinion of Gary Born, available at https://www.italaw.com/sites/default/files/case-documents/italaw9810.pdf ;

3.3. Italy

The situation in Italy is as follows, a total of 11 cases against the country have been initiated, 2 of which were decided in favor of the host country, another 2 were won by the foreign investor and the rest of them are still being solved by the relevant tribunals under the ECT and the ICSID[85] arbitration rules.[86]

Looking at the general facts about the renewable energy sector in Italy, again, the country tried to attract foreign investments by introducing a feed-in tariff[87] for renewable energy sources, with an emphasis to photovoltaics.[88]

The "complications" happened when it turned out that the incentives system was in fact expensive, which gradually led to its unaffordability. A good example for this is the three-year €6.7 billion scheme that got approved in June 2012 and was entirely exhausted by July 2013.[89] During the next year the government of Italy adopted the *'spalma incentivi'*[90] ('incentive-spreading') decree, which ordered a retroactive reduction in the feed-in tariff for photovoltaic plants larger than 200kW, i.e the incentive unilaterally reduced the feed-in-tariff granted to the operators of photovoltaics. After this, the investors were given 3 options (incentive regimes) to select from:

(1) tariffs granted for 24 years instead of 20, but subject to gradual reductions throughout the term; (2) reduced incentives for the initial period of the investment, in exchange for higher incentives for the subsequent period on the basis of percentages established by the competent authority; or (3) an annual decrease in the incentives by 6 to 8 per cent (depending on the plants' peak power) for the remainder of the incentives' duration.[91]

Not long after the changes to the incentive regime took place, the foreign investors in Italy that got affected started to challenge them in arbitrations under the ECT. A recent award is the one for the case "Belenergia v. Italy"[92], where the company had interests in a photovoltaic energy generation projects in Italy and it claimed that country's modification to its solar power regime

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[85] *"ICSID is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases. States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts",* available at https://icsid.worldbank.org/en/Pages/about/default.aspx ;

[86] United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Investment Dispute Settlement Navigator for the Czech Republic, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/103/italy ;

[87] The tariff was originally enacted in 2003 by Legislative Decree No. 387/2003;

[88] *Z. Brocka Balbi, 'The Rise and Fall of the Italian Scheme of Support For Renewable Energy From Photovoltaic Plants', 12, Transnat'l Disp. Mgmt., May 2015 and S.F. Massari, 'The Italian Photovoltaic Sector in two Practical Cases: How to Create an Unfavorable Investment Climate in Renewables', 12 Transnat'l Disp. Mgmt., May 2015*;

[89] Massari, supra note 27;

[90] Reg. ord. n. 253 del 2015 published on G.U. of 02/12/2015 n. 48, Order of the Latium Administrative Tribunal of 03/07/2015;

[91] Article 26, Legislative Decree no. 91 of 24 June 2014;

[92] Belenergia S.A. v. Italian Republic (ICSID Case No. ARB/15/40);

allegedly affected the profitability of the investment.[93] The claimant had stated the following breaches: Fair and equitable treatment/Minimum standard of treatment, including denial of justice claims; umbrella clause; arbitrary, unreasonable and/or discriminatory measures; full protection and security, or similar; and lastly a national treatment breach.[94]

The tribunal identified none of the abovementioned potential breaches and dismissed all claims at the merits stage of the case, like it was decided in all cases won by the Czech Republic. Although Belenergia argued that Italy breached the ECT's FET standard by lowering the prices, the tribunal dismissed this and explained that under the Italian laws and regulations PV investors should have expected reductions in PV incentives, even before deciding to invest in the country.

Moreover, the tribunal discussed the role of the GSE conventions in this case and concluded that

"*The GSE conventions on FITs merely referred to the various incentives provided by the general legislation and did not amount to any commitments addressed specifically to Belenergia. The tribunal also found that the GSE conventions on minimum prices were subject to a maximum one-year duration and provided for possible amendments, such that Belenergia could not have any expectation that this scheme would not be amended".*[95]

Another claim that Belenergia failed to prove was the one of unreasonable or discriminatory measures. Italy objected to this claim, by pointing out to its overlapping with the FET claim and by stating that ECT Articles 10(2)[96] and (3)[97] applied only to establishments or acquirements of new or additional investments, as defined in ECT Article 1(8)[98]. The tribunal and the state of Italy shared the same opinion on Italy's treaty interpretation, while Belenergia had not managed to successfully prove that the alleged discriminatory character of the measures had affected the establishment or acquisition of a new (or an additional) investment in the photovoltaic sector. All in all, the tribunal had found that the changes to Italy's regulatory framework were not unreasonable, disproportionate or unpredictable, despite the allegation of Belenergia of them lacking public interest goals, such as environment or public health protection. According to the tribunal, the measures implemented by the country had not lacked "rational policy" and they

[93] United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Investment Dispute Settlement Navigator for the Czech Republic, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/670/belenergia-v-italy ;

[94] BELENERGIA S.A. Claimant and ITALIAN REPUBLIC Respondent ICSID Case No. ARB/15/40 AWARD, available at https://www.italaw.com/sites/default/files/case-documents/italaw10759.pdf ;

[95] "All claims dismissed by ICSID tribunal in energy investor's ECT case against Italy", by Trishna Menon, available at https://cf.iisd.net/itn/2019/12/17/all-claims-dismissed-by-icsid-tribunal-in-energy-investors-ect-case-against-italy-belenergia-s-a-v-italian-republic-icsid-case-no-arb-15-40/ ;

[96] *"Each Contracting Party shall endeavor to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph.";*

[97] *"For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favorable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favorable.";*

[98] *""Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.";*

served their purpose of the measures, by reducing the cost of subsidies, like it was initially planned by Italy.[99]

Contrary to the case of BELENERGIA S.A. v. Italian Republic[100], in the case of "CEF Energia BV v. Italian Republic", the company won the case by proving the claims of breached Fair and equitable treatment/Minimum standard of treatment, including denial of justice claims.[101] CEF Energia invested in three photovoltaic plants ("Enersol", "Megasol" and "Phenix") through direct and indirect shareholdings in related local companies and filed the dispute because of the same regulatory changes, discussed in the previous case analysis.

Briefly, in 2015 CEF Energia initiated an arbitration against Italy and challenged the following measures: the "Spalma incentive" decree, which reduced the incentives' amount; the administrative fees associated with the payment of the incentives; the imbalance costs scheme; and the fiscal measures such as the "Robin Hood" tax[102] and other immovable property taxes.[103]

"*CEF asserted that such measures breached the FET standard, the umbrella clause, the obligation to provide a transparent legal framework and the obligation not to unreasonably impair the investment under ECT Article 10."*[104] The claimant claimed that all these measures have amended directly or indirectly the incentive tariffs scheme.

Until now the FET standard was analyzed in different situations and we concluded that it covers and protects only those investors' expectations that existed at the moment when the investment took place. Precisely this has been once again proclaimed by the tribunal in CEF Energia v. Italy, when it stated that at the time of the investment only one of the power plants (Enersol) was eligible to apply for the incentive programme, as both Megasol and Phenix still had numerous

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[99] The tribunal was composed of Yves Derains (president, French national), Bernard Hanotiau (claimant's appointee, Belgian national) and José Carlos Fernández Rozas (respondent's appointee, Spanish national). The award, dated August 6, 2019, is available at https://www.italaw.com/sites/default/files/case-documents/italaw10759.pdf ;

[100] SCC Case No. 158/2015;

[101] United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Investment Dispute Settlement Navigator for the Czech Republic, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/770/cef-energia-v-italy ;

[102] *"The Robin Hood Tax was introduced in 2008 as a surtax on certain companies operating in the energy sector to rein in what was considered an excessive profits from high oil prices. Starting from 2011, it became applicable also to companies active in the renewable energy sector. In a nutshell, the Robin Hood Tax consisted in a surcharge of 6.5% of the ordinary corporate income tax rate and it was applicable to companies that exceeded certain financial thresholds.",* Giuliano Foglia and Giovanni d'Ayala Valva in "Italy: Robin Hood Tax on energy companies declared illegitimate", available at https://www.internationaltaxreview.com/article/b1f9jn59kwmbd6/italy-robin-hood-tax-on-energy-companies-declared-illegitimate ;

[103] The tribunal was composed of Klaus Reichert (president appointed by the disputing parties, German and Irish national), Klaus Sachs (claimant's appointee, German national) and Giorgio Sacerdoti (respondent's appointee, Italian national). The award is available at https://www.italaw.com/cases/7364 . The award is currently being challenged before Swedish Courts, which have stayed execution until further notice;

[104] "In yet another solar energy incentives case against Italy, ECT tribunal applying proportionality test finds breach of legitimate expectations", by Alessandra Mistura, available at https://cf.iisd.net/itn/2019/09/19/in-yet-another-solar-energy-incentives-case-against-italy-ect-tribunal-applying-proportionality-test-finds-breach-of-legitimate-expectations-alessandra-mistura/ ;

conditions to satisfy in order to apply. This means that CEF could not have expected that all three power plants would be accepted to use the benefits of the incentive scheme.

"It was also pointed out that Enersol had already been granted the desired incentive tariffs at the time of CEF's investment. Thus, according to the tribunal, the investor had legitimate expectations with respect to the payment of incentives only to Enersol, but not to Megasol or Phenix."[105]

Another important conclusion made by the tribunal is the one regarding the complaints arising from the before mentioned *"Robin Hood tax"*, the administrative fees, imbalance costs and the immovable property taxes. ECT's Article 21 is relevant here as it states that:

"(1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.

(2)ARTICLE 7(3) shall apply to Taxation Measures other than those on income or on capital, except that such provision shall not apply to:

(a) an advantage accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii); or

(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure of a Contracting Party arbitrarily discriminates against Energy Materials and Products originating in, or destined for the Area of another Contracting Party or arbitrarily restricts benefits accorded under Article 7(3).

(3)ARTICLE 10(2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:

(a) impose most favored nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii) or resulting from membership of any Regional Economic Integration Organization; or

(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates against an Investor of another Contracting Party or arbitrarily restricts benefits accorded under the Investment provisions of this Treaty."

[105] "In yet another solar energy incentives case against Italy, ECT tribunal applying proportionality test finds breach of legitimate expectations", by ALESSANDRA MISTURA, available at https://cf.iisd.net/itn/2019/09/19/in-yet-another-solar-energy-incentives-case-against-italy-ect-tribunal-applying-proportionality-test-finds-breach-of-legitimate-expectations-alessandra-mistura/ .

In relation to this, according to the tribunal all the complaints together with the "Robin Hood tax" fell under the tax carve-out provided by the ECT.[106]

Concerning CEF's legitimate expectations, the analysis was executed through a two-step approach, where the first step focused on their origin and scope, in order to provide argumentation for CEF's reasonability in this regard. As it was already concluded, only Enersol qualified to apply for Italy's incentive and the tribunal pointed out that CEF's expectations were breached by explicit acts of the country's government. During the arbitration, the host country of the investment argued that the due diligence report prepared by CEF's legal counsel (which was previously examined in detail by the tribunal) should have warned CEF of the risk of enactment of retroactive laws, that would have potentially amended the energy sector incentive program. By stating this the Italian Republic tried to impose that CEF should not have reasonably relied upon the expectations on the stability of Italy's regulatory framework on solar energy incentive tariffs. Later on, CEF rejected this allegation successfully by stating that in the report it is clearly stated a possibility of a low risk of retroactive changes and that these would concern only those companies which had not yet entered into an incentive contract. This was supported by the tribunal.

