UIT – The Arctic University of Norway, Faculty of Law

International Arbitration and Renewable Energy

The linkage between legislation and adjudication: The impact of arbitration tribunal decisions on energy policy and regulatory framework

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Abstract

With the proliferation of Investor-State Dispute Settlement cases pertaining to renewable energy, it has been observed that arbitration tribunals are gradually assuming the role of *de facto* contributors to energy and climate policymaking, exerting influence on the regulatory framework. In light of this context, the objective of this study is to analyze the impact of international arbitration cases concerning renewable energy investments on the development of renewable energy policy, while simultaneously proposing avenues for enhancing legislation pertaining to investment protection standards. Spain will be used as a case study to elucidate the key trends within the evolving legal landscape surrounding renewable energy and shed light on how tribunals interpret the standards of investment protection. Furthermore, the study explores the hypothesis of a regulatory chill effect resulting from ISDS decisions, developing, and employing a theoretical framework to conceptualize this notion. Due to the challenges associated with establishing conclusive evidence of the regulatory chill phenomenon, establishing a concrete linkage between the phenomenon and its impacts on policymaking remains difficult. Nonetheless, in the case of Spain, it can be argued that the country has experienced a "response chill" in connection to the protracted legal disputes surrounding its renewable energy sector. Lastly, this thesis discusses the implications of arbitration cases related to renewable energy on the investment protection regime and emphasizes the necessity of striking a better balance between the state's right to regulate and the protection of investments.

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Abbreviations

CEEAG: Climate, Energy and Environmental Aid Guidelines

COP: United Nations Climate Change Conference

ECT: Energy Charter Treaty

EEAG: Energy and Environmental Aid Guidelines

EU: European Union

FET: Fair and Equitable Treatment

FIP: Feed-in-Premium

FIT: Feed-in-Tariff

GHG: Greenhouse Gas Emissions

GO: Guarantees of Origin

ICSID: International Centre for Settlement of Investment Disputes

IIA: International Investment Treaty

IPCC: Intergovernmental Panel on Climate Change

IRENA: International Renewable Energy Agency

ISDS: Investor-State Dispute Settlement

MS: Member State

NECP: National and Energy Climate Plan

RED: Renewable Energy Directive

NDC: Nationally Determined Contribution

RD: Royal Decree

RE: Renewable Energy

TEU: Treaty on the European Union

TFEU: Treaty on the Functioning of the European Union

UN: United Nations

UNCITRAL: United Nations Commission on International Trade Law

1 Introduction

1.1 Background

Over the recent years, investment treaty arbitration has taken more and more space, becoming a major frontier to renewable energy related disputes[1]. With the climate change trend our world is going, states are facing increasing pressure to embrace and develop renewable energy in a time where the demand for energy is growing[2]. Given that the renewable energy sector is capital intensive, it still much depends on government subsidies to make it economically productive[3]. Indeed, renewable energy projects are complex and large, involving huge amount of money and many different stakeholders[4]. Thus, investments are much needed to develop renewable energy projects. At the beginning, the investor needs to invest a big amount of money which makes it very vulnerable until the company gets profits. Renewable energy projects can take time before working which lengthens the time before getting an attractive rate of return. During this period, investors fear that the governments would change the regulatory framework in a way that it would impede their future investments. This is why investment protection is important. In order to attract investors in the renewable energy sector, they need to be guaranteed that their investments will be secured. The Investor-State Dispute Settlement (ISDS) mechanism creates the possibility of enforcement of state liability directly by investors. States are thus obligated to create a stable operating environment for renewable energy investors if they do not want to be confronted with ISDS claims.

International arbitration is a court litigation that takes place before private adjudicators known as arbitrators. It is a consensual, neutral, binding, private and enforceable means of international dispute resolution[5], that is usually favored by foreign investors to handle disputes in the renewable energy sector[6]. Arbitral proceedings protect from possible nationalization of the host state, as foreign investors are investing outside their home country, they face more risks. However, the use of international arbitral tribunals also becomes a means to fill a «governance gap»[7], providing conclusions that can contribute to the global energy and climate governance. At the same time, arbitration decisions against states create a risk of regulatory chill on

[1] Moloo & and Jacinto, 2011, p. 3
[2] Stewarts law, 2022
[3] Marata et al., 2010, p. 1
[4] Stewarts law, 2022
[5] Steingruber, 2012, p. 13
[6] Stewarts law, 2022
[7] Peel, 2011, p. 15

governments. Thus, there seems to be a link between the judicial policymaking and the legislative policymaking, so that the judicial decisions have an impact on the regulatory landscape[8].

1.2 Purpose and research questions

With the growing number of cases of ISDS related to renewables, arbitration tribunals are said to slowly becoming a de facto source of energy and climate policymaking having an impact on the regulatory landscape[9]. As the link between judicial and legislative policymaking is increasingly entangled, the thesis will dig into the implications of investment arbitration on renewable energy policymaking. The study aims at analyzing how international renewable energy investment arbitration cases influence the development of renewable energy policy, while at the same time offering ways to improve legislation on investment protection standards. To study the impacts of arbitration tribunal decisions on renewables policy and regulatory framework, the thesis addresses the following research questions:

1. *How do the current renewable energy policies relate to the investment protection regime? / How are they linked to the outcome of investor-state disputes?*
2. *Do the ISDS tribunals provide legal stability, balancing the interests of the investors and the host state right to regulate by interpreting the investment protection standards?*
3. *Do the ISDS tribunals create a regulatory chilling effect on governments that could hinder the energy transition?*
4. *How do the ISDS tribunals impact the investment protection regime and its need to be reformed with greener considerations?*

1.3 Literature review and theoretical framework

Academic literature on the linkages between legislation and adjudication is vast, as the phenomenon has been growing for almost 10 years[10]. Case law is different from legislation, the former being determined by Court and the latter by legislators[11]. The EU context presents an interesting example of the linkages between them. In EU law, only the Treaty on European Union and the Treaty on the Functioning of the European Union are constituting primary law.

[8] Tienhaara, 2018, p. 232
[9] Newton, 2022
[10] Berge and Berger, 2019; Behn, 2015, p. 363-415; Côté, 2014; Matveev, 2015, p. 348–386; Schram et al., 2018; Tienhaara, 2018, p. 229- 250
[11] Schmidt, 2018, p. 93

The Commission is said to be the guardian of these treaties as it monitors the application of the EU law and makes sure it is uniformly applied throughout the EU[12]. Scholars have demonstrated that EU judicial policymaking can be an alternative to legislation in the EU legal order[13]. The Commission has the legislative initiative and bases its proposals on case law as well as political compromises on secondary law[14]. In that way, the legal uncertainty of the development of case law can be rectified through the codification into secondary law based on the Treaty's interpretations. However, case law cannot embody an entire regulation, it consists on a conclusion based on general principles from legislation in a specific dispute. It only interprets principles of the Treaty and thus cannot provide broad general rules for a field of law.

Many articles have also been written on the problems that ISDS could pose in relation to the duty of states to regulate[15]. The articles particularly focus on fossil fuels and how investment protection treaties such as the ECT block states from legislating and developing more environmental laws[16]. In contrast, there are few articles discussing arbitration in relation to the changing legislation on renewable energies. The literature on the subject is emerging, now that the regulatory chill hypothesis is established among scholars, many hypotheses are being made[17]. However, it is difficult to draw conclusions, as the whole sector is undergoing modernization, which means that many things will change in the coming years.

Furthermore, the linkages of investment arbitration with EU state aid rules has received limited attention in the literature. Nonetheless, the significant ongoing conflict arising from ISDS judgments regarding the compatibility of EU state aid rules with international investment law is poised to exert a substantial influence on investment protection standards and the ISDS mechanism.

In international investment law, the discussion on the linkages mainly boils down to the discourse on potential regulatory chill[18], which is the fear of States to face arbitration, under investor-State dispute settlement which leads to the restriction of States to enact certain public

[12] Consolidated Version of the Treaty on European Union, Article 17
[13] Schmidt, 2018, p. 124
[14] Schmidt, 2018, p. 95
[15] Tienhaara, 2011; Aikaterina, 2014; Satwik, 2016; Arseni, 2015
[16] Balino, 2021, IISD website
[17] Berge and Berger, 2019; Tienhaara and Downie, 2018
[18] Tienhaara, 2018, p. 229

policy measures[19]. Indeed, a large number of International Investment Agreements (IIAs) include provisions for recourse to the ISDS mechanism in the event of a litigation[20]. In the context of the energy sector, it is the Energy Charter Treaty that provides in its Article 26 for a mechanism of Settlement of Disputes between an Investor and a Contracting Party. Through these ISDS provisions, the state becomes liable for its change of national policies if it impedes the interests of investors in energy projects. The ISDS mechanism can hamper governments in adopting necessary climate policies under the fear of receiving ISDS claims leading to regulatory chill in policymaking.

1.4 Methodology

The thesis will mainly follow a doctrinal methodology. It will analyze legislation, as well as case law and literature sources related to renewables in governmental policies and international investment arbitration. Relevant legal provisions will be analyzed and hypotheses on how they can change under the effects of arbitration awards will be made. Exploring the impacts of renewables arbitration cases on renewable energy policies will also force the research to understand the characteristics and legal effects of the policy instruments.

Moreover, as environmental law as an interdisciplinary branch of legal science often integrates other perspectives in its analysis,[21] the present study will incorporate an investment law approach to environmental law. By doing so, it will dig into investment law provisions that affect investments in the energy sector. A political science perspective will also be integrated when explaining the theoretic framework of the notion of «regulatory chill».

The thesis will be a transnational law research, as environmental law involves various legal issues and regulations that are cross-border, multi-stakeholder and applied at different level[22]. The European legislation on energy, climate change and green transition is well developed and will be used as the basis of the research. The Spanish legislation on renewable energy will be used as a case study to see how the policy is impacted by the ISDS decisions.

[19] Ibid
[20] IPCC, 2022, Chapter 14, p. 81
[21] Kokko, 2015, p. 286
[22] Ibid, p. 287

For primary sources, the analysis will be based on EU legislation on the green transition, especially on the renewable energy legislations as well as the incentive mechanisms that the Member States can implement to attract renewable energy investors. Furthermore, to illustrate the European legislation, the research will have a focus on the Spanish legislation. Investment protection provisions will also be analyzed with a focal point on the Article 10(1) of the Energy Charter Treaty on the fair and equitable treatment protection.

For secondary sources, ISDS case law on renewable energy against Spain will be summarized and analyzed. Case law will also be mentioned at the level of European secondary legislation. In addition, the study will be based on numerous EU policies and communications from the Commission. Finally, the study will draw on academic literature, particularly on the potential regulatory impact of the ISDS mechanism on policy making. On the subject, it is Kyla Tienhaara who develops the most complete definition of the phenomenon on which many scholars will rely[23]. The study will also base its analysis on academic literature to analyze the Spanish renewables cases and the legal standards they encompass. For the latter, the analysis will rely on the works of Nicolas Angelet [24] and Federico Ortino [25] on the fair and equitable treatment in international investment law.

1.5 Scope and structure of the thesis

It is important to note from the outset that the study focuses on the Spanish renewable energy policy, analyzing the Spanish renewables saga in investment arbitration as a case study. This choice is made for practical reason of limiting the scope of research and materials. Due to the high number of ECT claims against Spain, it allows a good understanding of the issues at hand with various examples to illustrate the reasoning.

The thesis is structured as follows. In chapter 2, the thesis provides an overview of the current renewable energy policies and investment regime for renewable energy. Indeed, the green transition needs to be accelerated by the development of renewable energy. The international climate regime emphasizes the need for more subsidies in the clean energy sector[26] as financial contributions are needed for the development of renewable energy technologies. Because huge amounts of money are needed to initiate renewable energy projects, states are trying through

[23] Tienhaara, 2018, p. 229–250
[24] Angelet, 2022
[25] Ortino, 2020
[26] IPCC AR6 Synthesis Report (SYR)

subsidies to attract foreign investors to invest in clean energies in their countries. International investment law in the sector of energy has developed significantly in the late 1990s, leading to the creation of the Energy Charter Treaty, which creates a legal framework to promote energy investments between countries through a solid investment protection regime. The investment protection regime will be analyzed with a deep focus on the Fair and Equitable Treatment provision[27].

In chapter 3, the thesis outlines the main trends in the evolving judicial landscape on renewable energy and how the tribunals are interpreting the investment protection standards. Are they really trying to balance the interests of the investors and the host state right to regulate? Do their judgments provide legal stability? To analyze the main trends of the effervescent judicial landscape on renewable energy, the discussions are focused on the Spanish renewable energy arbitration. Indeed, since a change in its incentive for renewables regulatory framework in 2009, Spain has been receiving many claims against a breach of investment protection from foreign investors. The country is currently the epicenter for arbitration claims under the Energy Charter Treaty: as of April 2023, 56 claims were filed against Spain by renewable energy investors[28]. Moreover, Spain is part of the EU, so it may be interesting to see how the EU interferes with international investment disputes especially on state aid regulation.

Then, in the continuation of this analysis, in chapter 4, the thesis looks at how the ISDS judgments are affecting the Spanish energy and climate regime and its way of complying with its environmental international targets. Are the ISDS tribunals creating a regulatory chill effect on governments that could hinder the energy transition? Based on the Spanish case study, the mandatory National Energy and Climate Plan of Spain is analyzed. The thesis specifically looks at the intended targets for renewables. Subsequently, the implementation of the National Energy and Climate Plan is assessed by checking the different decisions that the Spanish government made to create new renewables projects or to release more financial funds. Moreover, the regulatory chill effect of the ISDS decisions hypothesis is analyzed by providing a theoretical framework of the notion. Additionally, it is examined whether regulatory chill can be good in some cases and what are the ways to try to prevent the phenomenon. Furthermore, it is explored how the EU state aid regulation is interfering with international investment law in arbitration cases and whether the Commission as a guardian of the treaty has authority over it.

