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CHAPTER 1

# No Green without More Green: The Importance of Protecting FDI through International Investment Law to Meet the Climate Change Challenge

*Sarah Z. Vasani* and Nathalie Allen***

**Abstract**

The growing climate change crisis requires significant development in and implementation of sustainable and renewable energies. To bring about that development, greater foreign direct investment is needed. Investment treaty arbitration contributes to encouraging greater levels of foreign direct investment, including in the context of investment in climate-friendly energies, by giving foreign private investors that knowledge that they can have recourse to a neutral dispute forum, which can, in turn, help shape regulatory frameworks, resulting in attractive investment conditions for foreign private investors. In this article, the authors argue that the European Union's forward thinking regulatory approach has been pivotal to the progression of a legal framework encouraging cleaner energy and more environmentally-friendly technology. Whilst enormous benefits have been derived from this approach, the authors argue that the European Union is at risk of overstepping the mark and of deterring, as opposed to encouraging, the necessary foreign direct investment, through, in part, its much publicised aversion to investment treaty arbitration.

## 1 Introduction

Foreign direct investment (FDI), which constitutes 38% of global Gross Domestic Product (GDP),[1] is critical to the continued development of environmentally friendly renewable energies and green technologies that are critical to meeting the crucial climate change challenge. The fact that private, and

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1 UNCTAD, *World Investment Report 2019, Regional Fact Sheet: Developed Economies* (June 2019).

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often foreign, capital plays a central role in the transition to a low-carbon economy, has been acknowledged by those in both the public and private sectors. Mark Carney, in his forthcoming role as special advisor on climate finance to UK Prime Minister, Boris Johnson, stated that:

> [t]he objective for the private finance work for COP26 is simple … to make sure that every private finance decision takes climate change into account.[2]

Larry Fink, Chairman, CEO and founder of BlackRock, the world's largest asset manager with nearly USD 7 trillion in investments, announced in his highly anticipated and closely watched 2020 annual letter to the CEOs of the world's largest companies that BlackRock would make investment decisions with environmental sustainability as a core goal.[3] Mr Fink indicated BlackRock would introduce new funds that shun fossil fuel-oriented stocks, move more aggressively to vote against management teams that fail to make progress on sustainability, and press companies to disclose plans "for operating under a scenario where the Paris Agreement's goal of limiting global warming to less than two degrees is fully realized."[4]

It is no news to any of us that the world is facing a climate change crisis which we must address with a dramatic increase in the use of greener and more efficient energies. This sort of development does not come cheap. Many countries are in desperate need of and are seeking foreign investment to make a transition to climate friendly investment more commonplace. The Organisation for Economic Co-operation and Development (OECD) estimates that nearly USD 7 trillion per year would be required to meet the temperature targets set out in the Paris Agreement Under the United Nations Framework Convention on Climate Change (the Paris Agreement) and the United Nations Sustainable Development Goals, as set out in the UN 2030 Agenda for Sustainable Development.[5] Such staggering levels of investment are unlikely to be achieved in the absence of robust investor protections available through international investment law.

2 C Farand, 'Net zero goal 'greatest commercial opportunity of our time' says Mark Carney', Climate Change News, 27 February 2020 <www.climatechangenews.com> accessed on 12 June 2020.
3 2020 Annual Letter from Larry Fink, Chairman and CEO of Blackrock, to CEOs <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> accessed on 12 June 2020.
4 *Ibid*.
5 C Farand (n 2).

This is the case because investments – and in particular foreign investments – are greatly influenced by risks of ex post-regulatory changes and/or interference by the State. There is a fear that States may be tempted to renege on promises of public support, or may find themselves having to alter their regulatory framework, once the investments have been made and costs are "sunk".[6] Furthermore, investment environments which do not provide access to effective neutral dispute settlement mechanisms create uncertainty, especially for foreign investors. This, in turn, can lead to missed opportunities for investment and development, or a slowing down of such development at a time when such investment is critical to addressing climate change and the evolution of low carbon energies and other green technologies.

The international community is intensifying its attention and focus on private low-carbon investments, as evidenced by the Paris Agreement. This necessarily involves climate change policies which require flexibility to incorporate and to respond to political, technological, and scientific evolutions. As foreign investors are key to meeting the climate change challenge, and because they require stability, especially when involved in long-term and capital-intensive projects, progressive policies and stable legal and regulatory framework are necessary to develop investment in, and therefore progress, the renewable energy sector and other green technologies.

This is evident from the Paris Agreement, whose signatories are progressing transition to a low-carbon future, known as Nationally Determined Contributions (NDC). Thus, for example, Austria is one of the signatories pioneering a transition towards low-carbon energy usage. Austria has published its 'Taking Responsibility for Austria' programme aimed at making Austria a pioneer in climate change transition. Austria undertakes to meet its Paris Agreement targets at all costs. To achieve this, Austria's programme includes financial incentives, as well as targets for the expansion of renewable energies.[7]

An estimated USD 1.7 trillion is needed by 2030 just to implement the renewable energy components in the NDCs.[8] This necessarily means that more investment is needed in the field of green energy, in particular, and for this

6 *See* D Helm, C Hepburn and R Mash, Credible Carbon Policy [2003] 19 Oxford Rev.Econ. Polhbnbhy 438, 439–42.

7 C Cudlik and C Jirak, 'New Opportunities for Renewable Energy: Austrian government programme to 2020 to 2024', 24 February 2020, International Law Office, <www.internationallawoffice.com> accessed on 12 June 2020.

8 International Renewable Energy Agency, 'Investment Needs' <https://www.irena.org/financeinvestment/Investment-Needs> accessed on 12 June 2020.

increase in investment, more investment protection is needed. The legal arena clearly has a very important role to play:

> Investment in 'greenfield' technology, new renewable-related mining, higher-efficiency municipal structures, transportation systems and residential infrastructure presents challenges associated with traditional emerging-market risk. Legal tools are required to manage and allocate that risk in order for private funders and investors to reach the level of investment comfort necessary to deploy or otherwise proceed.[9]

Achieving a low-carbon future will not be easy. Indeed, there have already been numerous set-backs. For example, sufficient progress was not achieved during COP25[10] in Madrid in December 2019. The talks were unable to reach consensus in many areas, pushing decisions needing to be made into 2020, such as decisions on reporting requirements for transparency and common timeframes. This results in further pressure on the signatories. UN Secretary General, António Guterres, noted of COP25 that:

> the international community lost an important opportunity to show increased ambition on mitigation, adaptation and finance to tackle the climate crisis.[11]

If anything, COP25 serves as a poignant reminder that we cannot simply rely on the Paris Agreement to resolve the problems posed by climate change. We also need a committed and clear legal and regulatory framework encouraging foreign investment and holding States to account.