Secondly, the tribunal was supposed to determine whether CEF's legitimate expectations had been breached. The tribunal did this by applying a so called "proportionality criteria", which has been set out in the case "*El Paso v. Argentina"*[107]. The criteria is applied by testing the level of an *"acceptable margin of change*"[108], which is the acceptable margin up to which the state can exercise its regulatory powers and protect the public interest by amend its regulatory framework, but without breaching investors' legitimate expectations. In order to find get to the answer the tribunal must carry out *"a balancing and weighing exercise"* between the claimant's expectations and the respondent's right to regulate.

Furthermore, it has been observed by the tribunal that Italy's amendments to its regulatory framework had been reasonable and their primary aim was in favor of the public interest. The tribunal added that regulatory changes must always be balanced and that

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[106] SCC Arbitration V (2015/158) CEF Energia B.V. v. The Italian Republic, AWARD, dated 16 of January 2019, available at https://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/Italy-Award-16.01.19.pdf ;

[107] EL PASO ENERGY INTERNATIONAL COMPANY Claimant and THE ARGENTINE REPUBLIC Respondent ICSID Case, No. ARB/03/15 AWARD, dated 31st of October 2011, available at https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf ;

[108] *"A similar view has been expressed by the tribunal in El Paso v. Argentina: There can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis. No reasonable investor can have such an expectation unless very specific commitments have been made towards it or unless the alteration of the legal framework is total. Under a FET clause, a foreign investor can expect that the rules will not be changed without a justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze.",* THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2017 (Oxford), edited by Giuliana Ziccardi Capaldo;

"*In the event of higher "level of engagement" between the state and the investor, as in the case at stake, less deference should be attributed to acts that, even if reasonable, end up breaching investors' expectations.:*[109]

Finally, by the majority it was concluded that the *"Spalma incentive"* had evidently breached ECT Article 10(1) in relation to CEF's legitimate expectations regarding its investment in Enersol. However, once again there was an arbitrator who disagreed with the majority, this was Giorgio Sacerdoti and he dissented by stating that the balancing and weighing exercise should have actually led the tribunal to reach the opposite conclusion.

"In particular, he noted how the findings of the due diligence report on the possibility of unilateral amendment, the reasonableness of Italy's regulatory changes, the transparent way in which they were adopted and the existence of a legitimate public interest all led to the conclusion that CEF could not reasonably rely on its legitimate expectations."[110]

Last but not least, it is essential to mention that Italy decided to submit its withdrawal from the ECT, on 31 December 2014, which had been effective since 1 January 2016.[111] This brings importance mostly because of the fact that despite this decision, according to ECT's "*sunset clause"*[112] in Article 47[113], the treaty's protections continue to apply to investments made before January 2016, for another 20 years.[114] Although the justification of the Italian government was the desire to reduce the costs of participating in international organizations, by analyzing some of

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[109] "In yet another solar energy incentives case against Italy, ECT tribunal applying proportionality test finds breach of legitimate expectations", SEPTEMBER 19, 2019, by ALESSANDRA MISTURA, available at https://cf.iisd.net/itn/2019/09/19/in-yet-another-solar-energy-incentives-case-against-italy-ect-tribunal-applying-proportionality-test-finds-breach-of-legitimate-expectations-alessandra-mistura/ ;

[110] "In yet another solar energy incentives case against Italy, ECT tribunal applying proportionality test finds breach of legitimate expectations", SEPTEMBER 19, 2019, by ALESSANDRA MISTURA, available at https://cf.iisd.net/itn/2019/09/19/in-yet-another-solar-energy-incentives-case-against-italy-ect-tribunal-applying-proportionality-test-finds-breach-of-legitimate-expectations-alessandra-mistura/ ;

[111] Gaetano Iorio Fiorelli, 'Italy withdraws from Energy Charter Treaty', Global Arbitration Review, 6 May 2015; Lorenzo Parola, Francesca Petronio and Fabio Cozzi, 'Italy Withdraws from Energy Charter Treaty: What Next?', Law360, 30 April 2015;

[112] *A sunset provision or clause is a measure within a statute, regulation or other law that provides that the law shall cease to have effect after a specific date, unless further legislative action is taken to extend the law. https://en.wikipedia.org/wiki/Sunset_provision#:~:text=From%20Wikipedia%2C%20the%20free%20encyclopedia,taken%20to%20extend%20the%20law ;*

[113] *(1) At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depository of its withdrawal from the Treaty.*
(2) Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depository, or on such later date as may be specified in the notification of withdrawal.
(3) The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.
(4) All Protocols to which a Contracting Party is party shall cease to be in force for that Contracting Party on the effective date of its withdrawal from this Treaty;

[114] Parola, supra note 34;

the recent outcomes of the cases where the country acts as a respondent, it is only logical to presume the possibility that the risk of further disputes under the ECT (and potential adverse decisions) may have influenced this withdrawal.

3.4. Germany

The situation in Germany and the number of active and past energy investment disputes differ in many ways from what we have discussed until now. Although there are only 3 cases in total (2 active and one past case)[115] against the Federal Republic of Germany, as a host state for an investment, the analysis of the disputes will provide valuable points of view and a broader picture, relevant for our topic.

The first ever investor-state arbitration concerning (renewable) energy was commenced in 2009 and it is known as "Vattenfall v. Germany (I)"[116]. The scope of the investment involved rights under an agreement concluded between the Vattenfall Group and the Hamburg Government for the construction of a coal-fired power plant known as the *"Moorburg powerplant"*[117]. In general,

"The dispute was caused by the alleged conduct of the Hamburg government authorities relating to the administrative procedure for the issuing of permits for a new power plant being constructed by Vattenfall Generation, at the site of a former plant located at Hamburg-Moorburg."[118]

Additionally, the following breaches were stated by the Claimant: Indirect expropriation; Fair and equitable treatment/Minimum standard of treatment, including denial of justice claims; Full protection and security, or similar; and Arbitrary, unreasonable and/or discriminatory measures.

The case developed in a way that by August 26, 2010 both parties informed the Tribunal[119] that they had already signed an agreement concerning the final and binding resolution of their dispute, which later followed a discontinuance of the proceedings. What was essential that this agreement regulated, was the call for a suspension of the proceedings for an indefinite period and the fact that either party could resume the proceedings unilaterally in the following two situations:

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[115] United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Investment Dispute Settlement Navigator for Germany, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/78/germany ;

[116] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I) (ICSID Case No. ARB/09/6);

[117] *"Moorburg was built as a cogeneration plant, capable of supplying heat to the city's district heating system (up to 650 MW) as well as supplying steam to industrial facilities. However, as a result of Hamburg's 'green' politics (Hamburg aspires to be climate-neutral by 2050), it is not allowed to supply the district heating scheme – it now works solely as a power plant.", MOORBURG CHP PLANT – ONE OF GERMANY'S MOST MODERN AND EFFICIENT POWER PLANTS, by Stephen Mills, dated 9 January 2018, available at https://www.iea-coal.org/blogs/moorburg-chp-plant-one-of-germanys-most-modern-and-efficient-power-plants/ ;*

[118] United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Investment Dispute Settlement Navigator, Vattenfall v. Germany (I), available at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/329/vattenfall-v-germany-i- ;

[119] The Tribunal was constituted on August 6, 2009, with Professor Gabrielle KaufmannKohler (appointed by the Claimants), Sir Franklin Berman (appointed by the Respondent), as arbitrators, and the Honorable Marc Lalonde, as President (appointed by the two partyappointed arbitrators);

"(i) If all the conditions set out in the Agreement had been fulfilled; and (ii) if the conditions had not been fulfilled by March 31, 2011."[120]

The parties in this case, namely Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG ("Vattenfall" / "Claimants") and Federal Republic of Germany ("Germany" / "Respondent") agreed to settle the dispute. Such outcome happens rarely, but when it occurs it is arranged under certain conditions, that must be respected and fulfilled. Before the parties agreed upon the settlement, Germany had denied Vattenfall's Claims and reserved its right to raise objections to the jurisdiction of the Tribunal and the admissibility of the Claims.[121] The agreement constitutes

"*A mechanism for the final and binding resolution of all of the Claims and of their Dispute in its entirety as well as the discontinuance of the Proceedings."*

As it is said in the first Article of the agreement. Whereas, the fulfilment of the conditions is said to present

"A full and final satisfaction and settlement of all of the Claims. The Claimants confirm that upon the fulfilment of the Conditions any ground for complaint or cause of action ("Beschwer"[122]*) related to the Claims which may have existed under the Energy Charter Treaty shall cease to exist. Upon fulfilment of the Conditions, automatically and without the need for any further action of any of the Parties, all and any claims that the Claimants or any of them or any of their shareholders ever had, may have or hereafter can, shall or may have against the Respondent in relation to the Dispute, shall be released and forever discharged. The Claimants shall hold harmless and indemnify the Respondent for any claims raised against it by any of the Claimants' shareholders."*

A crucial condition set out in the agreement was the second one which stated that

"A modified water use permit having been issued to Vattenfall Europe Generation AG in accordance with the annex to the OVG-Settlement and declared immediately enforceable."

The settlement of this case caught not only the lawyers' attention, but also caused reactions from environmentalists and politicians. Initially, the permit delays were the reason why the Swedish company commenced the arbitration and according to them the required government permits became an issue when the state's environmental ministry established clear and strict requirements for the plant.[123]

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[120] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES WASHINGTON, D.C. IN THE PROCEEDING BETWEEN VATTENFALL AB, VATTENFALL EUROPE AG, VATTENFALL EUROPE GENERATION AG (CLAIMANTS) - ANDFEDERAL REPUBLIC OF GERMANY (RESPONDENT) (lCSID Case No. ARB/09/6) AWARD, dated March 11, 2011, available at https://www.italaw.com/sites/default/files/case-documents/ita0890.pdf ;

[121] AGREEMENT between the parties to ICSID Casc No. ARB/09/6 ("Parties"): Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG ("Vattenfall" / "Claimants") and Federal Republic of Germany ("Germany" / "Respondent"), available at https://www.italaw.com/sites/default/files/case-documents/ita0890.pdf ;

[122] "Appeal" in Germanl

[123] "Corporate Attacks: Health Case Study: Coal-Fired Electric Plant", available at http://media.wix.com/ugd/7c0358_f3446f51732e46c99d5b55d7bf8a654c.pdf ;

As in April 2008 the conservative party had to form a coalition with the Green Party in the City State of Hamburg, the Green Party imposed heavy environmental restrictions on the plant project. This had led to significant changes for Vattenfall and serious implications for the project to become extremely less profitable, or even a loss. The company failed to convince the government to change their minds regarding the new restrictions, which left them with no other choice but to initiate a proceeding.