[27] Energy Charter Treaty, Article 10(1)
[28] UNCTAD, Investment Policy Hub, cases as Respondent State

In the last chapter, chapter 5, the thesis discusses the implications of the renewable energy arbitration cases on the investment protection regime. The results of the investigation of the impacts on renewable energy policymaking in the investment sector are examined as well as the way forward for investment regime reform. As many scholars are studying the current reform of the Energy Charter Treaty, it is interesting to see how the withdrawal of the countries would affect the treaty and if it would it influence the discussions on modernization of the treaty. The EU has been very active in the process. It has negotiated new agreements to clarify the relation between ISDS arbitration and EU law.

The thesis ends with concluding remarks on the linkages between legislation and adjudication in the renewable energy sector. The conclusion aims to show the impacts of ISDS arbitration already perceived by governments on their way to create new environmental policies as well as the new phenomena and challenges this entails.

2 Renewable energy policy and legislation on renewable energy investment protection

Energy transition and foreign direct investment are governed by different legal instruments. Thus, their interaction must be examined from different legal and analytical perspectives, namely international environmental law, and international investment law. Indeed, under international and EU law, Member States (MS) must meet renewable energy targets. To facilitate the development of various types of renewable energy, which require new technologies and can therefore be costly, the EU has developed a detailed regulatory framework. In addition, under international investment law, an investment protection regime has been established in the energy sector under the Energy Charter Treaty.

In order to examine all the challenges associated with ISDS renewable energy cases, it is important to understand why we need renewable energy and what it encompasses.

2.1 The increasing role of renewable energy in a sustainable future

2.1.1 Renewable energy for climate change mitigation

Renewable energy refers to energy sources that are replenished naturally and can be used repeatedly without depletion. These energy sources include solar, wind, hydro, geothermal, and biomass, among others[29]. The use of renewable energy is important for climate mitigation because it helps to reduce greenhouse gas emissions (GHG) and air pollution by providing an alternative to fossil fuels, which are the primary source of GHG emissions that cause climate change. The excess of GHG in the atmosphere, resulting from human activities disrupts the natural atmospheric balance and is the main cause of the observed warming since the mid-20th century[30].

Scientific reports have been published stating the need to make an energy transition to renewable energy sources in order to reduce carbon emissions on earth and thus slow down the climate crisis[31]. In the Sixth Assessment Report, for example, the Intergovernmental Panel on Climate Change (IPCC) calls for a complete halt to coal mining and a 60% reduction in oil use and a 70% reduction in gas use by 2050 compared to 2019 levels, to achieve the goal of net-zero and contain the global warming at 1.5° C[32]. The electricity sector has probably the biggest

[29] International Renewable Energy Agency
[30] IPCC, 2023: Summary for Policymakers
[31] IPCC Working Group III findings, 2022
[32] IPCC AR6 Synthesis Report (SYR)

role in achieving carbon neutrality of the economy[33]. The use of energy needs to be shifted from fossil fuels to more electricity through a range of technological solutions allowing the storage of renewable energy (batteries, hydrogen etc.).

As climate change accelerated, it became clear that an international effort was necessary to address the challenge and mitigate its impacts. In 2015, during the UN Climate Change Conference (COP21[34]), the international community adopted the Paris Agreement with the intention to keep the rise of temperature at 2 or even 1.5° C[35]. However, the agreement does not explicitly refer to energy, letting alone renewable energy and fossil fuels in its text. This omission could create some issues for the implementation of the agreement, notably on how to hold countries accountable for their emissions reductions commitments. Moreover, because there is no legally binding result of reduction of GHG emissions, some countries are not very rigorous about the targets in their Nationally Determined Contributions (NDC). The International Renewable Energy Agency (IRENA) underlines that only thirteen parties have committed to a percentage of renewables in their overall energy mixes[36].

One of the recent conferences of the UNFCCC parties, COP26, closed with the adoption of the «Glasgow climate pact» on 13 November 2021 with the aim of reducing global CO2 emissions by 45% by 2030 compared to 2010 levels[37]. For the first time, the UNFCCC parties mentions fossil fuels and the need to rapidly deploy clean power generation and energy efficiency measures[38]. However, the signatories of the pact attenuated the ambition of the text with the formulation of «phase out of unabated coal power» intending only a gradual decrease of the use of coal. Some countries have tried to pursue the COP26 efforts on the gradual phase out of the use of coal with other fossil fuels such as gas and oil but without success[39].

In the meantime, between the COP26 and COP27, the IPCC released its 6th Assessment Report concluding that even if the current commitments of all countries in the world are met by 2030,

[33] International Energy Agency, Net Zero by 2050, A Roadmap for the Global Energy Sector, Summary for Policy Makers
[34] Conference of the Parties, December 2015 in Paris
[35] United Nations Framework Convention on Climate Change, Article 2
[36] The International Renewable Energy Agency, Targets and nationally determined contributions
[37] Glasgow pact IV. Mitigation, Article 22
[38] Glasgow pact IV. Mitigation, Article 36
[39] Germany adopted in 2021 the Act to Reduce and End Coal-Fired Power Generation which aims at gradually reducing and eventually phasing out from hard coal and lignite power generation by 2038

the global warming target of 1.5°C set by the Paris Agreement remains out of reach[40]. Following this statement, the much-anticipated COP27 looked very promising. While the conference recognised that the unprecedented global energy crisis underscores the urgency of rapidly transforming energy systems to be more secure, reliable, and resilient, accelerating clean and fair transitions to renewable energy, it appeared to be very modest in ambition and even «paradoxical»[41]. It created a fund to finance the «loss and damage» caused by climate change in vulnerable countries but did not order to act on the root causes of this damage, which are fossil fuels. To conclude, no concrete progress has been made on CO2 emission thresholds or on phasing out fossil fuels: neither commitment to reduce the use of fossil fuels, nor to stop funding these energy sources has been made.

2.1.2 Renewable energy for energy security

Renewable energy is also crucial for energy security. Energy security can be defined as «a condition in which a nation and all, or most, of its citizens and business have access to sufficient energy resources at reasonable prices for the foreseeable future free from serious risk of major disruption of service »[42]. It has been recognized as one of the UN sustainable goals to « Ensure access to affordable, reliable, sustainable and modern energy for all »[43]. By enhancing the energy transition to cleaner energy, such as solar, wind power and biofuels, countries are less dependent on import and thus have a better energy security. For example, Finland, which used to be very dependent on the import of gas from Russia, in the actual geopolitical situation, is accelerating the development of offshore wind farms to reduce the dependency on imports and increase its energy security. Therefore, increasing the electricity produced by renewable energies reduces the dependence on often imported hydrocarbons[44], and the green transition, which implies a shift from a carbonized economy towards a greener one, would ensure security of supply, low prices, and sustainability.

However, it is not yet possible to rely exclusively on renewable energies, as they can be uncertain. Indeed, the power supply of renewables mostly depend on weather conditions which are difficult to predict. If the renewable energy power supply does not meet the baseload, it can create interference and lead to a blackout. The combination of dispatchable with variable

[40] PCC AR6 Synthesis Report (SYR)
[41] BFMTV, 2022
[42] Barton et al, 2005, p. 5
[43] A/RES/70/1, UN Goal 7
[44] Holzer and Kopytsia, 2022

renewable energy generator with flexible fossil fuel power allows it to be used to meet power demand including baseload demand[45]. Technologies exist to prevent the potential volatile nature of renewable energy resources. Energy storage through hydroreservoirs, batteries and potentially hydrogen allows to collect the surplus of energy, store it and later when needed put it back in the grid.

To conclude, by diversifying the energy mix and developing the use of renewable energy sources, countries can reduce their dependence on fossil fuels and increase their energy security. Apart from reducing the negative impact on climate and air pollution, investing in renewable energy sources can also promote job creation and improve public health, thereby contributing to sustainable economic growth and social well-being. Therefore, energy security and the green transition are mutually reinforcing, and a transition to cleaner and more sustainable sources of energy is essential for achieving long-term energy security.

2.2 Recent trends in renewable energy policy

2.2.1 Global strategic policies on renewables

The global strategic policies on renewable energy are primarily based on international climate targets discussed above. In order to facilitate international cooperation in the renewable energy sector, intergovernmental organizations, such as IRENA, provide advice and assistance to states to increase the global uptake of renewable energy.

IRENA aims to facilitate cooperation, advance knowledge, and promote the adoption and sustainable use of renewable energy between countries to ensure a transition to a sustainable energy future[46]. According to the international organization, the most realistic way to reduce the emissions by 2030 is to combine a powerful energy efficiency strategy with the rise of renewable energy to replace fossil fuels[47]. IRENA also reminds that NDCs are not legally binding as such and thus need to be aligned at the national level with national energy plans and renewable energy targets to ensure the achievement of NDC targets. To do so, net zero pledges are important and must be implemented through concrete plans that reflect long-term pathways towards net zero emissions[48]. An example is quantified targets such as percentage of renewables

[45] International Renewable Energy Agency, ETWG , 2019
[46] Statue of the International Renewable Energy Agency, Preamble
[47] International Renewable Energy Agency, Energy transition outlook
[48] International Renewable Energy Agency, Renewable energy targets in 2022, A guide to design, p. 76

for heating and cooling, as well as transport for the short term[49]. The targets must be country specific as they are supposed to reflect the long-term political commitment to renewable energy of the country. Market confidence is very important to attract investors in the sector, hence, the more detailed the targets, the more favourable it is for investment. The organization warns that if the international target of achieving carbon neutrality by 2050 is to be reached, the level of ambition needs to at least be doubled for the renewable energy power targets set for 2030[50]. Finally, IRENA recalls that periodic revisions are crucial, especially since it is now easier to collect data. Countries can revise their national plan and adjust it to make it more ambitious. Overall, IRENA's strategic policies are aimed at accelerating the transition to a sustainable, low-carbon energy system based on renewable energy sources by promoting capacity building, knowledge sharing, innovation and energy access. IRENA is currently involved in the NDC's engagement of many countries in Europe (North Macedonia, Albania, Georgia..) in Asia and the Pacific (Fiji, Afghanistan, Cambodia, Indonesia..) in Latin America (El Salvador, Paraguay, Colombia, Ecuador..) and in Arica (Benin, Gabon, Mali, Niger…)[51].

2.2.2 The EU green transition and renewable energy policy

The EU strives to play a global leadership role in the battle against climate change. Party to the Paris Agreement, it has developed a comprehensive and detailed legal framework, to ensure a green transition and meet its NDC, which the EU upgraded in 2020 to reduce emissions by at least 55% by 2030 from 1990 levels[52]. Jointly with its MS, the EU is bound by this target. Adopted in 2019, the European Green Deal aims to transform the EU into a modern «resource-efficient and competitive economy» ensuring zero emissions of GHG by 2050[53]. In order to meet this objective, the European Commission has adopted a set of policies to make Europe fit for reducing net GHG emissions by at least 55% by 2030, the so-called 'Fit for 55'[54]. Energy sector measures are at the core of the 'Fit for 55' legislative package. For instance, the updated Renewable Energy Directive (RED II)[55] sets a new binding renewable energy target of at least 32% for 2030.

[49] International Renewable Energy Agency website, Targets and nationally determined contributions
[50] International Renewable Energy Agency, Renewable energy targets in 2022, A guide to design, p. 77
[51] International Renewable Energy Agency, Climate Action with Energy Transition: Enhancing and Implementing Nationally Determined Contributions, 2021, p. 9
[52] European Commission, State of the Union: Commission raises climate ambition and proposes 55% cut in emissions by 2030, 17 September 2020
[53] COM/2019/640 final
[54] COM/2021/550 final
[55] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, Article 3

Recently, the EU launched the REPowerEU to end reliance on Russian fossil fuels before 2030 in response to the 2022 Russian invasion of Ukraine[56]. The plan aims for saving energy, producing cleaner energy, and diversifying energy supplies. One of the proposed measures of the plan is to raise the European renewables target for 2030 to 45%[57]. It would facilitate the Union overarching objective to achieve carbon neutrality by 2050.

Moreover, to help the MS to implement the new climate and energy policy targets, the Commission launched in 2019 the «Clean Energy for all Europeans» package [58], a legislative package to meet the European Green Deal objectives. At the EU level, energy is a shared competence between the EU and the MS[59]. The article 191 of the Treaty on the Functioning of the European Union (TFEU) is the legal basis for the European environmental policy, which requires MS to promote measures at international level to combat climate change. The EU energy policy shall ensure the functioning of the energy market, energy security, energy efficiency and energy saving and the integration of renewables[60]. The 'Clean Energy for all Europeans' package is a major instrument of the EU long-term strategy of achieving carbon neutrality by 2050. The package includes a governance system[61] for the Energy Union in which MS are required to establish integrated 10-year National Energy and Climate Plans (NECPs)[62]. The regulation applies to the five dimensions of the Energy Union which is a policy initiative launched by the Commission in 2015 aimed at creating a more integrated, secure, and sustainable energy market across the EU MS. The Energy Union includes decarbonization (GHG reduction and renewables)[63] through the use of renewable energy. MS shall integrate the main objectives and targets of the Energy Union consistent with the Paris Agreement[64]. From 2021, the national plans need to reflect the renewable energy objective through an indicative trajectory of the target contribution in terms of the «Member State's share of energy from renewable sources in gross final energy consumption in 2030» [65]. The trajectories should include benchmark increases of 18% in 2022, 45% in 2025, and 65% in 2027. This ensures that

[56] COM/2022/230, final
[57] COM/2022/230, final
[58] European Commission, Clean energy for all Europeans, 2019
[59] Consolidated version of the Treaty on the Functioning of the European Union, Article 4
[60] Ibid, Article 194(1)
[61] Regulation on the Governance of the Energy Union and Climate Action (EU) 2018/1999
[62] Ibid, Article 1
[63] Ibid, Article 1.2 (d)
[64] Ibid, Article 4 (a) (1)
[65] Ibid, Article 4 (a) (2)

in 2030 the indicative trajectory reaches at least the MS's planned contribution. Of course, MS are free to set more ambitious benchmark increases.

