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## DOCTOR OF PHILOSOPHY

# In the Footsteps of the Giant 'Lex Petrolea', The Birth of 'Lex Renewables' Jurisprudence: Co-existence Probabilities or Possibilities?

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# In the Footsteps of the Giant 'Lex Petrolea', The Birth of 'Lex Renewables' Jurisprudence: Co-existence Probabilities or Possibilities?

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# LIST OF ABBREVIATIONS

| | |
|---|---|
| **ADR** | Alternative Dispute Resolution |
| **AEE** | Asociacion Empresarial Eolica |
| **BNEF** | Bloomberg's New Energy Finance |
| **BNHF** | Baku Nobel Heritage Foundation |
| **BIT** | Bilateral Investment Treaties |
| **CEPMLP** | Centre for Energy, Petroleum, and Mineral Law and Policy |
| **CERDS** | Charter of Economic Rights and Duties of States |
| **CHP** | Combined Heat and Power |
| **CJEU** | Court of Justice of the European Union |
| **COP21/26** | Conference of the Parties 2021/26 |
| **CPE** | Centrally Planned Economies |
| **CUP** | Cambridge University Press |
| **DSB** | Dispute Settlement Body |
| **DSU** | Dispute Settlement Understanding |
| **EBRD** | European Bank for Reconstruction and Development |
| **ECT** | Energy Charter Treaty |
| **EU** | European Union |
| **FAR** | Federal Acquisition Regulations |
| **FDI** | Foreign Direct Investment |
| **FET** | Fair and Equitable Treatment |

| | |
|---|---|
| **FIT** | Feed-In Tariff |
| **FTA** | Free Trade Agreement |
| **FTC** | Free Trade Commission |
| **FSU** | Former Soviet Union |
| **GA** | General Assembly |
| **GAR** | Global Arbitration Review |
| **GATS** | General Agreement on Trade in Services |
| **GATT** | General Agreement on the Tariff and Trade |
| **GDP** | Gross Domestic Product |
| **GHG** | Green House Gas |
| **GIB** | Green Investment Bank |
| **GREMO** | Global Renewable Energy Market Outlook |
| **ICJ** | International Court of Justice |
| **ICSID** | International Centre for Settlement of Investment Disputes |
| **ICTSD** | International Centre for Trade and Sustainable Development |
| **IEA** | International Energy Agency |
| **IIA** | International Investment Agreements |
| **ILC** | International Law Commission |
| **IMF** | International Monetary Fund |
| **IISD** | International Institute for Sustainable Development |
| **IOC** | International Oil Companies |

| | |
|---|---|
| **IPA** | International Petroleum Agreement |
| **IRENA** | International Renewable Energy Agency |
| **ISDS** | Investor-State Dispute Settlement |
| **IUSCT** | Iran-United States Claims Tribunal |
| **LCIA** | London Court of International Arbitration |
| **LCR** | Local Content Requirement |
| **LMAA** | London Maritime Arbitrators Association |
| **LNG** | Liquefied Natural Gas |
| **MDGs** | Millennium Development Goals |
| **MFN** | Most Favoured Nation |
| **MFNT** | Most Favoured Nation Treatment |
| **MST** | Minimum Standard of Treatment |
| **NAFTA** | North American Free Trade Agreement |
| **NATO** | North Atlantic Treaty Organisation |
| **NDCs** | Nationally Determined Contributions |
| **NGO** | Non-Governmental Organisation |
| **NOC** | National Oil Companies |
| **OECD** | Organisation for Economic Cooperation and Development |
| **OGEL** | Oil, Gas & Energy Law Intelligence |
| **OPEC** | Organisation of Petroleum Exporting Countries |
| **OUP** | Oxford University Press |

| | |
|---|---|
| **PCA** | Permanent Court of Arbitration |
| **PSC** | Production Sharing Contract |
| **PSNR** | Permanent Sovereignty over Natural Resources |
| **PV** | Photovoltaics |
| **QMULCCLS** | Queen Mary University of London's Centre for Commercial Law Studies |
| **REIL** | Renewable Energy Issues in Law and Policy |
| **RIDR** | Renewables International Dispute Resolution |
| **RIIA** | Royal Institute of International Affairs |
| **RTA** | Regional Trade Agreements |
| **SCC** | Stockholm Chamber of Commerce |
| **SE4All** | Sustainable Energy for All |
| **STE** | State Trading Enterprise |
| **TIPs** | Treaties with Investment Provisions |
| **TPLI** | Transnational Petroleum Law Institute |
| **TFEU** | Treaty on the Functioning of the European Union |
| **TRIM** | Trade-related Investment Measure |
| **UK** | United Kingdom |
| **UN** | United Nations |
| **UNCITRAL** | United Nations Commission on International Trade Law |
| **UNCTAD** | United Nations Centre for Trade and Development |

| | |
|---|---|
| **UNFCCC** | United Nations Framework Convention on Climate Change |
| **UNGA** | United Nations General Assembly Resolution |
| **USA** | United States of America |
| **USAID** | United States Agency for International Development |
| **USIPO** | United States Investment Promotion Office |
| **USMCA** | United-States Mexico-Canada Agreement |
| **VCLT** | The Vienna Convention on the Law of Treaties |
| **WTO** | World Trade Organisation |

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**Psalm 136:26**

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My Guide dog for the Blind Cora. You are my guardian angel, the epitome of goodness, beauty, wholesomeness, unconditional love and support. I love you endlessly. Thank you

**To my parents**:

I fulfilled my promise. I wish you are both here with us. Thank you for watching over me from afar. RIP.

**To Peter:**

Dr Peter Varadi thank you for your encouragement, the solar PV and the phenomenal legacy, much love, Katia.

**To everyone else:**

*One cannot ignore the human connections, whether alive or dead, by means of which we have risen in the world. I proceed with mentioning key names of each one who made and/or has been making significant contribution to my advancement but before the names of humans comes the name of a spectacular country that I deeply love and owe it my utmost thanks:* ***Scotland****.*

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**To Mother Earth and our planet - This is for you.**

# DECLARATION

I, Katherine Ramo, am the sole author of this thesis; that, unless otherwise stated, all references cited have been consulted by me; that the work of which the thesis is a record has been done by me, and that it has not been previously accepted for a higher degree.

Signature: Katherine Ramo (Electronic Signature) Date: 13 May 2022

# In the Footsteps of the Giant 'Lex Petrolea', The Birth of 'Lex Renewables[1]' Jurisprudence: Co-existence Probabilities or Possibilities?

## ABSTRACT

*The Renewables International Dispute Resolution (RIDR) has been quietly emerging with its own jurisprudence providing a fertile source for self-drawn customary international law. The diverse body of procedural and substantive law issues are steadily on the rise leading us to a point in between two worlds: Lex Ferenda and Lex Lata yet undoubtedly giving birth to a vibrant 'Lex Renewables'.*

*Whilst the renewables industry is no longer novel, it has been grappling to assert itself alongside its oldest sibling the fossil fuels' industry. Going back to the early 1970s as the "New International Economic Order" facilitated the birth of Lex Petrolea, for the past five plus decades, Lex Petrolea has gathered significant momentum and continues to thrive as an autonomous transnational legal order. At its heart, it has taken the path of Lex Mercatoria, 'transcending the nation-state' and has been solidly endorsed by academics, practitioners, jurists, and industry think-tanks.*

*For 'Lex Renewables', as the renewables industry currently rides above the tumultuous waves of recent cases and arbitral awards resulting from a paradoxical web of international legal frameworks for example under the ECT, the old NAFTA[2], and BITs, to note a few, Can this industry, too, sustain itself by fostering its own legal rules and norms i.e. a 'Lex Renewables' jurisprudence? And assuming Lex Renewables is in its initial 'jurisgenerative stage', can it exist on its own or could the behemoth establishment of the fossil fuels' Lex Petrolea' be the overarching standard for its co-existence?*

*Against the above backdrop, this thesis aims to pronounce the birth of a new jurisprudence: 'Lex Renewables', akin to its giant sibling fossil fuels' 'Lex Petrolea.' It will purport to answer the above questions adopting the view of the original 'New Haven School' by examining international law in the arbitral jurisprudence from both a legal pluralist and comparative transnational legal process perspectives. In summary, this thesis asserts the reality of 'Lex Petrolea' and takes it a small step further to investigate the emergence of 'Lex Renewables'. It argues that the renewables industry is ripe in charting a path following the footsteps of its giant sibling and forming a branch of International Energy Law in its own right.*

[1] The term 'Lex Renewables' is coined by the author and defined here to mean: international commercial, trade and investment usages in the renewables industry that can be treated as part of the governing law. It is akin to 'Lex Petrolea' or 'Lex Sportiva' which are defined as legal rules adapted to an industry's specific characteristics and/or a transnational autonomous legal order.

[2] The scope of this thesis does not extend to the newly renegotiated North America, the United States-Mexico-Canada Agreement (USMCA), which entered into force on July 1, 2020. It only covers its predecessor the old North American Free Trade Agreement (NAFTA).

# CHAPTER 1:

# INTRODUCTION: Context and Thesis Overview

***'Sustainable energy is the golden thread that connects economic growth, increased social equity, and an environment that allows the world to thrive'.***

***— Ban Ki-moon[1]***

***'We will harness the sun and the wind and the soil to fuel our cars and run our factories ... All this we can do. All this we will do.'***

***— Barack Obama[2]***

## 1.1 OVERVIEW

### 1.1.1 Foundational concepts and terms

This thesis is about Renewables[3] International Dispute Resolution ('**RIDR**') and the ultimate rise of the jurisprudence of non-fossil fuels (referred to thereafter as '**Lex[4] Renewables**'[5]), its

[1] 'Sustainable Energy 'Golden Thread' Connecting Economic Growth, Increased Social Equity, Secretary-General Tells Ministerial Meeting | Meetings Coverage And Press Releases' (*Un.org*, 2014) <https://www.un.org/press/en/2014/sgsm15839.doc.htm> accessed 12 September 2021 (Former UN Secretary-General Ban Ki-moon's message to the Clean Energy Ministerial Meeting in Seoul from 12 to 13 May 2014).

[2] Macon Phillips, 'Former President Barak Obama's Inaugural Address on the New 'Era of Responsibility' (the WHITEHOUSE PRESIDENT BARACK OBAMA, 2009) <https://obamawhitehouse.archives.gov/blog/2009/01/21/president-Barack-obamas-inaugural-address> last accessed on 12.09.2021

[3] The term 'Renewables' as used in this thesis means to include the main five types of renewable energy: Solar, Wind, Hydro, Geothermal and Biomass – cited here in no particular order.

[4] The term "**Lex"** is defined as "*Law." (1) A law or statute. (2) A code or collection of statutes dealing with a specific domain of activity or class of persons. (3) A collection of all statutes applicable in a specific jurisdiction; a code of laws. (4) Positive law; law promulgated by a competent authority. (5) A provision or clause of a binding agreement. (6) An established body of customary or codified law."*
**Lex generalis**. "General law." Law as it applies generally to all subjects or with respect to all subject matters as opposed to **Lex specalis** specialized legal regime applying only to specific subject matter, such as international trade law disciplines, or to specific persons, such as parties to an applicable treaty.
See Fellmeth AX and Horwitz M, *Guide to Latin in International Law* (OUP 2011), pages 165 and 168.

[5] The author advances the term **'Lex Renewables'** in this thesis to facilitate the comparison of the evolution of RIDR with '**Lex Petrolea'** and to begin asserting the birth of a new Lex Specialis as in **'Lex Renewables'.** It is defined here in this thesis to mean: international commercial, trade and investment usages in the renewables industry that can be treated as part of the governing law. In my opinion, **'Lex Renewables'** is clearer to the reader than 'Lex Renewlea' and more intuitive than 'Lex Renew.' I coined it here since the submission of my upgraded PhD proposal on 31 August 2013. Both a library and Google searches as late as 8 November 2021 showed that the term '**Lex Renewables'** remains unmentioned. It does not exist nor coined anywhere else. Copies of these searches are on file, if needed.
'**Lex Renewables'** is akin to '**Lex Mercatoria'** 'The law merchant; the customary international law governing transnational commercial transactions. The lex mercatoria dates back to the seventeenth century in Europe and continues to be used as an interpretive aid even today by some tribunals in international commercial disputes. It includes rules and customs governing both transnational commercial relations and shipping'

rapid evolving journey - most of the time in an ad hoc fashion - sometimes in a parallel progression alongside to, and/or at other times in the throes and/or within the folds of the fossil fuels[6]' jurisprudence (referred to thereafter as 'Lex Petrolea'[7]). Fossil fuels and renewables jurisprudences are both subsets of energy law[8] which is derived from three levels of law, international, national and local[9]. The angle of the research is predominately covering the international aspects of RIDR.

Whilst it is submitted that the renewables industry is no longer novel, it has been grappling to assert itself alongside its oldest sibling the fossil fuels' industry. Going back to the early 1970s as the "New International Economic Order[10]" facilitated the birth of Lex Petrolea, for the past five plus decades, Lex Petrolea has gathered significant momentum and continues to thrive as an autonomous transnational legal order. At its heart, it has taken the path of Lex Mercatoria, 'transcending the nation-state[11]' and has been solidly endorsed by academics, practitioners, jurists, and industry think-tanks.

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See ibid page 171. Or another widely used example is 'Lex Sportiva' which are defined as legal rules adapted to an industry's specific characteristics and/or a transnational autonomous legal order. See ibid 1 and Marcus Mazzucco 'Lex Sportiva - Sports Law as a Transnational Autonomous Legal Order' (*academia.edu*) <http://www.academia.edu/436095/Lex_Sportiva_-_Sports_Law_as_a_Transnational_Autonomous_Legal_Order> Last accessed on August 28, 2013.

[6] The term 'Fossil fuel(s)' as used in this thesis meant to cover material that has hydrocarbon as in petroleum, coal and natural gas.

[7] The concept of 'Lex Petrolea' was initially promoted by Professor El Kosheri of l'Êcole de Dijon, in a Hague Lecture in 1975, then the actual term 'Lex Petrolea' came to being as a result of the AMIN oil award in 1982. See 'The Prodigious story of the Lex Petroloea and the Rhinoceros Philosophical Aspects of the Transnational Legal Order of the Petroleum Society' by Dr. Alfredo De Jesus O, Transnational Petroleum Law Institute, Vol.1. No.1 2012. And R. Doak Bishop, International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea, XXIII YB COM ARB 1131 (1998);
Thomas C Childs 'Update on Lex Petrolea: The continuing development of customary law relating to international oil and gas exploration and production' Journal of World Energy Law and Business, 2011, Vol. 4, No. 3. Kim Talus, Scott Looper, and Steven Otillar 'Lex Petrolea and the internationalization of petroleum agreements: focus on Host Government Contracts' Journal of World Energy Law and Business, 2012, Vol. 5, No. 3. Tim Martin, 'Lex Petrolea in International Law' in Ronnie King, Consulting Editor, 'Dispute Resolution in the Energy Sector: A Practitioner's Handbook' London. Global Law and Business c. 2012. Carmen Otero Garcıa-Castrillon 'Reflections on the law applicable to international oil contracts', Journal of World Energy Law and Business, 2013, Vol. 6, No. 2.

[8] The author adopts the definition of Energy Law as 'concerns the management of energy resources' See R. J. Heffron, Energy Law: An Introduction, 2nd Edition, Springer Briefs in Law, Switzerland, 2021 page 1

[9] Ibid chapter 2 page 15

[10] As adopted by the General Assembly of the United Nations in its sixth session on 1 May 1974 https://digitallibrary.un.org/record/218450?ln=en last accessed on 23/08/21 #, See also T. Wälde "A Requiem for the "New International Economic Order: The Rise and Fall of Paradigms in International Economic Law", (Dundee: CEMLP Paper 1994), A. Lowenfeld, International Economic Law, (Oxford: Oxford University Press, 2003).

[11] See Dr. Alfredo De Jesus O ibid 2

For 'Lex Renewables', as the renewables industry currently rides above the tumultuous waves of recent cases and arbitral awards resulting from a paradoxical web of international legal frameworks for example under the ECT, the old NAFTA[12], and BITs, to note a few, Can this industry, too, sustain itself by fostering its own legal rules and norms i.e. a 'Lex Renewables' jurisprudence? And assuming Lex Renewables is in its initial 'jurisgenerative stage', can it exist on its own or could the behemoth establishment of the fossil fuels' Lex Petrolea' be the overarching standard for its co-existence?

### 1.2 The Energy sector, energy law and a snapshot of the current legal energy sector

Energy, irrespective of its source, renewable and/or fossil fuel-based, is a crucial impactful and ever-changing industry sector. To understand this evolving journey of Lex Renewables, one must start with the source of it all, i.e. the energy sector as a whole. It provides the ever-evolving interconnected frameworks economically, politically, environmentally, and most importantly, legally, which is our subject matter. No other sector akin to energy has a growing need to reduce greenhouse gas emissions, with equally competing global demand, security of supply issues and ground-breaking technical advances yet coupled with ageing assets. All global stakeholders ranging from governments to private citizens are continuously faced with some of the most complex and challenging decisions that will have a lasting substantive impact not only on our economic prosperity, but also on the long-term health of our planet and our lives. Energy is the vein of life and our life-force.

Thomas Wälde wrote that in 1970 'there was no international energy law'[13] This was due to the fact that the 'substance matter' for international law was not needed save for customary international rules to facilitate the oil industry's international investments. Oil was the only exception then since by default it has multifaceted links globally throughout its supply chain. This is no surprise to read. The oil industry experienced its dizzying changes at the end of the 1970s and the 1980s where 'oil Power[14]' prevailed. Fast forward to today's world, we witness great changes on the renewables industry's front with complex legal implications that were hard to envisage fifty years ago.

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[12] The scope of this thesis does not extend to the newly renegotiated North America, the United States-Mexico-Canada Agreement (USMCA), which entered into force on July 1, 2020. It only covers its predecessor the old North American Free Trade Agreement (NAFTA).

[13] See Wälde, T.W. 'International Energy Law: Concepts, Context and Players: A preliminary introduction', OGEL (Oil, Gas & Energy Law Intelligence) Vol 1- Issue 4 published September 2003

[14] For the full fascinating history of the role of oil in modern history, See Yergin, D.; The Prize: The Epic Quest for Oil, Money & Power with a new epilogue December 2009 Edition (Simon & Schuster Ltd, London, 1991)

By way of brief examples, in 2015, the United Nations Climate Change Conference of the Parties (COP21) in Paris, 195 countries made history when they agreed to adopt clean energy and phase out fossil fuels. As I review this chapter, the global commitment to changes are alive in COP26[15] and taking place in Glasgow, where at least 40 countries are about to sign off on phasing coal completely and arriving at a NetZero by 2050. The globe is full of encouraging push "to make countries submit more ambitious carbon-cutting plans by the end of 2022 and increase climate finance "beyond $100bn a year" to help poorer nations cope with climate change and the phasing out of fossil fuel"[16] Awareness for the masses of this upheaval of changes is a bound and books on how to be NetPositive[17] are topping the best seller lists. They all point us towards a fact that the renewables industry and its infrastructure are unstoppable with far-reaching positive impact till the end of times.

It follows that the energy and natural resources legal sector has been facing a myriad of complex challenges and exciting opportunities domestically (UK) and globally. Below is a snapshot of the current stance[18]. The challenges are:

1. Volatile oil and increased power prices;
2. Surging environmental concerns (global warming/climate change and emissions/carbon requirements/natural disasters);
3. Increasing political pressures. This is manifested in at least two streams:

a) More regulations (albeit contradicting[19]): Climate Change Related Legislation, The EU Environmental Liability Directive, Carbon Reduction Commitment Energy Efficiency

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[15] See 'COP26: What Is It And Why Is It Happening In Glasgow In 2021? - CBBC Newsround' (*BBC.co.uk*, 2021) <https://www.bbc.co.uk/newsround/51372486> accessed 10 November 2021; and 'COP26: What Was Agreed At The Glasgow Climate Conference?' (*BBC News*, 2021) <https://www.bbc.com/news/science-environment-56901261> accessed 10 November 2021

[16] Ibid 13

[17] See Paul Polman and Andrew Winston, 'Net Positive: How Courageous Companies Thrive By Giving More Than They Take' (Harvard Business Review Press, 2021) <https://store.hbr.org/product/net-positive-how-courageous-companies-thrive-by-giving-more-than-they-take/10496> accessed 10 November 2021

[18] This snapshot was prepared using various readings from 'Financial Times Special Report on Modern Energy'2011-12 and Deloitte Energy Predictions Report 2010-12 i.e. written at the start of my thesis.

[19] See UK, Spain, Bulgaria and other countries either reneging or renegotiating originally proposed tariffs and subsidies http://www.pv-tech.org/news/list/category/tariff_watch/L50/P100
Last accessed September 2012. See also Paul Voosen, 'Spain's Solar Market Crash Offers A Cautionary Tale About Feed-In Tariffs - Nytimes.Com' (*Archive.nytimes.com*, 2009) <https://archive.nytimes.com/www.nytimes.com/gwire/2009/08/18/18greenwire-spains-solar-market-crash-

Scheme 2010, government stimulus programmes and tariff incentive subsidies e.g. the Renewable Heat Incentive[20], the failure of Copenhagen Convention, and

b) Political instability in some supply markets (Syria, Iraq, Libya, Nigeria) this seriously impedes business transactions and prevents law abiding parties from fulfilling their contractual obligations. A prime example is the recent sanctions on Iran's oil export by both the EU and the USA[21].

4. Increased demand for smarter technological ways in producing clean energy.

As to opportunities, the energy and natural resources legal sector is well-poised for outstanding growth for decades to come resulting in an immense increase in the following work:

a) Contentious: e.g. rise in use of investment arbitration utilising NAFTA, the Energy Charter Treaty (ECT), bilateral treaties and traditional litigation but with increase in class action; and
b) Non-contentious: e.g. regulatory compliance, paralleled with more Mergers & Acquisitions and innovative Project's Finance deals, insurance, and taxation. These are in response to expanding trends of varying degrees of growth:

i. increase in renewable energy investments, especially in large emerging markets such as China and India where solar photovoltaic and wind utilization and manufacturing are rapidly increasing,
ii. capitalizing on potential savings from energy efficiency strategies,
iii. the boom in shale oil and gas,
iv. increased demand for floating gas platforms after the Japan Nuclear disaster, and
v. the expanding role for extraction technology.

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offers-a-cautionary-88308.html?pagewanted=all> last accessed 29 November 2021. See also, Adam Easton, 'Polish Renewables: Investors Await Legislation Details To See Which Way The Wind Blows' (*Ft.com*, 2013) <https://www.ft.com/content/1fc54398-b703-11e2-a249-00144feabdc0> accessed 31 August 2013. See OGEL Forum posting dated August 28, 2013 'Jordan stops accepting direct proposals from renewable energy companies'Email copy is on file.

[20] See Smaller Projects can restore faith in renewable energy http://www.thetimes.co.uk/tto/business/industries/publicsector/article3252411.ece Last accessed December 9, 2011

[21] See 'UK energy industry hit by sanctions on Syria' at http://thetimes.co.uk/tto/law/article3258171.ece Last accessed December 15, 2011.

The foregoing clearly indicates, as Professor Heffron described it aptly, that 'Energy law is not a legal subject that is as conclusive as, for example, tax (revenue) law. It is one that will continuously evolve and/or be renewed. It is important, therefore, for students of energy law to think critically and to aim to identify the strengths and weaknesses of the energy law.[22]' This is the spirit that prevails in this thesis in particular in presenting 'Lex Renewables' as a new area of specialised energy dispute resolution.

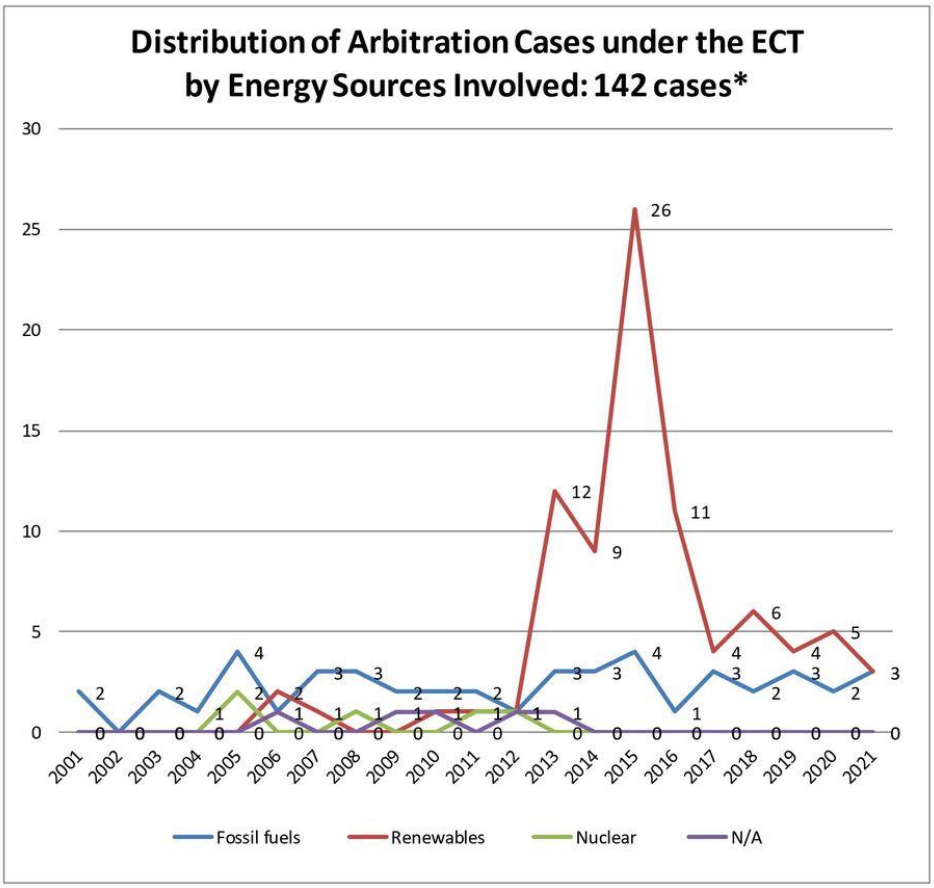
## 1.3 RIDR and the research problem

### 1.3.1 RIDR increase

In 2010, in the entire world, as Dr Peter Varadi[23] wrote, 'there were 40 GW of deployed PV systems in operation which were providing electric power equivalent to five fossil fuel or nuclear power stations.' He added that by 2015, 'the global operating PV systems provided 230 GW, the equivalent of 30 fossil-fuel or nuclear stations' which shows a continuation of a meteoric rise of solar energy alone as one element of the renewables industry. During that same period and beyond, the number of the RIDRs cases exponentially increased, particularly in the field of solar energy. A closer look at even only one avenue of RIDRs mechanisms available to the international renewable energy investors who are using the ECT investment arbitration mechanism, supports this finding. See Figure 1 below[24]

[22] See footnote 9 page 11
[23] See page xvi introduction 'Sun Towards High Noon: Solar Power Transforming our Energy Future' by Dr Peter F Varadi, Pan Stanford Publishing, 2017
[24] See 'Statistics' (*Energy Charter Treaty*, 2021) <https://www.energychartertreaty.org/cases/statistics/> accessed 10 November 2021

***Figure 1: Distribution of Arbitration Cases under ECT by Energy Sources Involved***




| Fossil Fuels | | Renewables | | Nuclear | | N/A | |
|---|---|---|---|---|---|---|---|
| Total Damages Claimed | Total Damages Awarded | Total Damages Claimed | Total Damages Awarded | Total Damages Claimed | Total Damages Awarded | Total Damages Claimed | Total Damages Awarded |
| approx. EUR 12 billion + the Yukos cases (EUR 84 billion) | approx. EUR 500 million + the Yukos cases (EUR 41 billion) | approx. EUR 22 billion | approx. EUR 1 billion | approx. EUR 5 billion | approx. EUR 74 million | approx. EUR 543 million | approx. EUR 11 million |

Surprisingly, the call for international policies on dealing with the whole aspects of renewables may well date back to the Second World War[25].

While the renewables industry, has a rich history of evolving, it has prominently come to the fore over the past 40 plus years and exponentially expanded over the last 25 years[26].

[25] See E. I. Kotok, 'International Policy on Renewable Natural Resources' The American Economic Review, Vol. 35, No. 2, Papers and Proceedings of the Fifty-seventh Annual Meeting of the American Economic Association (May, 1945), pp. 110-119 Published By: American Economic Association. In Kotok's paper, he defined the term 'renewable natural resources' as: "…the resources which, with or without man's assistance, are capable of being replenished indefinitely. In general, they are organic materials derived from the soil, water, and atmosphere."

[26] See Eric Martineau, Research Director, Institute for Sustainable Energy Policies, TEDx Tokyo talk 'Renewable Energy is our Future' on May 12, 2013 <http://www.youtube.com/watch?v=zGHsXljf3fQ>

As this research is approached from an advocacy perspective to advance the case for RIDR and Lex Renewables in international law and international investment law in particular; it argues for reform and concrete steps to grow 'Lex Renewables' development. Whether one advocates for one shape of reform in favour of another, or even none at all, understanding the renewables' business model and what this industry needs legally from an international law perspective, to operate and thrive in this new green economy, is paramount.

In 2007, Guruswamy and Doran wrote that 'the global response to the energy crises has been unsatisfactory'[27]. They concluded that:

> "With respect to international agreements that explicitly and substantially deal with sustainable energy, are not adequate to the task of addressing climate change or global energy security…they were not designed with this ambition in mind...We contend that these formal commitments should be enhanced and woven into a larger collaborative fabric that is intended to serve as a coordinated response to global energy security."[28]

Gentry and Ronk[29], in the same year 2007, asserted that:

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Also, see 'Renewables Energy Futures Report 2013' published by Renewable Energy Policy Network for the 21st Century. Accessed in February 2013 at: <http://www.ren21.net>
The report indicates that: "Only a few countries had renewable energy support policies in the 1980s and early 1990s, but many more countries, states, provinces, and cities began to adopt such policies during the period 1995–2005, and especially during the period 2005–2012. **The number of countries with some type of support policy related to renewable energy more than doubled during this latter period, from an estimated 55 in early 2005 to some 120 by early 2012.**" The report which was produced with the collaboration of 170 credible global experts, foresees the following 'common policies' to persist: "Legally binding targets for renewables, Electricity market reforms for power generation and combined heat and power (CHP), Publicly supported research, development, and commercialization, Feed-in tariffs, quotas, and/or other finance-attracting policy regimes, Subsidies, tax credits and abatements, and other cost-reduction incentives, Market aggregation policies, Energy efficiency standards for equipment, vehicles, and materials, Building codes and standards (both national codes and local policies), Emissions trading and cap-and-trade schemes for both power and heat supply, Carbon taxes, Industrial policies that target renewable energy for jobs and international competitiveness, Social policies that target renewable energy for its social benefits, Frameworks for energy prices that reflect the full cost of energy, including environmental and social costs, Phase-outs of subsidies for fossil fuels and nuclear power."

[27] Lakshman Guruswamy (with Kevin Doran), *The Effectiveness and Impacts of International Energy Treaties*, in From Barriers to Opportunities: Renewable Energy Issues in Law and Policy, at 89 (Coppock et al. eds., Yale) (2007). Accessed in February 2013 http://environment.research.yale.edu/documents/downloads/0-9/11-04-Guruswamy-and-Doran.pdf

[28] Ibid at Page107 I submit that this quote does not expressly refer to dispute settlement mechanisms, however, it is accepted that Disputes under Treaties or International Agreements have the option to be settled in various way. As such, the absence of an explicit mention of dispute settlement mechanisms does not undermine what this quote supports regarding improving the effectiveness of such treaties/agreements.

[29] See Bradford S. Gentry & Jennifer J. Ronk, 'International Investment Agreements and Investments in Renewable Energy, in From Barrier to Opportunities: Renewable Energy Issues in Law and Policy.' A report on the work of the Renewable Energy and International Law Project (REIL), 2006–2007. At Page 76, available at:

> "…agreements to protect "investments," no matter what sector any particular investment is in. **Such protections are of great use to investors in renewable energy projects, but by their very nature, do not address the more specific barriers**[30] **facing investments in the renewable energy sector. As such, efforts to use international investment law to promote investments in renewable energy projects should be placed in a wider context,** embracing traditional IIAs (where some areas for work do remain), sectoral energy and environmental agreements, initiatives by multilateral development agencies, as well as efforts to inform and coordinate national policies."

In September 2011, the then UN Secretary-General, Ban Ki-moon, launched the Sustainable Energy for All (SE4All)[31] initiative with the aim of achieving three goals by 2030:

1. Ensuring universal access to modern energy services;
2. Doubling the global rate of improvement in energy efficiency; and
3. Doubling the share of renewable energy in the global mix.

In 2013, the same clarion call for change and gathering momentum remained loud and clear as nothing much had transpired in regard to a clear global coordinated effort in support of renewables. Yet, there are commendable efforts exerted that may eventually yield a result. One can detect a consensus that the industry's challenges do not lie in 'technical issues' but more in the basket of policies and practices. This was the collective opinion of 170 experts in the Renewables Futures Report 2013.

> "…, the challenges of integrating renewable energy into utility power grids, buildings, transport, and industry are not fundamentally a technical issue—although a variety of technical issues certainly need to be worked out. Rather, **the challenges relate to practices, policies, institutions, business models, finance, aggregation, and cross-**

<http://environment.research.yale.edu/documents/downloads/0-9/11-03-Gentry_Ronk.pdf Last accessed December 2012.>

[30] Ibid at pp 57-59 Gentry and Ronk outlined these barriers under three main themes of: Market Barriers, Government Regulations, and Capital Risks.

[31] See 'History' (*Sustainable Energy for All | SEforALL*, 2021) <https://www.seforall.org/who-we-are/history> last accessed 12 September 2021

**sectoral linkages, along with changes in professional practices, education and training[32]."**

These challenges are complex undertakings that cannot be resolved overnight and evidently require a consistent, coordinated effort from various global players. At one of the annual summits of Bloomberg's New Energy Finance (BNEF), The Future of Energy Sixth Summit in New York, **The United Nations (UN) former Secretary-General Ban Ki-moon,** in his keynote speech[33] about climate change and efforts to boost investments in renewable energy sources, **expressly sought** the help of such players as: the private sector, member states, and civil societies. He emphasized that they are three primary partners to the UN, whose support are crucial for the international community to be successful in affecting change to provide universal access of energy to 8 Billion people by 2030, as the UN 'cannot' do it alone.

The view from the Renewables Energy Futures Report 2013 depicted the following[34]:

a) "conservative" outlooks project the share of renewable energy in global energy supply remaining below 20% in the future, not much higher than today.
b) "Moderate" outlooks by experts and scenarios project renewable energy shares of 30–45% by 2050, including electricity, heating/cooling, and transport.
c) "High renewables" outlooks project 50–95% energy shares by 2050.

Adopting the same 'optimistic' tone in regard to the considerable growth in renewables' investments, the research from Bloomberg New Energy Finance (BNEF) shared at their summit in April 2013, shows: "Investment in clean energy capacity is expected to triple between now and 2030, …and that growth in renewables investment could jump 230% to US$630 billion a year by 2030." Their forecast index, named GREMO (Global Renewable Energy Market Outlook) "sees renewables accounting for between 69% and 74% of all new power capacity added between now and 2030[35]."

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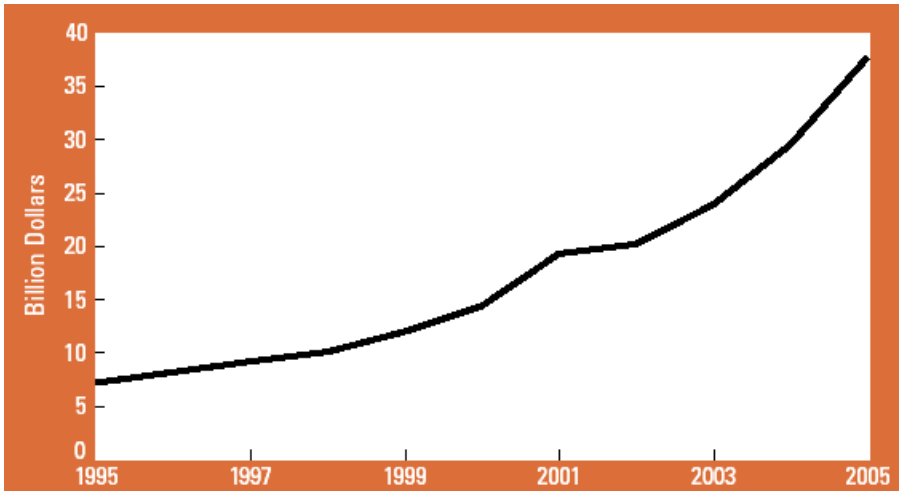
[32] See 'Renewables Energy Futures Report 2013' supra note 15 at Page 8.
[33] See his speech at: http://bnef.folioshack.com/document/summit2013/b1m6q last accessed November 2013
[34] See 'Renewables Energy Futures Report 2013' supra note 15 at Page 8
[35] See <http://www.theclimategroup.org/what-we-do/news-and-blogs/clean-energy-investment-expected-to-triple-by-2030-analysis/> Last accessed on April 23, 2013

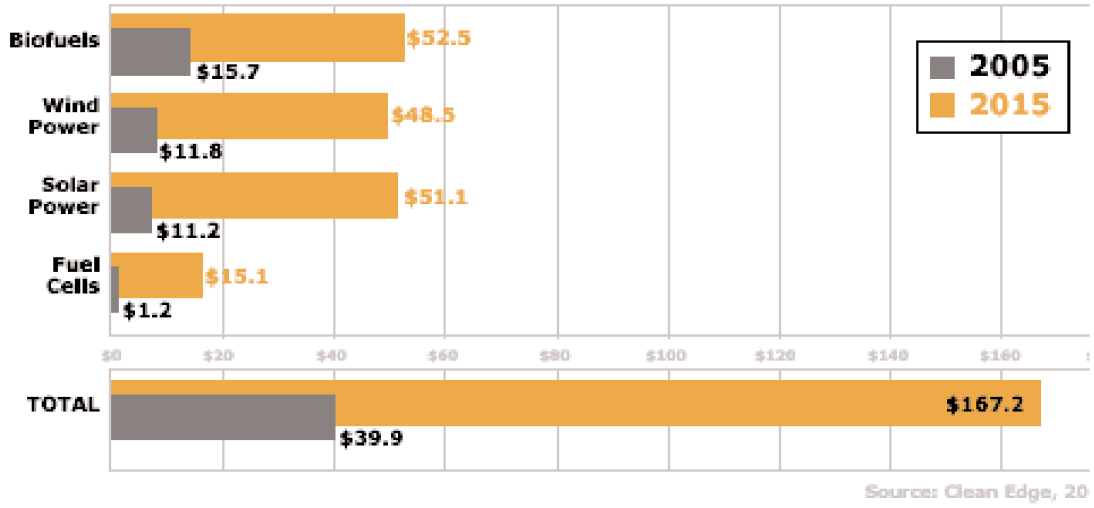
And a simple at a glance charts comparison between the growth figures for 1995-2015 used in Gentry and Ronk's research in 2006-2007 (Figures 1 and 2) and the BNEF's actual growth figures for 2001-2012 (Figures 3,4, and 5), limns the huge and unstoppable growth that has been taking place over the past decades.

***Figure 2: Annual Investment in Renewable Energy 1995-2005***




(Source: Dr Eric Martinot, Renewables Global Status Report, 2006 Update Ren12 Policy Network. http://www.Ren21.net/globalstatusreport/download/RE_GSR_2006_Update.pdf – From Gentry and Ronk Page 55)

***Figure 3: Clean Energy Projected Growth 2005-2015 ($US Billions)***




(Source: Makower, et al., 2006 From Gentry and Ronk Page 57)

***Figure 4: Global Total New Investment in Clean Energy 2004-2012***

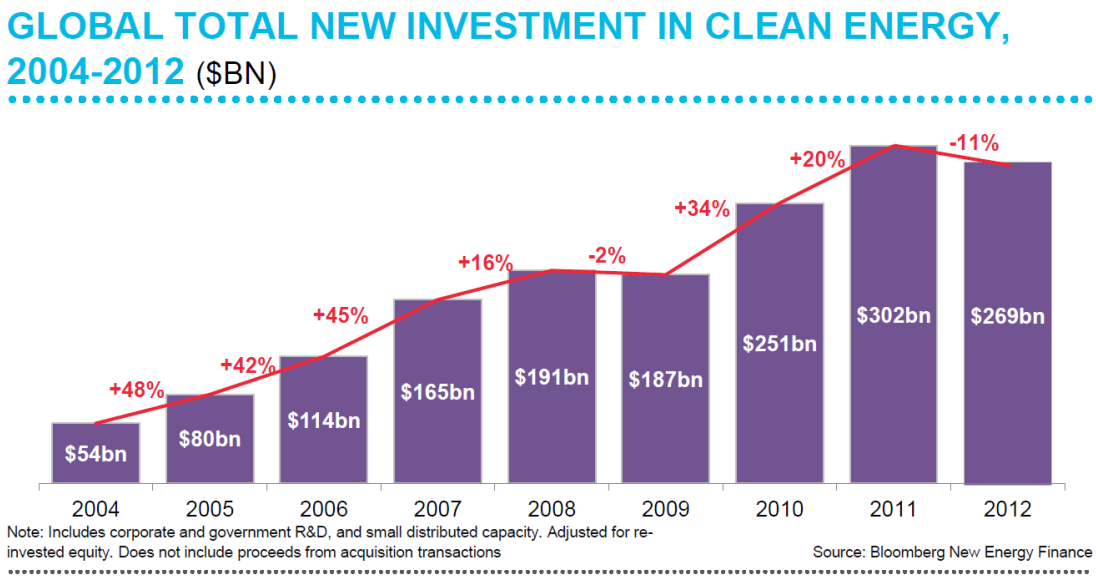



**Figure 4** (Source: Bloomberg New Energy Sixth Summit 2013 website)

***Figure 5: Global Renewable Capacity Additions***

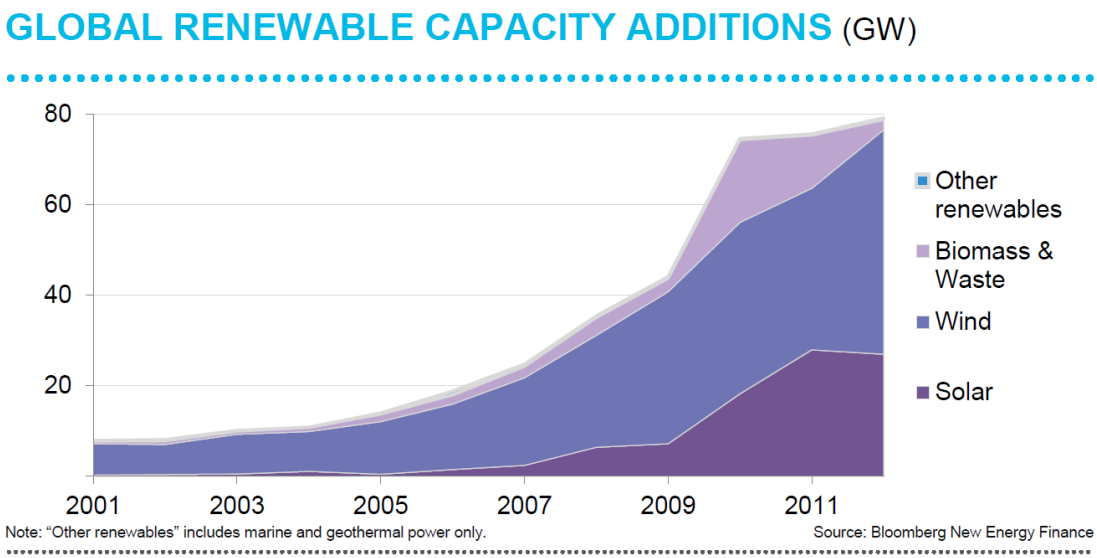



**Figure 5** (Source: Bloomberg New Energy Sixth Summit 2013 website)

***Figure 6: Investment in Clean Energy by Region, 2004-2012***

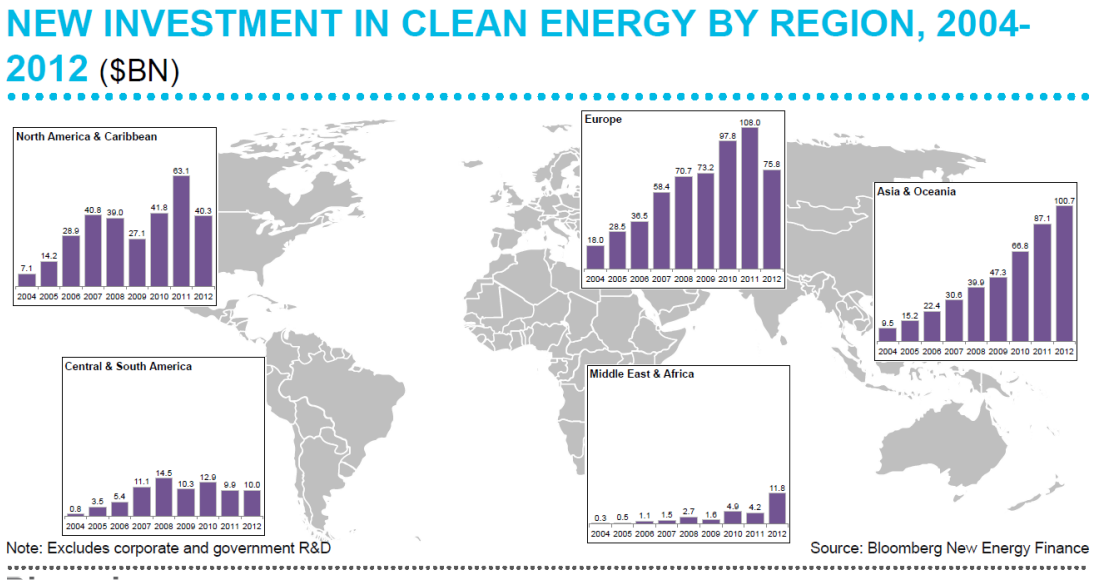



**Figure 6** (Source: Bloomberg New Energy Sixth Summit 2013 website)

In 2015 IRENA's report "Road Map for Renewable Energy Future"[36], the growth of the renewables industry continued to defy convention even the drop in the oil prices did not impede the growth of the renewables industry investments. The report confirmed that naturally, 'investors appreciate that wind and solar power can balance out their energy portfolios and hedge against tightening regulations on fossil fuels', which supports upward growth for the renewables industry due to technological advances falling operational costs allowing banks to offer loans at very low-interest rates. Even if one questions all of the above figures and charts, and presume they are lopsided, it still does not alter the fact that one can detect a clear undercurrent of persistent growth for renewables. By setting aside these figures all together, and taking the most pessimistic view, assuming a 1% growth for this industry, this 1% may indeed have formed a critical 1% microtrend[37] that turned into a macro trend[38] in reality that is here to stay and warrants our attention.

[36] See Roadmap for a Renewable Energy Future, 2016 Edition page 13 at https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2016/IRENA_REmap_2016_edition_report.ashx last accessed on 12/09/2021

[37] The term 'microtrend' is defined as "trends" that are often counterintuitive, usually followed by 1% or less of the population, but they are pursued passionately and are fundamentally reshaping our society. See Mark Penn and E. Kinney Zalesne.s book:" Microtrends: The Small Forces Behind Tomorrow's Big Changes". Published by Twelve in September 2007.

[38] A trend is defined as: …a line of development., the general movement in the course of time of a statistically detectable change. Merriam Webste's Collegiate Dictionary USA Tenth Edition1997 page 1259

Identification of trends is not an enough end though - neither in the scholarly nor the commercial practice circles. It is what we do with these trends that matter. Chief Judge, James E. Baker wrote 'the operational code is the law that matter, because that is the law that critical actors feel bound to follow.' He spread Michael Reisman's 'value-based and practical' work ethos that supports this line of thought, i.e. by 'projecting future trends, showing decision-makers how to shape the law' in order to reach desired outcomes - Be it procedural or substantive guidance' promulgation[39]. He quoted Reisman's assertion of this as follows:

> "It is not sufficient for the scholar simply to identify and assemble trends in decision. Trends must then be tested against the requirements of world public order as a means of assessing their adequacy. Insofar as they are found wanting, scholars should take the responsibility of proposing alternative arrangements so that a better approximation of political and legal goals can be achieved in the future."[40]

Stuart Bruce[41] proposed four legal options to help both reduce greenhouse gas emissions and advance a meaningful implementation of SE4ALL. These are:

> (1) an international energy convention;
> (2) an energy protocol to the UNFCCC;
> (3) reform of and a new protocol to the ECT; and
> (4) an international declaration on renewable energy principles.

Options 3 and 4 are in line of this thesis' discussion from both academic and legal practice aspects. Bruce expressly contended that '…*whatever legal format might be politically feasible, the age of sustainable energy has arrived. The dynamism and influence of* ***international energy law is crucial to a global energy transition...*** *'* emphasis added.

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[39] Chief Judge, U.S. Court of Appeal for the Armed Forces, Adjunct Professor of Law, Georgetown Law School, Washington DC. See James E. Baker 'Prelude to Decision: Michael Reisman, the Intelligence Function and a Scholar's study of Intelligence in Law, Process and Values' at Page 72 in 'Looking to the Future: Essays on International Law in honor of W. Michael Reisman' Editors: Arsanjani, Cogan, Sloane, Weissner. Martinus Nijhoff Publishers 2011

[40] See James Baker supra note 27 at Page 74. Footnote 5 W. Reisman, 'International Legal Responses to Terrorism', 22 Hous. J. Int'l L 3, 6 (1999)

[41] See page 1 Bruce S, 'International Law and Renewable Energy: Facilitating Sustainable Energy for All?' (2013) 14 MelbJIL 1.

It is in this spirit, that I approach the investigation of fostering RIDR and 'Lex Renewables' as a sector of energy law in its own right. The research put forth the case for the development of a 'Lex Specialis[42]' / a 'Lex Renewables', or a special body formed from within the existing international dispute resolution fora, or the commencement of a new one. Yet regardless of any resulting course of action, one denominator underscores them all, is that 'facilitating, the design and negotiation of new international energy instruments needs to be integrated with prior international endeavours"[43].

Yackee[44] presented the view that "investment treaties, while perhaps a good thing in some respects, for the most part they are largely unnecessary, and perhaps a bit dangerous, too." I strongly disagree, as neglecting what has been achieved before would be a fatal error for both renewables and international arbitration. It is not prudent to wipe out what the international arbitration achieved 'as a community that has the normative potency to generate procedural practices and standards that guide the conduct of arbitration and breed expectation of compliance.[45]'

Yackee, reasonably contends though that his thoughts are to be placed within a 'small…comparative institutional literature' This is in the hope that they spur 'thoughtful analysis of whether we need the system of international investment law that we have, and if we don't, then what a workable and sufficient alternative system might look like?[46].' He clearly succeeded as my voice will be added, albeit from a biased angle in assessing the international investment law through the lens of renewables.

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[42] 'lex specialis' refers to' a normal aspect of the functioning of the law, understood as a legal system' See 'International Law Commission Study Group on Fragmentation by M. Koskenniemi Fragmentation Of International Law: Topic (a): The function and scope of the lex specialis rule and the question of 'self-contained regimes': An outline.' At http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf Last accessed in May 2013. Published in TDM 1 (2009)

[43] Lakshman Guruswamy (with Kevin Doran), *The Effectiveness and Impacts of International Energy Treaties*, in From Barriers to Opportunities: Renewable Energy Issues in Law and Policy, at 89 (Coppock et al. eds., Yale) (2007).

[44] See Jason Webb Yackee 'Toward a Minimalist System of International Investment Law'32 Suffolk Transnat'l L. Rev. 303 2008-2009

[45] See Stavros L Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law' presented at Wilmer Cutler Pickering Hale and Dorr LLP and Queen Mary, School of International Arbitration, University of London Seminar in London on December 17, 2012.

[46] See Yackee supra note 31

### 1.3.2 The Research problem

While it is submitted that renewables as an industry is at its infancy despite its exponential growth rate in the last few decades in comparison with the long history of the fossil fuels, all the trends and indications, as provided in this thesis, present solid evidence that the infant will grow to be a giant. It is the future. So, how can we be prepared to handle this giant? The giant is even showing its teeth via the recent unprecedented high-value complex RIDRs – and this is just the start! 'The emergence of a new world order shaped more by bargains, compromises and necessity than by grand architectural designs' is no longer 'underway', it is here[47].

The gaps amongst the diverging interests of stakeholders ranging from governments to private citizens in renewables are wider than ever before and renewables' share in the global investment market is a force to be reckoned with. The instruments available for RIDRs such as NAFTA[48] Chapter 11 and/or the ECT may be able to serve the renewables industry, in their current state, or maybe not? As such, a closer evidentiary analysis must be conducted through the renewables industry business model and applicable case law.

As to BITs, most of the investor-state disputes that arise and invoke them, are highly likely to go to ICSID. And ICSID is failing. ICSID is failing with Argentine. Bolivia, Ecuador, and Venezuela pulled out, and some of the sovereigns are quite unhappy with the results. The trend of hostility towards foreign investors continues, but, it appears that the sovereign has the trump card. And if the sovereign has the trump card, can you do business? The obvious answer is No. So, what can we do? While tempering and taming sovereignty is in demand, we also have to have international renewable industry investors that recognise that there is public interest involved which you can neither eliminate nor reduce. That is the tussle! How do we make it come together in a way that preserves for each stakeholder their autonomy but ultimately links them to work together? It would be an exaggeration to say that this thesis will be able to have all the answers to the issues raised above.