This case has been an "ice-breaker" for Germany to be on the other side of the bench during an arbitration and had maybe encouraged the 2 proceedings which followed afterwards. On one hand Germany was and probably still is considered an investor-friendly country and on the other hand the country was accused of an expropriation and a violation of Germany's obligation to afford foreign investors "fair and equitable treatment", as it was previously discussed. This case certainly caused strong reactions in the public.[124] It was evident that Germany had no other option but to avoid the highly likely scenario where they pay a massive amount of compensation to Vattenfall, so the country resorted to settle.

This dispute and its outcome explain more closely how delicate the regulation of energy investments really is and how at some point an ECT standard may be breached, but the public interest exceeds upon it. This case definitely led to a shift in the energy investment disputes and the analysis of the 2 following disputes will certainly prove this statement.

In 2012 occurred the dispute between Vattenfall and the Federal Republic of Germany[125] and this time the claims arose out of Germany's enactment of legislation to phase out nuclear power plants in the country by the year 2022. Basically, the claimant claimed that Germany had breached a numerous international obligations by forbidding the usage of nuclear energy plants and by implementing renewable energy solutions instead. Firstly, the tribunal[126] decided to determine whether the decision in the C-284/16 Slowakische Republik v. Achmea BV case *("Achmea Judgment")*[127] had any implications on these proceedings. The reason for this move by the tribunal was an objection made by the Respondent, stating that

"All claims pending before this Tribunal be dismissed because the Tribunal has no jurisdiction in the light of ECJ's Achmea Judgment"

Before discussing the tribunal's stance on this issue here is a brief introduction to the meaning of the "Achmea Judgement". On 6 March 2018, the Court of Justice of the European Union (CJEU) issued its judgment in Slovak Republic v. Achmea and conlcuded that the European Treaty (TFEU)[128] precluded a provision in a bilateral investment treaty between two member states of

[124] "Vattenfall v. Germany: Anomaly or New Trend?" , by Cesare Romano (Loyola Law School Los Angeles), dated May 6th 2009, available at http://arbitrationblog.kluwerarbitration.com/2009/05/06/vattenfall-v-germany-anomaly-or-new-trend/?doing_wp_cron=1592425037.7801439762115478515625 ;
[125] Vattenfall AB and others v. Federal Republic of Germany (II) (ICSID Case No. ARB/12/12);
[126] Professor Albert Jan VAN DEN BERG, President, the honorable Charles N. BROWER, Professor Vaughan LOWE.
[127] Judgment of 6 March 2018, Slovak Republic v. Achmea BV, Case No. C-284/16, EU: C, 2018, 158;
[128] *Treaty on the Functioning of the European Union (TFEU) Related Content. One of the two main Treaties that form the basis of EU law. Formerly known as the EC Treaty, the Treaty of Rome or the Treaty establishing the European Community.*

the European Union, authorizing investor–state arbitration. The Achmea decision is considered a "game-changer" because before it, the European Commission attempted to intervene in a number of arbitrations, in order to express concern regarding the frequent use of arbitration provisions in *intra-EU BITs*[129].

"The Commission's concern was based on the principle that members are required to use the judicial system established by the European Union and settling disputes through private arbitration would circumvent the jurisdiction of Europe's highest court and prevent the uniform application of European law. In those interventions the tribunals had rejected the Commission's concerns and concluded that they had jurisdiction. However, following the European court decision in Achmea, the rubber hit the road."[130]

Moving on with the developments in the Decision on the Achmea Issue relevant for Vattenfall v. Germany case, the following is the tribunal's stance

"EU law does not constitute principles of international law, which may be used to derive meaning from Article 26 ECT[131]*, since it is not general law applicable as such to the interpretation and application of the arbitration clause in another treaty (¶ 133). One possibility through which EU law could be brought into the interpretive exercise is as "relevant rules of international law applicable in the relations between the parties" under Article 31(3) (c) VCLT. In order to test this argument, it was necessary to determine whether EU law is international law (¶ 134).*

Furthermore the tribunal stated that

"The CJEU decided that "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States". The basis for its decision was that the arbitral tribunal under the Dutch-Slovak BIT was not a "court or tribunal of a Member State" within the meaning of Article 267 TFEU and, thus, according to the rules established by the CJEU, an arbitral tribunal was not able to refer questions of EU law to the CJEU under the preliminary ruling procedure in that provision (¶ 136), although it "may be called on to interpret or indeed to apply EU law" (¶ 137). This Tribunal considered the Achmea Judgment to be a new development, insofar as it arguably closed the door on the arbitral tribunal's jurisdiction under the Dutch-Slovak BIT by precluding the arbitration agreement, which could prevent a potential dispute from being resolved in a manner that ensures the full effectiveness of EU law (¶ 139)."[132]

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[129] *intra-EU bilateral investment treaties;*

[130] The Guide to Energy Arbitrations - Third Edition, "Arbitrations Involving Renewable Energy", by Gordon E Kaiser, available at https://globalarbitrationreview.com/chapter/1178844/arbitrations-involving-renewable-energy#footnote-002 .;

[131] *The ECT allows investors to sue a state before an international ICSID arbitral tribunal instead of submitting the dispute to the host country's state courts*.

[132] School of International Arbitration, Queen Mary, University of London International Arbitration Case Law Academic Directors: Ignacio Torterola, Loukas Mistelis, dated 31st of August 2018, available at https://www.transnational-disputemanagement.com/downloads/22101_case_report_vattenfall_v_germany_achmea_2018.pdf ;

Subsequently, the tribunal came to the conclusion that the request of the respondent should be dismissed. The reasoning behind this was explained as follows

"The Tribunal has no jurisdiction in the light of the ECJ Judgment in Achmea of 6 March 2018".

There is no further development regarding this case and until a final decision is made (or until the case gets settled) a lot of question remain raised, as when it comes to investment arbitrations in Germany, there is no precedent cases, which could use as a starting point.

Despite this, it is evident that although Germany has faced only 3 energy investment related arbitrations until now, they definitely have a greater meaning than it is thought. In my opinion, the fact that the first Vattenfall case got settled indirectly points out to the obvious observation that the country wasn't able to defend its stance, since the company's allegations were legally supported and a breach did happen. Once again, I believe that in Vattenfall (II) filing a damages claim will result at least with a settlement agreement, based on what we have seen until now.

"Apart from the phasing out of nuclear power, Germany's utilities are also suffering from the country's massive boom in renewable capacity that continues to replace their conventional gas and coal-fired power units."[133]

Last but not least, is the case Strabag and others v. Germany[134] where Austrian companies invested in offshore wind energy projects in the German North Sea. The companies' claims arose out of the Government's legislative changes of its renewable energy regime, involving offshore wind energy production, which allegedly had forced the claimants to abandon their offshore wind projects.[135]

Until this moment no official relevant documents have been published, except for the notification of a request for arbitration.[136] What is known is that since 2009, Strabag (and two of its affiliates "Erste Nordsee-Offshore Holding GmbH" and "Zweite Nordsee-Offshore Holding GmbH") had been investing in offshore-projects in Germany and their primary plan involved building of approximately 850 wind turbines by the year 2026. However this is not what actually happened later on. Strabag started to change their plans and they have been withdrawing from the marker and selling its shareholdings.

[133] UPDATE 1-Vattenfall wants 4.7 bln euros for German nuclear exit -govt source, dated OCTOBER 15th, 2014, available at https://af.reuters.com/article/commoditiesNews/idAFL6N0SA3AK20141015 ;
[134] Erste Nordsee-Offshore Holding GmbH, Strabag SE, Zweite Nordsee-Offshore Holding GmbH v. Federal Republic of Germany (ICSID Case No. ARB/19/29);
[135] United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Investment Dispute Settlement Navigator for Strabag and others v. Germany, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1000/strabag-and-others-v-germany ;
[136] Strabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v. Federal Republic of Germany (ICSID Case No. ARB/19/29), available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/19/29 ;

A good example is that in 2016, Strabag's subsidiary, Erste Nordsee-Offshore-Holding GmbH, sold its shares in an offshore wind project ("Northern Enegery Global Tech II GmbH") to *Vattenfall (II)*, discussed earlier.[137]

According to an interview, Strabag's claims are caused by the negative economic effects on its investments, which were a consequence of the over-regulation in the German energy market. [138]Apparently, Strabag's primary reason for suing are the amendments to the "*German Renewable Energy Sources Act (EEG)"*[139]. This act's purpose was to promote the development of renewable energy projects and is therefore considered an innovative and successful energy policy measure, although it has been modified several times in the past 20 years now. The EEG was amended in 2004, 2009, 2012 and 2014 with the explanation that the changes are essential for its adaptation to the continuous positive development of renewable energies in all sectors.[140]

"The EEG originally provided a feed-in tariff ("FIT") scheme to encourage the generation of renewable electricity. The state and investors concluded long-term contracts with state-fixed funding rates. This changed as of 2014, when the legislator introduced an auction system, according to which the funding rate for most renewable energy systems will be determined through tenders. This principally means that those who demand the least for the economic operation of a new renewable energy plant will receive financial support."[141]

The duty of the ICSID tribunal[142] will be to examine whether these changes in the German law could justify a claim for damages by Strabag, despite the Achmea issue and other recent developments in investment arbitration.

"It is to be assumed that the Strabag case will continue to keep Germany busy for a long time to come as it is the case with the second (in)famous ICSID claim against Germany still pending, the Vattenfall case. In 2015, the Vattenfall case became the public scapegoat for critics of

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[137] "Vattenfall erwirbt Projektgesellschaft für Offshore-Windpark „Global Tech II"", dated 10th of August, 2016, available at https://www.strabag.com/databases/internet/_public/content.nsf/web/D10F3B4022243D25C125800B0049EC76 ;

[138] „Streit um Offshoreausbau: Strabag schiebt mit Freshfields Schiedsverfahren gegen Deutschland an", dated 24th of September, 2019, available at https://www.juve.de/nachrichten/verfahren/2019/09/streit-um-offshoreausbau-strabag-schiebt-mit-freshfields-schiedsverfahren-gegen-deutschland-an ;

[139] "*Erneuerbare-Energien-Gesetz" in German;*

[140] THE GERMAN FEED-IN TARIFF, available at https://www.futurepolicy.org/climate-stability/renewable-energies/the-german-feed-in-tariff/ ;

[141] *"Federal Republic of Germany faces third ever investor-state arbitration: Might changes to renewables regime lead to another public "Vattenfall-outcry" about arbitration?",* dated October 14th, 2019, by Dr. Max Oehm and David Weiss, available at https://globalarbitrationnews.com/federal-republic-germany-faces-third-ever-investor-state-arbitration-might-changes-renewables-regime-lead-another-public-vattenfall-outcry-arbitration/ ;

[142] President: Veijo HEISKANEN (Finnish) - Appointed by the Parties; Arbitrators: Judith GILL (British) - Appointed by the Claimant(s), Maria Chiara MALAGUTI (Italian) - Appointed by the Respondent(s);

international investment arbitration proceedings. The public outcry over allegedly "back door justice" was massive. Yet, the German public has not widely taken note of the Strabag case. If recent history is any indication, both Parties and the involved law firms may prefer to keep it that way."[143]

The outcome of the Strabag case will provide relevant answers and projections of what is to be expected in energy investments in future stages. The decision of the tribunal will be valuable not only to investors that were once meaning to invest in Germany, but also to investors willing to fund an energy project in any foreign country. The allegations in both Strabag and Vattenfall (II) are serious and it seems that the breaches involved are punishable under the ECT.