One of the major elements of the EU 'Clean Energy for all Europeans' package is the revised Renewable Energy Directive (RED II)[66]. RED II establishes a legal framework to promote the use of renewables and help the MS to meet the Union target of 32% energy from renewable sources by 2030[67]. Renewable energy is defined in a comprehensive manner as «energy from renewable non-fossil sources, namely wind, solar and geothermal energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas»[68]. REDII reminds that MS shall set national contributions, in their NECP to collectively meet the overall binding Union target of 45% renewables for 2030[69]. Importantly, the text establishes common rules for renewables support schemes to develop electricity from renewable energy sources[70].

2.3 Policies for attracting investment in the renewable energy sector and the international energy investment protection regime

2.3.1 The problem of investments in the green transition

Renewable energy investors can face a variety of policy implications that can hinder their efforts to finance and develop renewable energy projects. Firstly, the significant upfront costs that renewable energy projects often require can scare and dissuade investors who are unwilling to commit large amounts of capital. This is why public support schemes are important to promote the use of energy from renewable sources by «reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation…»[71]. Governments can provide incentives such as tax credits, grants, and loans to help reduce the upfront costs of renewable energy projects and make them more attractive to investors. Another market barrier that renewable energy investors must often face is the grid integration. Indeed, the inertia of the existing electricity system is impeding investment because renewable energy is a threat to the dominance and profit of traditional energy that has already established customers and a supply and demand structure. Investors wanting to invest in

[66] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources
[67] Ibid, Article 3 (1)
[68] Ibid, Article 2(1)
[69] Ibid, Article 3 (2)
[70] Ibid, Article 4 (3)
[71] Ibid Article 2(5)

renewable energy projects may face challenges related to the lack of supporting infrastructure that are mostly created around conventional energy systems. Infrastructures for distributed generation is important to lower the price of renewable energy production. Thus, it can be expensive to integrate renewable energy into the existing grid, requiring new transmission infrastructure to transport renewable energy from where it is produced to where it is needed. The development of new technologies such as the modernization of the grid would create new investment opportunities for investors with more certainty while reducing risks. In order to be able to develop these new technologies, countries need to cooperate, transferring technologies. This can be supervised by international organizations such as IEA and IRENA which would support the countries in capacity building. Another factor that significantly impact renewable energy investors is the market demand: the increased demand of renewables makes it more economically attractive for investors. The EU has been working to liberalize its energy markets, with the goal of creating a more competitive and integrated energy market across MS. This can impact investors by creating new opportunities to invest in cross-border energy infrastructure projects.

2.3.2 Energy investment support schemes

As discussed above, the EU has set ambitious energy targets for 2030 that include reducing GHG emissions, increasing renewable energy use, and improving energy efficiency and each MS has developed its own policies to achieve these targets and to ensure the security and sustainability of their energy systems. For instance, under the RED II, MS are required to establish national schemes for issuing Guarantees of Origin (GOs) for electricity produced from renewable sources. These schemes must be transparent, reliable, and subject to monitoring and verification. The aim of this instrument is to show the quantity of energy produced from renewable sources to the electricity consumers through a green certificate. The directive also sets out rules for the transfer and cancellation of GOs, as well as the use of these certificates for compliance with national targets and reporting requirements.[72] The standard size for a GO is equivalent to 1 MWh of electricity produced[73]. The GOs can be traded electronically in the market for renewable energy certificates, their value depends on market demand.[74]

[72] Ibid, Article 15
[73] Max Andrews, 2020
[74] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, Article 15

However, the main instrument of the EU renewable energy policy is subsidies. To promote investments in the renewable energy sector, the EU has created a strong legal framework with financial incentives to attract renewable energy investors. The incentives can be given in a market premium form, either sliding or fixed. The Feed-in-Tarif (FIT) is a fixed payment that is independent from the market price, typically set above market price and never changes. The problem is that this incentive can become very expensive in the long-term, especially when an economic crisis happens. The Feed-in-Premium (FIP) is a more flexible payment that follows the market price, still above it. The payment is not shielded from the market fluctuation which makes the costs less. However, this incentive is more uncertain for the investors and even if it is more effective in practice, it still contains a risk. The EU would prefer that MS move from FIT to FIP as FIT can engage higher costs, shielding the payment from market fluctuation. The FIT appears as the best market-based and market-responsive incentive[75].

Renewable energy investors need to understand the energy policy of the EU and each MS, as these policies and concrete measures can have a significant impact on the success of their investments. For example, carbon taxes practiced by some MS[76] that impose charges on carbon emissions may create additional opportunities for low-carbon investments[77]. In addition, EU common policies, such as public support schemes, may apply that ensure a stable and predictable investment environment by providing a guaranteed return on investment. By identifying the right energy policy, renewable energy investors can identify investment opportunities that align with the EU's energy targets and ensure long-term profitability while contributing to the transition to a more sustainable and secure energy system. Thus, policies that promote renewable energy can create a more favorable investment environment for investors. However, there is still a risk of changes in policies, that could impede the investments made in the sector, the next chapters will further discuss the challenges that it creates.

2.3.3 Investment protection regime under the Energy Charter Treaty

The EU and national energy investment promotion policies are set following basic rules of the energy investment protection regime. The international regime for investments in the energy sector is largely based on the Energy Charter Treaty (ECT), which is an international instrument for the promotion of long-term cooperation in the energy sector, providing a multilateral

[75] Couture and Gagnon, 2010, p. 955
[76] Sweden, Finland, Poland, Denmark are MS that have imposed carbon taxes in their country
[77] Muresianu and Li, 2022, p. 2

framework based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter[78]. In the late 1990s, the treaty represented a new opportunity to overcome previous economic divisions between countries of the Western and Eastern Europe. The new legal basis for the creation of an open international energy market for the 21st century developed energy cooperation among the states of Eurasia; as of today, there are 53 signatories parties including the EU and Euratom. The aim of the ECT is to create, 'common rules of the game' for the energy sector, designed to encourage investment and trade, to ensure reliable transit, and to promote efficient energy use'[79]. The main provisions of the Treaty concern the protection of investment, trade in energy materials and products, along with transit and dispute settlement. The Treaty covers all sources of energy: it does not have special rules for the renewable energy sector at such, but all the provisions are affecting the sector. The treaty protects energy investment against discrimination[80] and expropriation [81].

The ECT provides a number of substantive standards of protection, such as the prohibition of unlawful expropriation, non-discrimination, full protection and security, among others[82]. The most important rule for the purpose of the paper is the «Fair and Equitable Treatment» (FET)[83] defined as the obligation for Parties to «encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area». Investments in the energy sector shall enjoy the «most constant protection and security», meaning that Parties to the treaty cannot take «unreasonable or discriminatory» measures that would impair the investments. This led to investments cannot be treated in a «less favourable» way than required by international law and treaty obligations. The standard of international investment law does not protect substantive rights as such, it protects the investments from the host state's decision-making process[84]. An issue with the provision is its very vague wording which has led to a number of disputes. The topic will be address later in the thesis.

Another controversial provision of the ECT is the so-called 'sunset clause'. The ECT allows Parties to the treaty to unilaterally terminate their legal engagements under the treaty after five

[78] Energy Charter Treaty, Article 2
[79] Energy Charter Treaty
[80] Energy Charter Treaty, Article 10
[81] Ibid, Article 13
[82] Hober, 2010, p. 156
[83] Energy Charter Treaty, Article 10(1)
[84] OECD, 2004/3, p. 2

years of its entry into force[85]. In order to do so, the Party wanting to leave the treaty needs to notify the Depositary of its withdrawal. After the notification, the Party's withdrawal takes effect (*at least / or later if specified)* one year after the date of the receipt of the notification[86]. Following the provision, countries are supposedly able to withdraw from the treaty after they notify the Depositary. However, the so-called «sunset clause»[87] binds the Parties to the application of the provisions of the treaty for a period of twenty years. This provision is very favorable to investors as return on investments usually takes time, especially in the energy sector with a large dependence on infrastructure. The period of twenty years is supposed to guarantee the return on investments and thus protects the investments. The investors are the winners of the treaty, even if a number of obligations would be discharged from the treaty, the investment protection will continue to operate.

Another important feature of the treaty is the forum for arbitration that it offers[88]. Based on the provisions of the treaty, investors can sue host state for a breach of the treaty's obligations. As a result, the treaty has served as the foundation for over 90% of the recent ISDS cases involving renewable energy[89]. Indeed, if disputes under Part III of the treaty cannot be settled amicably after three months, the investor Parties have choices to submit the dispute for resolution[90]. The arbitration under the ECT is conducted under the rules of the International Centre for Settlement of Investment Disputes (ICSID), or under the United Nations Commission on International Trade Law (UNCITRAL) rules if both parties agree. The arbitral tribunal is composed of three arbitrators, one appointed by each party and a third appointed by agreement between the parties or by the appointing authority. The Investor must provide its consent to submit the dispute to the ICSID. Contracting Parties have given its unconditional consent to the submission of a dispute to international arbitration or conciliation by signing the Treaty.

It should be noted that the ECT also provides for a mechanism for resolving disputes between state Parties. In this case, the dispute is resolved through consultation, and if that fails, it is referred to a conciliation commission. If the conciliation commission is unable to resolve the dispute, the parties may submit the dispute to arbitration or to the International Court of Justice.

[85] Energy Charter Treaty, Article 47
[86] Ibid, Article 47 (2)
[87] Ibid, Article 47(3)
[88] Ibid, Article 26
[89] UNCTAD, ISDS Navigator
[90] Energy Charter Treaty, Article 26 (2)

These disputes happen way less frequently, only little application of this mechanism has been made so far[91].

All in all, the ECT is controversial and the target of much criticism. Many Contracting Parties have recently expressed their desire to leave the treaty. The binding international dispute settlement mechanism allows foreign investor to sue a state before a private arbitration tribunal to challenge expropriations. Critics argue that this mechanism gives too much power to foreign corporations and undermines democratic decision-making[92]. The Treaty can thus favour traditional production and consumption of non-renewable energy sources through the protection of the investments made in the sector. Fossil fuel investors have a way to challenge States when they make energy policy choices that result in a reduction of the profits expected by an energy company at the time of its investment. In other words, foreign investors can demand substantial financial compensation from Governments that decide to modify their energy policy because of the negative consequences of this choice on the sustainability of their investments and on the expected profits[93]. In a sense, the ECT can be seen as a dissuasive instrument to induce states to abandon fossil fuels. This phenomenon is called the «regulatory chill» effect[94] and occurs when governments are limiting their legislative authority afraid of potential ISDS claims. This phenomenon will further be explained in chapter 3.

Furthermore, the twenty-year «sunset clause» is reinforcing the debate around the Treaty, prolonging the protection of fossil fuel investment for that period. Public opinion, including ENGOs, have a strong opinion on this provision, which they denounce as an «immune clause». Although the treaty contains a protocol on Energy Efficiency and Related Environmental Aspects, integrating specific international law obligations, it does not mention renewable energies and no additional protocol exists[95].

The European Parliament has recognized that a collective exit from the Treaty would be best and calls for a coordinated withdrawal from the MS[96]. The treaty used to be a useful cooperation tool in the sector of energy which allowed development of the sector. However, today the

[91] Energy Charter Treaty, list of cases
[92] Civil Society Organisations' Statement against the Energy Charter Treaty
[93] RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands (ICSID Case No. ARB/21/4)
[94] Tienhaara, 2018, p. 229
[95] Wilder, Drake, 2016, p. 372
[96] RC-B9-0498/2022, European Parliament, Joint motion for a resolution

international needs have changed, and international cooperation is needed to promote a just energy transition to reduce GHG.

To conclude, the use of renewable energy sources is crucial for mitigating climate change by reducing GHG and air pollution. Because climate change is a phenomenon that is affecting everyone, an international regime is mandatory to provide a global response. Based on the IPCC reports, policymakers are trying to develop a multilateral climate framework that will ensure a green transition in order to meet the target of climate neutrality by 2050. In the climate crisis, the EU is playing a leading role in making efforts towards a green transition. To help the MS, the EU has created a comprehensive legal framework, including the "Clean energy for all Europeans" package, which includes a governance system to ensure a more effective implementation of the law. The current energy crisis due to the geopolitical situation calls for energy security, which reenforces the call for the expansion of renewable energy.

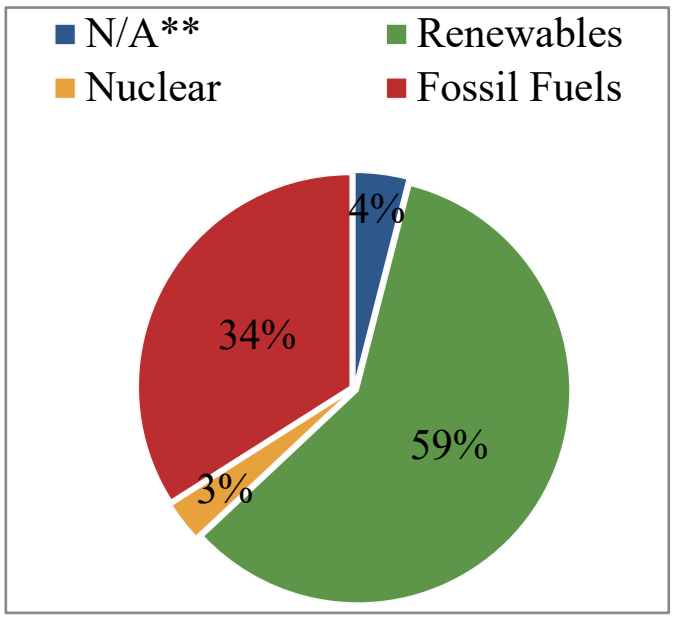
Renewable energy investors are facing risks when they invest in renewable energy projects in a foreign country due to significant upfront costs, grid integration problems, lack of supporting infrastructure and market demand. They need solid incentives from governments and investment protection guarantee in order to invest. The EU has created a strong legal framework with incentives to attract renewable energy investors, including the Feed-in-Tarif and the Feed-in-Premium incentives. Due to the potential instability of the regulatory regime and what it could mean for investors, investment protection standards are essential. Protection of investment in the energy sector is ensured under the Energy Charter Treaty, which provides a multilateral framework for cooperation in the energy sector, promoting long-term cooperation and mutual benefits. However, due to the many critics it receives, and the loss of some of its Parties, the Treaty is going through a modernization process that will supposedly include environmental concerns that will make it more sustainable.