To attract and to continue to attract foreign private investment, climate regulations need to be compatible with the way private investors make their investment decisions, and climate regulations need to remain compatible. It is not sufficient to merely draw investors in; they must be remain and be successful. Similarly, foreign investors often feel the need to be sure that they can bring disputes in a neutral forum that will not favour the host state. The ability

9 W Miles, 'Legislators of the World', The Resolver, Winter 2020.

10 COP is the annual conference where parties to the 1992 United Nations Framework Convention on Climate Change (UNFCCC) convene to forge a global response to the climate emergency.

11 COP25 Climate change talks: 'We've lost an important opportunity', *BBC* (London, 15 December 2019) <https://www.bbc.co.uk/news/science-environment-50801493> accessed on 12 June 2020.

of investors to bring an investment claim against a host state independently from their home state through the ISDS system is an innovative and powerful aspect of the investment law regime. The influence that this ability has exerted – and can continue to exert – on the continuation of foreign private investment, including in the context of clean energy investment, should not be underestimated.

Paradoxically, the ISDS system has attracted significant criticism in recent years, with an increasing number of renunciations and renegotiations by States of their international investment agreements (IIA), especially in relation to the scope of dispute settlement provisions. Some States are increasingly wary of and disgruntled about ISDS. Thus, India is moving away from investor-state dispute settlement provisions wherever it can;[12] and an increasing number of ISDS provisions are qualified by the addition of further restrictions and limitations, such as the establishment of committees to provide binding interpretations of IIAs.[13] South Africa has commenced a programme of denouncing its investment treaties,[14] while Venezuela, Ecuador and Bolivia have all renounced the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Indonesia has announced its intention to terminate its 67 BITs,[15] and Germany has argued for the ISDS provisions not to be included in the negotiations on the EU-US Trade and Investment Partnership.[16] Furthermore, the European Union has

12 R Bhat, 'Will India do away with investor state arbitration?', Kluwer Arbitration Blog, 23 August 2017 <http://arbitrationblog.kluwerarbitration.com/2017/08/23/will-india-away-investor-state-arbitration/?doing_wp_cron=1591966160.2082469463348388671875> accessed 12 June 2020.

13 Article 4, Reciprocal Investment Promotion and Protection Agreement Between the Government of Morocco and the Government of the Federal Republic of Nigeria.

14 South African Institute of International Affairs, 'South Africa's revocation of its bilateral investment treaties: Beware of strangers bringing money, especially if you need I', Polity, 5 May 2015 <www.polity.org.za> accessed 12 June 2020.

15 D Price, 'Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?', [2017] 7 Asian Journal of International Law 124 <https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/indonesias-bold-strategy-on-bilateral-investment-treaties-seeking-an-equitable-climate-for-investment/2B196186FE7A415E60E84D57E169803D> accessed on 12 June 2020.

16 J Stoel, M Burgstaller and M Jacobson, 'Germany Reverses its Support for Investor-State Dispute Settlement in the Transatlantic and Investment Partnership', ARBlog, 1 April 2014 <https://www.hlregulation.com/2014/03/28/germany-reverses-its-support-for-investor-state-dispute-settlement-in-the-transatlantic-trade-and-investment-partnership-ttip/> accessed on 12 June 2020.

been outspoken about its preference and support for a multilateral investment court, as a replacement for the current ISDS system.[17]

Despite this growing voice of discontent, approximately 3,000 IIAs remain in place, protecting foreign investors against host state interference with the financial and regulatory basis of their (often long-term and capital-intensive) investments.[18] In recent times, international investment law has been based on the reduction of non-commercial regulatory and political risks to promote the inflow of foreign capital.[19] The substantive investment standards that are generally contained in IIAs include protection against expropriation, the provision of fair and equitable treatment (FET), and non-discrimination clauses. As the recent Spanish solar cases show, for FET at least, that these international investment protection standards are capable of shielding low-carbon investments.[20]

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17 European Parliament, Directorate-General for External Policies, Policy Department, 'In Pursuit of an International Investment Court: Recently negotiated investment chapters in EU Comprehensive FTA in comparative perspective', 4 July 2017 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603844/EXPO_STU(2017)603844_EN.pdf> accessed on 12 June 2020.

18 R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008).

19 Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation* 14 (2004).

20 *See OperaFund Eco-Invest SICAV PLC and Schwab Holding AG* v. *Spain,* ICSID Case No. Arb/15/36 <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4806/DS12832_En.pdf> accessed on 22 June 2020; *E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH* v. *Spain*, ICSID Case No. ARB/15/35; *Cavalum SGPS, S.A.* v. *Spain*, ICSID Case No. ARB/15/34; *JGC Corp.* v. *Spain*, ICSID Case No. ARB/15/27; *KS Invest GmbH and TLS Invest GmbH* v. *Spain*, ICSID Case No. ARB/15/25; *Matthias Kruck, et al.* v. *Spain*, ICSID Case No. ARB/15/23; *Cube Infrastructure Fund SICAV, et al.* v. *Spain*, ICSID Case No. ARB/15/20, Award, 15 July 2019 <https://www.italaw.com/sites/default/files/case-documents/italaw10694.pdf> accessed 22 June 2020; *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH* v. *Spain*, ICSID Case No. ARB/15/16; *9REN Holding S.a.r.l* v. *Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019 <https://www.italaw.com/sites/default/files/case-documents/italaw10565.pdf> accessed 22 June 2020; *STEAG GmbH* v. *Spain*, ICSID Case No. ARB/15/4; *Stadtwerke München GmbH, RWE Innogy GmbH, et al.* v. *Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019 <https://www.italaw.com/sites/default/files/case-documents/italaw11056.pdf> accessed 22 June 2020; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U.* v. *Spain*, ICSID Case No. ARB/14/34; *RENERGY S.à.r.l.* v. *Spain*, ICSID Case No. ARB/14/18; *InfraRed Environmental Infrastructure GP Limited, et al.* v. *Spain*, ICSID Case No. ARB/14/12; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V.* v. *Spain*, ICSID Case No. ARB/14/11, Award, 31 May 2019 <https://www.italaw.com/sites/default/files/case-documents/italaw10568.pdf> accessed 22 June 2020; *Masdar Solar & Wind Cooperatief U.A.* v. *Spain,* ICSID Case No. ARB/14/1, Awad, 16 May 2018 <https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf> accessed 22 June

While robust investment protection is key to attracting the necessary foreign capital required to bring about the essential investment in low-carbon and green technologies, a fine line exists between protecting foreign investors and enabling States to retain regulatory freedom. As the *Saluka* v. *Czech Republic* tribunal noted:

> No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.[21]

This is an imbalance which States are increasingly seeking to redress. Thus, in response to a perceived imbalance in favour of the foreign investor, a new generation of Bilateral Investment Treaties (BIT) is emerging. These BITs expressly address more contemporaneous issues, such as human rights, corporate and social responsibility, and sustainable development, as well as, crucially, environmental safeguarding.

