Investment Arbitration and Climate Change

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Edited by

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Wolters Kluwer

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: lrs-sales@wolterskluwer.com
Website: www.wolterskluwer.com/en/solutions/kluwerlawinternational

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
920 Links Avenue
Landisville, PA 17538
United States of America
E-mail: customer.service@wolterskluwer.com

This book was made possible with financing from the ICC Sweden CN70 Foundation.

ISBN 978-94-035-4207-2

e-Book: ISBN 978-94-035-4217-1
web-PDF: ISBN 978-94-035-4227-0

Printed in the Netherlands.

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Summary of Contents

Table of Contents

CHAPTER 11

The Role and Relevance of Investment Treaties in Promoting Renewable Energy Investments

Ladan Mehranvar & Lisa Sachs[*]

§11.01 INTRODUCTION

Achieving our global goals of universal access to clean energy and averting a climate crisis will require a mass scale-up of investments into renewable energy infrastructure, redirecting capital from carbon-intensive energy and transport systems. The International Renewable Energy Agency estimates that the transformation of the energy system alone will need cumulative investments to reach USD 110 trillion by 2050 to keep the rise in global temperatures to well below 2°C and towards 1.5°C during this century. Of that amount, over 80% will need to be invested in renewables, energy efficiency, end-use electrification, and power grids and flexibility.[1]

The private sector and private finance will play an important role in scaling renewable energy generation, transmission, and storage. Much of this investment will be cross-border, as capital and technology must flow to developing and emerging

* This chapter draws heavily on Ladan Mehranvar and Sunayana Sasmal, "The Role of Investment Treaties and Investor State Dispute Settlement in Renewable Energy Investments" (New York: Columbia Center on Sustainable Investment (CCSI), December 2022), https://ccsi.columbia.edu/sites/default/files/content/ccsi-investment-treaties-isds-renewable-energy.pdf. The authors are grateful to the following reviewers for their helpful comments and guidance on this paper: Professor Muthucumaraswamy Sornarajah, Professor Federico Ortino, Lucía Bárcena Menéndez, Helionor De Anzizu, Simon Batifort, and Lea Di Salvatore; and to the following research interns and fellows for their help going through the various Spanish renewables cases and government royal decrees: Sunayana Sasmal, Ana Toimil, Nikola Đorđević, and Maximilien Boyne.

1. International Renewable Energy Agency, "Global Renewables Outlook: Energy Transformation 2050" (April 2020) at p. 34, https://www.irena.org/publications/2020/Apr/Global-Renewables-Outlook-2020.

economies to bridge the widening regional differences in the rate and amount of renewable energy investments. Accordingly, policymakers across a range of government agencies and functions, as well as development finance institutions and other international organizations, are identifying the key constraints to renewable energy investments and developing policies to accelerate the necessary finance. Understanding the constraints and drivers of investments in renewable energy investments is also important for negotiators of international investment agreements (IIAs or investment treaties), like the Energy Charter Treaty (ECT).

Some proponents of the investment treaty system argue that investment treaties remain a critical and necessary tool for promoting and protecting investments in the renewable energy sectors.[2] However, the evidence does not support that assertion. Recent research by the authors of this chapter on the political, economic, financial and legal drivers of investment in renewable energy supports the mounting evidence that investment treaties are neither necessary nor effective at increasing investments.[3]

Moreover, the investor-state dispute settlement mechanism (ISDS) embedded in most investment treaties is hostile to the measures that states should be taking to advance their climate goals. In a rapidly changing climate and variable economic context, governments need to have the flexibility and agility to quickly adapt how public funds are spent in order to encourage a just energy transition.[4] The recent COVID-19 pandemic and financial crises are indicative of how quickly contexts can evolve and the necessity for governments to review and modify their policies in the face of such changes.[5] Governments also need every policy lever to realize the substantial and urgent climate goals, including transforming our fossil-fuel-based economy to one based on renewable energy and green fuels. Both phasing out fossil fuels and scaling

2. International Energy Charter, "Communication of the Secretary General on the Modernisation of the Energy Charter Treaty" (July 1, 2022), https://tinyurl.com/2v8put7e; Jay Newman and Richard Carty, "Nobody expects the Spanish arbitration: Playing dirty with clean energy subsidies" (February 2, 2023), https://on.ft.com/3YsJc6A.
3. *See* Mithatcan Aydos, Perrine Toledano, Martin Dietrich Brauch, Ladan Mehranvar, Theodoros Iliopoulos, and Sunayana Sasmal, "Scaling Investment in Renewable Energy Generation to Achieve Sustainable Development Goals 7 (Affordable and Clean Energy) and 13 (Climate Action) and the Paris Agreement: Roadblocks and Drivers" (New York: Columbia Center on Sustainable Investment (CCSI), December 2022), https://ccsi.columbia.edu/content/renewable-energy-investment-roadblocks-drivers (Aydos et al., 2022).
4. It is important to note here that not only is it within states' sovereign power to adapt their laws and policies to changing circumstances, but the majority of states have also assumed obligations to respect, protect and fulfill human rights under international human rights treaties. In particular, "the obligation to *fulfil* entails that States must take affirmative steps to facilitate the enjoyment of basic human rights [like the right to a healthy environment and to an adequate standard of living], including through legislative and regulatory action. Introducing new regulations to promote human rights is an important aspect of States' duty to fulfill human rights." For a more detailed discussion on the relevance and importance of states' international human rights obligations as they relate to climate change and a just transition, *see* Helionor de Anzizu and Nikki Reisch, "The Duty to Regulate Fossil Fuels, Investor-State Disputes, and the Climate Emergency: A Human Rights Perspective," in Anja Ipp and Annette Magnusson (eds), *Investment Arbitration and Climate Change* (pp. 179-206).
5. Nikos Braoudakis, Clémentine Baldon, Sara Lickel, and Mathilde Dupré, "Protecting Renewables with the Energy Charter Treaty: A False Good Idea," Veblen Institute for Economic Reforms (July 2021) at p. 2 (Veblen, 2021).

investments in clean energy require governments to regularly assess and adapt policies, regulations, subsidies, permitting requirements, and more. Transforming the energy system is a dynamic and constantly evolving challenge for which governments need to be agile, responsive, and bold. The renewable energy cases brought under investment treaties are a prime example of problems that the ISDS system can present for sustainable investment in the energy sector and for achieving climate mitigation goals. ISDS tribunals have expanded the scope of investor protections and privileges beyond equivalent protections found in domestic legal frameworks, limiting the critical policy space governments need to regulate the energy transition and increasing the costs to states and their citizens of the climate crisis.

While states do need to take both domestic and international measures to scale investment in renewable energies, investment treaties are both ineffective at attracting investment and hostile to other more effective measures. Section §11.02 of this chapter reviews the evidence of the role that investment treaties do (or do not) play in investor decision-making. Sections §11.03 and §11.04 review ISDS awards in the renewable energy field and consider their effect on governments' regulatory space and on the distribution of the costs and benefits of climate action. The conclusion draws policy implications for investment treaty negotiators and other policymakers with responsibilities for states' climate goals and investment policy.

§11.02 DO INVESTMENT TREATIES ATTRACT INWARD FOREIGN INVESTMENT FLOWS?

Proponents of investment treaties, and of the ECT in particular, contend that investor protections are necessary—or at least effective—at mobilizing foreign direct investment (FDI) and, therefore, are an important instrument for states seeking to attract investment in renewable energy. However, decades of empirical analysis, supplemented by more recent surveys of renewable energy investors, fail to substantiate that claim.

Investment treaties provide guarantees of protection and treatment that contracting states promise to investors of counterparty states. Common substantive treaty provisions protect foreign investors against discrimination, uncompensated (direct or indirect) expropriation, unfair and inequitable treatment, and other maltreatment by host states. The majority of these treaties grant foreign investors the right to sue host governments and seek damages based on alleged treaty violations before international arbitration tribunals.[6] These tribunals issue binding awards, which may necessitate the host state to pay monetary compensation to claimant investors, often on the order of USD tens of millions and occasionally billions.[7] The idea is that investment treaties will deter capricious, arbitrary, and discriminatory state conduct and protect investors from

6. There have been 1229 publicly known ISDS cases as of July 31, 2022. *See* UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement.
7. Carolina Moehlecke and Rachel L. Wellhausen, "Political Risk and International Investment Law," 25 Annual Review of Political Science (2022) 485 at p. 486 DOI: 10.1146/annurev-polisci-051120-014429.

costs incurred in the event of a breach of those commitments,[8] thereby reducing a barrier to investment and increasing investment flows.