3 The evolving judicial landscape of renewable energy disputes

The capital-intensive nature of renewable energy projects makes it mandatory to establish a stable attractive legal environment for investors. Investor State Dispute Settlement plays a major role in ensuring the protection of the investment standard by allowing investors to challenge governmental decisions that possibly could put their investments at risk. In these investors-state arbitration cases the potential liability of the state is at stake. When investors are

investing in a foreign country, they are exposed to financial risks of the host state that can impede renewable energy investments[97]. Currently, most of the RE projects depend on government incentive schemes such as the FIT[98]. The incentive schemes are however not immune to political risk and make the investors particularity vulnerable to policy change[99]. ISDS can prevent the political risks that the investor could potentially face from the host state. At the same time, the threat of investors seeking monetary compensation through ISDS can in some cases be sufficient to deter a state from making changes in the first place (see later in the next chapter the part on regulatory chill). Indeed, an increased number of ISDS procedures in recent years originate from the energy sector. In what follows, the research will focus on the Spanish renewable energy saga disputes, as Spain is the country who received the most claims under the ECT for its renewable energy regulatory changes. The disputes form a trend in the renewable energy state policy and thus provide clear empirical evidence to the impact of adjudication on state policy.

Distribution of Arbitration Cases under the ECT by Energy Sources Involved: 158 cases*[100]



[97] Tienhaara and Downie, 2018 p. 458
[98] Feed-in-Tariff usually set a price for their energy over a fixed period of time, or by mandating that a specific proportion of electricity provided by utilities companies comes from the renewables sector.
[99] Talus, 2015
[100] Statistics of Energy Charter Treaty cases (as of 1/5/2023)
* One case involves more than one form of energy sources
** In six cases, it has not been possible to identify particular energy sources

3.1 The Spanish renewable energy saga

The «Spanish renewable energy saga» refers to a series of disputes between foreign investors and the Spanish government over changes made to the state renewable energy policies following the financial crisis of 2008. The disputes have been primarily handled through international arbitration under the ECT, which Spain joined in 1994.

3.1.1 The changing regulatory regime

To promote renewable energy production, the Spanish government introduced two different regimes in 1997 depending on the generation plants type[101]. The ordinary regime applies to electricity generation facilities that are not considered renewable energy sources, the «traditional generation plant». Under this regime, electricity producers receive a market price for the electricity they generate, which is determined by supply and demand in the wholesale electricity market. This means that producers are subject to market risks and fluctuations in electricity prices, which can affect their profitability. The special regime, on the other hand, benefits renewable energy producers, which would receive a fixed tariff for the electricity they generate, which is guaranteed for a set period of time. This tariff is generally higher than the market price for electricity, which provides producers with a stable and predictable income stream. In addition, producers under the special regime benefit from priority access to the electricity grid, which allows them to sell their electricity first and ensures that they have a market for their product. The Law 54/577 was later reinforced by the Royal Decree ('RD') 436/2004, which allowed the renewable energy producers to choose between a feed-in-premium (FIP) or a feed-in-tariff (FIT) based on the kilowatt-hour electricity produced. As explained in the previous chapter, a FIT is a fixed payment that is independent from the market price, typically set above market price and never changes, compared to a FIP that is a sliding payment that follows the market price but is still above it.

In 2007, Spain enriched the special regime to further promote renewable energies through the RD 661/2007's incentive scheme. The regulation ensured that producers of renewable energy under the Special Regime could choose to either sell their electricity to the system at a fixed FIT in eurocents per kWh or to sell their electricity on the wholesale market and earn a premium in eurocents per kW[102]. It also establishes specific incentives for small-scale renewable energy

[101] BOE Ley 54/1997, de 27 de noviembre, del Sector Eléctrico

[102] Noilhac, 2020, p. 25

projects and encourages the use of cogeneration systems. This led to a boom in renewable energy investment in the country.

Between 2010 and 2012, following the economic and financial crisis of 2008, Spain amended the previous regime. In July 2010, the Spanish government passed the Royal Decree-Law 14/2010[103], which introduced new regulations for the renewable energy sector. The law aimed to reduce the cost of the electricity system and address the issue of the tariff deficit, which had been growing due to the high costs of renewable energy subsidies. The law established new limits on the amount of renewable energy that could receive subsidies and introduced a new tax on electricity production, renewable projects could benefit from the FIT scheme only for a limited period. Then, in January 2012, the Spanish government passed the Royal Decree-Law 1/2012[104], which made further changes to the regulatory framework for renewable energy. The law reduced the subsidies for new renewable energy projects and introduced new fees for existing projects. The law also established a new system for calculating the subsidies, based on the average cost of production of each technology, suppressing economic incentives for new PV facilities.

Finally, in February 2013, the Spanish government passed the Royal Decree-Law 2/2013[105], which eliminated the feed-in tariff system that had provided fixed prices for renewable energy producers and replaced it with a new system of auctions. The law also introduced a new tax on the production of electricity from renewable sources. Thus, the Royal Decree Law 24/2013 deleted the previous regimes, replacing it with one 'specific regime'[106]. This means that traditional and renewable energy generators were given the same treatment, which resulted in renewable energy installations losing their exclusive access to the power grid and priority for dispatch that they had under the special regime. The new regime's system of calculation for remuneration is now based on installed capacity and the exploitation costs of a standard facility. Furthermore, the system now includes a provision that ensures a 'reasonable rate of return'

[103] BOE Real Decreto-ley 14/2010, de 23 de diciembre, por el que se establecen medidas urgentes para la corrección del déficit tarifario del sector eléctrico
[104] BOE Real Decreto-ley 1/2012, de 27 de enero, por el que se procede a la suspensión de los procedimientos de preasignación de retribución y a la supresión de los incentivos económicos para nuevas instalaciones de producción de energía eléctrica a partir de cogeneración, fuentes de energía renovables y residuos
[105] BOE Real Decreto-ley 2/2013, de 1 de febrero, de medidas urgentes en el sistema eléctrico y en el sector financiero
[106] BOE Ley 24/2013, de 26 de diciembre, del Sector Eléctric

determined by the regulatory authority for a typical power plant with a set initial profit target of 7.398%.

Overall, the new regime for renewable energy established by the Spanish government between 2010 and 2013 was a problem for renewable energy investors because it created uncertainty, reduced profits, and made it more difficult to secure financing for renewable energy projects. This, in turn, led to a slowdown in the growth of the renewable energy sector in Spain[107]. Finally, these regulatory changes have led to a large number of foreign investors, mostly from Europe, filing investment treaty claims against Spain under the ECT and arguing that the changes to the renewable energy incentives violated the treaty's protection standards for foreign investors.

3.1.2 Investors against Spain

Following the changes in the regulatory framework for renewable energy incentives, multiple disputes were brought to investment arbitration against Spain. Indeed, the legislative amendments have caused problems in the sense that the Spanish government made retroactive changes to its FIT program, which impacted the profits of renewable energy investors who had already invested in the sector based on the previous FIT rates. The retroactive changes resulted in a significant reduction in the returns on investments and created uncertainty for investors. The Spanish government also made cuts in subsidies for renewable energy projects, which impacted the financial viability of projects and made it more difficult for investors to secure financing. The cuts in subsidies made it difficult for renewable energy projects to compete with traditional energy sources and resulted in a slowdown in the growth of the renewable energy sector in Spain. Finally, the lack of transparency in the implementation of the new regime for renewable energy was criticized[108]. Investors were not consulted in the decision-making process which further increased the level of uncertainty and risk for renewable energy investments in Spain. It is thus interesting to analyze the different cases and see the tribunals' views on it, and how stable their judgment was and whether there was a 'consistency' around the 'legitimate expectations' of the investors.

The first case opening the 'Spanish renewables saga' is from 2012, in which *Charanne B.V. and Construction Investments S.A.R.L.* claimed that Spain's regulatory changes in the renewable

[107] International Energy Agency, Spain 2021 Energy Policy Review, p. 79
[108] Novenergia II - Energy & Environment (SCA), SICAR v The Kingdom of Spain, SCC Arb No 2015/063

energy sector negatively impacted their investments in the country[109]. The investors argued that the changes were inconsistent with the fair and equitable treatment and the full protection and security standards set forth in the ECT. The case highlights the potential risks that investors face when investing in renewable energy projects, as changes in government policy and regulations can significantly impact their investments. Additionally, the case led to the idea that investors have 'legitimate expectations' of stability of the legal framework and they could be breach even without specific commitments of the State towards the investors[110]. This case marks the beginning of many complaints against the Spanish government for changing its renewables regulatory framework. From these cases it can be noticed that the plaintiffs are all claiming a breach of the FET provision. The breach is alleged in almost all of the cases resulting in the awards requiring Spain to pay huge amounts[111].

3.2 Fair and equitable treatment as the main legal issue of the Spanish renewable energy saga

3.2.1 The tribunals' reasoning and findings

Although the tribunals have not always followed the same reasoning, they have tried to analyze the FET's violation of Article 10(1) of the ECT in the same way, balancing the state's obligation to provide a stable legal framework against the state's sovereign right to modify the regulatory framework. Firstly, the tribunals looked at whether the state has committed itself to the investors through specific commitments, which constitute a stability clause that would be violated by the 2012/14 measures. In a number of cases, Spain has been found guilty of breaking this stability clause emanating from specific commitments. In the decision *Novenergia*[112], the investors argued that the sudden change in policy violated their legitimate expectations, as they had invested in the projects with the understanding that the incentives would remain in place for the duration of their contracts. The tribunal held that 'the commitment from the Kingdom of Spain could not have been clearer' not to change the regulatory framework[113], and considered the challenged measures as radical and unexpected[114], breaching the fair and equitable treatment clause of the Article 10(1) of the ECT. When specific commitments are made by a host state to investors, it 'crystallizes' the stability of the legal framework into a strict obligation. It is then

[109] Charanne B. V. & Construction Investments S.A.R.L. v the Kingdom of Spain, SCC Arb No 062/2012
[110] Ibid, §517
[111] In only two cases the Tribunal didn't find a breach of the FET provision: Charanne B.V. and Constructions Investments S.à.r.l v. Spain, SCC Case No. V (062/2012); The PV Investors v. Spain, PCA Case No. 2012-14
[112] Novenergia II - Energy & Environment (SCA), SICAR v The Kingdom of Spain, SCC Arb No 2015/063
[113] Ibid §667
[114] Ibid §695

very easy to identify a breach of the specific commitments and thus of the legitimate expectations of the investors based on the Article 10(1) of the ECT. In other cases, the court considered that Article 44(3) of RD 661/2007 should be considered in itself as a regime stabilization clause by the state. In the *Antin* case[115], the tribunal stated that 'given the precision and detail exhibited in the royal decrees, particularly the contemplation that the treatment would be accorded for a defined period of time',[116] the claimants were entitled to have legitimate expectations of the regulatory framework. By ruling in favor of *Antin*, the international arbitration established that the specification of Article 44(3) of RD 661/2007 created a stabilization clause giving rise to legitimate expectations to the investors. The case is important as it highlights the significance of stability and predictability in regulatory frameworks for renewable energy investments. The stabilization clause in Article 44(3) of RD 661/2007 was intended to provide this stability, and the ruling in the *Antin* case confirmed that this clause has legal force and can be enforced through international arbitration. Investors in renewable energy need to be able to rely on stable and predictable regulatory frameworks to make long-term investments in renewable energy infrastructure, and the stability clause is an important mechanism to provide this certainty. In these cases, the tribunal has recognized that the presence of specific commitments from a state towards the investors created an obligation of 'stability' of the legal framework[117].

Secondly, in the absence of specific commitments made by the state, the Article 10(1) of ECT has been interpreted to bound the state to the obligation of 'consistency' of the legal framework leading to legitimate expectations for the investors. This obligation of consistency is detailed in the *Infrared* case[118] as 'that the regulatory framework will not be radically or fundamentally changed may arise even in the absence of such a specific commitment, depending on the facts automatically foreclose a finding of breach of the FET standard since – in the balancing exercise that tribunals are called upon to carry out – the consideration of a legitimate legislative objective may be outweighed by the radical nature of the changes to the legislative framework at issue'[119]. It relates to the legal principle that governments must act consistently and predictably in their

[115] Antin Infrastructure Services Luxembourg S.à.r.l and Antin Energia Termosolar B.V v Kingdom of Spain, ICSID Case No ARB 13/31
[116] Ibid, §552
[117] InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain, ICSID Case No ARB 14/12 §366
[118] InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain, ICSID Case No ARB 14/12
[119] Ibid §368

regulatory policies in order to protect the legitimate expectations of investors. In the *SolEs Badajoz* case[120], the tribunal judged that the newly implemented Spanish measures were 'disproportionate in the severity of their economic on the investment'[121] accentuating the importance of the economic deprivation that the measures could create. The tribunal followed a similar reasoning in the *RREEF* case[122] in which it describes a stable environment as an environment without unpredictable radical transformation the conditions of the investments. In the specific case, the tribunal established that Spain breached the Article 10(1) of the ECT by implementing unproportionate and unreasonable measures through the calculation of the financial damage sustained by the claimant[123]. At the end, even without specific commitments taken by the host state toward the investors, they are still the winners in most cases because the regulatory changes are considered to be disproportionate and made the claimants bear an excessive burden by the disputed measures.

