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It's something unpredictable but who shall set it right? Change in law in RES support schemes and investment protection instruments under EU law and the ECT

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It's something unpredictable but who shall set it right? Change in law in RES support schemes and investment protection instruments under EU law and the ECT

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1. *Introduction*

As the energy markets open up all across the world and regulation becomes the method to promote and manage energy markets, States reduce their presence as market actors but maintain their role of regulators. EU member states are subject to EU obligations, international treaties such as the ECT, in an increasingly mixed international legal order, whereby influential soft laws, such as the environmental and sustainable development obligations, promote greener energy productions.

The EU institutions agreed to maximize their efforts to promote the production of energy from renewable sources (RES), as well as keeping up to a regulated market for the production and distribution of energy[1] The energy mix choices, at times of

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[1] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (Text with EEA relevance), OJ L 140, 5.6.2009, 16; Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (Text with EEA relevance), OJ L 211, 14.8.2009, 55: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Energy Roadmap 2050*,

financial and economic crises and constantly growing crude oil prices are strategic in a view to ensure a stable and acceptable amount of energy production, as well as maintaining a regulated market in which competition drives innovation, resilience and price reduction on thw whole system. In this context, the endeavour to develop appropriate RES production becomes crucial in a view to address economic, environmental and energy security concerns, while building resilience by diversification and microgeneration. Also, the construction of smart grids is essential to ensure the stability of the distribution system and of the grid in general, especially with reference to non-programmable energy sources such as solar and wind. Supported by the EU policy choices, member states decided to incentivize the production of RES energy and power setting up different schemes at the administrative, regulatory and financial level. The main focus of the present paper will be feed-in tariffs, one of the potential and allegedly the most stable (for both the production and consumption markets) method to promote the development of solar photovoltaic (PV) energy production. The reason for introducing such scheme is that the state of technology does not appear capable to bear all of the energy production needs with renewables, if needed, and the *grid parity* has not been reached at a global level yet, therefore making the kWh produced with renewables more expensive than the kWh produced from conventional spurces[2]. Regulators deemed necessary thus to stimulate renewable energy productions that the market itself would not undertake and bear due to the unaffordable prices of capital for such long term and capital intensive initiatives. Artificial subsidies have been created, then, with a view to have the less invasive effects possible on the market, above all in the solar photovoltaic sector. These incentives have two forms, and in both cases are market-based: subsidies based on and proportionate to the amount of energy produced or subsidies based on the amount of energy produced without carbon intensive technologies. These subsidies are believed, conceived and expected to reduce the scope for market distortions deriving from the promotion of RES in the production of energy. They exist also in a world were subsidies are afforded to fossil fuels, and where electricity market prices form mainly on the basis of the prices of crude oil[3].

COM (2011) 885 final, 15 December 2011; Communication from the Commission to the European Parliament, the Council, *Energy 2020 - A strategy for competitive, sustainable and secure energy*, COM(2010) 639, November 2010.

[2] C.J. YANG, *Reconsidering solar grid parity*, Energy Policy, 38 (2010) 3270.

[3] For a comprehensive review of subsidies to energy sources, see IEA (2011) World Energy Outlook 2011. Paris: IEA.

One of the most influential factors leading to the choice to develop certain subsidies policies is the need to comply with environmental goals and climate change policies, which took off at the international and internal level mainly from market instruments. Incentives are then a regulatory measure aimed at ensuring the most neutral achievement of emissions reductions targets by placing a burden on the impact of energy production and paying up a subsidy to cleaner productions. Feed-in tariffs (FITs) have been used to subsidize the PV production in many jurisdictions[4]. FITs are a market instrument by means of which the public sector pays a price higher than that usually paid for energy production to the energy sold to the grid and originated by PV plants, with the aim of promoting production and incentivising research and development and market expansion towards the achievement of the *grid parity*. To promote the maximum possible production, FITs are guaranteed for a period of 20 to 25 years, and their level is higher for the plants entered into operation earlier, assuming that the prices of the PV plants equipment and components decreases with the entry into operation of more PV plants. This has proven true in most markets, but the private and public finance economic crises triggered ever since 2008 have urged some FITs paying States to re-assess their programmes, mainly because of the unexpected growth of plants.

Major controversies on FIT cuts arose then within and against EU member States, as governments chose to slash subsidies in a view of reducing public expenditure. This affected operators with initiatives whose costs of equipment and capital were pegged to the expected FIT level to be achieved, so that the markets affected by the cuts saw mainly foreign capital investors reacting against measures seen as unfair, above all since the governments had committed themselves to pay up the incentives at certain rates for plants entered into operation at a certain time and for a number of years to come[5].

The adoption of measures reducing FIT levels at a pace quicker than envisaged in previous legislative or formal government measures was seen as hindering ongoing investments in RES in the whole EU. In most cases legitimate expectations of investors were defined as the main concern and ground for claiming the measures as

[4] International Energy Agency's Database Addressing Climate Change: Policies and Measures, available at: *www.iea.org/textbase/pm/?mode=cc*.

[5] T. COUTURE-Y. GAGNON, *An analysis of feed-in tariff remuneration models: Implications for renewable energy investment*. Energy Policy, (2010) 38 (2), 955; SEC (2008) 57 EC Commission Staff Working Document, *The support of electricity from renewable energy sources*, Accompanying document to COM (2008) 19 proposal for a Directive of the European Parliament and of the Council on the promotion of the use of electricity from renewable energy sources.

FITs schemes granted certain FITs rates levels to all plants that could meet certain conditions within a certain timeframe. Instead subsidies were slashed with consequences on the whole investment planning and deployment as FITs generally are designed to last around 20 years, and the policies to which they are pegged are designed to give decreasing subsidies by the time the plants become eligible for the subsidies. Cuts proved particularly detrimental when impacting on plants which already meet or are in the course of obtaining the necessary eligibility criteria in the form of authorisations or project design. Such plants were exposed to an almost certain project failure or saw a sharp decrease of heir financial expected outcomes as lower than planned or no expected FITs cause economic losses with respect to supplies (prices of solar panels and inverters tend to be pegged to the incentives levels) and economic returns. The effects of cuts induced rapid contractions on the major PV plants market, and propagated also upstream to weaker and smaller equipments and components producers and to smaller enterprises involved in the development of RES plants, causing them to shut down production lines or to go bankrupt. The reaction of the more affected RES investors producers and investors with ongoing development plants seeking redress has been directed first to the administrative measures implementing directly such cuts and then to the relevant legislation, with different effects depending on the country where judicial protection has been sought. Legal actions have been undertaken also at the EU and international level, mainly at the ECT level. The above *fora* have different but potentially overlapping rules which may not represent effective remedies.

