



## Suspended in legal limbo: Protecting investment in renewable energy in the EU

Monica Alessi, Jorge Núñez Ferrer and Christian Egenhofer

### Summary

This paper focuses on the damage – and the potential for inflicting further damage – to investor confidence arising from legal uncertainties surrounding renewable energy support in some EU member states. A higher-than-expected expansion of the renewables sector, resulting in higher costs of the support, combined with the financial crisis, has driven some member states to radically curtail renewable energy support schemes. Loss-making investors unsuccessfully challenged these EU governments in national courts, arguing that their rights had been violated and denounced reforms that they considered to be retroactively punitive in nature. A number of EU-based international investors turned to international arbitration courts under the provisions of the Energy Charter Treaty (ECT), which protects cross-border investment in the energy sector. This move, however, has called into question the legal framework of the single market and EU state aid rules. A dispute on the jurisdiction of the ECT within the single market has ensued, which highlights a complex and unresolved situation. While the legal disputes accumulate, the concern is that investors may shy away from the EU as a result of the regulatory and legal uncertainties. The main aim of the paper is to provide some clarity for non-specialists on a complex situation, and to highlight the need to find workable solutions that *de facto* restore investor confidence.

**Keywords:** Energy Charter Treaty, ECT, retroactive changes, RES, renewables, renewable energy Directive, investors, single market, arbitration, state aids

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# Suspended in legal limbo:

## Protecting investment in renewable energy in the EU

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### 1. Introduction

If the EU is to achieve its 2020, 2030 and longer-term climate objectives, it is crucial for the member states to adopt renewable energy on a large scale, which in turn depends on the sector's ability to continue to attract private-sector capital from across the EU and beyond. The renewable energy Directive (2009/28/EC) (2009 RE Directive) promotes the increase of the share of renewable energy in the EU's energy mix and sets an EU-wide target equal to 20% renewable energy in the energy mix by 2020. In parallel with the legislative proposal for that Directive, the European Commission adopted State aid guidelines (the so-called 2008 Environment Guidelines).<sup>1</sup> These stipulate that the Commission will authorise the necessary State aid to implement those objectives but must ensure that there is no overcompensation, although compensation paid may include a reasonable profit. Neither the 2008 Environmental Guidelines nor their successor (the 2014 Energy and Environmental Guidelines<sup>2</sup>), however, create an entitlement to receiving such State aid.

The Directive states in its introductory clause, para. 25: "One important means to achieve the aim of this Directive is to guarantee the proper functioning of national support schemes (...) in order to maintain investor confidence and allow Member States to design effective national measures for target compliance." In combination with the authorisation of State aid by the Commission, the Directive prioritised dispatch and mandated grid access. This resulted in a significant increase in support to renewable energy sources (RES) in the EU member states, which in turn succeeded in attracting considerable private investment.

Starting in 2010, private investors' confidence in RES policies and commitments began to wane as a result of actions taken by the member states. Significant policy reversals have had negative effects on the financial sustainability of RES projects, leading in some cases to a decrease in private investment. The most drastic reversals occurred in Spain with successive reforms from 2010 onwards, particularly in the solar PV sector. To a lesser extent, the Czech Republic, Bulgaria, Poland, Romania and Italy also introduced reforms between 2010 and 2016, which altered the investment environment for the renewable sector and resulted in reductions in new renewable installations in those countries.

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<sup>1</sup> OJ 2008 C 82/1. On reasonable profit, see point 109, which refers to a "normal return on capital".

<sup>2</sup> OJ 2014 C 200/1. On reasonable profit, see point 129, which refers to "full depreciation".

Investors have launched several legal challenges in national courts, claiming that the policy changes were retroactive in nature and breached legitimate expectations – but without success, apart from one instance in Bulgaria.<sup>3</sup> Other Supreme Courts, notably in the Czech Republic, Italy and Spain, found that the changes were not retroactive as they applied only to future payments. As a result, both domestic and cross-border investors consider that they cannot obtain appropriate protection in member states' national courts. A detailed introduction to the situation addressed in this paper is presented in Egenhofer et al. (2016).