To conclude, it seems that the tribunal bases its judgment not only on the law but mostly taking into account the economic and technological situation of each investor to decide if there is a breach of the Article 10(1) ECT or not. When there are no specific commitments from the host state towards the investors, the tribunal judges their 'legitimate expectations' in connection to the evolution of the regulatory framework. If the expectations of the investors are judged 'reasonable' and 'proportionate', the host state is in breach of the Article 10(1) of the ECT for having undermined the investments of the investors. But how exactly are these expectations judged reasonable or not? What is the benchmark to consider the new regime to be disproportionate and thus in breach of the FET clause? The next sub-sections will analyze the wording of the provision under Article 10(1) and the legal content of the FET standard developed in academic literature, customary and case law to better understand this.

3.2.2 The scope of FET under the Energy Charter Treaty and case law

The fair and equitable treatment (FET) is a legal principle found in many international investment treaties, including the ECT. The FET standard obliges host countries to treat foreign investors in a fair and equitable manner, without discrimination and in accordance with international law[124]. Article 10(1) of the ECT states:

[120] SolEs Badajoz GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/38)
[121] Ibid, §462
[122] REEF Infrastructure (G.P.) Limited and RREEF Pan-Euro- pean Infrastructure Two Lux S.à r.l. v Kingdom of Spain, ICSID Case No ARB 13/30
[123] Ibid §472
[124] Angelet, 2022, p. 4

> *'Each Contracting Party shall ensure fair and equitable treatment in its territory to the investments of investors of other Contracting Parties. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment, or disposal. In no case shall such Investments be accorded treatment less favorable than that required by international law, including treaty obligations'.*

The provision itself does not define what is meant by 'fair and equitable treatment'. It is therefore necessary to rely on case law and academic literature to understand what the FET standard entails exactly.

A broad understanding of the standard implies protection against expropriation without compensation, the right to due process, and the right to receive fair and prompt compensation in the event of expropriation[125]. In the case whereas a government takes actions that effectively deprive investors of their property rights, they must be compensated in a fair and adequate manner. Secondly, the FET standard requires that investors be accorded a degree of due process in any legal proceedings that may impact their investments. This means that investors must be given a fair opportunity to present their case, and that the decision-making process must be transparent and impartial[126]. Finally, the protection must be reasonable and predictable for the investors which means that they should rely on a stable regulatory framework. Arbitrary or sudden changes that could impact their investments negatively would thus be considered as a breach of FET[127].

For the purpose of the thesis, and the understanding of the main claims of investors in the Spanish renewable energy disputes, the requirement of the stability of the regulatory framework and the related legitimate expectations of investors will be further analyzed. Determining the legitimate expectations has become a challenging task due to the numerous interpretations attributed to fair and equitable treatment. Indeed, what legitimate expectations can general legislation give rise to? What is considered to be reasonable and what is not?

[125] Vadi, 2021, p. 1331
[126] Hobér, 2010, p. 158
[127] Levashova, 2020, p. 3

3.2.3 Protection of the legitimate expectations of investors

The concept of «legitimate expectations» derives from the Fair and Equitable Treatment[128], and like the latter it lacks definition. In the Spanish renewable energy saga cases, the tribunals assessed the due diligence process carried out by the investor to determine if the legitimate expectations were reasonable. Still, the tribunals did not make it clear what exactly forms due diligence, no proper legal requirements were specified. The requirement that seems to be most applied is to verify if the investors conducted an assessment of risks concerning the regulatory framework it relied on at the time of its investment. In the *Stadtwerke* case, the tribunal has acknowledged that in order to fulfill acceptable due diligence, it was necessary to obtain some form of formal written legal advice regarding the potential consequences of changes to the regulatory framework[129]. However, the scope required for the due diligence is not agreed across jurisprudence,[130] as in some cases the tribunals did not consider the due diligence process as a pre-process that is necessary before making a successful claim for the safeguarding of legitimate expectations.

Several arbitral tribunals have taken a broad interpretation of the FET standard, which includes the state's obligation to protect an investor's legitimate expectations and to ensure a stable legal environment[131]. In international law, legal stability refers to the predictability, coherence, and consistency of a legal system over time, as well as its ability to protect the legitimate expectations of foreign investors. Changes that are considered unreasonable to the stability of the legal framework constitute a breach of FET[132]. According to Federico Ortino, different notions of legal stability exist[133]. When the notion of reasonable expectation is interpreted in a strict manner, any regulatory change would amount to a FET breach. Following a soft interpretation, the obligation of stability is to view it in a more lenient manner, where the requirement is for any regulatory modifications made by the host state to be deemed 'reasonable' or 'unreasonable linked to a lawful public policy objective'. To determine whether or not expectations are reasonable, the tribunal establishes a balancing test on the merits of the regulatory reform to determine the fairness and reasonableness of the questioned measures[134].

[128] Noilhac, 2020, p. 22
[129] *Stadtwerke München GMBH and others v Kingdom of Spain*, ICSID Case No ARB/15/1, §264
[130] Cube Infrastructure Fund SICAV and Others v Kingdom of Spain, ICSID Case No ARB 15/20
[131] Vadi, 2021, p. 1331
[132] Dolzer and Schreuer, 2012, p. 145
[133] Ortino, 2020, p. 2
[134] Ibid, p. 4

Firstly, retroactive changes to the regulatory framework could be considered arbitrary and could breach the FET standard. Indeed, if the subsidies are reduced retroactively, it is unfair as the renewable energy investors had already made their investments. In the *Stadtwerke* case[135], the tribunal ruled that the measures taken by the government were not unreasonable due to their non-retroactive application. Secondly, the lack of transparency of the regulatory changes makes the new measures unreasonable. The host state must provide foreign investors with adequate information and opportunities to participate in the regulatory process. Legal stability needs to be ensured. The *Novenergia* case[136] is an example in which the tribunal analyzed in a soft manner the notion of legal stability with a balancing test. The tribunal stated that 'radical or unexpected changes that would cause severe economic impacts for investors, despite not entirely obliterating the claimant's investment' would constitute a violation of the FET standard. Even if the tribunal specified that the economic effect on the claimant's investment is not the only factor to consider when conducting a balancing test under the FET, the economic interests of the investors is the major factor that is analyzed[137]. Indeed, while assessing the balance of the economic interests, the tribunal did not take into account the need of policy adjustment by Spain for public interest at the time.

Thus, legal stability is a dynamic concept that is assessed depending on the scope of the FET provision. The broader the scope is, the higher the expectations of investors may be. Indeed, the recent jurisprudence tries to improve the investment protection regime's coherence and predictability. There are no fixed criteria that clearly define what has to be considered as reasonable or unreasonable but rather a set of notions that are assessed on the basis of a balancing interest test. The balancing test can be viewed as a method of evaluating the legitimacy of the state's measure through a cost-benefit analysis, where the benefits need to outweigh the costs[138]. Based on recent cases, the tribunals are mostly interpreting the FET standard and legitimate expectations of the legal stability in a strict sense, making any change in the regulatory framework applicable to the investment a violation of the standard.

To conclude, several trends in judicial interpretation of the FET investment protection rule applied to investments in renewable energy can be identified. The disputes brought against

[135] Stadtwerke München GmbH, RWE Innogy GmbH and others v Kingdom of Spain, ICSID Case No ARB 15/1
[136] Novenergia II - Energy & Environment (SCA), SICAR v The Kingdom of Spain, SCC Arb No 2015/063
[137] Ibid, §694
[138] Sunstein, 2018

Spain are most prominent in this respect, with an evolving interpretation of the FET standard. At the beginning, the tribunals interpreted the FET standard in a narrow way, finding that the changes to the Spanish regulatory framework were not constituting a breach of FET[139]. Over time, however, the tribunals have applied a broader interpretation of the standard, in which the changes to the regulatory framework constituted a violation of FET[140]. There is a growing emphasis made on the protection of the legitimate expectations of the investors. Indeed, legal stability is a dynamic concept that evolves with regular reviews of legal frameworks, the adoption of best practices from other legal systems, and the incorporation of new legal developments and innovations. The tribunals showed a heightened emphasis on the potential effects of regulatory modifications on investors. This has consequently elevated the significance of ensuring that any such adjustments are carried out in a manner that is clear and foreseeable. It made the assessment of legitimate expectations more rigorous, focusing on factors such as the specific commitments made by the host government to investors, and the degree of reliance that investors placed on those commitments. In some cases, specific commitments from the host state were identified only through the Article 44 (3) of the Royal Decree 661/2007 which constitutes a "stability assurance" of the legal regime[141]. Thus, the FET standard is not fixed and requires a careful analysis of the specific circumstances of each case in which the economic interests of the investors is taken into account. Moreover, the non-agreed scope of the due diligence process in the cases creates uncertainty as to the existence and extent of an investor's responsibility to act diligently when investing in a host state. Even if the tribunals did not yet take a clear position on how to interpret FET with specific legal requirements, their rulings have much in common: in the majority of cases, the investors are the winners with their investments being safely protected under the FET standard.

As seen in this chapter, the FET standard has been interpreted to protect the interests of foreign investors, often at the detriment of host states' ability to regulate in the public interest. This poses a risk of creating a chilling effect on the willingness of host states to adopt and implement renewable energy policies, as they may be subject to costly and uncertain investment disputes. The next chapter will therefore further explore the implications of this adjudication for renewable energy policy and the development of a sustainable energy transition.

[139] Charanne B. V. & Construction Investments S.A.R.L. v the Kingdom of Spain, SCC Arb No 062/2012
[140] *The PV Investors v Kingdom of Spain*, PCA Case No 2012- 14
[141] Cube Infrastructure Fund SICAV and Others v Kingdom of Spain, ICSID Case No ARB 15/20 §401

4 The impacts of investment arbitration decisions on renewable energy policy-making: the case of Spain

Over the recent years, the ISDS mechanism faces a crisis of legitimacy[142] regarding the impacts it has on government policies. Recently, the European Commission opened a formal state aid in depth investigation procedure concerning the award issued in *Antin v Spain* on the potential conflict between EU law and international investment law[143]. Furthermore, through ISDS arbitration, investors have a way to directly enforce the standards of investment protection contained in international investment treaties[144], making states accountable for investment protection. This can result in regulatory uncertainty and create a risk of a chilling effect on future renewable energy policies[145].

4.1 Linkages of investment arbitration with EU state aid rules

An important ongoing conflict arising from ISDS judgments that has not been addressed much in literature is the compatibility of EU state aid rules with international investment law. Indeed, EU's rules on subsidies prohibit MS from granting advantages to companies without prior approval by the European Commission[146]. The ECT arbitration awards in the sector of renewable energy reinforced the debate on the relationship between EU State aid law and investment arbitration. Indeed, in renewable energy investment arbitration, state aid issues can arise at two different moments. First, the EU state aid rules can be infringed before the arbitration judgment when MS are initiating any changes or renewable energy policies. Secondly, state aid rules can be broken after the judgment when arbitration awards are mandating compensation to investors.

4.1.1 Infringement of state aid rules prior to the judgement

The Renewables Directive (RED II) stipulates that MS are entitled to implement support schemes for the promotion of renewables, with the goal of maximizing the integration of electricity from renewables in the electricity market[147]. At the same time, according to article 107 of the TFEU, aid granted by MS through state resources is in principle incompatible with the common market, as it could provide companies a distortive advantage over its competitors. To qualify as a state aid, it should be granted through state resources directly or indirectly, the

[142] Brower and Schill, 2009, p. 472
[143] European Commission, State aid: Commission opens in-depth investigation into arbitration award in favor of Antin to be paid by Spain
[144] SWD/2017/0302 final
[145] Tienhaara, 2018, p. 232
[146] Fahner, 2022, p. 672
[147] Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Article 4

intervention must be liable to affect trade between MS, selective advantage must be conferred upon an undertaking and the measure must distort or threaten to distort competition[148]. This is why, article 107 of the TFEU generally prohibits state aid unless it is exceptionally justified by reasons of general economic development[149]. The prohibition does not apply to subsidies provided to individuals or general measures available to all enterprises, and such subsidies do not qualify as state aid[150].

However, following the exceptions laid down in Article 107(3) state aid may be admissible in the energy sector. The state can provide aid «to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State» [151] and to «facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest»[152]. Support schemes for renewable energy can fall under the criteria of these provisions, as it is for the common interest of the EU and thus compatible with article 107. To make it clearer, recently the European Commission created guidelines on state aid to facilitate their identification and their lawfulness[153]. In this regard, The Commission adopted the 'Climate, Energy and Environmental Aid Guidelines' (CEEAG) applied since January 2022 [154] which further supports the Green Deal objectives and with minimum distortions of competition[155]. The new framework outlines that state aid is beneficial to achieve the Union binding target for the promotion of renewables by 2030. It permits a broader category of measures and an increased amount of aid than the previous 'Energy & Environmental Aid Guidelines' (EEAG) from 2014 to 2021. Overall, the CEEAG aim to allow more public investments to address climate change, and accelerate the green transition[156]. More recently, the Commission adopted the Temporary Crisis and Transition State Aid Framework[157] which aims to «boost investments for a faster roll-out of renewable energies». MS can set up a scheme that will speed up the deployment of renewable energy technologies with faster access to

[148] Consolidated version of the Treaty on the Functioning of the European Union, Article 107(1)
[149] European Commission, Competition policy
[150] European Commission, State Aid Overview
[151] Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Article 107(3)(b)
[152] Ibid, Article 107(3)(c)
[153] C/2022/481
[154] Ibid
[155] Ibid
[156] Ysewyn et al., 2022
[157] European Commission, Temporary Crisis and Transition Framework

funding for companies operating in the EU. When the aid is granted by the state, the MS has to inform the Commission of the measures[158].