The forums where investors could seek protection following the cuts, especially when the alleged violation concerned their legitimate expectations rather than only their rights, include the internal jurisdictions, the EU courts, and a number of human rights and investment arbitration courts pursuant to bilateral investments treaties and the Energy Charter framework (the ECT). At the internal level, the main variable to decide whether to act or not depended mainly on the court having jurisdiction, its speed in taking definitive decisions, its willingness to address controversies affecting public budgets at times of economic crisis while privileging the interests of investors, even though affected by a breach of the rule of law in the form of potential legitimate expectations.

One option for all entities qualified for investors protection under the ECT and the EU has bee, as an alternative to the EU Treaty, resorting to an ECT arbitration under, in general, ICSID rules. This will raise the issue of compatibility of the potential ICSID statement with the EU provisions. This is a slower and potentially more

expensive mechanism[6]. The rules of these panels are known only to a certain number of academics and counsels, energy regulation has not been a major concern of such panels therefore investors doubt on the effectiveness of such potential remedy.

Question is, then, which of the remedies granted in the different legal orders proved or can prove effective for issues of changes in law and forms of indirect expropriation as those at stake when a country is changing significantly the investments climate. Legal stability and reasonability of measures are elements of both the rules on foreign investments and promotion of RES, and both public (domestic and EU) and private policies may be impaired by the lack of effective remedies.

2. *RES Investors Protection Under The EU Treaty And At The Member States Level*

Under Directive 2009/28/EC, the production of green energy shall achieve binding reduction targets by 2020 (Annex I). The methods envisaged to this aim include subsidies, admitted under the competition rules with specific derogations and domestic as well as transboundary support schemes (art. 2.(k), art. 3 and art. 6). In the EU intentions, support schemes shall sustain a greener growth also creating new jobs and sustaining smaller enterprises.

The structure of investments in the RES sector is one of the major obstacles to the development of plants in a cost effective manner at a time when technology is not fully cost-efficient and subsidies are needed. Raising funds for these capital intensive projects and obtaining credit from financial institutions is a major challenge of developers. The guarantees requested by financial institutions, project finance being the preferred solution, penalize investments with the higher financial leverage as they are based on the profitability of the PV plant i.e. on the possibility to provide a stable energy output and subsidy, consisting of both the price of the energy sold to the grid and the related incentive. It is in consideration of this that the EU deems subsidies as a necessary tool for promoting investments in renewable energy sources even beyond 2020 and that a stable and predictable regulatory environment is also essential for ensuring the stability of investments and the achievement of the RES production

[6] ICSID rules amount easily to tens of thousands of dollars. See ICSID schedule of fees available at *http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=scheduledFees&reqFrom=Main*.

goals[7].

Recently such tenets, which seem to be pretty straightforward in the academic community, have been challenged by several States domestic decisions in the aftermath of the 2008 economic crisis. Spain first, followed by Czech Republic, Italy and the UK have implemented, among other measures aimed at reducing public expenditure, cuts to the subsidies previously ensured to the RES sector. The cuts operated in such different jurisdictions, spanning from feed-in tariffs reductions, green certificates cuts, tax increases, has been justified in the protection of a sustained and stable growth of the RES sector, the necessity to deploy public funds in more essential economic sectors or economic policy reasons. The cuts have different juridical nature depending on the jurisdiction, but their general effect has been impacting on ongoing PV investments, causing the annulment of contracts due to the impossibility to perform successfully the underlying activities.

Investors with ongoing developments have seen their investments hindered or terminated, and have sought for redress in several *fora*. The main forum has been the national one, but referrals to the ECJ and other courts have been undertaken in a view of obtaining a wider statement from the courts. So far, the only judicial statement giving some accounts of the illegitimacy of retroactive rules came from the UK[8].

Depending on the jurisdiction involved the investors choose to resort for example to action under Article 258 (ex Article 226) of the Treaty on the Functioning of the European Union (TFEU), soliciting a formal complaint to the EU Commission and direct action by the Commission itself. This has been so far only partially taken up as a matter by the Commission REF letters from Oettinger to the Italian Minister of Economic Development[9].

Recourse to the EUCJ through the domestic court was not a major option as the necessity of the referral for a preliminary ruling by a national judge under TFEU art. 267 would nevertheless represent a filter, above all in countries where the judiciary has a case-law track seen as not willing to challenge government's financial decision in times of general austerity. Claims against the UK FITs cuts have represented a

[7] See above at 1.

[8] SECRETARY OF STATE FOR ENERGY & CLIMATE CHANGE v FRIENDS OF THE EARTH & ORS [2012] EWCA Civ 28, CA (Civ Div), Judgement of 25 January 2012. Available at: *http://www.judiciary.gov.uk/NR/exeres/8A486ED5-F340-497C-A9EE-4C5A1970036F*. The Supreme Court rejected a request to appeal on 23 March 2012.

[9] G. OETTINGER, Letter to Italian Minister of Economic Development Paolo Romani, 15/04/2011. Available at: *http://ec.europa.eu/commission_2010-2014/oettinger/headlines/letters/doc/20110415.pdf*

major exception to this tendencies, as a final statement on the 2012 cuts envisaged by the government has been reached in a few months from the claim[10]. Time is crucial FITs claims as certainty of admission to FITs for an ongoing PV admission in due course shall decide its survival or definitive abandonment, with consequences to contracts and supplies, payment of penalties as well as the more general effect of a decrease of the willingness to invest regardless of the commitments of to protect investors. Lack of certainty means, in the cases described in this paper, the abrupt debarment from access to previously granted credit lines while tariff nevertheless decrease, therefore a late advantageous statement would not repay the investment as expected.

In this sense the internal legal orders and EU overlap of *fora* are of greater relevance the quicker judgments are issued and the more satisfactory are the expected final statements in terms of compensation for damages. Both the EU and its member states are signatories of the ECT, and investors affected by the FITs cuts belonged most of the times to EU capital exporting countries, but also to non-EU and non ECT countries.