Yet what is to be done in a world which desperately needs further foreign investment to meet the immediate and critical challenges posed by climate change? International environmental agreements have been defined in literature as "intergovernmental document[s] intended as legally binding with a primary stated purpose of preventing or managing human impacts on natural

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2020; *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l.* v. *Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 <https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf> accessed 22 June 2020; *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.* v. *Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 <https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf> accessed 22 June 2020; and *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l.* v. *Spain*, ICSID Case No. 13/30, Award, 11 December 2019 <https://www.italaw.com/sites/default/files/case-documents/italaw11143_0.pdf> accessed 22 June 2020.

21 *Saluka Investments BV* v. *the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 305 <https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> accessed on 12 June 2020. *See* also *Continental Casualty Co.* v. *The Argentine Republic*, Final Award, 5 September 2008, para. 258 <https://www.italaw.com/sites/default/files/case-documents/ita0228.pdf> accessed on 12 June 2020; *M.C.I. Power Group L.C.* v. *Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 278 <https://www.italaw.com/sites/default/files/case-documents/ita0500.pdf> accessed on 12 June 2020.

resources".[22] Such definition would at least include the binding climate change obligations laid down in international climate treaties to which a State is a party. The Paris Agreement is an obvious example of such a necessary initiative. It requires States to implement NDCs to mitigate climate change. Although this is an obligation under international law, the implementation of these commitments occurs at a national or regional level. The Paris Agreement sets out a global framework to avoid dangerous climate change by limiting global warming to below 2°C, with further efforts to limit it to 1.5°C. The Paris Agreement seeks to advance signatories' abilities to address the impacts of climate change and to support the signatories in their efforts. Thus, the Paris Agreement signatories are committed to "[m]aking finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".[23]

To put in this context, currently, the world's combined NDCs put the global community on course for global warming in the region of 3°C – which would have disastrous effects – far off the 1.5°C which the Paris Agreement signatories are aiming for.[24]

A key, and imperative, feature of the Paris Agreement is that different signatory States have different levels of commitment and different strategies. This is necessary as it allows countries to evolve autonomously, and in a context which best suits them. It is also a clear recognition that certain States will be able to take on more rapid change than other States, whose economies may not be able to withstand such rapid development.

The European Union has been a leader in addressing climate change legislation. It takes environmental issues very seriously, and has sought to advance legislation and regulations to ensure compliance with a greener energy climate within the European Union, as well as to influence what is implemented outside of the European Union. There are criticisms that the European Union has gone too far, and that even the European Union is at risk of acting in contravention of the Paris Agreement by denying its Member States the freedom to set their own regulatory and legislative framework.[25] In particular, certain Member States have been critical of EU overreach and are opposed

22 University of Oregon, *International Environmental Agreements (IEAs) Database Project*, <https://iea.uoregon.edu/international-environmental-agreements-ieas-defined> accessed on 12 June 2020.

23 Article 2.1(c) Paris Agreement.

24 R Black, 'To be credible at COP26, the UK needs a plan for its climate change', Climate Change News, 27 February 2020 <www.climatechangenews.com> accessed on 12 June 2020.

25 M Khan, 'Europe's divided front on climate change', Financial Times, 23 September 2019.

to the European Union's leading ambitions in climate change commitments. For example, Poland objected to the European Union's 2030 emission targets, which would require a minimum EUR 60bn spend by Poland, a state whose economy is heavily coal-reliant.[26] Politically, this is a serious problem for Poland and the European Union, and is one on which the far right in Poland have focused.[27] Estonia, Hungary and the Czech Republic all resisted the European Union climate changes for quite some time. Hungary and the Czech Republic only agreed after obtaining assurances that nuclear energy would be included in the carbon neutrality targets.[28]

However, there can be no doubting that the European Union has played and continues to play a pivotal role in the development of efficient energy legislation. In doing so, the European Union has provided much-needed baseline security, and has helped to lead the way in climate change legislation.

At the same time, the European Union increasingly has spoken out against investment treaty arbitration – an important tool for achieving the levels of FDI necessary to address the climate change crisis. Instead, the European Union favours the introduction of a specialised international investment court. The European Union's Directorate-General for External Policies published 'In Pursuit of an International Investment Court: Recently negotiated investment chapters in EU Comprehensive FTA in comparative perspective', a document which clearly sets out the disadvantages to investment treaty arbitration as perceived by the European Union, and how the European Union considers that an international investment court would resolve these disadvantages.[29]

It is suggested that the introduction of an international investment court could, at this point in time, be detrimental to the continued foreign investment in low-carbon energy and green technologies, and would represent a move away from the now well-trodden world of investment treaty arbitration. After all, the continually increasing number of investment treaty arbitrations which are commenced each year would suggest that foreign investors see real benefit to the system.[30] Given the strong reliance on foreign investment for climate friendly energies and technologies in developing countries in particular,

26 *Ibid.*

27 A Neslen, 'Far-right MEPs could threaten EU climate policy, experts warn', The Guardian, 21 May 2019.

28 'EU carbon neutrality: Leaders agree 2050 target without Poland', BBC, 13 December 2019 <https://www.bbc.co.uk/news/world-europe-50778001> accessed on 12 June 2020.

29 *Supra* (n 17).

30 ICSID Secretariat, 'The ICSID Caseload – Statistics' (Issue 2019-1) 6–7 <https://icsid.worldbank.org/en/Documents/resources/icsid%20Web%20Stats%202019-1(English).pdf> accessed on 12 June 2020.

it is important to consider what appeals to foreign investors and host States, as well as the interests of society.

Furthermore, such an international investment court would risk tilting the balance against investors, who, if they see it as such, risk altering their investment decisions, and potentially, refraining from investing in certain industries and certain jurisdictions. This could prove to be fatal to the development of clean energy investments and other green technologies.