The following two chapters provide a general conclusion arising from the case analysis conducted so far and a personal forecast of what is to come in near future.

[143] *"Federal Republic of Germany faces third ever investor-state arbitration: Might changes to renewables regime lead to another public "Vattenfall-outcry" about arbitration?",* dated October 14th, 2019, by Dr. Max Oehm and David Weiss, available at https://globalarbitrationnews.com/federal-republic-germany-faces-third-ever-investor-state-arbitration-might-changes-renewables-regime-lead-another-public-vattenfall-outcry-arbitration/ ;

4. The global impact of past and ongoing disputes

From what was discussed so far, we got a good grasp of the role of the ECT and the protections it offers to foreign investors in the energy sector. It was explained that these protections are not only various, but also broad. The protections of the ECT involve: fair and equitable treatment (FET standard); constant protection and security; non-discrimination; most-favored nation[144]; fulfilment of commitments; prohibition against expropriation; compensation of losses; etc…

The case analysis conducted regarding the relevant disputes concerning the four countries (Spain, The Czech Republic, Italy and Germany) showed that the (renewable) energy arbitrations brought under the ECT involve several legal issues that occur most frequently. As previously discussed, the two most common issues detected in the case studies were breaches to the ECT's guarantee of fair and equitable treatment or an (indirect) expropriation, which are triggered by the regulatory and legislative changes to the (renewable) energy incentive regimes.[145]

4.1. FET standard and investors' reasonable expectations

Firstly, although the ECT as a whole provides all kinds of protections for the foreign investors, Article 10(1) of the ECT offers one of the most frequent bases asserted in investor–state disputes – the fair and equitable treatment requirement (FET). Article 10(1) serves to provide the following:

"Encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such

[144] *"In international economic relations and international politics, most favored nation (MFN) is a status or level of treatment accorded by one state to another in international trade. The term means the country which is the recipient of this treatment must nominally receive equal trade advantages as the "most favored nation" by the country granting such treatment (trade advantages include low tariffs or high import quotas).",* McCloure, Mike (2011-07-25). "Most Favored Nation Clauses – No favored view on how they should be interpreted" Archived 2011-10-07 at the Wayback Machine. Kluwer Arbitration Blog. Retrieved 2011-07-26;

[145] Additionally, the ECT contains an 'umbrella clause', which involves a requirement for a host state to *'observe any obligations it has entered into with an Investor or an Investment of an Investor'*. (ECT Article 10(1)).The clause purpose is to bring any contractual agreements between the investor and the state under the 'umbrella' of the ECT, by enforcing the contractual rights under the ECT. The specific agreement between the investor and the host state, may determine that the umbrella clause forms the basis for additional claims. See A. Reuter, *'Retroactive Reduction of Support for Renewable Energy and Investment Treaty Protection from the Perspective of Shareholders and Lenders'*, 12 Transnat'l Disp. Mgmt., May 2015, at 42;

Investments be accorded treatment less favorable than that required by international law, including treaty obligations."

Despite the fact that the FET is unambiguous and rather straightforward, it still counts as *'one of the most actively debated concepts in investment protection law'*,[146] Therefore, lawyers, commentators and arbitral tribunals as well, provide separate interpretations of what its requirements ought involve.[147] Stances and opinions on this matter may differ, but in most cases the FET standard contains the requirements, as follows:

- *"the host state must act in a transparent manner;*
- *the state is obliged to act in good faith;*
- *the state's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; and*
- *the state must respect procedural propriety and due process."*[148]

The aim of FET standard is to detect whether there has been violations from the side of the host state, while modifying (or eliminating) the existing incentive regime. It also analyses if the host state acted with consistency, transparency and reasonableness when implementing the regulative changes and additionally inspects whether investors had reasonable and legitimate expectations that were breached as a result of the state's actions. As discussed earlier, among the commentators and tribunals it is agreed that there is no universally applicable standard as to when investors' expectations should be granted with a treaty protection under the FET requirement. Evidently, any evaluation and further conclusion will depend on the provided facts.[149]

"However, there are two acknowledged approaches to determining when investor expectations are reasonable so as to warrant treaty protection. 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 could 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'[150]*. Thus, as the Tecmed arbitral tribunal explained, the host state should act 'consistently, transparently, and in a predictable and rational manner', so*

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[146] *"Investor-State Arbitration" 502,* by C.F. Dugan, D. Wallace Jr., N.D. Rubins, B. Sabahi, (2008);
[147] 'Fair and Equitable Treatment: Today's Contours', 12 Santa Clara J. Int'l L. 7, by R. Dolzer, (2014);
[148] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, available at https://www.italaw.com/cases/942 ;
[149] The Guide to Energy Arbitrations - Third Edition, "Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty", by Charles A Patrizia, Joseph R Profaizer, Samuel W Cooper and Igor V Timofeyev, (Paul Hastings LLP), available at https://globalarbitrationreview.com/chapter/1178836/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty#footnote-067 ;
[150] See Dugan, supra note 38, at 513;

as not to 'affect the basic expectations that were taken into account by the foreign investor to make the investment'[151]*. The tribunal in CMS v. Argentina – an influential decision with respect to determining when a change in the host nation's legal framework constitutes a breach of the FET – similarly observed that the stability and predictability of the legal and regulatory environment is an important component of fair and equitable treatment.*[152][153]

An important characteristic of the FET is its broadness within the regulation. This broadness of the FET allows consideration in many situations, for example the standard grants the host state its right to regulate, which may involve changing previous regulations, where necessary and justified. This has been noted by many tribunals, one of them being the tribunal in EDF (Services) Limited v. Romania, where it was stated that the FET requirement cannot be interpreted as

'The virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life'.[154]

Simply put, this means that foreign investors cannot rely on a bilateral investment treaty in a way that it would grant a kind of "insurance policy", which could eliminate a potential risk of any changes in the host State's legal and economic framework.[155] As much as the ECT and the FET standard serve to protect investor's fundamental rights,

'No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged'.

On the contrary, the FET serves to determine

'Whether frustration of the foreign investor's expectations was justified and reasonable', which additionally requires consideration of 'the Host State's legitimate right subsequently to regulate domestic matters in the public interest'.[156]

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[151] See Tecnicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB (AF)/00/2;
[152] Occidental Exploration & Production Co. v. Ecuador, LCIA Case No. UN3467, Final Award, dated 1st of July, 2004, available at https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf;
[153] The Guide to Energy Arbitrations - Third Edition, "Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty", by Charles A Patrizia, Joseph R Profaizer, Samuel W Cooper and Igor V Timofeyev, (Paul Hastings LLP), available at https://globalarbitrationreview.com/chapter/1178836/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty#footnote-067 ;
[154] EDF (SERVICES) LIMITED (CLAIMANT) AND ROMANIA (RESPONDENT) (ICSID CASE NO. ARB/05/13) AWARD, dated October 8th, 2009, available at https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf ;
[155] The Guide to Energy Arbitrations - Third Edition, "Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty", by Charles A Patrizia, Joseph R Profaizer, Samuel W Cooper and Igor V Timofeyev (Paul Hastings LLP), available at https://globalarbitrationreview.com/chapter/1178836/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty#footnote-067 .
[156] El Paso Energy International Co. v. Argentina, ICSID Case No. ARB/03/15, Award, dated 31st of October, 2011;

Commonly, when a tribunal agrees that a breach of the FET requirement occurred, the host state had either (implicitly or explicitly) made specific representations, commitments, assurances or promises, which were crucial and reliable for foreign investor when deciding to proceed with the investment.[157]

Moreover, *"The investor is only entitled to the host state's 'regulatory fairness' or 'regulatory certainty', which provides limited protection against regulatory changes that impair the recovery of operation costs, the amortization of investments and the achievement of a reasonable return."*[158]

However, this does not undermine the investor's right to 'stable' and 'transparent' conditions for investing. In this regard, the host state is committed to provide fair and equitable treatment at all times, in order to preserve a long-term legal stability. As previously absolved, Article 10(1) of the ECT constitutes the basis for affording the legitimate expectations of investors that operate in the energy industry, by comparatively providing greater protection against regulatory changes.[159]

The case analysis brings us to the conclusion that a change in the host state's regulatory framework does not always mean that a breach of the FET guarantee has been made. This was noted in Charanne – the first renewable energy arbitration that resulted in an award, as the tribunal concluded that

'In the absence of a specific commitment, an investor cannot have a legitimate expectation that existing rules will not be modified.'[160]

The tribunal supported this decision by turning to a Spanish law pre-dating the investment allowed the country to modify its solar energy regulations (this could have been previously anticipated by the claimant). Another relevant example for this principle is the case Antaris v. The Czech Republic, which was previously analyzed. When assessing the reduction of excessive profits (with the aim to protect consumers from excessive electricity price rises), the tribunal concluded that the Czech Republic was rather rational, while the claimant's legitimate expectations were irrational at this point.

The examination of the ECT's guarantee of fair and equitable treatment has another side as well. In some cases tribunals have arrived at a different conclusion and have therefore decided that investors' legitimate expectations had actually been breached by the immutability of the state's original incentive regime. In this regard,

"The Antin, Novenergia, and Masdar tribunals[161] *concluded that Spain failed to comply with its obligation to create stable, favorable, and transparent conditions for foreign investors, and that*

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[157] See P. Dumberry, supra note 39, at 43-47 (discussing Glamis Gold Ltd. v. United States, UNCITRAL, Award, 8 June 2009);
[158] Id. paras. 310–12; A. Reuter, supra note 37, at 24;
[159] See Reuter, supra note 37, at 24 and 30;
[160] Charanne, supra note 16, para. 499;
[161] Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain, ICSID Case No. ARB/13/31, Award, June 15, 2018; Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1, Award, May 16, 2018; Jones, supra note 40;

these investors had legitimate expectations that the existing investment regime would not be modified.[162]

This observation once again proves that a tribunal will always base their final stance regarding legitimate expectations on the reasonableness of those expectations and the particularity of the state's commitments concerning the investment.[163] The foreseeability that the existing regime may be altered also plays a vital role when a tribunal assesses a potential breach.

As for the investor, it should be clear that if a thorough and a robust due diligence is made up front, the chances for misinterpreting the legitimate expectations are extremely low and the investment would not have to face profit loss or in some cases even termination.

[162] The Guide to Energy Arbitrations - Third Edition, "Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty", by Charles A Patrizia, Joseph R Profaizer, Samuel W Cooper and Igor V Timofeyev (Paul Hastings LLP), available at https://globalarbitrationreview.com/chapter/1178836/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty#footnote-067 ;

[163] Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1, Award, dated May 16th, 2018, (paras. 489-522), available at https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf ;

4.2. The two sides of indirect expropriation

Apart from the involving of the FET standard in numerous pending arbitrations concerning (renewable) energy, the claim of indirect expropriation is also a frequent subject for the tribunals. Relevant for the ECT in this regard is the lack of a specific provision which would address indirect expropriation. As it was already discussed, the treaty contains Article 13, which prohibits expropriation of investments unless

"Justified by public interest purposes, carried out under due process of law and accompanied by a prompt, adequate and effective compensation."