In this sense, the protection of foreign investors can be referred to as a matter of conflict with the ECT due to the entry into force of the Lisbon Treaty[11]. The ECT is a multilateral investment treaty (MIT) that fell within the competences of the EU member states as a mixed agreement. Following the entry into force of the Lisbon Treaty foreign direct investment (FDI) protection falls under the EU Common Commercial Policy (art. 207 TFEU). With reference to Bilateral Investment Treaties (BITs) FDI has been analyzed by the EUCJ as a matter of restriction of the free movement of capital under the now TFEU articles 64, 66 and 75. The EUCJ seemed to opt out for the primacy of EU law, though the fact that the BITs at hand had been negotiated prior to the accession to the EU of the states involved implied the need to renegotiate them in the light of the entry into force of the EC Treaties also for the respondent States[12]. Therefore, the ECT has become a mixed MIT with potential conflicting implications on the jurisdiction of the EU depending on the origin of the investor or individual raising the claim and its belonging to the scope of both the EU

[10] Reuters US, *UK top court ends govt bid to cut solar subsidy early*, available at *http://www.reuters.com/article/2012/03/23/britain-solar-idUSL6E8EN6ID20120323*.

[11] T. ROE-M. HAPPOLD-J. DINGEMANS, *Settlement of investment disputes under the Energy Charter Treaty* Cambridge: CUP, 2011.

[12] Case C-205/06, *Commission v Republic of Austria*; Case C-249/06, *Commission v Kingdom of Sweden*.

and the ECT or being an investor of outside the EU and belonging to the ECT or an investor of outside both the ECT and the EU[13].

Since speed in obtaining a definitive statement on access to FITs is crucial for a PV development, in the cases of the analyzed changes in law, whatever is the outcome of the claims and the *forum*, the complexity of the legal orders creates high levels of uncertainty, as an international award may come months, if no years, after the claim has been lodged.

Where a definitive measure by an EU member State is taken, and no action at the EU level or at the internal administrative level has been effective, then it is for the investor to choose whether to choose for alternative financial sources or to follow the the domestic courts and eventually EU courts path, or, alternatively, activate an arbitration under the ECT, as described below, or under any existent BIT between the two countries.

a. Treaty level and secondary legislation

Energy policy has been for long a field to international agreements at the EU level (the ECSC and EURATOM were two of the Communities under the 1957 Treaty of Rome) but, on the other hand, each single national market has attempted to protect its own energy mix against external interferences. One reason for this is national sovereignty and energy security: Europe is heavily dependent on hydrocarbons and coal for keeping the standards of life and rights promised in the Treaties. Procuring oil and coal supplies is a matter of national security and stability and few states would be willing to withdraw from this lacking reciprocity. The idea of regulation as the new tool for governing the markets has had an impact on policy decisions in the energy field, and opened up the production to individual producers and foreign investors.

Most of the GDP related to energy comes from the proceeds of national industrial

[13] J. KLEINHEISTERKAMP, *Investment protection and EU Law: the intra- and extra-EU dimension of the Energy Charter Treaty*, J Int Economic Law (2012) 15 (1) 85 – 109; N. LAVRANOS, *Bilateral Investment Treaty (BITS) and EU Law* (September 27, 2010). ESIL Conference 2010. Available at SSRN: *http://ssrn.com/abstract=1683348* or *http://dx.doi.org/10.2139/ssrn.1683348*; R. TORRENT, *The Contradictory Overlapping of National, EU, Bilateral, and the Multilateral Rules on Foreign Direct Investment: Who is Guilty of Such a Mess*, 34 Fordham Int'l L.J. 1377 (2011), *http://ir.lawnet.fordham.edu/ilj/vol34/iss5/9*; H. WEHLAND, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?*, ICLQ 58 (2009) 2, pp. 297–320; A. VAN AAKEN, *International Investment Law between Commitment and Flexibility: A Contract Theory Analysis* (June 2009). Journal of International Economic Law, Vol. 12, Issue 2, pp. 507-538, 2009. Available at SSRN: *http://ssrn.com/abstract=1418396* or *http://dx.doi.org/jgp022*; G. COOP, *Energy Charter Treaty and the European Union: Is Conflict Inevitable?*, 27 J. Energy & Nat. Resources L. 404 2009.

"champions" involved in the oil sector. Energy security concerns are also at the centre of the debate, as the appropriate use of RES determines a diffused generation all across territories, local jobs, less grid transportation costs and risks and power generation can determine higher communities resilience to changes**.** However, following greater g a time of relatively affordable oil prices, RES (except for hydropower and geothermal, whose technologies had been developed long time before the current stream of RES technology) become a tool for developing national energy production and excellences through mainly public subsidies to consumption, seen as more market neutral. The market of components, nevertheless, is influenced by non-EU market choices conditions (price of silicon, Chinese productions, etc.) as well as by endogenous conditions, such as obsolete networks fit for energy sources with programmable production but inadequate for RES, whose main feature is the impossibility to program their production. Resort to RES is also strategic to reduce carbon emissions and comply with the emissions reductions imposed by the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

RES stands at the brink between industrial policy and environmental policy, therefore it is subject to the sustainable development obligations (art. 3, para. 3 TEU; art. 21. para. 2 TEU). Under the TFEU, instead, environmental obligations, including the protection of the environment under title XX of the TFEU, are closely linked to the rules on energy as of title XXI thereof.

The entry into force of the Lisbon Treaty has increased the rules on production of low carbon energy, and, together with its sustainable development regime in art. 11 of the TFEU, the EU has established that, without prejudice to the right of member States to «determine the conditions for exploiting its energy resources, choice between different energy sources and the general structure of its energy supply», abiding to the environmental obligations under art. 192 (2) TFEU. It is then for the EU Commission to «promote energy efficiency and energy saving and the development of new and renewable forms of energy» within the framework of the internal market, so to ensure environmental protection and in a spirit of "solidarity" amongst the member States. It is clear that the powers of the Commission in the energy field have been clarified finally with the Lisbon Treaty, and the present rules are subject no more to the TFEU title on Environment, as they were before, but to the specific Energy title, where the Commission has consistent powers of setting the rule and agenda of the energy policy. The decision making is under shared competences governed by art. 2, para. 2 TFEU, but a country may choose to retain its own competences only in the tax field, where unanimous voting is necessary to approve a measure, and only if a measure is taken «significantly affecting a member state's choice between different energy sources and

the general structure of its energy supply». Thus, only the broad architecture of the national energy mix and the overall structure of the energy sector seem to remain for the national regulators[14].