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[47] See Gidon Gottlieb 'Global Bargaining: The Legal and Diplomatic Framework' Page 210 in Richard Falk, Friedrich Kratochwil, and Saul H. Mendlovitz 'International Law: A Contemporary Perspective' Westview Press Inc 1985

[48] The scope of this thesis does not extend to the newly renegotiated North America, the United States-Mexico-Canada Agreement (USMCA), which entered into force on July 1, 2020. It only covers its predecessor, the old North American Free Trade Agreement (NAFTA).

**The key problem is that the legal reforms needed to assist in shaping a more developed legal framework for RIDRs are going at a much slower pace than the actual development of the renewables industry. There is no one existing single legal framework that is ready to meet the challenges of the disputes that arise in this sector. Perhaps roles of the contracting parties may need better legal definition. Is there an overarching international administrative body? What about special damages? Issues of ownership of property? Feed-in Tariffs, Licensing, and Taxation problems? Is there a ready list of arbitrators and qualified international experts? etc. This is where the comparison with the Fossil Fuels industry Lex Petrolea may lend a hand in scratching the surface as an initial attempt to shed light on what could be emulated for Renewables and Lex Renewables.**

'If we are to have any realistic prospect at all of reshaping this context, we must accurately appreciate the constraints as well as the options[49]' wrote Richard Falk in 1985 and it is analogous to our time. This is how this research will distinguish itself by focusing on the commercial interests and dispute resolution needs of the new breed of investors adopting new business models to go green, be profitable as well as co-existing with or without a reasonable sovereign. This does not mean that the author sees 'sovereigns' as adversaries. She is supporting 'the emergence of political leaders more attuned to the need and opportunity for global reform[50]' especially as it concerns the survival of a pioneering industry as renewables.

## 1.4 The Research questions and objectives

### 1.4.1 Research questions

The thesis is centred around the following main research question:

**Is the international energy sector witnessing developments in the Renewables industry similar to Fossil Fuels' 'Lex Petrolea'? Can these developments work towards forming 'Lex Renewables'?**

To answer this main research question, the following sub-research questions will be examined:

[49] See Richard Falk 'A New Paradigm for International Legal Studies: Prospects and Proposals' in Supra note 121 at Page 652
[50] Ibid Page 653

**a. What are the special aspects of the Fossil Fuels' industry contracts and standards in comparison with Renewables?**
**The relationship between the two industries shall be explored through describing the similarities and differences, the historical evolution and how they both emerged.**

**b. To what extent is Foreign Direct Investment (FDI) prevalent in the Renewables industry? And how significant is the scope for international investment arbitration to contribute to the development of a 'Lex Renewables'?**

As the Renewables' growth timeline does not parallel that of Fossil Fuels exact phases, in ebbs, flows and/or boom, bust and echo style[51], it follows that one cannot evidently ascertain the strong impact of foreign direct investment on this industry without careful research and investigation of the issues that the use of international investment arbitration has been contributing towards the development of 'Lex Renewables' as it did for 'Lex Petrolea.'

However, there are common ground inquiries e.g. What can be done to close the ever-growing gap and resolve the conflicting interests to achieve a fruitful bargain amongst the various contractual parties[52] in these investments? This is often the problem at the heart of almost all investments disputes and international investment treaties negotiations where the sovereigns and their organs guise to protect the public interest via heavy-handed and contradicting regulations strangling, along the way, its own private sector and/or active, and interested foreign direct investors[53].

[51] The author is using an analogy from demographics See David K Foot with Daniel Stoffman '*Boom, Bust & Echo: Profiting from the Demographic Shift in the 21st Century'* Saint Anthony Messenger Press and Franciscan; First Edition (September 27, 1997)
[52] The term 'Contractual Parties' in this paper for simplification includes States, Organs of the States, and/or investors (individuals and/or organizations) that are bound by a treaty and/or contractual obligation that may benefit from a treaty's scope.
[53] On April 22-24, 2013 in New York at Bloomberg Future of Energy Sixth Summit, Riccardo Puliti, the managing director of energy at the European Bank for Reconstruction and Development stated: "The damage done to wind and solar investment in Europe by the retroactive subsidy cuts, introduced first by Spain, had been transmitted like a virus through other southern and eastern European countries." He also predicted that: "the EBRD would be lending just EUR 50m to European renewables this year – compared to an average of some EUR 600m in recent years." Also, Akio Fukui, chairman of Mitsubishi Power Systems Europe, said that "it was now easier to raise finance for a renewable energy project in Latin America, South Africa or Japan than it was in Europe."

Also, issues of liability and quantum e.g. When rendering awards with compensatory damages, Could the Tribunals import proven practices from other specialized industry-focused dispute resolution rules that would lend a better understanding of how the quantum/damages in the awards are calculated/assessed? Renewables witnessed the rise of disputes as a result of subsidies, Feed-in-Tariffs, and other government-backed incentives drying up or haphazardly withdrawn by sovereigns and their organs. In turn, the Renewables' investors are finding new ways of funding, which ultimately give rise to complex financial structures complicating the contractual relationship further[54] impacting the disputes that may arise. In light of these challenges, the clarity and transparency of the rationale behind the compensation and damages awarded are central in such disputes, especially in the absence of 'Stare Decisis[55]' in international investment arbitration. In general, the literature regarding 'Damages' in international investment dispute resolution is extremely scant at best. Renewables disputes, given their capital intensity and long-term nature, run in the billions[56] as such a thorough analysis is warranted to provide a complete view the renewables jurisprudence as part of this research.

### 1.4.2 The Research objectives

This thesis aims to examine past, present, and future issues that closely impact fostering RIDR as a sector of international energy law in its own right. While it argues that the renewables industry is ripe to acknowledge and gather its own jurisprudence, akin to Fossil Fuels' 'Lex Petrolea[57]', it does not purport to offer a panacea for RIDRs' law-making but a glimpse into

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[54] ibid However bleak the statements may be, they were counteracted by other statements promising new innovative ways of funding and investments for renewables e.g. support for 'Master Limited Partnership' structures, which are known to be available for oil and gas investments, to be extended to renewable energy projects as well. The Summit briefing notes, which can be accessed at: http://bnef.folioshack.com/document/summit2013 revealed that Senator Lisa Murkowski, the ranking Republican on the U.S. Senate Energy and Natural Resources Committee, supports such legislation. This received massive support from the lobbying group American Petroleum Institute chief executive Jack Gerard told attendees: "that the oil industry actually supports the idea." Meanwhile, the push for Green Banks continues e.g. See: http://www.renewableenergyworld.com/rea/news/article/2013/01/why-the-renewable-energy-industry-needs-green-banks Last accessed on February 19, 2013. The UK is a pioneer in forming the world's first 'Green Investment Bank – GIB' with a government funding of £3Billion. See: http://www.greeninvestmentbank.com/ The team leader that advised the UK Government regarding the GIB is an imminent international Project's Finance lawyer. See: Tsang Linda, 'Lawyer Of The Week: Jon Ellis The Projects Partner in the London Office of Norton Rose led the Team that Advised the Government's Green Investment Bank' (*The Times*, 2013) < http://www.thetimes.co.uk/tto/law/article3659562.ece> Last accessed 17 January 2013.

[55] See Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream. Necessity, or Excuse' as part of the 2006 Freshfields Lectures. Arbitration International, Vol 23, Issue 3 and available at: http://www.arbitration-icca.org/media/0/12319143087130/00950001.pdf last accessed in May 2013

[56] See Figure 1 in this thesis from the ECT Statistics as one minor example of this.

[57] See explanation on the origins of Lex petrolea – Supra, note 7.

the possibility of a 'Lex Renewables[58]' development and jurisprudence depository for renewables.

In essence, it offers:

a. a crude[59] assessment of how an industry, such as renewables, that by default thrives on growth and innovation can skilfully assert itself, as a stand-alone energy industry, through the use of existing international dispute resolution mechanisms (investment arbitration - such as NAFTA Chapter 11, ECT, BITs; commercial arbitration; mediation…etc.) or the creation of new ones as the case may be; and

b. how can this be achieved, not only in the current paradoxical international dispute resolution framework but in crisis-laden tumultuous financial, economic, and political times that may take decades to overcome.

**1.5 <u>The scope of the thesis research</u>**

The scope for this research is focused and narrow in terms of the time period and number of renewable cases considered. It is important to remember that the subject matter is fairly new and this is the first time the concept of Lex Renewables is raised.

(a) The time period is up to the end of 2018. My research was deferred for reasons beyond my control and containing the time period up till end of 2018 is reasonable as it is a six-year period since the start of my research. The research analysis focuses on the case law and arbitral decisions published by the end of 2018. So, if the outcome of the case was not decided or not published by then, I will consider the case up to the stage it arrived at the end of the research period.

(b) The number of cases considered may appear in favour of solar energy investors cases against Spain. This is reflective of the reality of the time period. By way of background, in 2007 Spain implemented a number of regulatory measures

[58] The term 'Lex Renewables' is defined here in this paper to mean: international commercial, trade and investment usages in the renewables industry that can be treated as part of the governing law. It is akin to 'Lex Petrolea' or 'Lex Sportiva' which are defined as legal rules adapted to an industry's specific characteristics and/or a transnational autonomous legal order. See ibid 1 and Marcus Mazzucco 'Lex Sportiva - Sports Law as a Transnational Autonomous Legal Order', supra, note 5.

[59] The word 'crude' is used here to mean an untreated unvarnished initial glimpse into the subject matter.

that were greatly welcomed, as their main purpose was to incentivise investment in renewable energy. What ensued was a surprise as the program's great success backfired due to an amalgamation of a tariff deficit and the impact of the credit crunch financial crisis. Spain's way out was to implement a slew of successive measures from 2010 onward, whereby it retracted some features of the original regulations[60]. As a result, by 2017, there were 32 cases registered against Spain under the ECT alone, and seven more each against Italy and the Czech Republic[61].

(c) Other cases are considered as well to offer a fair view of all mechanisms used in RIDR i.e. Whether under a BIT, ECT, NAFTA and/or other.

(d) This academic research is based on practice and supports the notion of a 'Lex Specialis' and that there is 'Lex Petrolea' following 'Lex Mercatoria' and hence 'Lex Renewables', too. They are all here to stay.

(e) The scope and the premise of the research will not engage in an academic debate to undermine nor refute Lex Petrolea[62].

## 1.6 The research methodology and analytical framework

### 1.6.1 The Research methodology

In addressing my research questions, I will employ three methods:

(a) A methodology of a doctrinal comparative deductive approach developed from primary sources (legislation, rules, awards and case law) and secondary sources (journal articles, practitioners' textbooks, websites). The

[60] See Reynoso Isabella, 'Spain's Renewable Energy Saga: Lessons for International Investment Law and Sustainable Development – Investment Treaty News' (*Iisd.org*, 2019) <https://www.iisd.org/itn/en/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/> accessed 11 October 2021

[61] See Cosbey Aaron, 'Can Investor-State Dispute Settlement be Good for the Environment?' (*International Institute for Sustainable Development*, 2017) <https://www.iisd.org/library/can-investor-state-dispute-settlement-be-good-environment> accessed 11 November 2021

[62] The author does not agree at all with the views of Terence Daintith, a Professorial Fellow, Institute of Advanced Legal Studies, University of London against Lex Petrolea which he shared in presentation to the Swansea-Texas Symposium, 'Lex Petrolea – Myth or Reality?' held in London on 21 June 2016 then expanded in an academic journal in 2017. For sake of completeness, Daintith argues that "*we should dispense with this concept (meaning Lex Petrolea), on the grounds that it is ill-defined, that there is little or no evidence to support the claims made for it, that it lacks any sound theoretical basis, and that it may be capable of employment in a way that damages legitimate interests of petroleum host states. We should certainly continue to look for common elements in international industry, state and arbitral petroleum practice that might guide future policy, agreements and dispute settlement in the field, but these can be adequately described in ordinary English ('transnational petroleum law') instead of bad Latin."* See Daintith, T 'Against Lex Petrolea' Journal of World Energy Law and Business, 2017, 10, 1–13

main thread is a doctrinal legal analysis of international law in particular international investment law (both hard law i.e. legally binding on the parties and can be legally enforced by court and soft law[63]). By way of example as a non-exhaustive list, the analysis may include international treaties, international declarations, travaux préparatoires, jurisprudence of international courts and monitoring bodies and arbitration institutions, international reports, doctrine and general principles of international law that impact RIDRs and Lex Petrolea;

(b) The second method draws on my field knowledge and applicable certified training of two executive energy training programmes at the Energy Charter Secretariat:

- Third Executive Training Programme for Young Professionals: Visegrad Spring Session on 'Addressing Energy Challenges at Regional and Global Levels by Applying Common Rules and Good governance Practices' which took place in Brussels between the 13-16, May 2014; and
- Fifth Executive Training Programme for Young Energy Leaders Legal Session on 'Enabling Amicable Settlement of Investment Disputes: Mediation and Conciliation' which took place in Brussels between 5 – 7 November 2014; and

(c) The third method draws on my own experience as a practitioner in a top 10 global law firm. I initially trained and qualified as an energy lawyer which availed me first-hand experience dealing with the subject matter of the research and interacting with the sector's key players, leading arbitrators and or Arbitral Institutions.

[63] Soft Law defined as "(in international law) Guidelines of behaviour, such as those provided by treaties not yet in force, resolutions of the United Nations, or international conferences, that are not binding in themselves but are more than mere statements of political aspiration (they fall into a legal/political limbo between these two states). Soft law contrasts with **hard law**, i.e. those legal obligations, found either in treaties or customary international law (see custom), that are binding in and of themselves. See Law J. and Martin E. A Dictionary of Law (7 ed.) Publisher: OUP Published online: 2009 Current Online Version: 2014.

The three proposed methods provide the opportunity of a well-rounded comprehensive research outcome that considers not only state-made rules but all the key actors of law-making i.e. combining theory and practice and avoiding the strict 'positivist' view or a pure 'rationalist' theory[64]. Perhaps, a pluralist approach to international law that highlights 'norm-generation[65]' After all, it is a study of 'International Law' as such, it 'must be contextual, i.e. it must perceive all features of the social process of immediate concern, it must be problem-oriented. It must be multi-method[66].' Moreover, it is a reflection of the writer's own identity as 'a world-citizen[67]' who interacted and still interacts with a mix similar to all the key players above which is a strength to be used to further the goal of this research.

### 1.6.2 The Analytical framework

The research is approached through a lens that is impacted by the New Haven School of thought[68] (a.k.a. New Haven approach), as the analytical framework of choice due to its flexibility and efficacy in addressing policy issues within public international law, given that the renewables industry's 'Investment treaty arbitration has a hybrid nature combining public international law (as regards its substance) with elements of international commercial arbitration (as regards procedure)'[69]. The New Haven School defines law as a policy-oriented approach of decision-making that is both 'authoritative and controlling'[70]. The School promotes the quest 'for *informed* decision in the service of *clear* goals,' and seeks

[64] See Andrew Guzman 'How International Law Works: A Rational Choice Theory' Oxford Press 2008. And see Jack L. Goldsmith and Eric Posner 'The Limits of International Law' Oxford University Press 2005.

[65] See Paul Schiff Berman 'A Pluralist Approach to International Law' 32 Yale of International Law 301 (2007). Berman discusses the work of Robert Cover, another New Haven School academic and practitioner whose international law work complements that of McDougal, Laswell, and Reisman's.

[66] See Daniel Bodansky 'Prologue to a Theory of Non-Treaty Norms' in Arsanjani, Cogan, Sloane, Weissner Supra note 29 at p 119 quoting Myers S. McDougal, Harold D. Lasswell & W. Michael Reisman 'Theories About International Law: Prologue to a Configurative Jurisprudence' 8 Va. J. Int'l L. 188, 196 (1968).

[67] See Robert D. Sloane 'More Than What Courts Do: Jurisprudence, Decision, and Dignity—In Brief Encounters and Global Affairs' The Yale Journal Of International Law [Vol. 34: 517 2009] Sloane argues that 'International lawyers, in particular, but indeed all lawyers, need a methodology that can capture the myriad facts and factors that influence the processes of decision in different legal and political contexts. My proposed methodology reflects this. He also quoted Reisman's from his 2007 General Course on International Law at The Hague Academy, that he sees 'the international lawyer of the twenty-first century as a "world citizen."' which is who I am.

[68] "This approach was founded by the Yale Law School faculty in the 1960s and proposes international law as the jurisprudence of social choices, which is applied to analyse various decision-making processes… Its main features involve a focus on values, an appreciation for cultural diversity, and broad applicability to various fields and issues." See Lone, F 'The New Haven School of International Law', Oxford Bibliographies Online: International Law, Oxford University Press (Published 27 March 2019)

[69] See Schill, S. W. 'International Investment Law and Comparative Public Law' (OUP 2010)

[70] See W. Michael Reisman, Seigfried Wiessner & Andrew R. Willard supra note 6

comprehensively to map and scrutinize the factors, which, within any legal system, will be genuinely enlightening[71]'.

**What does this mean?** Because the ultimate goal of this research is to foster the renewables industry's interest through assembly of jurisprudence and implementation of reforms of some of the existing international disputes mechanisms, it means that the final research results will be analysed through the School's three 'coordinate communicative dimensions[72]' in mind which Reisman et al conceptualized them as the terms of 'law-making' or 'norm prescription.'

Sloane[73] set them out to be as follows:

> "(1) policy content, the extent to which a norm communicates a directive or prohibition: "thou shalt" or "thou shalt not";
> (2) authority signal, the extent to which, empirically, the processes generating that norm and the symbols attached to it convey a sense of legitimacy or propriety to the normative communication's recipients; and
> (3) control intention, the extent to which those recipients expect that those with effective power will invest sufficient resources to make the norm effective—in common parlance, to enforce it."

**How can this be conducted analytically?** The New Haven School identified a 'praxis of five intellectual tasks[74]' that are used as tools to facilitate decision-making and/or assist in solving a problem – that is the context. Within this lie six elements of: 'the participants', 'their perspective', 'the situations', 'the resources', 'Strategies', 'Outcomes.' Please see the narrative, Table 1, and Figure 6 below for further clarification.

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[71] Sloane note 66 at note 113
[72] Ibid
[73] Ibid - where he also quoted in footnote 24 *See generally* W. Michael Reisman, International Law-making: A Process of Communication, The Harold D. Lasswell Memorial Lecture (Apr. 24, 1981), *in* 75 AM. SOC'Y INT'L L. PROC. 101 (1981). Please note that this will be complemented by Robert Cover's 's work as discussed by Bermen, see supra note 111. Berman wrote: "*In a plural world, law is an ongoing process of articulation, adaptation, re-articulation, absorption, resistance, deployment, and on and on. It is a process that never ends, and international law scholars would do well to study the multiplicity and engage in the conversation, rather than impose a top-down framework that cannot help but distort the astonishing variety on the ground"* Clearly, this fits the goal of this research.
[74] See W. Michael Reisman, Seigfried Wiessner & Andrew R. Willard supra note 6

**Why the New Haven School is important for adjudicating in RIDR/Lex Renewables disputes?**

As we examine the special features of the renewables industry in the next chapter, it is evident that renewables are at a different stage in their lifecycle than traditional fossil fuels. For example, the renewables infrastructure, by default requires high upfront investments and should not be treated akin to oil and gas infrastructure that is widely available. The renewables technology requires continuous research and development, while the market continues to grow yet it is neither entirely well-developed nor mature. It is for these reasons that renewables investments and investors require government subsidies and special protection - that is the main key argument about renewables.

As we also accept that 'growth and innovation' are inherent features of renewables as well as the fact that environmental protection and minimizing and/or eliminating climate change negative impact is an international public good that we should all aspire to, then it follows that whichever mechanism of dispute resolution that is available to promote and support the renewables industry should be viewed with hope from that positive angle.

By way of elaboration, one of the key benefits that flows from renewables is that it leads to sustainable development, reducing climate change impacts leading to all matters of public interest issues which justifies special treatment and this is why the original New Haven analytical framework that any law should be looked at from the prism of how it promotes public interest rather than sectional or vested interest is the right approach[75].

In that vein, if we accept this line of thought, then renewables fall within that category of public good. Unlike traditional energy sources, hydrocarbons/coal have a lot of externalities[76] ;

[75] See Page 576 in W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard The New Haven School: A Brief Introduction The Yale Journal of International Law (2007) they asserted '…the New Haven School adapts focal lenses from the social sciences, a mode of organizing data about various social processes though cultural anthropology's modality of phase analysis and an analytical break-down of the actual components of a decision." Due to the pervasiveness in the renewables in our everyday lives and its connectedness with the sustainable development goals, adjudication of its disputes ought to be through the lens of the New Haven School approach.

[76] Anil Markandya, Deger Saygin, Asami Miketa, Dolf Gielen and Nicholas Wagner, The True Cost of Fossil Fuels: Saving on the Externalities of Air Pollution and Climate Change. Brief. IRENA and Remap. May 2016. Available at https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2016/IRENA_REmap_externality_brief_2016.pdf Last accessed 13 December 2021

Some of the Key findings:

**-External costs related** to the use of fossil fuels stem from many causes. These include pollution and environmental degradation resulting from the extraction of resources; indoor and outdoor air pollution due directly

therefore, they deserve no such special treatment in resolving their disputes. While renewables industry externalities are not zero, they do not have the same level of risks involved with hydrocarbons/coal. The tribunals when adjudicating cases in relation to renewables they should take this into account and consider this in their analysis and come with this mindset in resolving the dispute. I submit that while this is an interesting proposition, the key challenge is: Are there no other more simply easier ways of addressing this rather than changing the whole legal map and coming up with new jurisprudence creating a new special customary rules Lex Renewables? For example, using the same instruments currently available?

### 1.7 The Problem

To elaborate, in this research the problem in a nutshell is: A struggling new industry, Renewables, striving to survive within the current paradoxical international legal framework and with time, similar to the fossil fuels industry, it will have its own legal rules and norms, hence, the main research question:

**Is the international energy sector witnessing developments in the Renewables industry similar to Fossil Fuels' 'Lex Petrolea'? Can these developments work towards forming 'Lex Renewables'?**

### 1.8 The Mechanics of Approaching the Problem

to fuel combustion as well as non-combustion emissions such as those from industrial processes; and the negative impact of extreme weather events caused by global warming

-**Doubling the renewable** share in the global energy mix can result in significant savings of fossil fuels.

-**Modern renewables inclu**de multiple types of sustainable, cost-effective bioenergy and biofuels, which comprise crucial elements in the energy transition. The envisaged scale-up of modern renewables also allows for the phase-out of traditional bioenergy uses that involve unsustainable fuel gathering and toxic combustion.

-**Reduced use of fossil fuels allow** the avoidance of carbon dioxide (CO2) emissions and air pollutants.

***Table 1: The New Haven School Five Intellectual Tasks as Applied to This Research***

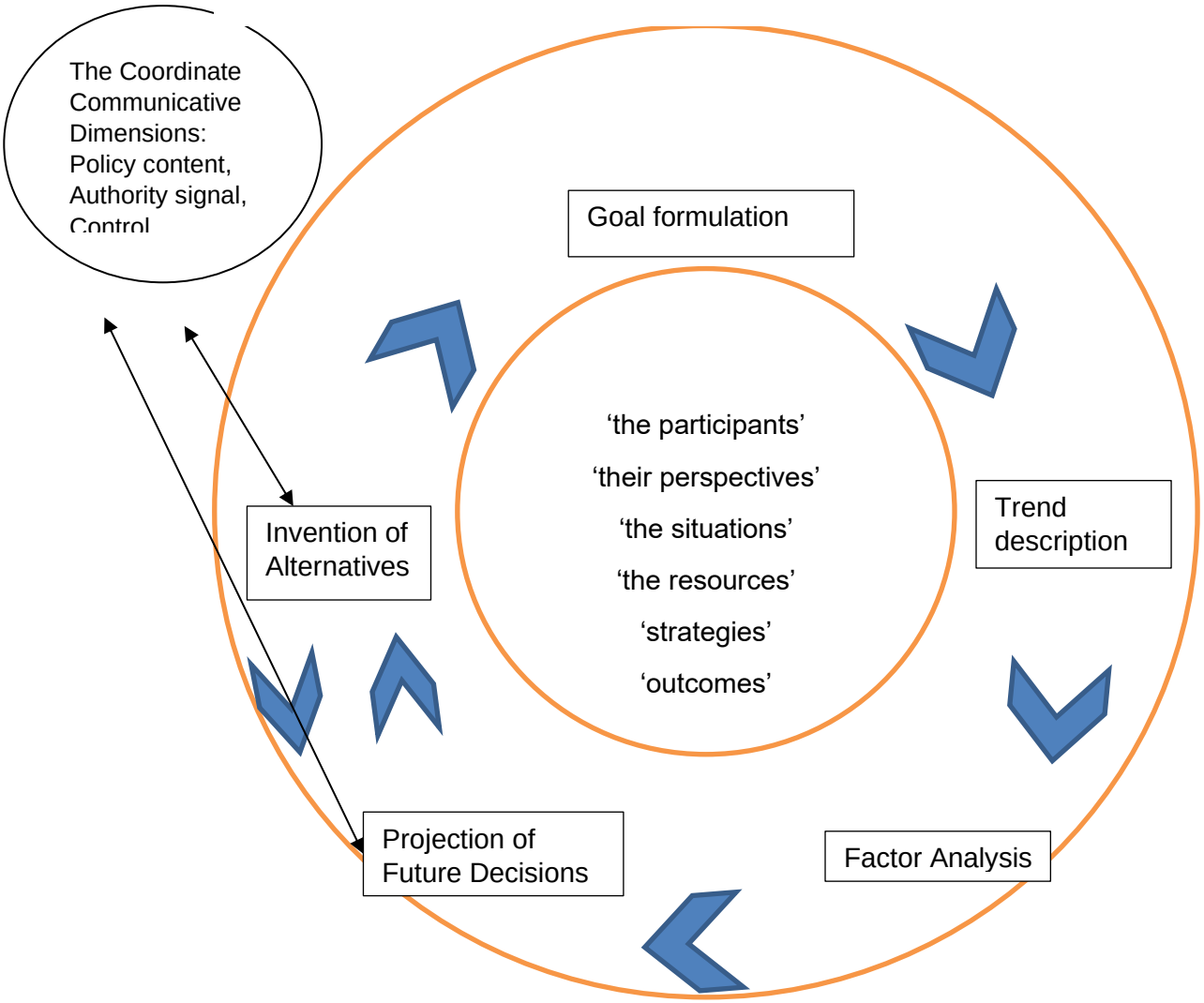
| **The New Haven School's Five Intellectual Tasks to Solve a Problem** | **How They Apply to this Research** |
|---|---|
| 1. Goal formulation | It means fostering the interests of the renewables industry, assembling jurisprudence, and identification of areas of reforms |
| 2. Trend description | It means understanding not only the business model of renewables but the energy sector as a whole and the international investment regime within the current political and economic climate. |
| 3. Factor Analysis | This is the comparative analysis between Fossil Fuels' industry contracts, standards and how prevalent FDI's existence and renewables |
| 4. Projection of Future Decisions | This is the stage of the aggregation of the research results and concluding remarks |
| 5. Invention of Alternatives | This, too, is another layer of the stage of the aggregation of the concluding remarks and options available to move forward |

The above intellectual tasks are not empirical in nature in this research. It is merely a breakdown of the six elements of the author thought process when assessing the state of RIDR:

a. 'the participants' i.e. the ones involved in the social process'. In this research it means: the key law-making players identified in the methodology.
b. 'their perspective' i.e. the subjective dimensions that animate them. In this research it means: how do they approach the decisions they made or will make in their capacities as an arbitrator, academic, legislator…etc in regard to the 'international' issues identified in this research
c. 'the situations' in which they interact. In this research it means: where the decision is made i.e. in a court, an executive or a legislative branch and under what circumstances i.e. crisis versus business as usual situation.

d. ‘the resources’ upon which they draw bases of power. In this research it means: who and what supported their decisions.
e. ‘Strategies’ or the ways they manipulate those resources. In this research it means: how did they optimize the use of the available resources? In what mode? Did they use a persuasive or a coercive mode e.g. using diplomatic interventions, economic solutions, public relations, or on the farthest extreme of the spectrum - military power; and
f. ‘Outcomes’ these are the aggregate outcomes of the process of interaction. In this research it means the result of the research analysis of an award or decision analysis as the case may be.

***Figure 7: The New Haven School Analytical Framework Representation for this Research***



(Source: The figure is developed and drawn by the Author but the concepts belong to the New Haven School)

In a nutshell, the research, within the New Haven School of thought, will strive to meet its aim of identifying any applicable new rule-making for a transnational autonomous legal order for the renewables industry i.e. a 'Lex Renewables', in a fashion prescribed in the words of McDougal, Lasswell, and Reisman[77]:

> "A jurisprudence that guides the scholar or the decision-maker will contain the categories that aid an orientation toward the manifold of events that includes the future as well as the past; will utilize all the available stocks of knowledge to illuminate trends, explanatory conditions, and projective potentials; and will, hence, stir the creative origination of objectives and strategies that afford realistic anticipation of the benefits, costs and risks of alternative options available to a human community whose members are growing accustomed to accept the challenge of taking the course of evolution into their own hands".

## 1.9 Significance of the thesis

### 1.9.1 Significance to Lex Renewables research

The significance relating to the 'Lex Renewables' research may well be summarised to:

(a) It offers a new angle of analysis affecting the international legal framework governing renewables investor-state relations[78]. It is part of its law-making (jurisgenerativity). Since the arbitral awards under the ECT, NAFTA, BITs are rendered within 'public international law, there is no stare decisis. As such, and as Professor Dr. Kaj Hobér[79] advised: 'it will take long time for arbitral case law to bring order to the interpretation and understanding' of instruments such the ECT and NAFTA ...etc hence the need for a research analysis such as this;

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[77] See Myers S. McDougal, Harold D. Lasswell & W. Michael Reisman 'Theories About International Law: Prologue to a Configurative Jurisprudence' 8 Va. J. Int'l L. 188, 196 (1968).

[78] See Stephan W. Schill 'Beyond Dispute: International Judicial Institutions as Lawmakers: System-Building in Investment Treaty Arbitration and Law-making' 12 German L.J. 1083 2011. Schill wrote: '… the awards …increasingly form a body of jurisprudence that affects the legal framework governing investor-State relations at a multilateral level, that is, rather independently of specific bilateral investment treaty relations. The reason for this is that investment treaty tribunals heavily rely on precedents set **by** earlier investment treaty tribunals, and increasingly are expected to fall into line which earlier arbitral jurisprudence.'

[79] See Crina Baltag Supra note 54 at Page xv.

(b) It brings a sense of 'Legitimacy' and presence to the renewables international dispute resolution[80]; and

(c) It will serve as a part of the 'evolutionary' model for renewables international dispute resolution which is forming and being formed now. As such, it will not only help current international legal scholars and practitioners but future scholars as well who may take it to the next stage without having to start all over again. This in turn will indirectly help in 'legitimizing' renewables international dispute resolution as referenced above[81].

### 1.9.2 Contribution to the field

#### 1.9.2.1 Addressing a gap in the academic literature on RIDR in energy law

In examining the main research question: '**Is the international energy sector witnessing developments in the Renewables industry similar to Fossil Fuels' 'Lex Petrolea'? Could these developments work towards forming 'Lex Renewables'?',** the research serves as an initial foundational block and depository bank on the subject as a tip of the iceberg to aid and inspire further research.

It is a fact that, unequivocally, the literature on 'RIDR', as a topic, is still fairly small in size and new in ideas and propositions. Since my initial research proposal in 2012 till present not much has changed in terms of literature on the topic despite the rise of the number of renewables arbitral decisions. There is a substantial room for worthy scholarly and practical input even if it is narrow in scope. Furthermore, as the current literature volume is not commensurate with the growth and potential of the renewables industry. There are many gaps to be filled regarding substantive and procedural issues under the various international dispute

[80] See Charles N. Brower, Charles H. Brower II, Jeremy K. Sharpe 'The Coming Crisis in the Global Adjudication System Arbitration International Volume 19 Number 4 2003. Judge Brower, in describing a classic adjudication system, added a 'consistent body of jurisprudence' as one of its salient characteristics, lending the system to be 'predominantly accepted. While Renewables International Dispute Resolution does not quite fit the classic view of adjudication system, nevertheless whether a consistent or inconsistent body of jurisprudence is accumulated at this stage, it will still lend it the legitimacy it deserves – even if it just means a placeholder on the map for a start.

[81] See Supra note 77 where E. Donald Elliott alluded to this function as follows: "To say that evolutionary models have particular advantages for describing gradual patterns of change in the law is not, however, to assert that the function of jurisprudence is primarily descriptive. Theories of law are rarely written to describe; their aim is more often to advocate and to legitimate."

resolution mechanisms within and/or outside the scope of this thesis, particularly, under the overarching international investment regime.

#### 1.9.2.2 Originality of thought – 'Lex Renewables'

The research is unique and original in two ways:

(a) its '…spirit of seeking to grasp world order patterns[82]' for the development of 'Lex Renewables' jurisprudence as a term/concept; and

(b) its proposition of the assembly of renewables jurisprudence. As a result of its main research question, it asserts the birth and growth of **'Lex Renewables[83]'** akin to 'Lex Petrolea[84]' which was developed by R. D. Bishop where the thorough analysis of published oil awards revealed a pattern 'of a real lex petrolea that is instructive for the international petroleum industry.'

#### 1.9.2.3 Timely and topical research

In the same vein, assessing and promoting 'Lex Renewables' at this stage of the current exponential growth of the renewables industry's legal sector, especially at the heels of COPs 21 and 26, all points towards asserting RIDR as a branch of energy law in its own right[85].

#### 1.9.2.4 Jurisgenerativity[86] of 'Lex Renewables'

The research showcases the adaptability and resilience of the most used judicial and arbitral mechanisms in international energy dispute resolution (investment arbitration, commercial

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[82] These are the words of Richard Falk Supra note 121 at Page 653.

[83] See footnotes 3 and 4 above

[84] See supra note 3 and also R. Doak Bishop and William W. Russell 'Survey of Arbitration Awards Under Chapter 11 of the North American Free Trade Agreement' Journal of International Arbitration 19(6): 505–579, 2002. The article surveyed the issues addressed by arbitral tribunals convened under NAFTA Chapter 11 but was not industry specific.

[85] The writer has not come across any similar ideas to hers that were published for renewables within the international dispute resolution regime. However, she came across informative published work in Climate Change Litigation within the U.S. jurisdiction. It is the work of David Markell & J.B.Ruhl 'An Empirical Assessment of Climate Change In the Courts: A New Jurisprudence or Business as Usual? 64 Fla L. Rev. 15 2012 the authors assessed the trend to be one of both i.e. 'forging a new jurisprudence but one of operating under business as usual' From analysing the cases, their study provided evidence that 'the courts are performing this 'prods and pleas' function in the climate change arena'

[86] "Jurisgenerativity," a term originally suggested by Robert Cover - See Robert Cover, "Foreword: Nomos and Narrative," The Supreme Court 1982 Term, Harvard Law Review 97/4 (1983/84): 4–68. Cover proffered that as 'we inhabit a nomos - a normative universe. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. Once understood in the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live. In this normative world, law and narrative are inseparably related…' The birth of 'Lex Renewables' would lend itself to such status. Reflecting further on Cover's analysis, Seyla Benhabib expands the definition of jurisgenerativity, she writes that it is "*the*

arbitration, mediation, – and possibly others) through the lens of the renewables' business model narratives in case law and arbitral decisions and how they can better serve the renewables industry's interest87 by the creation of new legal rules. How do we melt and shape down these 'structures' that act, as international disputes resolution medium, to balance the competing interests between 'sovereigns' and 'international investors' in their pursuit of a fruitful bargain under the current challenging international political, regulatory, and economic climate?

The author as a practitioner supports the notion that the arbitrators' decisions in investment arbitrations is pure law-making by default and part of the jurisgenerative processes in investment arbitration whereby legal and customary rules are set 'by canvassing arbitral interpretation as a jurisgenerative process per se, and by exploring its impact on future treatymaking'[88].

### 1.10 Thesis structure

The thesis is divided into six chapters. Chapter one is an introduction providing an overview of the nature of the legal problem, its context, key research questions, research methodology, scope, aims and general outline of the research. Chapter two examines, through the lens of key select arbitral awards and case law, the Renewables in International Dispute Resolution Law: Survival for Co-existence, or Co-operation, or both? Chapter three focuses on Fossil Fuels in International Investment Dispute Resolution Law: The behemoth establishment of 'Lex Petrolea' and its development via the different stages of its jurisprudence starting pre, with and

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*law's capacity to create a normative universe of meaning which can often escape the 'provenance of formal lawmaking'*" See Seyla Benhabib: Dignity in Adversity: Human Rights in Troubled Times, Cambridge 2011 – pages 125-126.

[87] See Rafael Leal-Arcas 'International Trade and Investment Law: Multilateral, Regional and Bilateral Governance' Edward Elgar 2011 Dr. Leal-Arcas calls for a better incorporation of environmental issues in the multilateral investment regime as they have been marginally represented. While he does not expressly mention 'renewables', it is without a doubt that renewables investors and investments go hand-in-hand with the environmental and climate change standards. My research will help fill part of this gap. At Page 264 He wrote:" environmental and labor standards – which until now have only been treated marginally in international investment agreements – are increasingly seen as inseparable from foreign investment and therefore, from a substantive point of view, it is key to ensure that they are incorporated in a future multilateral framework for investment. This will be even more justified as globalization continues to be a reality that affects the social and environmental responsibility of foreign investors"

[88] See the work of C. Titi "*The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration*" The Journal of World Investment & Trade 14 (2013) 829–851

Catharine wrote "…, the international system of investment dispute resolution has taken centre stage and has been placed in a unique position from which to formulate international investment law. At the heart of this system, the arbitrator possesses considerable 'jurisgenerative' powers that span over different aspects of the rules governing investment, from treaty provisions relating to jurisdictional and substantive standards to the interpretation of relevant rules of customary international law and the development of new treaty models…"

after the AMIN Oil case. Chapter four briefly addresses Foreign Direct Investment (FDI) and International Investment Arbitration: How special is the tie and its contribution to a ‘Lex Renewables’ development? Chapter five: brings closely the evolution of both jurisprudences together via analysis and comparison of the body of ‘Lex Petrolea’ v ‘Lex Renewables’: Divide and conquer or united we stand? Focusing on select cases in renewables investment disputes in international arbitration. Chapter six is the Conclusion providing brief concluding remarks on – Renewables International Dispute Resolution Jurisprudence: Where are we on the journey? Are these developments, that are akin to the standing point between Lex Lata and Lex Ferenda, leading us to ‘Lex Renewables’?

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# CHAPTER 2

## Renewables in International Investment Dispute Resolution Law: Survival for Coexistence, or Co-operation, or both?

***'…But there are industries, organizations and individuals protecting their fading business or their own ideology and not considering the benefit of people and the health of our planet and with whatever means they are trying to slow down the meteoric rise of clean energy systems...'The PV business changed the life of mankind[1]'***

***— Dr Peter F. Varadi[2]***

### 2.1 Overview

It is undeniable that we are facing a challenging climate change crisis and unprecedented global warming. The world strongly desires to move away from the traditional sources of energy to newer, cleaner types that are kinder to us humans and planet earth.

The different sources of renewables are the suggested option to allow us to practically reach this new era of clean green zero waste living and achieve the UN sustainable development 17 goals and 169 targets by 2030 and beyond [3]. However, there are

[1] See Varadi, P 'Sun above the Horizon' 2014 Acknowledgements page

[2]This is a quote from "The Solar Electric Affair: A Thriller" – a unique topical thriller on clean energy, solar industry, climate change and the fossil fuel industry by Peter F. Varadi (self-published 2018)
Dr Peter F. Varadi is a personal mentor and family to the author. He is a pillar pioneer in the global solar industry. It is the discussions with Dr Varadi (Peter to me) that fuelled my desire to embark on the PhD. Neville Williams 5 August 2009 wrote about him: Pioneers of the Solar Industry - Peter Varadi (dasolar.com) Solar electricity may seem like a gift from the Gods, but in fact it was an invention of man (perhaps God inspired), and it is not new. The photovoltaic (PV) effect was discovered in 18th century France, promoted by Germany's Werner von Siemens, and developed as a workable product by our own Bell Labs in 1954. But it was pioneers like Peter Varadi, with the appropriate initials "PV", who created the modern solar PV industry. He is a global well-renowned Solar Energy Pioneer co-founded Solarex Corporation, USA, in 1973 to develop the utilization of solar cells for terrestrial applications. Solarex was one of the two companies that pioneered this field. By 1983, it became the largest PV Company in the world, when it was sold to AMOCO. Dr. Varadi continued consulting for the European Commission, World Bank, NREL, and other organizations. His book Sun above the Horizon, which describes the meteoric rise of the solar industry, and its sequel, Sun towards High Noon, were published in 2014 and 2017, respectively and used in this thesis.

[3] See https://sdgs.un.org/goals "The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015, provides a shared blueprint for peace and prosperity for people and the planet, now and into the future. At its heart are the 17 Sustainable Development Goals (SDGs), which

barriers to entry for the success of investments of all sources of renewables. These barriers are often summarised as[4]:

- Market, technical and regulatory barriers;
- Economic and financial barriers;
- Administrative barriers; and
- Lack of awareness, capacity and professional skills.

A functioning set of global legal rules, customs and methods of resolving disputes is a necessity for the renewables industry to survive in a new era where it prevails as the mainstream source of energy not in the shadows anymore.

As this thesis' focus is on presenting a new notion of a specific legal framework for the resolution of investment disputes for renewables, it follows that in order to mitigate the above barriers for renewables investments, we need to examine the legal instruments currently available in so far as to ascertain if they are fit for purpose and ought to remain as is, or modify them if necessary or initiate a whole new system that has the renewables specific features and its stakeholders at the core of this new legal framework. Lowenfeld[5] summarised four key developments that transpired collectively together in the latter part of the 20th century to present us with the current shape of the 'prevailing principles of the international law of international investment'. These are:

1. The World Bank launching ICSID as a major effort to provide ground rules for international arbitration of investment disputes between foreign private investors and host-states;
2. The Iranian revolution and the reversal of the previous foreign investment measures resulting in US-Iran Contra Affair and 15-year claims tribunal that

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are an urgent call for action by all countries - developed and developing - in a global partnership. They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests. The SDGs build on decades of work by countries and the UN, including the UN Department of Economic and Social Affairs"

[4] See https://www.irena.org/ Executive Strategy Workshop 12 January 2013 on Renewable Energy in South East Europe Background Paper Topic D Overcoming Barriers to Authorizing Renewable Power Plants and Infrastructure.

[5] See Ch 17 Page 536 'Evolving Standards in International Law on International Investment' in Andreas F. Lowenfeld 'International Economic Law' 2nd Edition 2008 Oxford

solved this dispute which, according to Lowenfeld made major contributions 'to the corpus of international law';

3. The rise of more than 'a thousand Bilateral Investment Treaties were concluded between developed and developing countries (and some between developing countries inter se), closely similar in content, all providing for the security of foreign investments, and all providing for international arbitration of investor-state disputes'; and
4. The creation of Multilateral Investment Guarantee Agency by the World Bank and its dedication to the encouragement of international private investment as a way' to advance economic growth in less developed countries, in part by providing for the security of investments and agreement on basic principles of law.'

This chapter presents a summary of the methods and instruments available (namely, NAFTA Chapter 11, ECT, BITs and/or Mediation) for the global renewables industry to resolve its investment disputes/RIDR, reiterating why the renewables industry are special and why tribunals ought to use the lens of the original New Haven School approach when adjudicating such disputes. Aligning these lines of thoughts together, provide us with an initial view of RIDR/Lex Renewables (customary rules) within a new era of a 'New International Economic Order' that has renewables at its heart not fossil fuels. On examination, even if it is at a basic level, we would be able to identify a preliminary position as to whether this new notion of a Lex Renewables would be merely existing alongside Lex Petrolea's, or is it a hybrid of both systems or anything else.

This thesis does not aim to provide an ultimate blueprint for the future of renewables investment dispute resolutions. It is a mere exploration of thought based on the current legal instruments and the jurisprudence available rather than on a comprehensive systematic analysis[6] due to the fact that the renewables industry is yet to be fully mature

[6] This is the most practical approach to proceed as an initial step towards building a renewables literature on the subject matter. This reminds me of the words written by Rudolf Dolzer & Christoph Schreuer when they wrote: "Principles of International Investment Law" In the foreword they wrote:" "In this current setting of the law, the authors have chosen, in their study and arrangement of the field, neither to provide an abstract blueprint of the subject matter along the lines of a European-style treatise nor merely to present a sequence of cases in the style of a common law casebook. The aim of the book is mainly to

and constantly evolving. It is highly likely that the available investment dispute mechanisms ought to be modified as clearly renewables was not part of the scope when most of these instruments and international treaties were negotiated. Should these instruments continue as they are without any adjustments to take renewables into account, then the whole system of renewables adjudication would be undermined because the renewables investment and investors cannot survive under the current regime. We may wish to consider the rise of renewables as the fifth element of change to drive another change in the map of internal investment laws.

## 2.2 Summary of the special features of the Renewables Industry

Since 2005 REN21[7] (Renewables Now), reported that they have been tracking 'what is happening where in the world in renewable energy markets,' including policies and investments. They reported[8] key proven features and benefits of renewables that are inherent in our everyday lives and our planet. For special features, REN21, highlighted that while each energy source, whether renewables or fossil fuels, has its own trade-offs, the advantages of renewables and **their exponential growth** **(See figure 8)** is undeniable over the devastating impacts of fossil fuels (namely: the reduction of water and land use, less air and water pollution, less wildlife and habitat loss, to no or lower greenhouse gas emissions, and most importantly fossil fuels are finite resources, and with the continuation of extraction they are depleted by the day. See the comparison in **Figure 9**).

In addition, REN21 research confirms that the **renewables decentralized character and technology development** generate important benefits for the global economy and

elucidate the meaning of the central principles that govern current foreign investment law." It is worth noting that Rudolf Dolzer spent time at Yale during the writing of this book. It is

[7] REN21 is the only global renewable energy community of actors from science, governments, NGOs and industry. We provide up-to-date and peer-reviewed facts, figures and analysis of global developments in technology, policies and markets. Their goal is to enable decision-makers to make the shift to renewable energy happen – now. See <https://www.ren21.net/why-is-renewable-energy-important/> last accessed 18 November 2021

[8] REN21 reported that 'the world still heavily relies on fossil fuels and even continues subsidising them. Meanwhile, the pollution they cause – from climate-damaging greenhouse gases to health-endangering particles – has reached record levels. And when something goes wrong, for example when the Deepwater Horizon oil platform exploded in 2010, the consequences are dramatic.

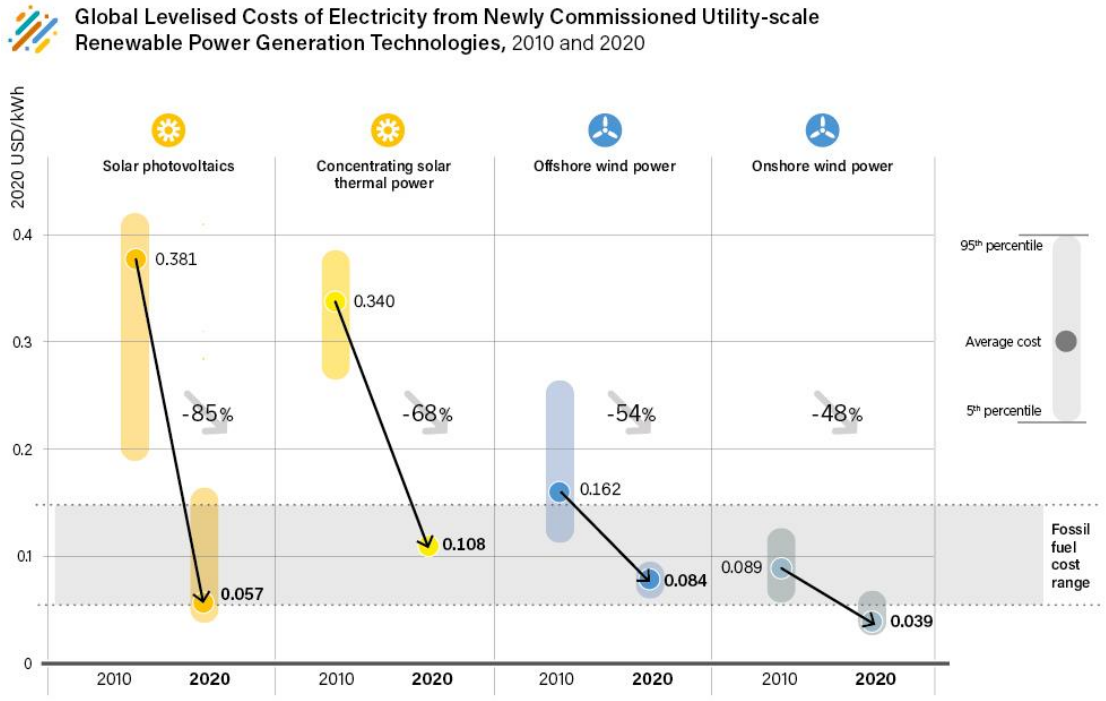
Since 2011, renewable energy is growing faster than all other energy forms. Renewable energy had another record-breaking year in 2020, as installed power capacity grew more than 256 gigawatts (GW) – its largest increase ever. More than 29% of our electricity now comes from renewable energy – and this keeps growing.' See 'Why Is Renewable Energy Important? - REN21' (*REN21*, 2021) <https://www.ren21.net/why-is-renewable-energy-important/> last accessed 18 November 2021

people. As of today, there is a considerable number of cities in the world that already source 100 percent of their electricity from renewables. REN21 confirms that such cities are now ‘taking steps to expand their ambitions to get rid of fossil fuels in heating, cooling, transport and industry.’ (**See Figure 10**)

The key benefits summary is:

- “Renewable energy emits no or low greenhouse gases. That’s good for the climate.
- Renewable energy emits no or low air pollutants. That’s better for our health.
- Renewable energy comes with low costs. That’s good for keeping energy prices at affordable levels.
- Renewable energy creates jobs. That’s good for the local community.
- Renewable energy makes the energy system resilient. That’s important to prevent power shortages.
- Renewable energy is accessible to all. That’s good for development.
- Renewable energy is secure. That’s good for stability
- Renewable energy is democratic. That’s good for acceptance.”

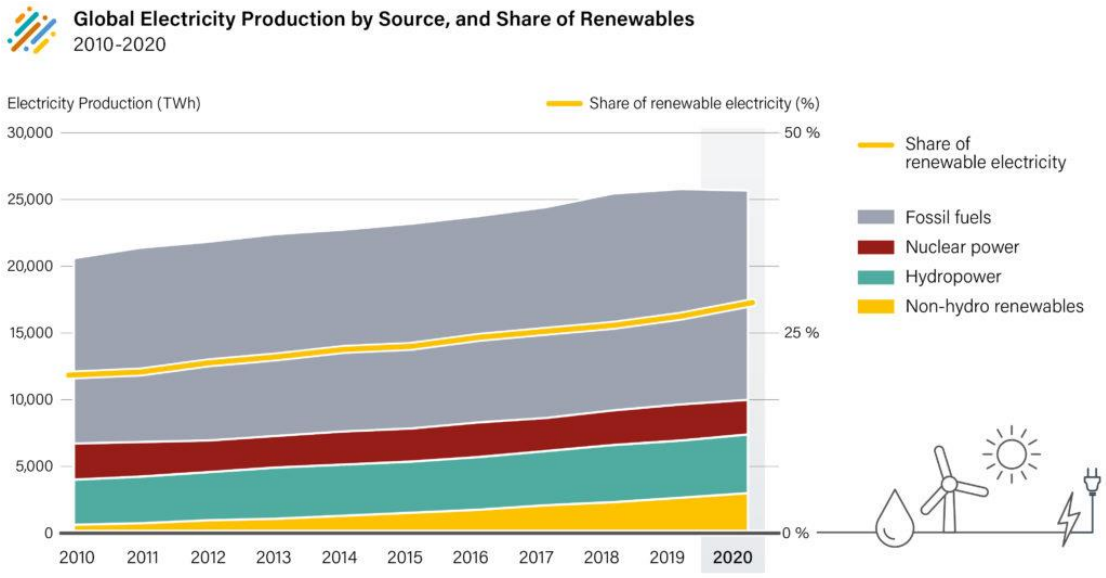
***Figure 8: Global Levelised Costs of Electricity from Newly Commissioned Utility-Scale Renewable Power Generation Technologies, 2010 and 2020***




Source: IRENA.