Good example depicting this matter is the "Nykomb v. Latvia" arbitration, where the tribunal examined claims of indirect expropriation under the ECT, but its final decision may have been unexpected.[164] The claimant signed an agreement with the energy distributor of the Latvian state to participate by producing energy from a cogeneration plant and according to the regulation applicable at the time of the investment, the company was to receive a double tariff for eight years. The crucial event has happened shortly before the implementation of the endeavor, as Latvia revoked the favorable treatment and retroactively imposed a significantly lower tariff.[165] Logically, the investor was on the standpoint that the withdrawal of the original tariff had resulted with an 'indirect' or 'creeping' expropriation, since it

"Rendered the enterprise not 'economically viable' and the 'investment worthless".[166]

The reaction of the arbitral tribunal regarding this issue has been of great importance to future investments and has alerted the investors when it comes to indirect expropriation allegations. This time the tribunal chose to disagree with the statement of the claimant and concluded that

"The loss of the economic value of the investment did not, by itself, constitute expropriation, because the state did not take possession of the enterprise or its assets, or interfere with the shareholders' rights or management control."[167]

Moreover, The Nykomb decision has been labeled as promoting rather narrow view of the concept of indirect expropriation. According to many commentators the decision failed to consider the economic effects of the government's actions as a whole.

Another case that views expropriation more critically is the before analyzed 9REN Holding S.À.R.L. v. The Kingdom of Spain. This time, concerning the expropriation allegations the tribunal held that the loss in value of 9REN's shares in Spanish companies did not constitute an expropriation. The tribunal clarified this by stating that the company did not have any right to make profit from electricity sold to SES, but that the downstream operating companies did.

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[164] Nykomb Synergetics Technology Holding AB (Sweden) v. Latvia, SCC – Case No. 118/2001, Arbitral Award, dated 16th December, 2003, available at https://www.italaw.com/sites/default/files/case-documents/ita0570.pdf ;
[165] Id. para. 1.2;
[166] Id. para. 4.3.1;
[167] Id. para. 4.3.1;

So, despite the fact that the value of 9REN's shares was impacted by the regulatory changes, Spain never denied any payments, and 9REN never alleged loss of control of shares. Therefore, the tribunal dismissed the expropriation claim and at this point it was decided that Spain had only violated the FET under ECT Art. 10(1) through the frustration of legitimate expectations.

Classic example on this topic is the Charanne tribunal, since it likewise rejected the claim of the investor, which stated that the Spanish regulation change of the incentive regime led to indirect expropriation. On one hand the claimant explained that the modification of the incentive regime affected their returns for the investment and on the other hand the tribunal ruled that

"Indirect expropriation implies a substantial effect on the property rights of the investor, including a loss of value that could be equal by its magnitude to a deprivation of the investment."[168]

Once again it was observed by the tribunal that since the project remained operational and profitable, a certain reduction in profitability, or theoretically any decrease in the value of the company's shares does not lead to indirect expropriation.[169] All in all, the conclusions are as follows, the Charanne tribunal had decided to reject the expropriation claim, because it proclaimed a broader definition of the concept of indirect expropriation. Contrary to how the tribunal in Nykomb interpreted the expropriation claim, meaning that in this case the allegation had been viewed in a more narrow way.

In conclusion, the claims for expropriation require a similar methodology and analysis like when dealing with a situation, where a state's action may have led to a breach of the FET obligation. The concerned tribunals have the duty to balance the protection of investors' expectations with the state's right to change the legal framework and implement new policies. As discussed above, there are many different approaches but what they all have in common is the necessity to closely examine the specific facts and circumstances of each case. It does not matter if the case is about imposed reductions of a feed-in tariff or, a roll-back of the renewable energy investment incentive regime, every detail has to be taken into consideration in order to make a fair and objective decision. Until today many approaches have been developed when it comes to deciding upon the FET and the expropriation claims, but it still remains to be seen what would bring the future of dispute resolution in this regard.[170]

[168] Charanne, supra note 16, para. 461;
[169] Id. paras. 462-65;
[170] The Guide to Energy Arbitrations - Third Edition, "Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty", by Charles A Patrizia, Joseph R Profaizer, Samuel W Cooper and Igor V Timofeyev (Paul Hastings LLP), available at https://globalarbitrationreview.com/chapter/1178836/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty#footnote-067 ;

4.3. Modernization of the Energy Charter Treaty

Long time before the most recent initiatives for the modernization of the ECT even began, experts from numerous organizations and EU institutions have said that the reform of the Energy Charter Treaty (ECT) will not help the EU in meeting the targets set in the Paris Agreement. As discussed in the earlier chapters, the Paris climate conference, which took place in December 2015, consisted of 195 countries that agreed to adopt the first-ever universal, legally-binding global climate deal, aiming to keep the increase in global temperature well below 2°C.

The so called "modernization" of the ECT is planned every five years, but this is done without the obligation any results to be produced. In relation to this, it should be mentioned that in the past revisions took place in 1999, 2004, 2009 (again without result) and in 2014 as well.[171] That being so, in 2018, the working group in charge of the revision of the ECT, started consultations with the treaties' parties and involved relevant industries and observers, in order to establish a list of elements open for revision.[172]

In addition to this, the European Union classified the negotiating mandate granted to the Commission in full transparency. The draft mandate of the reforms to be implemented was published in May 2019 and it was approved by the Council in July 2019[173]. If one observes the mandate, it can be concluded that the EU seems to have taken the necessary actions for what is at highest risk. Naturally, one of the central objectives of the mandate is the idea that

"The modernized treaty reflects climate change and clean energy transition goals and contributes to the achievement of the objectives of the Paris Agreement".[174]

Moreover, the EU in its mandate tended to defend the States' "right to regulate". The Union supported this by clarifying that there has been no commitment by the contracting parties not to change their laws, even if there was a negative impact on the profits expected by investors. In relation to this, a revision of the ISDS mechanism has been proposed. A revision consistent with the discussions under way in other international forums for the creation of a so called Multilateral Investment Court.[175]

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[171] Energy Charter Conference Decisions, available at https://www.energycharter.org/what-we-do/conference-decisions/documents/all/ ;

[172] "Sujets approuvés pour la modernisation du traité sur la Charte de l'énergie", available at https://www.energychartertreaty.org/fr/modernisation-of-du-traite/ ;

[173] Council of the European Union, Negotiating Directives for the Modernization of the Energy Charter Treaty, Brussels, July 2, 2019, available at https://www.consilium.europa.eu/en/press/press-releases/2019/07/15/council-adopts-negotiation-directives-for-modernisation-of-energy-charter-treaty/ ;

[174] INVESTMENT AND CLIMATE > "REFORMING THE ENERGY CHARTER TREATY" > POLICY BRIEF, 8 MAY 2020, available at https://www.cncd.be/policy-brief-reforming-the-energy-charter-treaty ;

[175] Available at "Council of the European Union, Negotiating Directives for the Modernization of the Energy Charter Treaty", op.cit.., pp. 4-5;

All in all, the proposal of the EU Commission consisted of reforming the "outdated" treaty in order to increase investments in the energy sector in a sustainable way and with the goal to tackle the upcoming political and economic global challenges.

The EU's input in modernizing the ECT hasn't been regarded to be successful, since the start of the negotiations. The Union faced a "narrow margin for maneuver", which was later on reduced by the unanimity rule prevailing for any amendment to the ECT.[176] This being the issue, it also encountered Japan's refusal to consider any modernization of the treaty during the first exchange of views held in October 2019, just before the start of any negotiations. This has been known as the "Japanese veto" and it compromises a real reform of the treaty.

"Faced with an imperative need for energy supply, the EU has therefore become entangled in an energy quagmire from which it is difficult to get out. Faced with Japan which refuses, at this stage, to modernize the treaty, pushed by its objectives of coherence with sustainable development and in particular the fight against global warming, the EU is facing an intense power struggle."[177]

As already discussed in this thesis, The ECT is currently regarded as probably the crucial defender of the fossil fuel industry worldwide, according to field experts. These have also claimed that the reform proposed by the commission will keep protecting the exploitation of such materials. Since it doesn't make a difference between sorts of energy production, it gives the existing fossil fuel industry an important advantage. So, the proposed reform by the European Commission will not amend this in any way, even though the climate challenges are certainly undeniable.

"When you look at the elements of the modernization of ECT, the scope is the same: there will be investment protection and no distinctions between renewables and fossil fuels. This [reform] is going to take years, but climate change is happening now," warned the director of economic law of Canada-based think tank the International Institute on Sustainable Development (IISD), Nathalie Bernasconi.

A vital point in relation to the above mentioned arguments is the fact that the ECT provides binding provisions for investment protection, free trade and freedom of transit of energy materials, but it provides only non-binding provisions for the promotion of energy efficiency and environmental protection by developing renewable and clean energies.

"The ECT is a powerful tool in hands of big oil, gas and coal companies to discourage governments from transitioning to clean energy," affirms a recently released report from the UK-based Corporate Europe Organization (CEO).

The CEO researcher Pia Eberhardt on the other hand is on the standpoint that,

[176] ANALYSIS > "The controversy behind the Energy Charter Treaty reforms", By ELENA SÁNCHEZ NICOLÁS, BRUSSELS, 5. SEP 2019, available at https://euobserver.com/energy/145839 ;
[177] INVESTMENT AND CLIMATE > "REFORMING THE ENERGY CHARTER TREATY" > POLICY BRIEF, 8 MAY 2020, available at https://www.cncd.be/policy-brief-reforming-the-energy-charter-treaty ;

"ECT is being used against governments, when governments decide to keep fossil fuels in the ground".

"How can we still protect investments that are destroying the planet?" she asked.

While holding a speech at an event in Brussels, the head of investment at DG trade at the EU commission and one of the leaders of the reform process, Carlo Pettinato, stated that the commission is "*working really hard to reform the treaty*".

"*We should make this treaty fully-compatible with the Paris Agreement, that is why we should include provisions in line with the green economy*," he then added.