This report argues that the current situation creates a sort of legal limbo for these investors. This dilemma arises from a combination of factors linked to the exclusive competence of the European Commission on State aid, which according to investors hinders national courts to determine objectively whether investors' legitimate expectations have been violated.<sup>4</sup>

Renewable energy investors have found an alternative to national courts by turning to independent international arbitration under the Energy Charter Treaty (ECT). The energy sector benefits from a specific international regime governing investor-State disputes – the Energy Charter Treaty (ECT)<sup>5</sup> – which provides that when an investor from one State party to the ECT makes an investment in another ECT State, the investor can have recourse to international arbitration to recover damages against the host State for i) nationalisation or expropriation, ii) discriminatory treatment and iii) breach of legitimate expectations (also known as fair and equitable treatment). The European Union and all EU member states are signatories (Italy has since withdrawn).

The European Commission's legal services and the respondent EU member states, however, have challenged the applicability of the ECT within the EU, for legal reasons that will be described in this paper.

Investor-State arbitration is complex, lengthy and costly, and to date only four cases – three against Spain and one against the Czech Republic – have been completed. In the first two Spanish cases, which concerned initial policy changes starting in 2010, the arbitrators held that the limited 2010 changes were not extensive enough to constitute expropriation or a breach of legitimate expectations. In a second arbitration from the same investor on the post-2010 changes, the arbitrators also found that standards were not met.<sup>6</sup> The same happened in the Czech case. However, the situation is taking a new turn as the first case regarding policy reforms introduced in Spain from 2012 onwards was found to constitute a breach of the ECT's

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<sup>3</sup> Constitutional Court of Bulgaria, Resolution N13/31.07.2014. See State aid decision SA.44840 (2016/NN) – Bulgaria Support for renewable energy generation in Bulgaria, paragraph 31.

<sup>4</sup> In addition, when a State aid is not notified, it cannot be challenged in national courts as it was never approved in the first place.

<sup>5</sup> Energy Charter Secretariat, "[The International Energy Charter Consolidated Energy Charter Treaty](#) – with Related Documents", Brussels, January 2016.

<sup>6</sup> In both cases, these were 2-1 decisions.

guarantee of fair and equitable treatment, and damages were awarded to the investors<sup>7</sup> (this case is currently under appeal). As more than 30 claims relating to the same post-2012 changes are still in the arbitration process, these may similarly succeed. However, because awards themselves are in essence compensation for renewable support schemes that are subject to State Aid rules (including the exemptions under the 2009 RE Directive and later State Aid Guidance), the European Commission considers that the awards are subject to Commission review and approval as State Aid. Absent such approval, such compensation could in principle not be paid out. On the other hand, arbitration awards are nevertheless binding, and claimants will most likely seek the enforcement of damages both inside and outside the EU, which in practice may mean the impounding of assets owned by the respondent state and located in any country covered by the ECT. Furthermore, the ECT has successfully protected European investors vis-à-vis non-EU countries. This raises questions as to the logic of providing a seemingly higher level of protection for EU investors in non-EU countries than is provided within the EU single market. There is, however, a serious caveat regarding cases of investors within the single market against EU governments, as the ECT only applies to cross-border investors. Domestic investors (e.g. Spanish investors in Spain) cannot therefore make use of arbitration under the ECT.

Regardless of the merits of the European Commission's argument about jurisdiction and the legality of the awards granted by arbitration courts, investors are witnessing a protracted period of uncertainty regarding their legal rights when confronted with the impact of sudden modifications to the support for existing investments. Investors appear to be the somewhat forgotten collateral damage of a contradictory legal situation. As a result, investment in renewable energy in some member states has slowed down considerably, possibly negatively affecting the EU's ability to meet its climate and energy policy objectives.