However, research in the past two decades has failed to establish that legal protections contained within investment treaties have a discernible impact on foreign investment flows.[9] A 2021 meta-analysis of seventy-four studies looking at the effects of investment treaties on FDI found that investment treaties "have an effect on [FDI] that is so small as to be considered as negligible or zero."[10] Another meta-analysis from 2015 concluded that "… the empirical evidence on the basis of a meta-analysis suggests that the FDI promotion effect of [bilateral investment treaties] seems to be economically negligible."[11] In the case of renewable energy investments, researchers have found no evidence that the ECT has had a positive influence on FDI inflows in the renewable energy sector.[12] Ironically, a 2018 report concluded that five countries that had terminated investment treaties (Ecuador, Bolivia, South Africa, Indonesia and India) had increased foreign investment notwithstanding the termination of their treaties.[13]

Some scholars have criticized the methodology of existing studies for failing to consider the variations among investment treaties in their analysis[14] or noting the severely constrained nature of FDI flow data.[15] Yet, whether as a result of

8. Zachary Elkins, Andrew T. Guzman, and Beth A. Simmons, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000," 60(4) International Organization (2006) 811 at pp. 823-824 DOI: 10.1017/s0020818306060279; Eric Neumayer and Laura Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" 33(1) World Development (2005) 1567 at p. 1572. Also *see* Julia Calvert and Kyla Tienhaara, "Beyond 'Once BITten, Twice Shy': Defending the Legitimacy of Investor-State Dispute Settlement in Peru and Australia," Review of International Political Economy (2022) (Calvert and Tienhaara, 2022). The authors discuss the perception of stability and good governance as created by investment treaties. For example, "MINCETUR officials asserted that [the Peru-US Trade Agreement] would 'reinforce the stability of economic policy and institutions' and 'reduce perceptions of country risk amongst international economic agents'," at p. 7 DOI: 10.1080/09692290.2022.2134172.
9. *See* Karl P. Sauvant and Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (New York: Oxford University Press, 2009); Lauge N. Skovgaard Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence" in *Yearbook on International Investment Law and Policy 2009/2010* (New York: Oxford University Press, 2010) 539 (Poulsen, 2010); Joachim Pohl, "Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence," OECD Working Papers on International Investment 2018/01 (2018); Josef C. Brada, Zdenek Drabek and Ichiro Iwasaki, "Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis," 35(1) Journal of Economic Surveys (2021) 34 (Brada et al. 2021) DOI: 10.1111/joes.12392.
10. Brada et al. 2021 at p. 58.
11. Christian Bellak, "Economic Impact of Investment Agreements," Department of Economics Working Paper Series No. 200, (2015) at p. 19 (Bellak, 2015).
12. Kyla Tienhaara and Christian Downie, "Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes," 24(3) Global Governance: A Review of Multilateralism and International Organizations (2018) 451 (Tienhaara and Downie, 2018).
13. Public Citizen, "Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows," Research Brief, Public Citizen Global Trade Watch (April 2018), https://tinyurl.com/5ybbb4a7.
14. Michael N. Jacobs, "Do Bilateral Investment Treaties Attract Foreign Direct Investment to Developing Countries? A Review of the Empirical Literature," 5 International Relations and Diplomacy (2017) 583 DOI: 10.17265/2328-2134/2017.10.001.
15. Andrew Kerner, "What Can We Really Know About Bits and FDI?" 33(1) ICSID Review (2018) 1 DOI: 10.1093/icsidreview/six038.

methodological flaws, data challenges, or the lack of true correlation, the empirical evidence fails to conclusively demonstrate the correlation or causation between investment treaties and increased foreign investment on which the proliferation of treaties has relied or that states without investment treaties have been disadvantaged in FDI inflows.

Understanding investor behavior and the factors that are considered most critical or important in their decision-making process regarding energy investments offers an alternative path to answering the question of whether IIAs actually encourage investment flows. The present authors, in collaboration with the independent climate change think tank E3G and colleagues at the Columbia Center on Sustainable Investment, administered a survey in 2022 of renewable energy investors to understand the importance of various factors in their investment-making decisions. When asked about the top five deterring factors to investing in renewable energy abroad, only one respondent (out of thirty-two foreign investors) identified the absence of international legal protections by way of IIAs as among their top five. And when asked to rank six risk mitigation tools in terms of importance in their foreign investment decisions, treaty-based investment arbitration was one of the two lowest-ranked options, together with green insurance.[16] The survey and complementary interviews show that other legal elements, as well as other relevant economic and financial components, are far more decisive in investment decision-making.

Despite the lack of evidence that investment treaties are effective at driving investments, investment treaty proponents continue to advance the narrative that these treaties are important for scaling investments in renewable energy, particularly in defense against the growing criticism of the treaties' protection of fossil fuel investments and its incompatibility with the Paris Agreement.[17]

§11.03 INVESTOR-STATE DISPUTES INVOLVING RENEWABLE ENERGY INVESTMENTS

While investors may not place much emphasis on the existence of an investment treaty between their home state and a potential host state when they are making a decision about where to invest, they do take advantage of the strong protections afforded by IIAs when determining *how* to invest or how to resolve disputes that arise. Indeed, law firms have advised their clients who have already decided to invest in a specific jurisdiction to (re)structure their investments so as to benefit from additional treaty-based protections.[18] For instance, investors have been encouraged to "audit their corporate structure and change it, if needed, to ensure they are protected by an investment treaty" and that such restructuring "should take place before any climate-related

16. Aydos et al., 2022.
17. International Energy Charter, "Communication of the Secretary General on the Modernisation of the Energy Charter Treaty" (July 1, 2022), https://tinyurl.com/2v8put7e.
18. For example, Jones Day, "Restructuring Recommended after CJEU Decision on Intra-EU Bilateral Investment Treaties" (Cleveland: Jones Day, 2018), https://tinyurl.com/mr47rc7c; Jones Day, "Climate Change and Investor-State Dispute Settlement" (Newsletter, 2022), https://tinyurl.com/daxmkv5s.

dispute with the state has arisen or is reasonably foreseeable."[19] Accordingly, one can conclude that states are affording additional protections to investors without actually influencing their investment decisions.

In response to the growing criticism that fossil fuel companies and investors can use ISDS to thwart, weaken, or profit from climate-related measures,[20] some investment treaty proponents have countered that a growing number of ISDS cases are brought by renewable energy investors, suggesting that the sector of the claimant justifies the mechanism and its outcomes. There have been at least ninety-one publicly-known ISDS cases brought by investors in renewable energy sectors since 2011, eighty-one of which have been brought under the ECT.[21] Almost all of the ninety-one claims so far arise out of amendments made by host governments to support schemes offered to investors in renewable energy sectors, including feed-in tariffs (FITs), feed-in premiums, and green certificate programs.[22] A handful of cases relate to the alleged cancellation of renewables projects by the state: by terminating long-term energy contracts,[23] by failing to execute and perform a concession agreement[24] or to

19. Jones Day, "Climate Change and Investor-State Dispute Settlement" (Newsletter, 2022), https://tinyurl.com/daxmkv5s.
20. Lea Di Salvatore, "Investor-State Disputes in the Fossil Fuel Industry," International Institute for Sustainable Development (December 31, 2021), https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry; Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," 7(2) Transnational Environmental Law (2018) 229.
21. UNCTAD, "Treaty-based Investor-State Dispute Settlement Cases and Climate Action," IIA Issues Note (September 2022), https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf (UNCTAD, 2022). In this publication, UNCTAD reports eighty known cases in the renewable energy sector. Further research by the authors, using the Investment Policy Hub, IAReporter, and Energy Charter Treaty websites, revealed an additional eleven cases in the renewables sector up to December 2022. In addition, according to UNCTAD, 2022, "[p]rior to 2010, a small number of ISDS cases were brought in relation to renewable energy projects, such as hydroelectric/water power supply projects. *See*, *e.g.*, *Empresa Nacional de Electricidad v. Argentina*; *Impregilo v. Pakistan (I)*; *Impregilo v. Pakistan (II)*; *Cementownia v. Turkey (I)*," at fn. 7. In light of the number of claims brought under the ECT and following the Achmea decision in 2018, the European Commission called on all Member States to terminate their intra-EU BITs, "given their incontestable incompatibility with EU law." *See* European Commission, "Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment" (July 19, 2018) at p. 2, https://tinyurl.com/msfwec4a. In May 2020, twenty-three Member States signed the Agreement for the Termination of Intra-EU Bilateral Investment Treaties. *See* Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169 (May 29, 2020), https://tinyurl.com/4pdzyeuk.
22. For example, cases that dealt with the reduction of green certificates granted included: *Aderlyne Limited v. Romania*, ICSID Case No. ARB/22/13; *KELAG-Kärntner and others v. Romania*, ICSID Case No. ARB/21/54; *EP Wind v. Romania*, ICSID Case No. ARB/20/15; cases that dealt with tariff schemes included: *Orazul International v. Argentine Republic*, ICSID Case No. ARB/19/25; cases that dealt with FIT schemes included: *Modus Energy v. Ukraine*, SCC Case No. 2021/039; *ESPF and others v. Italy*, ICSID Case No. ARB/16/5; *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40; *Greentech and NovEnergia v. Italy*, SCC Case No. 2015/095; *Blusun v. Italy*, ICSID Case No. ARB/14/3; *Natland and others v. Czech Republic*, PCA Case No. 2013-35; *Photovoltaik Knopf v. Czech Republic*, PCA Case No. 2014-21, and a number of cases against Spain, discussed in this chapter.
23. *Invenergy v. Poland*, PCA Case No. 2018-40.
24. *Albaniabeg Ambient v. Albania*, ICSID Case No. ARB/14/26.

uphold a power purchase agreement (PPA),[25] or by revoking previously granted permits.[26] In at least one case, delays in permitting a hydroelectric power plant, which claimants allege caused the failure of their project, were due to irregularities with the company's environmental impact assessment and community opposition.[27]

In these cases, foreign investors are challenging changes in the host countries' regulatory framework or the states' administrative decision-making. Yet beneath these regulatory changes and administrative decisions are governments' complex considerations and deliberations about how to manage and mitigate anticipated risks and impacts of climate change, including the distribution of anticipated benefits and costs between the public and private sectors,[28] upholding their regional and international obligations, and managing limited public funds.[29] Diverse interests and complex issues are raised, evaluated, challenged, and adjudicated during periods of contestation. The ability of a state to respond to and act in the face of changed or changing circumstances is a critical aspect of effective governance.[30] Yet, the tribunals deciding these cases have paid little to no attention to the complex set of considerations states face in their regulatory and administrative decision-making.