In a view of achieving the above policy targets, the EU has set its RES production targets together with the emissions reduction standards at an ambitious 20% based on 1990 emissions by 2020 and it has showed to be the only international actor with a serious commitment to the promotion of RES, derogating to the basic competition rules which are an essential part of the Community's policies. States are called to implement the 2020 obligations and submit RES action plans to the EU Commission. To provide a clear roadmap to the achievement of such aim, the States have submitted their action plans to the EU Commission so to show commitment to achieving the targets. The title of Directive 2009/28/EC itself «Directive on the promotion of the use of energy from renewable energy sources» shows that the EU commitment is to a stable support to green energy.

Support to RES has been developed at different levels in the EU, including grants for research and development. However, the main and more successful instruments are those "support mechanisms" that included green certificates, feed-in tariffs, white certificates for energy efficiency purposes and others. It is generally the case of demand side measures, be they incentives to the production of energy or compulsory quotas. The Italian Government, in view of an early meeting of the grid parity has circulated in December 2011 a draft decree indicating that from 2013 the incentives to energy produced by PV plants shall be incentivized by auctioned amounts of electricity.

The support mechanisms adopted are national, and this makes the investments climate different from country to country in the EU as to the level of investments and the methods to implement above all FIT schemes, their timing the level of tariffs awarded, the level of expenditure. The EU Commission is called to make this uniform, and claims that it would be necessary to have EU wide support mechanisms have been put forward as an element of investments stability and of competition neutrality[15]. The EU Commission itself entered the debate following the implementation of the 2001/77/EC Directive, with regular reports and analyzing the scope and impacts of

[14] A. DORSMAN-W. WESTERMAN-M. BAHA KARAN-Ö. ARSLAN-Z. R. ARSLAN (eds), *Financial Aspects in Energy: A European Perspective*, Springer, 2011.

[15] C. EGENHOFER, J. C. JANSEN, *A timetable for harmonisation of support schemes for renewable electricity in the EU*, European Review of Energy Markets, V. 1, I. 2, April 2006. Available at: *http://www.eeinstitute.org/european-review-of-energy-market/issue-2-article-egenhofer*.

support mechanisms in the EU. Together with the quantitative and qualitative methods, a number of administrative mechanisms are necessary to maintain a sustained renewable energy use, such as priority construction titles, fast-track and simplified administrative procedures, etc.[16].

b. Scope of RES support under FIT schemes.

Under EU case law electricity is a good which shall be subject to the Community freedoms. covered by the Treaty provisions on the free movement of goods. In some Member States, support schemes foresee a purchase obligation, which obliges suppliers to purchase all renewable electricity produced in a certain region at a fixed price.

In *PreussenElektra*, the European Court of Justice (ECJ, now EUCJ) held that purchase obligations imposed to local energy distributors under the German laws on renewable energy of 1990 an 1998 could in theory impair the free movement of goods (Article 28 of the EC Treaty), but they were nevertheless justified and proportionate as they were adopted in a view to achieve environmental protection goals (Articles 6 and 174 of the EC Treaty). At that time markets were in the process of full scale liberalization not achieved yet, therefore the ECJ tested the proportionality of the measure under the aims to open the electric markets to competition and to the achievement of harmonization and found the measure proportionate[17]. In other cases the EU Commission ruled out the possibility that these subsidies constituted state aid[18].

Although it might be argued that support schemes to specific energy sources are not adequate or proportionate under the aims of competition support and the opening of markets. As we will see later, the test of proportionality shall correctly apply to the

[16] Communication from the Commission "The support of electricity from renewable energy sources", COM(2005) 627 final. Available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0627:FIN:EN:PDF*; Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources COM(2008) 19 final, {COM(2008) 30 final} {SEC(2008) 57} {SEC(2008) 85} /* COM/2008/0019 final - COD 2008/0016 */, available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0019:FIN:EN:HTML*.

[17] Judgment of the European Court of Justice of 13 March 2001 in Case C-379/98 *PreussenElektra AG and Schleswag AG*.

[18] Decisions of 4.7.2006 in cases N 317a/2006 and N 317b/2006, OJ 2006 C 221. Decisions of 22.5.2002 in cases NN 27/2000 and NN 68/2000, OJ 2002 C 164.

measures granting support measures, but is should *mutatis mutandis* apply to measures who seek to remove certain measures.

Quantity-based instruments aim at creating an "environmental market" to price environmentally-sensitive activities or behavior. In this way, internalization of environmental externalities is achieved through a price which enters into the assessments performed by agents and which are at the basis of their behavior. The instruments consist in both establishing a market and defining the level of one "side" of such market, either demand or supply[19]. Scientific evidence shows the importance and efficacy of feed-in tariff schemes in the early stages of renewable energy production, and the necessity to move to more competitive and market based activities once the energy market becomes more mature[20]. The most common schemes so far include feed-in tariffs, feed-in premiums and green certificates or other obligation systems. The EU commission is aware of the challenge of ensuring a stable regulatory context, and the RES Directive addresses the financing issues as well as the necessary planning and building regulatory amendments and the electricity grid challenges ahead[21]. The challenge is spending resources in a cost effective manner until the market reaches the *grid parity*. The blueprint towards a fully working renewable energy sector is believed to be a driver of energy security and safety (an insurance against ever growing fossil fuels costs), of emissions reductions and job creation. Grid parity in the EU Commission intentions should be reached by 2020.

It is undisputed that incentives may be crucial elements in the financing of a RES plant, above all solar and wind energy plants. The incentive schemes act on several sides of the investments: the technology used (with effects also on revamping), the areas where the plants are located (be they, as in Italy, abandoned lands, agricultural areas, industrial areas, rooftops). The more the incentives progress, moving from R&D, regulatory incentives, support to project finance, grants and other. Empirical evidence drawn by the EU Commission shows how RES support when the market has

[19] A. POTOTSCHNIG, *The use of market-based instruments for the implementation of environmental policy in the power sector*, European Review of Energy Markets, V. 3, I. 3, October 2009. Available at *http://www.eeinstitute.org/european-review-of-energy-market/EREM_9-Article_Alberto_Pototschnig.pdf.*

[20] J. CANTON-Å. JOHANNESSON LINDÉN, *Support schemes for renewable electricity in the EU*, European Commission, European Economy. Economic Papers, 408, April 2010. Available at *http://ec.europa.eu/economy_finance/publications/economic_paper/2010/pdf/ecp408_en.pdf*.

