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The Role of Investment Treaties and Investor–State Dispute Settlement (ISDS) in Renewable Energy Investments

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THE ROLE OF INVESTMENT TREATIES AND INVESTOR-STATE DISPUTE SETTLEMENT IN RENEWABLE ENERGY INVESTMENTS

December 2022

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Suggested citation:

Ladan Mehranvar and Sunayana Sasmal. *The Role of Investment Treaties and Investor-State Dispute Settlement in Renewable Energy Investments*. New York: Columbia Center on Sustainable Investment (CCSI), December 2022.

I. Introduction

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

The private sector and private finance will play an important role in scaling renewable energy generation, transmission, and storage. Much of this investment will be cross-border, as capital and technology must flow to developing and emerging economies to bridge the widening regional differences in the rate and amount of renewable energy investments.

To help accelerate a shift of finance into renewable investments by foreign companies, it is critical to address the key constraints that hinder the scale-up of renewable investment, as well as the key determinants that would accelerate the necessary capital for a sustainable energy transition. Understanding these factors is a critical input to policy-making across a range of government agencies and functions, for development finance institutions, and for other international organizations.

To contribute to the understanding of what drives investments in renewables, we designed and carried out a survey targeting industry experts in the renewable energy space, to understand the range of political, regulatory, and economic factors that shape their investment decisions. The survey complements desk research into the determinants and constraints to scaling investment; the findings from that research are presented in our report, “Scaling Investment in Renewable Energy Generation to Achieve Sustainable Development Goals 7 (Affordable and Clean Energy) and 13 (Climate Action) and the Paris Agreement: Roadblocks and Drivers”.² This report focuses on one particular part of that analysis: namely the relevance of international investment agreements (IIAs or investment treaties), like the Energy Charter Treaty (ECT), to investor decision making. Proponents of IIAs advocate that IIAs are important drivers to investment in renewable energy; we therefore designed our survey to assess this claim, and the relative importance of IIAs against other factors. This report focuses on the specific findings of the survey that are relevant to that analysis.

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

2 Mithatcan Aydos, Perrine Toledano, Martin Dietrich Brauch, Ladan Mehranvar, Theodoros Iliopoulos, and Sunayana Sasmal, “Scaling Investment in Renewable Energy Generation to Achieve Sustainable Development Goals 7 (Affordable and Clean Energy) and 13 (Climate Action) and the Paris Agreement: Roadblocks and Drivers” (New York: CCSI, 2022), <https://ccsi.columbia.edu/content/renewable-energy-investment-roadblocks-drivers>.

In the first section of this report, we present our survey findings and consider the role of IIAs in promoting renewable energy investments.³ In the second section, we assess the relevance of the investor-state dispute settlement (or ISDS) as a risk mitigation tool for foreign investors in renewable energy sectors. In the third section, we analyze the elements of legal stability in host countries that are important to renewable energy investors. In the final section, we discuss recent ISDS cases related to renewable energy, and explore how, as interpreted, IIAs can undermine the policy space that governments need to implement the policies and measures that are most important and most effective at driving investment in renewable energy. It is important to note that this report focuses, in particular, on legal and regulatory factors, but that the survey, and the longer report to which it contributed, consider other—often more critical—factors, such as economic and financial ones.



³ The role, relevance and impact of the ECT with respect to the energy transition is being currently debated in the European Union. See, European Commission, “Agreement in principle reached on Modernised Energy Charter Treaty” (News Article, 24 Jun 2022), https://policy.trade.ec.europa.eu/news/agreement-principle-reached-modernised-energy-charter-treaty-2022-06-24_en.

II. The Role of Investment Treaties in Attracting Foreign Investment

One of the most controversial tools advocated by some lawyers and international institutions to promote investments in renewables is the use of IIAs.⁴ Investment treaties provide host state guarantees and protection to investors of counterparty states.⁵ Common substantive treaty provisions include protections against discrimination and uncompensated (direct or indirect) expropriation, and guarantees of fair and equitable treatment of foreign investors. Most of these treaties grant foreign investors the right to sue host governments and seek damages based on alleged treaty violations before ad hoc, party-appointed international arbitration tribunals (commonly known as ISDS). These tribunals issue binding awards, which may necessitate the host state to pay monetary compensation to claimant investors, often on the order of tens of millions of dollars and occasionally billions.⁶ There have been 1190 publicly-known ISDS cases as of December 31, 2021.⁷

Investment treaties restrict the ability of governments to act (or not act) in certain ways that may impact the economic interests of foreign investors who seek to invest, or who have invested, in those countries. Despite this, almost every country has signed several such treaties over the past half century under the assumption that additional legal protections



⁴ Paul E. Comeaux and N. Stephan Kinsella, “Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance,” *New York Law School Journal of International and Comparative Law*, Vol 15(1) (1994): art. 2, https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol15/iss1/2/; Priyanka Kher and Dongwook Chun, “Policy Options to Mitigate Political Risk and Attract FDI” (Washington, D.C.: The World Bank Group, 2020), <https://openknowledge.worldbank.org/handle/10986/34380>. Also, a number of law firms have published articles on managing political risk through bilateral investment treaties. See e.g., Matthew Coleman and Thomas Innes, “Managing Political Risk Through Bilateral Investment Treaties” (Steptoe & Johnson LLP, 2 Oct 2018), <https://www.steptoelaw.com/en/news-publications/managing-political-risk-through-bilateral-investment-treaties.html>.