## 2 EU and International Law Aimed at Facilitating Investment in Renewable Energies Is Now Well Developed

The European Union has adopted an increasingly serious approach towards environmental law, and the need to put in place legislation which brings about a greater reliance on green energy. It has helped to push forward the advancement and greater use of green energy. The Treaty of Rome made no mention of environmental policy, with environmental issues only being first addressed in the 1973 European Council Declaration.[31] More recently, the European Union has developed an extensive and far-reaching environmental protection and climate change framework, to reflect its strong commitment to addressing the dangers of climate change. The European Union recognises and has responded assiduously to the climate change crisis which the world is facing. Thus, Article 3(3) of the Treaty on European Union (TEU), inserted by the 2009 Lisbon Treaty, lists among the European Union's objectives "sustainable development … based on … inter alia a high level of protection and improvement of the quality of the environment".[32]

Furthermore, environmental policy is now listed as an element in the completion of the internal market through Article 114(3) of the Treaty on the Functioning of the European Union (TFEU).[33] In addition, Article 194 TFEU, which is the legal basis for the adoption of measures of energy, requires European Union policy to be exercised with regard to preserving and improving the environment, as well as promoting energy efficiency and energy savings, and the development of new and renewable forms of energy. The TFEU also contains

31 Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment [1973] OJEU C 112/1–53, 20 December 1973.

32 Article 3.3 Treaty on European Union (TEU) 1992.

33 Article 114(3) Treaty on the Functioning of the European Union (TFEU).

a special section on environmental policy in Title XX,[34] and Article 191(1) TFEU provides that the European Union shall contribute to:

- (i) preserving, protecting and improving the quality of the environment;
- (ii) protecting human health;
- (iii) prudent and rational utilisation of natural resources; and
- (iv) promoting measures at an international level to deal with regional or worldwide environmental problems, and in particular combating climate change.[35]

As part of its commitment to addressing climate change, the European Union has moved towards adopting environmental measures in the form of regulations that are directly applicable in the law of each Member State. Examples of such directly applicable laws and regulations include the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation regarding chemicals,[36] the EU Habitats Directive,[37] the Waste Framework Directive,[38] the Air Quality Framework Directive[39] and the Industrial Emissions Directive.[40]

Similarly, the European Union directives are typically ambitious and reflective of the urgency of climate change. According to the EU Emissions Trading System (EU ETS) Directive, installations covered by the scheme shall account for their carbon emissions and hold a permit (emission allowance) for each

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34 Title XX TFEU.

35 Article 191(1) TFEU.

36 Council Regulation (EU) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Council Directive (EU) 1999/45/EC and repealing Council Regulation (EEC) 793/93 and Commission Regulation (EC) 1488/94 as well as Council Directive (EU) 76/769/EEC and Commission Directives (EU) 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJEU L 396/1–850 30 December 2006.

37 Council Directive (EU) 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJEU L 206/7–50, 22 July 1992.

38 Council Directive (EU) 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (Text with EEA relevance) [2008] OJEU L 312/3–30, 22 November 2008.

39 Council Directive (EU) 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJEU L 152/1–44, 11 June 2008.

40 Council Directive (EU) 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) Text with EEA relevance [2010] OJEU L 334/17–119, 17 December 2010.

tonne of emissions emitted.[41] The implementation of this scheme is proceeding in phases and is gradually broadening its scope, by including additional sectors such as aviation, becoming more ambitious, by setting new targets and by replacing the free allocation of allowances with an auctioning system. This legislation curtails the activity and consequently reduces the profitability of emissions-intensive industries.

In 2010, the European Union created a Directorate-General for Climate Action, who is responsible for energy policy, dealing with the consequences of climate change and implementing the EU ETS.[42] Similarly, the Commission and other European Union bodies with a role in environmental policy are overseen by the Court of Justice of the European Union (CJEU). Pursuant to Article 263 TFEU, the CJEU has responsibility for reviewing the legality of legislative acts (such as regulations and directives) and other acts of the Commission and other European Union bodies.[43]

If the Commission considers a Member State has failed to fulfil an obligation under the Treaties, including complying with European Union environmental treaty obligations and implementing European Union legal acts in the environmental sphere, the Commission is responsible for bringing infringement proceedings against the Member State in question, under Article 258 TFEU.[44] As part of that process, the Commission will first deliver a reasoned opinion on the matter after giving the Member State concerned the opportunity to make submissions. If the Member State concerned does not comply with the opinion of the Commission within the prescribed period, the Commission may bring the matter before the CJEU, who may issue penalties for non-compliance.

Not only has the European Union made serious inroads in the world of climate change legislation, it has also furthered its commitment to addressing climate change by becoming a signatory and leading advocate for the Paris Agreement. The Paris Agreement sets out a global framework to address climate change by limiting global warming, whilst respecting the need for each State to develop their own individual and tailored regulatory framework. In particular, the signatories to the Paris Agreement agreed:

(i) on a long-term goal of keeping the increase in global average temperature to well below 2°C above pre-industrial levels;

41 Article 16 Council Directive (EU) 2003/87/EC of the European Parliament and of the Council of 13 October 2003 (EU ETS Directive) [2003] OJEU L 275/32–46, 25 October 2003.

42 European Commission, 'Climate Action, What We Do' <https://ec.europa.eu/clima/index_en> accessed on 12 June 2020.

43 Article 263 TFEU.

44 Article 258 TFEU.

(ii) to aim to limit the increase to 1.5°C, since this would significantly reduce the risks and the impacts of climate change;
(iii) on the need for global emissions to peak as soon as possible, recognising that this will take longer for developing countries; and
(iv) to undertake rapid reductions thereafter in accordance with the best available science, to achieve a balance between emissions and removals in the second half of the century.[45]

The signatories further agreed to:
(i) come together every 5 years to assess the collective progress towards the long-term goals and inform parties in updating and enhancing their NDCs;
(ii) report to each other and the public on how they are implementing climate action; and
(iii) track progress towards their commitments under the Paris Agreement through a robust transparency and accountability system. The Paris Agreement also aims to strengthen countries' ability to deal with the impacts of climate change and support them in their efforts.

Foreign investments are usually regulated by both international law and the domestic law of the host State. International law, often through a BIT or a multilateral investment treaty (MIT), affords the investor and its investment protections such as fair and equitable treatment, full protection and security, as well as freedom from expropriation, and from arbitrary and discriminatory treatment, while at the same time enabling the investor to pursue a direct cause of action against the host State before a neutral arbitral tribunal. It is this neutrality which is key to the foreign investor. Some instruments or agreements lay down specific provisions on the applicable law. Article 42 of the ICSID Convention, for example, stipulates that the tribunal "shall decide a dispute in accordance with such rules of law as may be agreed by the parties". In case there is no such agreement, the ICSID tribunal shall apply the domestic law of the host state together with applicable international law.[46]

The importance of environmental law has been reflected in IIAs for a long time. The 2009 Peru-US Trade Promotion Agreement lays down that parties shall adopt laws and regulations to fulfil their obligations under a number of multilateral environmental agreements.[47] In a similar vein, the 2008

45 Article 2 Paris Agreement.
46 Article 42 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (ICSID Convention).
47 Chapter Eighteen Peru-US Trade Promotion Agreement, 2009.