Trying to show the bigger picture, it is important to point out that the majority of the ECT disputes, 67 % to be more exact (this number has been drastically increasing in the recent years), took place between countries which are part of the EU. As we previously concluded, Spain is definitely the country with the biggest number of energy investments lawsuits (under the ECT), after which follow Italy and the Czech Republic.[178]

It was no coincidence that the Italian government has recently declared its withdrawal from the Energy Charter Treaty ("ECT"). When explaining the reasons for the withdrawal from the treaty, the Italian government mentioned the cost cutting of its membership in international organizations due to the most recent budget restrictions (withdrawing from the ECT will save Italy around € 370.000 annually). Despite this, a more reasonable justification for the decision to quit the ECT, is that Italy in fact fears much larger bills. Namely, under the ECT, solar power investors might sue the Italian state for enacting the so-called "Spalma incentive" decree, which was discussed in large detail in the previous chapters. It might seem as a not so serious matter, but this decree actually greatly impacted around 8.600 investors, which have already planned and relied on their investments.[179]

Although Italy has decided to withdraw from the ECT, it is not Italy's decision to make weather investors still choose to sue against it. This is made possible by the incorporated "sunset clause" (Article 47(3)), which prolongs the effects of the treaty for 20 years after the exit from a contracting party. The 'sunset clause' allows investors to sue a state even if this one is no longer a party to the ECT. For example, Italy today is still prosecuted by the British oil and gas company "Rockhopper", following its "*morato- riumonoffshore*" drilling.[180]

A lot of experts and experienced lawyers from the field have analyzed and explained the positive and negative effects of the inevitable "sunset clause" in the ECT. So, during one interview the ECT secretary-general Urban Rusnák refers to the modernised treaty as to "*a complement to the*

[178] ANALYSIS > "The controversy behind the Energy Charter Treaty reforms", By ELENA SÁNCHEZ NICOLÁS, BRUSSELS, 5. SEP 2019, available at https://euobserver.com/energy/145839 ;
[179] "Italy withdraws from Energy Charter Treaty", May 6th , Author: Gaetano Iorio Fiorelli, available at https://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507/ ;
[180] INVESTMENT AND CLIMATE > "REFORMING THE ENERGY CHARTER TREATY" > POLICY BRIEF, 8 MAY 2020, available at https://www.cncd.be/policy-brief-reforming-the-energy-charter-treaty ;

Paris Agreement". It is his personal standpoint that by protecting the trade and transit of renewable energy, the ECT will ensure the respecting of climate commitments.[181]

One of the most important aspects of the modernization of the RCT is the EU's aim to improve the articulation of "*the right of countries to regulate to achieve legitimate policy objectives*" and "*full integration of objectives relating to the fight against climate change*". Contrary to this

"The internal rules of negotiation within the ECT, where amendments must be adopted unanimously, including by countries largely dependent on the extractive economy, would seem to constitute a less than favourable terrain for reaching a more virtuous agreement. The fact that ending protections for fossil fuel investments is not on the negotiating table is further cause for doubt." Argues Benjamin Hourticq in his article "How the little-known Energy Charter Treaty is holding environmental policy hostage".[182]

Acording to Roux of Friends of the Earth

"We should expect nothing from this modernisation. Decisions are being made in favour of big business, contrary to the challenges we currently face." Saheb has no doubt that "the negotiations will fail, it's a fool's errand".

This really opens the whole argument about the theories that the modernization of the ECT, does not in fact live up to the promise of making the ECT climate-friendly.

"Two of the most obvious and effective reform options are missing from the list of topics that will be discussed: firstly, the exclusion of carbon-intensive energy investments from the scope of the ECT, and secondly, the exclusion of investor-state dispute settlement or ISDS. Both options would prevent polluters from challenging climate change mitigation actions by states outside of their national legal systems, limiting the risk of a chilling effect on climate action."[183]

Furthermore, in order to contain climate change, many experts recommend and suggest leaving the agreement. As Saheb[184] puts it:

"Europe cannot announce an end to fossil fuel subsidies by the European Investment Bank and pass an European Climate Law while at the same time protecting fossil fuels."

The statement of Dupré that

"There is nothing stopping this treaty from being terminated. A solid core of outgoing countries could sign an agreement between themselves to put an end to the sunset clause. But we have to act quickly, time is running out, investments continue and we are wasting time that could be spent achieving climate objectives."

[181] Equal Times > 7th September 2020 > "How the little-known Energy Charter Treaty is holding environmental policy hostage", by Benjamin Hourticq, available at https://www.bilaterals.org/?how-the-little-known-energy ;
[182] Dated 7th September 2020, available at https://www.bilaterals.org/?how-the-little-known-energy ;
[183] https://energy-charter-dirty-secrets.org/#ect-modernisation ;
[184] https://www.euractiv.com/authors/yamina-saheb/ ;

Really changes the perspective of the "importance" of the ECT and the fact that countries are actually able to take the situation in their own hands and make vital decisions jointly. Some valuable information regarding this is to be aware that the time from announcement to effective withdrawal from the ECT is one year.

Additionally, Roux of Amis de la Terre[185] on one occasion stated that

"A lot of people, even within many climate-focused NGOs, don't know about this treaty,". Real educational work has to be done."

Which in fact presents a much different picture of what has been previously known about how big role the ECT plays for investors and countries. The global argument that the ECT does not provide the needed security and protection, changes the entire perspective of the future of this treaty, especially because of how it tends to change the investors' points of view. It changes the perception of both previous and prospective investors and it is evident that the power to make a changes lies in the investors themselves. When the time comes and as it seems at the moment the time will come sooner than expected, the countries will respect whatever the investors decide, as the possible revenues and economic prosperity depends on the investors' will to invest.

Revenues aside, another significant point of view is that policymakers need to be aware of what they implement and vouch for. For example

"When the French Minister of the Economy says that he wants the public investment bank to stop subsidising fossil fuels, does he know that this runs contrary to the ECT?" This was once questioned by Roux of Amis de la Terre.

On the other side, all these allegations for the ECT not serving its purpose were presented by the European Commission with the following statement:

"The ECT's investment protection provisions have not been updated since the 1990s and are now outdated compared to the new standards of the EU's reformed approach on investment policy. Similarly, there is a growing perception that the ECT does not sufficiently meet today's climate policy commitments."

Later on, the 3 main aims of the modernization proposal are explained. Namely, first goal of the ECT' modernization involves bringing the ECT's provisions on investment protection in line with those of agreements, recently concluded by the EU and its Member States. The second one refers to ensuring that the ECT better reflects climate change and clean energy transition goals and facilitates a transition to a low-carbon, more digital and consumer-centric energy system, thus contributing to the objectives of the Paris Agreement and our decarbonisation ambition. The third goal is about reforming the ECT's investor-to-state dispute settlement mechanism in line with the EU's work in the ongoing multilateral reform process in the United Nations Commission on International Trade Law (UNCITRAL).[186]

[185] https://en.wikipedia.org/wiki/Friends_of_the_Earth_%E2%80%93_France ;

[186] "Commission presents EU proposal for modernising Energy Charter Treaty", Brussels, 27th of May 2020, available at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2148 ;

After concluding several rounds of talks with EU member states, the Commission has additionally proposed an updated modernization agenda. The aim would now be strengthening the provisions related to the ISDS mechanism. The update of the agenda was followed up with the following statement:

"Following requests by several member states, the text now includes a new provision explicitly referring to the future application of a Multilateral Investment Court"

Although the EU Commission updated the initial proposal with much eagerness, the global opinion of activists did not actually change. The point of view of the public is that the possible new provisions on dispute settlement would bring no value in the practice. The argumentation behind this comes from the fact that the ECT would continue to allow investors to ask for serious amounts in compensation.

One of the most relevant criticism towards the revised proposal is that the revision does not include any updates on the FET standard nor the Legitimate Expectations and Most Favoured Nations (MFN). Meaning it does not refer to possible ways for limiting the far-reaching investor rights in relation to these principles.[187]

Furthermore, another crucial argument of the public is the about the alignment of the ECT with the Paris agreement. Namely, this would be possible only if fossil fuels are no longer protected by the Treaty. Despite this, the EU negotiating proposal does not include "phasing-out" fossil fuels from the investment protection provisions of the ECT. On the contrary, the EU negotiating position argues that the

"EU will table a proposal at the appropriate time in the course of the negotiations on the scope of energy investment to be protected by the ECT in the future."

Bottom line, the general opinion and forecast of the public suggests that even though this topic would have been negotiated during the first round of the negotiations, it will not be included in the following rounds. After all it seems that the "modernized" ECT will not be Paris compliant, as it was primarily expected.

The reasoning behind this is easy to explain, as countries like Azerbaijan, Turkmenistan, Kazakhstan, Mongolia and Uzbekistan form a group of countries that highly benefit from the fossil fuels. This benefit is largely shown in their higher GDPs and this is why it is unlikely for them to vote for a lower fossil fuel usage, under the ECT. Another scenario which would probably never happen is Japan voting for the phase-out of fossil fuels, since this country is a leader in coal investments and supports coal investments in developing countries.[188]

In conclusion, I would like to point out the general opinion on the collective withdrawal of the EU and its Member States from the ECT. Once again it is all about the "sunset clause", as many

[187]" EU plans to reform Energy Charter Treaty falling short", By Frédéric Simon, Apr 30th , 2020, available at https://www.euractiv.com/section/energy/news/eu-plans-to-reform-energy-charter-treaty-falling-short-activists-say/ ;

[188] "Energy Charter Treaty reform: Failure in the first round", By Yamina Saheb, Jul 15th , 2020, available at https://www.euractiv.com/section/energy/opinion/energy-charter-treaty-reform-failure-in-the-first-round/ ;

believe that along the withdrawal an agreement to end the ECT sunset clause should be enacted. This is expected, since the "sunset clause" prolongs the provisions for twenty years, which is a long period of time during which countries might have to pay large amounts of money to investors.

Another important point is that more than 70% of foreign investment in the energy sector in EU countries are investments between EU members. In terms of costs this means that the costs to end the EU participation to the ECT would be much lower than the amounts spent at the moment.[189]

All in all, there are a lot of different views and arguments when it comes to the modernization of the ECT. Some support it as they believe it hasn't been renewed in a long time and that change would bring positive outcomes. Others see the idea for modernization as a barrier to the climate goals of the EU and also the goals of the current German Presidency. So, it seems that maybe the ECT has had its moment of glory and that the future will bring different means for investor protection.

[189] "Energy Charter Treaty reform: Failure in the first round", By Yamina Saheb, Jul 15th , 2020, available at https://www.euractiv.com/section/energy/opinion/energy-charter-treaty-reform-failure-in-the-first-round/ ;

4.4. The end of Intra-EU Bilateral investment treaties

Another event which is greatly impacting the future of the ECT and of energy investments in general is the termination of the intra-EU bilateral investment treaties (BITs). The termination of the BUTs has been an important issue since the end of 2019, as EU Member States reached an agreement on a plurilateral treaty, which was triggered by the legal consequences of the judgment of the Court of Justice in the "Achmea" case. This case and how its outcome affected the energy investment protection was discussed in great detail in the previous chapters of this thesis, so it is clear why it had a huge impact in the European Union and why the member states committed to terminate their intra-EU BITs.

Signatories of the termination agreement are Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. It is no surprise that the termination agreement also includes the European Court of Justice judgement regarding "Achmea case", from March 2018. Precisely because this was when the Court found that investor-State arbitration clauses in intra-EU bilateral investment treaties ("intra-EU BITs") are incompatible with the EU Treaties.[190] Namely, the investor-state arbitration provision included in the Slovakia-Netherlands BIT was found to be incompatible with the EU law and this resulted with deprivation of the arbitration provisions in this intra-EU BIT[191]. The termination agreement[192] entered into force on 29 August 2020.

The main target of intra-EU BITs Termination Agreement is to make sure that the arbitration provisions contained in intra-EU BITs

"Cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State of the European Union."[193]

Important to point out is that the Termination Agreement has the effect of

"Terminating intra-EU BITs upon its entry into force in the relevant EU Member States and extinguishing any sunset clauses contained in those BITS so that they do not extend treaty protections beyond the date of termination."