⁵ “Primer on International Investment Treaties and Investor-State Dispute Settlement,” Columbia Center on Sustainable Investment, https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement###_ftn14.

⁶ As of June 2021, the average amount states are ordered to pay claimants is USD 437.5 million. Removing a set of awards against Russia, which are particularly large outliers ordering that government to pay USD 50 billion to investor claimants, the average ISDS award is USD 169.5 million. Both the amounts claimed and the size of the awards are increasing. On top of this, the average legal costs for states are approximately USD 4.7 million, and the average arbitration tribunal’s fees are USD 1 million. *Ibid*; Deborah Ruff, Julia Kalinina Belcher, and Charles Golsong, “Financing a Claim or Defense” (London: Global Arbitration Review, 14 Jan 2022), <https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/financing-claim-or-defence>; Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, “Costs, Damages and Duration in Investor-State Arbitration” (London: BIICL and Allen & Overy, June 2021), https://www.biicl.org/documents/136_isds-costs-damages-duration.pdf.

⁷ “ISDS Navigator Update: 1190 Known Investment Treaty Cases by 31 December 2021,” Investment Policy Hub, UNCTAD, 26 Apr 2022, <https://investmentpolicy.unctad.org/news/hub/1688/20220426-isds-navigator-update-1190-known-investment-treaty-cases-by-31-december-2021>.

for foreign investors enforceable outside of the domestic judicial system of the host state will encourage further investment,⁸ which, in turn, will promote domestic development.

The assertion is that investment treaties will deter capricious, arbitrary, and discriminatory state conduct, and protect investors from costs incurred in the event of a breach of those commitments,⁹ thereby reducing a barrier to investment and increasing investment flows. However, decades of research have failed to establish that legal protections contained within investment treaties have a discernable impact on promoting foreign investment flows.¹⁰ A 2021 meta-analysis of 74 studies looking at the effects of investment treaties on foreign direct investment (FDI) found that investment treaties “have an effect on [FDI] that is so small as to be considered as negligible or zero.”¹¹ Another meta-analysis from 2015 concluded that “... the empirical evidence on the basis of a meta-analysis suggests that the FDI promotion effect of [bilateral investment treaties] seems to be economically negligible.”¹² In the case of renewable energy investments, researchers have found no evidence to show that the ECT has had a positive influence on FDI inflows in the renewable energy sector.¹³ Ironically, a 2018 report concluded that countries that have terminated IIAs in the recent past have actually had or are likely to have increased foreign investment following the treaties’ termination.¹⁴

8 Lise Johnson, Lisa Sachs, Brooke Güven and Jesse Coleman, “Costs and Benefits of Investment Treaties: Practical Considerations for States” (New York: CCSI, 2018), <https://ccsi.columbia.edu/sites/default/files/content/pics/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr.pdf> [Johnson et al. 2018]; Lise Johnson, Lisa Sachs and Nathan Lobel, “Briefing Note: Aligning International Investment Agreements with the Sustainable Development Goals” (Nov 2020); Joachim Pohl, “Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence” OECD Working Papers on International Investment (OECD, 2018), at pp. 16-17, <https://www.oecd-ilibrary.org/docserver/e5f85c3d-en.pdf?expires=1668261267&id=id&accname=guest&checksum=EA66F1BE0FEBA35907ED01B401CC8C53> [Pohl, 2018]; Eric Neumayer and Laura Spess, “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?,” *World Development* 33, no. 10 (2005): 1567, <https://www.sciencedirect.com/science/article/pii/S0305750X05001233> [Neumayer and Spess, 2005]. The authors conclude that investment treaties appear to be useful “substitutes” for domestic political reform. However, see Jason Yackee, “Do BITs Really Work? Revisiting the Empirical Link Between Investment Treaties and Foreign Direct Investment,” in Karl Sauvant and Lisa E. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (New York: Columbia Center on Sustainable Investment Books, 2009), Chapter 14, at p. 379, https://scholarship.law.columbia.edu/sustainable_investment_books/6/. Here the author criticizes the study by Neumayer and Spess, finding that a replication with a larger dataset does not produce the same result of a positive correlation between bilateral investment treaties and foreign direct investment. In fact, Yackee writes that investors have little awareness or appreciation of specific investment treaties as “multinational corporations have historically only haphazardly and imperfectly institutionalized general “political risk assessment” procedures,” at p. 381.

9 Zachary Elkins, Andrew T. Guzman and Beth A. Simmons, “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000,” *International Organization*, Vol 60(4) (2006): 811, at pp. 823-824, <https://www.cambridge.org/core/journals/international-organization/article/competing-for-capital-the-diffusion-of-bilateral-investment-treaties-19602000/474DA5396C266F75C5C26752D22620C7>; Neumayer and Spess, 2005, at p. 1572; Also see Julia Calvert and Kyla Tienhaara, “Beyond ‘Once BITten, Twice Shy’: Defending the Legitimacy of Investor-State Dispute Settlement in Peru and Australia,” *Review of International Political Economy* (2022), <https://www.tandfonline.com/doi/pdf/10.1080/09692290.2022.2134172?needAccess=true> [Calvert and Tienhaara, 2022]. The authors discuss the perception of stability and good governance as created by investment treaties. For e.g., “MINCETUR officials asserted that [the Peru-US Trade Agreement] would ‘reinforce the stability of economic policy and institutions’ and ‘reduce perceptions of country risk amongst international economic agents,’” at p. 7.