Canada-Colombia FTA recognises the right and the duty of States to conserve and protect the environment, as well as the obligations under multilateral environmental treaties.[48] Finally, the preamble of the 2009 Japan-Switzerland Economic Partnership Agreement states that parties seek to "adequately address the challenges of climate change".[49] Where IIAs specifically acknowledge the protection of the environment and sustainable development as stated goals of the treaty, or carve out regulatory powers in relation to those areas in order to fulfil international climate change commitments, such provisions will undoubtedly inform the interpretation of investment protection standards, including in any disputes which arise thereunder.

Reflective of the current crisis situation, newer BITs are, *inter alia*, further highlighting commitments to sustainable development. For example, the 2012 US Model BIT refers in its preamble to its desire "to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights".[50] Other recent investment treaties increasingly refer to climate change, environmental principles and obligations under international environmental agreements.

The 2019 Netherlands Model BIT is an example of an expressly forward-thinking and comprehensive BIT. Its Preamble acknowledges that the Contracting States are "[r]eaffirming their commitment to sustainable development and to enhancing the contribution of international trade and investment to sustainable development."[51] Significantly, – and clearly in response to certain disputes in recent years – the Netherlands Model BIT specifies that:

> The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons. The mere fact

48 Chapter Seventeen Canada-Colombia Free Trade Agreement, 2008.

49 Preamble Japan-Switzerland Economic Partnership Agreement, 2009.

50 Preamble, US Model Bilateral Investment Treaty, 2012.

51 Preamble Netherlands Model Bilateral Investment Treaty, 2019. This is especially noteworthy in light of the Vienna Convention on the Law of Treaties which requires that the provisions of an IIA be interpreted in view of its object and purpose. To specify the importance of sustainable development in the Preamble is to highlight its significance in the wider purpose of the treaty. *See* for a detailed analysis regarding the new Dutch Model BIT text, A M Paschalidis and N Lavranos, 'Comparative analysis between the 2018 and 2004 Dutch Model BIT texts' [2019] 4 European Investment Law and Arbitration Review 89.

> that a Contracting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectation of profits, is not a breach of an obligation under this Agreement.[52]

The Netherlands Model BIT further recognises Contracting States' obligations under other international agreements, and therefore reinforces commitments under the Paris Agreement, where applicable.[53] Similarly, the Preamble of the 2017 Uzbekistan-Turkey BIT specifies that the Contracting States are "[c]onvinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as international recognized labor rights."[54]

In recent years, sustainable development has received increasing attention in international economic law, and rightly so. This trend can be observed in recent BITs and FTAs, which increasingly contain language emphasising the importance of sustainable development, the environment and climate change. A 2014 OECD study brought to light that more than 75% of recent investment treaties contain language on sustainable development. Almost all of the treaties concluded in 2012 and 2013 contain such language.[55]

These new generation treaties demonstrate an increasing prioritisation by host States of issues relating to the protection of the environment and sustainable development, a welcome development which is critical in light of the impending climate change crisis. These new treaties highlight the need for many States to attract significant volumes of FDI to develop and proliferate the use of renewable energy and green technology. This is especially true for developing countries. At the same time, however, these treaties continue to afford key protections to foreign investors, a fact which will be critical to attracting and maintaining required levels of FDI in the renewable energy and green technology sectors.

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52 Article 2(2) Netherlands Model Bilateral Investment Treaty, 2019.

53 Article 6(6) Netherlands Model Bilateral Investment Treaty, 2019: "The Contracting Parties are committed to cooperate as appropriate on investment related sustainable development matters of mutual interest in multilateral fora".

54 Preamble Agreement Between the Government of the Republic of Uzbekistan and the Government of The Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, 2017.

55 K Gordon, J Pohl and M Bouchard, *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey*, OECD Working Papers on International Investment (2014) <www.oecd-ilibrary.org>.

In case of a conflict between international law (like an applicable BIT) and domestic law of the host state, international law will most likely prevail, but with consideration of the domestic law. This approach is reflected in Article 27 of the Vienna Convention on the Law of Treaties, which prohibits a state from employing its domestic laws to justify non-compliance with international treaties to which it is a party.[56] International tribunals have consistently followed this approach.[57]

When it comes to a host state's climate change obligations, in most circumstances, such obligations will be implemented in the host state's domestic law because climate treaties require States to formulate their own national policies in order to stop global warming. Consequently, a state will give effect to these commitments by incorporating regulations into its domestic legal framework. This will lead to the adoption of new domestic laws and the amendment of existing laws.

In the context of the European Union, the CJEU has gone even further by maintaining that EU law has an autonomous status with respect to both international law and the domestic law of its Member States.[58] This is a somewhat controversial position which is not necessarily supported globally, and which reflects some of the issues which are raised by virtue of the European Union being a signatory to the Paris Agreement, in addition to the individual Member States also being signatories in their own individual capacities.

## 3 The Role of ISDS in Increasing Private Investment in Renewable Energies and Green Technologies

It is important to recall that international investment law does not exist in a vacuum, and arbitral decisions on disputes "concerning the interpretation or application" of the underlying investment treaty should be in accordance with applicable rules of international law.[59] Law – on both the domestic and international planes – has a pivotal role to play in the development and

56 Article 27 Vienna Convention on the Law of Treaties.

57 PCIJ Advisory Opinion, *Exchange of Greek and Turkish Populations*, Série B – No. 10 (21 February 1925) <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_B/B_10/01_Echange_des_populations_grecques_et_turques_Avis_consultatif.pdf> accessed on 26 June 2020.

58 CJEU Case 6/64 *Costa* v. *Enel* ECLI:EU:C:1964:66; CJEU Case C-284/16 *Slovak Republic* v. *Achmea BV* ECLI:EU:C:2018:158, para 33.

59 Article VIII Treaty Between United States of America and the Argentine Republic Concerning The Reciprocal Encouragement and Protection of Investment, 1994.

increasing use of renewable energies and green technologies. This manifests itself through legislation and through the legal disputes that help identify the necessary changes to be made to legislation. This necessarily includes investment treaty arbitration.