In the eighty-one renewable energy cases brought under the ECT to date, fifty-one have been lodged against Spain and twelve against Italy.[31] All of these cases challenged the relevant governments' legislative changes in their incentives policies used to promote investments in renewable energy sectors, and most challenged the same measure. The majority of these involved reductions in FIT schemes for renewable energy production, which was the main policy mechanism used by EU Member States and others, like Canada, starting in the early to mid-2000s.

The aim of FIT schemes was to offset the higher cost of renewables technologies by reducing financial and regulatory risk and encouraging investments in renewables sectors. FIT schemes typically guarantee the following: all electricity generated from a renewable source will be purchased by electricity distributors or transmission operators; producers are provided with a set price (above the market price) for each unit of electricity they feed into the grid; and that tariff price is guaranteed over a fixed period of time (five to twenty-five years) through long-term contracts.[32] If designed properly, incentives scheme also set a criteria for the tariff price to adjust over time in order to account for technological developments or other changed circumstances that may impact the

25. *KLS Energy v. Sri Lanka*, ICSID Case No. ARB/18/39.
26. *Enel v. Turkey*, ICSID Case No. ARB/21/61.
27. *Mamacocha and Latam Hydro v. Peru*, ICSID Case No. ARB/19/28. *See* the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction (February 9, 2021) at paras. 196-237.
28. Cara Dowling, C. Mark Baker, Dylan McKimmie, Tamlyn Mills, Kevin O'Gorman and Martin Valasek, "Climate Change and Sustainability Disputes Between Foreign Investors and States," International Arbitration Report, Issue 17 (December 2021), https://tinyurl.com/3fv75hbr.
29. *RENERGY v. Spain*, ICSID Case No. ARB/14/18, Dissent on Liability and Quantum of Professor Philippe Sands QC (22 Apr 2022) at para. 1.
30. Ella Merrill, Jesse Coleman, Lisa Sachs, and Lise Johnson, *International Investment Law and the Extractive Industries* (New York: Columbia Center on Sustainable Investment (CCSI), July 2022) at p. 9, https://tinyurl.com/y3a879kr.
31. UNCTAD, 2022.
32. Tienhaara and Downie, 2018 at p. 457.

cost of the energy source.[33] The cost of these FIT schemes may eventually pass on to consumers through electricity surcharges[34] or come directly out of the state coffers.[35]

In the case of Spain, the government "had set a goal of installing 400 megawatts (MW) of [photovoltaic solar technology] by 2010, [which] was reached in early 2007; and by 2010, nearly 4000 MW had been installed."[36] The "tariffs were designed to provide developers with an internal rate of return [… of] 5 per cent and 9 per cent… Actual [internal rate of return] for projects in the best locations were, however, between 10 per cent and 15 per cent."[37] This attracted all types of investors, including financial investment funds that diverted their investments from the housing sector, which was in crisis, to already-installed solar photovoltaic investments, which were much more profitable at the time.[38] In Spain, as in other countries, more renewable energy was installed than its electricity system could absorb in terms of both regulatory and grid capacity.[39]

Countries' energy markets were also profoundly affected by the financial crisis of 2008 and the consequent reduction of electricity consumption,[40] and over a similar period, technological advances reduced costs and increased the efficiency of renewable energy generation, transmission and use.[41] In Spain, the cost of the FIT scheme increased from EUR 194 million in 2007 to EUR 2.6 billion in 2009, a thirteen-fold increase.[42] Together, these developments resulted in massive tariff deficits in states' electricity systems, rendering the incentives scheme financially unsustainable.[43]

33. Daniel Behn and Ole Kristian Fauchald, "Governments under Cross-Fire: Renewable Energy and International Economic Tribunals," 12 Manchester J Int'l Econ Law (2015) 117 at p. 119 (Behn and Fauchald, 2015).
34. Theodoros Iliopoulos, "Renewable Energy Regulation: Feed-in Tariff Schemes under Recession Conditions," 4(2) European Networks Law & Regulation Quarterly (2016) 110 at p. 111, https://enlr.lexxion.eu/article/ENLR/2016/2/7 (Iliopoulos, 2016).
35. Behn and Fauchald, 2015 at p. 125.
36. Behn and Fauchald, 2015 at p. 121.
37. Pablo del Río and Pere Mir-Artigues, "A Cautionary Tale: Spain's Solar PV Investment Bubble," International Institute for Sustainable Development (IISD) and Global Subsidies Initiative (GSI) (2014) at p. 12, https://www.iisd.org/gsi/sites/default/files/rens_ct_spain.pdf (Río and Mir-Artigues, 2014). Also *see* Lucía Bárcena and Fabian Flues, "From Solar Dream to Legal Nightmare: How Financial Investors, Law Firms and Arbitrators are Profiting from the Investment Arbitration Boom in Spain," Transnational Institute and Powershift (May 31, 2022) at p. 9, https://www.tni.org/en/publication/from-solar-dream-to-legal-nightmare (Bárcena and Flues, 2022).
38. Río and Mir-Artigues, 2014 at p. 15; Bárcena and Flues, 2022 at p. 9.
39. Behn and Fauchald, 2015 at p. 127.
40. *9REN Holding v. Spain*, ICSID Case no. ARB/15/15, Award (31 May 2019) at para. 247.
41. For instance, the cost of PV solar modules dropped from about five Euro/watt in 2006 to about 50 Eurocents/watt in mid-2014. *See* Zachary Shahan, "Solar PV Module Prices Have Fallen 80% Since 2008, Wind Turbines 29%," Clean Technical (May 6, 2013), https://cleantechnica.com/2013/05/06/solar-pv-module-prices-have-fallen-80-since-2008-wind-turbines-29/; Behn and Fauchald, 2015 at p. 118; Carmen Otero García-Castrillón, "Spain and Investment Arbitration: The Renewable Energy Explosion," CIGI Investor-State Arbitration Series, Paper No. 17 (November 2016) at p. 4, https://www.cigionline.org/static/documents/documents/ISA%20Paper%20No.17.pdf (García-Castrillón, 2016).
42. Bárcena and Flues, 2022 at p. 10.
43. Theodoros Iliopoulos, "Price Support Schemes in the Service of the EU's Low-Carbon Energy Transition," in Theodoros Zachariadis, Janet E. Milne, Mikael Skou Andersen, and Hope Ashiabor (eds.), *Economic Instruments for a Low-Carbon Future* (Cheltenham: Edward Elgar

The preamble of Royal Decree 6/2009, which was one of the first modifications made by the Spanish Government to curb the enormous deficit reached in the electricity system, stated:

> The growing tariff deficit, i.e. the difference between that collected from the regulated tariffs set by the government and that which the consumers pay for their regulated supply and from the access tariffs set by the liberalized market, and the real costs associated with these tariffs, is producing serious problems, which in the current context of international financial crisis is profoundly affecting the system. This puts at risk not only the financial situation of companies in the electricity sector, but also the sustainability of that system. This maladjustment is unsustainable and has serious consequences, by deteriorating the security and capacity of the financing of investment needed for the supply of electricity at the levels of quality and security that Spanish society demands.[44]

At the end of 2012, Spain's tariff deficit was more than EUR 29 billion (approximately 3% of the Spanish GDP),[45] and by 2013, it had exceeded EUR 40 billion (approximately 4% of its GDP).[46] In response, the Spanish Government—as well as other governments both in the EU and elsewhere—rolled back or revoked renewable energy incentives policies with the aim of stopping the tariff deficit from growing further[47] and reducing the costs of the energy bill of final customers.[48]

Because of the alleged impact of these regulatory changes on their investment profitability, investors (both domestic and foreign) implemented diverse legal strategies to defend their economic interests. Investors from EU Member States brought a number of claims against respondent states, most notably Spain and Italy, in their domestic courts as well as before the Court of Justice of the European Union (CJEU). These investors have claimed the changes to the regulatory framework of the incentives policies violated protections afforded to them under national and EU laws, such as the principles of legal certainty and legitimate expectations, as well as provisions of the Charter of Fundamental Rights of the European Union. In the majority (if not all) of these cases before national and international courts, the state has prevailed (*see* §11.04 for further discussion on these cases).

Dozens of foreign investors impacted by the changes in these same EU Member States have relied instead on the standards of protection afforded to them under the ECT, claiming that the regulatory changes made violated the protection of their

Publishing, July 28, 2020), https://www.elgaronline.com/view/edcoll/9781839109904/9781839109904.00011.xml; García-Castrillón, 2016; UNCTAD, 2022 at p. 5.