10 See Karl P. Sauvant and Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (New York: Columbia Center on Sustainable Investment Books, 2009); Lauge N. Skovgaard Poulsen, “The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence” in *Yearbook on International Investment Law and Policy 2009/2010* (New York: Oxford University Press, 2010): 539 [Poulsen, 2010]; Pohl, 2018; Josef C. Brada, Zdenek Drabek and Ichiro Iwasaki, “Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis,” *Journal of Economic Surveys*, Vol 35(1) (2021): 34 [Brada et al., 2021].

11 Brada et al., 2021. This is a meta-analysis of 74 studies looking at the effects of IIAs on foreign direct investment. They found that IIAs “have an effect on [foreign direct investment] that is so small as to be considered as negligible or zero.” See also Christian Bellak, “Economic Impact of Investment Agreements” (Department of Economics Working Paper Series No. 200, Vienna: Vienna University of Economics and Business, 2015), <https://research.wu.ac.at/en/publications/economic-impact-of-investment-agreements-3> [Bellak, 2015]. This is another meta-analysis, which concludes that “... the empirical evidence on the basis of a meta-analysis suggests that the FDI promotion effect of [bilateral investment treaties] ... seems to be economically negligible,” at p. 19.

12 Bellak, 2015.

13 Kyla Tienhaara & Christian Downie, “Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes,” *Global Governance*, Vol 24(3) (2018): 451, <https://doi.org/10.1163/19426720-02403009>.

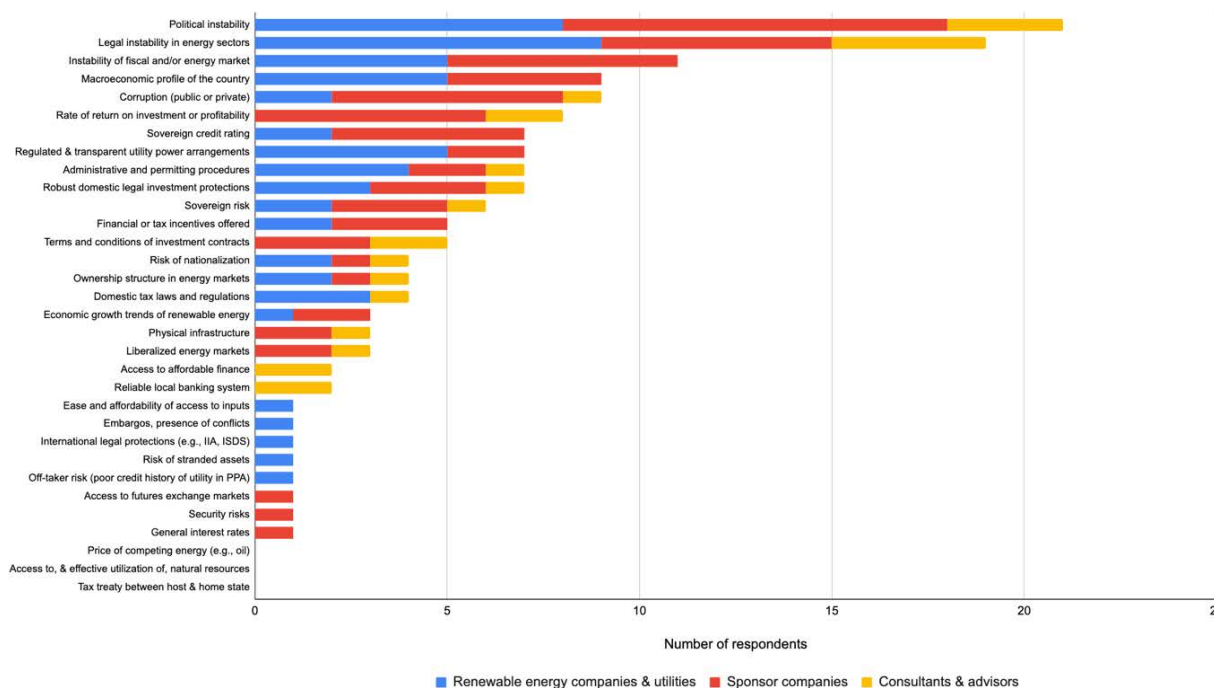
14 Public Citizen, “Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries’ Foreign Direct Investment Inflows,” Research Brief, Public Citizen Global Trade Watch (April 2018), https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_1.pdf.