The availability of arbitration as a neutral forum for dispute resolution appeals to a number of potential and actual foreign investors:

> [c]ontractual terms, including New York Convention arbitration provisions, and investment laws and treaties all provide additional risk management and securitization for investors and help mobilise the necessary private finance.[60]

Investment arbitration can provide important comfort to foreign investors investing in climate-friendly projects, in particular as a result of government set incentives, which are necessary to attract the significant volume of FDI required in the context of greener energy, to address the climate change crisis. The Spanish solar energy cases demonstrate that if the host state makes unreasonable changes to its legal and regulatory framework, resulting in a serious impact on the value of the investment, this could amount to an investment treaty violation. This is especially important for foreign investors who are, to a certain extent, relying on state support for the economic viability of their projects. This is also significant for climate policy as a whole. Unreasonable changes to the legal framework can and do have a detrimental effect on the credibility of renewable energy policies and the development of green technologies. The changes create a risk of uncertainty for investors which is potentially catastrophic when one considers the importance of stability in the legal and economic framework for investments in the green economy.

In order to be protected under international investment law, low-carbon investments should qualify as "investments" within the meaning of the applicable IIAs. The classification of regulatory and contractual rights relative to the financial support of low-carbon investments as "investments" has the effect of bringing these rights within the ambit of protection afforded by IIAs. The protection of an investor's rights under investment arbitration is not absolute. Arbitral practice generally (and rightly) acknowledges a host state's sovereign right to regulate.[61] However, existing investment standards have, in theory, the potential to adequately protect investors in low-carbon projects against

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60 W Miles (n 9).

61 *Saluka Investments BV* v. *the Czech Republic* (n 21) para. 305; *Continental Casualty Co.* v. *The Argentine Republic* (n 21) para. 258.

a state's refusal to honour the promises of support that they have made to attract projects. This remains an important and attractive proposition for foreign investors.

In the specific context of climate change, arbitral jurisprudence has demonstrated that investment arbitration tribunals are increasingly comfortable to consider and determine issues arising out of climate change investments. It is generally accepted that most low-carbon investments are likely to fulfil not only the broad, non-exhaustive list of investments included in most IIAs, but also that most low-carbon investments have all the hallmarks of an investment:

(1) investments in renewable energy or other low-carbon technologies are generally characterised by their high capital intensity and long term pay-back period;
(2) high costs and social relevance (e.g. for energy supply) of these investments expose them to considerable economic, financial, and political risk;[62] and
(3) low-carbon projects, particularly those in the energy industry, are important for the development of the national economy.

Furthermore, most low-carbon investment and renewable energy projects are likely to qualify under the Energy Charter Treaty (ECT) which is limited to "any investment associated with an 'economic activity in the energy sector' ".[63] Although the ECT is a treaty that follows the traditional pattern of investment treaties, with the peculiarity of focusing on energy investment, it is the first treaty of this kind that contains an express reference in its preamble to the climate change regime and has comprehensive consideration of other environmental agreements:

> Recognizing the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy; Recalling the United Nations Framework Convention on Climate Change, […] and other international environmental agreements with energy-related aspects; and Recognizing the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes[…].[64]

62 UNCITRAL, *World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge*, at 164, U.N. Doc. UNCTAD/WIR/2008 (24 September 2008).

63 Article 1(6) Energy Charter Treaty.

64 E Sussman, 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development' in M-C

Some have argued that, in line with the need for further developing investments in renewable energies, the ECT needs modernising. Whilst there may be merit in that position, and the European Union certainly thinks so,[65] it is important to note that the ECT, as currently drafted, and as evidenced by the numerous relevant arbitrations which have been brought under it, safeguard energy efficient investments by foreign private investors. Since its establishment in the 1990s, the ECT's provisions have hardly been revised. In the area of investment protection, the ECT rules do not correspond to modern standards as reflected in the EU's reformed approach on investment protection.

In recent years, the alteration of support schemes and subsidies for the promotion of renewable energy investments have led to several recent investment disputes, arising out of claims for breach of expropriation, FET and national treatment standards. Significantly, a number of investors have commenced arbitration proceedings under the ECT against a European Union Member State after the latter withdrew or reduced support schemes upon which foreign investors had relied, leading to a developing body of arbitral jurisprudence in this area.[66]

Historically, tribunals have been reluctant to isolate particular elements of a larger investment operation and qualify these elements as separate investments that would benefit from individual protection.[67] This is in accordance with the "totality of rights," "indivisible whole," or "unity of an investment operation" theories. Thus, for example, expropriation claims are generally assessed on the basis of the impact that the contested measures had or would have on the general investment, as opposed to on the potential destruction or deprivation of individual rights associated with this general investment.

Some tribunals have accepted that specific rights associated with a general investment transaction can individually qualify as investments.[68] These

Cordonier Segger, M W Gehring and A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 515–532.

65 In May 2019, the European Commission adopted a proposal for a Council Decision authorising negotiations to modernise the ECT, to which the EU is part.

66 *See* the cases listed in (n 20).

67 C Schreuer and U Kriebaum, 'The Concept of Property in Human Rights Law and International Investment Law', in S Breitenmoser et al. (eds), in *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* 743, 760 (Nomos Verlagsgesellschaft, 2007).

68 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Final Award, 21 November 2000 <https://www.italaw.com/sites/default/files/case-documents/ita0206.pdf> accessed 22 June 2020, paras. 5.3.9–.10, 7.5.11, 7.5.25–7.5.26.

tribunals justified this approach by highlighting the importance of these specific rights for the making of the general investment. For example in *Eureko* v. *Poland*, the tribunal argued that:

> since the grant to Eureko of [these specific] rights … was a key element of the investment, without which it appears that there would have been no investment at all, the Tribunal concludes that those rights have some economic value and are entitled to protection under the Treaty.[69]

The specific rights were "critical" to the making of the general investment.[70]

### 3.1 *Indirect and/or Partial Expropriation*

To date, foreign investors have relied on the standard of indirect expropriation in a number of cases with an environmental aspect.[71] Case law has demonstrated that there is a high threshold for establishing an indirect expropriation, mostly requiring 'total' or 'substantial' deprivation of the value of the investment. A number of early environmental cases have dealt with indirect expropriation. For example, the tribunal in *Metalclad* v. *Mexico* found that by denying the investor the right to operate a landfill, Mexico's actions amounted to an expropriation of his investment.[72] In addition, the tribunal noted that the Ecological Decree issued by the Mexican authorities, which created an ecological preserve in the area of the landfill, made it impossible for the investor to operate its investment.[73]

However, some later tribunals have adopted the 'purpose approach' by allowing necessary regulations in the public interest and excluding these from the scope of the investment treaty protections. The tribunal in *Methanex* v. *United States* found that a regulation enacted by the United States and

69 *Eureko B.V.* v. *Republic of Poland*, Partial Award, 19 August 2005, para. 145 <https://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf> accessed 22 June 2020; see *Middle East Cement Shipping & Handling Co., S.A.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, paras. 100–01, 135–38 <https://www.italaw.com/sites/default/files/case-documents/ita0531.pdf> accessed 22 June 2020.