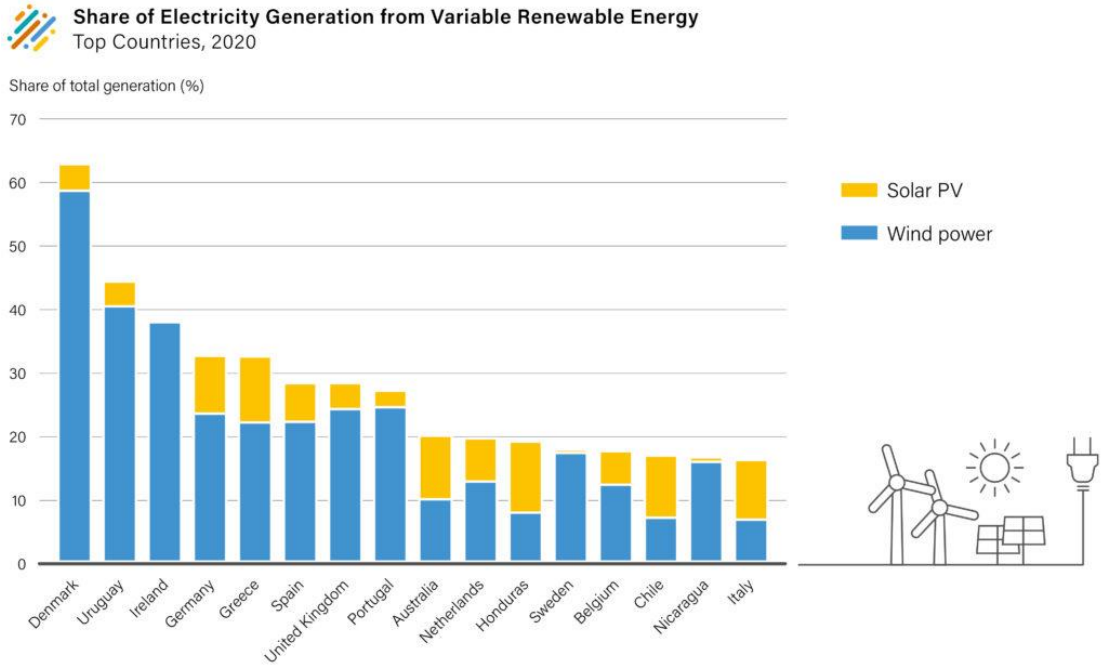


***Figure 9: Global Electricity Production by Source and Share of Renewables 2010-2020***




Source: Ember.

***Figure 10: Share of Electricity Generation from Variable Renewable Energy- Top Countries, 2020***




Note: Figure shows countries among the top 15 according to the best available data at the time of publication. Several smaller countries with low total generation and/or high imports are excluded from this list.

REN21 RENEWABLES 2021 GLOBAL STATUS REPORT

## 2.3 Key International Investment Dispute Resolution Mechanisms in Use

### 2.3.1 NAFTA, ECT, BITs, and Other

The choice of examining NAFTA Chapter 11 and ECT to assess the international dispute resolution framework for renewables, as opposed to any other multilateral treaties, stems from these factors:

(1) they are both multilateral treaties negotiated, signed, and came into force around the same time frame[9] which lends somewhat of a level-playing field regarding the baseline and time frame of cases and awards analysis - since they 'have been

[9] NAFTA was signed on December 17, 1992 and came into force on January 1, 1994 to further liberalize trade and investment amongst Canada, Mexico, and the United States. See http://www.naftanow.org The ECT was signed on December 17, 1994 and came into force on April 24, 1998 to provide a multilateral framework for energy cooperation 'that is unique under international law'. See 'Home - Energy Charter' (*Encharter.org*) <http://www.encharter.org> last accessed 13 December 2021
See, for the underlined quote, Norah Gallagher, Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty, Juris 2011, referenced in Footnote 43 in Kabir Duggal The Energy Sector, Investment Arbitration, and the ECT: Carving out a Special Regime.' Presented at the Juris Conference in April 2013 in Washington DC

both relied on in a far wider range of cases than might originally have been anticipated' since their inception;

(2) their scopes encourage foreign direct investment, albeit the ECT is explicitly limited to energy investments[10]; and

(3) the comprehensive international legal jurisdictions they both cover[11].

Moreover, on par with these factors, Gentry and Ronk[12], asserted that:

> "Key features of investment frameworks are often, but not always, shared among many neighbouring countries. **Continuing development of the Energy Charter or even the electricity portions of NAFTA to reflect the lessons learned about promoting investments in renewable energy may offer opportunities for moving ahead."**

As to other mechanisms used in the framework of international energy dispute resolution, the Bilateral Investment Treaties (BITs) will be examined, too. This is due to their pervasive existence in the turbulent seas of foreign direct investment. Besides, the probability of using all three instruments in resolving renewable energy disputes. The use of all instruments is highly likely to grow and is happening as of the time of writing. Furthermore, the UNCTAD's Investment Dispute Settlement Report, published in April 2013, reported 'the three investment instruments most frequently used as a basis for ISDS claims have been NAFTA (49 cases), the Energy Charter Treaty (29) and the Argentina-United States BIT (17)'. Emphasis added. This is also

[10] See Peter D. Cameron 'International Energy Investment Law: The pursuit of Stability' Oxford 2010 and Reprinted 2012 at Page 154 Cameron discusses the challenges presented by 'the limited scope of the ECT to investments in the energy sector' See also, Andrea J. Menaker and Heather Van Slooten Walsh 'The Energy Charter Treaty and U.S. Investment Treaties: An overview of key contrasts.' P 307 in Graham Coop and Clarisse Ribeiro's 'Investment Protection and The Energy Charter Treaty' Juris Net 2008

[11] At the time of writing, The ECT's Secretariat website shows that the treaty has 53 signatories, 10 observers, and 16 observers by invitation. While this may not be a thorough representation of the whole global dispute resolution infrastructure framework for the 193 member states of the United Nations, it is a significant enough representation for the purposes of this research especially when coupled with the discussion and analysis of other instruments of dispute resolution e.g. Bilateral Investment Treaties (BIT).

[12] See Gentry and Ronk Supra note 19 Page 73 in Chapter 1 in this thesis at footnote 28.

supported by a reasonable optimistic outlook regarding renewables' investments growth[13].

When we fast forward to UNCTAD's 2018[14], cases under the ECT increased by 400% and under NAFTA by almost 130%. The exact number of how many of these were in the renewables sector was not available - the following facts were reported, which shows a considerable steady rise in the general numbers of investment disputes invoking dispute resolution mechanisms mentioned:

- "About 60 per cent of investment arbitrations in 2018 were brought under BITs and TIPs[15] originally signed in the 1990s or earlier. The remaining cases were based on treaties signed between 2000 and 2011, except for one case that was based solely on a later treaty (Manolium Processing v. Belarus).
- The Energy Charter Treaty (1994) was the IIA invoked most frequently in 2018 (with seven cases), followed by the Canada–Colombia FTA (2008), the Republic of Korea–United States FTA (2007) and the Treaty on the Eurasian Economic Union (2014), with three cases each.
- Looking at the overall trend, about 20 per cent of the 942 known cases have invoked the Energy Charter Treaty (121 cases) or the North American Free Trade Agreement (NAFTA) (63 cases)."

We will cover each mechanism in the next section.

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[13] See 'Renewables Energy Futures Report 2013' supra note 15. The report indicates that 'Global investment in renewable energy reached $260–290 billion in 2011, up from just $40 billion in 2004.' Also, it adds that some experts said: 'there is barely any renewable energy market that isn't getting raised in discussions for investment." "by 2020, renewables will be the leading energy class for investment."

[14] See 'Fact Sheet On Investor–State Dispute Settlement Cases In 2018 | Publications | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/publications/1202/fact-sheet-on-investor-state-dispute-settlement-cases-in-2018> last accessed 21 November 2021

[15] At the time of writing, there are Bilateral Investment Treaties (BITs) Total: 2826 Total in force: 2258 and Treaties with Investment Provisions (TIPs) Total: 420 Total in force: 324 See 'EU (European Union) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/international-investment-agreements/groupings/28/eu-european-union-> last accessed 21 November 2021

### 2.3.2 NAFTA[16]

Approaching two decades since entering into force, NAFTA's Chapter 11 continues its success in maintaining its vibrancy and controversy via lively debates regarding its drafting interpretation and awards. With no exaggeration, NAFTA Chapter 11, in the author's opinion, is akin to a René Magritte painting, i.e. 'the ordinary object in an unusual context' and 'Now you see it - now you don't'[17] - the mysterious contradictory phenomenon. Or a Greek mythology analogy may fit here to describe it as another Janus double-faced God[18]. Because after almost twenty years, the general view of NAFTA's Chapter 11 still swings between seeing it as: 'a shield to be embraced' to protect the investors or a 'sword to be feared' when used by the investors to attack the NAFTA countries' policies.[19]'.

In looking to the future, Garcia, the former Deputy-General Counsel at the Ministry of Economy in Mexico[20], with extensive NAFTA disputes experience, advocates asking the following questions:

> "When we reflect upon the future of the NAFTA Chapter 11, we have to ask ourselves two important questions. The first is whether Chapter 11 has been a success. This is a contentious question. After fifteen years of NAFTA experience, two lines of criticism have emerged. Some argue that the rules set out in NAFTA Chapter 11 undermine the governments' ability to regulate in the public interest. For other stakeholders, the role of the NAFTA governments and

[16] Reminder that the chapter was written early in my research and the scope of thesis does not extend to the newly negotiated USMCA which replaced NAFTA.
[17] See Adventures in Art 'Now you see it – now you don't' René Magritte. Published by Prestel 1998.
[18] While the author enjoys modern art and Greek Mythology analogy in the international investment circle, other authors have done the same See Jeswald Salacuse 'The Energy Charter Treaty and Bilateral Investment Treaty Regimes' in The Energy Charter Treaty: An East-West Gateway for Investment and Trade' Kluwer 1996
[19] See Ray C. Jones 'NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?' Brigham Young University Law Review [2002:527] Jones wrote: '…Chapter 11 proceedings have resulted in broader interpretations and far wider applications of the statutory framework than many of the NAFTA's drafters envisioned.' See also footnote 4 in Jones quoting Todd Weiler from Arbitral and Judicial Decision: The Ethyl Arbitration. Jones paper was written five years after NAFTA came into force, and his same view echoed by others e.g. see Jennifer A. Heindl 'Toward a History of NAFTA's Chapter Eleven' Berkeley Journal of International Law [vol.24:2 2006] maintaining Jones line of thought after 10 years of NAFTA, then see Luis Gonzalez Garcia 'The Future of NAFTA Chapter 11: The Next Fifteen Years' in 'Fifteen of Years of NAFTA Chapter 11 Arbitration' Published by Juris 2009. Also maintaining same views after fifteen years…
[20] See Garcia supra note 42

> the Free Trade Commission (FTC) jeopardizes the rights of investors and threatens the rule of law… Some view things more positively, claiming that NAFTA Chapter 11 has worked adequately over the past fifteen years. But even if we are to conclude that Chapter 11 has worked adequately, the conclusion on the adequacy does not mean that NAFTA Chapter 11 should stagnate[21]. The second important question is which parts, if any, of Chapter 11 need to be either clarified or developed?"

The debate regarding Garcia's first question will continue till the end of time with winners and losers switching positions as in a musical-chair game scheme - that is the nature of the beast and goes to the heart of the argument of considering renewables to be akin to public good and basic human right[22]. As to the second question that Garcia poses, the author will make her contribution to this core question through identifying what is needed to be reformed to serve renewables.

The body of the case law and publicly available awards' decisions under NAFTA's Chapter 11 is rich with the writings of the brilliant international legal minds that produced it. If this body, as a whole, is meticulously qualitatively analyzed from the renewables' interests lens and compared with other international dispute resolution mechanisms' decisions and awards under the ECT and BITs pertaining to 'Lex Petrolea', and 'Lex Renewables', it will be one way of reaching a result as to what needs to be reformed in NAFTA's Chapter 11 (or the ECT as will be discussed further below) in order to develop the Renewables International Dispute Resolution (RIDR), i.e. conducting analysis with the goal of a 'Lex Renewables' and renewables jurisprudence development in mind using the New Haven approach.

[21] Perhaps Garcia had a crystal ball at the time and in his looking to the future he would have envisaged that there will be change and the new USMCA negotiated in 2020 which is beyond the scope of this research. Nevertheless, it shows that the will of the stakeholders manifested in changing the stagnation.
[22] See the full text of the UN Universal Declaration of Human Rights at United Nations, 'Universal Declaration Of Human Rights | United Nations' (*United Nations*) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 18 November 2021

McDougal and Reisman[23] asserted in a practical fashion that 'the making of law is a decision function, which may be conveniently described as prescription'. The word prescription here is used within the principles of international law[24] and public international law[25] and not domestic English law on the use of prescription in property law easements. It is the making of law through the role of the international governmental organizations such as the UN and the World Bank and similar organizations that produced ICSID, BITs and NAFTAs and their role in making international investment law and, in turn, a rich jurisprudence for renewables. In 1980, McDougal and Reisman[26] wrote that:

> "…In light of the developments of recent decades, the
> most striking omission from the itemization in Article 38[27] is, of course, that of reference to the role of international governmental organizations in the creation of both explicitly formulated law and customary expectations, It is increasingly recognized that these organizations, and especially the United Nations, contribute to the creation of international law in many different ways and that any realistic description of transnational prescribing processes must take this contribution into account.48 The contribution of such organizations, through the performance of the intelligence and recommending functions, the maintenance of established structures of authority, and the making of law through explicit agreement is of long standing knowledge…"

[23] See pages 250-254 in McDougal and Reisman's 'The Prescribing Function in World Constitutive Process: How International Law is Made' Yale Studies in World Public Order, Volume 6, Number 2, Spring 1980

[24] See Malcolm D Evans "Principles of International Law" Oxford Press 3rd Edition 2010 pages 318-20

[25] See James Crawford 'Brownlie's Principles of Public International Law' 8th edition Oxford 2012 page 193 and 7th Edition 2008 Pages 691-693 "7. Law Making through Organisations…(b) Prescriptive Resolutions: A resolution not in itself binding, it may prescribe principles of international law and be, or purport to be, merely declaratory. **However, the mere formulation of principle may elucidate and develop the customary law.**85 When a resolution of the General Assembly touches on subjects dealt with in the United Nations Charter, it may be regarded as an authoritative interpretation of the Charter: obvious examples are the Universal Declaration of Human Rights86 and the Declaration on the Granting of Independence to Colonial Countries and Peoples87 contained in resolutions of the General Assembly. **Resolutions on new legal problems provide a means of corralling and defining the quickly growing practice of states, while remaining hortatory in form**.88."

[26] See Supra note 25 pages 265-66

[27] The reference here is to Article 38 of the ICJ as a source of International Law.

The proposed approach to do this comparison is via a list of legal issues[28], as identified in 'Lex Petrolea', distilling the similarities and differences and their impact as opposed to 'Lex Renewables', i.e. highlighting the legal issues that are either currently facing the renewables industry or highly likely to do so as the industry grows.

Gleaning from the current awards and/or pending renewables' proceedings and the handful of academics and practitioners who write about them[29], It appears that these core issues, in no particular order, are:

1. Legitimate Expectations Doctrine and The Fair and Equitable Treatment[30].
2. Performance Requirements
3. Expropriation (Direct and Indirect)
4. Stabilization Clauses
5. Quantum/Compensatory Damages assessment
6. Enforcement

[28] The side-bar in the Investment Treaty News section of The International Institute for Sustainable Development (IISD) has a collection of 21 legal issues (Amicus Curiae, Arbitrator Independence, Challenges, Expropriation, Fair and Equitable Treatment, Free Transfer of Capital, Investment Definition, Local Remedies, Most Favored Nation Treatment, Annulment, National treatment, Performance Requirements, Stabilization Clauses, Transparency, Umbrella Clause, Enforcement, Standard of Review, Treaty Shopping, Counterclaims, Provisional Measures, Fork-in-the-Road Clause) Last accessed in March 2013 at 'Investment Treaty News – News, Analysis And Opinions On International Investment Law.' (*Iisd.org*) <https://www.iisd.org/itn/en/>.This is a reasonable coverage to what is often discussed in the international investment disputes circles but by no means the IISD's list is an exhaustive one because it clearly overlooks 'quantum/compensatory damages' which is fairly crucial.

[29] See various papers by Anatole Boute (at least seven) available online at Heinonline and Westlaw in particular the following: 35 Fordham Int'l L.J. 613 2011-2012, 32 Energy L.J. 497 2011, and European Law Review 675 2012. See also Edna Sussman's 44 Int'l Law, 939 2010, 27 Pace Envtl. L. Rev. 313 2009-2010. See Peter D. Cameron 27 J. Energy & Nat. resources L. 305 2009. See Felix Mormann 42 Envtl. L. 681 2012. See Vyoma Jha, 'Trends In Investor Claims Over Feed-In Tariffs For Renewable Energy – Investment Treaty News' (*Iisd.org*, 2012) <https://www.iisd.org/itn/en/2012/07/19/trends-in-investor-claims-over-feed-in-tariffs-for-renewable-energy/> last accessed 13 December 2021, and See R. A. Nathanson 98 Iowa L. Rev. 863 2013

[30] See page 1 Michele Potesta "Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept" Pre-Print version
Final version published in 28 ICSID Review (2013) 88-122, available at
http://icsidreview.oxfordjournals.org/content/28/1/88.full.pdf+html
"If one observes the awards given by investment treaty tribunals in the last few years, one will hardly find any example where the concept of 'legitimate expectations' has not been invoked by the claimant and, at least to a certain extent, endorsed by the arbitral tribunal. To transpose into the investment arbitration context the observation made by Lord Scott on the growing importance of the doctrine of legitimate expectations in English law, legitimate expectations are nowadays 'much in vogue'.1 Yet, despite the fortune that legitimate expectations seem to have been enjoying lately, there has been very little attempt by arbitral tribunals to provide a systematic and rigorous framework for the consideration of such expectations in investment treaty arbitration."

It is important to clarify that legitimate expectations and stabilization clauses and quantum of compensation are not standalone obligations under investment treaties. They are elements and/or consequences of the breach of obligations under the said treaties, especially quantum and enforcement. So these are not used by investors as a basis of claim. Legitimate expectations are part of the fair and equitable treatment doctrine, and stabilization clauses are part and parcel of the umbrella clauses in BITs. Enforcement is not usually regulated by these treaties. It is regulated by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (a.k.a. the New York Convention)[31] or the ICSID convention. (See Article 53(1) of the ICSID Convention)[32].

#### 2.3.2.1 The Mesa Case

At the start of my research, the Mesa case was pending. This was what I wrote at the time; the current pending proceedings of the NAFTA Chapter 11 case, Mesa Power Group LLC v Government of Canada[33] highlights some of the core issues referenced above. On July 6, 2011, Mesa Power Group LLC, a Texas-based American renewable energy investor in wind farms, served a Notice of Intent to file an arbitration claim and later served its formal Notice on October 4, 2011, under the UNICITRAL rules, against the Government of Canada for violating its obligations under NAFTA Chapter 11. The investor's claim arose due to the 'arbitrary and unfair application' of various government measures taken by the Government of Ontario Province, as they relate to the Feed-in Tariff (FIT) program enabled by the Green Energy and Green Economy Act 2009. The violations cited in Mesa's claim are:

(a) NAFTA Article 1102, National Treatment, by providing more favorable treatment to a domestic company in like circumstances. (The reference here is

[31] See 'United Nations Convention On The Recognition And Enforcement » New York Convention' (*Newyorkconvention.org*) <https://www.newyorkconvention.org/english> last accessed 13 December 2021

[32] See 'Recognition And Enforcement - ICSID Convention | ICSID' (*Icsid.worldbank.org*) <https://icsid.worldbank.org/services/arbitration/convention/process/recognition-enforcement> accessed last 20 November 2021

[33] See the case facts and parties submissions at: '<St_Metadata_Og_Title_Content/>' (*Global Affairs Canada*, 2012) <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/mesa-1.aspx?lang=eng> last accessed 13 December 2021

to the local energy companies that benefited from the Ontario Power Authority rules changes);

(b) NAFTA Article 1103, Most Favored Nation Treatment, by providing more favorable treatment to a non-NAFTA party in like circumstances (the reference here is to Korea's Samsung C&T);

(c) NAFTA Article 1104, Standard of Treatment, which states that the investor is entitled to the better treatment required under both NAFTA 1102 and 1103;

(d) NAFTA Article 1105, International Law Standard of Treatment, by the provincial government directing the Ontario Power Authority to change the rules for awarding Power Purchase Agreements under the FIT Program; and

(e) NAFTA Article 1106, Performance of Requirements, by imposing a variety of prohibited Canadian and Ontario content requirements and "buy local" performance requirements.

In summary, the claims arising out of various government measures related to the regulation and production of renewable energy in Ontario, Canada, that allegedly imposed sudden changes to the established scheme of a feed-in-tariff program.

The investment details is: Indirect ownership and control of four wind farms in southwestern Ontario. Mesa sought a relief of not less than CND$ 775 Million to compensate it for loss and damage arising as a result of these arbitrary and unfair actions by the Government of Canada.

The ad-hoc arbitration tribunal consists of three eminent arbitrators: Professor Gabrielle Kaufmann-Kohler[34] (Presiding Arbitrator), The Honourable Charles N. Brower (Mesa's Nominee), and Toby Landau, QC (Canada's Nominee). They all contributed to the shape of the current international investment regime through their writings and decisions. As such, the final decision in the Mesa case has an impact in building renewables jurisprudence.

[34] I had the privilege of being taught by Professor Kaufmann-Kohler a class in investment arbitration in the summer of 2006 at QMUL CCLS.

**What is unique in this Mesa Power Group case** is that some of its issues were also raised by both Japan in 2010 and the EU in 2011 against Canada under the World Trade Organization Dispute Settlement arm[35] On May 6, 2013 the WTO Appellate Body ruled in favour of Japan and the EU confirming an earlier ruling by the WTO settlement arm in 2012 finding that 'Ontario's feed-in tariff (FIT) program to support renewable energy development was inconsistent with Canada's international trade obligations[36].' Will this be an indication that the NAFTA Chapter 11 claim award will be in favor of Mesa Power Group? No, one can predict at this stage but the WTO Appellate decision is worthy of being a signpost of what may potentially come for Mesa.

It is worth noting that the shape of investors in renewable energy is changing. NAFTA Chapter 11 appears to attract investors in renewable and green energy from unlikely places, i.e. from emerging and struggling economies and not necessarily from developed nations[37]. These investors are now savvy and selective as to where to relocate and expand where they have a degree of certainty in regard to their investment protection. I refer here to an example reported by the Financial Times[38] about an Egyptian Company 'El Sewedy Electrometer' serving cutting-edge green technology. They established a factory in Mexico in 2009 as a backdoor to the U.S. market. Its Chief Executive expressly said: "We said, 'why don't we establish a factory in Mexico where we can utilize the North American Free trade Agreement?" case in point. The body of the renewables investors seems to grow despite odds.

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[35] See News in Brief ' More legal woes for Canada's Feed-in-Tariff program for renewable energy' at: 'News In Brief – Investment Treaty News' (*Iisd.org*, 2011) <https://www.iisd.org/itn/es/2011/10/07/news-in-brief-5/> last accessed May 2013

[36] See 'Climate Law Blog » Blog Archive » WTO Appellate Body Finds Ontario'S Renewable Energy Program Violates International Trade Rules' (*Blogs.law.columbia.edu*, 2013) <http://blogs.law.columbia.edu/climatechange/2013/05/10/wto-appellate-body-finds-ontarios-renewable-energy-program-violates-international-trade-rules/> last accessed 13 December 2021

[37] This is in line with a recent report entitled 'Recent Developments in Investor-State Dispute Settlement (ISDS) published by UNCTAD on April 10, 2013, available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf The report cites 62 new cases were filed in 2012 and in 68 per cent of these cases, the respondents are developing or transition economies and while the number of cases filed by developing-country investors has increased, the majority of new cases amounting to 63 per cent are still originating from developed countries.

[38] See 'El Sewedy shows how Egyptian companies can beat the odds' at 'Financial Times' (*Ft.com*) <http://www.ft.com/> published on May 20, 2013 by Borzou Daragahi

The final award of the Mesa case was published on 24 March 2016 and had a very surprising outcome[39]. The Tribunal ruled against the investor, which is the opposite of the WTO case. The tribunal dismissed the case against Canada and ordered Mesa to bear the costs of the arbitral proceedings, as well as 30% of Canada's legal fees, together amounting to nearly US$3 million.

Mesa's final award presented clear evidence on the conflict and divergence between investment law and trade law as well as multilateralism and regionalism in particular jurisdictional matters. It is astonishing that the stakeholders have not changed yet the State is found a loser in the trade context, and the investor is a loser within the investment context. How can this serve to provide a stable and certain 'legal framework' for both the sovereigns and investors for the renewables industry to grow? At the moment there is no one answer. Currently, there is no such coherent system of rules that would harmonize the differences. Yang[40] argued that 'many international legal scholars and participants realize the issue of competition between multilateralism and regionalism. Based on the influence of regionalism on the multilateralism, some scholars further notice jurisdictional conflicts between the WTO and RTAs therein and find out that there is no effective existing rule to settle these conflicts in current international trade system.'

The key jurisdictional elements that drew my attention in the Mesa case were:

(a) the rejection of the tribunal of the timing of Mesa's filing for its claim yet they agreed that only some of the events could be construed as a 'sufficient' number of events needed to have occurred more than the six months period required by NAFTA Chapter 11 prior to the claim. The tribunal held that, '[i]f events relating to the same claim kept occurring, a claimant would effectively be

[39] See Jarrod Hepburn 28 April 2016 'Mesa V. Canada Tribunal Construes NAFTA'S Time-Bar And Procurement Rules; Does Not Follow WTO On Attribution Issue; And Frowns On Investor's Use Of U.S. Judicial Discovery | Investment Arbitration Reporter' (*Investment Arbitration Reporter*) <https://www.iareporter.com/articles/mesa-v-canada-tribunal-construes-naftas-time-bar-and-procurement-rules-does-not-follow-wto-on-attribution-issue-and-frowns-on-investors-use-of-u-s-judicial-discovery/> last accessed 19 November 2020.

[40] See page 111 in Songling Yang 'The Solution For Jurisdictional Conflicts Between The WTO And RTAs: The Forum Choice Clause' Michigan State International Law Review [Vol. 23.1 2014]

precluded from ever initiating an arbitration'. This is key for investors to have clarity as to when they can bring a claim under a treaty. Some treaties allow for claims at the time and initial stage of investment, and others such as the (ECT and some BITs avail protection only after the investment was made). According to Hepburn analysis, which I agree with, 'while certain events had occurred within six months prior to October 2011, the tribunal viewed these as 'merely developments' of earlier events, meaning that jurisdiction was not barred on this ground.'

(b) The second jurisdictional matter was the Parties' debate on the procurement exception, with the MFN argument being rejected. The disagreement on the definition of 'procurement' and what constitutes procurement under NAFTAs articles with the exceptions and carve-outs in place, in this case, highlights why the outcome in the WTO case was different to the NAFTA case. The majority of the tribunal agreed that there are differing meanings of procurement between WTO and NAFTA and within NAFTA itself. Hepburn summarised these issues as follows:

- 'Canada argued that NAFTA's procurement exception in Article 1108 applied, meaning that complaints of discrimination under Articles 1102 and 1103 could not be heard.
- In response, Mesa firstly contended that it could avoid the procurement exception by means of MFN, since Canada's investment treaties with other states did not contain the exception. However, the tribunal rejected this, noting that Mesa must first show that the base treaty (i.e., NAFTA) applies at all, before it could claim the benefit of the MFN obligation in that treaty. **Whether NAFTA applied, in turn, depended on whether the procurement exception applied; as a result, this argument did not assist the investor.**
- Mesa secondly contended that Ontario's renewable energy purchasing scheme did not amount to 'procurement', because the government purchased the electricity not for its own use but for onward resale to private consumers.

- The tribunal as a majority of arbitrators Kaufmann-Kohler and Landau, began by noting that 'procurement' was usually given a broad definition, and that arbitrators in the earlier NAFTA cases ADF v. USA and UPS v. Canada; the WTO panel and Appellate Body in the parallel FIT case; and the three NAFTA states themselves were all in agreement on this.
- What was also confusing is the fact that 'while Mesa had relied on a definition in Article 1001(5), which appeared to exclude government purchasing for commercial resale, the majority observed that Article 1108 did not contain any similar limitation nor any reference to Article 1001(5). **Furthermore, while Article 1001(5) was a 'carve-in', defining when NAFTA would apply to government procurement, Article 1108 was a 'carve-out', d**efining when NAFTA would not apply. In the majority's view, this suggested that the definitions might differ.
- Mesa also **'urged reliance on WTO law, arguing that 'procurement' was a term of art in international economic law**. However, the majority found no reference to the WTO's GATT agreement in NAFTA Article 1108, giving no reason to look outside that treaty. Although Canada had limited procurement to products for governmental use in a Note annexed to the WTO's Government Procurement Agreement, the majority considered that this merely demonstrated that the ordinary meaning of procurement was different, giving Canada reason to define it in its Note.
- The FIT program was held to constitute procurement under Article 1108. Further, it was procurement 'by a Party or a state enterprise' since the OPA was a state enterprise, and since Ontario's procurement was anyway attributable to Canada. As a result, Mesa's national treatment and MFN claims (under Articles 1102 and 1103) were dismissed.'

It is important to share the dissenting arbitrator Charles Brower's[41] views on Article 1105 and the procurement exception in Article 1108[42] as it is jurigenrerative in nature.

[41] Judge Charles Brower is an authority in investor-state arbitration especially as a key member of Iran-United States Claims tribunal. In my opinion his statements in such arbitration disputes are jurisgenerative. See his full resume at 'Charles N. Brower | Arbitrationlaw.Com' (*Arbitrationlaw.com*) <https://arbitrationlaw.com/profile/charles-n-brower-2> last accessed 13 December 2021

[42] See pages 15 and 16 as well as the full opinion here https://www.italaw.com/sites/default/files/case-documents/italaw7241.pdf Last accessed 21 November 2021.

> "While Canada's General Notes to Appendix I of the Government Procurement Agreement ("GPA") do not fall within any of the interpretive items listed in Article 31 of the Vienna Convention on the Law of Treaties ("VCLT"), I do think that the following statement
>
> in that context is relevant to determination of the "ordinary meaning" of "procurement by a Party or a state enterprise:" Procurement in terms of Canadian coverage is defined as contractual transactions to acquire property or services for the direct benefit or use of the government . . . It does not include . . . government provision of goods and services, given to individuals, firms, private institutions, and sub-central governments. It does not include procurements made with a view to commercial resale or made by one entity or enterprise or made by one entity or enterprise of Canada. **This accords with what I regard as a broad understanding in the field of "government procurement" as to what the "ordinary meaning" of that two-word term is, which I cannot distinguish from "procurement by a Party or a state enterprise." Accordingly, I do not accept that Webster's online dictionary, Webster's New Twentieth Century Dictionary of the English Language, or any other English lexicon's definition of the single word "procurement" standing alone, on which the Award relies for "ordinary meaning,"60 is at all relevant. Similarly, the fact that "procurement," standing alone, is "achats" (English: purchases) in NAFTA's French text and "compras" (English: purchases) in its Spanish text lacks relevance."**

### 2.3.3 ECT[43]

In keeping with the modern and contemporary art theme, in the author's opinion, if NAFTA's Chapter 11 is akin to a Magritte's painting, then the ECT energy investment protocol is akin to Edvard Munch's work 'The scream of Nature[44]' in its depiction of the uncertainties and volatility of the twentieth century and beyond. This is because, as Professor Dr. Kaj Hober[45] aptly wrote, the ECT is:

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[43] Unless expressly stated otherwise, the author's research refers to investor-state interests under Article 26 of the ECT

[44] See 'Edvard Munch: Behind the Scream' by Sue Prideaux 2005-2007 Yale University Press

[45] See the Foreword by Professor Hobér in Crina Baltag's 'The Energy Charter Treaty: The notion of Investor' Kluwer 2012

> '...a complex treaty…its language and provisions are not always easy to penetrate and understand…since the first arbitral award in 2003[46], numerous others have followed addressing procedural as well as substantive issues. ***The awards seem to get longer and longer, but not necessarily clearer and clearer. They are not always consistent***.'

The ECT, at inception, was touted for its novelty similar to NAFTA's Chapter 11, in providing the right to individual investors to arbitrate against governments and in the ECT's case the EU, too, which in turn bestowed on it a great potential to live up to[47]. But clearly, it has yet to fulfil it. The ECT was negotiated and 'concluded in a haste[48]' and still struggles with unresolved issues. Why did Russia leave the ECT and refused to ratify it [49]at the heel of its gas dispute with the Ukraine that left at least 18 European nations suffering a major drop or complete cut off of their gas supply? Will other countries follow suit and/or face the same issue of the ECT Article 45.1's Limitation Clause[50]? Will these potential leaver countries share the former Russian president's (Medvedev) call to the EU officials *"to continue efforts to develop a* ***reliable legal basis for future cooperation in the energy sector*** *with the goal of preventing energy crises similar to the gas dispute between Russia and Ukraine.[51]"*

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[46] The award referenced in this quote is the Nykomb Synergetics Technology Holding AB v The republic of Lativia issued on December 16, 2003 which ironically involved a revocation of a tariffs agreement by Latvia state electricity distributor which was entered into with Nykomb's subsidiary Windau to produce power through an environmentally friendly natural gas cogeneration plant.

[47] See Thomas Walde 'International Investment under the 1994 Energy Charter Treaty: Legal, Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries' in The Energy Charter Treaty: An East-West Gateway for Investment and Trade' Kluwer 1996

[48] See Todd Weiler and Thomas Walde 'Investment Arbitration under the Energy Charter Treaty in the light of the new NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation' OGEL Volume 1, Issue 02 March 2003

[49] See Sophie Nappert, an arbitrator at 3 Verulam Buildings, London 'Russia and the ECT:
the unplumbed depths of provisional application. The provisional application of the Energy Charter Treaty raises tricky substantive issues' accessed at https://www.biicl.org/files/3773_2_-_sophie_nappert.pdf

[50] See <http://kluwerarbitrationblog.com/blog/2010/02/16/provisional-application-of-the-energy-charter-treaty-article-451-%E2%80%9Climitation-clause%E2%80%9D/> last accessed July 2012

[51] See 'Russia Says 'No' To Energy Charter, Urges New Agreement | European Dialogue' (*Eurodialogue.org*) <http://eurodialogue.org/Russia-says-no-to-Energy-Charter> Last accessed July 2012

In February 2013, the ECT announced the acceptance of its 54th Conference member, which is Afghanistan[52]. To those who were not familiar with the profile of Afghanistan as a country with natural resources, it seemed to be a startling odd move. Why Afghanistan and why the ECT now? The author had field experience working in Afghanistan though, and as such was not surprised to learn of the news as it showed a progression towards the right direction for this war-torn country. However, this small step brought to the fore a confirmation that the ECT is going through soul-searching for ways to reform.

This view was closely echoed by respected academics and practitioners on the OGELFORUM[53] : One academic considered this new development as 'an expansion of the geographical scope of the ECT' and 'relates to the search of a new role for the ECT, no longer as an EU project but genuinely international project.' This is a thought-provoking remark as it leaves one with the impression that the ECT is indeed going through 'identity crisis.' What is also intriguing is that the same line of inquiry (i.e. ECT…genuinely international project) was raised in regard to NAFTA's Arbitration by the eminent international arbitration scholar Professor Thomas E. Carbonneau after fifteen years of NAFTA[54] where he concluded that NAFTA indeed is international and made 'substantial contribution to the promotion of essential adjudicatory values in this area of global activity' He presented the question as follows:

> "…whether NAFTA's arbitration is an authentically international form of arbitration or a more national, albeit sui generis, version of arbitral adjudication. Presumably, the question arises because of NAFTA's circumscribed geographic scope; it is, after all, a purely North American framework. Additionally, it seeks to resolve trade policy issues exclusively between the three participating States and their nationals. On the other side of the ledger, NAFTA arbitration--like ICSID's, which is a truly international form of arbitration—is regulated by treaty and seeks

[52] See <http://www.encharter.org/index.php?id=21&id_article=349&L=0> Last accessed February 2013
[53] The author has a full copy on file of this OGELFORUM email discussion on February 21-23, 2013.
[54] See Thomas E. Carbonneau 'Is Nafta Arbitration "International"?' Chapter 1 in 'Fifteen of Years of NAFTA Chapter 11 Arbitration' Published by Juris 2009

> to lessen the impact of sovereign standing and prerogatives on private commercial transactions."

As to the future of the ECT, on the same OGELFORUM referenced above, an eminent British academic and practitioner added:

> "Looking ahead, the Charter Process can go wider or go deeper. For the first, it will strive to bring in countries like Afghanistan…The long-term benefits of this approach are unclear but…one way…to go in setting itself on a new course (without which it has no reason for being there). The alternative is to go deeper into areas where its competence is not open to challenge and where no new geo-political agenda is required. That might include a stronger market opening orientation (say in tackling the widespread use of energy subsidies among its members), a more explicit environmental direction (low carbon economy) and perhaps a fresh approach to Russia."

These remarks may well be the tipping point for an opportunity of reforms in both the ECT and NAFTA to benefit the renewables international dispute resolution interests - the driving force for this research.

In 2007, Edna Sussman[55], promoted these same steps, i.e. the use of the ECT within the then-new context of climate-change promoting energy investment which is the now present and future called 'renewables investments'. This in itself supports the notion that renewables are public good and fit within the prism of the New Haven approach when their disputes are adjudicated. She wrote[56]:

> "As demonstrated by the decision in the *Nykomb* matter, the ECT, if binding on the host country, would create rights for investors against a host

[55] See also Edna Sussman Chapter 18 '10 Years Back - Post COP12 A 2007 Snapshot of Climate Change Litigation, Potential Disputes and Alternative Dispute Resolution' in 'Dispute Resolution and Climate Change, the Paris Agreement and Beyond' published by the ICC May 2021 https://sussmanadr.com/wp-content/uploads/2021/05/Climate-Change-ICC-Sussman-2017-pdf.pdf

[56] See Edna Sussman 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development' 14:2 ILSA J. Int'l & Comp. L. 391-404 (2008) at http://www.arbitralwomen.org/files/publication/5206152435619.pdf accessed January 2013

government for changing incentives and subsidies committed to a foreign investor or other laws or regulations in violation of the ECT investor protection provisions. **The increased certainty afforded by investment treaty protection should serve to significantly increase the availability of funds for investment in GHG mitigation projects in developing countries.** In essence, membership in the ECT enables a host state to make a credible and internationally enforceable promise about investment incentives and guarantees with respect to climate-change promoting energy investment."

The contemporaneous snapshot zoom of the ECT shows that it is about to be tested whether indeed it is to continue to navigate toward this new path for renewables dispute resolution.

Currently[57], the ECT has the following disputes filed under it:

**2.3.3.1** There is one active claim, using UNCITRAL rules under the ECT, by a **group of international Solar Photovoltaic investors against the Government of Spain which was commenced in 2011.** They are seeking hundreds of millions of Euros in compensation for the losses they incurred due to the retroactive changes and cuts made to the FiT program in March 2011. The investors have committed US$2 billion after the introduction of this FiT incentive program in 2007. The nature of their claim, clearly, invokes the 'stability v flexibility' debate and the doctrine of legitimate expectation[58].

**2.3.3.2** There is another claim, reported this year (2013), also under the ECT, but it is in the pipeline as it is still in the cooling-off period before it is formalized pursuant to Article 26 ECT. This potential claim is by **a group of international Solar Thermal investors against the Government of Spain**, too. Same as their contemporaries of Photovoltaic, the Solar Thermal investors will be seeking compensation for the losses incurred due to the Government of Spain reneging on its agreement via new laws approved in February 2013 that cut

[57] This was written in 2013/2014 and update on the cases and other cases will be provided in Chapter 5.
[58] See Vyoma Jha, and R. A. Nathanson supra note 38. See Miles Johnson in Madrid 'Investors seek compensation for Spanish solar cuts' at http://www.ft.com/ published November 17, 2011

subsidies for alternative energy technologies. While both claims on the surface share the same issue, i.e. sudden policy changes, the Solar Thermal group has a much higher stake of investments in Spain than the Photovoltaic[59]. They are reported to have committed more than US$17 billion of renewable energy assets in Spain.

**2.3.3.3** There is also a third claim, reported this year (2013) under the ECT using UNCITRAL rules. It is '**Antaris Solar GmbH et al v Czech Republic'**[60] A group of eight international solar investors filed the claim notice on 9 May 2013 seeking compensation in the proximity of 50-70 million euros due to financial losses they incurred resulting from the Czech government repealing 2010 legislative guarantees of photovoltaic solar tariffs and imposing a retroactive solar levy of 26%. It appears that the group of investors attempted amicable resolution in 2012 but failed[61]; and

**2.3.3.4** A fourth claim reported this year under the ECT using ICSID and registered on 19 July 2013 **Case No ARB/13/17. It is 'EVN AG v Republic of Bulgaria'**[62] While there is no public information available regarding the specifics of the claim, EVN AG posted a press release on its website on 21 June 2013 stating that the dispute arose out of the new Bulgaria government actions in relations to 'the pricing of electricity and compensation for public obligations in respect to renewable energy. These measures have caused substantial damage to EVN AG and its affiliates[63]'

One may argue that these are only four cases, and in the absence of stare decisis in investment arbitration, their final result may be a drop in the ocean in regard to either forming renewables jurisprudence/Lex Renewables or highlighting what reforms are

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[59] See Tracy Rucinski and Jose Elias Rodrigues 'Exclusive: Foreign Investors set to sue Spain over energy reform' at <https://www.reuters.com/article/uk-spain-renewables-idUKBRE91D1A220130214> Published on Thursday February 14, 2013

[60] See 'In-Depth Energy Efficiency Review Of Croatia (2005) - Energy Charter' (*Encharter.org*) <http://www.encharter.org/index.php?id=213&L=0#EVN2> last accessed 14 December 2021

[61] See the press release issued in Prague on one of the investors' websites on 9 May 2013 <http://www.rananasolar.cz/rubriky/press-releases/> last accessed 25 August 2013

[62] See <http://www.encharter.org/index.php?id=213&L=0#EVN2> last accessed 25 August 2013

[63] See the press release at <http://www.evn.at/Investoren/Pressemeldungen/EVN-AG-leitet-Schiedsverfahren-nach-Investitionssc.aspx?lang=en-us> last accessed on 25 August 2013

needed in the ECT. The author's rebuttal to this line of argument is to the contrary of it:

(a) these are fairly important cases to observe not only due to their financial size but to the fact that they showcase an evolutionary cycle of the new wave of savvy renewables investors that will neither tolerate being played as scapegoats for winning votes in election years nor accepting draconian arbitrary changes that wipeout, with the swipe of a pen in a day, their profits and what they toiled hard to start for years[64];

(b) the respondent party to these disputes are members of the EU (Spain in 1986, Czech Republic in 2004, Bulgaria 2007) While one may argue the Czech Republic and Bulgaria may have some residue of the Eastern bloc communism bureaucracy, this does not fit Spain's profile i.e. Spain is a developed western nation and a premier pioneer in renewables, hence, the shock waves that these decisions by the Spanish Government sent generally in the investment circles and in the renewables ones in particular. Why? Because this scenario does not play true to form, as in most investment disputes scenarios, where the respondents are often developing sovereigns with political instability and transitional economies (UNCATD reported 68% of the investment claims filed in 2012 fall in this respondent category). It is worthy to bear in mind the generally accepted adage that in finance and investments, the perception of weakness can be as damaging as weakness itself. Here, Spain not only already caused damage for its reputation, adding more to its financial and political risk credit rating woes, but also injured a slew of innocent investors[65]; and

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[64] See Christopher Coats, 'Spain Solar Critics Lawyer Up (AGAIN)', Forbes (2013) <http://www.forbes.com/sites/christophercoats/2013/02/19/spains-solar-critics-lawyer-up-again/> last accessed 14 December 2021

[65] The U.S. Assistant Secretary of State, Willard L. Thorp, in a speech on the subject of the 'Development of International Investment' said: "sometimes we feel that at the same moment our capital is sought, every obstacle is put in the way of its use on a fair and equitable basis… there is 'an attitude…feeling that the foreign investor is 'an exploiter' not 'a contributor' that his interest is not in the local welfare, that his allegiance is to a distant stockholder, that when he has won the highest return possible, he and his enterprise will withdraw." These remarks were made in 1948, sixty five years ago. It is astonishing after the many international treaties negotiated to remedy these negative perceptions, nothing much changed. See L. H. Woolsey 'The Problem of Foreign Investment' The American Journal of International Law, Vol. 42, No. 1 (Jan 1948), pp. 121-128. See also Andrew Guzman 'How International Law Works: A Rational Choice Theory' Oxford Press 2008. Guzman argued that violation of international law can costs the state in three instances that he coined as the Three Rs (Reputation, Reciprocal Non-Compliance,

(c) As lawyers, we are trained to argue issues for both sides, and it is easy to rise to the defense of Spain and other countries that also reneged on Solar tariffs and tax incentive agreements (e.g. Italy[66] and Czech Republic[67]), citing the prime causes as austerity measures and financial crises[68]. It is contended that it is difficult to strike a balanced bargain amongst competing interests under such dire circumstances. Yet, an agreement is an agreement. The simplest expectation in the international investment regime, especially as the world desires to promote renewables and clean energy, is that a treaty with an international obligation protecting foreign investors and investment bestows a certain level of expectation to be honored by its signatories.

At a minimum, honoring these agreements foster the tenets of international rule of law and public order that derives more global cooperation, not disintegration. That is the generally accepted standard which Reisman's words from the New Haven approach support here[69]:

> "If agreements are indispensable for longer-term cooperative behavior, a corollary indispensability is the expectation that those agreements will be applied faithfully. Indeed, the success of the exercise to establish a framework

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and Retaliation) He contended that this is a theoretical simplification but necessary in order to help understand our complex world!

[66] See UNCTAD Report Supra note 43 at Page 24 'Reportedly, Italy, the Czech Republic and Spain have been put on notice with respect to possible arbitrations regarding those countries' withdrawal of subsidies for solar energy, introduced at a time of a more favourable economic climate.'

[67]See Ben Willis, 'Investor Group To Sue Czech Government Over Solar Tax' (*PV Tech*, 2013) <http://www.pv-tech.org/news/investor_group_to_sue_czech_government_over_solar_tax> last accessed 14 December 2021

[68] See Suzanne A. Spears in 'The Quest for Policy Space in a New Generation of International Investment Agreements' J Int Economic Law (2010) 13 (4): 1037-1075. quoting Anne van Aaken and Jurgen Kurtz, 'The Global Financial Crisis: Will State Emergency Measures Trigger International Investment Disputes?', Columbia FDI Perspectives (2009). She wrote 'Fears that foreign investors might challenge the economic stabilization measures adopted in response to the current global financial and economic crisis have also served as a wake-up call for some who otherwise might have thought that investor protection was a priority not to be compromised.' It should be noted that this is a critical area of law and if the treaty interpretation is not done comprehensively by the tribunal the award may be subject to annulment as in Sempra energy v Argentine, when the ICSID tribunal rejected Argentine's 'necessity' defence as a basis for excusing its legal obligation under the U.S. Argentine BIT. The tribunal took a narrow interpretation applying international law standard not a treaty standard and thus exceeded its power and the ward was annulled.

[69] See Foreword by W. Michael Reisman at Page vii in J. Romesh Weeramantry 'Treaty Interpretation in Investment Arbitration' Oxford 2012

> for cooperative behavior depends upon a commonly accepted canon of interpretation and its faithful application, whether by the parties in the course of performance or by judges and arbitrators resolving a dispute about that framework. Every legal system has a canon of interpretation but given the difficulties of stabilizing expectations in the volatile political and economic environment with which international legal arrangements contend, diplomats and international legal scholars have given greater attention to prescribing the cannon of interpretation."

**Consequently, what does the above all mean in regard to renewables international dispute resolution and its jurisprudence?** It means that how the tribunals reach the final awards of these disputes, coupled with the NAFTA Chapter 11 Mesa Power Group claim, and analysis of prior awards while keeping all the competing interests of the parties involved in mind, will be significant not only in building the layers for a strong foundation for renewables jurisprudence / Lex Renewables but in regard to reforming the ECT and/or NAFTA to correct and move beyond the mistakes of the past. The late Professor Walde wrote a perceptive advice regarding the ECT and similar instruments:

> "From the perspective of a legal practitioner and scholar, one would hope …that future intergovernmental negotiators will make an effort at improving the user-friendliness of instruments of this type…A multilateral investment treaty should not be negotiated in too much haste, whatever the perception of current political convenience. Since it is likely to operate on a long term-horizon, consistency, clarity, and user-friendliness should be of paramount consideration."

How can this be achieved for the purposes of a renewables jurisprudence assembly? Presumably, in a staged-approach, in thoroughly understanding the roles and interests of all key players involved not only in a convergent but also divergent fashion. Alain Pellet[70], quoting Reisman wrote: 'Law making is not a philosophical or scientific exercise. It is quintessentially political, requiring knowledge of the diverse interests and the intensity of the demand of the political actors engaged, and then skill in trading

[70] See Alain Pellet 'Shaping the Future of International Law: The role of the World Court in Law-Making' Chapter 51 Footnotes 2 and 3 in 'Looking to the Future: Essays on International Law in honor of W. Michael Reisman' Editors: Arsanjani, Cogan, Sloane, Weissner. Martinus Nijhoff Publishers 2011

support and forming a coalition. The court cannot do this and even trying would compromise its position' And to complete this manner of thought, E. Donald Elliott[71] on 'evolutionary jurisprudence' quoting Wigmore aptly wrote:

> "…legal systems do not move in lock-step through the same stages, or even in the same directions." Wigmore stresses that law represents only a temporary "equilibrium" among competing social forces: "Law is usually a series of wrestling bouts; the prize to the final winner signifies the enactment of the winning force as a rule of law **....** But the victory does not signify the annihilation of the losing force; it signifies only a slight overbalance in the winning force, followed by a more or less temporary rest**"**

At this stage in time, the international investment regime, at least NAFTA Chapter 11 and ECT, may have passed through the threshold or, as Wigmore called it, 'a more or less temporary rest' stage and now is in the throes of forging ahead for reform. However, can this be said regarding other international dispute resolution mechanisms? Further investigation is needed.

The author will provide details on the awards of the ECT cases referenced above in Chapter 5 of this thesis. It is inspiring to report that the ECT is currently going through a modernization process[72] to allow it to move closer towards protecting cleaner, greener energy investments when it used to be described as the antithesis to COP21. Genuine efforts are exerted to redefine 'Economic activity[73]' under the ECT to include renewables. No one could have envisaged this change a decade ago. However, when I wrote my PhD proposal in 2011-2012, I strongly believed that this is where the whole world is heading, including the international investment disputes resolution regime for renewables.

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[71] See E. Donald Elliott 'The Evolutionary Tradition in Jurisprudence' 85 Colum. L. Rev. 38 1985

[72] See Ylli Dautaj and Esmé Shirlow, 'ECT Modernisation Perspectives: An Update - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2021) <http://arbitrationblog.kluwerarbitration.com/2021/08/05/ect-modernisation-perspectives-an-update/> last accessed 21 November 2021

[73] See Kluwer Arbitration blog by Maciej Bukowski (Ministry of Climate and Environment, Republic of Poland) at Maciej Bukowski, 'The EU'S Bittersweet Proposal To Redefine 'Economic Activity' Under The Energy Charter Treaty: Expected Implications For International Arbitration - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2021) <http://arbitrationblog.kluwerarbitration.com/2021/03/21/the-eus-bittersweet-proposal-to-redefine-economic-activity-under-the-energy-charter-treaty-expected-implications-for-international-arbitration/> last accessed 21 November 2021

### 2.3.4 BITs

For the previously stated reasons, the author will consider the role of BITs[74] within her research as one other mechanism available for renewables international dispute resolution. For the past few years, BITs received numerous attacks and calls for completely abandoning them[75]. BITs, in the author's opinion, surpassed and went beyond their 'fifteen minutes of fame' as in the words of the artist Andy Warhol. In a way, BITs growth parallels Warhol's art progress. Warhol's work flourished in the late fifties / early sixties and still lives after his passing.

The first BIT ever signed was between Germany and Pakistan in 1959[76]. And as BITs continue to grow today, albeit in a tempered fashion, like Warhol's art fame, it is by no

[74] Professor Kenneth Vandevelde ( a BIT expert and was on the U.S. negotiating team for BITs while in the Legal Adviser's office in the Department of State with Professor Jose E. Alvarez) explained BITS from the American perspective which does not differ from the general understanding if one removes the U.S. and replaces it with the name of another country, 'that these are treaties that provide for the protection of U.S. investment in other countries and, reciprocally, for the protection of foreign investment in the territory of the United States….Even if the BIT program falls short of its goals, the fact that it constitutes an improvement over prior practice would reflect perhaps not inconsiderable degree of success' See 'The BIT Program: A Fifteen-Year Appraisal by Kenneth Vandevelde in 'The Development and Expansion of Bilateral Investment Treaties' Jose E. Alvarez. 86 Am. Soc'y Int'l L. Proc. 532 1992 This is a good primer piece on the history of BITs from the people who made it happen. See also, R. Doak Bishop, James Crawford and W. Michael Reisman 'Foreign Investments Disputes: Cases, Materials, and Commentary' Kluwer 2005. The authors saw BITs as a 'Lex Specialis between the parties, they supersede any inconsistent customary international law and may embrace or exclude any incipient norms.' And that more less most of them contain the following provisions, among miscellaneous ones,: ' Many BITS contain five parts: (1) definitions, which often include a broad definition of investment, (2) general obligations of the governments, (3) standards for expropriation and compensation, (4) standards for currency transfers, and (5) dispute resolution provisions.'