[190] "EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties", first published on 05 May 2020, Author: Financial Stability, Financial Services and Capital Markets Union, Topics: Banking and financial services, available at https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en ;

[191] Slovak Republic v. Achmea B.V., CJEU Case C-284/16, paras. 58-60, available at http://curia.europa.eu/juris/liste.jsf?num=C-284/16 ;

[192] "AGREEMENT for the termination of Bilateral Investment Treaties between the Member States of the European Union", Official Journal of the European Union, 29.5.2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01) ;

[193] Termination Agreement, Preamble, fifth recital, available at at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01) ;

This plays a really significant role, as countries will not have to deal with any possible treaty consequences, unlike countries leaving the ECT. The fact that the sunset clauses would not bring any effect after that termination, provides security for the countries of the EU. Nevertheless, there are still exceptions for those investors considering potential investment treaty claims against any EU Member State.

It has to be made clear that the Termination Agreement specifically clarifies that it does not apply to the Energy Charter Treaty. Another point worth mentioning is that as the United Kingdom has recently exited the EU and this causes different implications from the Termination Agreement does. Namely, the agreement does not affect the BITs between the United Kingdom and any EU Member State in any way. Similarly, the Termination Agreement has again no impact on BITs between EU Member States and other countries outside the EU.[194]

The Termination Agreement provides specific categorization of the arbitration proceedings into three groups, based on the status of the proceedings on the date of March 6th, 2018, which is the date of the "Achmea judgment". This is a very pragmatic division of the past and remaining active cases and it is as follows:

- *"Concluded Arbitration Proceedings"*
- *"New Arbitration Proceedings"*
- *"Pending Arbitration Proceedings"*

Shortly, arbitration proceedings which were concluded are defined as those that ended with a settlement agreement or with a final award issued prior to March 6, 2018 and are not to be reopened. Secondly, new arbitration proceedings are those initiated on or after March 6, 2018 with a distinction that arbitration clauses will not be used as basis for new arbitration proceedings. Thirdly, as pending arbitrations, are described those initiated prior to and pending as of March 6, 2018. This group of proceedings is in a different position, as the Termination Agreement offers an option referred to as *"transition mechanism"*. This mechanism would be applied as a type of a settlement negotiation method.[195]

"In terms of procedure, either the investor or the State party to the arbitration has the possibility to request the other party to enter into a so-called "structured dialogue" for an out-of-court settlement of the dispute. This option is available to the parties on the condition that the arbitral tribunal grants the investor's request to stay the arbitration, or that the investor undertakes not to seek the enforcement of the award already rendered (if any). Importantly, if the structured

[194] GLOBAL ARBITRATION, TRADE AND ADVOCACY UPDATE, "Termination of Intra-EU Bilateral Investment Treaties – What's Next for Investor Claims?", May 12th 2020, available at https://www.sidley.com/en/insights/newsupdates/2020/05/termination-of-intraeu-bilateral-investment-treaties-whats-next-for-investor-claims ;

[195] "Termination of Intra-EU Bilateral Investment Treaties", available at https://www.sidley.com/en/insights/newsupdates/2020/05/termination-of-intraeu-bilateral-investment-treaties-whats-next-for-investor-claims ;

dialogue is unsuccessful, the parties to the arbitration may resume the arbitration or enforcement actions, as the case may be."[196]

The implementation of this so called "amicable out-of-court" settlement is conducted by an *impartial "facilitator"*, chosen by the parties. In a situation where the parties cannot agree on a facilitator, one of the parties may ask the Director General of the Legal Service of the European Commission to designate a former Member of the CJEU and an appropriate person will be designated, after a consultation with each party is initiated.

This settlement procedure is with a strong focus on the EU law, which is why "*the negotiations have to be conducted with due consideration of the relevant rulings of the CJEU and domestic courts, and of the case-law of the CJEU on the extent of reparations for damages under EU law. It bears mention that the parties may also agree on any other appropriate resolution of the dispute, provided that the solution complies with EU law."* As it is explained by András Nemescsói, Maxime Desplats and Zsófia Deli.

In order to apply the abovementioned mechanism, a request needs to be filed by the investor within six months from the entry into force of the Termination Agreement for the parties to the BIT. It has to be noted that the Termination Agreement cannot guarantee a resolution of the dispute through the mechanism.

Since this option does not promise any possible directions for the resolution of the ongoing dispute, another possibility offered with the Termination Agreement is for investors to submit pending disputes to domestic courts in the EU. This provides more credibility when tackled form the investors' point of view, because of the fact that this option is allowed even if the time limit for approaching a domestic court has expired. "*Recourse to the competent national court can be used by the investor to make a claim based on national or EU law. Hence, much like in the case of the structure dialogue, the investor may not invoke the violation of the (by then terminated) BIT or international law in the broader sense before the State party's national court."*

The group of disputes that include the newly commenced arbitration proceedings as well as the pending disputes are required by the Termination Agreement that the EU Member States are to inform the relevant arbitral tribunals about the legal consequences of the "Achmea judgment".[197]

"The Termination Agreement also directs EU Member States to ask domestic courts, including those in third countries, to set aside, annul, or refrain from enforcing awards under intra-EU BITs. The Termination Agreement includes a draft text in Annex C, which Member States are to use for informing arbitral tribunals and domestic courts of the legal consequences of "Achmea", says Sidley Austin LLP in their article on "Termination of Intra-EU Bilateral Investment

[196] "The end of Intra-EU BITs. Now what? ",4th of August 2020, By: András Nemescsói, Maxime Desplats and Zsófia Deli, available at https://www.dlapiper.com/en/czech/insights/publications/2020/08/the-end-of-intra-eu-bits-now-what/ ;

[197] GLOBAL ARBITRATION, TRADE AND ADVOCACY UPDATE, "Termination of Intra-EU Bilateral Investment Treaties – What's Next for Investor Claims?", May 12th 2020, available at https://www.sidley.com/en/insights/newsupdates/2020/05/termination-of-intraeu-bilateral-investment-treaties-whats-next-for-investor-claims ;

Treaties", published in the annual *GLOBAL ARBITRATION, TRADE AND ADVOCACY UPDATE*.

The most radical outcome of the Termination Agreement is included in Articles 2 and 3, where the termination of the sunset clauses in BITs is presented. As well as Articles 7 and 5, which enact the termination of all arbitrations under them, initiated after the "Achmea judgment". The termination of both matters provokes an interference with vested rights of third parties and therefore arises questions of validity and legal security, especially in the area of the international law in general.[198]

The justification behind this solution, is explained by claiming that the inapplicability or invalidity between the EU law and the BITs should lead to retroactivity of all cases from the date on which the last of the parties to the intra-EU BIT became a member state. "*For example, the arbitration clause in the Germany-Croatia BIT will have been invalid since July 1, 2013, date on which Croatia officially joined the EU. Pursuant to Articles 2 and 3 of the Termination Agreement, all sunset clauses are also terminated "and shall not produce legal effects.""*"[199]

There is a significant number of experts that believe the Termination Agreement will cause a lot of relevant dilemmas, which might be hard to handle. Firstly, how will the relevant arbitral tribunals evaluate the Termination Agreement? In the past tribunals have been consistent in rejecting arguments in relation to state consent, as well as on the basis of the "Achmea judgement".[200]

Despite this, the Termination Agreement could be seen as a *"new fact"* in pending or new arbitrations, which was previously unknown for the party, which might be able to mitigate the justification of new or belated jurisdictional objections. Another difficulty that tribunals will have to be deal with is the evident retroactive effect of the Termination Agreement and its relation with the validity of arbitration clauses, which claims the opposite of the basic legal principle of the non-retroactivity of treaties. Secondly, it has to be made clear for all affected parties that they may pursue remedies in front of EU national courts, only by invoking breaches

[198] INTERNATIONAL LAW, INTRA-EU BITS, INTRA-EU INVESTMENT ARBITRATION, INTRA-EU ISDS, INVESTMENT ARBITRATION, SUNSET CLAUSES, "Termination of Intra-EU BITs: Commission and Most Member States Testing the Principle of Good Faith under International Law", by Laura Halonen (WAGNER Arbitration), May 13th , 2020, available at http://arbitrationblog.kluwerarbitration.com/2020/05/13/termination-of-intra-eu-bits-commission-and-most-member-states-testing-the-principle-of-good-faith-under-international-law/ ;

[199] "Sun to set on intra-EU Bilateral Investment Treaties", Author: Alexa Biscaro , Canada, Publication, June 12th 2020, available at https://www.nortonrosefulbright.com/en-ca/knowledge/publications/de736178/sun-to-set-on-intra-eu-bilateral-investment-treaties ;

[200] The decision on jurisdiction for the "Adamakopoulos et al. v. Cyprus matter", the only occasion of a tribunal member declining jurisdiction on the basis of an intra-EU objection, February 7th , 2020, available at https://www.iareporter.com/articles/analysis-intra-eu-nature-of-claims-should-have-led-tribunal-to-decline-jurisdiction-in-adamakopoulos-v-cyprus-according-to-dissenting-arbitrator-marcelo-kohen/ ;

of EU or national law. This means that no claims based on investment protections granted under the BIT or based on international law will be accepted by the tribunals.[201]

Alexa Biscaro[202] tackles the complicated situation of the ongoing disputes after the promulgation of the Termination Agreement and explains it as follows:

"Most importantly, investors need to keep in mind that even if they clear the first hurdles and obtain an award against a contracting state, it may become increasingly difficult, not to say impossible to enforce such an award. While third states are unlikely to react positively to being asked not to recognize or enforce otherwise valid arbitral awards (in breach of their own obligations under the New York and ICSID Conventions), the problem of actually collecting from EU member states will remain thorny. As we have seen through the "Micula saga", the European Commission will aggressively pursue any member state it sees complying with an "incompatible" award and may even extend sanctions to the investors themselves.[203] If the only assets against which an award could be enforced are located in the territory of an EU member state, any victory before the arbitral tribunal may thus prove to be theoretical at best."

The above explained argumentation gives a clear picture of what the Termination Agreement of the BITs would cause and how it might be interpreted by all relevant parties. The whole idea for the termination of the BITs may come from solid grounds and relevant reasons are definitely presented along, but its implementation in the practice is still to be questioned. It is evident that many gaps are still present and new will arise. Time will show how the practice will develop in these aspects and how the future implementation of the Termination agreement will affect every relevant party.

[201] "Sun to set on intra-EU Bilateral Investment Treaties", Author: Alexa Biscaro, Canada, June 12th , 2020, available at https://www.nortonrosefulbright.com/en-ca/knowledge/publications/de736178/sun-to-set-on-intra-eu-bilateral-investment-treaties ;

[202] Senior Associate at Norton Rose Fulbright Canada LLP, https://www.nortonrosefulbright.com/en-ca/people/124567 ;

[203] *In Micula and Others v. Romania, ICSID ARB/05/20, issued in December 2013, Romania was ordered to pay a sum equal to EUR 178 million. In a decision dated March 30, 2015, the European Commission concluded that to comply with this award would constitute a violation of EU law against illegal state aid. Romania was ordered not to pay out any amounts to the claimants and to recover any amounts previously disbursed. The claimants were deemed jointly liable to repay any so-called illegal state aid received from Romania. On June 18, 2019, the General Court of the European Union held that the European Commission's decision of March 2015 was invalid and annulled. The European Commission has since appealed to the CJEU, where the case remains pending.*

Forecast for the future

The past couple of years have brought immense change and huge developments in the energy sector. Possibilities have increased and the interest for investing in the RES and in energy sources in general has surely grown, but complications were also created along the way. The usage of the ECT has changed the chain of events and the modernization of the Charter hasn't done much to improve the initial position of the parties affected. The termination of the BITs has also developed different scenarios and possible outcomes for the already commenced disputes, so it has become much harder to predict what is to follow and how are the dilemmas going to be resolved.