70 *Eureko B.V.* (n 69) paras. 144–145.

71 K Miles, 'Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes' [2010] 1 Climate Law 63, 71.

72 *Metalclad Corporation* v. *United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para 104 <https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf> accessed 22 June 2020.

73 *Ibid.*, para 68.

affecting the investor did not qualify as an indirect expropriation.[74] Instead, it held that it is:

> a matter of general international law, [that] a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory.[75]

According to the tribunal, a regulation meeting those criteria does not qualify as an indirect expropriation nor can it give rise to compensation for the investor, unless specific commitments were given to the investor that the government would not enact such a regulation. Those commitments were not given, and the tribunal noted that the investor was aware of the fact that the public authorities in the market in which the investor operated continuously enacted legislation for reasons of public health or the environment.[76]

### 3.2 *Fair and Equitable Treatment Standard*

Next to expropriation, most investment treaties contain a provision to ensure the FET of foreign investments. The FET standard has been the most invoked standard in recent years and the majority of successful claims in investment arbitration have been based on this standard of protection.[77] The FET standard requires the host state to observe the "basic expectations that were taken into account by the foreign investors to make the investment".[78] A key element of the FET standard is the legitimate expectations of the investor.[79] An investor's legitimate expectations must be based on "representations, commitments or

74 *Methanex Corporation* v. *United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, paras. 6–7 <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> accessed 22 June 2020.

75 *Ibid.*, para. 7.

76 *Ibid.*, paras. 7 and 10.

77 R Dolzer and C Schreuer (n 18) 130.

78 S Schill, 'Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law', 15–16 Inst. for Int'l Law & Justice N.Y.U. Sch. of Law, Working Paper No. 6, 2006 (quoting *Técnicas Medioambientales Tecmed*, para. 154); *see* also K Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments', in A Reinisch (ed.), *Standards of Investment Protection* (OUP 2008) 111, 124, 127, 130.

79 UNCTAD Series on Issues in International Investment Agreements II, 'Fair and Equitable Treatment' (2012) 63.

specific conditions offered by the State concerned"[80] and relied upon by the investor in making the investment.[81]

More recently, some tribunals have found that the FET standard requires a balancing act between the legitimate expectations of the investor on the one hand, and the legitimate regulatory goals of the host state on the other. Those awards indicate that the FET standard does not preclude the host state from taking measures in the public interest, even if they have a negative impact on investments. For example, in *Saluka* v. *Czech Republic* the tribunal stated that the host state's right to regulate in the public interest must be considered.[82]

Regulatory stability is closely linked to the guarantee of FET, and such a connection is long-established. In principle, a host state could be held in breach of its obligations if the business environment subsequently were to become unstable following government actions which reduce or invalidate the assurances or initiatives that formed the basis of the investor's legitimate expectations when investing in the host state. The tribunal in *Waste Management, Inc.* v. *United Mexican States* articulated that:

> conduct [that] is arbitrary, grossly unfair and idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome which offends judicial propriety – as may be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of candour in administrative process.[83]

In order to establish a violation of the FET standard, the investor's legitimate expectations must be weighed against the legitimate regulatory interests of the host state. According to the tribunal, the investor may expect that the conduct of the host state is *bona fide* and does not "manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination".[84]

In order to appreciate the legitimacy and reasonableness of the investor's expectations, tribunals have resorted to an analysis of the prevailing

80 *National Grid P.L.C.* v. *Argentine Republic*, Award, 3 November 2008, para. 173 <https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf> accessed 22 June 2020.

81 *Eureko B.V.* v. *Republic of Poland* (n 69) para. 235.

82 *Saluka Investments BV* v. *the Czech Republic* (n 21) para. 305.

83 *Waste Management, Inc.* v. *United Mexican States*, Final Award, 30 April 2004, para. 98 <https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf> accessed on 12 June 2020.

84 *Saluka Investments BV* v. *the Czech Republic* (n 21) para. 305.

circumstance in the host state at the time of making the investment among other things. Thus, the *EDF* v. *Romania* tribunal stated:

> [l]egitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case.[85]

Moreover, the tribunal in *Philip Morris* v. *Uruguay* made clear that it is now settled case law that under the FET standard, States maintain their sovereign authority to legislate and to adapt their legal framework to changing circumstances.[86] Therefore, the tribunal articulated, the state may amend general legislation insofar as this does not exceed its normal regulatory power to act in the pursuance of public interests and does not alter the legal framework upon which the investor has relied "outside the acceptable margin of change".[87]

Furthermore, to be able to rely on legitimate expectations, the investor must demonstrate that specific commitments have been made that the regulatory framework would not change.[88] Specific commitments can come in the form of representations directly addressed to the investor, or by more general rules or statements that are specifically aimed at inducing the investor to invest and on which the investor has relied.

A number of investors have invoked the protections of the FET standard when their investments were impacted by host state conduct aimed at addressing environmental concerns. In such cases, the investor's specific, investment-backed legitimate expectations have been deemed critical to determining whether or not the standard has been deemed to have been breached.

For example, in *Glamis Gold* v. *United States*, the investor's reliance on legitimate expectations was rejected *inter alia* because the habitat in which the investor operated "was becoming more and more sensitive to the environmental consequences" of his activities.[89] Commentators have argued that the

85 *EDF* (*Services*) *Limited* v. *Romania*, Award, 8 October 2009, para. 219 <https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf> accessed 22 June 2020.

86 *Philip Morris* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 422 <https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf> accessed 22 June 2020.