Section 2 of this paper addresses the possible impacts on EU emissions reductions and renewable energy targets. Section 3 explains why investors turn to international arbitration tribunals. Section 4 presents some potential steps to address the situation and section 5 gives a summary and conclusions. Because most of the concluded international arbitration cases to date concern Spain, the paper principally draws examples from that country. Research for this paper is based on existing literature, case law and interviews with experts, including international lawyers, academics and officials, several of whom requested not to be cited by name. The conclusions presented in this report reflect only the views of the authors and do not necessarily reflect the views of the interviewees.

## 2. RES trends and RES targets and the importance of investor confidence

The damage caused by policy reversals to RES support may harm the reputation of the EU as an attractive place for investing in renewables, especially in those countries that have

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<sup>7</sup> In a 3-0 decision.

introduced radical changes to their support policies. The situation is aggravated by the prevailing state of the legal uncertainty or ‘limbo’.

Despite the legally binding national renewables targets set out in the 2009 RE Directive, the stability of the investment framework in member states plays a very important role. The failure to provide a solution to the problem of a deteriorating investment climate in some EU member states may jeopardise the achievement of the 2020 renewables target, as well the ambitions set out towards 2030. In its latest Renewable Energy Progress Report,<sup>8</sup> the European Commission concludes that the “vast majority of EU countries are well on track to reach their 2020 binding targets for renewable energy, but all countries will have to continue their efforts to meet these targets”. The Commission mentions that only three member states, France, the Netherlands and Luxembourg, are falling behind their plans. This statement may be true for 2020, but it is misleading for the long term. Those member states that have introduced abrupt changes to their support systems may find it difficult to attract investment in renewables to meet whatever national targets they have set themselves. The situation and trends in a number of member states could mean that even if the EU as a whole achieves its 27% renewables target by 2030, the distribution of RES across the EU may be very uneven, as investors may shy away from those member states in which confidence in the investment climate has deteriorated.<sup>9</sup> Data from Bloomberg<sup>10</sup> already seems to suggest that renewable investment is increasingly concentrated in a few member states, such as Germany, Denmark, France and the UK.

Whether targets are met or not, however, is not the main concern of this paper. Changes to support policy will not necessarily lead to the non-achievement of targets, at least where 2020 targets are concerned. In addition, member states may fail to reach their targets but nevertheless take remedial action in line with the spirit of the Directive. Legitimate concerns arise, however, if member states move counter to the Directive’s spirit regarding investor confidence. Indeed, despite the fact that neither the Directive nor general principles of Union law prohibit the modification of future payments under support schemes, including for existing installations, permitting such modifications may undermine these provisions. Published arbitration awards under the ECT give detailed analysis on how some State aid reforms have infringed individual investors’ rights, but they do not address questions of EU law, in particular State aid law. The challenge is to find, given the problem at hand, a European solution that either prevents governments from introducing State aid reforms that infringe investors’ rights

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<sup>8</sup> COM(2017) 57 of 1.2.2017

<sup>9</sup> There are contradictory developments in the case of Spain. New RES capacity has quickly sold in auctions held by the government, despite the negative investment framework. This could reflect the belief on the part of investors that the Spanish State will soon have to reverse its decisions and introduce a more favourable policy. The sales of capacity allow the government to claim that the path to 2020 is being maintained, while the actual implementation of the project may be less than certain.

<sup>10</sup> Bloomberg, “New Energy Outlook 2017”, Bloomberg New Energy Finance, June 2017.

or establishes an appropriate litigation mechanism to allow for a quick resolution of claims by investors (both domestic and cross-border).