Despite the lack of supporting evidence, proponents of the investment treaty system continue to argue that IIAs are effective at mobilizing investment and are therefore critical to advancing the necessary scale-up of renewable energy investments. This narrative is being used, for example, by the ECT Secretariat in defense against the growing criticism of the treaty’s protection of fossil fuel investment and therefore its incompatibility with the Paris Agreement.¹⁵

Understanding the factors that investors consider most critical or important in their decision-making process regarding energy investments offers a complementary path to answering the question of whether IIAs actually encourage investment flows. The findings of our survey of renewable energy investors and industry experts on what really matters to them when investing in new foreign markets support the empirical conclusions that investment treaties are not decisive in investment decision-making.

When asked to choose the top-five factors that deterred their company from investing in a new market, the majority of respondents chose: political instability, legal instability in the energy sector, instability of fiscal and/or energy markets, the macroeconomic profile of a host state, and corruption. Only one respondent identified international legal protections by way of IIAs as among their top five deterring factors.¹⁶ See Figure 1.

Figure 1: Top deterrents to investing in renewable energy abroad



To delve deeper into the decision-making process of investors, several interviews were carried out as an extension of the survey. When asked about legal factors that were critical to investors, almost all those interviewed talked about the importance of domestic legal factors, including land leases, land ownership issues, tax laws, and domestic legal

¹⁵ Communication of the Secretary General on the Modernisation of the Energy Charter Treaty (1 Jul 2022) International Energy Charter, https://www.energycharter.org/media/news/article/communication-of-the-secretary-general-on-the-modernisation-of-the-energy-charter-treaty/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=72821feec70fab2743d97ad51eafb987.

¹⁶ This is also the conclusion by Poulsen, 2010, at p. 4, in relation to investors in general.

frameworks. Investment treaties were not a decisive factor in their decision-making process. One respondent said that, “investment agreements are not decisive in our investment decision-making. As a sponsor of renewable energy projects in Chile and, soon Colombia, we don’t contemplate treaty-based arbitration as part of our due diligence. It’s not the recourse in the event of a dispute. If it were, that would essentially signify an extreme scenario where we have been expropriated. But we don’t anticipate that happening in the first place.” Another respondent echoed that “[the presence of IIAs] wouldn’t be a very important factor. It wouldn’t make or break the decision on whether or not we invest.”

Further, when respondents were asked about pre-investment legal counsel, not a single one said anything about receiving advice on investing based on the presence of an IIA. On the other hand, factors such as connections with government officials or government agencies seem to be critical, especially in countries that have a higher political risk. Respondents noted that they use “extensive relationships with the government, the embassy, the ambassador,” and other “connections at the energy ministry and other ministry levels” at the pre-investment stage, and “lobbying and political influence” post-investment, in the event of a dispute. The utility of treaties therefore appears to be far less important—if at all—compared to diplomatic channels and connections to government officials.

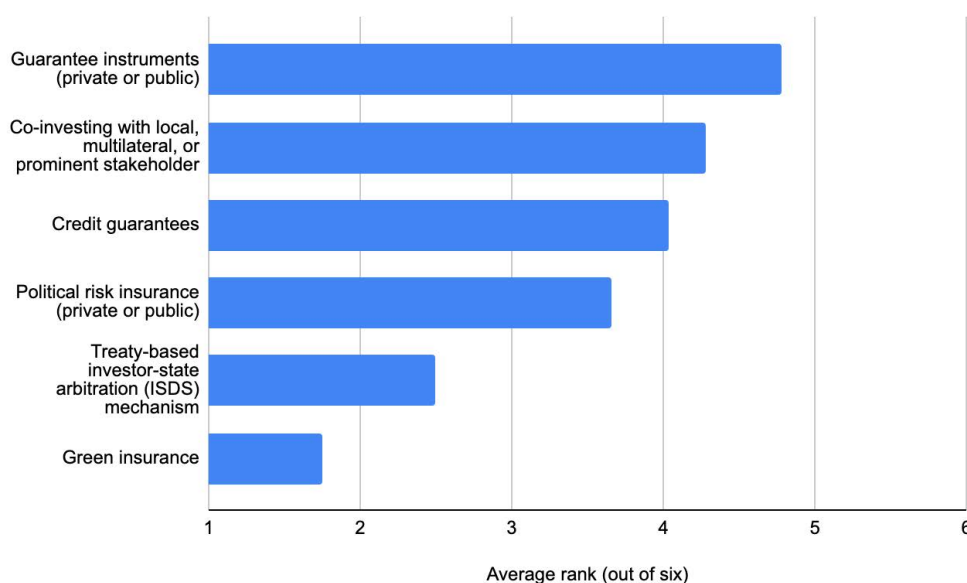
A combined reading of the survey responses together with the interviews suggests that other legal elements may be more critical when thinking about building an enticing investment environment for clean energy investments (along with relevant, and sometimes far more decisive, economic and financial components), and that IIAs are not among the most important ex ante determinants for foreign investors in the renewable energy space.

III. The Importance of ISDS as a Risk Mitigation Tool for Renewable Energy Investors

While investors may not be aware of—or place much emphasis on—the existence of an IIA between their home state and a potential host state when they are making a decision about where to invest, they may take advantage of the strong protections afforded by IIAs when or if a dispute arises post-establishment. This does not mean, however, that those investors would not have made their investments in the absence of a treaty. Indeed, law firms often advise their clients that have already decided to invest in a specific jurisdiction to (re)structure their investments so as to benefit from additional treaty-based protections.¹⁷ For instance, investors have been encouraged to “audit their corporate structure and change it, if needed, to ensure they are protected by an investment treaty,” and that such restructuring “should take place before any climate-related dispute with the State has arisen or is reasonably foreseeable.”¹⁸ Accordingly, investment treaties afford additional protections to investors without actually influencing their investment decisions.