44. Royal Decree 6/2009, April 30, on the adoption of certain measures in the energy sector and the approval of the social bond (BOE No 111, 39404 (May 7, 2009)).
45. Río and Mir-Artigues, 2014 at p. 9.
46. *Foresight v. Spain*, SCC Case No. 2015/150, Award (November 14, 2018) at para. 117.
47. Iliopoulos, 2016 at p. 110; Sofia-Natalia Boemi and Agis M. Papadopoulos, "Times of Recession: Three Different Renewable Energy Stories from the Mediterranean Region," in Evanthie Michalena and Jeremy Maxwell Hills (eds.), *Renewable Energy Governance: Complexities and Challenges* (London: Springer, 2013) 263.
48. Sondra Faccio, "The Italian Energy Reform as a Source of International Investment Disputes," Rivista di diritto internazionale privato e processuale—Commenti (2016) 460 at p. 461. Relatedly, this situation is again being played out given the high energy prices resulting from the current energy crisis.

legitimate expectations through the fair and equitable treatment (FET) standard, among other alleged breaches. Investment treaties, including the ECT, afford greater protections and privileges to foreign investors (including foreign subsidiaries, shareholders, and financiers) than are available under domestic and regional laws.[49]

Of the forty concluded cases against Spain and Italy, as of December 2022, thirty-two have been against Spain, and of those, twenty-six (or 81%) have been decided in favor of the investor.[50] As of December 2022, Spain owes over EUR 1.4 billion in compensation to investors, which is more than "the country's entire spending commitment to fight the climate crisis or five times what it spent to alleviate energy poverty in 2021."[51] In addition, Spain owes another at least EUR 116 million in associated legal and arbitration fees.[52]

The Spanish experience points to the troubling fact that investment treaties are being used as a weapon against effective governance in a changing and highly regulated space, where good faith action taken in the public interest to achieve development and climate goals is unduly discouraged.[53] These renewable energy cases also expose the fact that the ECT (like other investment treaties) has created a discriminatory system where foreign investors (or domestic investors with foreign subsidiaries) have access to legal protections that go beyond those granted to investors under domestic and regional laws; and allow for speculative damages (for lost future profits) to be awarded, while domestic disputes limit damages to sunk costs only.[54]

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49. Lise Johnson, Lisa E. Sachs, and Jeffrey D. Sachs, "Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law," CCSI Policy Paper (2015), https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/22.
50. We have included three cases in which a final Award has not yet been made, but for which a Decision on Jurisdiction, Liability and Directions on Quantum has been made, in favor of the investor. These three cases are: *Kruck and others v. Spain*, ICSID Case No. ARB/15/23; *Infracapital v. Spain*, ICSID Case No. ARB/14/12; and *Sevilla Beheer and others v. Spain*, ICSID Case No. ARB/16/27. It is also noteworthy that in ten of the twenty-six awards in which the investor prevailed, the respondent state's appointed arbitrator wrote a dissenting opinion in which they disagreed with the majority's finding of liability.
51. Bárcena and Flues, 2022 at p. 4. In that report, the authors state that Spain owes more than EUR 1.2 billion in compensation as of May 2022. Since then, several other cases have been decided and awarded, including *RENERGY v. Spain*, ICSID Case No. ARB/14/18; *Green Power and SCE v. Spain*, SCC Case No. V2016/135; and *Eurus Energy v. Spain*, ICSID Case No. ARB/16/4, which together increase the total cost owed by Spain by at least EUR 200,000.
52. Bárcena and Flues, 2022 at p. 4, which reports EUR 101 million up to May 2022. However, the costs have increased given the recently available cases of *RENERGY v. Spain*, *Green Power v. Spain*, and *Eurus Energy v. Spain*. While not all claims brought by investors have been successful, ISDS is extremely costly for states to defend. Respondent states incur significant costs, including arbitrators' fees and expenses, administrative fees for the facility used, and legal fees, which together amount to approximately USD 4.7 million per case. *See* Matthew Hodgson, Yarik Kryvoi, and Daniel Hrcka, "2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration," British Institute of International and Comparative Law (June 2021) at p. 4.
53. Lise Johnson, "Regulation of Investment Incentives: Instruments at an International/Supranational Level," in Ana Teresa Tavares-Lehman, Lisa Sachs, Lise Johnson, and Perrine Toledano (eds.), *Rethinking Investment Incentives* (New York: Columbia University Press, 2016) 264 at p. 304, http://cup.columbia.edu/book/rethinking-investment-incentives/9780231172981.
54. *Eurus Energy v. Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability (March 17, 2021) at paras. 447-454.

§11.04 FET STANDARD AND LEGITIMATE EXPECTATIONS

Most of the renewable energy claims brought against states allege that the challenged regulatory measures breached the investors' legitimate expectations when investing in these host countries, and therefore, the measures breach the ECT's FET standard. According to Article 10 of the ECT, "[e]ach Contracting Party shall … encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area," including "a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment."[55] Arbitral tribunals have interpreted the content of the FET standard to include elements, such as due process, transparency, non-arbitrariness, non-discrimination, and proportionality.[56] Although the protection of legitimate expectations is not an explicit component of the FET provision,[57] it has become "the dominant element of the standard"[58] and perhaps the most controversial.[59] Indeed, the increasing reference to investors' legitimate expectations in ISDS cases is a good illustration of Anthea Roberts' suggestion that investment treaty jurisprudence is like "a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the view and practices of states in general or the treaty parties in particular."[60]

Accordingly, the crux of these cases—including whether the claims themselves and the tribunals that determine their outcomes are valid and defensible from a policy perspective—hinges on the assessment of whether the investors' expectations at the time of investment were reasonable and legitimate, and if so, whether those expectations were breached in violation of the treaty. Notably, the concept of legitimate expectations also appears under domestic public law of several legal systems,

55. Energy Charter Treaty, Article 10 (1994), https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf.
56. *ESPF and others v. Italy,* ICSID Case No. ARB/16/5, Award (September 14, 2020) at para. 443; Tomáš Mach, "Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims," 2018/1 ELTE Law Journal (2018) 105 at p. 112.
57. UNCTAD states that, "[m]ost of the more recent IIAs contain a circumscribed FET clause, e.g. by replacing it with an exhaustive list of State obligations [...]. Some IIAs that have opted for a closed list retain the label of 'fair and equitable treatment', while others entirely omit this term [...]. Reform-oriented formulations and recent treaty examples can be found in the IIA Reform Accelerator [...]." *See* UNCTAD, "Review of 2020 Investor-State Arbitration Decisions: IIA Reform Issues at a Glance," IIA Issues Note (August 2022) at p. 11, https://unctad.org/system/files/official-document/diaepcbinf2022d5_en.pdf.
58. *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award (March 17, 2006) at para. 302.
59. One dissenting arbitrator observed that "the assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor [...] does not correspond, in any language, to the ordinary meaning to be given to the terms 'fair and equitable'." *See Suez et al. v. Argentina*, ICSID Case No. ARB/03/17, Separate Opinion of Arbitrator Pedro Nikken (Decision on Liability) (July 30, 2010) at para 3, also paras. 20-21.
60. Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States," 104 American Journal of International Law (2010) 179 at p. 179 DOI: 10.5305/amerjintelaw.104.2.0179.

including Spanish and English law,[61] as well as European Union law,[62] and has been the basis for numerous (domestic) claims brought in the renewables sectors. However, there are striking differences in the way domestic courts and investment tribunals have demarcated and applied three important elements of the concept of legitimate expectations: (1) the legitimacy of investors' expectations of stability; (2) the degree of diligence expected of an investor in the highly regulated energy sector; and (3) the degree to which states' pursuit of the 'public interest' factors into an assessment of a possible treaty violation.[63]

[A] Investors' Expectations of Stability

In the majority of the cases challenging states' measures related to renewable energy, investors have claimed that their expectation was that the legal and fiscal terms governing their initial investment would remain unmodified and that states' subsequent revision of the incentives scheme breached those expectations. One of the first elements adjudicators consider when assessing a legitimate expectations claim is the source of the claimant's expectations. When a state makes a specific commitment or assurance to the investor to freeze the regulatory framework applicable to the investment at the time the investment is made, it renounces its freedom of regulatory power to a certain degree.[64] Such assurances can come in various forms, including stabilization clauses in contracts and communications between authorized government officials and the beneficiary of the specific commitment. If the state subsequently

61. English law traditionally provided only *procedural* protection of legitimate expectations. When such expectations were violated, there was a duty to provide a hearing or adequate notice. While *substantive* protection of legitimate expectations has been slow and highly contentious, one may conclude that it is now established in English law, though "judges have held that its operation remains confined to 'exceptional situations'." *See* Michele Potesta, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept," 28 ICSID Review (2013) 88 at pp. 95-96 (Potesta, 2013) DOI: 10.1093/icsidreview/sis034. According to Potesta "... English courts are still particularly reluctant to intervene when expectations are frustrated by general changes in policy (rather than by departure from an individualized assurance). When a change of general policy is at issue, there has been almost a total denial of judicial protection." *See* Potesta, 2013 at p. 97.
62. Frederico Ortino, "The Public Interest as Part of Legitimate Expectations in Investment Arbitration: Missing in Action?" in C. Brower and J. Donoghue (eds.), *By Peaceful Means: International Adjudication and Arbitration: Essays in Honour of David D. Caron* (Oxford University Press, accepted/in press) at p. 2 (Ortino, 2023).
63. Ortino, 2023 at p. 2. In addition to these three elements, the difference in the valuation of damages between ISDS awards and Spanish domestic law is also noteworthy. ISDS awards frequently award investors damages based on an estimation of future lost profits. As the Spanish government argued, "the Spanish Supreme Court has rendered more than one hundred judgments rejecting the speculative quantification methods used by the Claimant [Eurus]. According to the Supreme Court that method 'lacks [the] necessary rigour and certainty'." *See Eurus Energy v. Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability (March 17, 2021) at para. 448.
64. Diego Zannoni, "The Legitimate Expectation of Regulatory Stability under the Energy Charter Treaty," 33 Leiden Journal of International Law (2020) 451 at p. 455 DOI: 10.1017/s09221565 20000047.

repudiates its former commitments that were relied upon by the investor, it may be held liable for any damages sustained.[65]

According to the Spanish Supreme Court and the CJEU, the crucial issue for the claimant is to demonstrate that the representation, in whatever form it was derived, was sufficiently precise and specific to give rise to a legitimate expectation of legal stability and to be in accordance with the applicable law.[66] Under EU law, "the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where the Community authorities have caused him to entertain legitimate expectations … However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration."[67] Therefore, in the absence of such specific commitments, investors cannot have a legitimate expectation of absolute stability in the regulatory environment of the host state. One author notes that "[t]he great majority of claims for breach of legitimate expectation fail because the applicant cannot establish the requisite precise and specific assurance."[68]