[21] EU Commission, Communication, Renewable Energy: Progressing towards the 2020 target; Brussels, COM(2011) 31 final, 31 Jnuary 2011. Available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0031:FIN:EN:PDF*.

reached a certain level of maturity is better made, up to a certain level with capital incentives and later on with operational incentives. In all these cases the importance of stable policies is crucial for the correct deployment of the policy and to ensure the correct renewal of the stock in time. Not all the support instruments live on their own, mostly they concur with market mechanisms (again green certificates) and tax incentives, as well as supported planning rules and incentives to industries to develop domestic production of components. However, with major reference to solar and wind power plant development, financing at an early stage is needed, therefore raising high amounts of equity and debt at the same time is necessary, though operational costs are low, to ensure returns adequate to the expectations and counterbalance the project risks. Thus, decisions taken at a certain point in the present are of paramount importance on the carbon emissions and energy production profiles of the future, as well as on the industry proceeds for economic actors on the ground. A sound and stable policy is therefore necessary to ensure that the targets of production of energy obtained from RES by 2020 is met.

Germany has established its policy in 1990, amended it in 2000 introducing the FIT system, and followed by other countries has stabilized such method. Other countries have adopted similar FIT schemes based on the German success, so for example in Spain, Italy and the UK the RES sector has increased its shares on the overall energy production following the EU commitment to emissions reduction.

The provisions of Directive 2009/28/EC aim at achieving such renewable energy investments. In its framework each member State is called to comply with such obligations under its own legal order and it shall continue its efforts following the implementation of 2001/77/EC Directive. More specifically, recital 25 to the 2009/28/EC Directive states that investors confidence in the stability of the different member States support mechanisms shall be ensured and that the promotion of support mechanisms should have also cross border effects, and the provision of statistical transfer to achieve the proposed targets of production serves this purpose (Article 6, Directive 2009/28/EC). As seen above, it is considered equally important to set up cross border support schemes, following the example of the international experience with the Kyoto Protocol flexible mechanisms.

c. Changes in law affecting investments

The stability of investments has been, however, hindered by the recent changes in law due mainly to public budgets concerns, but justified with other concerns. Spain

was the first to implement cuts, and lastly in 2010, by its Royal Decree (RD) no. 1565/2010 cut the FIT rates granted under RD no. 661/2007. Italy changed recently implemented cuts and its conditions by Legislative Decree no. 28/2011 and subsequently established a competitive regime to access to FIT so that it is impossible to predict whether bigger plants may access to incentives (Ministerial Decree of 5 May 2011). Some operators have appealed the rules on grounds that they had been adopted without previously advising the market and claiming that the Government was acting disproportionately and in contrast with the previous programme of incentives that provided for constantly decreasing FIT rates and a specific access mechanism, envisaging a review only following 2016 or having reached a certain level of FITs expenditure (Ministerial Decree of 6 August 2010). In 2011 also the UK launched a consultation to reduce FIT rates, which resulted in a dispute still under judicial scrutiny. In the last judgment the Court of Appeal held that the Secretary of State for Energy and Climate Change did not have a power to modify the conditions upon which the investment had to be made once the capital expenditure was made and the FIT license obtained. Under the applicable rules the judges found no grounds for launching a consultation as it was done to reduce the FITs from April 2012, and that "retrospective changes" to law varying the returns in capital «would have to be clearly shown» in the legislation[22].

If the applicants deem the above measures in breach of EU law, they could solicit a referral for preliminary ruling on whether or not such measures violate EU law and how internal law should be interpreted according to EU law. The spirit and aim of Directive 2009/28/EC and the aims of the EU Treaties of pursuing sustainable development and the protection of the environment as a policy integrated in EU law, as well as substantive provisions of the Directive are hindered by such measures which reduce first confidence in the stability of government rules and in the ability to abide to the rule of law when implementing EU law. This is one of the underlying reasons of the communications sent between 2010 and 2011 by the EU Commissioner for Energy to the Spanish, Czech and Italian Ministers competent to deploy the support mechanisms policies[23].

[22] See above at 8.

[23] In addition to the letter sent to the Italian Minister referred to above at 9, see Letter to Miguel Sebastián, Spanish Minister for Industry, Tourism and Commerce, 08/03/2011. Available at: *http://ec.europa.eu/commission_2010-2014/oettinger/headlines/letters/doc/20110308_sebastian.pd*;
Letter to Mr Martin Kuba, Minister of Industry and Trade Ministry of Industry and Trade of the Czech Republic, 12/12/2011. Available at: *http://ec.europa.eu/commission_2010-2014/oettinger/headlines/letters/doc/20111212.pdf*; and Letter to Martin Kocourek, Czech Minister for

Furthermore, the application of the above measures should be subject to a proportionality test, as requested by EU general principles applicable also to domestic law, as well as the principle of the protection of legitimate expectations as an instrument to ensure the application of the rule of law[24]. Also, the application of the principles of EU law could be supplemented by the consideration that human rights law as interpreted by the ECHR application of the principles of legitimate expectations[25].

3. *RES Investors Protection Under The ECT*

a. The ECT

As of 17 December 1994 the Energy Charter Treaty (ECT) was signed by most states of both sides of the former Iron Curtain and now it includes the EU, its member States and the EU itself. The ECT aimed at promoting investments in the energy sector and fostering economic cooperation between the Eurasian countries. The EU has also promoted the development of neighborhood policies trying to expand the scope of the ECT[26].

Trade and Industry, 08/03/2011. Available at: *http://ec.europa.eu/commission_2010-2014/oettinger/headlines/letters/doc/20110308_kocourek.pdf*.

[24] P. CRAIG, *EU Administrative Law*, Oxford: OUP, 2006; G. DE BÚRCA, *The Principle of Proportionality and its Application in EC Law*, Yearbook of European Law, 1993, p. 105; E. ELLIS, *The Principle of Proportionality in the Laws of Europe*, Oxford: Hart Legal Publishers, 1999; J.H. JANS, *Proportionality Revisited*, Legal Issues of European Integration 27(3), 2000; T. TRIDIMAS, *The General Principles of EC Law*, Oxford: OUP, 2006; Judgment of the European Court of Justice in Case C-112/77 *Toepfer v Commission* [1978] ECR 1019; Advocate General's opinion in Case C-31/91 to C-44/91 *SpA Alois Lageder and others v Amministrazione delle Finanze dello Stato* [1993] ECR 1761; P. CRAIG, *Substantive Legitimate Expectations in Domestic and Community Law*, 55 CAMB. L. J. 289 (1996) at 306.