To find out whether ISDS features as a critical risk mitigation tool for foreign investors, respondents were asked to rank six such tools in the order in which they are important in their foreign investment decisions. Treaty-based investment arbitration was one of the two lowest-ranked options of six risk mitigation strategies, together with green insurance. The three highest-ranked tools were guarantee instruments, credit guarantees, and co-investing with local or prominent stakeholders. See Figure 2.

Figure 2: Average ranking of six risk mitigation tools, where six was most important



¹⁷ For example, Jones Day, “Restructuring Recommended after CJEU Decision on Intra-EU Bilateral Investment Treaties” (Cleveland: Jones Day, 2018), <https://www.jonesday.com/en/insights/2018/03/restructuring-recommended-after-cjeu-decision-on-i>; Jones Day, “Climate Change and Investor-State Dispute Settlement” (Newsletter, 2022), <https://www.jonesday.com/en/insights/2022/02/climate-change-and-investorstate-dispute-settlement>.

¹⁸ Jones Day, “Climate Change and Investor-State Dispute Settlement” (Newsletter, 2022), <https://www.jonesday.com/en/insights/2022/02/climate-change-and-investorstate-dispute-settlement>.

IV. Who Benefits from IIAs and ISDS?

To date, dozens of ISDS cases related to renewable energy policies have been successfully brought against several states under the Energy Charter Treaty, resulting in millions of dollars in awarded compensation. The system is therefore profiting at least some investors. But who exactly are these investors?

As of September 2022, there have been at least 80 publicly-known ISDS cases related to changes in renewable energy policies, the majority of which have been brought under the ECT against Czechia, Italy, and Spain.¹⁹ These countries used feed-in tariffs (FITs) in the early to mid-2000s to induce investment in renewable energy sectors. Initially, the FIT policies were successful in attracting significant investment. However, in the context of a profound financial crisis in 2008, many European countries were unable to maintain their renewable energy support policies.²⁰ For instance, at the end of 2012, Spain's tariff deficit was more than EUR 29 billion, or 3% of the Spanish GDP.²¹ To respond to this unforeseen situation, governments rolled back or revoked renewable energy incentives policies in order to stop the tariff deficit from growing further.²² Investors have claimed the regulatory changes violated the protection of legitimate expectations through the fair and equitable treatment (FET) standard under the ECT.

To date, Spain has been subject to at least 51 known ISDS cases. Of the 27 awards as of November 2022, 21 have found Spain in violation of the FET standard. So far, Spain owes more than EUR 1.2 billion in compensation to successful investors, which is “equal to the country's entire spending commitment to fight the climate crisis or five times what it spent to alleviate energy poverty in 2021.”²³ Spain also owes EUR 101 million in associated legal and arbitration fees.

The investors that have brought the majority of cases under the ECT against Spain have been upstream financial investors. Unlike investors that produce, generate, store or distribute renewable energy, a recent study notes that “[i]n 89% of the cases [brought against Spain as of May 2022]... the claimant is not a renewable energy company but an equity fund or

¹⁹ Treaty-Based Investor-State Dispute Settlement Cases and Climate Action (Geneva: UNCTAD, Sept 2022), https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf.

²⁰ Theodoros G. Iliopoulos, “Price Support Schemes in the Service of the EU's Low-Carbon Energy Transition,” in Zachariadis et al. (eds), *Economic Instruments for a Low-Carbon Future* (Edward Elgar Publishing, 28 Jul 2020), <https://www.elgaronline.com/view/edcoll/9781839109904/9781839109904.00011.xml>; Carmen Otero García-Castrillón, “Spain and Investment Arbitration: The Renewable Energy Explosion” (Ontario: Centre for International Governance Innovation (CIGI), 2016), <https://www.cigionline.org/static/documents/documents/ISA%20Paper%20No.17.pdf> [García-Castrillón, 2016].

²¹ Pablo del Río and Pere Mir-Artigues, “A Cautionary Tale: Spain's Solar PV Investment Bubble” (Winnipeg: International Institute for Sustainable Development, 2014), at p. 9, https://www.iisd.org/gsi/sites/default/files/rens_ct_spain.pdf.

²² Theodoros Iliopoulos, “Renewable Energy Regulation: Feed-in Tariff Schemes under Recession Conditions,” *Lexxion: The Legal Publisher*, Vol 4(2) (2016): 110, at p. 110, <https://enr.lexxion.eu/article/ENLR/2016/2/7>; Sofia-Natalia Boemi and Agis M. Papadopoulos, “Times of Recession: Three Different Renewable Energy Stories from the Mediterranean Region,” in Evanthie Michalena and Jeremy Maxwell Hills (eds), *Renewable Energy Governance: Complexities and Challenges* (Springer, 2013), https://books.google.com/books?id=DSq5BAAQBAJ&printsec=frontcover&source=gbg_summary_r&cad=0#v=onepage&q&f=false.