5.1. Investment protection and good legislation

This thesis has documented in many examples what it takes to ensure that an energy investment is well protected. Through the examples of breached investments in countries such as Spain and the Czech Republic, we have concluded that in recent years the importance of ensuring the legal protection of an investment has been crucial. Investing in renewables and in energy sources in general is a serious endeavor, which requires robust research and afterwards protection.

The law firm *Baker McKenzie* provides steps that every future or even present energy investor has to take into consideration, before making the final decision.

"Like tax planning, investment protection planning is an important consideration at the time of making an investment. Issues to consider include:

- *is there an investment treaty between the State of the investor and the State where the investment is being made?*
- *if so, does the investment treaty provide the protections referred to above?*
- *does the investment treaty provide for ISDS, i.e. for claims to be brought in international arbitration?*
  if no
- *is there another state through which the investment can be made to ensure such protections are available?*

Even if you have already made your investment, you may want to consider restructuring that investment to ensure protections are available. Restructuring may be effective before the Host State makes regulatory changes but may not be effective if the restructuring is carried out after the regulatory changes have been made."[204]

[204] "Renewable Energy: Protection of Investments Through Arbitration", dated March 8th, 2020, available at https://www.bakermckenzie.com/en/insight/publications/2020/03/renewable-energy-investments ;

Furthermore, investment protection and legal protection in general is relevant not only for the investors themselves, but for any country, which tends to attract companies or individuals that have an interest in investing in a foreign country. Legal security and risk reduction should be many of the government's most important roles in promoting private foreign investments in the energy sector. This is especially important for countries that are not that familiar with the possibilities offered by the energy sector, so by reducing the number of potential "unknowns" investors might be encouraged to transfer their resources in new potential energy hubs.

It is no surprise that the Government of all countries can take a leadership role in this so called risk reduction and it can be implemented in many different situations.

Areas where it may be appropriate for the government to play a role include:

- *national energy planning;*
- *resource evaluation;*
- *market evaluation;*
- *least-cost-planning;*
- *providing access to expertise;*
- *eliminating obstacles to equitable markets;*
- *project oversight and evaluation; and*
- *assistance in providing access to capital and financing.*

One of the challenges in creating public-private partnerships[205] is for governments to create an appropriate environment to attract private investment. When governments act in their sovereign role as guardians of the public welfare, they are essentially providers of public goods and services, which in turn may be delivered through public or private channels. When governments implement policy decisions and resolve political conflicts through the legislative and regulatory process, their role is objectively to carry out the will of the body politic.[206]

An aspect that cannot be disregarded when discussing investment protection and good legislation related to them are the policy goals and their actual implementation. Robust energy protection policies and good governance are indicators that governments are prepared to create monitoring mechanisms, which would secure the continuity and transparency of these goals. Contrary to this, a regulatory framework that is not entirely and properly implemented in practice can cause only negative consequences not only for the investors and for the reputation of the government,

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[205] *"A public–private partnership (PPP, 3P, or P3) is a cooperative arrangement between two or more public and private sectors, typically of a long-term nature. In other words, it involves government(s) and business (es) that work together to complete a project and/or to provide services to the population. They are an example of multistakeholder governance. Public–private partnerships have been implemented in multiple countries, are primarily used for infrastructure projects, such as the building and equipping of schools, hospitals, transport systems, and water and sewerage systems.", available at https://en.wikipedia.org/wiki/Public%E2%80%93private_partnership ;*

[206] "The Renewable Energy Policy Manual", U.S. Export Council for Renewable Energy
A. John Armstrong, Esq. & Dr. Jan Hamrin, CHAPTER 4. GOVERNMENT'S ROLE IN THE ELECTRICITY SECTOR, available at https://www.oas.org/dsd/publications/Unit/oea79e/ch08.htm ;

but also for the economy of the country. Surely this would create a destabilizing picture for the private sector in general and later it would discourage foreign investors.

"This sub-indicator focuses on monitoring and evaluating the implementation of the energy goals. Monitoring provides an opportunity to assess the progress towards meeting energy investment objectives and identifying potential gaps. Furthermore, it allows governments to ensure that policies are periodically updated and amended when necessary. In this context, the establishment of an independent and competent authority with the appropriate monitoring and reporting mechanisms is critical. It gives investors the confidence that policies will be evaluated and improved to achieve the desired outcomes and will not be subject to arbitrary modifications."[207]

5.2. The future of the energy investments

Forecasting what is to come in the energy sector is rather complicated, as new developments follow nonstop. In recent years, a number of (developing states) have been affected by the events occurring after the termination of the bilateral investment treaties (BITs) and by the decision for "modernization" of the Energy Charter Treaty. One thing that can be argued with high level of certainty is that the investing in emerging markets will suffer a huge impact, as a lot of skepticism arose after what has happened. Investors have also raised concerns regarding the legitimacy of investor-state dispute settlement (ISDS).[208]

Despite all the skepticism and insecurity, it is evident that disputes have been commenced in large numbers, which means that still there is a number of investors who would put their future in the hands of the relevant tribunals. For instance, although the credibility and stability of the ECT has been attacked on several occasions, it cannot remain unseen that the number of cases initiated under the treaty has not declined, in contrast to the previous expectations.

Furthermore, the attorney Neil Q. Miller[209] had a point when he argued that

"as large numbers of state companies, NOCs or otherwise, spread their wings outside of their home states and look to invest and participate in international markets, the possibilities for a wider range of disputes cannot be ruled out. As always in the energy sector, an uncertain political landscape combined with cross-border investment in energy projects and fluctuating

[207] "Energy investment risk assessment 2018", SUB-INDICATOR: ROBUSTNESS OF POLICY GOALS AND COMMITMENTS, available at https://www.energycharter.org/fileadmin/DocumentsMedia/Other_Publications/EIRA_2018_V08.pdf ;
[208] "Global overview of dispute trends in the energy sector", Author: Neil Q. Miller, Global Publication, October 2018, available at https://www.nortonrosefulbright.com/en/knowledge/publications/45e07228/global-overview-of-dispute-trends-in-the-energy-sector ;
[209] Partner at "Norton Rose Fulbright LLP", https://www.nortonrosefulbright.com/en/people/121203 ;

prices creates the model ecosystem for a whole spectrum of energy disputes to emerge globally, with arbitration remaining a key method of dispute resolution."

Disputes put aside, the investors are also affected by the transition to renewable energy resources, which has gradually taken over during the last 10 years.

"*ICC has seen a steady increase in its caseload in the energy sector, with the registration of 155 new energy cases, which represented 19% of its caseload in 2017. The most traditional of these disputes concern price reviews caused in first instance by (sharp) price fluctuations in oil and gas prices or by the introduction of government legislation which adversely affects the market value of fossil-fuel commodities. Conversely, renewable energy resources are also seeing an increase in legislation regulating the trade and marketing of hydrogen-fuels, synthetic fuels and liquid fuels."*[210]

Moreover, according to Pierre Duprey and Roland Ziade the energy transition has also developed a connection with the technological advances, which offer traditional energy commodities to be converted into more eco-friendly transport and storage applications as well as alternative commodities.

"*Current technologies make it possible for oil and (liquified) gas to be converted for electrified transportation, hydrogen-based storage facilities and battery power stations. The transition from traditional transportation and storage contracts, which are typically concluded for a long-term duration, is likely to give rise to new disputes. Market players already face increased pressure to adapt to the requirements of the renewable energy market and will, just as GPFG, wish to mitigate the risk of the increasingly volatile oil and gas prices. Knowledge of these sectors and new technologies will be key for arbitration lawyers to anticipate their clients' needs in these future disputes."*[211]

Considering the argumentation presented above it can be concluded that the challenges that the future of energy investing brings may change the established practice characteristic for the past. The developments regarding energy transition are already impacting the sector and will with surety provoke a serious number of distinctive approaches for many aspects of the investments. Technology and information availability create conditions where everyone (investors, states, tribunals…) has to act immediately, since many aspects are developing at a steady pace. All in all, dispute resolution mechanisms will without doubt have to meet the demands of the energy sector and of what its future developments will bring.

[210] "Arbitration and meeting the demands of the future energy sector", Guest blog, Paris, France, 01/04/2019, https://iccwbo.org/media-wall/news-speeches/arbitration-and-meeting-the-demands-of-the-future-energy-sector/ ;

[211] Pierre Duprey and Roland Ziade of Linklaters about the implications of the global energy transition on international arbitration, available at https://iccwbo.org/media-wall/news-speeches/arbitration-and-meeting-the-demands-of-the-future-energy-sector/ ;

Conclusion

This master thesis shows the different approaches of various jurisdictions when assessing energy investment disputes. The topic is focused on the effects brought by incentivizing long-term investments in the energy sector and the possible 'scenarios' that could follow as an outcome. As it presents the possible results when resolving an investment dispute, it provides a detailed analysis of all actions taken by the relevant parties, which are involved.

The global objective is to describe how the renewable energy sector usually depends on large, upfront investments, which take long period of time until the invested amount is returned. Because of this, the thesis aims to point out the how important role is played by the investor before deciding where the investment will take place. The paper describes in great detail how cautious investors need to be when choosing to implement an energy project in a foreign country. The paper also closely observes the impact and the meaning of protection from unwarranted government policy changes that could amount to expropriation or even to a denial of fair and equitable treatment. An important overview of the investments protection is given by gradually explaining the role of the Energy Charter Treaty (ECT) and the legal protection it offers. The role of the Treaty is briefly discussed as the ECT provides an international legal framework for energy cooperation, particularly in Europe. Since the past decade saw a significantly increased level of investment, including foreign investment as a result of international initiatives on the development of alternative energy sources, a significant number of countries have implemented government subsidies and support schemes to encourage investment in renewable energy. These measures were designed to encourage renewable resources usage and to gradually decrease the continued use of fossil fuels.

This paper discusses the cases of energy investment disputes in four countries (Italy, Germany, Spain and the Czech Republic) in a way that it shows the both sides of the dispute, by explaining the reasons for breaching in an unbiased setting. The case analysis offers a wide range of examples where investors have been put in difficult positions and how they managed to prove their statements. A broad picture is shown as all various scenarios are discussed by giving different perspectives from several experts and law practitioners.

Finally, the thesis focuses on the possible developments that the energy sector might need to face in near future. After the most significant events of the past investment disputes are examined, the paper turns towards what is to come. The discussion in this part is focused on the Energy Charter Treaty (ECT) modernization and on the termination of Bilateral Investment Treaties (BITs), as these two aspects are essential for all possible future outcomes in this area.

The forecast for the future is given from various points of view and the thesis concludes that the course of the energy investments disputes will need to adapt to the recent developments and tackle strategies to overcome them. All in all, everyone can agree on the following, the future of the energy sector holds challenges that are not to be underestimated and investors' protection has never been more at stake.

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