[25] European Court on Human Rights, Judgement no. 16021 of 18 May 2010, *Plalam*; European Court on Human Rights, Judgement of 20 November 1995, *Pressos Compania Naviera*.

[26] T. WÄLDE, *Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation*, 12 Arb Int'l (1996) 429; BAMBERGER and others, *The Energy Charter Treaty in 2000: In a New Phase Energy Law in Europe,* in Martha M. ROGGENKAMP and others (eds) *Energy Law in Europe*, OUP, Oxford 2001; Y. SELIVANOVA (ed.), *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter*, Kluwer Law International, 2011.

The ECT is a multilateral investment treaty, generally associated with regional policy targets for capital investments in energy, particularly at the European/Asian level. Other countries with strategic energy interests in the region have been granted observers status[27]. The ECT aims at creating a predictable investments regime and forum for investors states disputes to the point that States unilaterally accept that arbitration notices may be served to them by investors claiming that their rights have been impaired by the actions or behaviors of their signatories.

The territorial scope of the ECT is much broader than the EU, it includes countries from the former Eastern and Western sides of the former Iron Curtain and countries like Japan. Cross-investments between signatory countries are frequent and since the entry into force of the ECT most of its signatories adopted liberalization policies in the production of energy. In time, as knowledge of the possibilities enshrined in the ECT and investors increase the scope of their actions in energy, e.g. acting in the RES sector, disputes tend to increases as each host country pursues its policies in terms of energy regulation, each of them has its own standards of treatment of investors and the promotion of RES.

b. Standards of investments protection under the ECT

Beyond the hortatory provision of in Article 3 of the ECT, investments in energy are protected under Part III of the ECT. Foreign investments (defined in art. 1(6) of the ECT) as made by investors (as defined in Article 1 of the ECT) of a county subject to the ECT are to be kept stable and they shall be subject to rules common to other investments treaties all over the world. Investments protection standards under the ECT are no different than the investments protection standards commonly applied in

[27] MEMBERS OF THE ENERGY CHARTER CONFERENCE Albania, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Community (now part of the European Union) and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan. OBSERVERS TO THE ENERGY CHARTER CONFERENCE: Afghanistan, Algeria, Bahrain, Canada, China, Egypt, Indonesia, Iran, Jordan, Korea, Kuwait, Morocco, Nigeria, Oman, Pakistan, Palestinian National Authority, Qatar, Saudi Arabia, Serbia, Syria, Tunisia, United Arab Emirates, United States of America, Venezuela. International Organisations with Observer Status: ASEAN, BASREC, BSEC, CIS Electric Power Council, EBRD, IEA, OECD, UN-ECE, World Bank, WTO.

BITs[28]. The difference with traditional BITs is in the specificity of the investments carried out and how the protection standards apply to projects and the investments defined in the ECT.

The ECT applies to energy investments, broadly intended, the substantive principles of protection under the rules on non-discrimination, the principle of national treatment and the most favored national treatment (treatment granted to the nationals of the host country shall be applied to those of other countries or the most favored regime between those applied in the two countries at issue shall be applied) to those nationals who carried out investments in the energy sector. The provisions also impose certain non-contingent protection standards to be applied regardless of the principle of reciprocity or National Treatment (NT) or the Most Favored Nation. Thus crucial obligations of signatories are those to ensure the fair and equitable treatment of investments, the most constant protection and security of investments and the prohibition of expropriation and of discriminatory measures.

These standards are the most likely, within the limits of how they are understood and applied in international law, to lead to a greater accountability of States before ECT signatories investors. It has to be borne in mind that the rule on interpretation of the ECT clauses are those of international law, and they shall be interpreted according to the customary international rules applicable and under the Vienna Convention on the Law of Treaties.

The EU Treaties and the ECT overlap when it comes to the regulation of energy and investors disputes, but also with reference to the said EU FDI rules and as both the EU Treaties system and the ECT are international treaties, they may represent competitive forums it comes to their application[29]. Although one may try to solve the issue in logical terms and excluding resort to one or the other treaty, it is still for the claimant to choose the jurisdiction where it prefers its case to be treated. The ECT lacks any rule on exhaustion of internal remedies, unless signatories expressly commit to it, as we will see. On the other hand, the EU gives centripetal signs with reference to external *fora*, denying the reality of fragmentation in international law, above all when considering officially that the EU is a *municipal legal order* of a transnational

[28] P. CAMERON, *International Energy Investment Law. The Pursuit of Stability*, OUP: Oxford, 2010; R. DOLZER-C. SCHREUER, *Principles of International Investment Law*, New York: Oxford. University Press, 2008.

[29] ILC, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*. Available at *http://untreaty.un.org/ilc/guide/1_9.htm*; M. KOSKENNIEMI-P. LEINO, *Fragmentation of International Law? Postmodern Anxieties*, Leiden Journal of International Law (2002), 15, 553.

dimension. Such opinions seem not fully in line with the reality of many arbitrations brought about by investors from the EU jurisdiction before arbitral courts also under the ECT, whereby parties choosing to apply international law to settle their disputes rather than using only the EU jurisdiction to obtain satisfaction. One simple consideration is that there will be no court of last instance settling competences as it happens in domestic jurisdictions.

Foreign investors may seek for protection under the common international investments rules standards as applied by and to the ECT signatories. More specifically, protection may be sought under Title III of the ECT, which replicates some of the standards already applied under most of the BITs in place so far[30].

The ECT, as said, affords energy investors the same level of protection afforded under international law, in particular the law relating to expropriation.

Part III of the ECT sets out the provisions relating to the promotion, protection and treatment of investments in the energy sector. An "investment" includes a very broad definition including all economic activities in the energy sector (including the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of energy materials and products, and also tangible and intangible, moveable and immovable property related to energy activities).