²³ Lucía Bárcena and Fabian Flues, “From Solar Dream to Legal Nightmare: How Financial Investors, Law Firms and Arbitrators are Profiting from the Investment Arbitration Boom in Spain” (Transnational Institute and Powershift, 31 May 2022), at p. 4, <https://www.tni.org/en/publication/from-solar-dream-to-legal-nightmare> [Bárcena and Flues, 2022].

other type of financial investor, with a direct or indirect stake in companies operating in the sector, including banks.”²⁴ The main focus of upstream, speculative investors is to achieve maximum financial returns, irrespective of the field in which they operate.²⁵ They are often unknown to the public, and their modus operandi is to remain in a certain business venture for 5-7 years, reap the benefits of that business, then divest and find another profitable venture.²⁶ This is quite different from an investor that operates a renewable energy project in any given country, has a direct relationship with the government in that country, and is hopeful that both the project and the relationship are long-lasting. In fact, in some of the Spanish cases, the speculative investors sold their interests and profited substantially from those transactions, yet received further compensation as a result of their arbitration claims.²⁷



²⁴ Ibid, at p. 12.

²⁵ Joseph L. Staats and Glen Biglaiser, “The Effects of Judicial Strength and Rule of Law on Portfolio Investment in the Developing World,” *Social Science Quarterly*, Vol 92(3) (2011): 609, at p. 610 <https://www.jstor.org/stable/42956540>.

²⁶ CEO and TNI (2014), “Profiting from crisis: How corporations and lawyers are scavenging profits from Europe’s crisis countries” (March 2014), https://www.tni.org/files/download/profitting_from_crisis_1.pdf; Bárcena and Flues, 2022, at p. 12.

²⁷ In her dissenting opinion in the *Watkins v. Spain* case, Dr. Helene Ruiz Fabri states: “Last but not least, contrary to what the Majority considered (at para 593(ii) of the Award), the investment of the Claimants was not “destroyed”. The investment was bought at €91 million in 2011, valued €98 million at the moment of the alleged intervention of the wrongful act in 2014 and sold at €133 million in 2016 (which meant a return of 11.2%). What is the Majority considering as “destroyed” and what is the Tribunal repairing exactly, when awarding damages in the sum of €77 million, without taking into account the date of the investment and the impact of the context on reparation?” See *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case no. ARB/15/44, Award (21 Jan 2020), at para. 16, <https://jsumundi.com/en/document/decision/en-watkins-holdings-s-a-r-l-and-others-v-kingdom-of-spain-none-currently-available-wednesday-4th-november-2015>.

V. Legal Stability as a Driving Factor for Renewable Energy Investments

While the presence of IIAs and the reliance on ISDS as a risk mitigation tool do not appear to be important to most renewable energy investors, the survey results do confirm the importance of stability to investors' decision-making process. Among the factors driving foreign investment in renewables, an overwhelming majority of respondents considered "legal stability," "political stability," and "stability of fiscal and energy markets" as critical or very important in their investment decisions. This section focuses on the stability of legal frameworks, which includes both contractual and regulatory frameworks, in the renewables sector.

When scoping out a new market, investors will assess, among other factors, whether a state's legal institutions are well developed, whether the substance of the law is conducive to foreign investment, whether they will have access to effective dispute settlement processes, and whether the rule of law (in both substance and process) is well entrenched. A stable investment climate is in the interest of states as well. The lack of legal stability—for instance, by way of frequent, unpredictable, and arbitrary regulatory changes by the state—can discourage investments or provoke disputes with investors, which will ultimately affect the development of the renewable energy sector of a country.²⁸ Likewise, the potential benefits for the state (and the public) depend on the stability of an investment project; if renewables projects are stalled, targets related to sustainable, low-carbon, and affordable energy may not be met or realized.

A number of key characteristics define the type of stability expected of a state's legal and regulatory framework:

- ▶ laws and regulations are publicly available, uniformly administered and applied, and provide a means for affected actors to communicate with relevant authorities;²⁹
- ▶ laws and regulations serve clear policy objectives, such as economic development, social welfare or environmental protection,³⁰ are based on sound legal and empirical evidence; and allow for the mutual benefits of investors and the state;
- ▶ the governance framework is responsive to changing circumstances affecting either the state or the investor;³¹ and
- ▶ investors are protected from arbitrary or discriminatory government decisions, and domestic courts will provide impartial means to uphold investors' legal rights and enforce their commercial contracts.³²

²⁸ Miguel Mendonça, Stephen Lacey and Frede Hvelplund, "Stability, Participation and Transparency in Renewable Energy Policy: Lessons from Denmark and the United States," *Policy and Society*, Vol 27(4) (2009): 379, <https://academic.oup.com/policyandsociety/article/27/4/379/6420858>.

²⁹ Transparency and Predictability for Investment Policies Addressing National Security Concerns: A Survey of Practices (Paris: OECD, 2008), <https://www.oecd.org/daf/inv/investment-policy/40700254.pdf>.

³⁰ OECD/Korea Development Institute, "Improving Regulatory Governance: Trends, Practices and the Way Forward" (Paris: OECD Publishing, 2017): 20, https://read.oecd-ilibrary.org/governance/improving-regulatory-governance_9789264280366-en#page22.