4.1.2 Infringement of state aid rules after the judgement

As concerns compensation of damages mandated by an investment arbitration judgment, it is not in itself state aid, as it does not create a selective advantage for the investor. The financial compensation is supposed to only compensate for the loss of investment that the investor has suffered as a result of the change in the country's regulatory framework. MS are bound by the legal obligation resulting from the international arbitration process. However, the European Commission has the authority to scrutinize arbitration awards that involve transfer of state resources[159]. It has recently adopted the stance that investment arbitration awards could be regarded as state aid measures, particularly when the compensation involves the withdrawal of a state aid measure that was originally unlawful or incompatible[160].

Any incentive scheme adopted by the Spanish government for the promotion of renewable energy would normally be subject to state aid rules. However, Spain did not notify the Commission for the approval of its 2007 feed-in tariffs scheme under state aid rules . The government then modified the regulatory framework in 2013, retroactively changing the terms under which renewable installations could receive support[161]. The Commission accepted the 2013 support scheme for renewable electricity to be in line with EU State aid rules[162]. Following the Antin award[163], Spain notified the Commission to declare the compensation as a state aid measure. The Commission judged that the granting of compensation by the arbitration tribunal to an investor, based on the argument that Spain's modification of the 2007 scheme to the 2013 scheme constitutes state aid[164]. Indeed, the award would serve as compensation of unlawful state aid, which is selective in nature as it is granted exclusively to Antin using state resources. This selective treatment has the potential to distort competition and trade[165].

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[158] Consolidated version of the Treaty on the Functioning of the European Union, Article 108(3)
[159] CJEU, Case C638/19 P, European Commission v European Food and Others, January 2022, Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN)
[160]Ibid
[161] European Commission, Commission opens in-depth investigation into arbitration award in favor of Antin to be paid by Spain
[162] SA.40348 (2015/NN)
[163] Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31
[164] C 450/5 State aid SA.54155 (2021/NN)
[165] ibid, 4.1.4. Conclusion on existence of aid

The Commission assessed the compatibility of the measure with the internal market on the ground of any potential breach of EU Treaties and the compatibility with the criteria of the state aid guidelines both at the time of the incentive scheme (2007: EAG) and at the time of the award (2019: EEAG). For now, the Commission has doubt regarding the compatibility of the measure and if it has an incentive effect and is necessary for developing an economic activity of producing electricity from renewable sources or of another activity[166]. Moreover, the compensation that would be granted to *Antin* constitutes an additional support which would probably exceed the proportional rate of return established by the Commission in its 2017 decision for the current plants[167].

If the in-depth investigation of the Commission comes to the conclusion that the state aid measure of the award is unlawful, Spain will have to face several challenges. According to article 108(3), the non-compliance of the state aid rules could mean further proceedings and Spain could be required to repay the aid[168]. While the investigation is still ongoing, the Commission reminded Spain that it should not pay the compensation to the investor, as European law is superior in the European legal order. Another challenge of the declared unlawfulness of compensation as a state aid measure would be the future of other awards in which Spain is bound to pay compensation based on the change of the 2007 regulatory framework. Questions would arise regarding the violation of state aid rules by Spain through the retroactive cuts of the feed-in tariffs from 2007. The Commission will have to investigate on a case-by-case basis whether the additional support granted by the arbitration award for the damages that were caused by the changing regulatory framework of 2013 constitutes state aid and if it is unlawful according to the EU state aid guidelines. This could influence the Commission to create new state aid guidelines on how retroactive changes to renewable energy policies in EU MS should be handled to comply with state aid rules.

[166] Ibid
[167] Ibid
[168] Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Article 16

4.2 Measuring the chilling effect of arbitration cases

4.2.1 Risk for governments

Through ISDS foreign companies can file investor-state arbitration claims for measures taken by a state that affect negatively the economic interests of private actors[169]. As previously seen, the ECT offers a way for foreign investors to bring a claim under the ISDS if a provision of the treaty is breached by a State. Critics have been made by scholars denouncing the «regulatory chill effect» that the ISDS arbitration could potentially have[170]. Some argue that although ISDS tribunals do not have direct impacts on the environmental regulation, they could potentially have indirect impacts by influencing how host states exercise their regulatory powers in response to ISDS proceedings[171]. The question is why ISDS arbitration is expected to have an effect on state.

ISDS procedures are facing many critics, especially due to the substantial financial risk and difficulties to predict the outcomes[172]. The biggest issue is that the ISDS system is extremely expensive, lots of costs are needed to initiate an arbitration procedure. Even if the investors' party costs generally exceed those of respondent states, governments still have to face huge costs[173]. Another factor to take into account is the duration of the proceedings. In recent years, the length of proceedings has increased to reach an average length of five and a half years[174]. The lengthy procedure of ISDS benefits the investors, as it reinforces the idea of the high cost of ISDS and thus dissuades the state from defending a policy[175]. More than the costs of proceedings, states potentially have to pay the amount awarded if the investors are winning the case. The sums of damages are generally huge. For example, with all the claims against its new renewable energy regulatory framework, Spain is facing over €8 billion total amount claimed by foreign investors[176].

[169] Arcelor S.A. v. European Parliament Council, Case T-16/04, Judgment (Mar. 2, 2010)
[170] Tienhaara, 2018, p. 232
[171] Ibid, p. 233
[172] Tienhaara, 2011, p. 27
[173] British institute of International Dispute, 2021
[174] Hodgson et al., 2021, p. 5. « Of the 110 new cases published between June 2017 and May 2020, the mean length of proceedings is five and a half years. This means that recent proceedings last one year and six months longer than those which decisions were published before June 2017 ».
[175] Tienhaara, 2018, p. 235
[176] Bárcena and Flues, 2022, p. 4

A broad understanding of regulatory chill describes «the impact of the potential costs of trade disputes on governments' willingness to introduce new … regulations»[177]. Kyla Tienhaara proposes a theoretical framework for the definition of regulatory chill, implying three different varieties[178]. The first regulatory chill is the internalization chill which refers to a situation in which the regulatory process is slowed down in areas that affect foreign investors because policymakers are worried about the possibility of a dispute arising between investors and the state. This type of regulatory chill can be considered as «anticipatory chill» as the policymakers are internalizing the concern of investor-state dispute by prioritizing the avoidance of potential dispute before even drafting the policies. The internalization regulatory chill is however very difficult to identify[179]. Indeed, it is a preemptive and that makes it too challenging to establish a definitive causal link between regulatory decisions and the presence of internalization chill due to the lack of direct evidence of anticipated policy makers' decisions.

The second regulatory chill identified is the threat chill which concerns the negative impact on a specific regulatory measure that have been proposed by governments arising out of the fear of potential disputes between governments and foreign investors. This threat regulatory chill is considered to be a response chill as it would appear only if a government is aware of the risk of an investor-state dispute.

Lastly, Kyla Tienhaara identifies the cross-border regulatory chill which weakens the enforcement of regulations in areas that involve activities or transactions across different countries. It would easily happen when there are gaps in regulation between different jurisdictions, which often lead to unclear rules or inconsistent enforcement. By launching an ISDS case in at least one jurisdiction, the investor is creating a chilling effect in all other jurisdictions where he or she is active. The lengthy duration of the ISDS procedure would make the investor benefits from significant economic rewards, making the costs of the ISDS case outweigh itself. The cross-border chilling effect creates opportunities for investors to engage in activities with less supervision leading to potential risks, such as regulatory arbitrage for various stakeholders.

4.2.2 Real threat of regulatory chill

Tienhaara explains that the actual threat of the arbitration is not critical but rather it is important how the government is perceiving the threat of the arbitration[180]. If the government is

[177] Labonte and Sanger, 2006, p. 741
[178] Tienhaara, 2018, p. 233
[179] Tienhaara, 2011, p. 615
[180] Ibid

responding to the threat of investment arbitration by failing to enforce «bona fide» regulatory measures or modeling existing measures, then the government is going through regulatory chill.

At the same time, regulatory chill can arguably be good for the environment when investors that invest in clean energies are challenging the regulatory changes of the state. International investment law is then used to protect economic interest of renewables investors and thus can be seen as a "shield" to protect climate change mitigation measures»[181]. But the problem is that regulatory chill is mostly used in the other way around, i.e., a «sword» to protect private property against climate change mitigation measures[182]. Overall, regulatory chill leads to government self-censorship due to the threat of ISDS claims against new policies. It is the public interest that suffers the most of this phenomenon as governments could choose to not opt for further environmental measures if it may expose them to significant legal liability[183]. By altering their behavior in the fear of the adverse impacts of foreign investments claims and disputes, states could struggle to meet their climate targets.

The regulatory chill effect creates a risk of a reduction of ambition without explicit threats of investment arbitration claims[184]. The challenging part of the regulatory chill is that it is mainly happening in internal deliberations of ministerial bureaucracies and thus not made public. It is difficult to conduct legal assessment that yield divergent conclusions or involve external interventions. When policy makers are not applying policies, it consists of a non-event which is very difficult to observe[185]. It makes it hard to identify the exact circumstances that made the governments not creating new policies and to prove the causal link.

Tarald and Berge suggest to use as evidence of regulatory chill the link that can be made between the number of pending ISDS cases and the regulatory activity of the country[186]. According to their study, at the time of the wave of renewable energy cases brought against Spain, the Spanish government witnessed a drop in their regulatory activity[187].

[181] Tienhaara and Downie, 2018, p. 459
[182] Vadi, 2021, p. 1319
[183] Thakur, 2020, p. 1
[184] Schram et al, 2018, p. 193
[185] Berge & Berger, 2019, p. 9
[186] Ibid, p. 18
[187] Ibid

4.3 Examining chilling effects on the Spanish government

In the wake of investment disputes brought by renewable energy investors, Spain is currently facing several financial liability claims. This creates a risk of regulatory chill on the Spanish government's ability to further implement regulatory changes in the RE sector. Spain is aware of the proceedings launched against its RE policies and the amount of money it has to pay, and it can be understandable that the country fears additional ISDS cases that would mean more potential financial liabilities. Indeed, in 2017, the Spanish government declared that from 36 out of the current 51 investment arbitration cases launched against it, the amount demanded by foreign investors was almost €8 billion[188].

4.3.1 Evidence of regulatory chill on policy formulation

As a MS of the EU, Spain is bound to submit a National Energy and Climate Plan (NECP) as part of the Energy Union[189]. The NECP contains the main objectives and targets of the Energy Union consistent with the Paris Agreement, as well as the renewable energy objectives through an indicative trajectory of the target contribution in terms of the «Member State's share of energy from renewable sources in gross final energy consumption in 2030»[190]. In 2020, the Spanish government presented its NECP for the period 2021-2030, reflecting its commitment and contribution to the international and European effort of achieving climate neutrality by 2050[191]. Spain's NECP identifies the challenges and opportunities within the five dimensions of the Energy Union[192]. The plan first details the process, national objectives, existing policies and measures, and measures that are necessary for achieving the objectives of the Plan, providing an analysis of its economic, employment and distributive impacts and health benefits[193]. The second part of the plan includes the Annexes with the analysis of the projections, in Baseline Scenario and in Target scenario with the intended results[194].

According to the NECP, Spain will reduce its GHG emissions to 23% compared to 1990. By 2030, the MS will achieve 42% share of renewables in energy end-use which is more ambitious

[188] Bárcena and Flues, 2022, p. 4
[189] Regulation on the Governance of the Energy Union and Climate Action (EU) 2018/1999, Article 1
[190] Ibid, Article 4 (a)
[191] European Commission, Spain NECP
[192] Five dimensions of Energy Union: decarbonization, including renewable energy; energy efficiency; energy security; the internal energy market; and research, innovation and competitiveness
[193] European Commission, Spain NECP
[194] Ibid

than the EU target at the time of 32%[195]. The electricity generation is intended to be composed of 74% share of renewable energy. The improvement of the energy efficiency of the country is supposed to reach 39.5% of improvement by 2030. The Spanish results for 2030 are ambitious, above the EU-wide target and intend to «drive renewable energies, distributed generation and energy efficiency at local level, providing significant opportunities for investment and job creation»[196]. The NECP stresses the important correlation of the energy efficiency target with the need to reduce the primary energy consumption in order to achieve the renewables target[197]. The targets of the NECP have been implemented in the national legal order in 2021 in the law 7/2021 on climate change and energy transition. The law is trying to facilitate the co-ordination of policies among different fields with coherence[198], placing renewable energy as the major strategy to achieve the green transition, thus making them a big part of the economy of the country.

Looking at the targets of the NECP, it can be argued that Spain has been influenced following the RE investment disputes. The formulation of the Spanish NECP focuses on high share of RE, developing the solar energy sector. Indeed, total final energy consumption in Spain consists of the majority of electricity generated from renewables[199]. It is the renewable energy of the solar power that offers the most potential of all energy sources. Indeed, the geographical location of the country provides abundant sunlight, which ensures the greatest growth rate. Moreover, the solar sector is much more decentralized which allows more investments from different companies, even smaller ones[200]. The flexibility of the solar power projects allows them to better adapt to scale. Thus, it is possible to collect diverse investments, sufficient investments for smaller projects and larger investments for larger projects that may contain higher risk. The smaller scale solar power projects can then be connected to the local distribution grid to generate electricity easily. Whereas the wind sector is more centralized with less companies owing almost all the already installed wind power capacity[201], leaving little room for new investors to invest in new wind facilities. Furthermore, wind energy projects

[195] The EU target on renewables increased considerably in a short amount of time with the current energy crisis Europe is going through. The current EU-wide target on renewables is 40% with the REPowerEU guidelines of the Commission.
[196] European Commission, Spain NECP
[197] Gordon, 2019

[198] IEA, Spain 2021, Energy Policy Review, p. 33
[199] IEA (2021), IEA World Energy Statistics and Balances
[200] Gordon, 2019, p. 13
[201] In 2014, ten energy companies owned approximately 73% of the installed wind power capacity (AEE 2016)

usually require big scale with more land, infrastructures, and thus more investments. To receive the high voltage of the energy wind, an adapted centralized infrastructure capable to connect the renewable energy to the transmission grid is required.