[75] See very brief sample examples of some of these discussions and their rebuttal in: Yackee supra note 30, and Jeswald W. Salacuse Nicholas P. Sullivan 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain'46 Harv. Int'l L.J. 67 2005, Andrew T. Guzman 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' 38 Va. J. Int'l L. 639 1997-1998, Jose E. Alvarez in 'The Once and Future Foreign Investment Regime' 'Looking to the Future: Essays on International Law in honor of W. Michael Reisman' Editors: Arsanjani, Cogan, Sloane, Weissner. Martinus Nijhoff Publishers 2011, Also, See Jose E. Alvarez and Gustavo Topalian 'The Paradoxical Argentina Cases' World Arbitration Mediation Review Vol. 6, No. 3 2012

[76] See <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1732/germany---pakistan-bit-1959-> Note is now replaced by a 2009 updated version. See also Lauge Skovgaard Poulsen and Damon Vis-Dunbar 'Reflections on Pakistan's investment-treaty program after 50 years: an interview with the former Attorney General of Pakistan, Makhdoom Ali Khan' 16 March 2009 available at <https://www.iisd.org/itn/en/2009/03/16/pakistans-standstill-in-investment-treaty-making-an-interview-with-the-former-attorney-general-of-pakistan-makhdoom-ali-khan/>

means their effect is entirely diluted. UNCTAD's World Investment Report 2012[77] provided the following analysis:

> "By the end of 2011, the overall IIA universe consisted of 3,164 agreements, which included 2,833 BITs and 331 "other IIAs". In quantitative terms, bilateral agreements still dominate international investment policymaking; however, in terms of economic significance, there has been a gradual shift towards regionalism.
>
> …
>
> *International investment policymaking is in flux.* The annual number of new bilateral investment treaties (BITs) continues to decline, while regional investment policymaking is intensifying. Sustainable development is gaining prominence in international investment policymaking. Numerous ideas for reform of the investor–State dispute settlement (ISDS) system have emerged, but few have been put into action."

Recently, at the respected Juris Investment Conference in Washington, D.C. in April 2013, the sessions were focused on the Energy Sector. One of the sessions covered the issue of '*Should the energy sector be governed by a regime separate and apart from other general bilateral and multilateral investment protection agreements?'* The thesis is for renewables lex Specialis jurisprudence development. Thus, on the face of it, it appears to be advocating a separate system as in the ECT but with a caveat.

It is easy to say yes to a separate regime and why not endorse it indeed given the special nature of the renewables, compounded with the undeniable fact that it is growing on many levels beyond what was initially anticipated in any legal dispute resolution instrument - in particular with the addition and expansion of renewables. However, if the recommended separate system is the ECT, or even a totally new one, as the be all and end all, it would be naive to make such a recommendation. The ECT, as it is today, or even a new one, cannot stand by itself. Setting aside the fact that the ECT will need re-negotiation and reforms, even after any reforms, it still cannot operate in a vacuum,

[77] See Page 84 Available at: <http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx> Last accessed in May 2013

it will still remain interdependent on BITS and multilateral free trade agreements. NAFTA, ECT, BIT, and other forthcoming regional arrangement, none of them will obviate the need for the other.

Accordingly, we must keep the bigger picture in mind. This means deeply considering the nature of the investment arbitration beast and how it has developed todate[78]. It is part and parcel of international investment law, international public law and international law. The arbitral awards and judicial decisions become part of the rule of law of the said nation, whether it is a signatory to a BIT or a treaty like the ECT. This is the default position as per Article 38 of the Statute of the International Court of Justice [79] and Article 13 of the UN Charter[80]

So, can we rely 'exclusively' on a treaty like the ECT to serve the whole of the international energy community needs? Can we let go of BITs? It does not seem practicable at all. It will be beyond impossible to untangle this net of interdependence we have today or tomorrow, for that matter. And this is not because the policy makers, tribunals, and judges are incapable of devising new instruments and/or helping the legislative and executive branches in creating and enforcing new laws, respectively. It is simply mechanically not possible.

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[78] See Anthea Roberts 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' The American Journal of International Law, Vol. 107, No. 1 (January 2013), pp. 45-94 She provided a lively accurate picture of the divergent conceptions and misconceptions that plague the investment treaty system.

[79] **Article 38**

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

[80] **Article 13**

The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X.

A separate regime for resolving energy disputes remains to be a closed system and a part of the whole, not the whole. In both its short term and long term goals, it will be still serving the needs for a certain number of nations not the whole 193 plus UN member states. As such we will still need the other instruments, too. One may argue that not all of the 193 plus nations will have investments in energy let alone renewable energy. However, still, it does not alter the fact that the BITs and multilateral and regional treaties help cover what the one 'exclusive' system may lack.

Unquestionably, it is a herculean task to measure the success of an instrument against what the drafters intended for it. BITs and other treaties that make the web of international law may either be born still or go through phases of transformation. For BITs[81], they fit in the latter. The external shift in policy from initially using them 'as a way of insulating investment policy from foreign policy', to 'a method of using foreign investment policy to promote foreign policy goals', to its now current state of an expanded 'way of insulating investment policy from foreign policy' that takes into account transparency, environmental issues, State-owned Enterprises concerns validates such transformation. Judge Schwebel[82] addressed this shift in a keynote speech:

> "…investment by citizens and companies of the United States abroad grew and, by and during the Twentieth Century, it became the world's main engine of overseas investment. The attachment of the United States to capital creation and investment, and to legal principles and institutions, conduced to its support for the promotion and protection of foreign investment, through treaty-making as well as other means. That virtually unbroken pattern changed with the publication in 2004 of a new model bilateral investment treaty. The United States did not abandon its policy on foreign investment, but it significantly modified its policy."

[81]See Vendevelde's these exact words in Supra note 70. Also, See Jose E. Alvarez and Gustavo Topalian Supra note 68 stating: 'The Argentina crisis cases themselves provide evidence that the international investment regime has not stood still over the past ten years'

[82]See Judge Stephen M. Schwebel Keynote Address 'A Critical Assessment of the U.S. Model BIT' to the British Institute of International & Comparative Law Twelfth ITF Public Conference "Investment Treaties at 50: Host States Perspectives" London, 15 May 2009. Available at: <http://www.biicl.org/files/4253_schwebel-biicl15may2009speech_cor2.pdf>

He also endorsed[83] these improvements and changes, highlighting their effect on the map of international law:

> "…largely concordant terms of BITs. What is worth restating is that they specify terms far more specific and protective of foreign investment than ever did customary international law. And they provide for direct arbitral recourse by the investor against the host State, one of the most progressive developments of international law of the last century."

And a naked eye quick review of the text of the first U.S. BIT signed with Egypt in 1977, compared against the model U.S. BIT of 1984, 2004, and 2012 highlights this transformation, too[84].

In December 2012, The EU announced its adoption of a new legislation on bilateral investment treaties to 'provide legal certainty for European and foreign investors[85].' It is another evidential shift in BITs similar to what took place on the other side of the Atlantic.

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[83] Ibid

[84] See the closest text to the US. Egypt 1977 Treaty at: <http://www.state.gov/documents/organization/43559.pdf>
See Office of the United States Trade Representative, 2004 U.S. Model Bilateral Investment Treaty <http://www.ustr.gov/archive/Trade_Sectors/Investment/Model_BIT/Section_Index.html>
Model Bilateral Investment Treaty Fact Sheet Office of the Spokesperson Washington, DC April 20, 2012 U.S. Department of State <http://www.state.gov/r/pa/prs/ps/2012/04/188199.htm> . Also, A comparison Table between the U.S. Model BIT 1984 and 2004 available at: <http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__faculty__faculty_profiles__jalvarez/documents/documents/ecm_pro_066871.pdf> These tables were part of Jose Alvarez supra note 67 The Once and Future Foreign Investment Regime' Also, see OECD Part II Chapter 6 'Novel Features in Recent OECD Bilateral Investment Treaties' in International Investment Perspectives 2006 Edition. Available at: <http://www.oecd.org/daf/inv/internationalinvestmentagreements/40072428.pdf>

[85] See 'Press Corner' (*European Commission - European Commission*, 2012) <http://europa.eu/rapid/press-release_MEMO-12-977_en.htm> last accessed 14 December 2021
"The European Parliament and Council adopted a new legislation on bilateral investment treaties. The regulation aims at ensuring a smooth transition towards a new EU investment policy. It provides legal certainty for European and foreign investors benefiting from investment protection offered in Member States' bilateral investment treaties concluded with other parts of the world previous to the Lisbon Treaty which entered into force in December 2009. It also clarifies the legal status of those agreements under EU laws and confirms that they may be maintained in force until they are replaced by an EU investment agreement. At the same time, the regulation establishes a mechanism for empowering Member States – under certain conditions – to negotiate bilateral investment agreements with countries not immediately scheduled for the EU-wide investment negotiations."

Yet these changes and improvements in the new breed of BITs, irrespective of their endorsements by the sophisticated, knowledgeable calibre of Judge Schwebel and Professors Alvarez[86], seem still to fall short in the eyes of the of 'the unrealistic panacea' chasers. For example, the new U.S. Model BIT of 2012 was criticized more or less that the balance is still pro-investor[87]

Professor Loukas Mistelis shed some light as to why this 'pro-investor' bias is often detected and that it is clearly a problem attributed to the wording of the treaties themselves and the way they are variedly interpreted. He aptly wrote:

> "…many investment arbitration tribunals expressly recognize the Vienna Convention rules and attempt to apply them (although to varying degrees) when interpreting treaties…the Convention Rules are in considerable measure suitable for application in investor-state treaty disputes, perhaps with two exceptions: (a) there is lack of access to travaux preparatoire, and (b) one could observe a pro-investor bias emerging from the application of the object and purpose criterion to interpret investment treaties. Of course, it goes without saying that some, <u>if not most, of these problems, can be attributed to the wording of investment treaties, which are susceptible to many divergent interpretations."</u>

As to where does all of the above lead in regard to renewables jurisprudence, the above discussion is meant to show that decisions and awards and trends under BITs will make a difference in the pursuit of this jurisprudence assembly. It is not clear at this stage to what extent. Professor Jose Alvarez[88], while not directly mentioning any particular sector of the economy or any particular investment dispute instrument, promoted a similar view. He wrote:

> "When we situate investment agreements within the larger context of the world social events and processes as we are directed to do by the New Haven School…it is untenable to claim that the investment regime remains a tool of

[86] See Jose E. Alvarez and Gustavo Topalian in footnote 77 in this thesis Chapter 2.
[87] See 'The New U.S. Model Bilateral Investment Treaty: A Public Interest Critique' prepared on May 9, 2012 by members of an Investment Subcommittee of the Advisory Committee on International Economic Policy charged with providing input to the Obama administration on the U.S. model BIT.
[88] See Alvarez in footnote 88

> the Western capital interests…whether or not we approve the changes to BITs…the international investment regime has become 'progressively' democratized"…In the midst of the current economic crises, all of the participants in the investment regime are becoming more aware than ever before that, as McDougal and his associates saw long ago, the effects of economic interdependence cannot be avoided by any nation. What they will do with that realization in the context of the investment regime, however, remains a guess.

## 2.4 Other instruments TIPS and/or Mediation

Currently, the EU is concluding a Trade Agreement with Canada[89] , and the U.S. is following suit and launched talks on February 13, 2013,[90] for same. It is too early to gauge how these will affect renewables and/or energy[91] in general and ultimately this research. Yet, it shows that the shape of the international investment map is changing at a faster pace than before.

Also, as the prime goal of this research is a push forward for augmenting 'Lex Renewables' / jurisprudence, Contract Claims will be considered as well whenever the decisions are accessible, i.e. a clear distinction will be made between treaty versus contract cases and awards. At the time of writing, a group of Maltese and Serbian solar investors announced[92] their intention to bring an arbitration claim using the London Court of International Arbitration (LCIA) amounting to 160 million euros against the Republic of Serbia due to the government breach of the umbrella agreement in its failure to provide the investor with the needed land to construct the world's largest solar power park. Since this dispute is at its early stage it is not clear if there is a possibility

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[89] See <http://globalnews.ca/news/549228/canada-eu-trade-agreement-could-be-most-significant-since-nafta-says-expert/ > Last visited May 2013 This is touted to be the most significant since NAFTA but it has its fair share of opposition. See Stuart Trew 'Five reasons Canada should NOT ratify a Canada-EU free trade agreement' Published April 26, 2013 <http://canadians.org/blog/?p=20505>

[90] See 'EU And US Free-Trade Talks Launched' (*BBC News*, 2013) <https://www.bbc.com/news/business-21439945> last accessed 15 December 2021

[91] The negative perception around the U.S.EU and Canada-EU in the media and blogsphere in title such as: **'Chevron calls for strong investor rights chapter in US-EU trade deal; will be able to use CETA to challenge EU policy in meantime' See Stuart Trew pice published on May 14, 2013 at** <http://canadians.org/blog/?p=20823>

[92] See 'Serbia faces LCIA claim over solar park' Leo Szolnoki, Global Arbitration Review (GAR), 12 August 2013 at <http://globalarbitrationreview.com/news/article/31806/serbia-faces-lcia-claim-solar-park/> In December 2013 the investors added a BIT claim in addition to the contracts claim see <https://www.iareporter.com/articles/serbia-disputes-mytilineos-files-a-new-bit-claim-in-long-running-fight-while-solar-park-investor-adds-treaty-claim-to-threat-of-contract-arbitration/ >

of a treaty claim here. So far, it is only a breach of contract claim that bestowed the jurisdiction on LCIA tribunal to resolve it since it could not be resolved amicably.

Another International Dispute Resolution mechanism to be considered is Mediation. The call for its use has recently surfaced in the literature of investor-state disputes to complement the arbitration process.[93]

## 2.5. Thoughts on Quantum / Compensatory Damages

Quantum and compensatory damages calculation and assessment methods are part of understanding the business model of renewables disputes. The literature generally in this area is quite scant and needs more input, and the scope of this thesis may not fully cover it unless it is briefly discussed within the case analysis.

In international law, the principles for reparation for wrongful acts is conducted under the law of state of responsibility adopted by the International Law Commission (ILC) Article 34[94]. The remedies range from restitution, to compensation, or satisfaction. Clearly, 'satisfaction' is not quite suitable for international investment law, which has financial issues at its core. As such, compensation is the number one remedy sought in investment claims.

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[93] See Nancy A. Welsh and Andrea K. Schneider, Becoming "Investor-State Mediation", 1 Penn. St. J.L. & Int'l Aff. 86 (2012). Available at: <http://elibrary.law.psu.edu/jlia/vol1/iss1/5>, Jean E. Kalicki, Arnold & Porter LLP ' Mediation of Investor-State Disputes: Revisiting the Prospects' 14 June 2013 Available at: <http://kluwerarbitrationblog.com/blog/2013/06/14/mediation-of-investor-state-disputes-revisiting-the-prospects/>, Shamsu Yahaya 'Is Mediation a Viable Option for Resolving International Disputes' Available at: <http://www.dundee.ac.uk/cepmlp/gateway/files.php>, Thomas Walde 'Mediation/Alternative Dispute Resolution in the Oil, Gas and Energy Transactions: Superior to Arbitration/ Litigation from a Commercial and Management Perspective', 2, OGEL (2003) <www.ogel.org>, and Margete Stevens of King & Spalding presentation 'ICSID at Cross Roads: Thoughts and Recommendations for Improving the System' World Trade Institute, Bern, September 10, 2011. Available at: <http://www.wti.org/fileadmin/user_upload/wti.org/Events/4_Stevens.%20PPT.pdf> Ms Stevens expressed that 'a large portion of ICSID cases settle before award is rendered, 30-40%' She recommended to:

'• Appoint high level ADR experts to Panel of Conciliators

• Draw attention to the possibility of seeking mediation, either in combination with an arbitral proceeding, or as an alternative dispute settlement method.'

[94] See Rudolf Dolzer and Christopher Scheruer 'Principles of International Investment Law' Oxford 2008 pp 271-277. The ILC Articles available at: <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf>

As witnessed, the relief and remedies sought in the current pending cases under NAFTA Chapter 11 and ECT, run in billions. While it is submitted that this trend of high-value disputes is not solely exclusive to renewables but part of the energy sector at large, it is not going to change any time soon. It warrants understanding due to the sensitivity and seriousness of the impact an award of damages may have. A recent OECD paper reported[95]:

> "…in some cases, the amount of claimed compensation is high enough – hundreds of millions or even billions of dollars – to seriously affect a respondent country's fiscal position…In relative percentage of GDP terms, the USD 270 million CME award against the Czech Republic may have been the equivalent of a USD 71 billion award against the United States. See Separate opinion of Ian Brownlie in *CME Czech Republic B.V. v. Czech Republic,* § 80 (reproducing Czech calculation showing that equivalent claim against the United States, in relative percentage of GDP terms, would be USD 131 billion)*; CME Czech Republic B.V. v. Czech Republic,* Final Award § 649 (awarding CME approximately 55% of the amount claimed)."

The Late Professor Sir Ian Brownlie, QC separate opinion in CME v Czech Republic[96], on the purpose of protection of investment treaties and liabilities and damages calculation is the leading guiding framework in this discussion i.e. the formula of 'just compensation' = the fair market value of the expropriated investment versus sunk costs i.e. valuation using reliance interest not the expectation interest[97].

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[95] See David Gaukrodger and Kathryn Gordon (2012). "Investor-state dispute settlement: A scoping paper for the investment policy community", OECD Working Papers on International Investment, No. 2012/3, OECD Investment Division, <www.oecd.org/daf/investment/workingpapers> accessed in February 2013. Also, the UNCATD 2012 Report confirmed that high amounts of damages awarded (e.g. US$1.77 billion in the case of Occidental v. Ecuador) demonstrate the protective potential of the IIA/ISDS regime'

[96] Available at: <http://italaw.com/documents/CME2003-SeparateOpinion_001.pdf>

[97] See Mark Kantor 'Valuation for Arbitration: Compensation Standards, Valuation Methods, and Expert Evidence' Kluwer 2008. See also Joshua B. Simmons 'Valuation In Investor State Arbitration: Toward A more Exact Science' Berkeley Journal of International Law [Vol 30:1 2012] He emphasized the challenges faced at the 'damages phase of investor-state arbitration' in particular 'when fair market value applies as the standard for calculating damages.' He explains that 'under customary international law, a fundamental principle of reparation is to "wipe out all the consequences of the illegal act." and advances the 'compensation of fair market value as a means of achieving such reparation, as opposed to restitution, contractual formulas,' or moral damages.'

Whenever possible in I may cover issues that surfaced in the literature in regard to the standards of compensation in energy disputes in particular[98] and other pertinent material in regard to quantum, causation, morality and offset of benefits[99]. And another issue of note is the lack of public interest perspective when the tribunals consider quantum and damages[100] - given the nature of the renewables industry as public good, it ought to be considered.

There is an idea that would be best explored further by other researchers which is to explore What else can be done in regard to the award of damages? Could we import from other specialized arbitration rules (as in commercial arbitration) a best practice that may help in renewables? For example, for years, The London Maritime Arbitrators Association (LMAA) has embedded in its arbitration rules this idea of 'privileged reasons[101]' with its awards' that seems not widely used in other arbitrations.

> *"…22. (a) An award will contain the reasons for it unless the parties agree otherwise.*
>
> *(b) The parties may agree to dispense with reasons in which case notice shall be given to the tribunal before the award is made. [Note: the effect of such agreement is to exclude the court's jurisdiction under Section 69 of the Act to determine an appeal on a question of law arising out of the award; see Section 69(1)]*

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[98] See Joshua Simmons 'Measure by Measure? Calculating Damages in Energy Disputes. The Investment Agreement in Investment Arbitration: Effects on Damages' and Nicholas J. Birch 'Calculating Damages in Energy Disputes: The Restoration of Indexing Clauses' both papers were presented at the Juris Conference in April 2013

[99] See Stephen Jagusch and Thomas Sebastian 'Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing?' Arbitration International Vol.29. No. 1 2013, Andrea K. Bjorklund 'Causation, Morality, and Quantum' 32 Suffolk Transnat'l L Rev 435 2008-2009, Christian TIETJE & Emily SIPIORSKI 'Offset of Benefits in Damages Calculation in International Investment Arbitration' Journal of International Arbitration 29, no. 5 (2012): 545–566, Louise T. Wells 'Double dipping in Arbitration Awards? An Economist Questions Damages Awarded to Karaha Bodas Company in Indonesia'' Arbitration International Vol.19. No. 4 2003

[100] See Margret B. Devaney 'Remedies in Investor-State Arbitration: A Public Interest Perspective' Published March 22, 2013 at: <http://www.iisd.org/itn/2013/03/22/remedies-in-investor-state-arbitration-a-public-interest-perspective/>

[101] I cannot take full credit for this idea. This was discussed with Professor Thomas Carbonneau in the summer of 2012.

> *(c) Where in accordance with paragraph (b) the parties have agreed to dispense with reasons the tribunal will issue an award without reasons together with a document which does not form part of the award but which gives, on a confidential basis, an outline of the reasons for the tribunal's decision (hereafter called "privileged reasons").*
> *(d) Unless the court shall otherwise determine, the document containing privileged reasons (referred to in paragraph (c) may not be relied upon or referred to by either party in any proceedings relating to the award…*[102]*"*

'Privileged reasons' allow for the arbitral tribunal to inform the parties why they won, why they lost, how the law was applied, and how the applicable figures were determined for damages. It is an opinion explaining the result. It is called 'privileged reasons' because it is confidential and goes just to the parties, and is not part of the award. It has nothing to do with the official litigation. It is not enforceable. It just explains why the win or loss. In a way, it reconciles the need for psychological explanation with a view that stays the court, and gives them a reason to vacate the award. It protects the autonomy of arbitration. Reasons are crucial in international investment law, and 'international investment awards may have a major political impact on an entire country'[103],

'Privileged reasons' is an idea that may considerably please both parties. Because the arbitrators get what they seek, they get no court in their faces, and the parties get what they seek as the privileged reasons explain why one party is paying damages at a certain amount for the other. This allows the arbitrators to do that without succumbing to the supervision of judicial tribunals, which is necessary.

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[102] <http://www.lmaa.org.uk/uploads/documents/LMAAterms2006.pdf>

[103] See Guillermo Aguilar Alvarez and W. Michael Reisman 'How well are investment awards reasoned?' in 'The Reasons Requirement in International Investment Arbitration: Critical Case Studies' Martinus Nijhoff Publishers 2008

In essence, law ought to have a 'minimum degree of effectiveness[104]' 'Privileged Reasons' may assist in achieving this. Furthermore, it is not a novel idea to borrow working 'effective' practice in commercial arbitration to use in investment arbitration[105].

## 2.6 Concluding thoughts

This chapter attempts to answer as to whether the development of Lex Renewables i.e. Renewables in International Investment Dispute Resolution Law, is it a Survival for Coexistence, or Co-operation, or both?

We explored the various mechanisms available to resolve such disputes with brief examples of arbitral cases, which also will be explored further in Chapter 5. This comparative analysis of the different dispute resolution mechanisms is unavoidable. The nature of investment disputes is global and involve different legal systems as in common law versus civil law which cannot be ignored. While my analysis is mainly using the New Haven approach, my choice of the title of this chapter was deliberate. It has been influenced by the work of the eminent scholar Wolfgang Friedman[106] While he is not formally one of the New Haven scholars, he is a proponent of it and especially the work of Myers McDougal.

Friedmann wrote on the 'changing structure of international law[107]' He presented three levels of contemporary international law that are characterized as follows:

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[104] See W. Michael Reisman 'Goals and Policies: Institutionalized Decision Processes and World Public Order' in W. Michael Reisman 'Nullity and Revision: The Review and Enforcement of International Judgements and Awards' Yale University Press 1971. Reisman presented 'The Principle of Maximum Effectiveness' as a basic principle of decision recommended to arbitrators and reviewers.

[105] See Anthea Roberts supra note 81 citing ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, para. 532 (Oct. 2, 2006) as an example of a borrowed practice when the tribunal endorsed the principle that "the successful party should have its costs paid by the unsuccessful party, as adopted in commercial arbitration".

[106] See <https://www.researchgate.net/publication/295260550_Wolfgang_Friedmann_1907-1972_with_an_Excursus_on_Gustav_Radbruch_1878-1949/link/5ef39e4e4585153fb1b385d7/download>

[107] See pages 142-152Wolfgang Friedmann 'The Changing Structure of International Law' in Studies on a Just World Order No 2, 'International Law: A Contemporary Perspective' edited by Richard Falk, Friedrich Kratochwil and Saul H. Mendlovitz, published by Westview Press Inc 1985

(a) The international law of co-existence – whereby the main object is the 'regulation of the conditions of mutual diplomatic intercourse and in particular of mutual respect for national sovereignty';
(b) The international law of co-operation: Universal concerns – it reflects positive cooperation implemented by international treaties and, in many cases, permanent international organizations; and
(c) The international law of co-operation: Regional Groupings – it depends on a close-knit community of values and purposes proceeding on a more restrictive level of international organization mostly of a regional pattern.

Friedmann recognized that the structure of international society has undergone 'basic changes, and that, correspondingly, international law is now developing on several levels, one continuing the traditional international law of diplomatic coexistence and the other two implementing the quest for both universal and regional international cooperation and organization'. He added that this 'must lead to a far-reaching reorientation in our conceptions of the science and study of contemporary international law.[108]' The foregoing is what Friedmann's called 'the new dimensions of international law.' He wrote about Myers McDougal's Hague lectures of 1953, highlighting the need for 'a contemporary study of international law that would include not only the nation state but also international government organizations, transnational political parties, pressure groups, private associations and the individual human being.'

The above, in a nutshell, describes the quest for Lex Renewables through the jurisegenrative nature of the various dispute resolution mechanisms discussed. As such, it would reflect and encompass the three levels of contemporary international law as described by Friedmann and supported by the New Haven approach of Myers McDougal. This, in turn, translates to a Lex Renewables that can only survive on both Coexistence and Cooperation.

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[108] See ibid page 145 footnote 109

# CHAPTER 3

## 'Lex Petrolea' – A brief history and the capacity of jurisgenerativity

***'A plan was developed at a meeting in La Jolla, California, in 2012 to plot out a "tobacco" strategy—that is, to brand oil and gas companies as peddlers of a dangerous and addictive product, like the tobacco companies. The difference, of course, is that tobacco is a habit, while oil and gas are enablers of modern life.'***

***— Dr Daniel Yergin[1]***

### 3.1 Overview

This chapter focuses on fossil fuels in international investment dispute resolution law: The behemoth establishment of Lex Petrolea and its development since the AMIN Oil case[2]. This is a brief outline of the history of Lex Petrolea before and after the term was expressly mentioned in the AMIN Oil case award in 1982 and the scholarly commentary on the scope of this research case law stops, which is 2018 inclusive. The chapter then proceeds to discuss the impact of Lex Petrolea in the form of its capacity of jurisgenerativity in international investment dispute resolution. .

While this thesis has the promotion of Lex Renewables and the push for energy transition at its heart, it remains a comparative research between the growth of fossil fuels' international investment dispute resolution development and the notable growth of renewables disputes, hence the proposition of a Lex Renewables. As such, a discussion of Lex Petrolea's development is necessary in a chapter of its own. Fossil fuels investments and disputes are unlikely to disappear in our lifetime. They will remain for decades to come as part of the map of energy law where the 'international energy industry is touted to be the single largest user of

[1] From Chapter 41 pages 386-387 in Daniel Yergin's 'The New Map: Energy, Climate and the Clash of Nations' Penguin Books Ltd (2020). The Pulitzer-Prize winning author of "The Prize," and "The Quest," Dr. Yergin is vice chairman of IHS Markit and founded IHS CERA (now part of IHS Markit). He is an authority on energy, international politics and economics. His awards include Lifetime Achievement from the Prime Minister of India and the United States Energy Award for lifelong achievements in energy and the promotion of international understanding. He holds a Bachelor of Arts from Yale University and a Ph.D. from Cambridge University, where he was a Marshall Scholar. https://www.youtube.com/watch?v=Ye1EIY2p-wo Energy, Geopolitics, And The New Map: A Book Talk With Daniel Yergin And Mark P. Mills 22 Sept 2020

[2] The Government of the State of Kuwait v The American Independent Oil Company ('Kuwait v Aminoil') Year of the award: 1982 Forum: Ad hoc Arbitral Tribunal Summary accessed last accessed on 21 November 2021 https://www.biicl.org/files/3938_1982_kuwait_v_aminoil.pdf

international arbitration[3]'.

**In 2003, and after 21 years of Lex Petrolea, Thomas Walde[4]** wrote:

> "Multinational energy companies are a major actor – if not the principal actor – in the **process that generates international energy law.** That may come as a surprise for scholars with traditional, state-centred perspective where law, including international law, is produced by states for states…companies …move towards the best investment opportunities and bargain, explicitly or implicitly, with states wishing to attract or retain them…here the contract practice created by the international energy companies (both with host states and with each other and their supporters…) is often the major, most relevant and most clear and specific sources of law…"

**In 2010, Timothy G. Nelson[5]** wrote a passionate treatise as to 'why Investor-State Arbitration Will Survive the ''New Revolution''. Citing the Libya and Lena Goldfields cases, he asserted that concession arbitration, as the first category of investor-state arbitrations, will continue 'for so long as such investments are made', and 'arbitral tribunals (whether ICSID, UNCITRAL or ICC) will continue to handle this kind of ''investor-state'' arbitration' due to the importance of the negotiation of stabilization clauses with the host states. He defended the second category of investor-state arbitration, which is 'claims tribunals' under BITs, as unlikely to collapse and disintegrate either. His reasoning was factually based on historical accounts from the nineteenth century up to 2010 when he wrote the treatise, showing that 'capital-exporting states (and states that aspire to that status) have regarded arbitration as an efficient system for resolving claims. Host states, by and large, appear to have regarded arbitration as a reasonable and fair system too.' He rightly highlighted that 'the world economy is much more dynamic. Just to use the above cases as examples, the host state respondents in the Lena Goldfields and Gulf cases (i.e., Russia, Qatar and the United Arab Emirates) now possess large foreign investments…'

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[3] See Doak Bishop, Eldy Quintanilla Roché and Sara McBrearty of King & Spalding, 'The Breadth and Complexity of the International Energy Industry', 'Global Arbitration Review - Guide to Energy Arbitrations - Third Edition' (*Globalarbitrationreview.com*, 2019) <https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/3rd-edition/article/the-breadth-and-complexity-of-the-international-energy-industry> accessed 21 November 2021

[4] See pages 43-46 Thomas W. Walde 'International Energy Law: Concepts, Context and Players: A Preliminary Introduction' OGEL Vol.1 Issue 4 September 2003

[5] See Timothy G Nelson, Chapter 24 '''History Ain't Changed'': Why Investor-State Arbitration Will Survive the ''New Revolution''' in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin, "The Backlash against Investment Arbitration: Perceptions and Reality" pp. 555–575. Published by Kluwer Law International BV, The Netherlands in 2010 and accessed at https://www.skadden.com/publications2085_0PDF

**In 2019, Doak Bishop et al**[6] wrote based on International Agency Reports[7] that

> 'It is estimated that **US$48 trillion of investment will be required to supply the world's energy needs up to the year 2035**. According to the International Energy Agency, nearly two-thirds of this investment will take place in emerging economies. And while most of the energy resources are state-owned, private sector investment is essential to meeting energy investment needs. **This, in turn, requires foreign direct investment and the participation of international petroleum companies.**'

**In 2020, the story has not changed much at all despite the growth of renewables**, fossil fuels, as Dr Yergin rightly mentioned in his quote at the start of this chapter, remain to be **'enablers of modern life'.** Multinational energy companies remain key players as well as the sovereigns in energy. We ought to remember that oil and gas took over the coal industry only in the 1960s and still has long life. While now is the time for renewables with large companies as in Tesla, and investors such as Bill Gates who announced in 2015[8] his plan to invest US$1 billion in clean energy technology over the next five years as he believed that the next half-decade will bring many breakthroughs that will help solve climate change, by default, this is a transitional stage not a takeover stage i.e. it is unlikely that fossil fuels will disappear any time soon. This has impact on the continued growth of the body of Lex Petrolea and, in turn, its impact on the growth of Lex Renewables. Therefore, briefly outlining the development of Lex Petrolea from scholarly materials is integral to ascertaining its jurisgenerative powers, which will highly likely bear the same weight in Lex Renewables' jurisgenerative.

## 3.2 The history of Lex Petrolea

In this section, we briefly outline the history of Lex Petrolea in scholarly papers that expressly discuss them. They are examined from the prism of the New Haven approach where scholars of the New Haven School studied law as 'a social process of authoritative decision-making' which is known to have increasingly recognized, throughout its development, the importance of considering the varying degrees of the impact of norms generated by diverse communities

[6] Doak Bishop et al., supra footnote 3

[7] International Energy Agency, World Energy Investment Outlook, 11 (2014), www.worldenergyoutlook.org/investment.

[8] Bill Gates, 'TURNING THE FUTURE GREEN We Need Clean-Energy Innovation, And Lots of It. Three Steps We Can Take to Prevent the Worst Effects of Global Warming.' (*GatesNotes, 2015*) <https://www.gatesnotes.com/energy/energy-innovation> last accessed 23 December 2021

on international law. This impact has a holistic approach and considers coercive norms and/or non-coercive ones. This is an approach to international law drawn from legal pluralism[9].

In that same spirit in setting the context and related concepts for this section, the above New Haven prism aligns with the holistic view of Heffron's definition of 'energy law.' He defines it as 'the regulation of energy-related rights and duties of various stakeholders over energy resources and over the energy life-cycle and ensures just outcomes for society.'[10] This is key to in guiding the understanding of either Lex Petrolea and/or Lex Renewables. The assumption throughout this thesis is that both Lex Petrolea and Lex Renewables are all part and parcel of energy law whereby they involve the full cycle of and drivers of energy law revolution as advanced by Heffron and will be explained shortly. It is important to clarify this point as there is a wide misconception that Lex Petrolea only focuses on 'property rights', which takes an archaic old view of petroleum law from the 19th century and thus inadvertently dismissing Lex Petrolea as not all representative of all issues in petroleum law jurisprudence. This misconception is easily dismissed by the examination of the breadth of case law discussed in the Lex Petrolea scholarly papers below.

Heffron also advances seven stages/drivers of the evolution of energy law (safety, security, economics, infrastructure, justice, technology and ownership – see Figure 11 below developed by Heffron). These drivers are clearly changeable in each country and at each stage of time. Heffron confirmed that there is a growing interest in energy law theory and jurisprudence. He rightly argues that 'Judges need to adjudicate on energy law issues and they need to understand the normative aims of this particular legal field. Currently, the energy law community does not have this 'body of knowledge' that can be referred to and used to guide decision-making' [11] - I wholeheartedly agree with his assertions. It clearly supports this thesis and has not changed since legal scholars and practitioners focused on augmenting jurisgenerative knowledge.

[9] See Paul Schiff Berman 'A Pluralist Approach to International Law' George Washington University Law School published 2007. Berman's article is an homage to the New Haven School (in particular Myers McDougal, Harold Lasswell, Michael Reisman) through highlighting the work of Robert Cover another Yale Law School professor. Berman discusses 'Cover's work and its relationship to the New Haven School of International Law, while arguing that Cover's emphasis on norm-generating communities - rather than nation-states - along with his celebration of jurisdictional redundancy is key for understanding the plural normative centers of the current international law scholarship.'

[10] See Raphael J Heffron 'Energy Law: An introduction' Second Edition Chapter 4 page 63 Springer 2021

[11] Ibid footnote 10 page 61

***Figure 11: The Evolution of Energy Law (Drivers of Change)***

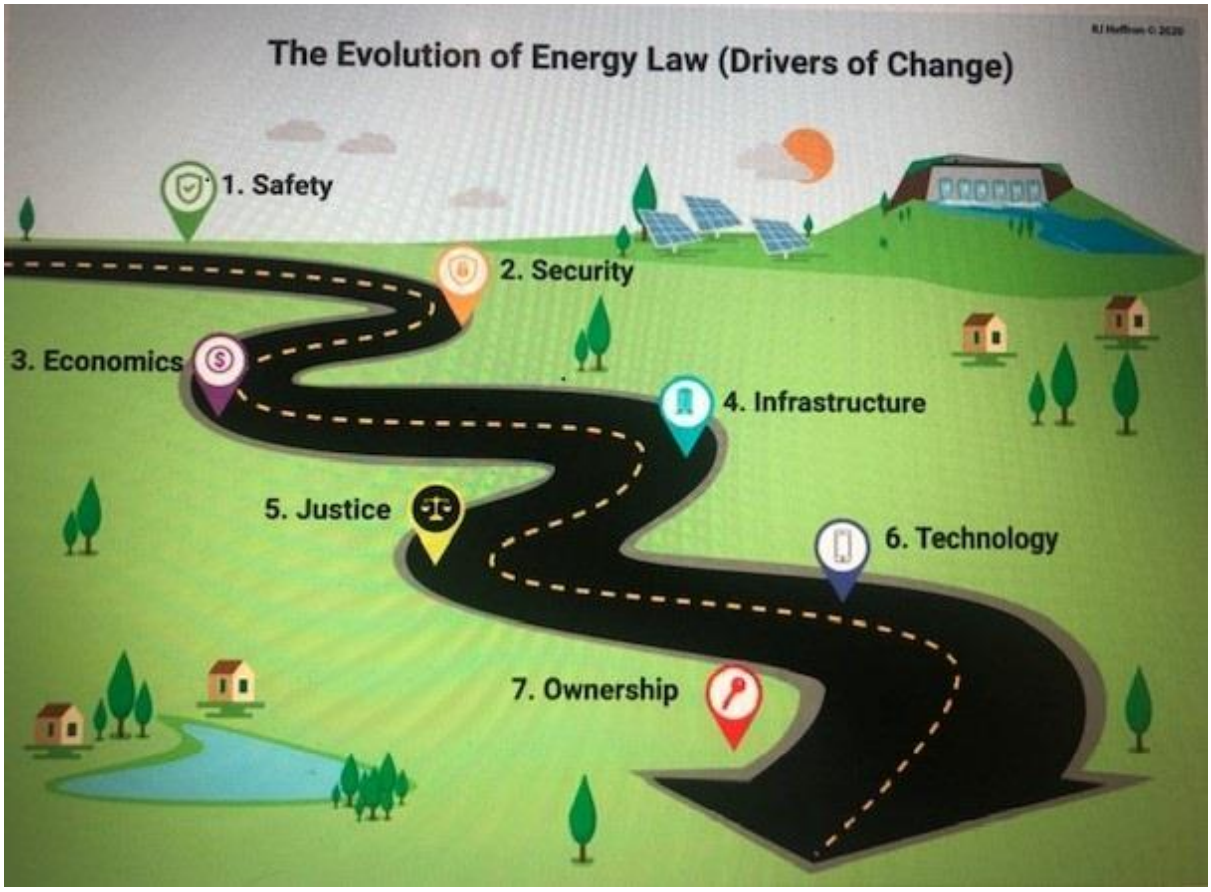


Figure 11 – Source: Energy Law: An introduction by R J Heffron (2020) – page 65

### 3.2.1 Pre-Doak Bishop's AMIN Oil Case 1982[12]

#### 3.2.1.1 The early years before 1950s

Petroleum investment arbitration / investor-state disputes have been existing for decades. It was preceded by petroleum arbitrations in pre-wars concession cases, mostly in mining, which later served as a source of inspiration for petroleum investment arbitrations. Many petroleum contracts go back to the 1930s where there was a boom of oil due to the first and second world war demands. The actual oil and gas jurisprudence goes even back further as we will discuss shortly.

In 1898 in Titusville, PA, USA, George Bryan[13] set out to address a gap of legal knowledge

[12] This section is mainly written from my study notes of Petroleum Arbitration from my LLM in International Comparative Dispute Resolution at the Commercial Law Centre at QMUL in London in 2006-2008. The Petroleum Arbitration module was taught by Professor Loukas Mistelis and Norah Gallagher. If there are other sources used outside my study notes, I will expressly reference them.

[13] See Bryan, George. Law of Petroleum and Natural Gas with Forms. Philadelphia, George T. Bisel (1898)

regarding the jurisprudence of a new sector called oil and gas which was presenting difficulties in new questions of law presented to the Supreme Court of Pennsylvania. Two Judges in 1893 and 1897 respectively wrote:

> "A new question, and one that is full of difficulty. We find ourselves upon a new road, without chart or compass to guide us, and we propose to move slowly."
>
> "So far on in our inquiry we have a well-beaten path to travel, but from this point forward we are without any definite landmark to guide us."

Bryan wrote a book called 'the Law of Petroleum and Natural Gas with forms' where he canvassed court decisions in leading several cases across the USA, which have made the subject one of special study. In his own words, George wrote "It has, therefore, been thought that an effort to supply such a chart by a presentation of the leading cases from the several courts which have made this would not be unwelcome to the profession." It is said that 'the history of petroleum as an article of commerce…may be said to have commenced in 1860.'[14]

In Europe, from the Iron Age until the 1850s, the use of oil in Europe was limited, then it increased in the 1860s with the introduction of new technologies in both production and refining[15]. It is a fact that Europe and Europeans played a large role in the development of the modern global oil and gas industry and, as such, built the body of early global oil contracts and disputes. A prime example is Ludvig Immanuel Nobel and his brothers Alfred and Robert the founders of the Novel Prize[16]. Robert Nobel realized the commercial possibilities of the oil wells in Baku, Azerbaijan and persuaded his brother Ludvig to join in exploiting the oil wells. In 1876, they both started an oil company called Branobel. Ludvig Nobel is credited with

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[14] See the first page of the Preface of Bryan, George. Law of Petroleum and Natural Gas with Forms. Philadelphia, George T. Bisel (1898)

[15] Craig et al wrote that 'The first commercial oil wells in Europe were manually dug in Poland in 1853, Romania in 1857, Germany in 1859 and Italy in 1860, before the gradual intro duction of mechanical cable drilling rigs started in the early 1860s.' For full detailed history see 'The history of the European oil and gas industry (1600s–2000s)' by Jonathan Craig, Francesco Gerali, Fiona MacAulay and Rasoul Sorkhabi Geological Society, London, Special Publications, 465, 1-24, 21 June 2018 accessed at https://doi.org/10.1144/SP465.23

[16] It is said that 'Nobel left a $265m endowment to fund the Nobel prize in his will when he died in 1896 – and a sizeable portion of that money came from the extraction of Azerbaijani oil and between 20 and 22 percent of the funds used to start the Nobel Foundation came from Alfred's shares in the oil company.' This is according to Togrul Bagirov, chairman of the Baku Nobel Heritage Foundation (BNHF). See Ayseba Umutlu, 'Alfred Nobel's Lesser-Known Azerbaijan Connection' (*Aljazeera.com*, 2017) <https://www.aljazeera.com/economy/2017/12/9/alfred-nobels-lesser-known-azerbaijan-connection> last accessed 23 December 2021

creating the Russian oil industry, and at some point Branobel produced 50% of the world's oil[17].

At roughly the same period in 1850s, the USA saw the rise of Edwin Drake and Rockfeller and the Standard Oil Company[18]. Drake's first oil well was successfully dug in Titsuville, Pa. on 27 August, 1859[19]. The first oil boom was prompted by the American Civil War from 12 April 1861 – 9 April 1865.

#### 3.2.1.2 The years 1950s – 1970s

Geographical expansion of exploration continued from 1900 to the 1950s which saw Churchill ad Anglo Persian Oil in 1909 then named Anglo-Iranian in 1935 (and now became BP), the Achnacarry Agreements signed in Scotland on 17 September 1928, the first global agreements to limit petroleum production.

##### 3.2.1.2.1 Key UNGAs[20]

After the WWII, the UN issued a slew of General Assembly (GA) resolutions in natural resources[21] that for the first time aimed at asserting human rights and protecting sovereignty over natural sources. Some of these key resolutions are:

- GA Resolution 523 (VI) of 1952 on Integrated Economic Development and Commercial Agreements where it is considered the first in the initiatives by the UN in facilitating the equitable benefits in the exploitation of natural resources in developing countries;
- GA Resolution 626 (VII) of 1952 provided for the right to exploit freely natural wealth and resources. It identified three key areas in the enjoyment of the freedom to use and exploit natural resources by developing countries[22]:

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[17] See Douglas Frantz, 'Baku Journal; How The Nobels Made A Prize Of Baku (Published 2001)' (*Nytimes.com*, 2001) <https://www.nytimes.com/2001/02/03/world/baku-journal-how-the-nobels-made-a-prize-of-baku.html> last accessed 23 December 2021

[18] See Jennifer Latson, 'How The American Oil Industry Got Its Start' (*Time*, 2015) <https://time.com/4008544/american-oil-well-history> accessed 23 December 2021

[19] Ibid footnote 16

[20] These resolutions are key to mention as they were discussed by tribunals in cases such as LIAMCO and TOPCO when the Libyan government then contended that these resolutions established a rule in international law in relation to compensation for an expropriation.

[21] See 'Permanent Sovereignty Over Natural Resources, General Assembly Resolution 1803 (XVII) - Main Page' (*Legal.un.org*) <https://legal.un.org/avl/ha/ga_1803/ga_1803.html> last accessed 23 December 2021

[22] See Dr. Telesphory D.B Magogoi 'The Principle Of Permanent Sovereignty Over Natural Resources (PSNR) Vis-À-Vis Benefits From Extractive Investments: A Highlight On Natural Resources Investment Arrangements' In International Journal of Legal Developments and Allied Issues Volume 6 Issue 1 – Issn 2454-1273 January 2020

(a) the demand for proper management of resources for economic development and for peacekeeping;

(b) the importance of economic integration/ international commercial/ trade or investment whereby people and nations have the inherent right to freely use and exploit natural wealth and resources, in so far as is the inherent right of states, when so exercised, should have due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic cooperation among nations; and

(c) the demand for abstinence from any performance likely to obstruct sovereignty over natural resources. All members of the United Nations are recommended to refrain from actions, direct or indirect, designed to impede the exercise of the sovereignty of any state over its natural resources;

- GA Resolution 1314 (XIII) of 1958 it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination; and
- GA Resolution 1803 (XVII) of 1962 established permanent sovereignty over natural resources providing that States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter of the United Nations and the principles contained in the resolution.

In between the above key UN resolutions, few nationalization movements took place and led to the formation of OPEC (Organisation of the Petroleum Exporting Countries)[23] in 1960 by 5 countries (Iran, Iraq, Kuwait, Saudi Arabia and Venezuela). It is worth noting that OPEC's formation occurred at 'a time of transition in the international economic and political landscape'. It was a time marred 'with extensive decolonization and the birth of many new independent states in the developing world. The international oil market was dominated by the then old "Seven Sisters" multinational companies, five of which were American (Exxon (now ExxonMobil), Mobil (now ExxonMobil), Chevron, Gulf Oil (now Chevron), Texaco (now

[23] See 'OPEC: Brief History' (*Opec.org*) <https://www.opec.org/opec_web/en/about_us/24.htm> last accessed 23 December 2021. OPEC's objective is to co-ordinate and unify petroleum policies among Member Countries, in order to secure fair and stable prices for petroleum producers; an efficient, economic and regular supply of petroleum to consuming nations; and a fair return on capital to those investing in the industry.

Chevron), BP and Shell. They were largely separate from that of the former Soviet Union (FSU) and other centrally planned economies (CPEs).'

At that point, two key impactful conventions on enforcement came to force that would lend a backbone and spine for international state-investor investment arbitration as well as commercial arbitration disputes settlements to spread further and gain popularity as they availed the awards to be enforced in foreign jurisdictions. This was a moment of reckoning for both sovereigns (especially in emerging nations) and investors to have such certainty.

#### 3.2.1.2.2 The enforcement conventions

There are two key treaties that govern the enforcement of international arbitral awards in foreign jurisdictions:

(a) The New York Convention[24] - the Convention on the Recognition and Enforcement of Foreign Arbitral Awards - adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. 157 nations ratified the New York Convention. It is arguably known to be one of the most successful United Nations treaties in the area of international trade law. It requires contracting States to recognize and enforce foreign arbitral awards (i.e. awards made in jurisdictions other than that in which enforcement is sought) as if they were domestic awards[25] ; and

(b) The Washington Convention[26] - the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Submitted to Governments by the Executive Directors of the International Bank for Reconstruction and Development, on 18 March, 1965, Washington. It entered into force on October 14, 1966, 30 days after ratification by the first 20 States. At present, it is ratified by 155 Contracting States. It created the International Centre for Settlement of Investment Disputes (ICSID) under the auspices of the World Bank. ICSID is a forum for arbitrating disputes arising under contracts, local investment laws and international treaties between a ratifying state and a national of another ratifying state. The Washington Convention

[24] See 'The New York Convention » New York Convention' (*Newyorkconvention.org*) <https://www.newyorkconvention.org/> last accessed 23 December 2021

[25] See Matthew H. Kirtland and Katie Connolly, 'A Comparison Of The Enforcement Regimes Under The New York And Washington Conventions — A Tale Of Two Cities' (*Nortonrosefulbright.com*, 2018) <https://www.nortonrosefulbright.com/en/knowledge/publications/04f14b2a/a-comparison-of-the-enforcement-regimes-under-the-new-york-and-washington-conventions-mdashbra-tale-of-two-cities> last accessed 23 December 2021

[26] See 'ICSID Convention | ICSID' (*Icsid.worldbank.org*) <https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview> last accessed 23 December 2021

also creates enforcement mechanisms for awards issued under the Washington Convention. ICSID awards are "automatically" enforceable in any ratifying State as if it is a judgment of the national courts.[27]

Below is a summary comparison of how each convention functions:

***Table 2: A comparison of the New York Convention and the Washington Convention regimes***

| **Table 2 - A comparison of the two convention enforcement regimes[28]** | | |
|---|---|---|
| **Question** | **New York Convention** | **Washington Convention** |
| **What awards can be enforced?** | Pecuniary and non-pecuniary foreign arbitral awards issued by both ad hoc and permanent arbitral bodies are subject to certain treaty-based and national limitations such as limiting enforcement to awards issued in other ratifying states and/or dealing with commercial subject matter | • Pecuniary awards only issued under the Washington Convention. |
| **How will the award be enforced?** | While enforcement must be subject to the same national rules as for domestic arbitral award enforcement – no more expensive or onerous – contracting States still tend to require that awards be formally "recognized" before enforcement. | • Awards are "automatically" enforceable in any ratifying State as a final judgment of the national courts |
| **What can be done to resist enforcement?** | There are seven discretionary and exhaustive grounds for refusing recognition or enforcement of an award:<br>• Lack of a valid arbitration agreement.<br>• Violation of due process. | • Arbitral appeal mechanisms are limited to annulment, revision or interpretation of an award. |

[27] See supra footnote 24
[28] See Ibid. The source of the whole table is: Matthew H. Kirtland and Katie Connolly, supra note 25

| **Table 2 - A comparison of the two convention enforcement regimes[28]** | | |
|---|---|---|
| **Question** | **New York Convention** | **Washington Convention** |
| | • Exceeding the Tribunal's authority.<br>• Irregularity in the composition of the Tribunal or its procedures.<br>• The award is not yet final or binding.<br>• The award has been set aside or suspended.<br>• Public policy reasons. | • At the enforcement stage, grounds for resisting enforcement are exceptionally limited to those available for resisting enforcement of final judgment of a court of that State, and therefore can vary from State to State according to domestic law. |

#### 3.2.1.2.3 UN Charter of Economic Rights 1974

The above was followed by the UN Charter of Economic Rights in 1974.[29] The Charter addresses the "fundamentals of international economic relations," listing the "economic rights and duties of states," and considers the "common responsibilities towards the international community." The rights are economic, social and cultural rights include the rights to adequate food, to adequate housing, to education, to health, to social security, to take part in cultural life, to water and sanitation, and to work. This is important to highlight as it goes to the heart of the whole thesis of adopting a holistic approach using the stance that renewables are public good akin to any of these rights.

### 3.2.1.3 Key awards in 1950-1970

The following is a summary of select key awards that are often used in the body of jurisprudence of Lex Petrolea that represent that era.