### 3. On legal uncertainty in the EU and why investors are resorting to international arbitration

The financial losses caused by the substantial reduction in the profitability of many existing RES projects in member states has led investors to claim that the reforms have violated “legitimate expectations of fair and equitable treatment”, that they were retroactive in nature, and had in some instances an impact equivalent to expropriation. The cases brought to national courts were unsuccessful in the Czech Republic, Italy and Spain. In the Czech Republic and Italy, the Constitutional Courts ruled that there had been no violation of legitimate expectations and that the modifications did not have retroactive effect. The European Commission came to the same view when assessing this matter.

Even in the national context, however, the Spanish Supreme Court rulings concerning the harshest post-2012 reforms reveal that the issue is divisive, as three out of seven judges dissented from the decisions. Two judges wrote that the changes were *de facto* retroactive, and one judge wrote that the changes violated Spanish legal norms of ‘legal certainty’ and ‘legitimate trust’.<sup>11</sup> Investors felt that their legitimate rights were not being addressed fairly, while in other countries the trust in the independence and adequacy of the national courts has been seen as limited<sup>12</sup>.

As a result, both EU-based and non-EU-based cross-border investors have brought their cases to international arbitration tribunals under Article 26 of the ECT on the claim that the States concerned are in breach of their obligations under Articles 10 and 13<sup>13</sup> of the ECT.

Prior to the changes in renewable support policies in EU member states, out of approximately 30 arbitrations under the ECT, there were no international arbitration cases brought by an EU investor against an EU member state.<sup>14</sup> The situation today is very different, with over 40 ECT claims filed against EU member states, most of which have been brought by EU-based investors, and the rest by Asian or Middle Eastern investors. Of those, the majority<sup>15</sup> have been

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<sup>11</sup> See R. Rincón, “[El Supremo avala el recorte de 1.700 millones de Rajoy a las renovables](#)”, *El País*, 1 June 2016.

<sup>12</sup> A fact recognised by the European Commission in the case of Bulgaria and Romania: See European Commission [reports](#) on the Cooperation and Verification Mechanism.

<sup>13</sup> Article 10 requires governments to give fair and equitable treatment, thereby providing fundamental stability to investors. This does not exclude the possibility of reasonable changes to policies, but it does not allow radical alterations to regimes applied to existing investments. Article 13 identifies the case of unlawful expropriation.

<sup>14</sup> Some cases have been brought against EU member states, but these took place prior to their accession.

<sup>15</sup> The ECT website only lists 32 cases until December 2016, but interviews indicated that another five have been submitted in the intervening period up to end of June 2017.

lodged against Spain (i.e. the country that has introduced the most radical changes in its RES support), only three of which have been concluded.

According to representatives of the investors, the use of the (financially costly) international arbitration option is the result of the inadequate protection provided by the member states and the lack of engagement of the EU institutions. At the same time, there are a number of grounds on which the European Commission and the sued member states can mount a challenge to the jurisdiction of the ECT within the EU. While the stance of the European Commission upsets investors, there is a potential legal conflict between EU State Aid law and the ECT. Sections 3.1 and 3.2 below give an overview of the basic causes for the present situation, based on information provided by the interviewees.

### 3.1 Why is the ECT important?

The adoption of the Energy Charter dates back to the early 1990s, with the aim of overcoming previous Cold War economic divisions and developing energy cooperation among the states of Eurasia.

The Energy Charter Treaty (ECT),<sup>16</sup> signed in December 1994 and entered into force in April 1998, establishes legally-binding multilateral rules “to provide a more balanced and efficient framework for international cooperation than is offered by bilateral agreements alone or by non-legislative instruments”.<sup>17</sup> It is intended to play a “role as part of an international effort to build a legal foundation for energy security, based on the principles of open, competitive markets and sustainable development”.<sup>18</sup> Its fundamental aim is “to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thereby mitigating risks associated with energy-related investment and trade”.<sup>19</sup>

