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

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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.

In the first section of this report, we present our survey findings and consider the role of IIAs in promoting renewable energy investments. 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.

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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. Investment treaties provide host state guarantees and protection to investors of counterparty states. 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. There have been 1190 publicly-known ISDS cases as of December 31, 2021.

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

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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.

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


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.


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.\textsuperscript{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.\textsuperscript{16} See Figure 1.

\textbf{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


\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure2.png}
\caption{Average ranking of six risk mitigation tools, where six was most important}
\end{figure}


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. 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. For instance, at the end of 2012, Spain’s tariff deficit was more than EUR 29 billion, or 3% of the Spanish GDP. 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. 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.” 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

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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. 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. 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.
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://jusmundi.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. 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;
- laws and regulations serve clear policy objectives, such as economic development, social welfare or environmental protection, 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; 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.

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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

of the support scheme.” 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.” 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.


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.

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. 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. 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.  


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