Arbitral tribunals, however, have broadened the scope of the source of a claimant's expectations by allowing claimants to rely on general regulatory or administrative acts, which are not specifically addressed to an individual investor but are targeted to a group of investors.[69] A number of tribunals, for example, have held that the Spanish royal decrees on which investors seemingly relied[70] when investing, established a framework guaranteeing a FIT scheme that would not be subject to future modifications.[71] In other words, these policies created a specific commitment on the

65. Veblen, 2021 at p. 9.
66. Sentencia del Tribunal Supremo (STS) 7961/2009, ECLI:ES:TS:2009:7961 (December 3, 2009); Potesta, 2013 at p. 94; Yaaser Vanderman, "Substantive Legitimate Expectation," 21 Judicial Review (2016) 174 at p. 174 (Vanderman, 2016) DOI: 10.1080/10854681.2016.1229857. The case law of the CJEU is settled to the effect that "traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained." *See Kyowa Hakko v. Commission*, Case T-223/00, General Court of the European Union, Judgment of the Court of First Instance (Fourth Chamber), ECR II-2553 (July 9, 2003) at para. 39.
67. *Kyowa Hakko v. Commission*, Case T-223/00, General Court of the European Union, Judgment of the Court of First Instance (Fourth Chamber), ECR II-2553 (July 9, 2003) at para. 38. *See also Van den Bergh v. Commission*, Case T- 65/98, General Court of the European Union, Judgment of the Court of First Instance (Fifth Chamber), ECR II-4653 (October 23, 2003) at para. 192 ("it is settled case-law that the right to rely on the principle of the protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations by giving him precise assurances").
68. Craig, 2012.
69. *Cube Infrastructure v. Spain*, ICSID Case No. ARB/15/20, Final Award (June 26, 2019) at para. 388.
70. The concept of reliance—whether an investor relied on the expectation that a specific measure or regulatory framework would remain unchanged throughout the lifespan of its investment—is another important element that adjudicators in domestic and regional courts typically take into account when deciding whether a legitimate expectation should be upheld, but in the majority of the renewables cases against Spain, the concept has received scarce treatment.
71. Veblen, 2021 at p. 10 and fn. 30. *See, e.g.*, *Masdar Solar v. Spain,* ICSID Case No. ARB/14/1, Award (May 16, 2018) at para. 503 ("RD661/2007 and other texts included a stabilisation clause [which] is sufficient to exclude any modification of the law, so far as investors, which had made

part of the state. In the *Cube Infrastructure v. Spain* case, for instance, the tribunal stated that "whatever the rationale behind the structure of tariffs and premiums set out in RD 661/2007," it was a "clear representation … that the structure would be maintained in the terms set out in the Royal Decree."[72] In the *9REN v. Spain* case, the tribunal reasoned that while "[t]here is no doubt that an enforceable 'legitimate expectation' requires a clear and specific commitment … there is no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself[.]"[73] Contrary to the approach of domestic courts, these tribunals essentially converted general legislation into specific commitments made by the state, which then gave rise to investors' expectations that the remuneration regime would remain unchanged.

More generally, through such expansive interpretations of the concept of legitimate expectations, arbitral tribunals have converted the FET standard into an effective stabilization clause. In *Occidental v. Ecuador I*, for example, the tribunal held that "there is certainly an obligation not to alter the legal and business environment in which the investment has been made"[74] and that the stability requirement is "an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not."[75]

Several of the tribunals in the cases against Spain have similarly advanced the interpretation of the FET standard as guaranteeing legal stability. In *9REN Holding v. Spain*, the tribunal emphasized Spain's obligation under the ECT to protect an investor's legitimate expectation of stability:

> While unforeseen events understandably created serious difficulty for the Spanish regulators and the Spanish economy, Spain accepted international obligations under the ECT and the Tribunal's obligation is not to rewrite history but to give effect to the RD 661/2007 embodiment of government policy to the extent RD

investments in reliance upon its terms, were concerned"). *See also SolEs Badajoz v. Spain*, ICSID Case No. ARB/15/38, Award (July 31, 2019) at para. 313; *Cube Infrastructure and others v. Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum (February 19, 2019) at para. 388; *Antin Infrastructure v. Spain*, ICSID Case No. ARB/13/31, Award (June 15, 2018) at paras. 538 and 554; *OperaFund v. Spain*, ICSID Case No. ARB/15/36, Award (September 6, 2019) at para. 485. Also *see ESPF and others v. Italy,* ICSID Case No. ARB/16/5, Award (September 14, 2020) at para. 512. A small number of tribunals have held that such general legislation cannot give rise to legitimate expectations that the regulatory framework would remain unchanged. *See*, for example, *Charanne v. Spain*, SCC Case No. 062/2012, Final Award (January 21, 2016) at para. 499; *Isolux Infrastructure v. Spain*, SCC Case No. V2013/153, Award (July, 2016) at para. 775; *WA Investments v. Czech Republic*, PCA Case No. 2014-19, Award (May 15, 2019) at para. 569.

72. *Cube Infrastructure v. Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum (February 19, 2019) at para. 296.
73. *9REN Holding v. Spain*, ICSID Case No. ARB/15/15, Award (May 31, 2019) at para. 295.
74. *Occidental Exploration v. Ecuador (I)*, LCIA Case No. UN3467, Award (July 1, 2004) at para. 191. *See also MTD v. Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004) at paras. 114-115, 163-166 (the tribunal found that the government was not permitted to act inconsistently with prior administrative decisions despite policy considerations underlying change of course of conduct).
75. *Occidental v. Ecuador I*, at para. 186.

> 661/2007 created legitimate expectations of stability in accordance with its terms.[76]

Such an interpretation of the FET standard—to allow for the expectation of regulatory stability even absent a specific commitment of stability—essentially requires host states to compensate affected foreign investors for legitimate policy changes that respond to new and evolving circumstances.[77] This interpretation has a chilling effect on states, disincentivizing the critical policy measures necessary to pursue states' policy-oriented objects and responsibilities. In the cases brought by renewable energy companies, the protected expectation of absolute stability of the FIT regime undermined the precise flexibility and adaptability that governments need to navigate the complex and evolving transformation of regional energy systems—flexibility that is expressly recognized and protected under domestic and regional laws.

[B] Due Diligence

An important and contested element of legitimate expectations is the extent to which investors are expected to have conducted a diligent analysis of the regulatory framework before making their investment, especially in a highly regulated industry such as renewable energy.[78] Under EU law, if the disputed measure or conduct could have been reasonably foreseeable at the time of the investment by a prudent and diligent investor, there is no scope for the operation of the protection of legitimate expectations.[79]

In its analysis of the claims brought by renewable investors in the domestic judicial system, the Spanish Supreme Court found that a diligent and prudent investor should have recognized that the advantages of avoiding market risks implied in the regulated FIT scheme were counterbalanced by the regulatory risk that in certain situations there may be a need for the government to amend the scheme in order to address superior public needs and that the energy sector, in particular, is subject to intense administrative intervention due to its significance to the general public

76. *9REN Holding v. Spain*, ICSID Case No. ARB/15/15, Award (May 31, 2019) at para. 259.
77. But *see Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, Award (September 5, 2008) at para. 258 ("it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose. Such an implication as to stability in the BIT's Preamble would be contrary to an effective interpretation of the Treaty; reliance on such an implication by a foreign investor would be misplaced and, indeed, unreasonable").
78. *Charanne v. Spain*, SCC Case No. 062/2012, Final Award (January 21, 2016) at paras. 505-507; *Foresight v. Spain*, SCC Case No. 2015/150, Partial Dissenting Opinion of Arbitrator Raúl E. Vinuesa (October 30, 2018) at paras. 39-47.
79. Judgment of the Court (Second Chamber), *Di Lenardo and Dilexport v. Ministero del Commercio con l'Estero*, Joined Cases C-37/02 and C-38/02, ECLI:EU:C:2004:443 (July 15, 2004) at para. 70 ("Any trader on the part of whom an institution has promoted reasonable expectations may rely on the principle of the protection of legitimate expectations. However, if a prudent and circumspect trader could have foreseen that the adoption of a Community measure is likely to affect his interests, he cannot plead that principle if the measure is adopted").

interest.[80] Indeed, an investor seeking to make an investment in the renewables sector would have been on notice that several publicly available judgments of the Supreme Court, even as early as 2006,[81] had established that "producers do not have an unmodifiable right that the economic scheme which regulates modifications to premiums will remain the same."[82] In 2006, the Spanish Supreme Court stated:

> [T]he payment regime under examination does not guarantee to special regime electricity producers that a certain level of profits or revenues will be unchanged relative to those obtained in previous years, or that the formulas for fixing the premiums will stay unchanged.
>
> Just as in terms of an economic policy with many different aspects (the promotion of renewable energy but also the planning of electricity networks, and other considerations regarding energy saving and efficiency), grants and incentives for the production of electricity under the special regime may increase from one year to another, but they may also decrease when those same considerations warrant it. We stress that these changes have remained within the legal limits that regulate this type of promotion, and the mere fact that the annual adjustment or the level of the premium goes up or down does not of itself constitute grounds for revocation or affect the legitimate expectations of their recipients.
>
> Companies that freely decide to enter a market such as electricity generation under the special regime, knowing that it is largely dependent on the setting of economic incentives by public authorities, are or should be aware that they may be modified within legal guidelines by those same authorities. One of the "regulatory risks" to which they submit and which they must take into account is precisely the variation of parameters for premiums or incentives, something which the Electricity Sector law limited ... but does not preclude.[83]

For those investors who invested after 2010 and who brought claims related to the regulatory modifications in 2013 and 2014, regulatory pronouncements would have further advised of the regulatory risks of FIT schemes that became financially untenable. In particular, the Preamble of Royal Decree 6/2009, which was one of the first modifications made by the Spanish Government, advised that the modification was necessary in light of the unsustainable tariff deficit:

80. García-Castrillón, 2016 at p. 8; Spanish Constitutional Court (STC) 270/2015, BOE No. 19, 6370 (January 22, 2016) ("Respect for [the principle of legal certainty], and its corollary, the principle of legitimate expectations, is compatible with the modifications in the remuneration system for renewable energies carried out by Royal Decree-Law 9/2013, even more—as in the present case—in an area subject to a high administrative intervention by virtue of its impact on general interests, and a complex regulatory system that makes unfeasible the claim that the most favorable elements are invested with permanence or inalterability in the face of the exercise of a legislative power that obliges public powers to adapt said regulation to a changing economic reality").
81. STS 6317/2006, ECLI:ES:TS:2006:6317 (December 15, 2005). Also *see*, *Eurus Energy v. Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability (March 17, 2021) at para. 143 (the tribunal provides a summary of a number of the decisions issued by the Spanish Supreme Court since 2005).
82. STS 6317/2006, ECLI:ES:TS:2006:6317 (December 15, 2005).
83. STS 6317/2006, ECLI:ES:TS:2006:6317 (December 25, 2006). Also *see* STS 7633/2005, ECLI:ES:TS:2005:7633 (December 15, 2005); STS 6315/2007, ECLI:ES:TS:2007:6315 (March 20, 2007); STS 8027/2009, ECLI:ES:TS:2009:8027 (December 3, 2009) DOI: 10.1111/jns.2009.14.issue-s2.

> The growing tariff deficit, i.e. the difference between that collected from the regulated tariffs set by the government and that which the consumers pay for their regulated supply and from the access tariffs set by the liberalized market, and the real costs associated with these tariffs, is producing serious problems, which in the current context of international financial crisis is profoundly affecting the system. This puts at risk not only the financial situation of companies in the electricity sector, but also the sustainability of that system. This maladjustment is unsustainable and has serious consequences, by deteriorating the security and capacity of the financing of investment needed for the supply of electricity at the levels of quality and security that Spanish society demands.[84]

Accordingly, investors that entered the market post-2010,[85] after several modifications had already been introduced to the original incentives scheme or those that invested in 2007 or 2008 but expanded their investments post-2010,[86] should have expected or foreseen possible further adjustments to the FIT scheme.[87] Investor diligence is, therefore, a key consideration in assessing the "legitimacy" or "reasonableness" of the expectations alleged to be protected by Spanish law.[88]

The CJEU has similarly examined whether subsequent reduction or complete removal of incentives scheme is in accordance with the general principles of legal certainty and the protection of investors' legitimate expectations. The court has found that "where a prudent and circumspect economic operator could have foreseen the adoption of a measure likely to affect his or her interests, he or she cannot plead that principle if the measure is adopted."[89]

Unlike the courts, arbitral tribunals in the ISDS cases against Spain have typically given less weight to the role of a claimant's due diligence assessment of the Spanish

84. RD 6/2009, April 30, on the adoption of certain measures in the energy sector and the approval of the social bond (BOE No. 111, 39404 (May 7, 2009)).
85. *See infra* n. 129 for the identity of investors that entered the Spanish renewables market post-2010.
86. The following are examples of investors who expanded their investments post-2010: *RENERGY v. Spain*, ICSID Case No. ARB/14/18, Award (May 6, 2022) at para. 616; *BayWa v. Spain*, ICSID Case No. ARB/15/1, Decision on Jurisdiction, Liability and Directions on Quantum (December 2, 2019) at paras. 59, 60, 70; *RWE Innogy v. Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (December 30, 2019) at para. 190.
87. There is also the question of whether investors procured adequate due diligence on the content and scope of state aid and the consequences of relying on potentially illegal state aid (under EU law), which is beyond the scope of this paper. For more on this topic, *see Foresight v. Spain*, SCC Case No. 2015/150, Partial Dissenting Opinion of Arbitrator Raúl E. Vinuesa (October 30, 2018).
88. STS 2320/2012, ECLI:ES:TS:2012:2320 (April 12, 2012); STS 5479/2015, ECLI:ES:TS:2015:5479 (November 12, 2015).
89. Judgment of the Court (Tenth Chamber), Joined Cases C-180/18, C-286/18 and C-287/18, ECLI:EU:C:2019:605 (July 11, 2019) at para. 31, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2019%3A605; Judgment of the Court (Fifth Chamber), Joined Cases C-798/18 and C-799/18, ECLI:EU:C:2021:280 (April 15, 2021) at para. 42, https://curia.europa.eu/juris/document/document.jsf?text=&docid=239885&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=556389. In the latter case, brought by investors against Italy, the CJEU reaffirmed the Italian Constitutional Court's reasoning that "the alteration of the incentive scheme at issue in the main proceedings was neither unforeseeable nor unexpected, so that a prudent and circumspect economic operator would have been able to take account of possible legislative developments, considering the temporary and changeable nature of support schemes," at para. 16.

legal system at the time of investing.[90] For instance, in the *Foresight v. Spain* case, even though the "[e]vidence shows that [the claimants] have commissioned no due diligence on Spanish as well as on EU law,"[91] the majority of the tribunal considered "that it is reasonable for an investor to assume that its legal advisors would have raised a red flag had they detected any risk of fundamental change to the regulatory regime."[92] In *RENERGY v. Spain*, the dissenting arbitrator writes that the "[c]laimant's due diligence appears to have been less extensive than that which may have been carried out by a farmer purchasing a modest plot of land in Devon."[93] According to the dissenting arbitrator, despite the tribunal "having regard to a series of judgments of the Spanish Supreme Court … which made it crystal clear that, as a matter of Spanish law, the investor could have no expectation of a right of stability in relation to its investments," the majority appears to have concocted "an expectation on the part of the investor in the absence of any clear evidence before it."[94]

Some tribunals have gone even further, denying that due diligence is a requirement of a claimant's legitimate expectations. In *Cube Infrastructure v. Spain*, the tribunal stated that claimants did not need to demonstrate that they had carried out "any particular form or scale of legal due diligence."[95] In the tribunal's opinion, the claimants "were professional investors, used to evaluating risk, and did in fact procure legal advice from Spanish counsel, even though no detailed written opinion was filed in these proceedings."[96] The key factor for the tribunal was the investor's understanding of the stability of the regulatory regime rather than how that understanding came about.[97]

The tribunals in these renewable energy cases are not unique in systematically discounting the importance of investors' identifying and mitigating potential risks.[98] In other cases, not only have tribunals overlooked investors' ignorance of discernible and

90. *See*, *e.g.*, *Kruck and others v. Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum (September 14, 2022) at para. 191, and Partial Dissenting Opinion of Zachary Douglas (September 13, 2022) at para. 101; *RENERGY v. Spain*, ICSID Case No. ARB/14/18, Award (May 6, 2022) at paras. 707-708, and Dissent on Liability and Quantum of Professor Philippe Sands QC (April 22, 2022) at para. 11; *InfraRed v. Spain*, ICSID Case No. ARB/14/12, Award (August 2, 2019) at paras. 441-442, 447.
91. *Foresight v. Spain*, SCC Case No. 2015/150, Partial Dissenting Opinion of Arbitrator Raúl E. Vinuesa (October 30, 2018) at para. 44.
92. *Foresight v. Spain*, SCC Case No. 2015/150, Award (November 14, 2018) at para. 380.
93. *RENERGY v. Spain*, ICSID Case No. ARB/14/18, Award (May 6, 2022) at paras. 707-708, and Dissent on Liability and Quantum of Professor Philippe Sands QC (April 22, 2022) at para. 11.
94. *RENERGY v. Spain*, ICSID Case No. ARB/14/18, Award (May 6, 2022) at paras. 707-708, and Dissent on Liability and Quantum of Professor Philippe Sands QC (April 22, 2022) at paras. 10-11.
95. *Cube Infrastructure v. Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum (February 19, 2019) at para. 396.
96. *Cube Infrastructure v. Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum (February 19, 2019) at para. 401.
97. *Cube Infrastructure v. Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum (February 19, 2019) at paras. 388-406.
98. Lise Johnson, Lisa Sachs, and Carol Menezes-Cwajg, "Indemnifying Irresponsibility: How International Investment Law Undermines Responsible Business Conduct," in Anthony Goerzen (ed.) *Research Handbook on International Corporate Social Responsibility* (Edward Elgar Publishing Ltd., 2023).

addressable risks, but they have also decided in favor of investors even when it was the investors' own negligence and misconduct that contributed to the alleged losses.