To date, there are 54 signatories, including 52 states, the European Community and Euratom.<sup>20</sup> Article 26 of the ECT (“Settlement of Disputes between an Investor and a Contracting Party”) lays out the provisions for the resolution of disputes between a Contracting State and an investor of another Contracting State. It specifies which arbitration rules can qualify to arbitrate an ECT dispute, namely those of:

- the International Centre for Settlement of Investment Disputes (ICSID), based in Washington, D.C.,
- a sole arbitrator or an *ad hoc* arbitration tribunal under the United Nations Commission on International Trade Law (UNCITRAL) or

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<sup>16</sup> See [section](#) on “The Energy Charter Treaty” on the International Energy Charter website.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> For a full ECT membership list, see its [website](#).



- the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

The most relevant ECT article for cases brought to the ECT regarding changes to renewable energy policy is the one on “fair and equitable treatment” (Article 10, reproduced in the box below). The violation of legitimate expectations as a result of the retroactive application of a law is not directly addressed in the ECT, but it is generally recognised by arbitration tribunals as one possible violation of the fair and equitable treatment standard. If a change in policy affects an investment to such an extent that it leads to significant losses, it can also be equivalent to expropriation, i.e. an action by a State that divests an owner of his/her investment.

**Article 10 “Promotion, protection and treatment of investments”**

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

Finally, [Article 10\(12\)](#) states: “Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments, investment agreements, and investment authorisations”.

In this context, three aspects of the ECT are of particular relevance:

- 1) The ECT is the only existing multilateral agreement on investment protection and it is binding for member states as well as for the EU. The awards are binding and enforceable (State assets in other signatory countries can be seized).
- 2) The ECT is an international treaty and at the same time part of EU law.
- 3) The principles of the ECT were agreed with the full participation of the European Union.

There is a concern that the EU may in some cases provide lower protection standards than the ECT. At the same time, the European Commission argues that EU law provides a full set of rules protecting investments, so that – unlike third-country investors – EU investors do not need an additional set of remedies. To uphold the EU’s principle of mutual reliance on national courts, however, this would require that the level of protection is comparable in all EU member states.

### 3.2 Questions on the validity of the ECT for intra-EU disputes

The jurisdiction of the ECT has proven controversial, owing to the potential clash of this international treaty with the EU Treaties, which since 1958 has given the European Commission full competence on State aid and investor protection within the single market. The European Commission has challenged the jurisdiction of the ECT for intra-EU disputes, on the grounds that it does not conform to EU investment protection and State aid rules, and that for investors within the EU, EU law has supremacy. These arguments follow a similar line to the one upheld by the European Commission in its November 2016 Decision concerning a case against the Czech Republic (State Aid SA.40171 (2015/NN) – Czech Republic Promotion of electricity production from renewable energy sources, EC(2016) 7827 final). Paragraph 147 states:

In case of the Energy Charter Treaty, it is also clear from the wording, the objective and the context of the treaty that it does not apply in an intra-EU situation in any event. In general, when negotiating – as in the case of the Energy Charter Treaty – multilateral agreements as a “block”, the Union and its Member States only intend to create international obligations vis-à-vis third countries, but not inter se. That has been particularly clear in case of the Energy Charter Treaty, which had been initiated by the Union in order to promote investment flows from the then European Communities to the East, and energy flows in the opposite direction, as part of the external action of the European Communities. It is also borne out by the wording of Articles 1(3) and 1(10) of the Energy Charter Treaty, which defines the area of a regional economic integration organisation as the area of that organisation. The lack of competence of Member States to conclude inter se investment agreements and the multiple violations of Union law set out above in recitals (143) to (145) also constitute relevant context for the interpretation of the Energy Charter Treaty in harmony with Union law, so as to avoid treaty conflict.