[29] See 'Charter Of Economic Rights And Duties Of States - Main Page' (*Legal.un.org*) <https://legal.un.org/avl/ha/cerds/cerds.html> last accessed 23 December 2021

***Table 3: Select Key Cases that Shaped Lex Petrolea 1950-1970s***

| **Table 3 - Select Key Cases that Shaped Lex Petrolea 1950-1970s[30] Source – generated by the Thesis Author** | | | | |
|---|---|---|---|---|
| **Case** | **Saudi Arabia v Arabian American Oil Co (ARAMCO)[31]** | **BP Exploration Co Ltd v Libyan Arab Republic [32]** | **Libyan American Oil Co (LIAMCO) v Libyan Arab Rep[33]** | **Texaco v Libyan Arab Republic[34]** |
| **Facts** | • 1933 concession to Standard Oil Co of California later named as ARAMCO | • 1957 Concession to Mr Hunt<br>• 1960 Law and 1971 Nationalization law | • LIAMCO was granted 3 concessions in 1955; amendments followed in 1968 | • 14 concessions granted between 1955 and 1968 to TOPCO and CALASIATIC<br>• Modifications in 1963 and 1971 |
| **Nature of Dispute** | • 1954 – Saudi Government granted (Onassis) priority right to | • Nationalization as breach of concession<br>• Is that a contract dispute? Yes<br>• Is that an issue of Public | • Nationalization in 1973<br>• Reactions by LIAMCO and the US<br>• Ad hoc Arbitration in Switzerland | • Amendments change the control of the concessions<br>• Libya refused to participate in the arbitration |

[30] Table generated by the author

[31] See Judge Stephen M. Schwebel 'The kingdom of Saudi Arabia and Aramco arbitrate the Onassis agreement' Journal of World Energy Law & Business, 2010, Vol. 3, No. 3

[32] See Robin C. A. White 'Expropriation of the Libyan Oil Concessions: Two Conflicting International Arbitrations' The International and Comparative Law Quarterly, Jan., 1981, Vol. 30, No. 1 (Jan., 1981), pp. 1-19 Published by: Cambridge University Press on behalf of the British Institute of International and Comparative Law

[33] See <https://www.biicl.org/files/3939_1977_liamco_v_libya.pdf>

[34] See Julien Cantegreil 'The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law' in The European Journal of International Law Vol. 22 no. 2 2011

| **Table 3 - Select Key Cases that Shaped Lex Petrolea 1950-1970s[30]**<br>**Source – generated by the Thesis Author** | | | | |
|---|---|---|---|---|
| | transport Saudi Oil<br>• Did the Onassis Agreement violate the terms of the concession with ARAMCO?<br>• Ad hoc tribunal Arbitration in Switzerland | International Law? Yes<br>• Ad hoc[35] Arbitration in Denmark | | • Sole arbitrator appointed by the ICJ |
| **Award** | Award [36] of August 23, 1958, 27 I.L.R. 117 (1963), awarded in favour of ARAMCO declaratory relief to resolve conflicting claims over | Award of 10 October 1973, 53 I.L.R. 297 (1979), [37] awarded in favour of the investor<br>It is a contribution to jurisprudence on expropriation[38] | Award of 12 April 1977, 62 I.L.R. 140, 187-189 (1982) awarded in favour of the investor.<br>The Tribunal found that 'the Claimant was entitled to indemnification | Award on The Merits Of 19 January 1977, 53 I.l.r. 420, 457-462 (1977)<br>N.B. [rené-jean Dupuy (Sole Arbitrator)] |

[35] See Jus Mundi, 'BP V. Libya, Award (Merits), 10 Oct 1973' (*Jusmundi.com*) <https://jusmundi.com/en/document/decision/en-bp-exploration-company-libya-limited-v-government-of-the-libyan-arab-republic-award-wednesday-10th-october-1973> last accessed 23 December 2021

[36] See page 636 Bishop, R. Doak; Crawford, James; Reisman, W. Michael 'Foreign investment disputes: cases, materials, and commentary' Second edition 2014 Kluwer Law Netherlands

[37] See page 488 'Discriminatory Conduct: What Is The Customary International Law Standard?' in ibid footnote 33

[38] See ibid footnote 31 pages 17-18

| Table 3 - Select Key Cases that Shaped Lex Petrolea 1950-1970s[30]<br>Source – generated by the Thesis Author | | | | |
|---|---|---|---|---|
| | concessions from the Saudi government.<br>N.B. Myres McDougal was involved in this arbitration on behalf of the Saudi Government. | N.B. [gunnar Lagergren (Sole Arbitrator)] | for (lawful) nationalization'<br>N.B. [Sobhi Mahmassani (sole arbitrator)]<br><br>Note: This 'award could at first glance be considered as an exception, since it awards the Claimant a certain amount of lost profit after having found that the expropriation of LIAMCO by Libya was lawful. It is clear, however, that this part of the compensation, awarded on the basis of "equity," does not conform to the concept or the standard of restitutio in integrum.'[39] | Note: The award supports that whenever 'reference is being made to general principles of law in the International arbitration context, it can be held to be a sufficient criterion for the internationalization of a contract' |

[39] See ibid footnote 31 page 667

The above is not an exhaustive list of cases but represent key cases often relied on in oil and gas investor-state disputes resolved via international arbitration. Tim Martin[40] aptly summarised the key principles established in international investment law as:

- 'the sanctity of property and contracts;
- a prohibition on unjust enrichment;
- the right of states to expropriate investments;
- the requirement that in doing so, a state must compensate the investor for its loss; and
- the use of legitimate expectations in determining damages'

In relation to applicable law, which is often controversial, Martin highlighted that 'the tribunals chose not to exclusively apply local law, which was primarily Shari'ah' given that they were all in the MENA region.[41]

### 3.2.2 Doak Bishop's Lex Petrolea 1980 – 1998[42]

In the British Year Book of International Awards 1983[43] F.A. Mann wrote that Sir Gerald Fitzmaurice wrote to him that he had just finished a 'remarkable award' – that award was for the AMINOL arbitration and he was the arbitrator appointed by AMINOIL. Indeed, the AMINOL award remains a remarkable key guidance in stabilization clauses[44] in case of lawful expropriation. It was considered a 'leading modern case' at the time in relation to the 'liability for and the quantum of compensation in cases of expropriation.'

In this seminal case (AMINOIL v Kuwait), the Kuwaiti government granted a concession to

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[40] See page 103 in Tim Martin's 'Oil and gas arbitrations in the Middle East and North Africa' http://timmartin.ca/wp-content/uploads/2019/06/OG-Arbitrations-in-MENA-T-Martin-2019.pdf

[41] There was another key case in that era that is often used in breach of stabilisation clause. AGIP S.p.A. v. People's Republic of the Congo, ICSID Case No. ARB/77/1 awarded in favour of the investor in 1979 See https://www.italaw.com/cases/documents/3502

[42] Other key cases often used for precedence during that period are: Tesoro Petroleum v Trinidad & Tobago (conciliation -1983); Occidental of Pakistan v Pakistan (1987); Mobil Oil Corporation and Others v New Zealand (1987); Scimitar Exploration Ltd v Bangladesh (1992); Kufpec Congo v Congo (1997); and Mobile Argentina v Argentina (1999) See Table 3 in this section.

[43] See F. A. Mann 'The AMINOIL Arbitration' in The British Year Book of International Law Volume 54 Issue 1 1983 Pages 213–221, Accessed at https://academic.oup.com/bybil/articleabstract/54/1/213/324982?redirectedFrom=PDF

[44] Bishop, Crawford & Reisman outlined that: "The investor negotiating a stabilization clause can learn two valuable lessons from the Aminoil decision. The first is that a stabilization clause should be very explicit in what it is meant to prohibit. The second is that a stabilization clause should provide that, absent express written agreement to the contrary, its terms are binding regardless of subsequent compromise, negotiation, or amendment of the contract. This should allow the parties to negotiate changes in concession terms if circumstances change, without jeopardizing the overall stability of project terms and regulatory conditions." See Page 166 Footnote 36 'Foreign investment disputes: cases, materials, and commentary' Second edition 2014 Kluwer Law Netherlands

AMINOIL in 1948 and attempted to control the concessions. After a new agreement in 1973, Kuwait terminated the agreements in 1977. In an Ad hoc arbitration in Paris, the case was decided in neither party's favour, yet compensation was awarded to both parties.

It is no wonder that Doak Bishop relied on the esteemed arbitrators' skilfully constructed opinion in their reference of the term 'Lex Petrolea' in the award decision, albeit the use of Lex Petrolea then was rebuffed by the Tribunal. Doak Bishop wrote[45]:

> "…The Government of Kuwait argued, in one case, that a sub-species of these disputes has "generated a customary rule valid for the oil industry - a lex petrolea that was in some sort a particular branch of a general universal lex mercatoria". In the context of that very narrow claim, the contention was rejected, but it is the thesis of this paper that in a larger context, these published awards have created the beginnings of a real lex petrolea that is instructive for the international petroleum industry…"

Bishop's ground-breaking paper achieved his goal of serving as a starting point of a road map of substantive issues raised in oil and gas international investment arbitration awards covering a span of 25 years starting with the AMINOIL case until he published his paper in 1998. He reviewed ten key arbitration awards involving investor-state disputes. He focused on expropriation and its remedies in a practical fashion highlighting the substantive areas of the disputes arising from these cases rather than the legal theories (as in fair and equitable treatment obligation breach). He addressed production sharing contracts (force majeure clause, damages/liquidated damages/mitigation, unjust enrichment and interest) and operating agreements (misrepresentations or mistake and interest).

### 3.2.3 William T. Onorato & J. Jay Park's [46] Frameworks That Foster Oil and Gas Development and world petroleum legislation -2001

Onorato and Park brilliantly presented a practical solution for the oil and gas industry in the form of a framework derived from the impact of the legal reform and technical assistance projects done by the world bank worldwide. They asserted:

> "…another role that the World Bank has played is to support the development of enabling legislation which would assist World Bank members with petroleum potential

[45] See The Introduction page 1 in R. Doak Bishop, International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea, XXIII YB COM ARB 1131 (1998).
[46] William T. Onorato & J. Jay Park, 'World Petroleum Legislation: Frameworks That Foster Oil and Gas Development' (2001) 39 Alta L Rev 70

> in attracting foreign direct investment and risk capital into this critical sector of their economies. This is typically done through active participation in the legal reform and technical assistance ("TA") components of Petroleum Exploration Promotion Projects…The objectives[47] of these technical assistance programs is to aid in the development of acceptable, international-standard, legal, contractual, and fiscal frameworks to encourage a quickening of the pace of petroleum investment operations in the territories of member countries."

Their solution was to recommend an essential petroleum law format that has three main elements:

1. **Express provisions** which address these areas: state property in petroleum, competent authority, petroleum operations, petroleum agreements regulations, qualifications, duties, and rights of rights holder or contractor, taxation of profits, other taxes, duties, and exchange controls, fiscal stabilization, environmental protection and safety, miscellaneous provisions;
2. **Regulations to the petroleum** law which covers: competent authority, petroleum licensing, petroleum operations, petroleum agreements, fiscal and financial regime, assignment of rights, land use, environmental protection, miscellaneous provisions, model forms; and
3. **Model contracts** which covers: scope, duration, and grant of rights, mwo, work program, and guarantees, relinquishments, declaration of commercial discovery, joint management [advisory] committee; cost recovery, expenses, and production shares, taxes and duties, fees and bonuses, protection of the environment, supply of domestic market; emergency requisition, training of host government personnel, other standard provisions.

While Onorato and Park never mentioned Lex Petrolea expressly and/or use any examples of actual arbitration awards in their article, in my opinion, it presented a vision of what Lex Petrolea could be in terms of a framework for all players combining Bishop's, Childs' and Martin's views as discussed below.

[47] I started my career in International Development working with the World Bank, IMF and USAID and other similar organisations, as a trusted global legal adviser and international development practitioner I asset that what Onorato and Park presented in 2001 remains in my humble opinion a fantastic solution and win-win for all key stakeholders involved. It would be brilliant to emulate this for the renewables' industry – renewables law.

### 3.2.4 Thomas Childs'[48] Update on Lex Petrolea The continuing development of customary law relating to international oil and gas exploration and production – 1998-2011

Childs picked up the baton from Bishop. In 2011 he wrote an article where he expressly classified it as an update to Bishop's pioneering article. He followed the same theme of categorizing the tribunals rulings in accordance with the substantive areas of disputes (e.g. exploration licenses and export restrictions). He reviewed 18 arbitral decisions. He reiterated that his article shares the underlying thesis of Bishop's 'that the published awards relating to the international exploration and production industry have created a 'lex petrolea' or customary law comprising legal rules adapted to the industry nature and specificities.'

In Childs' article, we notice that in the disputes analysis, breaches of BITs are used more in commencing arbitration proceedings as by now more of them are signed and more discussion in relation taxation[49], export restrictions[50] and even environmental liability[51]. Only two nationalization cases were covered in relation to Venezuela and Ecuador, which shows how the trend changed from pre-1998 where more nationalization disputes dominated. While Childs expressly states that the published awards analysis 'represent only a small fraction of the universe of awards relating to the exploration and production industry, they address a sufficiently wide range of issues to create a 'Lex Petrolea' or customary law comprising legal rules adapted to the industry's nature and specificities.'[52]

***Table 4: Other Key Cases used for precedence***

| **Table 4 – Other Key Cases used for precedence<br>Source – generated by the Thesis Author** | | |
|---|---|---|
| **Parties** | **Case No.** | **Status of the case** |
| *Occidental of Pakistan, Inc. v. Islamic Republic of Pakistan* | ICSID Case No. ARB/87/4 | Settled |
| *Tesoro Petroleum v Trinidad & Tobago* | ICSID Case No. CONC/83/1 | Settled |

[48] See Thomas C. C. Childs 'Update on Lex Petrolea: The continuing development of customary law relating to international oil and gas exploration and production' Journal of World Energy Law and Business, 2011, Vol. 4, No. 3
[49] See City Oriente Limited v Ecuador and Occidental Exploration and Production Company v Ecuador
[50] See Total v Argentina
[51] See Chevron and TexPet against Ecuador
[52] See page 259 Thomas C. C. Childs, supra footnote 48

| **Table 4 – Other Key Cases used for precedence**<br>**Source – generated by the Thesis Author** | | |
|---|---|---|
| **Parties** | **Case No.** | **Status of the case** |
| | | |
| *Mobil Oil Corporation and others v. New Zealand* | ICSID Case No. ARB/87/2 | Settled |
| *Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation* | ICSID Case No. ARB/92/2 | Discontinued |
| *Société Kufpec (Congo) Limited v. Republic of Congo* | ICSID Case No. ARB/97/2 | Discontinued |
| *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic* | ICSID Case No. ARB/04/16 | In favour of Investor |
| *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* | ICSID Case No. ARB/01/10 | In favour of Investor |
| *F-W Oil Interests, Inc. v. The Republic of Trinidad and Tobago* | ICSID Case No. ARB/01/14<br><br>(Decision of 3/March/2006) | In favour of State |
| *TG World Petroleum Limited v. Republic of Niger* | ICSID Case No. CONC/03/1 | Settled |
| *The Rompetrol Group N.V. v. Romania* | ICSID Case No. ARB/06/3 | In favour of Investor |

| Table 4 – Other Key Cases used for precedence<br>Source – generated by the Thesis Author | | |
|---|---|---|
| **Parties** | **Case No.** | **Status of the case** |
| | | |
| *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* | ICSID Case No. ARB/06/11 | In favour of Investor |
| *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan* | ICSID Case No. ARB/06/15 | Dismissed (for lack of jurisdiction) |
| *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) [I]* | ICSID Case No. ARB/06/21 | Settled |
| *RSM Production Corporation v. Central African Republic* | ICSID Case No. ARB/07/2 | In favour of Investor |

### 3.2.5 Timothy Martin's53 'Lex Petrolea' in International Law and Kim Talus[54] Lex Petrolea and the internationalization of petroleum agreements: Focus on Host Government Contracts-(2012)

Tim Martin's article on Lex Petrolea was a clear endorsement of the thesis that Lex Petrolea

[53] A. Timothy Martin "Lex Petrolea in International Law" Dispute Resolution in the Energy Sector: A Practitioner's Handbook (May 2012); Last accessed on 24 Nov 2021 `at http://timmartin.ca/wp-content/uploads/2016/02/Lex-Petrolea-in-International-Law-Martin2012.pdf See author profile https://arbitrationlaw.com/profile/timothy-martin

[54] Kim Talus, Scott Looper, and Steven Otillar 'Lex Petrolea and the internationalization of petroleum agreements: focus on Host Government Contracts' Journal of World Energy Law and Business, 2012, Vol. 5, No. 3.

has developed over the years. However, what distinguishes Martin's from Bishops' and Childs' is that Martin widened the scope of Lex Petrolea's application. He rightly advanced that while Lex Petrolea 'primarily arises from arbitrations and courts cases, it has also developed in a number of other forums' – namely: government's petroleum legislation and contracts to the industry's business practices as per model contracts. He asserted that even in the absence of stare decisis55 in international arbitration, tribunals still rely on published decisions in arguing cases, and a 'Lex Petrolea has developed accordingly'56 where it also directly impacts how companies and governments conduct their oil and gas operations.

He covered the rise of the individual and non-governmental organization disputes and the body of Lex Petrolea developing around it, both in courts and before international bodies utilizing UN Conventions such as (Torture Convention, the Optional Protocol to the International Covenant on Civil and Political Rights; and the Convention on the Elimination of All Forms of Discrimination against Women). It is important to highlight this point not only because Martin predicted that it will be on the rise but also because it aligns with Lex Renewables' relation with environmental and human rights issues. Therefore, we see in practice the development of Lex Petrolea application highlighting the mix of collaboration and overlap amongst public international law and private international law, which mirrors the current development of Lex Renewables.

Kim Talus et al., while they acknowledged Bishop's and Childs' Lex Petrolea through international energy disputes as well as the widened scope added by Tim Marten's in relation to the precedents set by model contracts developed by institutions such as the Association of International Petroleum Negotiators (AIPN), in the scholarly literature, strangely, they shied away from making an explicit stance as to the existence of Lex Petrolea. It was lukewarm. They did not take a position on whether, in their opinion, Lex Petrolea exists or not. They considered it too large for consideration in their study. Yet, they went on to consider host government contracts internationalization in oil and gas. In my personal opinion, the extensive consideration of the internationalization of host government contracts in oil and gas is an extension of Lex Petrolea. I found what was presented in this article is an oxymoron stance.

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[55] P. H. Richards & L. B. Curzon Longman Dictionary of Law 8th Edition defines 'Stare Decisis' as "To stand by decided matters. (Stare decisis et non quieta movere = to stand by precedent and not to disturb settled points.) Doctrine according to which previous judicial decisions must be followed.' Page 443 – In latin the equivalent is: **Non quieta movere**. nōn kwē-ā´ta mōwā´rā. nan kwī-e´tu mō´vɜrē. "**Not to disturb what is settled."** See

[56] See page 96 in footnote 51

### 3.2.6 Alfredo De Jesus O[57] – The Prodigious Story of the Lex Petrolea and the Rhinoceros. Philosophical Aspects of Transnational Legal Order of the Petroleum Society – 2021

De Jesus' writing is a pillar of enormous support to Lex Petrolea. In his writings and lectures in the UK and the USA, on 'New Trends in Transnational Petroleum Transactions' he defined 'Lex Petrolea' as not just 'a bunch of rules' – **It is an international system of laws comprising a number of factors to deal with a truly global economy**.' He confirmed that the Lex Mercatoria model is at the heart of advancing Lex Petrolea.

He covered the historical origin of the paradigm shift from an international economy to a multinational one in the 1960s, then a different order of an economy emerging in the 1980s whereby third parties invest in companies of multiple nations spanning the globe and leading to the change of stakeholders in the sector. In particular, he gave detailed credit and account of events to Professor Ahmad El-Kosheri (as part of the L'Ecole de Dijon led by Berthold Goldman) and his innovative lecture delivered in French at the Hague on the Legal Regime Created by Petroleum Participation Agreements in 1975, which advanced the Lex Petrolea concept as Dr El-Kosheri was one of the selected counsels representing the government of Kuwait in the AMINOIL seminal arbitration case that referenced the term Lex Petrolea publicly.

He cited four main elements[58] contributing to the formation of such a new system; in my opinion, these are still valid today as they were when mentioned in 2012 and easily applied to Lex Renewables, too:

1.2.6.1 The worldwide economy;

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[57] See Alfredo De Jesus O 'The Prodigious Story of the Lex Petrolea and the Rhinoceros Philosophical Aspects of the Transnational Legal Order of the Petroleum Society' Transnational Petroleum Law Institute, Vol 1 No 1 2012 – I am also referring to my notes of a face to face interview with Alfredo De Jesus O after a lecture he presented on the same topic at CEPMLP at the University of Dundee on 17 October 2013.

[58] See these are the summary outcome of the lecture Dr Alfredo De Jesus O gave in the USA in April 2013, 'News And Events - University Of Houston Law Center' (*Law.uh.edu*, 2013) <https://www.law.uh.edu/news/spring2013/0426cardenas.asp> last accessed 23 December 2021. During that same lecture, Professor Julian Cardenas Garcia Cardenas cited the importance of laws and regulations governing worldwide offshore petroleum developments with serious consequences for individual companies, the industry as a whole, countries, and the environment. Transnational law is increasingly divided into specific sectors, he said. Lex Petrolea is one, with others that can be called Lex Sportiva, Lex Constructiva, and Lex Mercatoria. Each deal with varying legal systems, jurisdictional disputes and others that arise in transnational transactions. "We live in a world today that is now divided into sectors," he told students and visitors in the lunch hour presentation. "You belong to a sector more than you belong to a nationality. It's hard for us to write off the concept of nationality to individuals, but it's not hard for industry." Arbitration, best practice standards, municipal and international law are used in the form of a network of transnational rules that govern transnational petroleum transactions. **Given the phenomenon of regulatory inflation in the petroleum industry, Cardenas concluded, "We live in the Era of Sources of Law."**

1.2.6.2 legal theory, the merger of 'hard' law and 'soft law in the manner in which laws are created and applied;

1.2.6.3 interpretation of complex contracts that have evolved to 'relational' agreements; and

1.2.6.4 conflicts between international law and national law with varying conventions, rules, principles and applications.

De Jesus concludes his article by clarifying that comparative law is the answer in incorporating rules and principles in Lex Petrolea. He relied on Professor E Loquin and Professor E Gaillard mechanisms. It is summarised in two phases: (a) identifying the different trends and principle's; and (b) selecting the needs and interests of the Lex Petrolea. He was mirroring Professor's E Loquin analysis of Lex Mercatoria.

He concluded his article with a poignant translated paragraph by Professor El-Kosheri from his Hague's lecture:

> "…for participation agreements to work in harmony in order to guarantee maximal possible efficacy, petroleum relations must be carried in a larger and truly international environment in the form of an agreement of a global scale…if that form of internationalization is not achieved, we will continue to be under the shadow of an ephemeral law."[59]

### 3.2.7 John P Bowman[60] Lex Petrolea Sources and Successes of International Petroleum Law 2015[61]

In 2015, Bowman wrote a short piece that was an ode to Lex Petrolea. It was a balanced and evidentiary piece. He wrote:

> "…Despite this initial, notable rebuff of the notion of a lex petrolea[62], today four possible sources of a lex petrolea can be identified and considered national petroleum

[59] See the conclusion - Page 49 Alfredo De Jesus O 'The Prodigious Story of the Lex Petrolea and the Rhinoceros Philosophical Aspects of the Transnational Legal Order of the Petroleum Society' Transnational Petroleum Law Institute, Vol 1 No 1 2012

[60] John P Bowman is a global oil and gas arbitration practitioner with Kings & Spalding and also teaches international energy arbitration at Georgetown University Law Center, and is also an honorary lecturer at the University of Dundee's Centre for Energy, Petroleum and Mineral Law and Policy.

[61] See John P Bowman Blogpost publish 13 February 2015 https://www.kslaw.com/blog-posts/lex-petrolea-sources-successes-international-petroleum-law

[62] Bowman refers to the arbitration tribunal rebuff of Lex Petrolea in the seminal case of AMINOIL.

laws, international petroleum contracts, custom and practice in the international oil industry, and international arbitration awards and questions about the existence and composition of a lex petrolea can once again legitimately be asked."

Bowman endorsed three out of the four sources cited above as generating Lex Petrolea, but he differed in his opinion to Martin's in relation to AIPN model contracts ability to create Lex Petrolea. He wrote: "…the usefulness of The AIPN model contracts, while tremendously useful to the industry, cannot be said to form a lex petrolea." I disagree with this statement as it would dilute the well-rounded vision introduced by Onorato and Park in 2001, as discussed previously.

His view on the three other sources for Lex Petrolea, could be summarised as follows:

#### 3.2.7.1 ***International petroleum contracts***

They create a lex specialis, a special form of lex petrolea, because the parties can agree:

(a) in their contract to incorporate by reference a host country's law as of a certain date or by other means of identification which represent a common form of freezing clauses;
(b) include specific elements of the host country's laws by repeating that law verbatim in their contract as a contract term; thus, it remains an express term governing their contractual relationship for the life of their agreement protecting against the law repeal; and
(c) Sovereign risk allocation either to 'the State or state oil company' create a lex specialis that overrides even the parties choice of the applicable law. He provided the example held by the tribunals in the Himpurna v. PLN 1999 Final Award and in the Mobil Cerro Negro v. PDVSA Award at the end of 2011.

#### 3.2.7.2 ***Custom and practice***

This is already established in the awards of the Saudi Arabia v. ARAMCO arbitration, the Tribunal will be led, in the case of gaps in the law of Saudi Arabia, of which the Concession Agreement is a part, to ascertain the applicable principles by resorting to the worldwide custom and practice in the oil business and industry. Bowman notes that the 'International oil industry custom and practice' has been elevated to a legal

obligation in JOAs and host government contracts in one particularly important area, that of petroleum operations.'

### 3.2.7.3 *International Arbitration Awards*[63]

Here Bowman deals with two matters: the absence of the doctrine of stare decisis in international arbitration and the fact of the default nature of the long period of time in concession agreements that are subject to arbitration disputes. He wrote:

> '…In theory, international arbitration awards dealing with oil and gas disputes should provide a fertile soil for the flowering of a lex petrolea. For one thing, concession agreements dating back at least 60 years have relied upon decisions of international tribunals as a source for the parties chosen law. The Libyan Model Concession (Second Schedule to Petroleum Law No. 25 of 1955) stated: This Concession shall be governed by, and interpreted in accordance with, the principles of law of Libya common to the principles of International Law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by International Tribunals. (Emphasis added.) Fast forward 50 years to a Ghana 2006 Petroleum Agreement to find: This Agreement and the relationship between the State and GNPC on the one hand and Contractor on the other shall be governed by and construed in accordance with the laws of the Republic of Ghana…
>
> **…**In many of the awards in recent investment treaty cases, the arbitral tribunals have declared their intention to pay due regard to earlier decisions of international courts and tribunals. While recognizing that they are not bound by previous decisions, they also recognize a duty to adopt solutions established in a series of consistent cases, absent compelling contrary grounds. As explained in the 2012 Decision on Liability in Burlington Resources v. Ecuador, subject to the specifics of a given treaty and of the circumstances of the actual case, it

[63] Bowman expressly asserted that the International Arbitration Awards reference is a broad one in nature and that it would encompass: "… those rules and principles relied upon tribunals such as the International Court of Justice, the U.S. Iran Claims Tribunal, the European and Inter-American Courts of Human Rights, and the International Tribunal for the Law of the Sea, but could also be construed to cover rules and principles applied by international arbitration tribunals in commercial and investment disputes, especially those involving the international oil & gas industry…" Again, this is important for the application to a Lex renewables.

> [the Tribunal] has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. ..."

Bowman, concluded that international arbitration awards as the most obvious potential source of a lex petrolea, have not yet generated a significant body of international petroleum law.' He attributes this rightly to the generally private nature of commercial arbitration and the focus on treaty obligations in investment arbitration. However, he acknowledges that international arbitration awards have established a binding nature predominantly in 'one area of special importance to the international petroleum industry, namely, contract stability, available awards have established the clear principle of enforcement of stabilization obligations against host governments.

### 3.2.8 Majd[64], Tariq[65] and Daintith 2017

We continue to cover the scholarly papers mention of Lex Petrolea as a way of following its development and establishing itself as solid part of the international legal framework of resolving oil and gas investment disputes.

Majd advanced that international development law and sustainable development have an impact on petroleum contracts which changed how the sovereignty of states is viewed in the current international economic order, and these factors too have contributed to 'petroleum law or international petroleum law' He does not support the 'traditional jurists who refused the position of Lex Petrolea'. I personally believe in the importance of international development and the sustainable development goals for Lex Renewables due to climate change and the UN Sustainable Development Goals. This goes hand in hand with Lex Renewables development, too.

Tariq - In 2017, supported what Bishop and Childs presented in their articles. It was written from a supportive angle to the notion of Lex Petrolea. He covered:

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[64] See Saeid Rabiei Majd, 'Globalization Impact on the States Sovereignty and the Development of International Law on Petroleum Contracts' (2017) 66 JL Pol'y & Globalization 178

[65] See Sannan Tariq, 'The Potential Of Lex Petrolea - A Uniform Code Of Petroleum Laws - Courting The Law' (*Courting The Law*, 2017) <https://courtingthelaw.com/2017/11/09/commentary/the-potential-of-lex-petrolea-a-uniform-code-of-petroleum-laws/> last accessed 23 December 2021

i. ‘the development of lex petrolea in the last two decades and its existence in international law by way of arbitral awards, model contracts, host government contracts and treaties etc.;
ii. identify the issues and difficulties in recognizing various forms mentioned above, to be considered as a source of lex petrolea; and
iii. whether the Energy Charter Treaty, owing to its unique binding nature, could be considered a potential common code in this respect.’

He supports the idea that the Energy Charter Treaty ‘has a substantial role to play in the development of lex petrolea in light of the recent events and speculated decline of OPEC.’ Ihe added that ‘it could either be considered as the basis of lex petrolea in the coming years or a common unified code could be derived on its basis.’ Again, in my opinion, this is not different from what Onorato and Park advanced in 2001 or Professor El-Kosheri presented in his Hague lecture in 1975.

For the sake of completeness, I shall give a mention to Terence Daintith’s article ‘Against ‘lex petrolea’[66]’ While Daintith article is well-written and substantiated with references and facts, I found it to be a ‘rant’ on the use of the term ‘Lex Petrolea’ and divisive amongst Anglo and French legal thinkers. It focused on form rather than substance. I do not subscribe to his ‘rant’ on ‘Lex Petrolea’ as it did not add anything. I would be more inclined to follow all the thinkers of and practitioners supporting Lex Petrolea, whether from civil or common law countries and whom I referenced their work above.

Lex petrolea has passed the stage of ‘evoking[67]’ the existence of a distinct and distinctive group of rules that govern—or might govern—international petroleum transactions and relationships, alongside applicable national and international law’. Lex Petrolea exists.

[66] See Terence Daintith ‘Against ‘lex petrolea’’ Journal of World Energy Law and Business, 2017, 10, 1–13 Advance Access Publication Date: 4 January 2017
[67] Daintith wrote ‘…the concept of ‘lex petrolea’ to evoke the existence of…’

### 3.3 The jurisgenerative[68] capacity of Lex Petrolea

The importance of the role of investment arbitration law is widely accepted 'as a mechanism of global governance with the potential to accommodate the rights and interests of investors, States, as well as of civil society.'[69] It is also widely accepted that the investment regime is fragmented and in need of internal and external reforms,[70] whether the treaties themselves require reforms or the resolution of the ongoing debate of questioning the legitimacy of the arbitrators' role and opinions[71].

It is important to remember that this is a branch of international law that has only grown over the last 50 plus years, so there is no wonder it is currently experiencing foundational shifts until it is fully established. This mirrors the growth of Lex Petrolea and what this thesis is advancing in relation to Lex Renewables. As to whether investment arbitration law will be established in uniformity of standards and norms and in having its own 'jurisprudence constante'[72] or not, no one has the ability to ascertain this at this stage. Yet there are signs on the wall as to where these foundational shifts are heading, as I will explain shortly.

It is known that investors are often struck by the absence of a 'predictable jurisprudence, which, as we discussed before, results from 'the nature of arbitration as a one-off dispute settlement process without institutional mechanisms that can ensure consistency'.[73]

At the heart of the appeal of Lex Petrolea is its 'jurisgenerative' nature and impact in advancing the whole of oil and gas adjudication. This is the core issue of this thesis is the desire to emulate the jurisgenerativity's development of Lex Petrolea for Lex Renewables.

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[68] Note that the use of the term 'jurisgenerative' is widely attributed by many academics to Robert Cover due to his seminal article on nomos and narratives. See Robert M Cover, 'Foreword: Nomos and Narrative' The Supreme Court Term 1982 (1983) 97 Harv L Rev 4 Pages 4–68.

[69] See James Crawford Whewell Professor of International Law University of Cambridge Page vii in the Foreword of Stephen W. Schill 'International Investment Law and Comparative Public Law' Oxford (2010)

[70] See Giovanni Zarra "The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?' Published by Oxford University Press 7 April 2018 last accessed on 7 December 2021 at https://doi.org/10.1093/chinesejil/jmy005 Chinese Journal of International Law, Volume 17, Issue 1, March 2018, Pages 137–185

[71] See Malcolm Langford and Daniel Behn "Managing Backlash: The Evolving Investment Treaty Arbitrator?' The European Journal of International Law Vol. 29 no. 2 EJIL (2018), Vol. 29 No. 2, 551–580 last accessed on 28 November 2021 at https://doi:10.1093/ejil/chy030

[72] See Andrea K Bjorklund 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' UC Davis Legal Studies Research Paper No. 158 17 Pages Posted: 24 Dec 2008 Last Accessed on 6 December 2021 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319834

[73] See Stephen W. Schill Chapter 1 page 7 'International Investment Law And Comparative Public Law' An Introduction.' in International Investment Law and Comparative Public Law' Oxford (2010)

Accordingly, we will briefly discuss in this section within the context of investment arbitration key terms (as in jurisgenerative and jurisprudence); concepts of treaty interpretation, customs as well as the absence of the doctrine of precedent (Stare Decisis) in international law without hindering neither the progress of jurisgenerativity nor the reliance of tribunals in consulting prior decisions.

We will conclude with a final thought as to what we could potentially expect moving forward. To that end, a discussion on how this is advanced is below.

### 3.3.1 The terms jurisgenerative, jurisprudence and jurisprudence constante

#### 3.3.1.1 Jurisgenerative[74]

Any legal academic scholarship would not be able to reference the term 'jurisgenerative' without referencing the work of Robert Cover, the imminent Yale Law School professor and his work on 'norm-generating communities' as it complements the New Haven School of International Law's focus on law 'as a social process of authoritative decision-making.[75]

In his seminal work on 'Nomos and Narratives', Cover wrote[76]:

> "…Just as the meaning of law is determined by our interpretive commitments, so also can many of our actions be understood only in relation to a norm. Legal precepts and principles are not only demands made upon us by society, the people, the sovereign, or God…
>
> A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos - narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behaviour…

[74] Note that "The term 'jurisgenesis" has begun to be used as a general, and more academic-sounding, synonym for law making." See Page 1626 in in Franklin G. Snyder 'Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law' William & Mary Law Review Volume 40 (1998-1999) Issue 5 Article 6 published 5-1-1999 referencing Bruce Ackerman, Liberating Abstraction, 59 U. Cm. L. REV. 317, 333 (1992) (describing "the Founding, Reconstruction, and New Deal" as "great jurisgenerative periods")."

[75] See Larry Catá Backer 'Robert Cover and International Law--Narrative Nudges and Nomadic Nomos' Prepared for the Conference, The Life and Work of Robert M. Cover, Touro Law Center, 4-5 October 2021 accessed at https://lcbackerblog.blogspot.com/2021/10/robert-m-cover-and-international-law.html

[76] See Pages 7-9 and Pages 15-16 in Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97 Harv L Rev 4

> Thus, it is that the very act of constituting tight communities about common ritual **and law is jurisgenerative by a process of juridical mitosis**. New law is constantly created through the sectarian separation of communities…We unleash upon the fertile but weakly organized jurisgenerative cells an organizing principle itself incapable of producing the normative meaning that is life and growth."

Seyla Benhabib[77] elaborated on this power of jurisgenerativity using Cover's writing - even though it was within international human rights and politics contexts, it remains relevant here:

> "By "jurisgenerativity," a term originally suggested by Robert Cover, I understand the law's capacity to create a normative universe of meaning which can often escape the "provenance of formal lawmaking." "The uncontrolled character of meaning exercises a destabilizing influence upon power," writes Cover. "Precepts must 'have meaning,' but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal law making. Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion." Laws acquire meaning in that they are interpreted within the context of significations which they themselves cannot control. There can be no rules without interpretation; rules can only be followed insofar as they are interpreted; but there are also no rules which can control the varieties of interpretation each rule can be subject to within all different hermeneutical contexts. It is in the nature of rules in general and law in particular that the horizon of interpretation transcends the fixity of meaning. Law's normativity does not consist in its grounds of formal validity, that is, in its legality alone, though this is crucial. Law can also structure an extra-legal normative universe by developing new vocabularies for public claim-making, by encouraging new forms of subjectivity to engage with the public sphere, and by interjecting existing relations of power with anticipations of justice to come. Law anticipates forms of justice in the future to come. Law is not simply an instrument of domination and a method of coercion."

I also agree with Backer's assertion that 'Cover served as a vindication of the perception--unavoidable among international lawyers --that law was neither fixed (excepted as a function

[77] See Seyla Benhabib: Dignity in Adversity: Human Rights in Troubled Times, Cambridge 2011 at Page 125

of the narratives within which it was embedded) nor aligned with and expressed through states[78].'

Snyder's analysis of Cover's work on jurisgenerativity confirms that 'the jurisgenerative process is recursive' in so far that:

> 'The norms created by nomic groups influence legislators to enact certain norms in the form of statutes. The norms and the statutes together influence judges to reach certain decisions. The judicial decisions and the statutes, in turn, influence the norms of the nomic groups. This continues in an endless loop, driven by the perceived need to bring coherence out of dissonant materials.[79]

Snyder's aptly quoted James Gardner explaining the diverse chaotic loop:

> "The process whereby various groups within society generate interpretations of the law-what Cover called the "jurisgenerative" process-does not take place in some kind of pristine setting independent of actual judicial interpretations. Rather, judicial interpretations help constitute the conditions under which jurisgenesis takes place, and in fact occupy a special role in constituting these conditions precisely because society understands judicial power to be legitimate and authoritative. To oversimplify somewhat, members of society are predisposed (though never required, of course) to say: "If the court ruled that we hold such-and-such values, then, by golly, we must hold them." Indeed, for an authoritative institution like a court to make such a ruling is part of what it means for a society to hold certain values."[80]

The above goes to the heart of the interaction amongst the different stakeholders in investment arbitration in Lex Petrolea which yield the jurisgenerative power of the investment arbitration award decisions.

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[78] See Larry Catá Backer , supra footnote 75

[79] See Page 1720 in Franklin G. Snyder 'Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law' William & Mary Law Review Volume 40 (1998-1999) Issue 5 Article 6 published 5-1-1999
See also Amy J. Cohen 'Thinking with Culture in Law and Development' 511-586 Vol 57 – 2009 Cohen referenced Cover's jurisgenerativity to mean that: "We therefore need law-in its "world-maintaining" form 'not to create, but rather to work upon, regulate, and channel plural sites of legal meaning into an organized and disciplined form of social order. Thus, "the sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms. ' Norms, in this mode, "are universal and enforced by institutions. They need not be taught at all, as long as they are effective." Page 582

[80] See James A. Gardner, What Is a State Constitution? 24 RUTGERs L.J. 1025, 1041
(1993) in Page 1716 in Franklin G. Snyder 'Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law' William & Mary Law Review Volume 40 (1998-1999) Issue 5 Article 6 published 5-1-1999

### 3.3.1.2 Jurisprudence[81]

Jurisprudence is known to be 'wisdom about law[82]' It can mean to refer to both 'the philosophy of law' and 'the doctrinal thinking of the higher courts in any legal system'[83] In this thesis it is used to primarily refer to a mix of both philosophy and doctrinal thinking given the subject matter of the thesis involving a topic of public good such as renewables.

Jerome Hall's writing on jurisprudence resonates to the wavelength of the discussion in this thesis in its reference to jurisprudence as '…the play of the speculative mind on law and legal problems.'… that it '…provides a record of the ways in which the most profound men grappled with these difficulties. In doing that, it comprises a body of knowledge and a methodology by use of which we can better solve our problems. Thus; the challenge of jurisprudence, stated from another viewpoint, is a challenge to acquire that kind of knowledge.'[84]

In 1985, E. Donald Elliott wrote that 'Law is a scavenger'[85] This is a factual statement all lawyers and practitioners would endorse with no hesitation. Elliott explained that the law 'grows by feeding on ideas from outside, not by inventing new ones of its own.' He asserted then that the topic of 'How borrowed ideas-not political and social theories, but abstract ideas borrowed from other disciplines-affect the law is a topic scholars have overlooked.' He wrote his article then to fill that void 'bringing to light the evolutionary tradition in Anglo-American jurisprudence, which underlies many of our assumptions about law.' He confirmed that: 'the idea that law "evolves" is so deeply ingrained in Anglo-American legal thought that most lawyers are no longer even conscious of it as a metaphor 'adding that 'We speak of the law

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[81] Jurisprudence was born in Greece and its father is Socrates (See Jerome Hall 'The Challenge of Jurisprudence: To Build a Science and Philosophy of Law) 37 A.B.A. J. 23 1951
P. H. Richards & L. B. Curzon Longman Dictionary of Law 8th Edition defines 'Jurisprudence' as "The philosophy of law. 'Recorded thinking about the source, nature, end and efficiency of law, substantive and adjective, and of legal institutions': Reuschlein (1951)" Page 261 published by Pearson 2011

[82]See John Gardner 'Why study jurisprudence?' Page 1 - self-e-published at https://johngardnerathome.info/pdfs/whystudyjurisprudence.pdf Date unknown. John Gardner died suddenly in 2019

[83]See John Gardner, Professor of Jurisprudence, University of Oxford 'Law and Philosophy' Page 23 Last accessed on 8 December 2020 at http://users.ox.ac.uk/~lawf0081 The definitive version of the paper is published in Simon Halliday (ed), An Introduction to the Study of Law (Edinburgh: W Green 2012), 16-31 © Thomson Reuters Professional UK Limited 2012

[84] See Jerome Hall 'The Challenge of Jurisprudence: To Build a Science and Philosophy of Law) 37 A.B.A. J. 23 1951

[85] See Elliott, E. Donald, "The Evolutionary Tradition in Jurisprudence" (1985). Faculty Scholarship Series. Paper 2194. Page 1 last accessed on 8 December 201 at http://digitalcommons.law.yale.edu/fss_papers/2194

"adapting" to its social, cultural, and technological environment without the slightest awareness of the jurisprudential tradition we are invoking.'

Elliott favoured conscious awareness of the jurisprudential tradition for two purposes:

(a) 'archival' purpose 'to reclaim from obscurity and to evaluate several evolutionary theories of law which have either been forgotten or misunderstood'; and
(b) to 'define-and thereby to create-an **evolutionary tradition in jurisprudence with a cumulative power that transcends the individual works.**[86]'

Walter Probert wrote that the 'Notions of what it means to be a good lawyer vary, but any person's views on the matter are intimately tied to his implicit **jurisprudence**[87]**.**' Using M S McDougal[88]'s New Haven approach, Probert adds:

> "More generally, since a pronouncement or analysis of law is almost inherently ambiguous as to its moral implications when cast in the positivistic vein, the lawyer who wishes to communicate with full candour the weight and relevance of his opinions to his client needs to do at least some articulate jurisprudence in the counselling process..."

In the early twentieth century, Sir Paul Vinogradoff [89] admired Professor Eugen Ehrlich's book, 'Elements of the Sociology of Law'. He aptly wrote:

> " Another interesting symptom of **the fermentation in the domain of jurisprudenc**e is presented by Professor Eugen Ehrlich's book…the writer seeks to show that the law administered by the courts of justice is only a small part, and the most external part, of the juridical process. The real roots of law rest in the soil of everyday intercourse, of social custom, and the greater the technical severance of legal rules from this broad

[86] Note: E. Donald Elliott is a leading academic expert on improving the relationship between law and science, specializing in environmental law and chemical regulation. He is currently Adjunct Professor of Law, Yale Law School and Georgetown University Law Center, where he teaches a course comparing chemical regulation in the U.S. and E.U. He has been on the Yale Law School faculty since 1981.
[87] See Walter Probert "The Jurisprudence of a Good Lawyer" The Journal of the Legal Profession pp 37-46 2 J. Legal Prof. 37 (1977)
[88] See Ibid Page 40 Footnote 6 referencing McDougal, Law as a Process of Decision, 1 NAT. L.F. 53, 59-60 (1956)
[89] See Sir Paul Vinogradoff Chapter VIII 'Modern Tendencies in Jurisprudence' in 'Introduction to Historical Jurisprudence' Originally published by Oxford University Press in 1920 republished by Batoche Books Kitchener in 2002 – Page 126
And also See Paul Vinogradoff 'The Crisis of Modern Jurisprudence' The Yale Law Journal, Jan., 1920, Vol. 29, No. 3 (Jan., 1920), pp. 312-320 last accessed on 8 December 2021 http://www.jstor.com/stable/787166

> social basis, the worse for society at large. All the misunderstandings, the encroachments, the pedantries of modern legal systems may be traced to this source…"

The above words remain valid in the twenty-first century and strongly support the importance of the development of Lex Renewables that is advanced in this thesis. Lex Petrolea or Lex Renewables jurisprudence consider the specific traits for each sector that comprises all aspects not only law.

#### 3.3.1.3 Jurisprudence constante

We are adopting the definition of 'jurisprudence constante' as a 'persisting jurisprudence' that secures 'unification and stability of judicial activity.'[90] However, before we proceed in this section, it is important to address the contrast between the doctrines of 'Stare Decisis' and 'Jurisprudence Constante'. Given that investment arbitration is global with mixed jurisdictions of civil and common, the difference between these doctrines goes to the heart of the development of jurisprudence and the jurisgenerativity of the awards in investment arbitration. Robert Henry wrote[91]:

> "…the doctrines of Jurisprudence Constante in the Civil Law and of Stare Decisis in the Common Law look much alike, but the difference between them is such that it is one of the chief thing's which distinguishes the two great systems of the law. It is intimately connected both as to cause and effect with the differences in spirit and in technique; and in large measure accounts for the differences in simplicity and certainty in the law, and of flexibility in its application. The Civil Law begins with the principle that precedents are not binding. Then it makes exceptions where the matter is jurisprudence constante. Obviously, if the exceptions were very numerous, the situation would approximate that in which the Common Law finds itself under the rule of stare decisis"

He goes on and provides an apt gardening analogy of the nature of each doctrine. He wrote:

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[90] See M Troper and C Grzegorczyk, Precedent in France, in Interpreting Precedents, DN MacCormick & RS Summers (eds), (Ashgate/Dartmouth, 1997) 103, 137 as referenced in page 265 in Andrea K Bjorklund https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319834

[91] See Robert L. Henry 'Jurisprudence Constante and Stare Decisis Contrasted' published by the American Bar Association Journal, January, 1929, Vol. 15, No. 1 (JANUARY, 1929), pp. 11-13 Page 11 Last accessed 8 December 2021 at https://www.jstor.org/stable/25707546

> "The Civil Law may be likened to a tree in winter. The trunk, limbs, and branches are the principles laid down in the codes. Some twigs are added by the doctrine of jurisprudence constante. The Common Law is like a tree in summer. The leaves represent the cases. They are so numerous and confused in pattern that no branches or limbs of any kind can be seen, or traced with certainty…"[92]

Henry predicted that while 'the divergence in attitude as to precedents between the Civil Law and the Common is still great'[93], it will substantially be less with time and may well be destined to disappear in favour of the direction of civil law. He claimed that 'the Civil Law attitude appears the saner, and produces better results.' Proving as to whether this is the case now after almost 100 years of his prediction, is outside the scope of this thesis. However, it may well be in favour of the Lex Renewables development. This has been proven by the Tribunal in one of the key cases in investment arbitration El Paso Energy International Co. v. Argentine Republic[94] as cited by J. Commission[95],

> "…the tribunal in … El Paso (Caflisch, Stern, Bernardini), went so far as to positively affirm the rather established finding that it knew of "no provision, either in the [sic] Convention or in the BIT, establishing an obligation of stare decisis." It is not alone in stating as much, as in the last five years, at least seven other ICSID tribunals have repeated similar refrains despite the obvious and well-known lack of a binding rule of stare decisis in international law. While tribunals are absolutely correct that there exists no obligation of stare decisis in the context of investment treaty arbitration, prior decisions and awards cannot now be reasonably described as only a subsidiary source of international law, **as they have "attained a very influential position … that is highly reminiscent of stare decisis in Common Law Legal systems." Or, borrowing from the civil law tradition, as put recently by one commentator, "[g]radually one may expect the institution of a jurisprudence constante, and the emergence of key**

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[92] See Robert L. Henry 'Jurisprudence Constante and Stare Decisis Contrasted' published by the American Bar Association Journal, January 1929, Vol. 15, No. 1 (JANUARY, 1929), pp. 11-13 Page 13
Last accessed 8 December 2021 at https://www.jstor.org/stable/25707546

[93] See ibid Page 12

[94] See ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006, available at El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15 | italaw https://www.italaw.com/cases/382

[95] See Jeffery P Commission 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' Journal of International Arbitration 24(2): 129–158, 2007. Kluwer Law International. Printed in The Netherlands. Page 132

**decisions that are judged to be the influential starting points from which further analysis should flow."…'**

In 2007, Bjorklund examined 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' in depth. She unequivocally concluded that the investment arbitration decisions are key and essential for the modern investment law and that arbitral decisions are posited for reliance on jurisprudence contante as a starting point in the future. She concluded that:

> "… The decisions of investment treaty arbitral tribunals are proving to be essential in establishing the modern international law of investment. Given the paucity of detail in the international investment treaties to which states have adhered, it is inevitable that the meaning and contours of the legal standards in those treaties will be defined and clarified in arbitral decisions. **The actual compilation of a generally accepted set of standards will be an accretive process developed little by little as tribunals make decisions in individual cases, and as those decisions are tested by other tribunals, by publicists and international organizations, and by the states themselves. Gradually one may expect the institution of a jurisprudence constante, and the emergence of key decisions that are judged to be the influential starting points from which further analysis should flow**."

In 2013, indeed further research flowed from the imminent Todd Weiler [96] in his book 'The Interpretation of International Investment Law' primarily focused on highlighting 'the value of historical analysis in the interpretation of international investment law, however, cautioning against a jurisprudence constante emerging on the basis of an entirely incorrect premise. He concluded that:

> "…Historical analysis has an important role to play in treaty interpretation. IIL practitioners should always take care to consider whether the contemporaneity principle[97] has a role to play in their arguments and deliberations and must therefore take heed of the edifying role for historical analysis in any such consideration.

[96] See Todd Weiler 'The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context - (International litigation in practice; volume 6) Leiden • Boston Published by Martinus Nijhof 2013

[97] Treaty Interpretation will be discussed later in this chapter. However, it is worthy to explain what Weiler mean by 'The Contemporaneity Principle' He wrote: "The contemporaneity principle is not only about ensuring that historical rules are interpreted in historical context, however. It is also about taking account of certain circumstances at the time of application, namely whether some other feature of contemporary international law impacts upon the obligations carefully extracted from their proper historical context." See Todd Weiler Page 42 Chapter 2

> Thoughtful consideration of the contemporaneity principle in should have a salutary impact upon the ongoing development of the de facto jurisprudence constante of IIL.[98]

There is no prevailing right or wrong as to Todd Weiler's cautionary statement. It will be mainly led by time and nature of the disputes.

### 3.3.2 The absence of Precedent (Stare Decisis) – Is it truly absent?

In 2007-2008, I had the privilege of working with Matthew Weiniger at Herbert Smith Freehills (It was only Herbert Smith then) in the International Arbitration and Dispute Resolution practice whereby I had access to a draft research paper he was drafting with Christop Scheuer on the 'Doctrine of Precedent' questioning as to whether it exists in investment arbitration. Their paper was later published in Transnational Dispute Resolution[99] It examined with evidence of the practice of the investment treaty arbitration tribunals in relying on precedent with direct quotations from the said awards. At the time the paper was written in 2007, there were at least 20 plus key arbitral awards presented in this key paper which set the scene for other similar work to follow.

In the first section of their paper, Scheuer and Weinger quoted the titan Jan Paulsson[100]:

> "…the role of precedent in international law is a matter of considerable delicacy. Just as jealous sovereign States that are averse to any suggestion that compacts other than to which they have consented may be invoked against them, so too are they unwilling to submit to the elaboration of international law by anything resembling the accretion of binding precedent known as common law."

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[98] Todd Weiler Page 456 chapter 10

[99] See C.H. Schreuer; M. Weiniger; "Conversations Across Cases - Is there a Doctrine of Precedent in Investment Arbitration?" TDM 3 (2008), www.transnational-dispute-management.com URL: www.transnational-dispute-management.com/article.asp?key=1237

[100] J. Paulsson; "International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law" TDM 5 (2006), www.transnational-dispute-management.com URL: www.transnational-dispute-management.com/article.asp?key=883 Last accessed on 8 December 2021
Paulson in the introduction raised the question of: 'What is the status of awards rendered by ephemeral arbitral tribunals deciding claims of investors under treaties? 'He confirmed that 'Although they are not binding on subsequent tribunals, they are assuredly read by them. That they may have an influence is evidently believed by advocates whose pleadings treat them with great attention, **as precedents to be invoked, distinguished, or rejected. That scholars of international law deem awards worthy of sustained attention is equally evident, and testifies to a perception that they matter.'** This view has not changed.