[C] Public Interest

A third important and contested element of legitimate expectations is the extent to which the consideration of the public interest may trump investor expectations of regulatory stability.[99] Adjudicators assess the rationale for the contested measure against the impact that the measure had on investors who relied on past policies or practices.[100] So, even though investors may be found to have legitimate expectations of stability, a legitimate public interest can potentially override those expectations.[101]

As Professor Ortino notes, in English law, "[o]nce established, determining whether a legitimate expectation can lawfully be frustrated depends on whether, in all the circumstances, the public interest is sufficient to override the interest in keeping the promise."[102] Ortino cites, as an example, the *Solar Century* case, challenging the UK Government's premature termination of a statutory scheme supporting the generation of electricity from renewable sources.[103] The claimants argued that the statements made by the government leading up to the adoption of the disputed regulation that the scheme would not close before 2017 "were clear and unequivocal representations which gave rise to a legitimate expectation."[104] While the court found that no legitimate expectation had arisen in that case, it concluded that "even if there were a legitimate expectation … it was amply offset by the powerful public interest considerations on the other side of the equation."[105]

Similarly, in the domestic claims brought against Spain, the Spanish Supreme Court has held that the investors do not have an "unmodifiable right" to an unaltered

99. Ortino, 2023 at p. 4.
100. Paul Craig, *EU Administrative Law* (2nd edn.) (Oxford: Oxford University Press, 2012) 549 at p. 579.
101. In *Saluka v. Czech Republic*, PCA Case No. 2001-04, Partial Award (March 17, 2006) at paras. 306-307, the tribunal acknowledged the public interest in its application of the concept of legitimate expectations, as did the tribunal in *CEF Energia BV v. Italy*, SCC Case No. 2015/158, Award (January 16, 2019) at paras. 236-237. However, neither tribunal concluded that the disputed measure passed the balancing test. *See Saluka v. Czech Republic*, PCA Case No. 2001-04, Partial Award (March 17, 2006) at para. 407, and *CEF Energia BV v. Italy*, SCC Case No. 2015/158, Award (January 16, 2019) at para. 241.
102. Ortino, 2023 at p. 4, quoting Vanderman, 2016 at p. 174.
103. *Solar Century Holdings Ltd & Ors v. Secretary of State for Energy And Climate Change* (2016) EWCA Civ 117 (March 1, 2016) at para. 1; and *Solar Century Holdings Ltd & Ors v. Secretary of State for Energy and Climate Change* (2014) EWHC 3677 (Admin) (November 7, 2014) (*Solar Century*).
104. *Solar Century* at para. 2.
105. *Solar Century* at para. 90 ("… [E]ven if a sufficiently certain promise or representation has been made that a policy will continue in force and not be changed until a fixed date there is always a balance still to be struck between the retention of that policy and the strength of the (ex hypothesis) rational grounds which have arisen and which now are said by the Government to necessitate a frustration of that prior representation or promise. The test laid down by the Courts is whether the change of policy and the concomitant thwarting of the prior expectation amount to an abuse of power," at para. 73).

economic regime establishing their remuneration when they have opted not to go to the market[106] and that any diligent operator should have known that the energy sector is subject to intense administrative intervention due to its significance to the general public interest.[107] The Supreme Court has further stated that investors are not immune to changing circumstances, especially in light of an overriding public interest:

> [I]f the Administration initially establishes stimuli or incentives charged to the whole of society, subsequently and in the face of new circumstances, it can adjust or correct them so that the public assumption of costs is tempered to levels that… moderate the "final" rewards. This Chamber adds that if the operators that act under a free market regime had seen their overall remuneration reduced due to the fall in demand, the producers of the special regime—who had recognized their preferential entry into the system—could not expect to remain immune to change of circumstances.[108]

Accordingly, investors' legitimate expectations were not found to have been infringed by the Spanish Government, given the need to weigh the public interest at stake, as well as the financial and deficit crisis experienced in the electricity sector.[109]

Like these domestic legal systems, the EU legal system not only provides investors with a high level of protection against unjustified restrictions on their investments but also allows for markets to be regulated in order to pursue legitimate public policy objectives, which may also have consequences for investments.[110] The CJEU reaffirmed the Italian Constitutional Court's reasoning that the reform in the incentives policy "constitutes an intervention that, as regards the fair balancing of the opposing interests at stake, addresses a public interest intended to combine the policy of supporting the production of energy from renewable sources with making the related costs payable by end users of electricity more sustainable."[111]

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106. STS 2320/2012, ECLI:ES:TS:2012:2320 (April 12, 2012).
107. García-Castrillón, 2016 at p. 8.
108. STS 5493/2015, ECLI:ES:TS:2015:5493 (December 15, 2015) at p. 5.
109. STS 2320/2012, ECLI:ES:TS:2012:2320 (April 12, 2012) ("The agents or private operators [...] knew or should have known that the public regulatory framework [...] could not ignore subsequent relevant changes to the economic database, to which the reaction from public authorities to attune it to the new circumstances is logical… If the latter involve adjustments in many other productive sectors [...], it is not unreasonable that it is also extended to the renewable energy sector, which wants to continue receiving the regulated tariffs [...]. And all the more so when faced with situations of widespread economic crisis and, in the case of electricity, with the increased tariff deficit which, in some part, arises from the impact on the calculation of the access fees made by the remuneration of such by way of the regulated tariff, in terms of cost attributable to the electricity system").*See also* Pedro Corvinos Baseca, "Modification of the Remuneration Regime of Renewable Energies and Legal Certainty," Noticias Juridicas (May 29, 2012), https://noticias.juridicas.com/conocimiento/articulos-doctrinales/4766-modificacion-del-regimen-retributivo-de-las-energias-renovables-y-seguridad-juridica-/ for further analysis of the Spanish Supreme Court Judgment.
110. European Commission, "Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment" (July 19, 2018) at p. 1, https://tinyurl.com/msfwec4a.
111. Judgment of the Court (Fifth Chamber), Joined Cases C-798/18 and C-799/18, ECLI:EU:C:2021:280 (April 15, 2021) at para. 16, https://curia.europa.eu/juris/document/document.jsf?text=&docid=239885&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=556389.

States have affirmed the same principle in the ISDS context. In the *Teco v. Guatemala* case, the US Government stated—in its non-disputing state submission—that "[s]tates may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's 'expectations' about the state of regulation in a particular sector."[112] And indeed, some tribunals have given heed to this view; for instance, in *Saluka v. Czech Republic*, the tribunal reasoned that applying the relevant FET provision "requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other."[113]

Notably, in most (if not all) of the decisions won by investors in the cases against Spain, the tribunals did not consider Spain's public policy justification for the contested measures, taken in the midst of a massive tariff deficit and a financial crisis, in the public interest.[114] In the *Masdar v. Spain* case, for example, despite Spain's contention that the aim of the modifications had been to "guarantee the economic sustainability of the system and to correct over-remuneration,"[115] the tribunal found that Spain had breached the FET with no reference to its public interest justification.[116]

In the *Eiser v. Spain* case, while the tribunal acknowledges that the legitimate expectations of any investor have "to include the real possibility of reasonable changes and amendments in the legal framework, made by the competent authorities within the limits of the powers conferred on them by the law," it regarded the modified regulatory framework as "profoundly unfair and inequitable" because it "stripp[ed] Claimants of virtually all of the value of their investment."[117] While allegedly raising the bar for liability to only "radical" changes made to past regulations, the tribunal still found the Spanish measures "radical" without any consideration of the devastating economic circumstances in which Spain found itself or any reference to the interests of any other stakeholder, such as consumers and taxpayers, or other commitments Spain may have under EU or international law,[118] that may ultimately override the individual investor's legitimate expectations.

In other words, if modifications to general legislation loosely relied upon by a foreign investor result in a loss for that investor, a state may be held liable for frustrating the investor's legitimate expectations, irrespective of the policy justifications for the modifications.

112. *TECO v. Guatemala,* ICSID Case No. ARB/10/23, Submission of the United States of America (November 23, 2012) at para. 6.
113. *Saluka v. Czech Republic*, PCA Case No. 2001-04, Partial Award (March 17, 2006) at para. 306. *See also CEF Energia v. Italy,* Award (January 16, 2019) at paras. 235-247.
114. Ortino, 2023.
115. *Masdar Solar v. Spain*, ICSID Case No. ARB/14/1, Award (May 16, 2018) at para. 451.
116. *See also*: *9REN Holding v. Spain*, ICSID Case No. ARB/15/15, Award (May 31, 2019) at paras. 253-259; *Watkins v. Spain,* ICSID Case No. ARB/15/44, Award (January 21, 2020) at paras. 538, 562; *NextEra v. Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Principles of Quantum (March 12, 2019) at paras. 596, 599, 601.
117. *Eiser v. Spain*, ICSID Case No. ARB/13/36, Award (May 4, 2017) at para. 365.
118. *See* Helionor de Anzizu and Nikki Reisch, chapter in this book.

§11.05 RENEWABLE ENERGY CASES RAISE CONCERNS ABOUT UNJUST ENRICHMENT

The timing of the claimants' investments in many of the renewable cases and the compensation awarded also raise serious policy concerns about unjust enrichment. In the *Watkins v. Spain* case, for instance, the investor claimants had sold their interests for a profit before initiating and ultimately prevailing in their arbitration claim.[119] The majority in *Watkins* did not consider the investor's profit from its asset sale in its consideration of the alleged injury.[120] The dissenting arbitrator in that case noted that "... contrary to what the Majority considered ..., the investment of the Claimants was not 'destroyed'. The investment was bought at €91 million in 2011, valued €98 million at the moment of the alleged intervention of the wrongful act in 2014 and sold at €133 million in 2016 (which meant a return of 11.2%). What is the Majority considering as 'destroyed' and what is the Tribunal repairing exactly, when awarding damages in the sum of €77 million, without taking into account the date of the investment and the impact of the context on reparation?"[121]

It turns out that the investors in *Watkins* acquired their interests in August 2011,[122] which was after the initial disputed measures had been passed by Spain (in 2009 and 2010).[123] At that time, the 2009 decision of the Spanish Supreme Court was also available, which clearly stated "that there could be no guarantee that the regulatory regime was not going to change in the near future."[124] Despite the notorious