Tim Maxian Rusche (2017), an authority on EU renewable electricity law and policy, clarifies this position in an analysis of the situation between the EU Treaties and the ECT. He asserts that international arbitration sentences cannot be upheld for intra-EU disputes on State aid, arguing that within the EU, only the European Commission can determine whether a given change in State aid is compatible with the internal market, and thus can be authorised. As a consequence, the ECT can only apply to third countries. He also argues that the ECT recognises the EU as a “Regional Economic Integration Organization” (REIO), as the concept was specifically created to address the special nature of the EU.

To date, arbitration tribunals have rejected the EU’s and member states’ claims of lack of jurisdiction for intra-EU disputes. International lawyers disagree whether the EU has been officially recognised by parties to the ECT as a REIO, as formally required in Article 1(3) of the ECT. This has allowed a legal incompatibility to emerge in two separate but overlapping jurisdictions. The European Union and its member states are all founders and parties to the ECT and therefore are also individually bound by it. Thus, even if member states find themselves in breach of State aid rules when paying court-mandated compensation to investors, the arbitration awards are still binding. It is not in the remit of the arbitration tribunals to consider

this legal incompatibility. These can only focus on the merit of the claimants' specific case, i.e. whether their rights have been infringed by the State.

Maxian Rusche (2017, p. 9), however, notes that awards still require approval by the European Commission, because according to the arbitration tribunals' own provisions "ICSID (International Centre for Settlement of Investment Disputes) awards have to be recognised as if they were judgments of national courts that have acquired *res iudicata* (Art. 54 of ICSID Convention)". From this interpretation, it follows that since State aid is an exclusive competence of the EU, such an award in a national court would itself only be valid if the Commission, under the jurisdiction of the Court of Justice of the European Union (CJEU), approves the compensation for the investors.

Maxian Rusche (ibid.) further argues that because investors and governments within the EU are bound to respect the supremacy of EU law for intra-EU disputes, they should abstain from using the ECT and instead bring their cases before the national courts, which are authorised to refer cases to the CJEU, or – depending on the case – directly to the Court in Luxembourg. In sum, governments abiding by an arbitration award and paying compensation to investors may be subject to infringement procedures for providing illegal State aid, as transferring money to investors is considered a subsidy. From a purely legal point of view this is a valid argument. The single market prohibits compensating some investors and not others.

The problem, from a legal viewpoint, is the existence of two parallel jurisdictions: Arbitration tribunals claim that they have full jurisdiction, because the ECT is binding on individual member states, while EU law considers that the approval of State aid and any compensation to investors is a full competence of the European Commission and that the EU should be treated as a REIO. Both arguments are valid, but they are unfortunately incompatible with one another.

#### 4. Potential solutions to the stalemate

As early as 2011, a professor of law specialising in international commercial arbitration, Jan Kleinheisterkamp, identified a lack of clarity regarding the status of the EU in the ECT. He argued that although the ECT was originally designed to protect EU energy investors in Central and Eastern Europe, it was "partially also, from the very beginning an 'original intra-EU' agreement even previous to the two accession waves. The ECT does not contain any limitations regarding its applicability among the 'old' EU member states" (Kleinheisterkamp, 2011, p. 15). The European Commission, however, dissented from this view, arguing that the EU is a single market and should thus be treated by arbitration tribunals as a Regional Economic Integration Organization, as provided for under Article 1(3) ECT. According to the European Commission the term REIO was created to cater for the specific case of the EU, and thus questions why arbitration tribunals do not follow this interpretation. This issue remains unresolved, as reflected in the decisions of the arbitration tribunals.

Countering the opinion of the Commission, some interviewees argue that it was already evident when the ECT was signed that cases could potentially become the subject of intra-EU

arbitration; thus, member states implicitly accepted differential treatment for intra-EU cross-border investments.

Kleinheisterkamp (2011) argues that a solution would be to recognise the EU as a REIO in the ECT, but it would not suffice for the European Commission to simply take the decision to do so. The European Council would need to give a mandate to the European Commission to represent the EU and its member states in the context of the ECT. A more far-reaching option would be for EU member states to formally declare that the ECT does not have legal jurisdiction in intra-EU investor-state disputes.