Paulsson's words remain to this day to be the truth at the heart of the practice of any international investment arbitration tribunals albeit it is done with careful consideration especially in ICSID tribunals so they maintain their sovereignty whereby the awards would not be subjected to any annulments due the tribunals exceeding their powers and contravening the general principle of international law on the lack of precedence and/or irrespective, in case of litigations in front of the ICJ, of the statute of the ICJ pursuant to Article 59 'rejecting the precedent value in its decisions[101]'

This table was produced by J P Commission in his

***Table 5: Precedent in ICSID decisions and awards 1990–2001 Source J P Commission (2007)[102]***

| *Year* | *Number of decisions and awards* | *Number of citations to ICSID awards & decisions per award* | *Number of ICSID awards and decisions cited in total* | *Average number of citations to ICSID awards and decisions per award or decision* |
|---|---|---|---|---|
| 1990 | 3 | 1, 0, 0 | 1 | .33 |
| 1991 | — | — | — | — |
| 1992 | 1 | 1 | 1 | 1 |
| 1993 | 1 | 0 | 0 | 0 |
| 1994 | 1 | 5 | 5 | 5 |
| 1995 | — | — | — | — |
| 1996 | 1 | 1 | 1 | 1 |
| 1997 | 3 | 4, 0, 6 | 10 | 3.33 |
| 1998 | 2 | 0, 5 | 5 | 2.5 |
| 1999 | 6 | 5, 3, 3, 1, 2, 1 | 15 | 2.5 |
| 2000 | 12 | 3, 0, 0, 0, 0, 4, 0, 0, 2, 0, 5, 0 | 14 | 1.17 |
| 2001 | 11 | 0, 0, 0, 2, 0, 4, 4, 1, 4, 9, 2 | 28 | 2.55 |

Some of the select cases referenced in Schreuer and Weiniger remain pillar point of reference in investment arbitration on the role of precedent. For example:

### 3.3.2.1 ***Enron v Argentina***

"40. The Tribunal is of course mindful that decisions of ICSID or other arbitral tribunals are not a primary source of rules. The citations of and references to those decisions respond to the

[101] See Page 2 C.H. Schreuer; M. Weiniger; "Conversations Across Cases - Is there a Doctrine of Precedent in Investment Arbitration?" TDM 3 (2008), www.transnational-dispute-management.com URL: www.transnational-dispute-management.com/article.asp?key=1237
Article 59 of the ICJ provides that: "…the decision of the court has no binding force except in between the parties and in respect of that particular case…" Schreuer and Weinger added that this has never prevented the parties of litigation in front of the ICJ from relying on findings and dissenting opinions in previous cases.
[102] See Page 149 in J P Commission

fact that the Tribunal in examining the claim and arguments of this case under international law, believes that in essence the conclusions and reasons of those decisions are correct."[103]

In another decision in the same case as per Schreuer and Weiniger's discussions, the Tribunal confirmed its stance as follows:
"The Tribunal's Findings in Respect of Jurisdiction

25. The Tribunal agrees with the view expressed by the Argentine Republic in the hearing on jurisdiction held in respect of this dispute, to the effect that the decisions of ICSID tribunals are not binding precedents and that every case must be examined in the light of its own circumstances."[104]

#### 3.3.2.2 ***AES Corp v Argentina***

This case is often touted as the 'most detailed' tribunal decision in relation to the 'examination of the role of precedent in investment arbitration'[105]:

"The reading of some awards may lead to believe that the Tribunal has forgotten that it is acting in a sphere ruled by a lex specialis where generalizations are not usually wrong, but, what is worst, are illegitimate. Repeating decisions taken in other cases, without making the factual and legal distinctions, may constitute an excess of power and may affect the integrity of the international system for the protection of investments".

#### 3.3.2.3 ***Gas Natural v Argentina***

The Tribunal's careful choice of words in the award below serves as an example of how a tribunal remains within its powers yet clearly consulting other decisions before reaching the conclusion[106].

"Checking the Tribunal's Conclusions

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[103] See Page 17 in Enron v Argentina's tribunal decision on jurisdiction dated 14 January 2004 available at https://www.italaw.com/sites/default/files/case-documents/ita0290.pdf last accessed on 8 December 2021
[104] See Page 8 in Enron v Argentina's tribunal decision on jurisdiction on ancillary claim dated 2 August 2004 available at https://www.italaw.com/sites/default/files/case-documents/ita0291.pdf last accessed on 8 December 2021.
[105] See Schreuer & Weinger Page 5
[106] See Schreuer & Weiniger Page 8

36. The Tribunal wishes to emphasize that it has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards. Having reached its conclusions, however, the Tribunal thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules and arising out of claims under contemporary bilateral investment treaties. We summarize a few of these decisions here, and confirm that we have not found or been referred to any decisions or awards reaching a contrary conclusion"[107]

### 3.3.2.4 *LETCO v Liberia*

This is another express example of the Tribunal clarifying while they are not bound, they do consult prior decisions as it is 'instructive'.

"16.11. Though the Tribunal is not bound by the precedents established by other ICSID Tribunals, it is nonetheless instructive to consider their interpretations of what constitutes an agreement to treat a juridical person which had the nationality of the Contracting State party to the dispute as a national of another Contracting State. In the Holiday Inns case, the Tribunal indicated that… In Amco-Asia et al. v. The Republic of Indonesia…"[108]

### 3.3.2.5 *Feldman v Mexico*

This case was under NAFTA Chapter 11 in ICSID Additional Facility, the same practice of consulting prior decisions yet expressly saying the Tribunal is not bound.

**"**107. Along with the Restatement, this Tribunal has also sought guidance in the decisions of several earlier NAFTA Chapter 11 Tribunals that have interpreted Article 1110. The Tribunal realizes that under NAFTA Article 1136(1), "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case," and that each determination under Article 1110 is necessarily fact-specific. However, in view of the fact that both of the parties in this proceeding have extensively cited and relied upon some of the earlier decisions, the Tribunal believes it appropriate to discuss briefly relevant aspects

[107] See Page 23 in Gas Natural v Argentina's Decision of the Tribunal on Preliminary Questions on Jurisdiction (English) 17 June 2005 https://www.italaw.com/sites/default/files/case-documents/ita0354.pdf last accessed on 9 December 2021

[108] See LETCO v Liberia Award 31 March 1986 at https://jusmundi.com/en/document/decision/en-liberian-eastern-timber-corporation-v-republic-of-liberia-award-monday-31st-march-1986#decision_1051 last accessed on 9 December 2021.

of earlier decisions, particularly Azinian v. United Mexican States and Metalclad v. United Mexican States…"[109]

#### 3.3.2.6 Newer awards following same practice between 2009-2017[110]

The trend of the Tribunals considering prior decisions in their awards steadily continues and grows. Other newer cases are available to prove this. We will consider only two here[111]:

##### 3.3.2.6.1 *Saba Fakes v. Republic of Turkey*

"…96. The Tribunal is not bound by the decisions adopted by previous ICSID tribunals. At the same time, it believes that it should pay due regard to earlier decisions of such tribunals. The present Tribunal shares the opinion of the Tribunal in the Bayindir v. Pakistan case that, unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases that are comparable to the case at hand, subject to the specificity of the Treaty under consideration and the circumstances of the case. By doing so, it will fulfill its duty to seek to contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law…"[112]

##### 3.3.2.6.2 *Jürgen Wirtgen and others v. Czech Republic*

This is an important case as it is in the new breed of renewables cases with solar investors as claimants who brought a case against the Czech Republic under the Czech-German BIT as a result of the Czech Republic changing the Support Scheme for renewables and imposing a Solar levy, thus giving rise to breaching legitimate expectations guaranteed under the FET clause of the said BIT. The case was administered by the Permanent Court of Arbitration (PCA)

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[109] See Page 38 in Feldman v Mexico Award 16 December 2002 at https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf last accessed on 9 December 2021

[110] See Beata Gessel-Kalinowska vel Kalisz and Konrad Czech 'The Investment Treaty Arbitration Review: The Role of Precedent in Investment Treaty Arbitration' Published by the Law Reviews on 18 June 2021 at https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/the-role-of-precedent-in-investment-treaty-arbitration last accessed on 9 December 2021

[111] Other newer awards in support of the tribunal practice of consulting prior decisions are: Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 22; Austrian Airlines v. Slovak Republic, UNCITRAL, Award, 20 October 2009, para. 84; and Electrabel SA v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.15. See Beata Gessel-Kalinowska vel Kalisz and Konrad Czech *Gessel Koziorowski Spk*, 'The Law Reviews - The Investment Treaty Arbitration Review' (*Thelawreviews.co.uk*, 2021) <https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/the-role-of-precedent-in-investment-treaty-arbitration> last accessed 23 December 2021

[112] See Pages 31-32 Saba Face v Turkey Tribunal's Award 14 July 2010 https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf Last accessed on 9 December 2021

and dismissed all claims brought under the BIT in an award dated October 11, 2017. Professor Gabrielle Kaufmann-Kohler was the Presiding Arbitrator, and the titan Gary Born represented the Investors and wrote a dissenting opinion in the award.[113]

> This is one of the first awards where the Tribunal makes express reference to its role in creating 'harmonious development of investment law 'to create certainty.
>
> "181. The Tribunal is not bound by the decisions of other arbitral tribunals. At the same time, however, the Tribunal considers that it should pay due respect to such decisions. Unless there are reasons to the contrary, the Tribunal will adopt the approach established in a series of consistent cases, subject, of course, to the specifics of the Treaty and to the circumstances of the actual case. **By doing so, the Tribunal is of the view that it will act in conformity with its duty to contribute to the harmonious development of investment law and meet the legitimate expectations of the community of States and investors towards legal certainty and the rule of law**."[114]

In 2007, J P Commission[115] uncannily described the state of precedent in investment treaty arbitration to be akin to that of 'precedent in England at the time of Bracton's De Legibus[116], when there was not as yet any doctrine of binding stare decisis.' He quoted Sir Carleton Kemp Allen[117] stating that 'judges were seeking the guidance of precedent early in the thirteenth century." Commission quotes two other law greats 'In today's modern investment treaty tribunals, it is only expected that when faced with a particular legal problem, arbitrators similarly want "to know what others in similar situations have done," as "[i]t is difficult to conceive of a legal system in which precedent plays no part at all."[118]

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[113] See Mintewab Abebe, 'Solar Energy Claims Brought By German Investors Against Czechia Are Dismissed – Investment Treaty News' (*Iisd.org*, 2018) <https://www.iisd.org/itn/en/2018/04/24/solar-energy-claims-brought-by-german-investors-against-czechia-are-dismissed-mintewab-abebe/> last accessed 23 December 2021

[114] See Page 44 in Jürgen Wirtgen and others v. Czech Republic, PCA Case No. 2014-03, Final Award, 11 October 2017 at https://www.italaw.com/sites/default/files/case-documents/italaw9498.pdf last accessed on 9 December 2021

[115] See Jeffery P Commission 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' Journal of International Arbitration 24(2): 129–158, 2007. Kluwer Law International. Printed in The Netherlands. Page 158

[116] See ibid Frederick Bernays Wiener, BRACTON: A Tangled Web of Legal Mysteries that Defied Solution for More than Seven Centuries, 2 Int'l Sch. L. Rev. 129, 136 (1977–78); David J. Seipp, Bracton: The Year Books, and the Transformation of Elementary Legal Ideas in the Early Common Law, 7 Law & Hist. Rev. 175 (1989); Paul Vinogradoff, The Text of Bracton, 1 L. Q. Rev. 189 (1885).

[117] See ibid Sir Carleton Kemp Allen, Law in the Making 189 (1964)

[118] See ibid Klaus Peter Berger, The International Arbitrators' Application of Precedents, 9 J. Int'l Arb. 4, 5, 18 (1992); Michael Zander, The Law Making Process 215, 302–3 (6th ed. 2004) (citing the

Sureda [119] wrote that 'Even in a non-binding precedent system with multiple arbitral tribunals, precedents may nonetheless create expectations for the future. The multiplicity of decisions has narrowed the discretion of tribunals, both in the case of their decision in following a previous award or their decision not to follow it.' He goes on to quote the great New Haven Scholar Michael Reisman: "Precedent exercises a 'latent control function' through 'the expectation that international tribunals will follow the law, whether its origin is statutory, customary or judicial'.[120]

### 3.3.3 Treaty Interpretation's Importance in Investment Law

It is an accepted fact that international investment disputes are about discords between investors and sovereign states and/or amongst states primarily concerning 'the validity and interpretation of international agreements, and the practical content of state relations is embodied in agreements' e.g. the United Nations, has 'its legal basis in multilateral agreements.'[121]

The International Law Commission, as an international organization, has its focus on the law of treaties. In 1966, the Commission 'adopted a set of 75 draft articles, forming the basis for the Vienna Conference which in two sessions (1968 and 1969) completed work on the Vienna Convention on the Law of Treaties, consisting of 85 articles and an Annex which entered into force on 27 January 1980' and its provisions are regarded as primary sources of law.[122] Some of its articles are considered a codification of existing customary law on certain treaty disputes e.g. 'Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.'[123]

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Legal Process developed by Henry Hart and Albert M. Sacks, which catalogued the values of the common law system of precedent into the following categories: (i) "in furtherance of private ordering"; (ii) "in furtherance of fair and efficient adjudication"; and (iii) "in furtherance of public confidence in the judiciary."

[119] See Chapter 7 'Precedent' pp -131 in Andrés Rigo Sureda 'Investment Treaty Arbitration Judging under Uncertainty' Book DOI: http://dx.doi.org/10.1017/CBO9781139136792 Online ISBN: 9781139136792 Published by Cambridge University Press Last accessed in 2013.

[120] See Sureda, ibid, Chapter 7 Page 109 W.M. Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication' Recueil des coursl 258 (1996) 9,32

[121] See Page 607 Chapter 27 'The Law of Treaties' in in Ian Brownlie, CBE, QC 'Principles of Public International Law' Seventh Edition published by Oxford University Press 2008

[122] See ibid pp 607-608 and the Analytical Guide to the Work of the International Law Commission https://legal.un.org/ilc/sessions/18/ last accessed 11 December 2021.

[123] See ibid page 625

Before any discussion on treaty interpretation and investment law proceeds, a brief mention of sources of international law and what is binding and/or nonbinding ought to precede it for context because sources of international law and the law of treaties[124] 'must be regarded as fundamental: between them they provide the basic particles of the legal regime.'[125]

### 3.3.3.1 Sources of International Law

The International Court of Justice (ICJ[126]) is the principal legal organ of the United Nations (Article 1 of the ICJ Statute.) It was established by the United Nations Charter, which was signed in 1945 in San Francisco (United States), and began work in 1946 in the Peace Palace, The Hague (Netherlands). The Court, which is composed of 15 judges, has a twofold role: (a) settling legal disputes in accordance with international law between States submitted to it by them; and (b) providing advisory opinions on legal matters referred to it by duly authorized United Nations organs and specialized agencies. Only States are eligible to appear before the Court in contentious cases. The Court has no jurisdiction to deal with applications from individuals, non-governmental organizations, corporations or any other private entity. It cannot provide them with legal advice or help them in their dealings with national authorities. However, a State may take up the case of one of its nationals and invoke against another State the wrongs which its national claims to have suffered at the hands of the latter; the dispute then becomes one between States[127].

Under Article 93 of the UN Charter, all UN member states are by default parties to the ICJ Statute, but they are not required to submit any case to it except in cases where they have consented or promised to do so. The ICJ only has jurisdiction to decide cases that states consent to submit to it for decision. That consent can take the form of binding treaties or declarations of varying scope[128].

Article 38.1 of the Statute of the International Court of Justice, describes the law to be applied by the ICJ when deciding cases within its jurisdiction. This article is generally accepted as the

[124] See ibid page 4 'Law of treaties concerns the question of the content of obligations between individual states: the incidence of obligations resulting from express agreement.'
[125] See ibid page 3
[126] See 'Home | International Court of Justice' (*Icj-cij.org*) <https://www.icj-cij.org/en> last accessed 10 December 2021
[127] See Frequently Asked Questions, 'Home | International Court of Justice' (*Icj-cij.org*), Ibid.
[128] Law school course documents (date unknown)

highest authority in relation to the sources of International Law or as Brownlie, QC wrote 'a complete statement of the sources of international law'[129]. The provisions of Article 38. 1. state:

> **"Article 38**
>
> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."[130]

Brownlie, QC explained that the decision of the Court has no binding force except between the parties and in respect of that particular case. He added that these provisions of Article 38.1, are expressed in terms of 'the function of the Court, but they represent the previous practice of arbitral tribunals', and that the provisions are not stated to represent a hierarchy[131].

#### 3.3.3.2 Custom in investment law

It is accepted that customary international law continues to govern gaps of areas of law that are not stipulated under treaty law. According to Alvarez, it has been argued by key arbitrators and adjudicators such as Andreas Lowenfeld, along with others such as former ICJ Judge Stephen Schwebel 'that the investment treaty regime is affecting general public international law such that, for example, even states that are not parties to the 3000 or so (mostly bilateral) investment treaties may now be subject to some of the international investment rules emerging in that regime'.[132] Alvarez asserted that he is in agreement with Lowenfeld's stand that investment

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[129] See Page 5 Chapter 1 'Sources of the law' in Ian Brownlie, CBE, QC 'Principles of Public International Law' Seventh Edition published by Oxford University Press 2008.

[130] See 'Statute Of The Court | International Court Of Justice' (*Icj-cij.org*) <https://www.icj-cij.org/en/statute> last accessed 10 December 2021

[131] See Page 5 Chapter 1 'Sources of the law' in Ian Brownlie, CBE, QC 'Principles of Public International Law' Seventh Edition published by Oxford University Press 2008

[132] See Jose E. Alvarez 'A Bit on Custom' 42 N.Y.U. J. Int'l L. & Pol. 17 2009-2010 **citing** Andreas F. Lowenfeld, Investment Agreements and International Law, 42 COLUM. J. TRANSNAT'L L. 123 (2003); Stephen M.

treaties are connected to customary international law and general principles of law. As to custom[133], in general, rules of customary international law, i.e. customs defining obligations of each state to other state and their own citizens, are binding on all States[134]. Perreau-Saussine and Murphy rightly confirmed that 'Nowhere are customary rules of law more prominent than in international law.'[135] The two necessary elements to form custom is (a) state practice and (b) opinio juris. This two-element approach has been adopted by international tribunals to draw conclusions on the existence of customary rules[136]. These two elements both have great uncertainty in international law and have been challenged with non-endless debates[137]. They

Schwebel, The Influence of Bilateral Investment Treaties on Customary International Law, 98 Am. Soc'v INT'L L. 27 (2004).

[133] For a practice to be recognised as customary law it must be (a) reasonable in nature; and (b) have been followed continuously akin to a right, since the beginning of legal memory. It is documented that legal memory began in 1189. Scholars debate that a proof that a practice has been followed within living memory raises a presumption that it began before that date. See footnote 20 in Duxbury, Neil (2017) Custom as law in English law. Cambridge Law Journal "Under the Prescription Act 1832, s. 2, evidence of 20 years' continuous and uninterrupted enjoyment of an easement establishes a strong presumption that, at some time earlier, there was a (now lost) grant of the easement to the dominant neighbouring estate and that the holder of that estate enjoys the easement as a prescriptively acquired right. The presumption is practically unassailable because it can only be rebutted by proof that the grant could not have been made in the time before the prescription period but after the year 1189 (about which more later). In any event, once user has run for 40 years, the prescriptively acquired right becomes absolute." See Joseph Raz, "Legal Principles and the Limits of Law" (1972) 81 Yale L.J. 823, at 852-3; Also Grant Lamond, "Legal Sources, the Rule of Recognition, and Customary Law" (2014) 59 American Journal of Jurisprudence 25 – I agree with Lamond's analysis in relation to Hart's rule of recognition. He wrote: "…according to Hart, the sources of law are accepted as binding by the officials of a legal system, and this collective social practice of officials provides the foundations for a legal system. According to Hart, the rule of recognition differs fundamentally from other legal rules in three ways: (1) the grounds on which it is accepted; (2) the basis for its system-membership; and (3) its mode of existence.' Lamond argued that (1) should be rejected, and that (2) and (3) do not in fact make the rule of recognition fundamentally different to other legal rules in the way that Hart supposed. Instead, the rule of recognition is a form of customary law in for whose existence is practice-dependent, but which is nonetheless just as much a law of the system as other laws are. The rule of recognition provides a foundation for source-based law, but one that is internal to the system"

[134] ''Custom is not a special department or area of public international law: it is international law.'' Wrote I. Brownlie in The Rule of Law in International Affairs (The Hague: Martinus Nijhoff, 1998), 18. 2 and as cited by Gerald J. Postema in Chapter 12 'Custom in international law: a normative practice account' pp 279-306 in 'The Nature of Customary Law: Legal, Historical and Philosophical Perspectives' Edited by Amanda Perreau-Saussine, James B. Murphy Book DOI: http://dx.doi.org/10.1017/CBO9780511493744 Published by the University of Cambridge Press in 2007

[135] See front Amanda Perreau-Saussine and James B. Murphy 'The Nature of Customary Law: Legal, Historical and Philosophical Perspectives' Book DOI: http://dx.doi.org/10.1017/CBO9780511493744 Published by the University of Cambridge Press in 2007 and See also Murphy, Sean D., 'The Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission' American Journal of International Law (2015-16) Last accessed on 11 December 2021 at https://scholarship.law.gwu.edu/faculty_publications

[136] See Patrick Dumberry 'The Formation and Identification of Rules of Customary International Law in International Investment Law" Chapter 1 Published online by Cambridge University Press: 05 May 2016. Dumberry explores in detail with evidence the traditional and modern approaches of the double requirements of proving customary rules and examines the position that States have adopted in their pleadings and treaties regarding the necessity to demonstrate these two requirements. He also analyses the role played by judges and courts, including arbitral tribunals, in the formation and identification of customary rules in both general international law and investment arbitration (all in the Chapter 1) See also Patrick Dumberry "A Guide to State Succession in International Investment" Published by Edward Elgar Publishing Limited, UK 2018.

[137] See J. Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law

'gradually develop over time based on the uniform and consistent practice of a large number of representative States, which have the conviction (or the belief) that such practice is required by law (opinio juris).'[138] Dumberry rightly states that 'the basic reasons for the remaining importance of custom have been identified by the Iran–US Claims Tribunal in the Amoco case'. The Tribunal issued award text stated:

> 'B. The Legal Characterization of the Facts
>
> 4. Lawfulness or Unlawfulness of the Expropriation
>
> a) The Applicable Law
>
> [...]
>
> (ii) Customary International Law
>
> 112. As a lex specialis in the relations between the two countries, the Treaty supersedes the lex generalis, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. **On the contrary, the rules of customary law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions**.'[139]

Dumberry has the same view as Alvarez; he added that one of the key reasons for the continuing importance of custom in today's investment arbitration is due to the fact that these rules represent the applicable legal regime of protection in the absence of any BIT. He cautions too to another fact that 'the numerous BITs have become, they still do not cover the whole spectrum of possible bilateral treaty relationships between States which necessarily results in gaps in the legal protection of foreign investments.' He went further to expressly state that 'custom is no panacea in the field of international investment law' highlighting that:

> 'the existence of a few rules of custom cannot solve all problems facing foreign investors. In particular, custom does not provide them access to international arbitration. The host State must consent to arbitration. Individuals and corporations lack any automatic jus standi before international tribunals in the absence of specific State

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and Some of Its Problems', (2004) 15(3) EJIL 529 and See also Jean d'Aspremont 'International Customary Investment Law Story of a Paradox' Chapter 1 in Tarcisio Gazzini, Eric De Brabandere 'International Investment Law: The Sources of Rights and Obligations' Leiden; Boston: M. Nijhoff Publishers Date: 2012

[138] See Patrick Dumberry 'The Formation and Identification of Rules of Customary International Law in International Investment Law" Published online by Cambridge University Press: 05 May 2016

[139] See 'Iran-US Claims Tribunal, Amoco Int'L Finance Corp. V. Iran, 15 IRAN-U.S. C.T.R., At 189 Et Seq.' (*Translex.uni-koeln.de*) <http://translex.uni-koeln.de/231900/_/iran-us-claims-tribunal-amoco-int-l-finance-corp-v-iran-15-iran-us-ctr-at-189-et-seq/> last accessed 11 December 2021

consent. No customary rule has emerged that provides investors with a procedural 'right' to bring arbitration claims against the State where they make their investments.[140]

#### 3.3.3.3 Treaties interpretation in investment law

So, how in practice do the tribunals interpret treaties? Evidently, there is no one size fits all prescribed approach. It appears that each Tribunal may well refer to Articles 31 and 32 of the Vienna Convention on the Law of Treaties as a framework for a starting point for interpretation to lend it legitimacy, but the reality is different. Sureda explained that 'Arbitral tribunals rarely justify their interpretative approach, instead, they start their task of interpreting investment treaties by referring to Articles 31 and 32 of the Vienna Convention on the Law of Treaties[141] either because it is a treaty binding upon the host State and the State of which the investor is a national, or else because it is considered a manifestation of customary law as the ICJ has repeatedly recognized[142].' Sureda clarified that the 'reference to these articles does not necessarily illuminate the approach to interpretation chosen by the Tribunal and that Articles 31 and 32 of the Vienna Convention are themselves a compromise among different approaches'[143]

By way of example, Sureda cited Aguas del Tunari v. Bolivia[144] , where the Tribunal has described the interpretation under Article 31 of the Vienna Convention as follows:

> "… 'a process of progressive encirclement where the interpreter starts with (1) the ordinary meaning of terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three-step inquiry iteratively closes in upon the proper interpretation'"[145]

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[140] See Patrick Dumberry Chapter 5 pp 351-405 'The fundamental importance of customary rules in international investment law' in 'The Formation and Identification of Rules of Customary International Law in International Investment Law" Published online by Cambridge University Press: 05 May 2016

[141] See Vienna Convention on the Law of Treaties, Vienna, in force 27 January 1980, 1155 UNTS 331. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331. Accessible at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf last accessed

[142] See Page 20 Chapter 2 'Treaty Interpretation' pp -20-40 in Sureda, supra footnote 120.

[143] See ibid Page 21

[144] See Aguas del Tunari SA v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 91, available at: http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng 000.pdf

[145] See Sureda, supra footnote 120, at footnote 146 Page 22

Sureda explained that the Convention 'does not guide adjudicators when to choose a broad or narrow interpretation, when to choose between legal form and economic reality, or how to determine when an interpretation is 'balanced'. It merely provides a useful springboard for a tribunal to start the search for meaning '[146] He provided an evidentiary discussion from tribunals decisions reflecting the issues at competing balance and to consider when interpreting treaty provisions:

1. Clarity and common sense[147] (the differing positions of the tribunals in the Berschader[148] and Renta[149] cases where one Tribunal considered Belgian Ministers opinion valuable to gain clarity and the other considered it irrelevant);
2. Balance between purposes (the Tribunal in Saluka v. Czech Republic[150] sought to balance the two main purposes of the Treaty, and considered the effect of excessive protection on the promotion of investments);
3. Balance between purpose and text (the Tribunal in RosInvestCo[151] reasoned their decision on their power to determine whether the issue is 'consequential upon an act of Expropriation' and balanced it with their rejection of words that would have turned the jurisdictional clause into an arbitration one);
4. The interpretation of silence: the MFN clause controversy (The Tribunal in the NAFTA Methanex[152] case allowed the submission of amicus curiae brief by an NGO even though both NAFTA and UNCITRAL rules were both silent on the matter);
5. Interpretation of umbrella clauses (Sureda limited his reference here to the umbrella clauses in the UK BITs whereby four conditions are met: 'Each Contracting Party shall

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[146] See ibid

[147] See ibid Page 24 Sureda used the definition of Common Sense by N. MacCormick,
Legal Reasoning and Legal Theory (Oxford: Clarendon Press, 1978), 149. '"Common sense" has a dual role to play, as implying the sort of rough contemporary consensus on social values to which judges conceive of themselves as giving effect, and as covering the test for consistency of two possible objectives, to decide what makes pursuing one "self-defeating" in the context of pursuit of the other'

[148] See ibid page 24 Vladimir Berschader and Moïse Berschader v. The Russian Federation, SCC Case No. 080/2004 (see para 158) https://www.italaw.com/cases/140 and

[149] See ibid page 24 Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation, SCC No. 24/2007 (see para 59) https://www.italaw.com/cases/915

[150] See Sureda, supra footnote 120, footnote 146 Page 26, Saluka Investments B.V. v. The Czech Republic, UNCITRAL https://www.italaw.com/cases/961

[151] See ibid Page 27 and (Para 115) RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005 https://www.italaw.com/cases/923

[152] See ibid Page 29 Methanex Corporation v. United States of America, UNCITRAL https://www.italaw.com/cases/683

observe any obligation it may have entered into with regards to investments of investors of the other Contracting Party'; the 'obligation entered into' as a contractual obligation and not as referring to legislative provisions which may have given rise to certain expectations'; 'entered into' means referring to a specific contract between the foreign investor and the State; and last 'a contract qualifies as an investment. Sureda[153] also deferred to Crawford four schools of thoughts of case law in this area, namely:' (i) The application of the clause by internationalizing contract claims in full without even discussing the issue of the forum chosen in the contract (Fedax and Eureko[154]); (ii) the concern for the principle that breaches of contracts are not breaches of international law drives tribunals to interpret the clause so restrictively that it divests it of

any practical meaning (SGS v. Pakistan)[155]; (iii) the umbrella clause is reduced to cover only breaches resulting from the State acting as a sovereign; and an umbrella clause is operative and may form the basis for a substantive treaty claim,

but it does not convert a contractual claim into a treaty claim – this is the preferred approach of Crawford, and as (adopted by the majority in the SGS v. Philippines award)[156] Sureda added a fifth school of thought of case law to the above as none of them consider it which 'involves taking into account the international obligation of the disputing State to the other State party of the BIT.'[157]

6. The weight of the non-disputing state-party. Sureda asserted that' there is merit in tribunals being more active in seeking the views of the non-disputing State when interpreting controversial clauses and, particularly, when the arbitral Tribunal is aware that there is a divergence of between the parties to the Treaty in question or

[153] See ibid Page 32 citing J. Crawford, 'Treaty and Contract in Investment Arbitration' Arbitration International 24 (2008) 351, 367.
[154] See ibid footnote 44 Fedax N.V. v. Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 June 1997, 5 ICSID Reports 186; Award, 9 March 1998, 5 ICSID Reports 200, para. 29;
Eureko B.V v. Republic of Poland, ad hoc Arbitration, Partial Award, 19 August 2005, 12 ICSID Reports 331, paras. 244–60
[155] See ibid footnote 46 SGS Soci´et´e G´en´erale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, 8 ICSID Reports 406, paras. 163–74.
[156] See ibid Page 33 footnotes 47 and 48 Citing Crawford, 'Treaty and Contract in Investment Arbitration', 368.
48 SGS Soci´et´e G´en´erale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, 8 ICSID Reports 515.
[157] See ibid Page 33-36

before it engages in the analyses of documents which may reflect only one of the parties' views'[158].

It is important to note that some treaties may have 'provisional application' e.g. the ECT Article 45[159]. The Vienna Convention Article 25 provides for and establishes basic principles for consent for provisional application of a treaty pending its entry into force to accommodate the different pace between the slow internal ratification processes for states and the demands for faster more urgent and efficient need of application on the international law stage. Arsanjani and Reisman explained that 'unless clearly indicated in a treaty, provisional applications are not aspirational nor are they left to the political discretion of the parties as they are subject to the rule of pacta sunt servanda[160]. They added that 'while states are free to devise a treaty by mutual consent, the language in a treaty for the benefit of third parties must be clear. In case of ambiguity, in accordance with the contra proferentem rule[161], the treaties to be interpreted for the benefit of the third parties who relied on it, lest parties to a treaty avoid, at will compliance with their obligations'.[162]

[158] See ibid Pages 36-40

[159] See 'Article 45: Provisional Application' (*Energy Charter Treaty*) <https://www.energychartertreaty.org/provisions/part-viii-final-provisions/article-45-provisional-application/> last accessed 23 December 2021

[160] See Aaron X. Fetlmeth Maurice Horwitz "Guide To Latin In International Law" Oxford University Press 2011. It means "Treaties are observed." A maxim meaning that every treaty in force binds the parties to that treaty to perform their obligations in good faith until their adherence to the treaty has been lawfully terminated (and afterward in the case of obligations that continue after termination of the treaty). Concomitantly, the breach of a treaty obligation violates international law except with the consent of the other parties or, in some cases, under an established rule of customary international law. E.g., "The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule pacta sunt servanda if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance." Gabcíkovo-Nagymaros Project (Hung.v. Slovk.), 1997 I.C.J. Rep. 7, ¶ 114. See the Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331'

[161] See ibid Page 66. It means "Against the offeror." A principle of private law suggesting that ambiguity or vagueness in the legal instrument should be construed against the interests of the drafter. Thus, where there are two possible interpretations of contractual language, one of which is less favorable to the drafter and more favorable to the other party or parties, the instrument will be construed in this manner"

[162] See Mahnoush H. Arsanjani and W. Michael Reisman Chapter 5 'Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards' in Enzo Cannizzaro 'The Law of Treaties Beyond the Vienna Convention' Oxford Press Print publication date: 2011. This was written to clarify the confusion that took place after the Yukos awards. See Lisa Bench Nieuwveld (Conway & Partners), 'Provisional Application Of The Energy Charter Treaty: Article 45(1) "Limitation Clause" - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2010) <http://arbitrationblog.kluwerarbitration.com/2010/02/16/provisional-application-of-the-energy-charter-treaty-article-451-limitation-clause/> last accessed 23 December 2021

In 2008, in one of the last chapters the imminent Walde wrote[163] before his untimely passing, he expressly submitted to the challenges faced by tribunals in the interpretation of investment treaties. Based on his own practice and with wise analysis for the future, he provided a comprehensive commentary of selected key issues, which we will very briefly mention as a point of reference. These key issues/challenges still remain valid till the present and may not be fully resolved in our lifetime. The examples that Walde drew from were mainly related to the ECT, which is the global key multilateral Treaty for energy collaboration and resolving energy disputes.

Walde set out by making it clear that 'a treaty- like any legal or otherwise authoritative text- does not contrary to some accounts, speak for itself' and emphasized that modern investment arbitration is not only influenced by general public international law (both its interpretation rules and practices, but also its culture, styles, and the 'ICJ bar')'[164]

Walde recommended that the best approach for investment treaty interpretation is undoubtedly 'a resolutely technical and professional approach', i.e. one that 'employs increasingly detailed drafting techniques in treaty-making, but also a predominantly textual approach linked to identifiable common elements of modern practice in interpretation.'[165] It was no surprise to read Walde's recommendation that our:

> '…ultimate aim should be to facilitate the emergence of an international common law of investment arbitration—as if a world investment code existed. Investment disputes are part of international public law and, I suggest, also part of a wider body of transnational law. They reflect the gradual transition from the 19th century model of the nation-State to a more open 'market State', exposed to and participating in a global economy. That requires the development of a cosmopolitan and global professional, academic, and adjudicatory culture, where an acceptable style of investment treaty interpretation emerges over time. The goal cannot be full coherence; that is an aesthetic rather a realistic goal. Coherent systems can only be those that are artificial, inward-looking, frozen in time, and without relation to the outside world. It rather should be a reasonable and realistic degree of 'path coherence', that is, a gradual and cautious evolution that draws its legitimacy from a style of interpretation that is and appears to

[163] See Thomas Walde Chapter 38 'Interpreting investment treaties: Experiences and examples' in Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich 'International Investment Law for the 21st Century Essays in Honour of Christoph Schreuer' Published to Oxford Scholarship Online: September 2009

[164] See ibid pp 724-725

[165] See ibid 780

> be reasonably faithful to the authoritative text. A major means of achieving greater coherence is by accepting a concept of persuasive and, if jurisprudence is settled, binding precedent.' [166]

Walde wrote a separate opinion that was appended to the award in Thunderbird v Mexico that sums up his stance on interpretation, precedence and jurisprudence, which support the quote above, emphasizing that 'while there is no formal rule of precedent in international law, such awards and their reasoning form part of an emerging international investment law jurisprudence.'[167]

In conclusion, the law will continue to grow and develop akin to energy (old fossil fuels and new renewables) and our lives, and so as Donald E Elliott quoted Holmes "the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other… It will become entirely consistent only when it ceases to grow."[168]

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[166] See ibid pp 780-781footnotes 193 and 194 citing Cf also Southern Bluefin Tuna case, ITLOS (1999) para 123, invoking the lex specialis concept to conclude that the dispute resolution in a specific treaty should prevail over dispute settlement provisions in more general treaties; and V. Vadi, 'Towards Arbitral Path Coherence', Transnational Dispute Management (May 2008).

[167] T. Walde, Separate Opinion dated 1 December 2005 appended to Award in ¨ International Thunder bird Gaming Corporation v. United Mexican States, UNCITRAL, 26 January 2006, para. 15, available at: https://www.italaw.com/sites/default/files/case-documents/ita0432.pdf

"15. Finally, I wish to highlight the need to pay attention and respect to the consolidating jurisprudence coalescing out of pertinent decisions of other authoritative arbitral tribunals, in particularly the more recent
decisions applying the NAFTA and international investment treaties which have a similar methodology, procedure and substantive content to NAFTA Chapter XI. While there is no formal rule of precedent in international law, such awards and their reasoning form part of an emerging international investment law jurisprudence. This is again a significant difference from commercial arbitration where there is little
authoritative and persuasive precedent, largely because the awards are exclusively formulated for the private parties and because they are generally not publicly available. Investment treaty tribunals should therefore place themselves in the centre of emerging international investment law rather than at or beyond the margin:
"To place one decision in a long tradition of similar decisions give the entire tradition of consistency, an "integrity" that is a central feature of law as such"'.

[168] M Howe, Introduction to 0. Holmes, The Common Law xiv (M. Howe ed. 1963) at 32 in Page 54 in
Elliott, E. Donald, "The Evolutionary Tradition in Jurisprudence" (1985). Faculty Scholarship Series. Paper 2194 last accessed on 8 December 2021 at http://digitalcommons.law.yale.edu/fss_papers/2194

# CHAPTER 4

## Foreign Direct Investment (FDI) and International Investment Arbitration: How special is the tie and its contribution to a 'Lex Renewables' development?

***'… I warned about the risk of a new mediocre – new mediocre, low growth for a long time. Now, today what we must do is avoid that new mediocre becomes the new reality. We can do better and we must do better. That great Atlanticist, John Fitzgerald Kennedy, once said, and I quote, "There are risks and costs to action. But they are far less than the long range risks of comfortable inaction.'…'***

***— Christine Lagarde[1]***

***"…This troubling global investment picture underscores the importance of a conducive global investment environment, characterized by open, transparent and non-discriminatory investment policies…'***

***— António Guterres[2]***

***'…in order to achieve greater sustainable development in various areas—investment disputes, rule of law and good governance in developing and transition countries—and ultimately a more prudent and efficient use of the natural resources of the Earth, it is essential not to indulge in ''feeling good'', and projecting such essential ''goodness'' to others, but rather to understand the workings of the world; an altogether much more difficult, complex, subtle and uncertain undertaking…'***

***— Thomas Walde [3]***

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[1] Christine Lagarde speech at the Atlantic Council, A Conversation with Christine Lagarde on the Global Economy Speaker: Christine Lagarde Managing Director International Monetary Fund Welcome and Moderator: Frederick Kempe, President and CEO, Atlantic Council Location: Atlantic Council, Washington, D.C. Time: 10:30 a.m. EDT Date: Thursday, April 9, 2015 Transcripts: A Conversation with Christine Lagarde on the Global Economy By Global Business and Economics Program last accessed on 20 December 2022 https://www.atlanticcouncil.org/commentary/transcript/a-conversation-with-christine-lagarde-on-the-global-economy/

[2] Secretary-General of the United Nations in the Preface of 'The United Nations Conference On Trade And Development World Investment Report 2018: Investment And New Industrial Policies'

[3] Thomas Walde, 'Investment arbitration and sustainable development: good intentions—or effective results?' In response to the paper by James Chalker, ''Making the investment provisions of the Energy Charter Treaty sustainable development friendly'' (see pp. 435–458) Int Environ Agreements (2006) 6:459–466 DOI 10.1007/s10784-006-9022-2

## 4.1 Overview

Investment is the linchpin for investment arbitration disputes. Its definition in any international investment agreement (IIA) is primarily considered 'the gatekeeper' to investment treaty disputes[4]. Without sovereigns allowing capital flows access (whether by another sovereign and/or a private investor of another state) in the form of investments into their territories, there would not be investment agreements and treaties signed for the purposes of global development and fostering advancement for the greater good in many fields[5]. This is the idealist view.

Naturally, in projects where both stakeholders are sovereigns or one of the stakeholders is a sovereign and the other is a private investor pouring capital intensive investments, such as in fossil fuel and/or renewables in the said sovereign's country, it does not necessarily follow that those all-stakeholders' interests are aligned, even if they initially appeared so.

Accordingly, disputes arise due to one reason or the other but are often traced to what is a qualified investment under the applicable treaty that said investment falls within its remit and allows for investment arbitration as a means of resolving the said dispute and whereby answers as to how investment is defined [6]in the applicable treaty or IIA, or when it is considered to be an investment and how it is protected, what to do with the proceeds, how big is the profit margin, is it deemed acceptable or how to deal with any windfall that the investor(s) gain during the lifetime of the project...etc.

As climate change and sustainable development matters more and more to the world, we see also issues in disputes are related to the detrimental impact of such investments on climate change, the environment, and by default, the renewables industry, which is integral to fighting

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[4] See Paul B. Maslo 'Definition of Investment: Gatekeeper to Investment Treaty Arbitration' blog published on 24 May 2011 at Publicist an online Publication of Berkeley Journal of International Law https://bjil.typepad.com/publicist/2011/05/definition-of-investment-gatekeeper-to-investment-treaty-arbitration-1.html last accessed 24 Dec 2021 See Tache, Cristina-Elena Popa Chapter 2 ' Definition, forms and classification of foreign investment' in 'Introduction to International Investment Law' (2020). Bucharest, ADJURIS - International Academic Publisher.

[5] By way of example, Kenneth J. Vandevelde provided several reasons for countries signing BITs, namely, because it deals principally with (1) investment; (2) its protection. (3) attract foreign investments; and (4) the opportunity availed to resolve disputes which was a new provision added to BITs in the 1960s when ICSID was founded. See Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 U C Davis J Int'l L & Pol'y 157

[6] See for example Apotex v United States. This NAFTA case is "… a good example of how a tribunal inclined to be sceptical about a formally plausible claim for the existence of a qualifying investment can reasonably limit the scope of even a broadly drafted definition of investment in a treaty other than the ICSID Convention. ...And yet, probably reasonably, it concluded that under the particular circumstances at issue, Apotex simply had not engaged in sufficiently investment-like behaviour to trigger jurisdiction as a matter of the specific investment agreement at issue. ...Part of its reasoning was specific to NAFTA…" See Julian Davis Mortenson, 'Apotex v United States: Narrowing NAFTA's Definition of Investment' (2015) 16 J World Investment & Trade 163

climate change. This is a new trend in modern investment disputes that cannot be ignored and is integral to the development of Lex Renewables.

The above discussion is not an exclusive matter to a north versus south and/or east versus west divide amongst the world nations. This is across the board as we have seen already in some of the case law and the arbitral awards discussed so far in this thesis, especially as time has moved on whereby, we find emerging economies have been increasing their bargaining power slowly but surely and able to invest in developed countries.

It is accepted, as Vandevelde aptly noted that:

> "…history has led us to an increasingly universal international investment regime that seeks to integrate national economies through the removal of barriers to investment flows and through the protection of established investment. This is but another era in the continuing evolution of international investment agreements. **The impact of these agreements, particularly the results of arbitrations conducted pursuant to the agreements, in tandem with the evolution in the political and economic context in which these agreements operate, will determine the shape of the next era.**.[7]."

As such, it follows that it is useful to have a dedicated chapter, albeit brief, to highlight the links and importance of FDI for investment arbitration and its potential impact on the development of Lex Renewables as it did on the development of Lex Petrolea.

### 4.2 Foreign Direct Investment (FDI)

In 1989, the year the Berlin Wall fell, and three years after the US signed its BIT with Egypt, I was working for the United States Investment Promotion Office (USIPO) in Cairo, Egypt. It was established under a cooperative agreement to promote investments between the two countries in various areas, including but not limited to agribusiness, garments, energy, even tech, which was attracting not only American investors to Egypt but also third party investors (e.g. Dutch, French, Israeli and Belgians to name a few.) [8]

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[7] See Page 194 in Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 U C Davis J Int'l L & Pol'y 157

[8] My research and views expressed in this section of the thesis are affected by my own professional lived experience gained at the time in Egypt and beyond. I attended negotiation meetings, I travelled leading delegations in agribusiness, fashion and tech. Later on, this paved the way for me to work out of Washington, DC then in Afghanistan. I was involved in various projects that ranged from microlending, export promotion, investment promotion to judicial reform promoting arbitration both investment and commercial especially in the eastern bloc. I experienced first-hand how the investors' interests versus the sovereigns may easily conflict and how cultural misunderstandings may even backlash and be inherent in the arisen disputes that trigger extra protection from the state in the name of 'sovereignty protection'. Ironically, one of the negotiators of the US-Egypt BIT was the

Sometimes the investment was implemented in the form of joint ventures, and sometimes it was in-kind in the form of direct technical assistance or training or equipment. The main two vehicles through which the investment was implemented either through aid in the form of grants and cooperative agreements, which do not have stringent checks and balances as it was cash for goodwill for the relations between the two states and/or acquisition of goods and services which was more complex as it triggered layers of oversight and applicable US Federal Acquisition Regulations (FAR) which presented another layer of complexity with the host country local laws. These were not often within the remit of an FDI but certainly paved the way for FDI, especially with the introduction of the individual investors. In the late eighties and early 1990s, Egypt boasted the largest United States Agency for International Development (USAID) aid program in the history of foreign USAID. The reasons were due to Egypt's strategic geographical location in the Middle East, its natural resources, and the importance of creating a stabilized economy in the historically politically-charged region to encourage and attract FDI.

### 4.2.1 Importance of FDI

In 2002, Moosa summarised[9] that interest in and importance of FDI stem from the reasons below, which in my opinion are valid reasons that still prevail to the present day and fully impact the attraction of FDI for the renewables:

(i) 'the rapid growth in FDI and the change in its pattern, particularly since the 1980s.' He noted that 'in the 1990s, FDI accounted for about a quarter of international capital outflows, having grown relative to other forms of international investment since the 1970s.' He added that this 'rapid growth of FDI' was due to 'global competition as well as from the tendency to free up financial, goods and factor markets';

(ii) 'the concern it raises about the causes and consequences of foreign ownership';

(iii) 'it offers the possibility for channelling resources to developing countries' whereby it is becoming an important source of funds 'at a time when access to other means of financing is dwindling' – this remains valid especially not only in the 'aftermath of the international debt crisis that emerged in the early1980s'

esteemed Kenneth J. Vandevelde who was an attorney in the US State Department's Office of the Legal Adviser from 1982 until early 1988. While I never met him in person, I am honoured to reference his substantive work in international investment treaty law.

[9] See Pages 3-6 in Moosa, Imad 'Foreign Direct Investment Theory, Evidence and Practice' published in January 2002 by PALGRAVE DO - 10.1057/9781403907493 SN - 978-1-349-42615-7

but also in 2007 credit crunch. Moosa attributed to Lipsey (1999) that FDI 'has been the most dependable source of foreign investment for developing countries.' He highlights FDI is 'important in this sense not only because it entails the movement of financial capital but also because it is normally associated with the provision of technology as well as managerial, technical and marketing skills' which, as I explained key for an industry as the renewables; and

(iv) 'FDI is thought to play a potentially vital role in the transformation of the former Communist countries' – this is a true statement that I personally professionally lived, in witnessing the financing, for example of judicial reforms projects promoting both commercial and investment arbitration to provide a reliable and efficient legal framework for legal recourse for foreign investors away former communist regimes archaic and complex judicial systems.

### 4.2.2 Definition of FDI

At this junction, for the sake of clarification and avoiding confusion with international aid programs, it is useful to provide a definition for FDI that is key for the subject of the thesis. The definition of FDI was first issued in 1983[10]. I adopt the definition from The United Nations Conference on Trade and Development (UNCTAD)[11] as 'an investment reflecting a lasting interest and control by a foreign direct investor, resident in one economy, in an enterprise resident in another economy (foreign affiliate).'[12] It is also key to combine this with the IMF's

[10] See Page 14 Footnote 3 in 'OECD Benchmark Definition of Foreign Direct Investment' Fourth Edition © OECD 2008 ISBN 978-92-64-04573-6 last accessed on 25 December 2021 at https://www.oecd-ilibrary.org/docserver/9789264045743-3-en.pdf

[11] UNCTAD Handbook of Statistics 2019 - Economic trends, Fact sheet #9: Foreign direct investment based on figures from 2018. Last accessed on 24 December 2021 at https://unctad.org/system/files/official-document/tdstat44_FS09_en.pdf Moosa also discussed in length the motivations, the different types of FDI and its effect. While I found it very informative, discussing this in details here is outside the scope of the thesis.

[12] Note that UNCTAD World Investment Report 1999 on Foreign Direct Investment and the Challenge of Development defined FDI as "an investment involving a long-term relationship and reflecting a lasting interest and control of a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate)… FDI may be undertaken by individuals as well as business entities." See Page 465 at https://unctad.org/system/files/official-document/wir1999_en.pdf last accessed on 24 December 2021.
I note the removal of the words 'a long-term relationship' from the definition in the 2019 report – perhaps it is now implied. In January 2002, Imad A. Moosa of RMIT University explained that in UNCATD 1999 FDI definition 'The term `long-term' is used …in order to distinguish FDI from portfolio investment, the latter characterized by being short-term in nature and involving a high turnover of securities.' See Moosa, Imad 'Foreign Direct Investment Theory, Evidence and Practice' published in January 2002 by PALGRAVE
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definition of FDI in so far to rid of the misconception that FDI means simply of taking control of the enterprise[13]. The IMF report states[14]:

- "FDI does not necessarily imply control of the enterprise**, since only a 10 percent ownership is required to establish a direct investment relationship**.
- FDI does not constitute a "10 percent ownership" (or more) by a group of "unrelated" investors domiciled in the same foreign country—**FDI involves only one investor or a "related group" of investors in one or more countries**.
- FDI is not based on the nationality or citizenship of the direct investor—**FDI is based on the residence of the direct investor.**
- **Borrowings by direct investment enterprises from unrelated parties abroad that are guaranteed by direct investors are not FDI**."

Understanding the above is at the heart of any FDI in energy because energy FDIs are known to be of 'high value and long-term[15]' so there is no surprise in finding on going tug of wars in investment disputes arising likely as a result of these two traits where the impact of time alone, irrespective of any unanticipated political and/or global crisis, may well have adverse changes on both the investor and sovereigns interests.

### 4.3 Investment Treaty Arbitration and FDI: current pervasive issues

Investment Arbitration has leaped over the past decade and been acknowledged as a global force and not a 'peripheral academic interest.'[16] The prime rationale for this, and as reiterated previously here, is due to the link between investment arbitration, FDI and economic development. Franck emphasized that '…the concern originates from the potential impact upon the developing world and the implications for sustainable global economic development…[17]' In 2009, investment disputes witnessed 'a four-fold increase in the number

[13] Note – when looking at FDI data, it is important to understand the distinction between Greenfield Investments and M&A. "In the context of public debate, a sharp distinction is often drawn between "**greenfield" investment, providing fresh capital and additional jobs**, and **Mergers & Acquisitions (M&As) that are perceived to include only a change of ownership in an existing corporate entit**y." See Page 31 in OECD Benchmark Definition of Foreign Investment', Fourth Edition. 2008 last accessed on 25 December 2021 at: https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf

[14] See Page 3 The IMF 'Foreign Direct Investment: Trends, Data, Concepts, and Recording Practices' by Neil Patterson, Marie Montanjees John Motala Colleen Cardillo published in 2004 and last accessed on 24 December 2021 at https://www.imf.org/external/pubs/ft/fdi/2004/fditda.pdf

[15] See Peter D Cameron "International Energy Investment Law: The Pursuit of Stability" OUP (2010) - Cameron, argued that "the evolving framework of international investment law has acted as an important source of constraint on the behaviour of both states and investors in their approach to and management of disputes arising from energy investment agreements" (p. xlviii)

[16] See Susan D. Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harv Int'l LJ 435

[17] Ibid Page 436

of disputes, billions of dollars at stake, and national sovereignty and international relations on the line[18]' and, 'investment treaty arbitration has become a vital aspect of the debate about the international political economy.[19]'

Despite this leap, the investment arbitration field is riddled with a myriad of issues that are the subject of endless circular academic and practitioners' debates that I sincerely hope at some point yield to a practical solution in favour of all stakeholders in investment arbitration.

We will briefly discuss a select series of pervasive issues that are often the subject of these persistent debates from the angle of its effect on FDI, sovereigns and investors.

### 4.3.1 Sovereignty

The Charter of Economic Rights and Obligations of States (CERDS) of 1974 adopted by the UN is substantial in outlining state sovereignty from the economic angle. It provides[20]:

> " Article 2 para. (1): …Each state has and will freely exercise permanent sovereignty, including possession, use and disposition of all wealth, natural resources and economic activities.
>
> Article 2 para. (2) : …Each state has the right:
>
> a) to regulate and exercise authority over foreign investment within its national jurisdiction, in accordance with its laws and regulations and in accordance with its legislation and national objectives and priorities. No state will be obliged to grant preferential treatment to foreign investments;
>
> b) to regulate and supervise the activities of transnational corporations in its national jurisdiction and to take measures to ensure that these activities comply with its laws, rules and regulations and are in accordance with its economic and social policies. The transnational corporations must not interfere in the internal affairs of a host state."

[18] Ibid Page 435
[19] Ibid Page 435
[20] See UN General Assembly, Charter of Economic Rights and Obligations of States: Resolution/adopted by the General Assembly, 17 December 1984, A/RES/39/163, recalling UN Resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, containing the Declaration and Program of Action on the Establishment of a New International Economic Order, 3281 (XXIX) of 12 December 1974. The Charter of Economic Rights and Obligations of States and 3362 (S-VII) of 16 September 1975 on International Economic Development and Cooperation, which laid the foundations of the new international economic order – available at https://www.refworld.org/docid/3b00eff474.html last accessed on 24 December 2021.

In practice, the above does not follow a straight line. Customary international law exists independent of treaty law[21] and 'imposes no obligation on a state to admit people, goods, information, or capital into its territory.[22]' In support of this, one may as well add that "While rules and standards are conceptually distinct, no treaty provision can be a pure rule or a pure standard.[23]" This is the right approach as we are taught in law 'might is right' nothing is ever absolute. We see this in business and law every day in equal measures.