119. *Watkins v. Spain,* ICSID Case No. ARB/15/44, Award (January 21, 2020) at para. 654.
120. *Watkins v. Spain,* ICSID Case No. ARB/15/44, Dissent on Liability and Quantum of Prof. Dr. Hélène Ruiz Fabri (January 2020) at para. 13.
121. *Watkins v. Spain,* ICSID Case No. ARB/15/44, Dissent on Liability and Quantum of Prof. Dr. Hélène Ruiz Fabri (January 2020) at para. 16. The *Watkins* case is likely not the only case in which the investor sold its interest prior to bringing a claim against the respondent state and made a substantial profit from that sale. Most awards do not provide this kind of information. *See, e.g.*, *Infracapital v. Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum (September 13, 2021) at paras. 174-183.
122. *Watkins v. Spain,* ICSID Case No. ARB/15/44, Award (January 21, 2020) at para. 139.
123. Royal Decree (RD) 6/2009, April 30, on the adoption of certain measures in the energy sector and the approval of the social bond (BOE No. 111, 39404 (May 7, 2009)) ("which explained that the special regime had led to a tariff deficit and that this was causing huge problems, risking not only the financial situation of electricity companies but also the sustainability of the whole sector"); RD 1614/2010, 7 December, on the regulation and modification of certain aspects of the production of electricity from solar thermoelectric and wind technologies (BOE No. 298, 101853 (December 8, 2010)) ("which limited the bonus working hours for thermoelectric and wind technologies"); RDL 14/2010, December 23, on urgent measures to correct the tariff deficit in the electricity sector (BOE No. 312, 106386 (December 24, 2010)) ("which reduced certain revenues and cost consignments and adopted consumer protection measures in order to prevent further deficits, beginning in 2013"); *see* García-Castrillón, 2016 at p. 4.
124. *Watkins v. Spain,* ICSID Case No. ARB/15/44, Dissent on Liability and Quantum of Prof. Dr. Hélène Ruiz Fabri (Jan 2020) at para. 13 and fn. 9 ("Judgment Supreme Court 3rd Chamber, sect. 3, S 9-12-2009, appeal 152/2007: the Claimant in the case 'does not pay enough attention to the case-law of this Chamber specifically referred to with regard to the principles of legitimate expectation and non-retroactivity applied to the successive incentives' regimes for electricity generation. This involves the considerations set out in our decision dated October 25, 2006 and repeated in that issued on March 20, 2007, inter alia, about the legal situation of the owners of electrical energy production installations under a special regime to whom it is not

instability and unsustainability of the legal regime at the time of the investment,[125] as well as the deficit in the electricity system, which had already reached critical levels by 2009,[126] the majority in *Watkins* did not consider the date of the investment.[127] This is despite the fact that when *Watkins* first invested in Spain, "they were already well aware of the deepening crisis, the rise of Spain's sovereign debt and the decision of the government to cut subsidies to the renewable energy sector."[128] They nevertheless decided to invest.

The *Watkins* decision is not unique. In eleven (or 42%) of the cases concluded by December 2022 in which investors have been successful against Spain, those investors acquired equity interests in their respective ventures in or after 2010. Yet, they still managed to prevail in their claims.[129] In fact, as one study reports, one of the investors suing Spain in *PV Investors* (KGAL GmbH) "made at least three large investments in Spanish solar energy between July and November 2011 … [meaning] they were still buying assets whilst actually preparing their November 2011 lawsuit. Despite their suit, in 2013 KGAL's then Managing Director reported good returns: 'The amount of sunlight exceeded our expectations, and the excellent technical performance of our plants ensures good results for our investors ... Although the era of government

possible to acknowledge for the future an "unmodifiable right" to the maintenance unchanged of the remuneration framework approved by the holder of the regulatory authority provided that the stipulations of the Law on the Electricity Sector are respected in terms of the reasonable return on investments'").

125. *See*, for instance, the evidence before the tribunal in *Cube Infrastructure v. Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum (February 19, 2019) at para. 345.
126. *Cube v. Spain*, ICSID Case No. ARB/15/20, Separate and Partial Dissenting Opinion of Professor Christian Tomuschat (undated) at para. 8.
127. *Watkins v. Spain,* ICSID Case No. ARB/15/44, Dissent on Liability and Quantum of Prof. Dr. Hélène Ruiz Fabri (January 2020) at para. 13.
128. Olivet and Eberhardt, 2014 at p. 30.
129. *RREEF v. Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum (November 30, 2018) at para. 142; *NextEra v. Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Principles of Quantum (March 12, 2019) at para. 175 (this investment was made on December 28, 2010); *InfraRed v. Spain*, ICSID Case No. ARB/14/12, Award (August 2, 2019) at para. 57; *Watkins v. Spain,* ICSID Case No. ARB/15/44, Award (January 21, 2020) at para. 139; *STEAG v. Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum (October 8, 2020) at para. 371; *SolEs Badajoz v. Spain*, ICSID Case No. ARB/15/38, Award (July 31, 2019) at para. 138; *Hydro Energy 1 and Hydroxana v. Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (March 9, 2020) at para. 62; *Cube Infrastructure v. Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum (February 19, 2019) at para. 327; *Infracapital v. Spain,* ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum (September 13, 2021) at paras. 174-182; *Antin Infrastructure v. Spain*, ICSID Case No. ARB/13/31, Award (June 15, 2018) at para. 134, and also *see* Diario Oficial de la Unión Europea, "Ayuda estatal SA.54155 (2021/N)—Laudo arbitral de Antin—España: Invitación a presentar observaciones en aplicación del artículo 108, apartado 2, del Tratado de Funcionamiento de la Unión Europea" (November 5, 2021) at para. 48, https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:52021AS54155&from=EN#ntc34-C_2021450ES.01000801-E0033 ("In August 2017, Antin sold its investment in the Andasol plants to Cubico Sustainable Investments Limited at a price of EUR 75,2 million.").

payment for feed-in tariffs is ending, investing in renewable energies still makes sense.'"[130]

§11.06 CONCLUSION

The proliferation of filed and threatened treaty-based claims challenging changes to renewable energy incentives scheme substantially increases the cost to states of implementing policy measures that necessarily require flexibility in light of complex and evolving technologies, financial factors, and assumptions about costs and markets, among other changing circumstances.[131] In other words, even the threat or the risk of ISDS claims undermines governments' use of the very tools that are effective at promoting investments in renewable energy.[132] Moreover, "funds that could otherwise have been available as lawful subsidies to assist establishment of new production of renewable energy" have instead been "channelled towards securing an excessively high return on existing production facilities as a result of such decisions."[133]

Investment treaty and ECT proponents seem to be advocating for the role of investor protections for renewables as an attempt to preserve the traditional investment regime in the face of shattering public trust. Yet, the renewable energy cases undermine this most recent attempt to preserve the legitimacy of the system. There is no evidence that investment treaties influence investment decisions; the authors' survey of renewable energy investors affirmed the decades of empirical research that has shown that investment treaties are not a decisive factor in investors' locational decision-making.

Policymakers should draw two conclusions from these combined findings: the first is that investors *do* face significant constraints in investing in renewable energy investments, and there are key differences across jurisdictions. Policymakers seeking to attract investors in renewable energy should focus on those key constraints and drivers for renewable energy investments, none of which is addressed by traditional investment treaties.[134] A second conclusion is that the costs of these treaties

130. Olivet and Eberhardt, 2014 at pp. 30 and 38 ff., citing: KGAL "KGAL Photovoltaic Funds: Excellent Plant Performance, High Distributions for Private Investors," Press Release (January 28, 2013).
131. James Zhan and Joachim Karl, "Investment Incentives for Sustainable Development," in Ana Teresa Tavares-Lehman, Lisa Sachs, Lise Johnson, and Perrine Toledano (eds.), *Rethinking Investment Incentives* (New York: Columbia University Press, 2016) 204, http://cup.columbia.edu/book/rethinking-investment-incentives/9780231172981; Lise Johnson and Perrine Toledano, "Investment Incentives: A Survey of Policies and Approaches for Sustainable Investment," CCSI (2022) at pp. 55, 119, https://ccsi.columbia.edu/sites/default/files/content/docs/publications/Investment-Incentives-policies-approaches-sustainable-investment-CCSI-Oct-2022.pdf.
132. Ana Mercedes López-Rodríguez, "The Sun Behind the Clouds? Enforcement of Renewable Energy Awards in the EU," 8(2) Transnational Environmental Law (2019) 279 at p. 282 DOI: 10.1017/s204710251900013x.
133. Behn and Fauchald, 2015 at pp. 136-137.
134. Aydos et al., 2022.

substantially outweigh their (uncertain) benefits.[135] States expose themselves and their citizens to millions or even billions of dollars of potential liability in ISDS awards by the very nature of the dynamic and responsive regulation that is needed for the energy transition. States that are in favor of achieving climate goals should consider withdrawing from their investment treaties in order to maintain the necessary policy space to implement effective and urgent climate action policies.[136]

135. Lise Johnson, Lisa Sachs, Brooke Güven, and Jesse Coleman, "Costs and Benefits of Investment Treaties, Practical Considerations for States" (New York: Columbia Center on Sustainable Investment (CCSI), 2018), https://ccsi.columbia.edu/sites/default/files/content/pics/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr.pdf.

136. Martin Dietrich Brauch, "Should the European Union Fix, Leave or Kill the Energy Charter Treaty?" (New York: Columbia Center on Sustainable Investment (CCSI), February 9, 2021), https://ccsi.columbia.edu/news/should-european-union-fix-leave-or-kill-energy-charter-treaty. Indeed, the European Renewable Energies Federation is also calling on the "EU and Member States to join France, the Netherlands, Poland and Spain and to initiate their withdrawal from the Energy Charter Treaty (ECT) because the so-called agreement in principle on the modernisation of the ECT sustains EU fossil fuel dependency and impedes the transition to 100% renewable energy EU." *See* European Renewable Energies Federation, "Time to End the Energy Charter Treaty (ECT) and to Move on with the European Energy Transition," *EREF Press Release* (October 24, 2022), https://eref-europe.org/time-to-end-the-energy-charta-treaty-ect-and-to-move-on-with-the-european-energy-transition/.