The ease of obtaining a mandate by a qualified majority vote from the European Council, however, is not self-evident. One cannot assume that a sufficient number of member states would endorse such a proposal as long as the judicial systems across EU member states are not universally perceived as having *de facto* equivalent standards. Some member states may argue that national judicial bodies in other EU member states do not provide sufficient protection to investors from their own country, and that the present system does not ensure the same level of protection as the ECT. The desire to offer higher protection to national investors operating in other member states may trump the Union's principle of mutual trust in national judicial systems (including the right to address the CJEU in second instance).

Another practical solution would be for the EU to create an exception, whereby intra-EU arbitration rulings under the ECT are accepted as valid for existing investments. After all, the ECT has been successfully used by EU investors as a means of defending their operations in non-EU countries. But implementation of such a proposal poses difficulties because it would violate primary law and require a change of the EU Treaties. This exception would address the concern that when a new State aid is approved by the European Commission, it does not *per se* imply that existing investors have been treated fairly during the *transition process* to the new regime. Interviewees representing investors expressed concern that compliance of a State aid with EU provisions does not address investors' rights to a reasonable level, nor ensure legal certainty, avoidance of retroactive changes and protection against changes that would be equivalent to expropriation. Even though EU law and the CJEU would in principle protect them, they claim that this is not the case in practice.

Such an exception, however, still does not solve the conundrum of treating national investors differently than investors from another EU member state – unless the outcome automatically becomes valid for all EU investors. And such an outcome would pose an even greater conundrum: Would the European Council approve such an extension of rights to national investors, given the potential large costs of extending such an award to all concerned investors?

In November 2016 a reform proposal of the renewable energy Directive introduced specific wording against policy changes with retroactive effects.<sup>21</sup> This is welcome as it makes a clear

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<sup>21</sup> Proposal for a Directive on the promotion of the use of energy from renewable sources (recast) COM(2016) 767 final: "An EU-level framework setting out high-level principles for support schemes would also provide investor

statement that retroactive changes must be avoided, and offers the possibility that the European Commission can launch infringement procedures. It could also be made enforceable in national courts, and, eventually, in the CJEU.

It is questionable, however, whether this could be considered equivalent to providing a direct channel to investors through a dispute settlement mechanism, with provisions on fairness, legitimate expectations, equitable treatment and expropriation (as contained in Articles 10 and 13 of the ECT). Arbitration cases to date have also not accepted the claims of retroactivity, focusing instead on legitimate expectations and the disproportionate nature of the policy changes. Still, the present wording in the proposed Directive is an important step towards clarifying and strengthening investor protection. Formally, the protection provided will apply only once the new Directive enters into force on 1 January 2021, and therefore will only cover future cases. For the cases prior to 2021, some interviewees argue that the principles of Community Law recognise the protection of investors' legitimate expectations, and that any infringement could be challenged in the CJEU.

It is important to highlight that effectively protecting investors' rights, on the one hand, and opening an infringement procedure, on the other, are not comparable actions. In the first instance, investors are able to bring their cases to court and benefit from a trial, while the second instance primarily involves a dispute between the European Commission and a national government regarding the implementation of the Directive. The latter does not address specific violations of investors' rights nor does it award compensation for damages suffered.

It is reasonable to raise the question of whether the European Commission should not review the State aid rules and their implementation, to ensure that they are adapted to safeguard the proper functioning of the internal market, as well as to create the positive investment framework required by the existing and future renewable energy Directive.

To prevent the EU investment framework from being further undermined by the increasing number of legal challenges in arbitration courts, the European Commission services responsible for financial markets, energy and business development should become more proactively involved in finding a workable solution to reassure EU investors that EU provisions provide the necessary level of protection.