For sovereignty, as such in foreign investment law, Viñuales [24] sets out 'the idea that sovereignty is not a single legal concept but, rather, a mosaic of actionable legal concepts of varying density and legal nature that seek to express the pre-eminent position of the state as a unit of social organization' - He adds that:

> '…this concept is then applied to the analysis of the two actionable expressions of sovereignty frequently invoked in foreign investment disputes: the police powers doctrine and necessity/emergency clauses. First, by looking at sovereignty as an array or mosaic of actionable legal concepts, one can more easily determine their 'location' within international law. Specifically, the main actionable legal concepts expressing the

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[21] See Footnote 663 Page 122 in The United Nations 'Draft conclusions on identification of customary international law, with commentaries 2018' Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10). The report, which also contains commentaries to the draft articles (para. 66), will appear in Yearbook of the International Law Commission, 2018, vol. II, Part Two last accessed on 25 December 2021 at https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf It asserts that "Moreover, it may sometimes be necessary to determine the law applicable at the time when certain acts occurred ("the intertemporal law"), which may be customary international law even if a treaty is now in force. **In any event, a rule of customary international law may continue to exist and be applicable, separately from a treaty, even where the two have the same content and even among parties to the treaty (see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)**,
Merits, Judgment, I.C.J. Reports 1986, p. 14, at pp. 93–96, paras. 174–179"

[22] See Chapter 9 'Access' Page 405 in Kenneth J. Vandevelde 'Bilateral Investment Treaties: History, Policy and Interpretation (2010) available at http://ssrn.com/abstract=3022249 Thomas Jefferson School of Law San Diego, California. See also, Teale E Toweill 'Controlling Access to FDI: An Alternative Approach to Energy Sector Investment Protection' Juris Conference Paper 7 April 2013 – Toweill recommends that '…States should consider exercising their right to block risky investments before remedial action is needed. ' He gave example of the USA, Canada and Japan as countries that protect their national interest whole still greatly benefiting from FDI."

[23] See Page 285 in Kenneth J. Vandevelde, 'Treaty Interpretation from a Negotiator's Perspective' (1988)
21 Vand J Transnat'l L 281 - In footnote 9 on Page 284 Vandevelde explains: "A rule is a statement of the conduct required of a party. A standard is a statement of a goal toward which a party should direct its conduct. Thus, for example, a prohibition on driving in excess of 25 m.p.h. is a rule. A requirement that one drive safely is a standard. One may think of a rule as a particular case or application of a corresponding standard. The choice between rules and standards, then, is reducible to the question, at what level of generality should one define a party's obligations? Thus, as noted in the text below, because a rule is merely a particularized application of a standard, rules and standards are not mutually exclusive."

[24] See Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales 'The Foundations of International Investment Law: Bringing Theory into Practice' Print publication date: 2014 Print ISBN-13: 9780199685387 Published to DOI: 10.1093/acprof:oso/9780199685387.001.0001.

> idea of sovereignty (i.e. police powers, immunities, the necessity defence, the interpretation rules applicable to limitations of sovereignty, etc.) are both 'general' and 'customary' in nature.[25]'

As the world economic order evolved since the 1800s, with ebbs and flows, wars, global economic crises and even global pandemics, countries moved from a balanced and at times total openness on the spectrum for FDI flows to the complete opposite end of the spectrum adopting a total stance of protectionism. This has been often used as a means to regain their 'sovereignty' – sometimes invoking 'territorial sovereignty[26]' or 'gunboat diplomacy[27]'. It follows then, that it is not far-fetched to state that the global economy is in a constant state of a web of contrasts which is usually dubbed as 'home-country bias'[28]. This was analyzed by Colin and Fan where they asserted that 'in the past, government policies have been deliberately protective of domestic economic activity, but at the same time deliberately promotive of foreign investment[29].

By way of example, this has manifested in the exodus of Latin American countries from ICSID[30] We witnessed too that still even after 27 years of the ECT not all ECT contracting parties have ratified it[31] and the USA remains as an observer. What remains perplexing is while the United States signed the Vienna Convention on the Law of Treaties on April 24, 1970, 'the U.S. Senate has not given its advice and consent to the treaty. The United States, however, considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.'[32] Nevertheless, the US still reigns as the

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[25] See Pages 317-318 Chapter 11 'Sovereignty in Foreign Investment Law' by Jorge E. Viñuales in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales 'The Foundations of International Investment Law: Bringing Theory into Practice' Print publication date: 2014 Print ISBN-13: 9780199685387 Published to DOI: 10.1093/acprof:oso/9780199685387.001.0001

[26] See Chapter 1 Pages 1-3 in Bishop RD, Crawford JR and Reisman WM (eds) 'Foreign investment disputes: cases, materials and commentary' (2nd edn, Kluwer Law International 2014)

[27] Ibid Page 3

[28] Page 41 in Colin White and Miao Fan 'Risk and Foreign Direct Investment 'Published by Palgrave Macmillan in 2006

[29] Ibid Page 45

[30] See Nicolas Boeglin 'ICSID and Latin America: Criticisms. withdrawals and regional alternatives' June 2013 Last accessed on 25 December 2021 at https://www.bilaterals.org/?icsid-and-latin-america-criticisms&lang=fr "Bolivia was the first state to withdraw from the ICSID Convention (denunciation notified in May 2007 and effective November 2007), followed by Ecuador (denunciation notified in July 2009, effective January 2010). [9] Venezuela officially announced its withdrawal in late January 2012 which became effective on July 2012."

[31] Note "As 1 January 2018, the treaty has been signed or acceded to by fifty-four countries and Regional Economic Integration Organisations. All Members have ratified the treaty except for Australia, Belarus, Norway, and the Russian Federation." See https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/

[32] See U.S. Department of State Diplomacy in Action last accessed on 25 December 2021at https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm

top destination country, attracting $61bn of FDI[33]. China, which ranked second in 2019, dropped into third position in 2020, attracting 40% less capital investment[34].

Several scholars, including Cameron[35] and Leal-Arcas[36] have been advocating for 'a need for a coherent legal structure for the future of international investment law with the proviso that the majority are in agreement 'that there are customary international law rules concerning energy investments[37]'. Leal-Arcas rightly asserts in agreement with Cameron - that 'The current proliferation of investor-state arbitrations is evidence of the fact that, for the time being, bilateral and regional governance of investment via bilateral investment treaties (BITs) and investment chapters of free-trade agreements will be the prevailing means of governing foreign direct investment (FDI).[38]"

### 4.3.2 Definition of Investment and Investor

An investment dispute cannot stand without a clear definition of what is an 'investment' and 'investor'. This is due to the legal jurisdictional matters the tribunal has to establish to ascertain there is a viable qualified investment dispute between the sovereign and the investor whereby in turn the tribunal has jurisdiction to hear the dispute under the said investment treaty i.e. there is consent or without an arbitration clause in the investor's contract i.e. in case of an 'arbitration without privity[39], [40].

For an 'investor' in investment arbitration, it defaults to two key types of investors: 'natural ' and 'legal persons', Yannaca-Small explained that:

> "…for natural persons, investment agreements generally base nationality exclusively on the law of the state of claimed nationality. Some investment agreements also

[33] See Page 4 of the 'FDI Report 2021: Global greenfield investment trends' Editors Geraldine Ewing And Jacopo Dettoni, Financial Times – fDi Intelligence last accessed on 25 December 2021 at https://fdi-report-2021.fdiintelligence.com/
[34] Ibid
[35] See Peter D Cameron "International Energy Investment Law: The Pursuit of Stability" OUP (2010)
[36] See R. Leal-Arcas "International Energy Investment Law: The Pursuit of Stability by P. Cameron (book review)" OGEL ISSN: 1875-418X Issue: Vol. 9 - issue 1 Published: January 2011
[37] Ibid Page 2
[38] Ibid Page 2
[39] See Page 11 in Bishop RD, Crawford JR and Reisman WM (eds) 'Foreign investment disputes: cases, materials and commentary' (2nd edn, Kluwer Law International 2014) and See also C. Yannaca-Small, L. Liberti 'International Investment Law: Understanding Concepts and Tracking Innovation' OECD 2008, Chapter 1, Pages 1 and 8. And B. Legum Defining Investment and Investor: Who is Entitled to Claim? presentation at the Symposium Making the Most of International Investment Agreements: A Common Agenda, ICSID, OECD and UNCTAD, 12 December 2005, Paris last accessed 26 December 2021 https://www.oecd.org/investment/internationalinvestmentagreements/36370461.pdf
[40] Ibid Bishop et al Page 10

> introduce alternative criteria, such as a requirement of residency or domicile. The issues related to the nationality of legal persons are more complicated[41]."

To reiterate, clearly, it is essential to define what is an investor and investment to understand 'the scope of the rights and obligations of investment agreements and for establishing the jurisdiction of tribunals in arbitration based on the investment treaty'[42]. However, this is by far a complex process and may often be categorically 'subjective[43]' 'as international law does not currently provide a codified definition in this area'[44]. The OECD analysis indicated that: 'there is no single definition of what constitutes foreign investment[45].'

It is impossible to cover all the debates in relation to the definition of 'investment' and 'investor' in investment arbitration, it will require a separate thesis. Below is a brief outline of some jurisprudence on the definition of investment in investment arbitration.

Maslo rightly asserted that the definition of investment is the gatekeeper to investment treaty arbitration.[46] He added that the question of 'what constitutes an "investment" is largely dependent upon how the term is defined in the IIA at issue'[47]. Yet this does not solve the controversy around the definition of investment since he acknowledges that 'even with the most explicit definition, the tribunal still exercises a fair amount of discretion[48].

By way of highlighting 'the bounds' of the tribunals discretion in determining whether something constitutes an investment and 'the importance of including specific investment-related language in IIAs', Maslo examined three investment arbitration cases:

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[41] See Page 8 in Yannaca-Small and Liberti in Supra footnote 39 above
[42] See Page 43 Chapter 2 in Tache, Cristina-Elena Popa 'Introduction to International Investment Law' Published in Bucharest by ADJURIS - International Academic Publisher (2020)
[43] See Bishop et al - Supra in Footnote 39 – They wrote: "The term 'investment' is not defined in the ICSID Convention, but usually is defined in most BITs. Whether the BITs' definition of investment is sufficient, / whether additional 'inherent' characteristics are necessary, is a matter of some controversy in interpreting Article 25 of the ICSID Convention. The characteristics sometimes asserted as inherent in the nature of investment include the following. First, it has a certain temporal duration. It does not involve a single sale. Second, there is a commitment by the investor of capital or something of monetary value. Third, there is an expectation of profit. It is not a non-profit enterprise. Fourth, there is an undertaking of risk by the investor, and sometimes by the host government as well. Another frequent (but subjective and therefore controversial) characteristic is the contribution of the investment to the development of the State, by building or enhancing its infrastructure or its economy, or otherwise contributing to it."
[44] Ibid in Footnote 41 Page 43
[45] Ibid in Footnote 41 Page 43
[46] See Maslo - Supra in Footnote 4 above
[47] See Maslo – Supra in Footnote 4 above
[48] See Maslo – Supra in Footnote 4 above

***a) Inmaris Perestroika Sailing Maritime Services GMBH and Others v. Ukraine[49]***

- The tribunal considered whether payments made and the returns on various payments expected by Inmaris qualified as investments under the German-Ukraine BIT.
- For qualifying as an investment, the tribunal found that 'the "payment streams themselves are not necessarily 'investments' covered by the Treaty." Therefore, the tribunal determined that "[i]t is the asset acquired by an investor, typically as a result of such payments, that is the investment — be it tangible, such as an enterprise or real property, or intangible, such as claims to money or claims to performance (as here)."'
- For qualifying as an investor, the tribunal decided that 'the owners of investor companies "also qualify as investors by virtue of that ownership."

***b) Alasdair Ross Anderson v. Republic of Costa Rica[50]***

- The tribunal considered whether funds deposited in a Ponzi scheme constitute an "investment" under the Canada-Costa Rica BIT as investors brought claims against Costa Rica under the BIT. They alleged that "Costa Rica, by failing to provide proper vigilance and governmental regulatory supervision over the national financial system, had injured their investments in violation of the BIT provisions regarding full protection and security, fair and equitable treatment, due process of law, and protection against expropriation.
- The tribunal, using a common dictionary definition of "asset" as "anything of value," reasoned that the deposit of funds into the scheme, which promised to pay principal and interest, qualified as an asset. In addition, in evaluating the second part of the definition of investment, the tribunal reached the opposite conclusion and determined that the claimants did not own and control their assets in accordance with the laws of Costa Rica. As such, the tribunal held that it lacked jurisdiction to hear the claims against Costa Rica under the BIT[51].

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[49] See Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine, ICSID Case No. ARB/08/8 https://www.italaw.com/cases/565 last accessed on 25 December 2021

[50] See Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3 https://www.italaw.com/cases/85 last accessed on 25 December 2021

[51] See Maslo – Supra in Footnote 4 above

- The tribunal, in its conclusion, reasoned that "[n]ot all BITs contain a requirement that investments subject to treaty protection be 'made' or 'owned' in accordance with the law of the host country." And added 'that if the transaction by which the money was acquired was illegal then the claimants' acquisition of the asset resulting from the transaction was also not legal[52].

***c) Chevron-Texaco v. Ecuador[53]***

- Chevron-Texaco filed claims for breach of contract under the US-Ecuador BIT after 13 years of delays by the Ecuadorian national courts. The Ecuadorian government 'breached agreements by requiring Chevron-Texaco to provide it with more oil than was necessary to meet domestic demand at the agreed reduced price, which it sold on the international market for a profit.'
- Ecuador 'contended that "the lawsuits cannot be fit under BIT Article I(1)(a)(iii), 'claims to money or claims to performance having economic value, and associated with an investment.' Under that article, the lawsuits qualify as 'claims' but are not associated with any 'investment' because the investments that they would potentially relate to ceased to exist before the entry into force of the treaty" This is due to the fact that he BIT entered into force several years after the lawsuits were filed, settlement agreements were concluded, concession agreements had expired, and Chevron Texaco's withdrawal from Ecuador[54].
- The tribunal agreed with Chevron-Texaco's stance that: "[O]nce an investment is established; the BIT intends to close any possible gaps in the protection of that investment as it proceeds in time and potentially changes form. Once an investment is established, it continues to exist and be protected until its ultimate 'disposal' has been completed – that is, until it has been wound up." The tribunal also found that Chevron-Texaco's "investments were and are not yet fully wound up because of ongoing claims

[52] See Maslo – Supra in Footnote 4 above
[53] See Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877 https://www.italaw.com/cases/251 last accessed 25 December 2021 and Chevron-Texaco v. Ecuador, Partial Award on the Merits, UNCITRAL Arbitration Rules (March 30, 2010) at 21. Members of the Tribunal: The Honorable Charles N. Brower; Prof. Albert Jan van den Berg; and Prof. Karl-Heinz Böckstiegel, Chairman. Secretary: Brooks Daly (PCA).n
[54] See Maslo – Supra in Footnote 4 above

> for money arising directly out of their oil extraction and production activities under their contracts with Ecuador and its state-owned oil company." Note: The tribunal was consistent with the decision in the Mondev case[55] It held that "the Claimants' investments have not ceased to exist: their lawsuits continued their original investment through the entry into force of the BIT and to the date of commencement of this arbitration" (i.e., they continued "to hold subsisting interests in their original investment, but in a different form").[56]

The tribunals decisions in the above three cases are in line with Legum's warning in relation to the inconsistencies. He warned about the inconsistencies in some BITs in relation to the definition of Investments and Investor. He wrote:

> "…Many, if not all, of the U.K. and German BITs lack these special definitions, thus leaving it open to argument whether indirectly controlled investments are covered by the treaty's protections. Two other features, found largely if not exclusively in Canadian and U.S. BITs, bear mention as part of the landscape. The first is protection of pre-establishment investment activity. The protection is effected in part through the definition in U.S. BITs of "investor of a Party" as including "a national or enterprise of a Party, that attempts to make, is making or has made an investment . . . ." Because of this definition, the few substantive obligations in U.S. BITs that apply to "investors of a Party" – national and most-favored-nation treatment – cover activity before the investment is established as well as post establishment activity.
>
> The second feature of U.S. BITs relevant here is the denial-of-benefits provision. This provision gives the host State the authority effectively to carve out from the definition of "investor" shell companies owned by nationals of a third-country or the host State and companies owned by enemy aliens[57]"

In a nutshell, we submit that there no one definitive definition of 'investor' nor 'investment' in investment arbitration. Perhaps the system is benefiting from this flexibility irrespective of the confusion as it allows each case to be judged on its own merit and circumstances. Having said

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[55] See Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2 https://www.italaw.com/cases/715 last accessed on 25 December 2021

[56] See Maslo – Supra in Footnote 4 above

[57] See B. Legum Defining Investment and Investor: Who is Entitled to Claim? presentation at the Symposium Making the Most of International Investment Agreements: A Common Agenda, ICSID, OECD and UNCTAD, 12 December 2005, Paris last accessed 26 December 2021 https://www.oecd.org/investment/internationalinvestmentagreements/36370461.pdf

this, it does not take away from the importance of negotiating clear terms and clauses in both treaties and contracts for that matter. Tache aptly wrote: "It can be concluded that only through well-structured clauses included in international investment treaties can the terms "investment" or "investor" be defined, aspects that bring to the fore the special importance of negotiating, concluding and amending international treaties."[58]

### 4.3.3 Sustainable development

In 1994, Nicola Steen in discussing the Royal Institute of International Affairs (RIIA)'s workshop on Sustainable Development and the Energy Industries which centred on 'how the environmental legislation would impinge and had impinged on the energy industries within a context of industries and government aiming for a sustainable energy policy', she shared the irony that in the said workshop the term 'sustainable development' was not discussed explicitly and no formal definition was provided which she considered a good outcome. Yet she provided a loose definition that fits our purpose as follows:

> "…Sustainable development appeared to be comprehended as being related to the problem that world resources are limited, and that the present level of consumption of these resources, taking into account projections of worldwide growth of industry, population and per capita consumption, is not sustainable: 'not sustainable' meaning that the world- the global biosphere - will not be able indefinitely to tolerate or support such a way of living. This understanding implementation and impacts of environmental legislation demands action which will provide a situation that is supportable - that is, sustainable development…[59]"

Since 1994 till the present, the global landscape on sustainable development has been brimming with substantial changes for all stakeholders. Investment arbitration case law, academia, and the overall global political climate's attention to and interest in sustainable development has not subsided and remains rightly at its highest.

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[58] See Page 70 in Tache, Cristina-Elena Popa. Introduction to International Investment Law. Bucharest, ADJURIS - International Academic Publisher (2020)

[59] See Page 14 in the e-copy of Nicola Steen 'Sustainable Development and the Energy Industries Implementation and Impacts of Environmental Legislation' 1st Edition First Published 1994 eBook Published London 8 September 2017 Routledge DOIhttps://doi.org/10.4324/9781315143613 eBook ISBN9781315143613 Last accessed on 26 December 2021 at https://www.taylorfrancis.com/books/edit/10.4324/9781315143613/sustainable-development-energy-industries-nicola-steen See also T W Walde 'Sustainable Development And The 1994 Energy Charter Treaty' Discussion Paper DP9 CEPMLP, University of Dundee Law Library.

The shift we have seen is a global upheaval and collaboration for a greener life for us, our planet and the next generation. We steadily witnessed the growing commitment that will sweep anyone who would dare stand in the way of being 'green' in every aspect of our life even in IIA[60]. In 2000, the world leaders pledged commitment to UN's Millennium Development Goals (MDGs[61]) and expressly among the 8 goals was: to ensure environmental sustainability; and to develop a global partnership for development. In 2015, the MDGs were absorbed in bigger and better commitment for development and our planet. The UN created the Sustainable Development Goals (SDGs)[62] to focus their attention on the next 15 years promoting 17 goals with 169 targets where the planet, the environment, equality, dignity, living responsibly, life on land and life below water and climate action are at its heart.

Investment arbitration does not happen in a vacuum. It is a reflection of the global changes that all stakeholders live. Sustainable development is fundamental for the growth of the renewables industry and integral part of the evolution of investment arbitration and the rule of law in general[63] Professor Manjiao Chi advocates that:

> "… to effectively address the sustainable development concerns associated with transnational investment activities, the international investment agreements system should be reformed. Such reform should feature redesigning the provisions of the agreements, improving the structure of international investment agreements, strengthening the function of soft law, engaging nonstate actors and enhancing the dispute settlement mechanism."

[60] See Page 90 in Manjiao Chi 'Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications' Published by Routledge in 2018 ISBN 9780367263072 He wrote: "…For instance, though environmental provisions in China's IIAs appear inadequate in general, an empirical study reveals a clear trend that China's BITs are in the process of "greenization", in the sense that a larger number and better quality of environmental provisions are incorporated therein."

[61] See https://www.un.org/millenniumgoals/bkgd.shtml last accessed in August 2013

[62] See https://sdgs.un.org/goals last accessed in December 2016.

[63] See Thomas Walde 'Investment arbitration and sustainable development: good intentions—or effective results? In response to the paper by James Chalker, ''Making the investment provisions of the Energy Charter Treaty sustainable development friendly'' (see pp. 435–458) Received: 7 September 2006 / Accepted: 11 September 2006 / Published online: 25 October 2006 Springer Science+Business Media B.V. 2006. Walde in Page 466, concluded that "I believe that investment arbitration is a useful tool of good governance to create longer-term interests in the stewardship of economic, human and natural resources. It can be improved and complemented, but such improvement requires an extensive in-depth understanding of the world's realities rather than a quasi-religious approach valuing sentiment more than outcome." His statement transcends time and boundary and visionary as always. "

The calls for reform of the investment arbitration regime are not new, but what is key and new and ought to be embraced is expressly including a greener version of IIA that includes expressly the renewables industry.

This also a strategic point in the thesis to bring in a reminder of the New Haven School Analytical Framework representation for this research (See Figure 7 in Chapter 1). It is apt to showcase it in this section where we are discussing sustainable development and the greenisation of the IIA. This goes to the heart of the New Haven approach because its aim is ' to understand international law as a social process' for the purposes 'crafting minimum world public order based on the shared values of the international community[64]'. In the previous chapters, we methodically went through details of discussing and assessing the state of RIDR (albeit more case law pertaining to the renewables industry will be covered in Chapter 5) – So below is a summary of how it was covered:

a. 'the participants' i.e. the ones involved in the social process'. In this research it means: the key law-making players identified in the methodology (e.g. our discussion of sovereigns, investors and arbitrators as well as the various views of academics and practitioners.)

b. 'their perspective' i.e. the subjective dimensions that animate them. In this research it means: how do they approach the decisions they made or will make in their capacities as an arbitrator, academic, legislator…etc in regard to the 'international' issues identified in this research (e.g. the decisions of key arbitrators and adjudicators, and views of prominent academics and practitioners even from the 1800s, and my own lived professional and practical experience)

c. 'the situations' in which they interact. In this research it means: where the decision is made i.e. in a court, an executive or a legislative branch and under what circumstances i.e. crisis versus business as usual situation. (e.g. discussing global and political trends impacting the evolution of investment arbitration and accordingly Lex Renewables)

d. 'the resources' upon which they draw bases of power. In this research it means: who and what supported their decisions (e.g. this was covered in either the factual data used and/or the historical perspective presented.)

[64] See Fozia Lone 'The New Haven School of International Law' 27 MARCH 2019 DOI: 10.1093/OBO/9780199796953-0178 https://www.oxfordbibliographies.com/

e. ‘Strategies’ or the ways they manipulate those resources. In this research it means: how did they optimize the use of the available resources? In what mode? Did they use a persuasive or a coercive mode e.g. using diplomatic interventions, economic solutions, public relations, or on the farthest extreme of the spectrum - military power (e.g. this is more covered in the doctrines and legal principles discussed and the way to move forward); and

f. ‘Outcomes’ these are the aggregate outcomes of the process of interaction. In this research it means the result of the research analysis of an award or decision analysis as the case may be. (more on this will be in Chapters 5 and 6)

The above is in line with the modern trends in what has been and still being discussed in the global political circles in relation to what impacts the evolution of international investment arbitration and what is to come. So there is no surprise to see ‘investments for sustainable development’ listed as number 1. The list below is reproduced from Cristina - Elena Popa Tache book ‘Introduction to International Investment Law[65]’ She based them on the 9 non-binding principles that the G20 agreed to have as ‘Guiding Principles for Global Investment Policymaking’ on 11/07/2016 - Following their meeting in Shanghai on 9-10 July 2016 under the Chinese G20 Presidency, G20 Trade Ministers[66].

> “**1. Investments for sustainable development**. The general objective of developing the investment policy is to promote investments for inclusive growth and sustainable development.
>
> **2. Policy coherence**. Investment policies should be based on a country's overall development strategy. All policies that have an impact on investment should be coherent and synergistic both nationally and internationally.
>
> **3. Government and public institutions**. The investment policies should be developed that involve all stakeholders and are incorporated into an institutional framework based on the rules of law, which respects high standards of public governance and ensures predictable, efficient and transparent procedures for investors.

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[65] See Page 118 Tache, Cristina-Elena Popa. Introduction to International Investment Law. Bucharest, ADJURIS - International Academic Publisher (2020)

[66] See Annex III: G20 Guiding Principles for Global Investment Policymaking https://investmentpolicy.unctad.org/ G20 2016 principles https://www.oecd.org/investment/g20-agrees-principles-for-global-investment-policymaking.htm last accessed in December 2021

**4. Development of dynamic policies**. The investment policies should be regularly reviewed for effectiveness and relevance and adapted to evolving development dynamics.

**5. Balanced rights and obligations**. The investment policies should be balanced in establishing the rights and obligations of states and investors in the interests of development for all.

**6. The right to regulate.** Each country has the sovereign right to establish the conditions of entry and operation for foreign investment, in accordance with international commitments, in the interest of the public good and to minimize possible negative effects.

**7. Openness to investment**. In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment. In addition, the issue of "openness" goes beyond establishing an investment. The trade opening can also be important; especially when the investment is significantly dependent on imports or exports.

**8. Investment protection and treatment**. The investment policies should provide adequate protection for established investors. The treatment of established investors should be non-discriminatory.

**9. Promoting and facilitating investments**. The investment promotion and facilitation policies should be aligned with sustainable development objectives and designed to minimize the risk of harmful competition for investment.

**10. Corporate governance** (administration) and responsibility. The investment policies should promote and facilitate the adoption and observance of international best practices on corporate social responsibility and good corporate governance.

**11. International cooperation.** The international community should work together to address common investment challenges for development, especially in the least developed countries. The collective efforts should be made to avoid investment protectionism (the definition of protectionism, according to the Explanatory Dictionary: “represents the economic policy of a state, which seeks the temporary, partial or total protection of indigenous industry and agriculture by import, through currency restrictions” etc.)”

### 4.4. The impact of FDI on Lex Renewables Development

A study by UNCTAD in 2009 confirmed that, for most countries, IIAs are a 'key instrument', in particular for developing countries, to attract foreign investment[67]. While scholars provide that 'there is mixed empirical and anecdotal evidence about the impact investment treaties have on FDI'[68], in my opinion supported by data and case law in this thesis, it is unequivocal that 'the substantive and procedural rights offered in investment treaties have important implications for foreign investment decisions and the rule of law', in particular investment treaty arbitration, has proved to have 'a unique role to play in the future of foreign investment'[69]'.

Furthermore, Bishop et al supported the fact that "ICSID and NAFTA awards have substantially developed foreign investment jurisprudence, adding to the 'case law' from mixed arbitral tribunals, such as the Iran-United States Claims Tribunal (IUSCT), and a few well-publicized decisions of the ICJ and ad hoc arbitral tribunals.[70]"

Since 2012, it has been documented in studies that no other sector akin to the renewable energy 'can arguably be deemed to be of greater political, environmental and even social importance to the global economy[71]' Global FDI in renewables is on the rise. Its outlook for growth and its demand of an equally sophisticated legal framework can no longer be described as 'hazy'[72].

Against the above backdrop, it is no wonder that in 2020, the renewable energy **'has dethroned oil and gas as the biggest recipient of FDI for t**he first time ever since the Financial Times fDi Market intelligence began recording the renewable energy FDI growth 20 years ago. The primary top key finding/trend in 2020 affirms that '**the renewable energy replaced coal, oil & gas as the top sector by capital investment, accounting for $87.2bn in 2020.'**[73]

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[67] See UNCTAD 2009 Report 'The Role of IIAs in Attracting FDI to Developing Countries' available at https://unctad.org/system/files/official-document/diaeia20095_en.pdf last accessed in August 2013

[68] See Page 373 Susan D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2006) 19 Pac McGeorge Global Bus & Dev LJ 337

[69] Ibid Page 373

[70] See Chapter 1 Pages 1-3 in Bishop RD, Crawford JR and Reisman WM (eds) 'Foreign investment disputes: cases, materials and commentary' (2nd edn, Kluwer Law International 2014)

[71] See Page 1 'FDI in Renewable Energy: A promising decade ahead March 2012 available at www.ocoinsight.com last accessed in August 2013

[72] Ibid Page 7 in 2012 the report stated: "While global FDI in renewables is on the rise, the outlook for a global political agreement and accompanying commitments on targets for renewables still remains somewhat hazy" Well, we can see now that this is no longer the case since 2020.

[73] See Page 4 of the 'FDI Report 2021: Global greenfield investment trends' Editors Geraldine Ewing And Jacopo Dettoni, Financial Times – fDi Intelligence last accessed on 25 December 2021 at https://fdi-report-2021.fdiintelligence.com/
Note: See footnote 13 above for the definition of the term 'Greenfield investment' in FDI.

The two figures below illustrate further the exponential growth of FDI in the renewables industry.

***Figure 12: Renewable Energy as Top Sector for first time in FDI***

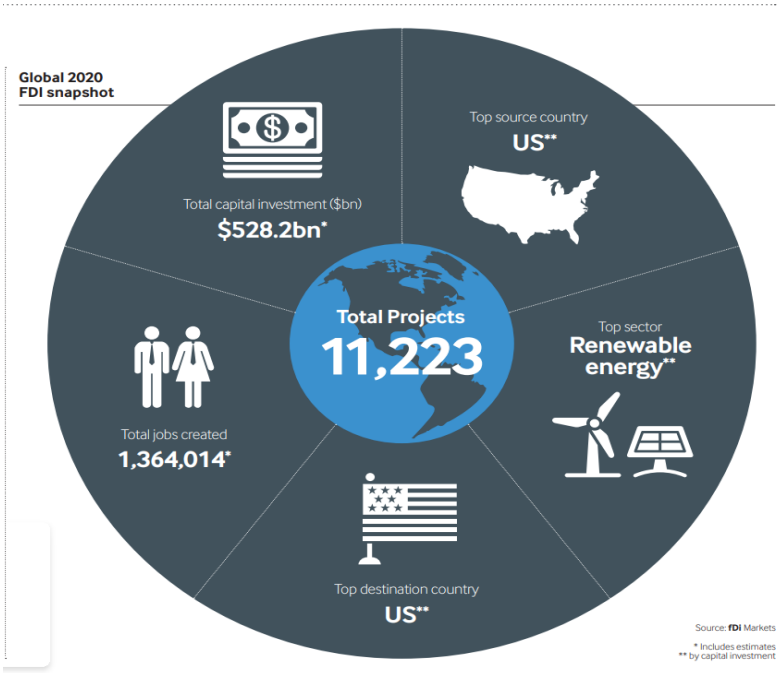


**Figure Number 12** – Renewable Energy as Top Sector for first time in FDI – Source fDi Markets – Financial Times – fDi Intelligence[74]

[74] See Page 4 of the 'FDI Report 2021: Global greenfield investment trends' Editors Geraldine Ewing And Jacopo Dettoni, Financial Times – fDi Intelligence last accessed on 25 December 2021 at https://fdi-report-2021.fdiintelligence.com/
Note: See footnote 13 above for the definition of the term 'Greenfield investment' in FDI.

***Figure 13: Renewable Analysis 2020***

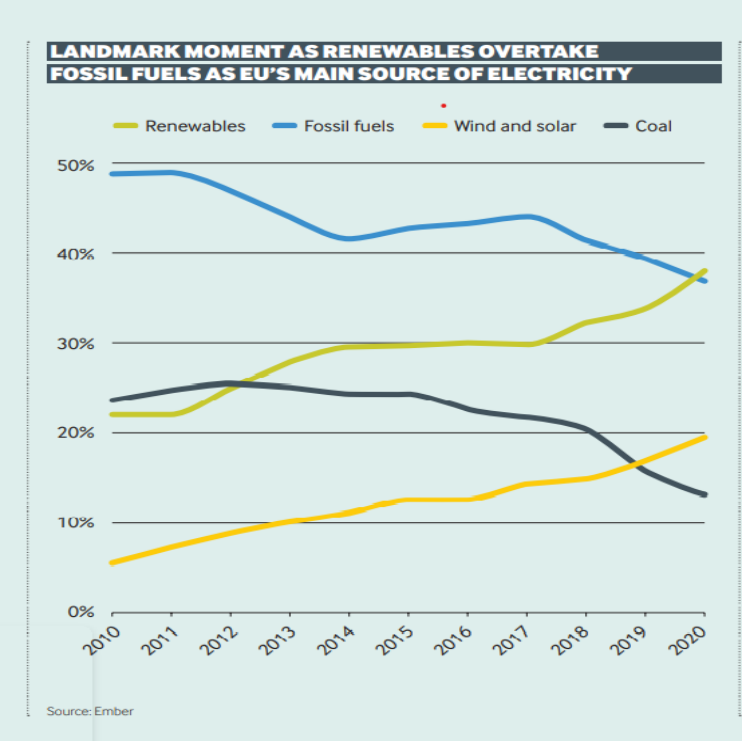


**Figure Number 13 – Renewable Analysis 2020 – Source fDi Markets – Financial Times – fDi Intelligence[75]**

## 4.5 Conclusion – a strong and unbreakable link between FDI and Lex Renewables Development

The renewable energy is set to make a significant contribution to the reduction of greenhouse gas emissions, more efficient use of resources and security of supply. This is reflected in all the global commitments made to the SDGs and COP26. However, the current IIA regime remain in state of influx and being modernized to accommodate the growth of the sector and the global demand for sustainability, it is neither unrealistic nor unreasonable to expect a rise of disputes in the renewable energy sector as a result.

As we will examine in Chapter 5, the number of 'published' renewables case law under IIAs has increased steadily and at times exponentially in the last decade. We have seen that in 2020 alone, UNCTAD's IIA Reform Accelerator was launched in November 2020, 'to help speed

[75] Ibid Page 23

up the reform of unbalanced treaty provisions prevalent in the old stock of IIAs'[76]. NAFTA has surfaced in a new form as USMCA.[77]

Furthermore, on 27 May 2020, the European Commission released its latest proposals for the modernization of the ECT. These range from a more stringent "Fair and Equitable Treatment" standard, and a ban on punitive damages, to provisions aimed at bolstering a state's right to regulate to protect the environment and combat climate change, while encouraging a sustainable investment environment[78].

In conclusion, one can deduce with certainty that there is no going back in relation to the growth of FDI and the strong link with the renewables sector and as a result the development of Lex Renewables.

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[76] See UNCATD IIA Issue Note January 2021 Issue 1 'Review of ISDA Decisions In 2019: Selected IIA Reform Issues' https://unctad.org/system/files/official-document/diaepcbinf2021d1_en.pdf This note alone included information of known published 13 cases in renewable energy.

[77] Note: While the USMCA largely does away with the investor-state dispute settlement mechanism ("ISDS") that was a central feature of NAFTA Chapter 11, a similar ISDS system now Chapter 14 in USMCA is preserved for certain U.S. investments in Mexico's energy sector. See https://www.kirkland.com/publications/blog-post/2020/07/usmca-investments-in-mexico-energy-sector last accessed in December 2021.

[78] See 'Commission presents EU proposal for modernising Energy Charter Treaty' Brussels 27 May 2020 https://trade.ec.europa.eu/doclib/press/index.cfm?id=2148 and 'The Energy Charter Treaty: first rounds of negotiations to modernise the ECT take place' https://sustainability.freshfields.com/post/102gder/the-energy-charter-treaty-first-rounds-of-negotiations-to-modernise-the-ect-take 13 August 2020 - last accessed December 2021.

# CHAPTER 5

## 'Lex Petrolea' v 'Lex Renewables': Divide and conquer or united we stand?

***'…It's a definition that if it's not renewable, it's going to run out at some point,…And we will have the choice of the collapse of civilization—and into the Dark Ages we go—or we find something renewable.'***

***— Elon Musk[1]***

***'…We need clean-energy innovation, and lots of it'***

***— Bill Gates @COP21 [2]***

***'…One big shift is that clean-energy innovation is higher on the agenda than ever. The world needs to get to zero carbon emissions by 2050… The second major shift is that the private sector is now playing a central role alongside governments and nonprofits… The third shift I'm seeing is that there's even more visibility for climate adaptation.'***

***— Bill Gates @COP26 [3]***

### 5.1 Overview

A successful energy transition requires not only private investments in so far that countries are able to meet their COP21 and COP26 goals but also the landscape of international investment arbitration awards interpretation and implementation of foreign investment protections under

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[1] See and listen at Minute 12 to 13:47 From Elon Musk's interview with Liz Hays on 60 Minutes Australia on 12 May 2020 'Elon Musk's prediction for the future of energy in Australia' Accessed at https://www.youtube.com/watch?v=PZz2r9j1Lfo

[2] See Bill Gates, 'TURNING THE FUTURE GREEN We Need Clean-Energy Innovation, And Lots of It. Three Steps We Can Take to Prevent the Worst Effects of Global Warming.' (*GatesNotes, 2015*)
Bill poignantly added that "The work needs to start immediately. The history of energy transitions is clear: It takes years to develop new sources of energy, and decades to make them a significant part of our energy mix. Today, renewables account for less than 5 percent of the world's energy. It took four decades for oil to go from 5 percent of the world's energy supply to 25 percent. Natural gas took even longer. I believe we can make this transition faster, both because the pace of innovation is accelerating, and because we have never had such an urgent reason to move from one source of energy to another. Some critics argue that only governments can manage such a big transition. Others argue that only the private sector can create the innovations we need. Both sides have a point. Private companies will ultimately develop energy breakthroughs. But their work will rely on the kind of basic research that only governments can fund. **The primary drivers of innovation are government research and high-risk private funding.**" <https://www.gatesnotes.com/energy/energy-innovation>

[3] See https://www.gatesnotes.com/Energy/Reflections-from-COP26
Bill Gates 'also helped launch the Net Zero World Initiative, https://www.nrel.gov/international/net-zero-world.html a commitment from the U.S. government to help other countries get to zero by providing funding and—even more important—access to experts throughout the government, including the top minds at America's world-class national laboratories. These countries will get support with planning the transition to a green economy, piloting new technologies, working with investors, and more.'

investment treaties has a hand and plays a key role in maintaining stable investment environment[4]. 'An estimated USD 1.7 trillion of investments are needed by 2030 just to implement the renewable energy components in the Nationally Determined Contributions ("NDCs"[5]) by countries globally to transition to a low-carbon economy.

Even if the Elon Musks and Bill Gates of this world hypothetically decided to no longer push anymore for renewables investments for our planet to heal and transform, the world cannot stop the progress of work of legendary innovators pioneers such as Dr Peter Varadi[6] , the father of modern solar energy, the man behind my personal journey, the man who wrote my PhD reference letter to CEPMLP and inspired me to write this thesis. His work, inventions and books are now pervasive across the globe and will continue to transform every aspect of life on our planet.

COVID19 did not stop the demand and growth for renewables. The International Energy Agency (IEA) in its 2020 report provided a key finding that: 'Renewables were the only source that posted a growth in demand, driven by larger installed capacity and priority dispatch[7].'

As I write this chapter, my memory took me to August 2013, during my PhD upgrade internal viva. One of the panelists, as they rightly do in playing devil's advocate, casted great doubt that there was a case to answer for Lex Renewables simply because there was not and would not be enough published investment treaty case law and awards to justify any special look at it, let alone the development of a Lex Renewables.

I vividly recall disagreeing with a measured yet passionate response. Yes, there were a handful of cases than when I applied to CEPMLP for my PhD in 2011/2012. Yet, the writing on the wall was very clear regarding the direction the world was heading to in relation not only to the energy transition, but the renewables industry growth and, accordingly, the ultimate rise of the number of cases and disputes related to renewables. Not long after, the energy world has been

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[4] See Wendy J. Miles, Catherine Amirfar, Merryl Lawry-White, Rhianna Hoover, Debevoise In Depth, 'Solar Arbitrations: A Year in Review' www.debevoise.com published 22 October 2019 last accessed December 2021

[5] See International Renewable Energy Agency, "Investment Needs," https://www.irena.org/financeinvestment/Investment-Needs last accessed December 2021

[6] See http://energyblog.dasolar.com/blog/solar-blog/index.php/2009/08/solar-industry-pioneers-peter-varadi

[7] See Page 3 'Global Energy Review 2020 Key findings: The impacts of the Covid-19 crisis on global energy demand and CO2 emissions' https://iea.blob.core.windows.net/assets/7e802f6a-0b30-4714-abb1-46f21a7a9530/Global_Energy_Review_2020.pdf last accessed on 28 December 2021

experiencing a steady and at times sweeping unstoppable waves of renewables cases shaking the applicable investment treaty arbitration legal framework demanding reform.

In October 2020, a mere one-click on the Energy Charter Secretariat's website, would take one to read the undeniable published renewables case law statistics under the ECT alone:

> **"Following the recent initiation of arbitral proceedings in 'Fin.Doc S.r.l. and others v. Romania and Encavis and others v. Italy[8]', the total number of investment disputes under the Energy Charter Treaty (ECT) that concern renewable energy sources is now 80 (approx. 60%).** Majority of all investment disputes under the Treaty are brought by small or medium enterprises (approx. 60%) …
>
> Information about the claims has been compiled on the basis of public sources, including specialized reporting services. Since 2001, when the first case invoking the ECT was registered, the Energy Charter Secretariat tracked 134 publicly known investment arbitration cases where the ECT was invoked (sometimes together with a bilateral investment treaty). **The ECT remains the most frequently invoked international investment agreement.[9]"**

The reference to global investors such as Bill Gates and Elon Musk, legendary pioneers as Dr Varadi, governments, academics, international law organizations as the Energy Charter Secretariat, legal practitioners and NGOs is deliberate. These are major actors in advancing law making, i.e. the responsibility is shared by all stakeholders.

Professor Reisman, as one of the founders of the New Haven approach, asserted that international law making is a process involving decisions by a wide range of actors. He wrote:

> "…In a bygone era, international law was defined by most of our profession as law between states. As states were the only active "subjects" of international law, a corollary of the definition was that only states made law, whether explicitly, through agreements, or implicitly, through their cumulative behavior. More than 50 years ago, Myres

[8] Note – these two cases were not included in the analysis of renewables case law below because we only considered cases up till the end of 2018 as the set scope for the study (See section 1.5 in Chapter 1 in this thesis).
[9] See Energy Charter Media News 'Even more renewable energy investors rely on treaty protection: updated statistics of investment arbitration cases under the Energy Charter Treaty' published on 12 October 2020 https://www.energycharter.org/media/news/article/even-more-renewable-energy-investors-rely-on-treaty-protection-updated-statistics-of-investment-arb/ last accessed on 28 December 2021

> McDougal and his colleagues dismissed the "states as subjects" approach and proposed the then radical idea that, for purposes of explaining why past decisions had been taken the way they were, trying to predict future decisions or trying to influence the course of future decisions, the reality of international law had to be conceived of as a process of decision in which not only states, but a much wider range of actors participated: those actors, or "participants," as McDougal called them, included national and international officials, the elites of non-governmental organizations running the gamut from those concerned with wealth through to those concerned with religious rectitude, transnational business entities, gangs and terrorists, and individuals…[10]"

At this backdrop, in this key chapter, we will discuss a select number of the published renewables investment treaty cases presenting a small sample of what is unfolding before us in international law-making in developing Lex Renewables in investment treaty arbitration and whether Lex Renewables growth would benefit from the already advanced Lex Petrolea or not.

### 5.2 Lex Renewables: select investment arbitration decisions

When Lex Petrolea was first presented by Doak Bishop[11] and updated later by Thomas Childs[12], approximately a sample of 18 to 20 oil and gas cases were explored to highlight the prevailing issues in Lex Petrolea. For the sake of levelling the comparative analysis for Lex Renewables, below is a table summarising the key issues of 20 renewables investment treaty cases in addition to others that were previously discussed in earlier chapters.

***Table 6: Lex Renewables: Select investment arbitration decisions***

| | **Table 6 – Lex Renewables: Select investment arbitration decisions<br>Source: Generated by the Thesis Author in November 2021** | | | | |
|---|---|---|---|---|---|
| **#** | **Case** | **Facts** | **Nature of the Dispute** | **Award** | **Other Comments ECT/BIT/ICSID/NAFTA** |
| **1** | ***Antaris Solar GmbH (Germany) and Dr. Michael Göde (Germany) v. Czech Republic, PCA*** | • Regarding interests in several Czech energy companies engaged in the | • Claim that the Respondent breached its obligations under the ECT and the BIT by repealing incentive | • Award of 2 May 2018<br>• In favour of State<br>• All claims dismissed at merits stage | • ECT<br>• Czech Republic – Germany BIT (1990)<br>• Arbitration Rules UNCITRAL |

[10] See Page 5 W. Michael Reisman 'The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application' Transnational Dispute Management (TDM) Issue: Vol. 2 - issue 3 Published: June 2005

[11] See section 3.2.2 in Chapter 3 of this thesis.

[12] See section 3.2.4 in Chapter 3 of this thesis.

| | Table 6 – Lex Renewables: Select investment arbitration decisions<br>Source: Generated by the Thesis Author in November 2021 | | | | |
|---|---|---|---|---|---|
| **#** | **Case** | **Facts** | **Nature of the Dispute** | **Award** | **Other Comments ECT/BIT/ICSID/NAFTA** |
| | ***Case No. 2014-01***[13] | photovoltaic sector[14]<br>• Alleged breach of the standard of fair and equitable treatment (FET), unreasonable and arbitrary measures, the umbrella clause and indirect or creeping expropriation | arrangements to attract investors in photovoltaic power generation contrary to its guarantees.[15] | | • Administering institution PCA (Permanent Court of Arbitration) |
| **2** | ***Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31** | • Alleged violation of FET, Umbrella clause, and Impairment of the Claimants' investments because of unreasonable measures[16] | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector, including a 7% tax on power generators' revenues and a reduction in renewable energy producer subsidies.[17] | • Award of 25 May 2018<br>• In favour of Investor<br>• Under Article 10(1) of the ECT, Spain breached its obligation to accord the Claimants FET. | • ICSID Convention: Arbitration Rules<br>• ECT |
| **3** | ***BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding*** | • Violation of FET/Minimum standard of treatment (MST), | • Claims originating from the Government's implementation of several | • Award of 2 December 2019<br>• In favour of Investor | • ICSID Convention: Arbitration Rules<br>• ECT |

[13] Antaris Solar GmbH (Germany) and Dr. Michael Göde (Germany) v. Czech Republic, PCA Case No. 2014-01 Award of 2 May 2018 Available at https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf Accessed 10 December 2021

[14] 'Antaris And Göde V. Czech Republic | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/558/antaris-and-g-de-v-czech-republic> accessed 10 December 2021

[15] Ibid

[16] 'Antin V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/556/antin-v-spain> accessed 9 December 2021

[17] Ibid.

| | Table 6 – Lex Renewables: Select investment arbitration decisions<br>Source: Generated by the Thesis Author in November 2021 | | | | |
|---|---|---|---|---|---|
| **#** | **Case** | **Facts** | **Nature of the Dispute** | **Award** | **Other Comments ECT/BIT/ICSID/NAFTA** |
| | ***GmbH v. Spain, ICSID Case No. ARB/15/16*** | including denial of justice claims[18] | energy reforms affecting the renewables sector, including a 7% tax on power generators' revenues and a reduction in renewable energy producer subsidies. | • Decision on Jurisdiction, Liability and Directions on Quantum | |
| **4** | ***Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40*** | • Alleged breach of FET/ MST, Umbrella clause, Arbitrary, unreasonable and/or discriminatory measures, Full protection and security, or similar National treatment[19] | • Claims stemming from a series of governmental decrees aimed at reducing tariff incentives for certain solar energy projects.[20] | • Award of 6 August 2019<br>• In favour of State<br>• All claims dismissed at the merits stage | • ICSID Convention: Arbitration Rules<br>• ECT |
| **5** | ***Charanne BV - Construction Investments SARL v El Reino de España - Arbitraje No 062-2012)***[21] | • Alleged breach of Protection and treatment of Investments, FET, Non-discrimination, Legitimate Expectations, Removal of Incentives,<br>• Sovereign's rights to regulate renewable energy sector | • Claims stemming from adjustments to the regulatory framework for electricity for solar photovoltaic energy - removal of incentive payments (in | • Award of 21 January 2016 – one the first published awards<br>• In favour of State | • Stockholm Chamber of Commerce ("SCC") Rules<br>• ECT |

[18] 'Baywa R.E. V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/622/baywa-r-e-v-spain> accessed 9 December 2021

[19] 'Belenergia V. Italy | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/670/belenergia-v-italy> accessed 9 December 2021

[20] Ibid

[21] Charanne B.V. and Construction Investments S.A.R.L. v. The Kingdom of Spain (SCC Case No. 062/2012) (English) Available at https://www.transnational-dispute-management.com/downloads/15994-case_report_charanne-v-spain-award.pdf accessed 9 December 2021

| | Table 6 – Lex Renewables: Select investment arbitration decisions<br>Source: Generated by the Thesis Author in November 2021 | | | | |
|---|---|---|---|---|---|
| **#** | **Case** | **Facts** | **Nature of the Dispute** | **Award** | **Other Comments ECT/BIT/ICSID/NAFTA** |
| | | | the nature of a Feed in Tariff)[22]<br>• Breach of ECT Article (10)1 | | |
| **6** | ***Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No. ARB/15/20***[23] | • Breach of FET in respect of investments in PV plants and hydro plants | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector, including a 7% tax on power generators' revenues and a reduction in renewable energy producer subsidies.[24] | • Decision of 19 February 2019<br>• In favour of Investor (Breach of FET) | • ICSID Convention: Arbitration Rules<br>• ECT |
| **7** | ***EDF v. Hungary***<br><br>***Electricite de France (EDF) International S.A. v. Republic of Hungary (2009)*** | • Alleged breach of FET/MST | • Claims originating from the government's cancellation of certain long-term power purchase agreements between EDF's local subsidiary and the state-owned energy company MVM, | • Award of 23 December 2014<br>• In favour of Investor | • Arbitration Rules: UNCITRAL<br>• Administering institution: PCA (Permanent Court of Arbitration)<br>• ECT |

[22] Ibid. See also (*Transnational Dispute Management*) <https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=15994> accessed 9 December 2021

[23] Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No. ARB/15/20. (English) Available at https://www.italaw.com/sites/default/files/case-documents/italaw10692.pdf Accessed 10/12/2021

[24] 'Cube Infrastructure and Others V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/627/cube-infrastructure-and-others-v-spain> accessed 10 December 2021

| | Table 6 – Lex Renewables: Select investment arbitration decisions<br>Source: Generated by the Thesis Author in November 2021 | | | | |
|---|---|---|---|---|---|
| **#** | **Case** | **Facts** | **Nature of the Dispute** | **Award** | **Other Comments ECT/BIT/ICSID/NAFTA** |
| | | | following a European Commission ruling deeming the arrangements unconstitutional under EU State aid rules and requiring their termination.[25] | | |
| **8** | ***Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID [26] Case No. ARB/13/36[27]*** | • In respect of interests in three concentrated solar power plants in Spain.[28]<br>• Breaches of FET/MST and Indirect Expropriation | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector, including a 7% tax on power generators' revenues and a reduction in renewable energy producer subsidies<br>• Different from Charanne as they argued that a set of | • Award of 4 May 2014<br>• In favour of Investor (Breach of FET/MST) | • ICSID Convention: Arbitration Rules<br>• ECT |

[25] 'EDF V. Hungary | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/364/edf-v-hungary> accessed 10 December 2021 and Douglas Thomson, 'EDF wins claim against Hungary' (*Global Arbitration Review 2014*) at <https://globalarbitrationreview.com/edf-wins-claim-against-hungary> last accessed 10 December 2021

[26] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36 Available at https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf. Accessed 10 December 2021

[27] Ibid

[28] 'Eiser And Energía Solar V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/535/eiser-and-energ-a-solar-v-spain> accessed 10 December 2021

| | Table 6 – Lex Renewables: Select investment arbitration decisions<br>Source: Generated by the Thesis Author in November 2021 | | | | |
|---|---|---|---|---|---|
| **#** | **Case** | **Facts** | **Nature of the Dispute** | **Award** | **Other Comments ECT/BIT/ICSID/NAFTA** |
| | | | later regulations from 2012-2014 breached rights under the ECT resulting in devaluation of investments and forcing their Spanish subsidiaries into debt restructuring [29] | | |
| **9** | ***Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain (ICSID Case No. ARB/16/4)*** | • Case concerning Investments in a renewable energy generation project.[30] | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector | • Decision of March 2021<br>• No breach of legitimate expectation<br>• Breach of the obligation of stability | • ICSID<br>• ECT |
| **10** | ***Foresight and others v. Spain***<br><br>***Foresight Luxembourg Solar 1 S.Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II*** | • Concerning investments in three solar photovoltaic facilities<br><br>• Alleged breach of FET/MST, Umbrella clause, Arbitrary, unreasonable and/or discriminatory measures, Indirect expropriation | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector | • Award of 14 November 2018<br>• In favour of Investor<br>• Breach of FET/MST | • Stockholm Chamber of Commerce ("SCC") Rules<br>• Administering Institution: SCC<br>• ECT |