4.3.2 Evidence of regulatory chill on policy implementation

The Spanish policy makers have been trying to achieve the NECP targets by establishing some changes in the national legislation.

Following the Spanish renewables raga, the government promulged a series of law to promote the self-consumption of renewables. First, in October 2018, the Spanish government approved the RD 15/2018[202] which abolishes the 'sun tax'[203] from 2015 that taxed the development of photovoltaic solar energy and self-consumption in Spain. The new law[204] supports the self-consumption across the country by simplifying the procedures for registering new power generators, allowing self-consumed energy for community renewable energy projects and eliminating all fees associated with self-generated electricity consumption[205]. The authorization of the collective self-consumption would benefit a major party of the population as approximately 65% of the Spanish population live in a cooperative regime and thus would take advantage of economies of scale[206]. The abolition of the infamous sun tax creates a shift which encourages collective self-consumption and establishes a simplified mechanism for compensation of self-produced and unconsumed energy[207] .

Second, in October 2022, the government approved the Plan +SE[208] which promotes incentives for the energy transition[209] and the development of renewable energy[210]. The tax schemes targeted at individuals and businesses engaged in economic activities. It includes two main benefits: unlimited depreciation for investments in renewable energy assets, and faster

[202] BOE del Real Decreto-ley 15/2018, de 5 de octubre, de medidas urgentes para la transición energética y la protección de los consumidores
[203] BOE Real Decreto 900/2015, de 9 de octubre, por el que se regulan las condiciones administrativas, técnicas y económicas de las modalidades de suministro de energía eléctrica con autoconsumo y de producción con autoconsumo
[204] BOE del Real Decreto-ley 15/2018, de 5 de octubre, de medidas urgentes para la transición energética y la protección de los consumidores
[205] Deign, 2018
[206] PV Magazine, 2018
[207] Valdivia, 2019
[208] Plan +Seguridad Energetica, October 2022
[209] Plan +Seguridad Energetica, Medida 55. Incentivos fiscales para la transición energética, f
[210] Garrigues Blog, Energy transition: these are the new tax incentives for renewable energy and electric vehicles in Spain, 2023

depreciation for specific electric vehicles[211]. The measures have been enforced in the Spanish legislation in the Royal Decree-law 18/2022[212]. The newly introduced legislation allows corporations to fully deduct the depreciation or amortization expenses for investments made in facilities aimed at self-consuming electricity generated from renewable sources. Additionally, this incentive extends to investments made in facilities that utilize renewable energy for thermal purposes, as a replacement for facilities reliant on fossil fuels. These incentives are applicable for investments that become operational in the year 2023, with a maximum amount of 500,000 euros[213].

From the creation of new incentives for renewables self-consumption it can be assumed that the Spanish government is trying to reach its renewables targets while escaping the possibility of being sued in ISDS tribunal. Indeed, through its changes in regulations concerning subsidies for solar energy investors, Spain may have lost the confidence of RE investors. By enacting new laws to encourage self-generation of renewable energy, the government may be trying to offset a lack of investment from foreign investors.

To conclude, the establishment of the regulatory chill phenomenon is hard to prove as it is difficult to establish the evidence of causal link between the ISDS proceedings and the government policymaking on renewables[214]. However, from the above investigation of the Spanish renewable energy policy, it can be established that ISDS decisions have an impact on policymaking.

First of all, the ambitious Spanish NECP, shows stronger targets than the ones of the EU. The capital-intensive nature of renewable energy projects places the green transition at the center of the economic policies of the country. The NECP concentrates on renewable energy and energy efficiency emphasizing the link between them. The government developed new incentives for RE self-consumption through several laws. The promotion of the self-consumption of renewables can be linked to the Spanish renewables saga. Indeed, following all the claims, the Spanish government could be more cautious when implementing new incentives for

[211] Ibid
[212] BOE Real Decreto-ley 18/2022, de 18 de octubre, por el que se aprueban medidas de refuerzo de la protección de los consumidores de energía y de contribución a la reducción del consumo de gas natural en aplicación del "Plan +SE"
[213] UNCTAD website, Investment Policy Hub, Spain - Introduces new incentives for investments in renewable energy
[214] Berge and Berger, 2019, p. 9; Thakur, 2020

renewables. All the ISDS proceedings could have led to the loss of confidence from the RE investors. Creating new policies to reach the ambitious RE target of the country by rewarding self-consumption of renewables seems safer.

Second, the Spanish renewables saga created implications for the regional – EU policy. In recent renewable energy cases, the compensation for the withdrawal of subsidies has been awarded to foreign investors. However, the European Commission has opposed such compensation pending an investigation of whether the original advantage was granted in violation of EU State aid law. The Commission argues that EU law does not allow for a finding of legitimate expectations in these circumstances. Following the Antin V Spain award, the Commission, the Commission declared that Spain was in breach of EU law by not correctly applying the state aid rules[215]. If the ongoing investigation of the Commission declares that compensation required by the ISDS decision from Spain to Antin investors is state aid, complex developments will have to take place in order to make ISDS judgment compatible with European law. Antin's case would then be the first of many claims all based on the retroactive cut of the 2007 feed-in tariffs scheme that constitutes unlawful state aid.

[215] C 450/5 State aid SA.54155 (2021/NN)

5 Implications for the investment protection regime

The controversy around the fact that investment protection standards enforced by ISDS could potentially hinder the green transition by making impossible for the host states to change their regulatory framework has an impact on the investment protection regime[216]. In reaction, new generation of International Investment Agreements (IIA) are said to have incorporated specific provisions on the protection of the environment that better safeguard the States' right to regulate on environmental policies[217]. Similarly, as seen in chapter 3, the FET provision of the Energy Charter Treaty[218] consists of a solid investment protection for investors making sure their legitimate expectations are not hampered. The Parties to the Energy Charter Treaty recently agreed on the necessary need to modernize the treaty that has been written in the late 1990s.

5.1 The impacts on the language of international investment agreements

5.1.1 Dealing with environmental concerns under IIAs

IIAs govern the conditions for foreign investment in foreign countries balancing investor protection with public policy objectives.[219] Countries usually sign these treaties to attract foreign investors in their state in order to further develop certain areas, including the renewable energy sector[220]. IIAs' regime represents 3,300 treaties, including 2,871 bilateral investment treaties (BITs) and 429 other treaties with investment provisions (TIPs)[221]. The new generation of IIAs are the new agreements concluded after 2010, which are said to better integrate sustainable development considerations through responsible investment, giving social and environmental goals equal weight to economic growth and development objectives[222]. According to Gordon and Pohl, the environmental language in IIAs changes according to the policy purpose[223]. One of the most common green language happens in the preambles as a general language that establishes protection of the environment as a concern of the parties to the treaty. Preambular provisions are useful to set a context, they help to establish the overall objective of the agreement.

[216] Newton, 2022
[217] UNCTAD, The international investment treaty regime and climate action 2022
[218] Energy Charter Treaty, Article 10(1)
[219] OECD, the future of Investment Treaties
[220] Mehranvar and Sasmal, 2022, p. 5
[221] UNCTAD, 2022
[222] UNCTAD, Towards a new generation of international investment policies : UNCTAD's fresh approach to multilateral investment policy-making 2013
[223] Gordon and Pohl, 2011, p. 9

However, preamble provisions are not binding, they cannot create rights and obligations between the parties but rather help the interpretation of the treaty. The more the clauses are well-drafted, detailed and clarified the better the treaty will be interpreted in a way that is consistent with the protection of the environment. Guidance for the interpretation is not enough to balance the investment protection regime with environmental matters, to be efficient, environmental language should also appear in the main body of the treaty[224].

In the main body of the IIA it is possible in new-generation of IIA to find specific sections on environmental protection and sustainable development[225]. These substantive provisions can establish an explicit right to regulate language for environmental governance space by granting the host state a right to regulate for environmental objectives[226]. The inclusion of such language in new generation IIAs allows for a balance between the host state's environmental policy and the economic interests of foreign investors by providing explicit protection for the state's environmental concerns in the context of those investors' activities in a progressive manner[227].

Another way is to remind the parties that the IIA aligns with the commitments of the Paris Agreement and thus the commitments are reaffirmed under the scope of the investment agreement[228]. The idea of these environmental clause is to incentivize foreign investors that align with the international climate targets by rewarding them[229]. Renewable energy investors could easily be attracted to a regulatory regime that reward them for promoting clean technologies in line with the Paris Agreement. Fossil fuels investors could also be attracted to invest in mitigation mechanisms such as carbon capture and storage technologies if they rewarded to do so[230].

Inside the treaty body, legislators can create environmental non-regression clauses that guarantee to not lower the environmental standards in order to attract investment. The efficiency of this mechanism is questionable: it all depends on the starting benchmark. Indeed,

[224] Gordon and Pohl, 2011, p. 16
[225] Gordon and Pohl, 2011, p. 17
[226] Agreement between the government of the Republic of Singapore and the government of the Republic of Indonesia on the promotion and protection of Investments, 2018, Article 11, and Reciprocal Investment promotion and protection Agreement between the government of the Kingdom of Morocco and the government of the Federal Republic of Nigeria, 2016, Article 8(2)
[227] Newton, 2022
[228] Agreement on reciprocal promotion and protection of Investments between … and the Kingdom of the Netherlands, 2019, Article 6.6
[229] Newton, 2022
[230] Ibid

if a state that has really poor environmental standards conclude an AII, the standards wont be lowered but what proves that they will be upgraded? In its latest report, the IPCC reminded that the current environmental crisis has no time. More ambitious actions should be taken in order to reach the international climate targets[231]. Further this non-regression clause would attract renewable energy investors as they will be guaranteed that their investments are protected.

An additional approach of greening an IIA is to add a carve-outs from certain investment protection standards and procedures to safeguard the policy space for environmental matters that would induce a reduction the discretion of ISDS tribunals[232]. In their article, Paine and Sheargold define a carve-out as « provisions that remove certain sectors or measures from the scope of coverage of the IIA, or which prevent ISDS claims in relation to certain sectors or measures »[233]. The carve-out can be made through different wordings such as « shall not apply to » and « does not apply to » when some measures are intended to be excluded for certain obligations of the treaty. Carve-outs can be used to exempt from specific obligations of the treaty or from the entire scope. The article exposes three advantages of carve-outs to safeguard climate measures from ISDS claims under investment treaties. First, carve-outs can be applied to all obligations in the IIA. They can also allow for the resolution of relevant claims prior to any consideration of the merits of an investor's claim. Lastly, they prevent any liability to pay compensation. To be the most effective in the safeguard for policy space to mitigate climate change, the authors argue that the removing of the relevant measures from the scope of the entire treaty. This way, no liability can arise through either investor–State or State–State disputes settlement. Carve-outs can also be sectoral by only excluding measures that have the purpose of combatting climate change for example. The broad scope of the FET provision could be restricted with an explicit carve-out for environmental measures. The sectoral carve-outs have the advantage of being less ambiguous as they are more clearly established. With simple wordings that cover measures with the purpose of reducing or stabilizing greenhouse gas emissions and an additional non-exhaustive list of measures, sectoral carve-outs can be a major tool for safeguarding policy space[234].

[231] IPCC, 2023: Summary for Policymakers
[232] Newton, 2022
[233] Paine and Sheargold, 2023, p.7
[234] Ibid

5.1.2 Potential changes in Spanish BITs

Recently, the Governments of the Kingdom of Spain and the Republic of Colombia replaced their old BIT from 2005[235] which follows the EU's new approach to international investment law[236]. Indeed, the 2021 BIT added a provision to highlight the State's right to regulate « The Contracting Parties mutually recognize their right to regulate within their respective Territories by reasonable measures to achieve legitimate public policy objectives, such as … sustainable development, … natural resources or the environment »[237]. The article expresses that it is not because a measure affects negatively an investment that it led to the breach of the investors expectations[238]. Furthermore, the modified BIT included an environmental non-regression clause that commits Spain and Colombia to not « encourage investment » which would weaken or diminish their environmental standards[239].

The modernized treaty expanded and clarified the ISDS mechanism by considering 17 articles[240] compared to the 2005 BIT which had only one 12 paragraph article on the subject. The treaty has for the first time addressed the issue of transparency of the mechanism. The article 23 of the treaty explicitly adheres to the Rules of Transparency established by UNCITRAL in Treaty-based Investor-State Arbitration. This would make arbitration under this BIT predominantly public[241]. The treaty also breaks new ground in terms of the rules of obligations that the members of the arbitral tribunal must apply[242]. These rules are intended to make the adjudication process more objective, in which arbitrators have less decision-making power. To face and reduce the high costs that the ISDS mechanism can generate, the BIT added an article on the security of costs[243].

5.2 ECT reform

In June 2021, the parties of the ECT agreed on the need of modernizing the treaty and in June 2022 they reached an agreement on modernization with proposed revisions of provisions. The

[235] Acuerdo entre la República de Colombia y el Reino de España para la Promoción y Protección Recíproca de Inversiones, signed in Madrid, 16 September 2021
[236] Garcia Clavijo, 2022, p. 25
[237] Acuerdo entre la República de Colombia y el Reino de España para la Promoción y Protección Recíproca de Inversiones, signed in Madrid, 16 September 2021, Article 14.1
[238] Ibid, Article 14.2
[239] Ibid, Article 16.1
[240] Ibid, Articles 19-35
[241] Garcia Clavijo, 2022, p. 29
[242] Acuerdo entre la República de Colombia y el Reino de España para la Promoción y Protección Recíproca de Inversiones, signed in Madrid, 16 September 2021, Article 14.1
[243] Ibid, Article 29

modernization draft has been adopted during the Energy Charter Conference on 22 November 2022. Modernizing the ECT to facilitate sustainable investments in the energy sector is not an easy task as the treaty protects investments in the energy sector meaning both fossil fuel and renewables. Limiting the protection for fossil fuel investments seems to be difficult, as we still much depend on fossil fuels and so for at least 30 years[244]. General options have been drafted but for the purpose of the study, only the proposed modernization of the ISDS mechanism and the FET provision will be assessed.