## 5. Summary and conclusions

The objective of this paper has not been to analyse in detail the respective legal provisions, nor to defend the conflicting positions of the arbitration courts and the European Commission: arbitration courts agree on the fact that the Energy Charter Treaty has intra-EU jurisdiction,

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certainty, which may have been undermined in the past by the stop and go policy – and sometimes retroactive measures – taken by certain Member States.” (p.7); “(...) principles for Member States to use for support schemes and the protection for investors against retroactive changes (p.13)”.

whereas the European Commission disagrees and points out that recourse to arbitration under the ECT is not in line with EU legislation on investor protection nor on State aid.

Both positions are internally consistent, but neither provides a solution for investors who find themselves trapped in-between. This is detrimental to the European Union's reputation as an investor-friendly destination and discourages investment in renewable energy. Arbitration courts themselves cannot modify their position, as it is not in their remit to reinterpret the ECT.

The official position of the European Commission rests on the supremacy of the EU State aid rules and investor protection provisions in the Treaties. Regardless of the merit of this position, what cannot be disregarded is that the arbitration tribunals have performed a thorough assessment of the claims, and in their latest case have ruled in favour of the claimants. In this instance, the court found evidence in Spain of breaches of Articles 10 and 13 of the ECT and awarded compensation to the claimants. If confirmed on appeal, such awards may be repeated in future law suits, based on comparable grounds as argued against the same set of Spanish reforms. Such cases, in fact, are already lining up.

The ruling is based on principles that all parties to the ECT have agreed to adhere to. Rejecting the award on the grounds of the supremacy of EU State aid rules and the lack of applicability of the ECT within the EU does not address the fundamental need to achieve the EU's key objectives, i.e. meeting the GHG emissions reduction targets, coupled with providing a stable environment for investors. As a result, the present policy stance will be increasingly vulnerable to challenges.

This study suggest the following options as possible means of addressing this dilemma:

- The EU could recognise arbitration rulings under the ECT until the member states agree in the Council of the EU to clarify whether or not the ECT applies between them. The ECT lays out standards for investor protection that the EU adheres to. Rejecting the awards seems equivalent to lowering protection standards within the EU. In consequence, a legal battle on ECT applicability within the EU will be detrimental to the EU's reputation as a leader in RES and damaging to investors' confidence.
- The arbitration rulings should also be used as a precedent for national investors, as no distinction should be drawn within the single market between national and other EU investors. According to the legal experts interviewed for this study, the principles of equivalence and effectiveness should apply. Under EU law, the principle of equivalence requires the same remedies and procedural rules to be available to claims based on EU law as are extended to analogous claims of a purely domestic nature. While the ECT is not 'European Law', its principles are subscribed to by both the European Commission and the member states. Following the principles of equivalence, effectiveness and equality, any EU member state found by a tribunal to have breached the ECT should upgrade its legal provisions on the treatment of existing investments to the highest-performing protection system.

- While the preceding option could offer a way to honour the point that “ICSID awards have to be recognised as if they were judgments of national Courts” (Article 54 of the ICSID Convention), the approval of support and compensation to investors remains an exclusive competence of the European Commission. Given the extensive analysis carried out by the arbitration courts, the Commission could use the findings as a guide to determine how to compensate investors during the transition to the new regime.
- There seems to be a need to clarify which possibilities of recourse are available to investors at the EU level, in the event that national courts perform poorly. Amongst others, an intra-EU arbitration system has been suggested. Such a system would complement the principle of mutual trust in the legal systems of the EU, on which the Union is based. For example, the CJEU could play a clearer arbitration role for investor-State disputes.

Finding a solution that provides legal clarity while appropriately and effectively protecting investors from radical and damaging policy reversals would provide multiple advantages It would: i) avoid the loss of investor confidence in the short-term; ii) restore the EU’s reputation as an investor-friendly destination; iii) prevent a back-log of international arbitration cases under the ECT; and iv) send a signal that investment in the EU energy sector is safe and protected by coherent legal rules.

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