[29] See Isabella Reynoso 'Spain's Renewable Energy Saga: Lessons for international investment law and sustainable development' Investment Treaty News 27 June 2019 https://www.iisd.org/

[30] 'Eurus Energy V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/703/eurus-energy-v-spain> accessed 10 December 2021

| | Table 6 – Lex Renewables: Select investment arbitration decisions<br>Source: Generated by the Thesis Author in November 2021 | | | | |
|---|---|---|---|---|---|
| **#** | **Case** | **Facts** | **Nature of the Dispute** | **Award** | **Other Comments ECT/BIT/ICSID/NAFTA** |
| | ***S.P.A v. Kingdom of Spain (SCC Case No. 2015/150)***[31] | | | | |
| **11** | ***Isolux v. Spain***<br><br>***Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain (SCC Case No. 2013/153)***[32] | • Regarding interests in several photovoltaic plants in Spain.[33] | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector<br>• Same as Eiser while it was decided first it was published after Charanne and Eiser becoming public[34] | • Award of 12 July 2016<br>• In favour of State<br>• Claims dismissed at merits stage | • Stockholm Chamber of Commerce ("SCC") Rules<br>• Administering Institution: SCC<br>• ECT |
| **12** | ***Masdar v. Spain***<br><br>***Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain (ICSID Case No. ARB/14/1)***[35] | • Regarding a stake in Torresol Energy Investments S.A., a Spanish firm that operated three concentrated solar power plants.[36]<br>• Alleged breach of FET/ MST | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector | • Award of 16 May 2018<br>• In favour of investor<br>• Breach of FET/MST | • ICSID<br>• ECT |

[31] 'Foresight and Others V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/837/foresight-and-others-v-spain> accessed 10 December 2021

[32] 'Isolux V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/564/isolux-v-spain> accessed 10 December 2021

[33] Ibid

[34] See Isabella Reynoso 'Spain's Renewable Energy Saga: Lessons for international investment law and sustainable development' Investment Treaty News 27 June 2019 https://www.iisd.org/

[35] 'Masdar V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/593/masdar-v-spain> accessed 10 December 2021

[36] Ibid

| | Table 6 – Lex Renewables: Select investment arbitration decisions<br>Source: Generated by the Thesis Author in November 2021 | | | | |
|---|---|---|---|---|---|
| **#** | **Case** | **Facts** | **Nature of the Dispute** | **Award** | **Other Comments ECT/BIT/ICSID/NAFTA** |
| **13** | ***NextEra v. Spain***<br><br>***NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain (ICSID Case No. ARB/14/11)***[37] | • Regarding construction and operation of two thermo-solar plants in Spain.<br>• Alleged breach of FET/MST, Most Favoured Nation Treatment (MFNT), Arbitrary, unreasonable and/or discriminatory measures, Umbrella clause[38] | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector | • Award of 31 May 2019<br>• In favour of investor<br>• Breach of FET/MST | • ICSID<br>• ECT |
| **14** | ***Novenergia v. Spain***<br><br>***Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain (SCC Case No. 063/2015)***[39] | • Alleged breach of FET/MST, Arbitrary, unreasonable and/or discriminatory measures, Full protection and security, Umbrella clause, Indirect expropriation<br>• From Indirect investment in 8 photovoltaic plants in Spain[40] | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector | • Award of 15 February 2018<br>• In favour of investor<br>• Breach of FET/MST | • Stockholm Chamber of Commerce ("SCC") Rules<br>• Administering Institution: SCC<br>• ECT |
| **15** | ***OperaFund and Schwab v. Spain***<br><br>***OperaFund Eco-Invest*** | • Regarding Investments in two photovoltaic projects[42]<br>• Alleged breach of FET/MST, | • Claims originating from the Government's implementation of several | • Award of 6 September 2019<br>• In favour of investor | • ICSID<br>• ECT |

[37] NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain (ICSID Case No. ARB/14/11) Award available at https://www.italaw.com/sites/default/files/case-documents/italaw10568.pdf Accessed 10 December 2021

[38] 'NextEra V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/566/nextera-v-spain> accessed 10 December 2021

[39] Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain (SCC Case No. 063/2015) Final Arbitral Award available at https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf Accessed 10 December 2021

[40] 'Novenergia V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/782/novenergia-v-spain> accessed 10 December 2021

[42] 'Operafund And Schwab V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/645/operafund-and-schwab-v-spain> accessed 10 December 2021

| | Table 6 – Lex Renewables: Select investment arbitration decisions<br>Source: Generated by the Thesis Author in November 2021 | | | | |
|---|---|---|---|---|---|
| **#** | **Case** | **Facts** | **Nature of the Dispute** | **Award** | **Other Comments ECT/BIT/ICSID/NAFTA** |
| | ***SICAV PLC and Schwab Holding AG v. Kingdom of Spain (ICSID Case No. ARB/15/36)***[41] | Arbitrary, unreasonable and/or discriminatory measures, Full protection and security, Umbrella clause | energy reforms affecting the renewables sector | • Breach of FET/MST | |
| **16** | ***RREEF v. Spain***<br><br>***RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/30)***[43] | • Regarding investments in two solar power plants[44]<br>• Alleged breach of FET/MST, Umbrella clause | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector | • Decision of 30 November 2018<br>• In favour of investor<br>• Breach of FET/MST | • ICSID<br>• ECT |
| **17** | ***RWE Innogy v. Spain***<br><br>***RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain (ICSID*** | • Regarding investments in several renewable energy generation projects in Spain[46]<br>• Alleged breach of FET/MST, Arbitrary, unreasonable and/or discriminatory | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector | • Award of 18 December 2020<br>• In favour of investor<br>• Breach of FET/MST, Arbitrary, unreasonable and/or discriminatory measures | • ICSID<br>• ECT |

[41] OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain (ICSID Case No. ARB/15/36) Available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4806/DS12832_En.pdf Accessed 10 December 2021

[43] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/30), Decision on Responsibility and on the Principles of Quantum dated 30 November 2018 Available at https://www.italaw.com/sites/default/files/case-documents/italaw10455_0.pdf Accessed 10 December 2021

[44] 'RREEF V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/536/rreef-v-spain> accessed 10 December 2021

[46] 'RWE Innogy V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/586/rwe-innogy-v-spain> accessed 10 December 2021

| | Table 6 – Lex Renewables: Select investment arbitration decisions<br>Source: Generated by the Thesis Author in November 2021 | | | | |
|---|---|---|---|---|---|
| **#** | **Case** | **Facts** | **Nature of the Dispute** | **Award** | **Other Comments ECT/BIT/ICSID/NAFTA** |
| | ***Case No. ARB/14/34)***[45] | measures, Umbrella clause[47] | | | |
| **18** | ***SolEs Badajoz v. Spain***<br><br>***SolEs Badajoz GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/38)***[48] | • Regarding investments in two photovoltaic plants[49]<br>• Alleged breach of FET/MST, Indirect expropriation, Umbrella clause | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector | • Award of 31 July 2019<br>• In favour of investor<br>• Breach of FET/MST | • ICSID<br>• ECT |
| **19** | ***Stadtwerke München GmbH and others v. Kingdom of Spain (ICSID Case No. ARB/15/1)***[50] | • Investments in Spanish thermo solar plant Andasol[51]<br>• Alleged breach of FET/MST, Arbitrary, unreasonable and/or discriminatory measures, Umbrella clause | • Claims originating from the Government's implementation of several energy reforms affecting the renewables sector | • Award of 2 December 2019<br>• In favour of State<br>• All claims dismissed at the merits stage[52] | • ICSID<br>• ECT |
| **20** | ***Tennant Energy, LLC. v. Canada (PCA Case No. 2018-54)*** | • Regarding Skyway 127 Wind Energy Inc., an Ontario-based company that planned to build a wind farm.[53] | • Claims resulting from Ontario's allegedly non-transparent | • Pending | • Arbitration Rules: UNCITRAL<br><br>• Administering institution: PCA |

[45] RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain (ICSID Case No. ARB/14/34) Award dated 18 December 2020 (English) Available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4065/DS16032_En.pdf Accessed 10 December 2021

[47] Ibid

[48] SolEs Badajoz GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/38) Award of 31 July 2019 Available at https://www.italaw.com/sites/default/files/case-documents/italaw10836.pdf Accessed 10 December 2021

[49] 'SolEs Badajoz V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/653/soles-badajoz-v-spain> accessed 10 December 2021

[50] Stadtwerke München GmbH and others v. Kingdom of Spain (ICSID Case No. ARB/15/1) Award dated 2 December 2019 Available at https://www.italaw.com/sites/default/files/case-documents/italaw11056.pdf Accessed 10 November 2021

[51] 'Stadtwerke München And Others V. Spain | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/655/stadtwerke-m-nchen-and-others-v-spain> accessed 10 December 2021

[52] Ibid

[53] 'Tennant Energy V. Canada | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (*Investmentpolicy.unctad.org*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/827/tennant-energy-v-canada> accessed 10 December 2021

| | Table 6 – Lex Renewables: Select investment arbitration decisions<br>Source: Generated by the Thesis Author in November 2021 | | | | |
|---|---|---|---|---|---|
| **#** | **Case** | **Facts** | **Nature of the Dispute** | **Award** | **Other Comments ECT/BIT/ICSID/NAFTA** |
| | | • Alleged breach of FET/MST | management of the feed-in tariff program for renewable energy sources, as well as the claimant's alleged discriminatory treatment of the wind farm project through certain regulatory measures.[54] | | (Permanent Court of Arbitration)<br>• Investment Treaty: NAFTA (1992) |

### 5.2.1 General observation on the 20-renewable case sample

From the 20 cases in Table 6 above, we notice that:

- 25% were resolved in favour of the State, 65% in favour of Investors, %5 in favour of neither and 5% is still pending.
- ICSID rules were used the most, followed by the SCC and UNCITRAL.
- The most IIA used is topped by the ECT, then BIT and NAFTA.
- The majority involves PV/Solar cases against Spain due to the ambitious Spanish government renewable energy policies that attracted foreign investors and still do[55].
- Breaches of FET standard tops the basis of claims[56], followed by and/or in conjunction with MST and indirect expropriation. The majority of cases primarily considered the same legal principles (the interpretation of "legitimate expectations", and each of the

[54] Ibid

[55] See Yannic Rack , 'Foreign Investors Flock to Spain's Booming Renewables Market' (*Spglobal.com*, 2021) <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/foreign-investors-flock-to-spain-s-booming-renewables-market-65428758> Last accessed December 2021

[56] See Point v The PV Investors v. The Kingdom of Spain, Final Award, PCA Case No. 2012-14, 28 February 2020 by Andre Yeap, SC, Kelvin Poon, Matthew Koh, David Isidore Tan, Daniel Ho and Mark Teo in 'The Investment Treaty Arbitration Review: Fair and Equitable Treatment' Rajah & Tann Asia published and accessed 18 June 2021 https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/fair-and-equitable-treatment

(i) "fair and equitable treatment" and (ii) "stability" standards in the ECT[57]). The investor's knowledge (i.e. what is known or ought to have been known by the investor at the of investment) was considered by the tribunals in assessing the existence and extent of its legitimate expectations.

- The Spanish cases all "loosely' follow a similar fact pattern, where the relevant State has introduced a renewables incentives regime, but for various economic and/or political reasons taken measures to reform the regime to the investors' detriment. **What is worthy of note is the varying degrees of success the claimant investors have in pursuing what would, on their face, appear to be very similar claims. This is not unusual in relation to investment treaty arbitration. There are several other examples of Tribunals coming to different conclusions on cases with very similar facts**.[58]
- In some of these cases, the Arbitrators involved were Doak Bishop and Gary Born known titans in investment arbitration - with Bishop introducing Lex Petrolea, one wonders if he would be also supportive of a Lex Renewables since most of the solar cases against Spain, Hungary and Czech Republic raised same questions on treaty interpretation.
- Note that in 2010 after Spain retracted some of the features of its renewables incentive program that started in 2007, it was hit by more than 40 arbitration claims. The above-mentioned cases against Spain is only a small number[59].
- The investors who successfully convinced the tribunal that the '…general legal framework (governing the incentive regime) was equivalent to the State providing a "specific commitment" in relation to the incentive regime' won their claims - see *OperaFund v. Spain* whereby '…the tribunals invoked the wording, as well as the object and purpose of the respective laws to find that the legislation had been deliberately drafted and implemented to attract these investors. The tribunals, therefore, found that the State had frustrated the investors' legitimate expectations by making the regulatory changes to the laws underlying the incentive regime.[60]

[57] Ronnie King, "'Same, Same, But Different"? Eurus Energy: A Cautionary Tale From Spain' (*Ashurst.com*, 2021) ASHURST International Arbitration Update 09 APR 2021 <https://www.ashurst.com/en/news-and-insights/legal-updates/same-same-but-different-eurus-energy-a-cautionary-tale-from-spain> accessed 29 December 2021
[58] Ibid
[59] See Supra Footnote 29
[60] See Supra Footnote 56

- Note that in November 2020, four investors confirmed 'that they have accepted the offer introduced in Spain's Royal Decree-law 17/2019, guaranteeing higher returns for renewable energy investors which renounce previous public international law claims and awards against the state.'…' while Spain has been keen to publicize this endorsement of its law, hundreds of millions of dollars owed by the state under international arbitration awards from previous claims have not been waived.[61]'

It is submitted that this is a small sample that is randomly selected, yet it provides a glimpse as to the prevailing matters of concern, especially in such highly technical industries such as the renewables. I am sure someone will pick up the baton and analyze the 80 plus published renewable investment treaty cases, which by the time would have doubled if not quadrupled.

### 5.2.2 Further case commentary[62]

***(a) Antaris Solar GmbH (Germany) and Dr. Michael Göde (Germany) v. Czech –*** The Antaris case started as a single claim filed by 10 investors against the Czech Republic in May 2013 under the ECT and various BITs. The Czech Republic refused to have all claims heard as a single claim. Eventually, they were broken into further six cases where all of them were heard under UNCITRAL and grouping investors and or affiliates on the same project together (*Natland Investment Group NV, Natland Group Limited, G.I.H.G Limited and Radiance Energy Holding S.A.R.L v Czech Republic; Voltaic Network GmbH v Czech Republic; ICW Europe Investments Limited v Czech Republic; Photovoltaik Knopf Betriebs-GmbH v The Czech Republic; WA Investments-Europa Nova Limited v Czech Republic; and Mr Jurgen Wirtgen, Mr Stefan Wirtgen and JSW Solar (ZWEI) v Czech Republic*). Gary Born was on all these 6 cases after Doak Bishop resigned due to issues of conflict[63].

***(b) Antin v Spain*** - In July 2021, The European Commission (EC) announced that it was launching an-in-depth investigation into the EUR-101-million arbitration award imposed on

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[61] See Stuart Duston and Basil Woodd-Walker 'Will more renewables investors renounce claims against Spain? Investors who have awards against Spain need to weigh the challenges of enforcement against the added incentives for relinquishing their claims' Simmons & Simmons Insight Publication 9 November 2020 last accessed December 2021 https://www.simmons-simmons.com/en/publications/ckhaj1g2c150d0965puipnu8j/will-more-renewables-investors-renounce-claims-against-spain-

[62] See for further background history on the Spanish Government program to support renewable energy investors Professor Carmen Otero García-Castrillón 'Spain And Investment Arbitration: The Renewable Energy Explosion' Investor-State Arbitration Series Paper No. 17 — November 2016 Centre for International Governance Innovation, (CIGI) www.cigionline.org last accessed December 2021; Fernando Dias Simoes, 'When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking' (2017) 45 Denv J Int'l L & Pol'y 251; 'Renewable Energy Incentives in the United States and Spain: Different Paths -Same Destination?' By Gerard Marata, Olegario Soldevila Ferrer, Jeff W Dorrill and Erin Larkin Watkins 28 J. Energy & Nat. Resources L. 481 2010

[63] See Kyriaki Karadelis 'Bishop resigns from Czech solar panel' Global Arbitration Review (GAR) blog published 11 December 2014 and last accessed same date 11 December 2014 (hardcopy on file)

Spain in favour of Antin as it breaches the EU rules on state aid. It is also reported that: "*Whether the additional support in the form of the arbitration award "is necessary for the development of an economic activity, has an incentive effect and is proportionate" will be the target of the EC's investigation. The EC will also examine whether the award discriminates investors based on nationality and on their ability to access international arbitration, since Spanish investors cannot mount such legal challenges for the changes to the 2007 scheme, the Commission adds*.[64]"

***(c) Cube v Spain*** - Balanced sovereignty matters. The tribunal explained that 'the commitments on which legitimate expectations were based represented the exercise of sovereign power: while "States have the sovereign right to amend their legislation," they "also have the right, and the legal power, to make representations as to the future treatment of investments in such a manner as to create expectations that cannot be defeated without violating a duty of [FET].[65]"'

***(d) Eiser v Spain*** - The tribunal did not provide analysis on what the investor's legitimate expectations were, which is opposite to what the tribunal did in *Charanne*, Isolux and *Novenergia*[66]. Some practitioners even argued that the current lack of an appellate mechanism to correct such inconsistencies is creating more uncertainties and ambiguities[67]. The tribunal rejected Spain's 'intra-EU' objection and its contention that the ECT does not apply to disputes involving investments made within the EU by investors from other EU countries. Accordingly, the tribunal lacked jurisdiction. The tribunal supported the Claimants reliance on a precedent on jurisdictional ruling in *RREEF v Spain* on the ordinary meaning of the ECT Article 26 as such the tribunal construed the provision in accordance with the Vienna Convention on the Law of Treaties and dismissed Spain's 'intra-EU' objection[68].

***(e) Eurus v Spain*** - Eurus is an energy subsidiary of Japan's Toyota Group. It 'indirectly owned and managed wind farms that were authorized to benefit from the special incentive regime in Spain.[69]' As Spain began to wind back the subsidies regime in 2013 and clawing back subsidies Eurus had already received. It brought a claim against Spain under the ECT using ICSID

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[64] See Sladjana Djunisic 'EC to weigh in on arbitration award against Spain for cutting FITs' RenewablesNow published 20 July 2021 last accessed December 2021 https://renewablesnow.com/news/ec-to-weigh-in-on-arbitration-award-against-spain-for-cutting-fits-748303/

[65] See Supra Footnote 4 and Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum (19 February 2019), **para 397.**

[66] See Supra Footnote 27

[67] See Supra Footnote 27

[68] See Gladwin Isaac 'Investors triumph over Spain in a claim concerning Spain's regulatory overhaul for clean energy Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36' published 26 September 2017 last accessed in September 2021 https://www.iisd.org/itn/en/2017/09/26/investors-triumph-over-spain-claim-concerning-spains-regulatory-overhaul-for-clean-energy-gladwin-issac/

[69] See Supra Footnote 57 Ronnie King – Ashurst - Tokyo Office analysis.

arbitration rules. The Tribunal dismissed the EUR 258 million claim brought by Eurus. The Tribunal found that 'Eurus could not have formed a legitimate expectation that the incentive regime would remain unchanged and that Spain would continue to pay the subsidies at the same rate for the lifetime of the wind farms[70]'. **This was because the Tribunal found that Spain had not made any "specific commitments" to maintain these subsidies[71]**. The Tribunal did 'concede that Eurus had legitimate expectations that those subsidies would be continued in "some substantial form," but not to the extent that they would remain the same for the lifetime of Eurus' investment.'[72]

***(f) Isolux v Spain*** - The tribunal did not accept jurisdictional objection based on carveout for taxation. It used the precedent of the decision in *Perenco v Ecuador* in relation to the FET standard by establishing first whether there was a violation of the FET when the investment was made. It was concluded that Spain did not violate FET because Isolux decided to invest in Spain on 29 October 2012, i.e. after Spain underwent the regulatory modifications. On deciding on the indirect expropriation matter, the tribunal established that Isolux had an investment under Article 13 of the ECT and used the test in *Electrabel v Hungary* – 'for an expropriation to occur, there must be a substantial, radical, severe, devastating or fundamental deprivation of right or virtual annihilation, effective neutralization or de facto destruction of the investment, its value or enjoyment' para 837 of the decision – using a Deloitte report on Isolux profitability, it was evident the profit recorded after the Spain alleged expropriation was 7.19% after taxes where Isolux projected % in May 2011 was 6.19% as such the tribunal found no severe loss and the decision was in favour of Spain[73].

***(g) Novenergia v Spain*** - The claim, in this case, was related to the same issues in Eiser and Isolux stemming from the same Spanish government reforms at the root of such disputes. However, the tribunals delivered differing interpretations on what creates 'legitimate expectations.' In *Charanne*, the tribunal said that the documents submitted were not specific enough that the regulatory framework created legitimate expectation. In *Novenergia*, the tribunal held that such expectations "arise naturally from undertakings and assurances" given

[70] Ibid
[71] Ibid
[72] Ibid
[73] See Claudia Maria Arietti Lopez, 'All claims by Isolux Infrastructure Netherlands against Spain are dismissed Isolux Infrastructure Netherlands B.V. v. the Kingdom of Spain, SCC Case No. V2013/153' published 26 September 2017 last accessed in September 2021 https://www.iisd.org/itn/en/2017/09/26/all-claims-by-isolux-infrastructure-netherlands-against-spain-are-dismissed-isolux-infrastructure-netherlands-v-spain-scc-case-v2013-153-claudia-maria-arietti-lopez/

by the state and need not be specific[74]. Spain relied on *Flaiminio Costa v ENEL* in its provision of the intra-EU objection, but the tribunal dismissed it[75]. The Court of Justice of the European Union (CJEU) judgment in *Slovak Republic v Achmea BV* on 6 March 2018 had an impact on this case as Spain made a request to rectify the result in *Novenergia* as the CJEU held that 'investor-state arbitration clauses in intra-EU BITs are not compatible with EU law. However, it is not clear as to whether this applies to intra-EU ECT claims[76].

### 5.2.3 Quantum

In the determination of quantum, there was no one formula. Differences were noted on how each tribunal derived each level of compensation; even when the facts appeared similar, there were clear differences in how the evidence was adduced. As explained before, reviewing a large number of renewables cases in the future may help ascertain a pattern on compensation.

A quick glance at the table below showcases the varying differences in the awards even though the basis of claims appears similar.

***Table 7: Investment arbitration awards issued against Spain in 2019 —all under the ECT[77]***

**Source: Debevoise In Depth – Solar Arbitrations a Year in Review Debevoise & Plimpton www.debevoise.com 22 October 2021**

| Case Name | Treaty Protection Violated | Measures at Issue | Award | Damages Awarded |
|---|---|---|---|---|
| *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v. Kingdom of Spain* | FET | 2013-2014 | 31 May 2019 | €291 million |
| *9REN Holding S.à r.l. v. Kingdom of Spain* | FET | 2010-2014 | 31 May 2019 | €42 million |
| *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain* | FET | 2013-2014 | 15 July 2019 | €34 million |
| *SolEs Badajoz GmbH v. Kingdom of* | FET | 2013-2014 | 31 July 2019 | €41 million |

[74] See Supra Footnote 27

[75] See Gladwin Issac, 'Luxembourg fund awarded EUR 53.3 million for FET breach arising out of Spain's curtailment of renewable energy incentive schemes Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No. 063/2015' published on 30 July 2018 last accessed September 2021 https://www.iisd.org/itn/en/2018/07/30/luxembourg-fund-awarded-eur-53-3-million-for-fet-breach-arising-out-of-spains-curtailment-of-renewable-energy-incentive-schemes/

[76] Ibid – Issac added "…On March 13, 2018, Spain made a request to rectify, clarify and complement the final award, including with respect to the applicability and relevance of EU law and its relationship with the ECT provisions. However, the tribunal found that it was not empowered to make a renewed assessment of Spain's case on the merits and dismissed the request on April 9, 2018. On May 16, 2018, the investor filed a petition in the U.S. Court for the District of Columbia for an order and judgment confirming, recognizing and enforcing the award. On the same day, however, upon Spain's request, the Swedish Svea Court of Appeal stayed the enforcement of the award based on the decision in Achmea."

[77] See Supra Footnote 4 - Note all of these awards are publicly available, and therefore, in some cases, the information has been drawn from public reporting of the decisions

| Case Name | Treaty Protection Violated | Measures at Issue | Award | Damages Awarded |
|---|---|---|---|---|
| *Spain* | | | | |
| *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain* | [Award not public] | [Award not public] | 2 Aug 2019 | Undisclosed (€92 million claimed) |
| *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* | FET | 2010-2014 | 6 Sept 2019 | €29 million |

Osborne and Grunwald analyzed quantum in the Spanish solar disputes mentioned in this Chapter.[78] They considered key factors such as:

- Entitlement to FiTs
- Entitlement to Reasonable Return
- Date of assessment
- Tax Gross-up
- Interest

### 5.3 Lex Petrolea v Lex Renewables[79]

In Chapter 3 in section 3.2 we examined the history and development of Lex Petrolea, and in this Chapter 5 and previously in other Chapters we discussed various renewables energy investment treaty cases. So, the question becomes, so what?

At this junction, it is useful to expressly state that the renewables awards and cases would benefit from further study as their number grows, they may well produce a renewables law to match the petroleum law suggested by Onorato & Park[80] in 2001. It is not farfetched **to replace the word petroleum with renewables** in Onorato & Park's solution of an essential petroleum law format containing the three main elements outlined again below. However, of course, we would expand on it with all the unique features and special traits for the renewables industry (e.g. incentives and FiTs as Subsidies will continue in order to assist with the energy transition,

[78] See Chris Osborne and Dora Grunwald, Osborne Partners 'The Renewable Energy Law Review: Determination of Quantum in Spanish Solar Disputes'11 August 2021last accessed December 2021 https://thelawreviews.co.uk/title/the-renewable-energy-law-review/determination-of-quantum-in-spanish-solar-disputes and Amélie Noilhac 'Renewable energy investment cases against Spain and the quest for regulatory consistency' QIL, Zoom-in 71 (2020) 21-39

[79] See R. Doak Bishop, International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea, XXIII YB COM ARB 1131 (1998); and Thomas C. C. Childs 'Update on Lex Petrolea: The continuing development of customary law relating to international oil and gas exploration and production' Journal of World Energy Law and Business, 2011, Vol. 4, No. 3

[80] William T. Onorato & J. Jay Park, 'World Petroleum Legislation: Frameworks That Foster Oil and Gas Development' (2001) 39 Alta L Rev 70

green tech, IP rights given the highly advanced technology in renewables, the need to respond to climate change goals[81]). It is worth noting that even the conflicting awards decisions provide guidance as precedence. For sake of completeness, here is a reproduction of Onorato & Park's recommendations:

4. **Express provisions** which address these areas: state property in petroleum, competent authority, petroleum operations, petroleum agreements regulations, qualifications, duties, and rights of rights holder or contractor, taxation of profits, other taxes, duties, and exchange controls, fiscal stabilization, environmental protection and safety, miscellaneous provisions;
5. **Regulations to the petroleum** law which covers: competent authority, petroleum licensing, petroleum operations, petroleum agreements, fiscal and financial regime, assignment of rights, land use, environmental protection, miscellaneous provisions, model forms; and
6. **Model contracts** which covers: scope, duration, and grant of rights, mwo, work program, and guarantees, relinquishments, declaration of commercial discovery, joint management [advisory] committee; cost recovery, expenses, and production shares, taxes and duties, fees and bonuses, protection of the environment, supply of domestic market; emergency requisition, training of host government personnel, other standard provisions.

Whilst there are numerous calls for certainty in relation to setting renewables governments regulations to avail investors certainty given their high risk/high-value investments, it is unlikely to happen anytime soon. However, what certainly can give assurance to both investors and governments is the stability of dispute resolution regime that understand the intricacies of the renewables sector interests as a fast-growing industry. A system that is not necessarily far removed from what assisted the fossil fuel industry, to begin with, i.e. Lex Renewables can easily co-exist with Lex Petrolea and benefit from some of the investment treaty interpretation in the already rendered awards on how the tribunals approached FET or creeping expropriation…etc. At some point in the future, the reliance on fossil fuels will diminish, and

[81] See Edna Sussman 'Dispute Resolution: The Paris Agreement and Beyond' Chapter 18 '10 Years Back - Post COP12 'A 2007 Snapshot of Climate Change Litigation, Potential Disputes and Alternative Dispute Resolution Published by the ICC and edited by Wendy Miles last accessed December 2021 https://sussmanadr.com/wp-content/uploads/2021/05/Climate-Change-ICC-Sussman-2017-pdf.pdf

Lex Renewables will take over. The major fossil fuel multinationals have arms and subsidiaries in renewable energies, so they cannot be separated, but we can tailor the international legal framework to help boost the climate the growing renewables industries operate within, whether in forming ventures or resolving disputes. It has to be a collective effort of all stakeholders.

Fernando Dias Simoes summed it up beautifully:

> "…The numerous claims over changes in economic support mechanisms that have surfaced in the past few years **provide evidence that states to rethink and reshape their renewable energy policies.** The determination of what is reasonable for the investor to expect is important for any reform of legal frameworks. Shifts in both policy and the development of countries make this determination different from country to country. **The creation of efficient and sustainable markets for renewable sources of energy is a tremendous financial and legal challenge. This endeavor can only be achieved through a thorough knowledge of the functioning and possible implications of the economic mechanisms and legal frameworks that underpin foreign investments in the renewable energy market**."[82]

### 5. 4. Conclusion

It is submitted that the above renewables arbitration decisions and case law for foreign investment protection under the existing legal framework have not been made on the grounds of sustainable development, nor decarbonization, nor to satisfy COP-21. While arguably they provide a limited vision of the future of Lex Renewables, considering the arbitral decisions here is one step to contribute to the evolving scholarship to highlight the potential for further research. The tussle between the sovereigns and investors will continue as there will always be competing interests. While the EU provided a form of certainty to investors within the EU Directive 2018/2001, it did not stop neither the case law nor the investors to invest. Article 6 states «Stability of financial support»:

> *«1. Without prejudice to adaptations necessary to comply with Articles 107 and 108 TFEU, Member States shall ensure that the level of, and the conditions attached to, the support granted to renewable energy projects are not revised in a way that negatively*

[82] See Page 285 Fernando Dias Simoes, 'When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking' (2017) 45 Denv J Int'l L & Pol'y 251

*affects the rights conferred thereunder and undermines the economic viability of projects that already benefit from support.*

*2. Member States may adjust the level of support in accordance with objective criteria, provided that such criteria are established in the original design of the support scheme».*

Despite the above certainty and the barrage of renewables investors cases against Spain, Spain remains 'the hottest ticket in town for international investors in renewable energy, with the government's green policies and a favorable power market helping to spark overseas interest.[83]' This will not change as other countries with strong commitment to energy transition follow suit. It's been reported that '*more takeovers and IPOs may follow, potentially including the listing of oil company Repsol SA's green energy arm, as investors tap into a sector benefiting from a thriving market for corporate supply deals, high power prices and a fast rebound in power demand following the coronavirus pandemic'*[84].

These actions are pure evidence that the trend will continue, and that Lex Renewables will grow as the case law and published awards grow. J. P. Commission words below express my sentiment for Lex Renewables growth and development with its jurisprudence in investment treaty arbitration. He wrote:

"… **A body of law predisposed to development by case law Despite the fact that each tribunal typically deals with different underlying bilateral or multilateral investment treaties, the "substantive provisions of the treaties are, for the most part, similar in form and content." Thus, while each tribunal is necessarily responsible for deciding the particular dispute pending before it, based upon a particular BIT, any decision or award it renders will also contribute more generally to the growing investment jurisprudence**…[85]"

[83] Yannic Rack 'Foreign investors flock to Spain's booming renewables market' 16 July 2021 https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/foreign-investors-flock-to-spain-s-booming-renewables-market-65428758 Last accessed December 2021

[84] Ibid – Some scholars were concerned that investors may shy away as result but clearly not given the new evolving commitments to climate change and the attractive package offered by Spain. See Monica Alessi, Jorge Núñez Ferrer and Christian Egenhofer 'Suspended in legal limbo: Protecting investment in renewable energy in the EU' Policy Insights No 2018/03, January 2018 www.ceps.eu last accessed December 2021

[85] See Page 141 Jeffery P Commission 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' Journal of International Arbitration 24(2): 129–158, 2007. Kluwer Law International.

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Printed in The Netherlands. Commission added in the same paragraph that *"…The structure of each and every BIT typically deals with: 1. Scope of Application; 2. Conditions for the Entry of Foreign Investment; 3. General Standards of Treatment of Foreign Investments—Fair and Equitable Treatment, Full Protection and Security, Unreasonable or Discriminatory Measures, International Law, Contractual Obligations, National and/or Most-Favored Nation Treatment; 4. Monetary Transfers; 5. Operational Conditions of the Investment; 6. Protection Against Expropriation and Dispossession; 7. Compensation for Losses; and 8. Investment Dispute Settlement."* Perhaps the new breed of BITs will include express language on Renewables.

# CHAPTER 6

# Conclusion

***'…We shall not cease from exploration And the end of all our exploring Will be to arrive where we started And know the place for the first time. Through the unknown, remembered gate. When the last of earth left to discover. Is that which was the beginning; At the source of the longest river. The voice of the hidden waterfall. And the children in the apple-tree. Not known, because not looked for. But heard, half-heard, in the stillness Between two waves of the sea...'***

***——T.S. Eliot*** [1]

## 6.1 On RIDR, Lex Renewables and the thesis objective and research questions

In the final Chapter, Chapter 6, as in the words of TS Eliot, 'And the end of all our exploring will be to arrive where we started'; it is useful to remember that the aim of the thesis as set out in section 1.4.2, is to examine past, present, and future issues that closely impact fostering RIDR as a sector of international energy law in its own right.

The thesis also argues that the renewables industry is ripe to acknowledge and gather its own jurisprudence, akin to fossil fuels' 'Lex Petrolea.' The thesis realistically never purported to offer a panacea for RIDRs' law-making but to introduce a mere initial glimpse into the possibility of a Lex Renewables' development and jurisprudence depository for renewables.

The above was clearly explored in presenting the detailed research questions, scope, methodology and analytical framework in Chapter 1.

In Chapter 2, we explored the special features of the renewables industry, the different investment treaty dispute resolution methods available and the New Haven approach, briefly highlighting the jurisegenrative nature of the various dispute resolution mechanisms for Lex Renewables and that it would encompass the three levels of contemporary international law and as such can only survive on both Coexistence and Cooperation amongst all these dispute resolution methods.

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[1] From ***"Little Gidding," Four Quartets (Gardners Books; Main edition, April 30, 2001) Originally published 1943. T.S. Eliot, Four Quartets***

In Chapter 3, we explored in detail the history of Lex Petrolea's development and its jurisgenerative nature as a way of highlighting the differences and similarities with Lex Renewables for its development.

In Chapter 4, given the New Haven analytical framework, it was instrumental to explore FDI, investors and sustainable development and their interlinks and links with the development of Lex Renewables that is reflective of our ever-evolving complex world from all aspects, concluding that there is a strong link.

In Chapter 5, we examined a select number of Lex Renewables investment treaty awards out of hundreds that are currently available in the public domain[2]. The aim was to prove, as a starting point for any future further research, that there is a considerable body of Lex Renewables with its decisions and awards providing a rich jurisprudence depository. This jurisprudence, while it has its own traits pertaining to the renewables' sector, would not alone stand in a vacuum without overlapping from time to time with its sibling Lex Petrolea especially that there are common doctrines of investment treaty arbitration that are overarching in both types of jurisprudence. We also proposed the seed of an idea of a renewables law formation based on Onorato & Park's[3] recommendation for petroleum law.

The above brief concluding thoughts serve to confirm that the thesis presents evidentiary answers to the main research question and sub-questions (referenced again below), to be explored further in the future either in empirical and/or doctrinal research.

For sake of completeness and ease of reference, the main research question is:

> ***Is the international energy sector witnessing developments in the Renewables industry similar to Fossil Fuels' 'Lex Petrolea'? Can these developments work towards forming 'Lex Renewables'?***

The answer is in the affirmative, and Lex Renewables co-existence with Lex Petroela is certainly not only possible but also highly likely probable.

[2] It is possible that the unpublished awards for renewables are also in hundreds.
[3] See William T. Onorato & J. Jay Park, 'World Petroleum Legislation: Frameworks That Foster Oil and Gas Development' (2001) 39 Alta L Rev 70

## 6.2. Where are we on the journey? Lex Lata[4] or Lex Ferenda[5]

As the proposition of Lex Renewables in this thesis involves jurisprudence of international investment treaty arbitrations, it is not enough to simply advance the concept in the research without providing a brief point of assessment as to where is it on the journey of its development, i.e. is it pure Lex Lata or Lex Ferenda? Moreover, with various calls for reforms of the currents ISDS regime, it adds a layer of confusion as to where Lex Renewables stand.

The answer based on the thesis research provides that Lex Renewables is at a revolving point, not a static one on a spectrum where at one end is Lex Lata and the other is Lex Ferenda. This is essentially due to the fact that this is a new area of law and it is developing yet it is benefiting from the already developed Lex Petrolea and the body of existing jurisprudence from the renewables case we discussed in the research.

The above assertion is supported by reference to the work of the prominent Oxford Scholar Hugh Thirlway in this field. Thirlway advanced:

> "…the view that the distinction between lex lata and lex ferenda is a real one, repeatedly recognized by the International Court of Justice, which serves an essential purpose in the current state of international law, and would do so in any system other than one based directly on natural-law thinking. It is also contended that it is apparent from the jurisprudence of the Court that, for a tribunal at least, only the lex lata is appropriate for application to the settlement of disputes, in the absence of any special agreement by the parties to submit their relations to some other law (which, by the same token, will in fact become lex lata of a conventional nature); that the very desirability of lex ferenda makes it essential to be on one's guard against permitting it to replace positive law; that in the field of treaty-law in particular, in which lex ferenda is also a concept having a real, though not evident, existence, the necessary distinction between actual and desirable law may be endangered by inappropriate appeals to the 'object and purpose' test, or to the principle of effectiveness; and that if, particularly in the ethically sensitive domain of human rights, some judicial recourse to lex ferenda may be authorized, this

[4] 'Lex Lata' means "Ratified law." The positive law currently in force, without modification to account for any rules subjectively preferred by the interpreter. See Page 169 in Aaron X. Fetlmeth Maurice Horwitz "Guide To Latin In International Law" Oxford University Press 2011

[5] Lex Ferenda' means "Law to be proposed." The law considered to be normatively preferable when the existing rule of law causes an unclear or undesirable result. Lex ferenda is thus a proposed law or proposed interpretation of law rather than a statement of law in force as reflected by positive sources of authority. See Pages 168 in Aaron X. Fetlmeth Maurice Horwitz, Ibid.

> is an exceptional situation which can only derive from the will of the parties to the relevant constituent instrument[6]"

Thirlway emphasised a distinction of 'Lex ferenda' from other concepts in international law: He explained that:

> "Lex Ferenda is also to be distinguished from two other concepts in the armoury of the international lawyer: principles, or general principles, of law; and equity. The general principles of law contemplated by Article 38, paragraph l(c), of the Statute of the International Court are destined, by the very terms of that instrument, to be applied by the Court to the determination of legal disputes, and therefore fall within the category of lex lata, even if they share with at least some elements of lex ferenda a certain status of desirability in terms of abstract justice. It is also possible, to a limited extent, to see an existing rule of law as the expression of an underlying principle, and to appeal to that principle to supplement the narrow terms of the rule;19 this approach is, however, only justifiable on the basis that the principle itself, and not merely the rule, is part of substantive law, lex lata.[7]"

Furthermore, Thirlway provided clarification as to codification within Lex Lata and Lex Ferenda, which Lex Renewables is yet to achieve. He wrote:

> "…The distinction lex lata/lex ferenda is of course familiar in the shape of the provision in the Statute of the International Law Commission for 'codification' and 'progressive development' of international law: codification, in the strict sense, signifies re-statement simply of the lex lata; progressive development implies selection from all possible rules other than those actually in force, and the positing of those rules as lex ferenda, with the intention that, through a multilateral convention or otherwise, they shall be transformed into lex lata. The term 'progressive development' is in fact suggestive as to the nature of the considerations which should influence the subjective classification of a particular rule as lex ferenda…"[8]

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[6] See Page 26 Thirlway, H "Reflections on Lex Ferenda" in Netherlands Yearbook of International Law, Volume 32 , December 2001 , pp. 3 – 26 DOI: https://doi.org/10.1017/S0167676800001148 Published online in July 2009 available at https://www.cambridge.org/core/terms https://doi.org/10.1017/S0167676800001148 last accessed in Sep 2021

[7] See Ibid Page 9

[8] See Ibid Page 10

### 6.3 What does Lex Renewables change and do for energy law?

Lex Renewables adds one more aspect to the discussion of addressing the renewables industry key problem highlighted at the beginning of the thesis i.e. *'A struggling new industry, Renewables, striving to survive within the current paradoxical international legal framework and with time, similar to the fossil fuels industry, it will have its own legal rules and norms.'*

Lex Renewables, as a concept, it means that it fosters the renewables industry's interest through assembly of jurisprudence and implementation of reforms of some of the existing international disputes mechanisms and the fecund current scholarship on energy justice and energy efficiency and accordingly impacting the key principles of energy transition. I wholeheartedly agree with Professor del Guayo' factual sentiments during my viva voce that: *'…the protection of investment in renewables is not the only guiding principle in this area. The ECT was written and signed to protect investment, although some new principles were added later (such as on energy efficiency)'* Consequently, it is with confideneca I make the statement that the future of Lex Renewables is tied into some of the principles of energy justice, and energy transition of energy law.

Lex Renewables, through the jurisgenerative capacity, is one of the 'many ways[9]' of understanding energy justice as it is tied to the global effort of clean energy for all under the Sustainable Development Goals. Lex renewables allows the renewable industry in energy law to easily fall and practically interpreted under all four modes of energy justice in a holistic fashion: Distributive justice; Procedural (or participation) justice: procedural rights to information and access to courts; Restorative (or reparation) justice: '*even-handed enforcement of energy statutes and regulations, as well as access to remedies when legal rights are violated'*; and Recognition justice[10].

The above is an ongoing journey of exploration and scholarship of energy law through prisms of energy justice and energy efficiency. As previously stated, the thesis ignites the discussion for the renewables industry. The detailed how at this stage is out of the scope of the thesis and would benefit from further academic and practical analysis in the future.

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[9] See Íñigo del Guayo, Lee Godden, Donald N. Zillman, Milton F. Montoya, and José Juan González, Introduction In: Energy Justice and Energy Law. Edited by Íñigo Del Guayo, Lee Godden, Donald N. Zillman, Milton F. Montoya, and José Juan González, Oxford University Press (2020) Chapter 1 page 4.
[10] Ibid Chapter 1 page 6.

### 6.4 Moving forward for our planet

It is important to remember that every aspect of our life is now about being and becoming green, including law-making[11]. This thesis defined Lex Renewables using Doak Bishop's Lex Petrolea's definition by way of analogy in so far that something similar could be done for the jurisprudence of renewables given the sector's specific characteristics.

How could that be developed? That is not the purpose of this research. **The purpose of this research is to ignite the discussion and highlight the potential. As to how it will develop, it is a question of time.**

Investors are after return on investments. In disputes, quantum is key for them. Because of the huge upfront investment and the infancy of the technology, renewables will continue, for some time in the future, requiring government subsidies and protection and should not be treated like oil and gas infrastructure as it is widely available. The market is not yet well developed for renewables, though, in order to develop the market, investors need special protection. That is the main key argument about renewables.

One of the key benefits that flows from renewables is that it leads to sustainable development, reducing climate change impacts leading to all matters of public interest issues justifying special treatment. This is why using the New Haven analytical framework that any law should be looked at from the prism of how it promotes public interest rather than sectional or vested interest.

If we accept as part of the main argument that environmental protection and minimising and/or eliminating climate change is an international public good, which we should all aspire to, therefore whichever mechanism that is available to promote renewables should be viewed with hope from that positive angle. And that anything, as in Lex Renewables, that would encourage it and promote it, should be protected and fostered. In that vein, if we accept this line of thought,

[11] See Chapter 8 Page 187 in International investment agreements and the emerging green economy: rising to the challenge' by Markus w. Gehring and Avidan Kent in 'Investment Law Within International Law: Integrationist perspectives' Edited by Freya Baetens Cambridge University Press 978-1-107-03888-2 Published in 2013
Gehring & Kent wrote aptly wrote: "In the 2012 Rio+20 Summit the world's nations committed themselves to the promotion of the green economy, in the context of sustainable development and poverty eradication. The term 'green economy' was defined by the United Nations Environment Programme (UNEP) as 'one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities'. Elsewhere the 'green economy' was described as an economy that 'should contribute to eradicating poverty as well as sustained economic growth, enhancing social inclusion, improving human welfare and creating opportunities for employment and decent work for all, while maintaining the healthy functioning of the Earth's ecosystems'."

then, renewables is unlike traditional energy sources, hydrocarbons/coal, which have a lot of externalities. Renewables do not.

One may argue that developing a whole new legal framework is too complex to achieve. The rebuttal to this is that we never fathomed NAFTA to be completely changed to USMCA or the ECT to be under reform or BREXIT to happen. The green revolution and NetZero enlightenment will force us to do it, if we do not prepare for change and take action now.

Setting all of this aside, another way is perhaps to introduce carve-outs for renewables in negotiating new BITs or multilateral treaties. By way of example, this is to follow what Mexico did when it negotiated NAFTA and carved out its oil and gas to protect it.

As to further thoughts, in 2013, I exchanged emails with the New Haven prominent scholar Michael Reisman after meeting him in person at a lecture at CEPLMP in Dundee in 2013[12] where I asked the following:

1. What are your thoughts regarding the development of legal rules 'adapted' to an industry's specific characteristics e.g. we have witnessed the development of a Lex Petrolea in International Arbitration, and of late, there are signs that a similar development may happen for the Renewables industry?

   **Reisman's answer:**

   "They are very interesting questions. At least since the Aramco award, it has been accepted that trade usages in the petroleum industry can be treated as part of the governing law. More generally, arbitration under most of the institutional rules allows for this type of custom to be admissible if it can be proved. **So, I am comfortable with the notion that specific customs, if proved, can be applied by tribunals as part of the governing law.** But, to be candid, I am uneasy about "buying a pig in a poke", i.e., with the introduction of a Latin expression referring generally to all sorts of unspecified arrangements without a rule-by-rule demonstration that each has been accepted by the relevant parties.

2. In a book titled 'The Law of Treaties – Beyond the Vienna Convention, you co-authored a Chapter' Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards' where you rightly stated that 'Provisional Application of treaties was

[12] Hard copy of Michael Reisman email to the Author dated 18 July 2013 is available upon request.

not a central issue in the design of the regime of the law of treaties. Neither was it an object of major discussions in the deliberations of the International Law Commission', And then we find in modern days the ECT came along and the problematic issue of its provisional application showed in its awards e.g. The Yukos cases. 'While states are free to devise a treaty by mutual consent, the language in a treaty for the benefit of third parties must be clear.' To me, it is glaringly obvious that it is time to reform the ECT to include clear language in regard to 'third party rights' that are affected by its provisional application. However, I am unable to tell on balance what is the best course of action to take here. E.g. is it to reform a treaty that is almost 20 years old? Or negotiate a new one, or simply rely on the accumulated jurisprudence in its awards to deal with this issue bearing in mind the absence of stare decisis in investment arbitration?

**Reisman's answer:**

"Your second question is very timely. All bilateral investment treaties are for the benefit of third parties and, in my view, should be interpreted that way. As for amending a multilateral treaty like the ECT, the obstacles would be great, and I think the most economic method is by jurisprudence constante."

I have discussed the concept of Jurisprudence Constante in length in Chapter 3 and this is an option available by default from the accumulation of the jurisprudence of Lex Renewables in investment treaty arbitrations.

It is also useful to state that traditional IIAs will still remain a critical element of efforts in promoting investments in renewable energy[13]. However, the challenge is lack of transparency – it may well be a hurdle as per Kalisz and Czech:

"…Even if one were willing to treat investment treaty arbitration and law as relatively distinct from classic fields of public international law, the lack of full transparency of investment treaty arbitration is another obstacle to the development of the precedent system. The latter requires publicity of decisions. Not all arbitral awards are public, many are partially redacted before publication, and the United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (the Mauritius Convention on Transparency) has, so far, been ratified only by three states. Moreover, even a wider

[13] See Page 74 in Bradford S Gentry and Jennifer J. Ronk 'International Investment Agreements and Investments in Renewable Energy' Pre-publication draft Yale School of Forestry & Environmental Studies January 2007

adoption of the Mauritius Convention on Transparency and, accordingly, broader application of the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration will not, on its own, pave the way for the future development of a precedential system in investment treaty arbitration."[14]

And another challenge is the backlash regarding the arbitrators' role[15] - yet these challenges do not take away from Lex Renewables the ability to develop jurisprudence and precedence in investment treaty arbitration. The view is not pessimistic. There are some key takeaways for renewables and its stakeholders' future by global legal practitioners and advisors in the field with whom I agree. They are reproduced below:

- "*…A number of countries recently announced net zero emissions targets by 2050 or even 2045, and electric energy transition is key to achieving those timelines. Inevitably, national policy and regulatory framework governing the renewables sector is still to face widespread, rapid and dramatic change. The uncertainty that accompanies this unprecedented transition in terms of scale converts all electric energy markets into "emerging markets," importing the risks and opportunities associated with these.*

- *The Paris Agreement allows countries to specify how they will—within the scope of their own regulatory histories, cultures and structures—contribute to the goal to limit global temperature increase through reduction of carbon emissions. As a result, national policies and regulatory frameworks will face unprecedented change in terms of scope and, potentially, variability between countries.*

- *Private investment will play a central role in making possible the transition required for countries to achieve their NDCs and to meet what is an internationally*

[14] See Beata Gessel-Kalinowska vel Kalisz and Konrad Czech of Gessel Koziorowski Spk, 'The Law Reviews - The Investment Treaty Arbitration Review' (*Thelawreviews.co.uk*, 2021) <https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/the-role-of-precedent-in-investment-treaty-arbitration> accessed 30 December 2021. The below are footnotes cited by the authors. United Nations Convention on Transparency in Treaty-based Investor–State Arbitration, New York, 10 December 2014, in force 18 October 2017. Mauritius Convention on Transparency has been ratified by Canada, Mauritius and Switzerland. See https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf (accessed on 13 April 2021). 10 Data of United Nations Conference on Trade and Development. See http://investmentpolicyhub.unctad.org/IIA (accessed at 6 March 2018).

[15] See Malcolm Langford, Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' European Journal of International Law, Volume 29, Issue 2, May 2018, Pages 551–580, https://doi.org/10.1093/ejil/chy030 Published: 23 July 2018

*common concern—encapsulated in the objectives of the Paris Agreement. Private investment is concerned with the stability of the investment regime and associated returns.*

- *For investors, careful investment structuring around investment treaty, and legitimate expectations protections offers an additional form of investment securitization. The existing Spanish solar cases offer a body of precedent that provides the necessary roadmap for an investor's securitization strategy. 22 October 2019.*
- *For countries, regime design in the renewables sector requires careful consideration in order successfully to achieve electric energy transition and also to avoid expensive damages awards. The Spanish solar cases offer a body of precedent outlining the pitfalls and nature of measures to avoid in national policies and regulatory frameworks governing electric energy transition.*

- *For transition to a low-carbon-energy future, success depends on systemic change. Each element in the system of electric energy or power must work towards that transition. Investment treaty protection, tribunals and awards are one element in the system. The awards in the Spanish solar cases (and their Italian and Czech Republic cousins) are giving a sense on the one hand, to countries as to how best to regulate, and on the other, to investors as to how best to invest*.[16]"

One last final concluding thought is that international law, from a New Haven perspective, will continue to evolve and grow, and the same for Lex Renewables investment treaty arbitration not without challenges but with time and innovative consideration, anything is possible. Michael Reisman's quote reflects my sentiment:

> "I do not believe that there is a crisis in international law-making, but rather a crisis in the perception of the law-making process in international law. Given the characteristics of the international system, I submit that international law-making is working about as well as can be expected. Its "problems" arise from the nature of the contemporary

[16] See Wendy J. Miles, Catherine Amirfar, Merryl Lawry-White, Rhianna Hoover, 'Solar Arbitrations: A Year in Review' (*Debevoise.com*, 2019) <https://www.debevoise.com/-/media/files/insights/publications/2019/10/20191022-solar-arbitrations-a-year-in-review.pdf> accessed 28 December 2021

> international social and political systems within which the law-making process operates. Those problems are an ineluctable part of the practice of modern international law and constitute one of the reasons why the study and practice of international law are so much more intellectually challenging and operationally difficult than their counterparts in domestic law[17]."

Also, inconsistencies are not always an enemy for law and lawyers, and so I must repeat a quote I used in Chapter 3: and so, as Donald E Elliott quoted Holmes "the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other . . . . It will become entirely consistent only when it ceases to grow."[18]

Lex Renewables is growth for international law and investment treaty law.

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[17] See Page 1 W. Michael Reisman 'The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application' Transnational Dispute Management (TDM) Issue: Vol. 2 - issue 3 Published: June 2005

[18] M Howe, Introduction to 0. Holmes, The Common Law xiv (M. Howe ed. 1963) at 32 in Page 54 in Elliott, E. Donald, "The Evolutionary Tradition in Jurisprudence" (1985). Faculty Scholarship Series. Paper 2194 last accessed on 8 December 2021 at http://digitalcommons.law.yale.edu/fss_papers/2194

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[***Note: I read this WTO case in my research to understand the issues of anti-dumping in the world trade order in as at the time of my research China was accused of antidumping activities for photovoltaics solar cells, which led to a significant drop in prices and disrupted the solar market***]

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