Part III may be sub-divided into two parts: one dealing with pre-investments and the second on post-investments. At an early stage ECT signatories are subject to general obligations and to place their "best efforts" in enacting nondiscriminatory national and most-favoured nation treatment. If in a way the host state enjoys a certain degree of discretion in admitting investors without discrimination, these rules could be used to redress issues of exclusion of foreign investors, though this has to be assessed against the treatment of the host state nationals. In the post-investment phase, the investment is in place (e.g. the PV plant is operating) and the investor enjoys a stronger protection. The grounds for complaint by investors in this case include discrimination, expropriation, breach of contract and other commitments, destruction and impediments to transfer of earnings and capital. In this phase the host country is

[30] P. MUCHLINSKI-F. ORTINO-C. SCHREUER (eds.), *Oxford Handbook of International Investment Law*, Oxford OUP, 2008 at 259 and 407; Soren. J. *Schonberg*, *Legitimate Expectations* in Administrative. Law, Oxford: OUP, 2000; A. NEWCOMBE-L. PARADELL, Law and practice of investment treaties: standards of treatment, Kluwers Law, 2009; E. SNODGRASS, *Protecting Investors' Legitimate Expectations – Recognizing and Delimiting a General Principle,* 21 ICSID REV. - FOREIGN INV. L.J. 1, 11 (2006); R. DOLZER, "Indirect Expropriation, New Developments?" *Environmental Law Journal*, vol. 11, 2002, p. 65. See also Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award 29 May 2003.

directly responsible for the behavior of its local and other public authorities. Contracts protected under the ECT Part III rules include sale and purchase of power agreements, contracts for the supply of transit pipelines and contracts for the construction of oil exploration plants.

Articles 12 and mainly 13 of the ECT protect foreign investors from expropriation, be it direct or indirect, but nevertheless still under the common international rules, as the fair and equitable treatment (FET) requirements under ECT Article 10 (1).

With reference to expropriation, the threshold for protection of legitimate expectations appears to be high in international practice even under the indirect expropriation standards, i.e. with reference to measures equivalent to expropriations. Outside the principles laid donw in written agreements (such as the NAFTA) it is difficult to seek and find redress of legitimate expectations, and the ECT does not provide a specific protection when, in its guidelines, it promotes a sort of respect of the business environment of host countries.[31] Under FET, instead, it can be argued that it refers to more general principles of fairness and due process, but it has still to be verified in the reality of the merits, and a progressive interpretation ought to interpret FET in light of the promotion of investments aims of the ECT under Article 3. However, this is still not conclusive, and the actions brought about by investors against Spain will be an interesting test for the ECT as a system and for its place in the international investments law arena[32].

c. Changes in law: potential protection under the fair and equitable treatment and expropriation standards

The meaning of protection standards under the ECT is to be addressed looking at the international BITs applicable standards of protection under the principles of the ECT, i.e. the investments promotion and protection under Title III of the ECT.

The protection of investments is functional to their promotion regarding policy, whereas their legal content differs. The ECT Art. 1(8) may be used to define the scope of the protection of investments whereas under art. 1(10) the standards of protection are defined including: fair and equitable treatment, most constant protection and

[31] ECT Secretariat, *Expropriation Regime under the Energy Charter Treaty*, 2012. Available at *http://www.encharter.org/index.php?id=556&L=0*. Generation Ukraine Inc. v. Ukraine (ICSID Case No. ARB/00/9).

[32] MILES JOHNSON, *Investors seek compensation for Spanish solar cuts*, Financial Times, 17 November 2011. Available at: *http://www.ft.com/cms/s/0/19088742-1117-11e1-ad22-00144feabdc0.html*.

security, protection against discriminatory measures, granting to investments a treatment no less favorable than that ensured under international law including treaty obligations, and the respect by host countries of obligations entered into with investors.

d. Dispute resolution

In the last decade resort to arbitration to redress alleged breaches of the ECT has increased due also to increased awareness in investors of the role of arbitral tribunals in redressing hindrances to investments protection.

In the hypothesis of investors feeling as having been treated unfairly under the ECT standards, the arbitration shall evaluate first the origin of the investor and define whether it has jurisdiction or not. The rules on jurisdiction of the ECT exclude resort to other means of action if an action is served before the ECT.

Disputes between investors and the host ECT signatories for alleged breaches are settled under Art. 26 of the ECT. The procedure is structured so to reduce the scope of disputes and promote a mediated phase before entering a trial.
Amicable settlement of disputes is the first step to be undertaken (ECT 26(1) and (4)) when an investment is involved. In case of failure of an amicable settlement within 3 months from the request of an amicable settlement notified to the Contracting Party, the plaintiff may choose to sue the State before different judges. Parties who resort to the internal judges are not admitted before arbitrators.

The ECT signatories agree unconditionally to be respondents in arbitration proceedings brought about under the ECT, though they may opt out arbitral or conciliation procedures under ECT Article 26(3). The dispute shall be solved before either the ICSID panels or a sole or more arbitrators under the UNCITRAL rules or under the Stockholm ICC rules. The grounds for bringing a claim are very broad, as the definition of Investment provided for under art. 1(6) of the ECT is very broad, and it is surely including claims under renewable energy investments.

The reference to be applied under the ECT lies, as for all the cases involving any form of State responsibility under international law, under the International Law Commission (ILC) Draft Rules on State Responsibility will be the standard applied by the arbitrators to solve the cases brought before them.

However, the potential overlap of the provisions of the ECT and the EU Treaties still remains. As seen above the EU seems to claim its primacy on intra-EU BITs. First, for intra-EU investment claims, supremacy of EU law as a *municipal legal order*

(as defined e.g. in *Kadi*)[33] may not be considered as a valid argument by applicants for seeking to raise an arbitral claim under the ECT, as jurisdiction under art. 1(7) of the ECT is not in principle to be excluded in such cases[34]. On the other hand, when the investor seeking for protection does not belong to the EU, the EU undertook to extend under certain conditions the principles of MFN and national treatment to certain entities with specific links to its territory, as state under the European Communities and its member states declaration attached to art. 25 of the ECT. Finally, the European Communities submitted to its courts system rather than to arbitration the controversies under art. 26, not being party to the ICSID, including the submission of a question of interpretation for preliminary ruling. This might raise further conflicts, provided that even if investors could obtain a statement by the ICSID, a State could still raise the issue of compatibility of such statement with Community law before the EU jurisdiction.

4. *Conclusion*

Beyond what has been referred to above, a claim against the use of FITs as subsidies violating the WTO Agreement on Subsidies based on the national treatment standard was lodged. A Canadian FIT scheme is challenged, in the case at hand, by Japan based on the principles of national treatment. It is not the first time that measures intended to protect the environment are brought before the WTO. It is not even the first time a measure accused of being a hidden subsidy is appealed against. However, the standards against to which these measures are challenged do not match with the standards violated by changes in law affecting both domestic and foreign investors[35]. Energy subsidies, and in particular demand side promotion measures such as FITs have not been challenged or discussed in any solved international case, as far as it appears in the literature and judgment published.