5.2.1 The future of the ISDS mechanism

The Agreement on Principle on the latest modernization of the treaty includes major changes regarding the dispute settlement of the ECT[245]. The ISDS mechanism should be more transparent, applying the UNCITRAL Rules on Transparency in Treaty-based Investor-State[246]. The procedure would not be triggered if the claims that are manifestly without legal merit were dismissed, either because they lack a legal basis or fall outside the jurisdiction of the tribunal[247]. The proposed change of the treaty that would impact the most EU MS is the preclusion of intra-EU ISDS claims under the ECT. The Agreement in Principle includes a provision that will clarify that the ISDS mechanism "shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation" (REIO)[248]. Currently, the EU is the only REIO contracting party to the ECT. With this modernization, investors from a MS can no longer bring an ISDS claim against another MS of the EU, bringing an end to the intra-EU applications under the ECT. Moreover, the EU hopes to conclude an agreement with EU MS under Article 31(3)(a) of the Vienna Convention on the Law of Treaties[249] to include «confirmation that the ECT has never applied, does not apply and will not apply within the EU, that the ECT cannot serve as a basis for an arbitral proceeding within the EU, and that the time limit clause does not apply within the EU». This will formalize the current position of the EU that the provisions of the ECT relating to ISDS do not apply when an EU investor seeks to file a complaint against an EU MS[250]. This new mechanism of precluding intra-EU ISDS aims to promote regional cooperation and alternative dispute resolution mechanisms. It could help to ensure better consistency in EU law, as ISDS tribunals could potentially interpret the provisions

[244] IEA, 2023
[245] CCDED 2022 10 GEN, 2022
[246] UNCITRAL Rules on Transparency in Treaty-based Investor-State arbitration of 1 April 2014
[247] CCDED 2022 10 GEN, 2022, 3. Dispute Settlement
[248] CCDED 2022 10 GEN, 6. Regional Economic Integration Organisation (REIO)
[249] Vienna Convention on the Law of Treaties, Article 31(3)(a)
[250] Maynard and Kalinin, 2022

of the ECT in a manner that conflicts with EU law[251]. This reform could be a solution to prevent the regulatory chill effect of ISDS cases on EU policymaking.

If the ECT adopts this new reform and precludes intra-EU ISDS claims, it would significantly impact the Spanish renewable saga[252]. It would mean that investors from EU MS would no longer be able to use the ISDS mechanism to challenge Spain's renewable energy measures and would have to rely on other forms of dispute resolution to resolve their disputes. This could help Spain by limiting the scope of potential claims against it under the ECT by investors from other EU MS. It could reduce the legal and financial pressure on Spain in the Spanish renewables saga.

5.2.2 Changes regarding the FET clause

As previously seen, the interpretation of the FET clause and its limited scope has caused controversy in investor-state disputes due to its lacking definition in the ECT. The modernization of the ECT should therefore address the lack of clarity on the FET protection, redefining the standard by providing a list of specific measures that infringe this protection[253]. Removing totally the FET standard from the ECT seems complicated as investors would lose the protection of their investment and therefore might be less inclined to invest. What appears to be most pragmatic is to reformulate the principle clearly and delimit its scope. The Agreement in Principle reached by the parties[254] explains that the new definition of the FET standard will «provide for a list that designates certain measures or series of measures that constitute a violation of this protection standard» aiming to increase legal certainty. Furthermore, the frustration of the investor's legitimate expectations will be specified as well as the conditions under which legitimate expectations may be considered[255].

The principle of the FET could be more balanced if the principle of the right to regulate of the state was emphasized in the ECT. Without clear definition of what is FET, the principle is subjective and leaves a lot of room for interpretation by investors. In the ECT, the state's right to regulate principle is mentioned in the preamble as a guidance for interpretation but does not create any binding obligation. In the Title I, the aim of establishing a stable and transparent

[251] C 450/5 State aid SA.54155 (2021/NN)
[252] Germany, Italy, and the Netherlands have initiated Investor-State Dispute Settlement claims against Spain under the ECT. These claims argue that Spain's modifications to its renewable energy legislation infringed upon the standard of fair and equitable treatment.
[253] Bagdat and Kuzhatov, 2022, p. 3
[254] CCDEC 2022 10 GEN, 2022,
[255] Ibid, 2. Investment Protection, Definition of Fair and Equitable Treatment

legal framework is mentioned, which are integrate elements of the FET standard[256]. The Article 10(1) of the ECT that establishes the FET standard does not contain express exceptions to regulatory rights of contracting parties for the public interest[257]. Adding a more explicit right to regulate for states in investment treaties, specifically in the FET provision, can help to balance the interests of investors and states with a better proportionality[258]. This would provide clarity on the scope and limits of FET, reduce the potential for disputes, and allow states to regulate in the public interest without fear of being sued by investors[259]. The modernization of the treaty would emphasize the right to regulate of the contracting parties in the preamble and through a standing provision in Part III of the treaty to ensure legal certainty[260]. The new provision would remind the right to regulate of the state party to the treaty in the interest of legitimate public policy objectives, such as the protection of the environment through climate change mitigation and adaptation.

Furthermore, the use of standard review in investment treaties could help to clarify the FET provision through additional requirements to evaluating the impact of regulatory measures on the investment of the claimant based on factual circumstances[261]. This method provides the arbitrators with a lot of discretion in their way of applying the principle of proportionality in ISDS cases. The ambiguousness of the proportionality principle needs to be pointed out, as it is often decided on a case-by-case basis. Due to the complexity of the principle, tribunals exercise flexibility and do it in a context-specific manner, which requires a lot of discretion from the arbitrators. Here comes back the issue of the judicial law-making role of arbitrators - leaving them more discretion in the interpretation of the principle of proportionality could accentuate the phenomenon judicial policymaking. Moreover, there is no insurance that the tribunal will interpret the standard of review in a consistent manner. If the interpretation of the standards is made on a case-by-case analysis, it could further undermine predictability and legitimacy of the ISDS system. Therefore, the use of standard of review should be seen as a tool only to help the tribunal in their assessment of whether the actions of the state are proportionate to the goal they are seeking to achieve.

[256] Energy Charter Treaty, Article 2
[257] Energy Charter Treaty, Article 10
[258] Pang, 2022, p. 14
[259] Bagdat and Kuzhatov, 2022, p. 3
[260] CCDEC 2022 10 GEN, 2. Investment protection, Right to regulate
[261] Bagdat and Kuzhatov, 2022, p. 4

Finally, the scope of FET standard could be limited through the creation of an exhaustive list of elements that the parties to the treaty accept as constituting FET[262]. The parties should be the ones negotiating and agreeing the elements of the FET and then incorporating this list into the text of the treaty. This method would limit the discretion of tribunals as they will be required to interpret the FET standard based on the agreed list of elements. The treaty practice would thus be more consistent with the provision bringing more certainty and clarity. However, the parties would not have the entire responsibility on the definition of FET, the tribunal would still have the final words on how to interpret the standard based on the elements. Depending on the facts of the case and the precision of the elements of the list, the interpretation of the tribunal can be different. That said, it is important to note that achieving a highly detained list of elements can be challenging for all the parties involved and thus some level of vagueness may persist as a result of compromise.

5.3 Adjusting adjudication

New generation of IIAs are more and more integrating procedures for cooperation and implementation of environmental protection[263]. Involving experts would allow for a more balanced view in consultation or disputes. In order to promote this cooperation, joint-committee mechanisms, public participation, consultations, panel of experts, national focal points and expert reports are needed to make it effective[264]. Investors can still challenge environmental measures in arbitration but at least the interpretation will be enriched with more environmental concerns.

Moreover, to prevent the bad effects of regulatory chill in investor-state disputes on environmental policies, Avidan Kent argues that tribunal should adopt a greener approach[265]. The international greening would entail a shift in the current approach of these institutions, taking into account environmental considerations when deciding on disputes related to renewables. Indeed, so far it has been seen that international arbitration tend to prioritize economic considerations over environmental concerns[266]. This is however a tricky situation as the author highlights the importance of environmental and social concerns in the development of renewables projects. To facilitate the achievement of the international greening, Kent

[262] Bagdat and Kuzhatov, 2022, p. 3
[263] Gordon and Pohl, 2011, p. 10
[264] Ibid, p. 666
[265] Kent, 2015, p. 5
[266] Ibid

suggests the adoption of environmental standards by a panel of environmental experts as well as the promotion of better transparency and public participation in dispute resolution processes. In essence, Kent emphasizes the significance of integrating environmental factors into the decision-making processes of international economic tribunals. This approach aims to foster sustainable development and facilitate the shift towards a more environmentally friendly global economy.

To conclude, although the frequency of environmental language in IIAs has increased over time, the set of environmental concerns that receive explicit mention remains limited and not very strong[267]. New generation of IIAs are including general environmental provisions and provisions dealing with sustainable development that might help safeguard climate action. The strength of language in new generation of IIAs lies in their ability to limit new fossil-fuel investments and encourage renewable energy investments aligned with the Paris Agreement, if drafted accurately.

In the recent Spain-Colombia BIT from 2021, the legislators added inside the treaty body an environmental non-regression clause that guarantee to not lower the environmental standards in order to attract investment as well as a provision on the space of the right to regulate for public interest policies. This progress can be explained after the recent EU modernization of BITs. The Spanish Renewable Energy Saga disputes have also impacted the new formulation of Spanish BIT. Indeed, the modified treaty counts 17 articles on the ISDS mechanism, including transparency, financial aid provisions.

The modernization that the ECT is undergoing promises to be beneficial if the Agreement in Principle is adopted by the treaty. More than general environmental provisions added in the core of the treaty, the modernization would bring an end to the intra-EU applications under the ECT that are contrary to EU law and recent judgments by the Court of Justice of the EU. The ISDS mechanism would be changed for all the EU MS, however, it would not prevent non-EU investors from preserving their right to challenge EU energy policy through ISDS claims.
Regarding the modernization of the fair and equitable treatment, the most suitable way to clarify its scope seems to rebalance the right of the Contracting Parties to regulate and the investment protection under the FET[268]. Emphasizing the right to regulate of the host state in the treaty

[267] Gordon and Pohl, 2011, p. 27
[268] Bagdat and Kuzhatov, 2022, p. 3

though new explicit provision appears as the best solution. Indeed, the arbitrators will always have the last word in arbitration tribunal, if new elements are integrated into the FET, they will always be the ones to interpret the standard. By strengthening the state's right to regulate, arbitrators will have to take more account of this principle in their interpretation, thus potentially reinforce new environmental policies. The aim is to ensure that the tribunal takes both sides of the issue into account when interpreting and making de facto policy decisions.

6 Conclusion

Following the recent development of IPCC assessments and the public debate on the urgency of climate change action, states are more and more under the pressure of developing mitigation policies to halt the climate crisis. The promotion of renewable energy is instrumental in achieving the climate change mitigation and energy security objectives. The capital-intensive nature of renewable energy projects requires the governments to create incentives to attract renewable energy investors in their countries. At the same time, investors need to trust the governments that they will not change the policies and impede the investments. Investment protection is used to safeguard the investments.

This thesis examined the notion of legal stability using the case study of the Spanish renewables saga and analyzing the FET standard and how it has been interpreted by tribunals. Through the years, the tribunals have applied a broader interpretation of the standard, in which the changes to the Spanish regulatory framework constituted a violation of FET. There is a growing prevalence trend in which tribunals favor investors and protect their investments. However, this trend applies to both clean energy and fossil fuel investors, highlighting the need for arbitral tribunal judges to carefully consider the states' right to regulate.

Under international investment treaties, arbitral tribunals always have the final authority and as the final judges, they participate *de facto* in global climate governance. They are the ones who interpret treaty provisions according to investors' claims and thereby adjudicate climate-related disputes. Their involvement in shaping policies, although not their primary role, raises concerns regarding the balance between investor protection and public policy objectives.

The regulatory chilling effect associated with ISDS proceedings can have adverse effects on Spanish renewable energy policymaking. Governments, wary of potential claims, may limit their regulatory space, hindering the green transition. However, in the case of the Spanish renewables saga, the regulatory chill may actually benefit the transition by discouraging further legislative changes that reduce incentives for renewable energy.To reach the international climate targets and achieve the carbon neutrality by 2050, the world cannot afford more barriers that cause delay on the green transition.

Generally, it is difficult to establish a concrete causal link between ISDS cases and the impact on the policymaking, as the regulatory chill can result in the non-event of new policies and is often indirect. However, at the national level, there are indications of a response chill, through the recently implemented legislations by the Spanish government promoting subsidies for the self-consumption of renewable energy. At the regional level, objections by the European Commission to compensation for the withdrawal of subsidies to foreign investors raise concerns about potential conflicts between state aid rules and international investment law. Following the investigation, if the measures are declared illegal by the Commission, the award rendered by the tribunal cannot be enforced because it is not compatible with EU law. It is however difficult to predict the future of the awards, as EU law takes precedence over ISDS tribunal awards.

Finally, to strike a better balance between investor protection and public policy objectives, international investment agreements increasingly incorporate environmental provisions. The aim is not to reduce investment protection, which is essential to attract renewable energy investors. What is needed is a better balance between the right to regulate of the state and the investment protection. Emphasizing the state's right to regulate can prevent regulatory chill and ensure adequate policy space for pursuing public policy goals.

The question that can be asked is who is bearing the cost of green transition. The regulatory chill effect of arbitral tribunals raises the cost of the green transition. By applying greener policies, governments are taking the risk to be sued for their changing policies and potentially pay huge compensations. Although the environmental awareness is growing and integrated in IIAs, the process is gradual and will take time to reach the targets needed to meet international climate obligations. An important setting to take into account for the following years is the lowering prices of the clean technology. This would logically lead to less policy risks and the governments would be able to gradually reduce the investment incentives, as less investments would be needed.

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