³¹ Lisa E. Sachs, Perrine Toledano, Jacky Mandelbaum, with James Otto, "Impacts of Fiscal Reforms on Country Attractiveness: Learning from the Facts," in *Yearbook on International Investment Law and Policy 2011-12* (Oxford: Oxford University Press, 2013): 345, at p. 375, <https://oxia.oup.com/view/10.1093/law-iic/9780199983025.016.0008/law-iic-9780199983025-document-8?prd=IC>. See also, Lou Wells, "It's Just a Clause, isn't it?" (CONNEX Support Unit, n.d.), <https://www.connex-unit.org/wp-content/uploads/2022/05/Clause-1-EN.pdf>. The author provides some guidance and recommendations on the use of stabilization clauses in government contracts with foreign investors.

³² Joseph L. Staats and Glen Biglaiser, "The Effects of Judicial Strength and Rule of Law on Portfolio Investment in the Developing World," *Social Science Quarterly*, Vol 92(3) (2011): 609, at p. 613, <https://www.jstor.org/stable/42956540>.

Investment treaty proponents argue that IIAs and ISDS are essential means of meeting investors' expectations of legal stability. However, tribunals have interpreted IIAs as providing for absolute stability in the legal and business environment of host states, far exceeding aspects of regulatory stability that matter to investors and, at the same time, undermining the flexibility that is important to both states and investors. Specifically, many ISDS tribunals have held that general legislation (even in the absence of specific stabilization commitments) can give rise to legitimate expectations that a regulatory framework will remain unchanged.³³

One well-known example of how a tribunal has interpreted the FET standard as implicating an absolute stability obligation is in the case of *Occidental v. Ecuador I*.³⁴ That tribunal noted that under the FET standard, “there is an obligation not to alter the legal and business environment in which the investment has been made,”³⁵ and that the stability requirement is “an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not.”³⁶ More recent cases, including several of the cases brought by renewable energy investors against Spain, have maintained the strict standard of absolute stability, even over the objections of dissenters. As one dissenting arbitrator opined in the *Renergy v. Spain* case, “[t]he expectation of a relatively (or absolutely) immutable rate of return identified by the Majority is not supported by the evidence or the case-law. It is an approach that is neither legitimate nor reasonable.”³⁷

Reading a commitment of absolute stabilization into the FET standard goes beyond general principles of legal certainty, including those of the EU's Renewable Energy Directive 2018/2001, which requires “stability of the financial support” granted to renewable energy projects but explicitly allows Member States to “adjust the level of support in accordance with objective criteria, provided that such criteria are established in the original design

33 *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case no. ARB/15/38, Award (31 Jul 2019), para. 313, <https://jsumundi.com/en/document/decision/en-soles-badajoz-gmbh-v-kingdom-of-spain-none-currently-available-monday-24th-august-2015>; *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case no. ARB/15/20, Award (15 Jul 2019), para. 388, <https://jsumundi.com/en/document/decision/en-cube-infrastructure-fund-sicav-and-others-v-kingdom-of-spain-award-monday-15th-july-2019>; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case no. ARB/15/36, Award (6 Sept 2019), para. 295, <https://jsumundi.com/en/document/decision/en-operafund-eco-invest-sicav-plc-and-schwab-holding-ag-v-kingdom-of-spain-none-currently-available-tuesday-11th-august-2015>; *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case no. ARB/15/15, Award (31 May 2019), <https://jsumundi.com/en/document/decision/en-9ren-holding-s-a-r-l-v-kingdom-of-spain-decision-of-the-ad-hoc-committee-on-the-non-disputing-partys-application-to-file-a-written-submission-friday-19th-november-2021>. A small number of other tribunals have held that such general legislation cannot give rise to legitimate expectations that the regulatory framework would remain unchanged. For example, see *Charanne v. Spain*, Arb. No. 062/2012, Final Award (21 Jan 2016), para. 499, https://jsumundi.com/en/document/decision/en-charanne-b-v-and-construction-investments-s-a-r-l-v-spain-final-award-thursday-21st-january-2016#decision_112; *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain*, SCC Case no. V2013/153, Award (12 Jul 2016), para. 775, <https://jsumundi.com/en/document/decision/es-isolux-infrastructure-netherlands-b-v-c-reino-de-espana-laudo-sunday-17th-july-2016>; *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case no. 2014-19, Award (15 May 2019), para. 569, <https://jsumundi.com/en/document/decision/en-wa-investments-europa-nova-limited-v-the-czech-republic-none-currently-available-tuesday-1st-january-2013>.

34 Federico Ortino, “The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?,” *Journal of International Economic Law*, Vol 21(4) (2018): 845, at pp. 846-847 & 851, <https://ideas.repec.org/a/oup/jieclw/v21y2018i4p845-865.html>.

35 *Occidental Exploration and Production Company v. Republic of Ecuador (I)*, LCIA Case no. UN3467, Award (1 Jul 2004), para. 191, <https://jsumundi.com/en/document/decision/en-occidental-exploration-and-production-company-v-republic-of-ecuador-i-award-thursday-1st-july-2004>.