At the domestic level, the Spanish 2007 FIT cuts did not lead, to our knowledge, to awards in favor of investors as they were deemed as justified under the Spanish

[33] ECJ Case T-315/01, Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities.

[34] ICSID, AES Summit Generation Ltd. v. Republic of Hungary, ICSID. Case No. ARB/07/22, (Sept. 23, 2010).; See also *http://www.encharter.org/fileadmin/user_upload/document/EN.pdf*.

[35] M. WILKE, *Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules, An Initial Legal Review*, 2011. Available at: *http://ictsd.org/i/publications/110845/*.

Constitution Articles 9.3, defining the principle of non-retroactivity of the law and of negative measures affecting individual rights, and Article . The claims brought about in Italy at present (end of January 2012) have been adjudicated only partially: the administrative judges have suspended retroactive cuts to greenhouse incentives only with respect to their effects for the claimants, considering that the (sudden and unplanned) change in the rules on PV greenhouses whose energy is eligible to incentives should have not hindered ongoing investments [64]. The concept of ongoing investment which had not to be impaired by change in law has been interpreted as a PV plant whose construction was authorized. Question is which authorization has been considered sufficient and by what time the plant should have been authorized, i.e. before the entry into force of the law repealing *de facto* the previous incentives or once the law has been effectively enacted (the latter seems to the authors the solution that the judges might have adopted). It shall be seen how the merits will be dealt with, as the hearing was scheduled to take place by the end of February 2012[36]. The hearing took place and due to a further change in law it was discontinued to July 2012.

Also the UK FITs cuts have been proposed under a consultation which caused great discontent in the PV operators and environmental groups. The solution proposed envisaged a reduction in order to «*to maximise the number of installations that are possible within the available budget rather than use available money to pay a higher tariff to half the number of installations*» based only on internal standards, also due to the fact that the claim was brought by domestic claimants. At the time of writing an application to appeal by the Secretary of State for Energy and Climate Change was dismissed on 23 March 2012, therefore signing a landmark for other UK cases, thus only partial conclusions may be drawn.

The only specific sources of reference for initiatives of enforcement under EU law are contained in the letters mentioned above sent by the EU Commission to the states which introduced retroactive FIT tariff cuts or other unfair measures by the Commissioner for Energy and the Commissioner for Climate Change, which provide a limited amount of information as to the adjudication of eventual claims. It is submitted that the principles of proportionality of measures with respect to the adjudication of the measures will be the main driver of the decisions, if any, taken by the EU courts or by the internal courts based on the previous EUCJ case law.

It remains to be seen how the involved judges will solve the cases at hand to see whether a specific standard will arise, or whether the measures will be judged based

[36] Interim Relief Order no. N. 02890/2011 REG.PROV.CAU. of the TAR del Lazio III-ter section, Rome.

on the traditional international investments law standards, which seems at the moment the most likely outcome.

On the international hand, instead, the situation seems much more open as no authority has expressed its views on the above issues under the ECT, at least not publicly. The only known case has been served under the UNCITRAL rules to the Spanish Government on 17 November 2011 as a request for conciliation was unsuccessful, therefore it remains to be seen how the arbitrators will respond to the claim brought about by several investors.

ABSTRACT

Luca Pardi, Nicola Cosentino - *It's something unpredictable but who shall set it right? Change in law in RES support schemes and investment protection instruments under EU law and the ECT*

EU law promotes the use of renewable energy sources (RES) in Member States as a tool for sustainable development. Directive 2009/28/CE is the secondary legislation tool focused at promoting investments in RES technology and production. At the state level, legal instruments to promote the use of renewable energy include, obligations of minimum quotas of renewable energy production, feed-in tariffs (FITs), green certificates, mandatory purchase prices for energy distribution enterprises. States may revoke such measures or reduce the support even significantly but, depending on the actual actions undertaken, have the capacity to hinder, as a consequence, ongoing investments.
The question of who shall bear the costs of such interventions may depend on the forum of resolution of the subsequent possible disputes. Sate measures adversely affecting investments may be challenged by private actors in several fora, at the State, EU and supra-national level. The paper investigates different protection options for investors following changes in law affecting renewable energy support schemes in Europe. The potential remedies are analyzed under both EU law and ECT.

Luca Pardi, Nicola Cosentino -*Chi può rimettere ordine nell'imprevedibile? Cambiamenti legislativi nei regimi di sostegno alle FER (fonti energetiche rinnovabili) e strumenti di tutela degli investimenti nella normativa UE e nella Carta dell'Energia (Energy Charter Treaty)*

Il diritto europeo promuove l'uso di fonti energetiche rinnovabili negli Stati Membri come strumento per lo sviluppo sostenibile. La Direttiva 2009/28/CE è lo strumento di legislazione secondaria dedicato alla promozione degli investimenti in sviluppo della tecnologia e produzione da fonti energetiche rinnovabili. A livello nazionale gli istituti per lo stimolo alla produzione di energia verde comprendono fissazione di obblighi per gli operatori di raggiungimento di determinate soglie minime di produzione da fonti rinnovabili, tariffe incentivanti, certificati verdi, livelli di prezzo minimi per l'acquisto

di energia da fonti rinnovabili per le imprese di distribuzione. Gli Stati Membri possono revocare tali misure o ridurre il supporto anche in maniera significativa ma, a seconda delle modalità utilizzate, hanno la capacità di minare, come conseguenza la sostenibilità e la prosecuzione degli investimenti in corso. La questione relativa a chi debba sopportare il costo finale di tali interventi può dipendere dal foro di risoluzione delle possibili controversie che ne scaturiscano. Le misure nazionali in grado di pregiudicare gli investimenti possono infatti essere contestate dagli operatori innanzi a diverse giurisdizioni, a livello statale, comunitario ed internazionale. Il lavoro è dedicato allo studio delle diverse opzioni disponibili, a livello europeo, per ottenere protezione nei confronti dei pregiudizi arrecati dai mutamenti nelle politiche di supporto alle energie rinnovabili. I potenziali rimedi sono analizzati tanto a livello comunitario che a livello internazionale sotto l'imperio dell'Energy Charter Treaty.