36 *Occidental v. Ecuador I*, para. 186.

37 *Renergy v. Spain*, para 48. Also see *EDF (Services) Limited v. Republic of Romania*, ICSID Case no. ARB/05/13, Award (8 Oct 2009), <https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf>: “The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life,” at para. 217.

of the support scheme.”³⁸ The Court of Justice of the European Union has consistently held that “economic operators cannot justifiably claim a legitimate expectation that an existing situation which may be altered by the national authorities in the exercise of their discretionary power will be maintained.”³⁹ Similarly, in the domestic claims brought against Spain, the Spanish Supreme Court has held that any diligent operator should have known that the energy sector is subject to intense administrative intervention due to its significance to the general public interest.⁴⁰



³⁸ European Union, Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources, OJ L 328 (21 Dec 2018), Art. 6.1 and Art. 6.2, <http://data.europa.eu/eli/dir/2018/2001/oj>.

³⁹ Italian Court (Tenth Chamber), Joined Cases C-180/18, C-186/18 and C-287/18, ECLI:EU:C:2019:605, para. 31, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2019%3A605>; Italian Court (Fifth Chamber), Joined Cases C-798/18 and C-799/18, C 217/2, para. 42, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CA0798>. In the latter case brought by investors against Italy, the CJEU reaffirmed the Italian Constitutional Court’s reasoning that the reform in the incentives policy “constitutes an intervention that, as regards the fair balancing of the opposing interests at stake, addresses a public interest intended to combine the policy of supporting the production of energy from renewable sources with making the related costs payable by end users of electricity more sustainable. It held, furthermore, that the alteration of the incentive scheme at issue in the main proceedings was neither unforeseeable nor unexpected, so that a prudent and circumspect economic operator would have been able to take account of possible legislative developments, considering the temporary and changeable nature of support schemes,” at p. 16.

⁴⁰ García-Castrillón, 2016.

VI. Conclusion

The findings of the survey confirm decades of research that have failed to establish that legal protections contained within investment treaties have a discernable impact on promoting foreign investment flows, including in the renewable energy sectors. While the survey confirms that elements of legal stability are important to investors, investment treaties, as interpreted by tribunals, impose an obligation of absolute stability that undermines states' use of policy tools to attract and govern investment.

The proliferation of claims and threatened claims challenging changes to renewable energy incentives schemes substantially increases the cost to states of implementing such policy tools that necessarily require flexibility in light of complex and evolving technologies, financial factors, and assumptions about costs and markets, among other changing circumstances.⁴¹ The “regulatory chill” that is emerging in light of increasingly costly investor–state disputes may indeed undermine the very tools that are effective at promoting investments in renewable energy.

States who are in favour of achieving climate goals should consider withdrawing from their investment treaties in order to maintain the necessary policy space to implement effective and urgent climate action policies.⁴² This analysis, together with the more extensive discussion of the drivers of renewable energy investments in “Scaling Investment in Renewable Energy Generation to Achieve Sustainable Development Goals 7 (Affordable and Clean Energy) and 13 (Climate Action) and the Paris Agreement: Roadblocks and Drivers” should reassure states that withdrawing from investment treaties will not affect investments into their renewable energy sectors.⁴³

⁴¹ See James Zhan and Joachim Karl, “Investment Incentives for Sustainable Development,” in Ana Teresa Tavares-Lehman, Lisa Sachs, Lise Johnson, and Perrine Toledano (eds), *Rethinking Investment Incentives* (New York: Columbia University Press, 2016): 204, <http://cup.columbia.edu/book/rethinking-investment-incentives/9780231172981>; Lise Johnson and Perrine Toledano, “Investment Incentives: A Survey of Policies and Approaches for Sustainable Investment” (New York: CCSI, 2022), at pp. 55 & 119, <https://ccsi.columbia.edu/sites/default/files/content/docs/publications/Investment-Incentives-policies-approaches-sustainable-investment-CCSI-Oct-2022.pdf>.

⁴² Martin Dietrich Brauch, “Should the European Union Fix, Leave or Kill the Energy Charter Treaty?” CCSI (9 Feb 2021), <https://ccsi.columbia.edu/news/should-european-union-fix-leave-or-kill-energy-charter-treaty>.

⁴³ Public Citizen, “Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries’ Foreign Direct Investment Inflows,” Research Brief, Public Citizen Global Trade Watch (April 2018), https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_1.pdf.

Acknowledgments

We would like to thank the following people for their help, support and guidance throughout this study and report: Lisa Sachs, Ethan Henry Goldstein, Mithatcan Aydos, and Duoye Xu; as well as Jérôme Schmitt and Tom Mitro, who were instrumental at the design phase of the CCSI- E3G survey. We were privileged to have had insightful conversations on this topic with Lise Johnson, George Kahale III, Lou Wells, Joe Bell, and Haydn Palliser. We also want to thank Susan McGregor, who helped us decipher the data and extract important conclusions from it. The CCSI-E3G survey would not have been possible without the support of E3G, especially Ignacio Arroniz Velasco and Lisa Fischer. And finally, we would like to thank all the industry expert respondents who completed the survey, especially those that went the extra mile to speak to us virtually for follow-up questions.





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