87 *Ibid.*

88 See *Methanex Corporation* v. *United States of America* (n 74) para. 7.

89 *Glamis Gold* v. *United States of America, UNCITRAL*, Award, 8 June 2009, para. 767 <https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf> accessed 22 June 2020.

environmental aspect was a key motivation for the tribunal to reject the investor's reliance on legitimate expectations.[90]

Furthermore, in *Unglaube* v. *Costa Rica*, the tribunal held that the protection of natural habitats and biodiversity was as a valid public policy and that the state's right to regulate for this purpose should be respected.[91]

Many States – including developing States – are in the process of establishing incentives for the promotion of renewable energy and green technologies, having appreciated the crisis which the world is confronted with in the context of climate change. These policies offer exciting investment opportunities for foreign investors but also entail significant legal and regulatory risks. Understandably, the attraction and the profitability of clean energy projects is often dependent on governmental subsidies and feed-in tariffs, which must remain stable throughout the life-cycle of the investment for the project to earn a reasonable return on investment. This has not always been the case and unexpected changes in the incentives have created an atmosphere of uncertainty and fear that "once investments are made, public authorities will be tempted to reconsider their commitments".[92]

With this in mind, tribunals are paying particular attention to the conditions that the host state proposes and the assurances it makes to attract foreign investors. This has become an area of significant focus for tribunals considering investment treaty claims arising in relation to clean(er) energy investment projects. Therefore, in *Sempra Energy International* v. *Argentine Republic*, the tribunal considered that the requirement not to affect the basic expectations taken into account by the investor to make its investment "becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations".[93]

Numerous ECT arbitrations against Spain have shed further light on the application of FET claims to renewable energy investments. Spain has been held liable to investors under IIAs for over €800 million following changes to its

90 D Rivkin, S Lamb and N Leslie, 'The future of investor-state dispute settlement in the energy sector; engaging with climate change, human rights and the rule of law' [2015] 8 The Journal of World Energy Law & Business 130–153.

91 *Marion Unglaube and Richard Unglaube* v. *Republic of Costa Rica*, ICSID Case No. ARB/08/1 and ARB/09/20, Award, 16 May 2012 <https://www.italaw.com/sites/default/files/case-documents/ita1052.pdf> accessed 22 June 2020.

92 A Boute, 'The Potential Contribution of International Investment Protection Law to Combat Climate Change' [2009] 27 3 Journal of Energy & Natural Resources Law 333–376.

93 See *Sempra Energy International* v. *Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 <https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf> accessed 22 June 2020, para. 298.

renewable electricity incentive scheme. Four tribunals have found that a series of measures taken by Spain between 2010 and 2014 to roll back/eliminate solar energy subsidies violated Spain's obligations under the ECT. The analysis of Spain's regulatory conduct looks set to continue, as evidenced by *OperaFund Eco-Invest SICAV plc and Schwab Holding AG* v. *Spain*.

These solar energy cases against Spain warrant particular consideration. In 2004, Spain put in place a new renewable electricity incentive scheme to attract investment in the renewables sector. Electricity production through solar photovoltaic energy was regulated by a "special regime" that provided for incentives and subsidies. In the following years, to encourage foreign investment, the Spanish government published a series of promotional presentations setting out why investors should invest in photovoltaic energy installations.

In 2007, the Spanish National Energy Commission issued a report describing "a proposed Royal Decree on regulation of the electric energy production activity under a special regime" and setting out the applicable criteria for such a regime such as ensuring that "economic incentives are stable and predictable."[94] This report contained an enumeration mechanism for electricity produced under the special regime, which provided for regulated tariffs and special premiums for electricity produced from photovoltaic energies.

In 2008, there was a growing deficit in the electricity system, as a result of power generation and distribution costs exceeding what utilities could recover from consumers. By 2010, it was clear that Spain could not afford these measures, and consequently, Spain altered the legal framework governing solar investments by:

- (i) limiting the number of production hours that were eligible to benefit from the feed-in tariff regime;[95]
- (ii) limiting government support for electricity produced from photovoltaic energy plants limited to 25 years rather than the lifetime of the facility;[96]
- (iii) eliminating economic incentives for certain new production installations;[97]
- (iv) imposing a 7% tax on electricity generation to be applied to all electricity generators;[98]
- (v) eliminating the existing system of tariffs;[99] and

94 Royal Decree Law 1/2012 of 27 January 2012.
95 Royal Decree Law 14/2010 of 23 December 2010.
96 Royal Decree Law 1565/2010 of 19 November 2010.
97 Royal Decree-Law 1/2012 of 27 January 2012.
98 Royal Decree Law 15/2012 of 20 April 2012.
99 Royal Decree Law 9/2013 of 12 July 2013.

(vi) eliminating the existing special regime for electricity producers.[100]

This resulted, in part, in a plethora of Spanish cases, some of which have resulted in multiple findings of breach of the ECT's FET standard, and in particular, breaches of investors' legitimate expectations.[101] The differing outcomes in these cases reveal the importance of the factual particularities underpinning each specific case, and the specificity of the commitments made to and relied upon by investors.

In *Charanne* v. *Spain*, the claimant acquired shares in Grupo T-Solar Global, S.A. (T-Solar), eventually acquiring further interest in T-Solar through other companies. T-Solar generated and sold electrical energy through solar photovoltaic centres. Prior to the claimant making its investment, Spain had put in place the special regime for solar energy producers described above. As a result of this regime, T-Solar was entitled to benefit from a feed-in tariff over 25 years.

In the arbitration, the claimant argued that Spain had breached the standards of expropriation and FET under the ECT,[102] by virtue of the modification of its legal framework for solar projects in 2010.[103]

Notwithstanding the change in Spain's legal framework governing solar investments, the tribunal dismissed the investor's claims. In doing so, it found that although the actions of which the claimant complained could seriously affect the profitability of its investment, such a deleterious impact – by itself – did not amount to an indirect expropriation because no deprivation of property took place.

The claimant also asserted that the actions of Spain breached the FET standard, by unexpectedly changing the legal framework and by violating the claimant's legitimate expectations. The tribunal recognised the importance of legitimate expectations when examining the FET standard; it found that it is a good faith principle of customary international law that states may not "induce

100 Royal Decree Law 24/2013 of 26 December 2013.

101 *See Charanne and Construction Investments* v. *Kingdom of Spain*, SCC Case No. V062/2012, Final Award, 21 January 2016 (Unofficial English translation) <https://www.italaw.com/cases/2082> accessed 2 March 2020; *Isolux Netherlands BV* v. *Kingdom of Spain* (n 33); *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l.* v. *Spain* (n 20); *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg) SICAR* v. *Kingdom of Spain* (n 58); *Masdar Solar & Wind Cooperatief U.A.* v. *Spain* (n 21); *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.* v. *Spain* (n 40).

102 *Charanne* v. *Kingdom of Spain* (n 101).

103 In 2010, the Spanish government introduced decrees limiting the number of production hours that were eligible to benefit from the feed-in tariff, which had been part of Spanish renewable energy policy since the 1990s. Furthermore, the Spanish government limited its support for electricity produced from photovoltaic plants from the lifetime of the facility, to 25 years.

an investor to make an investment, hereby generating legitimate expectations, to later ignore the commitments that had generated such expectations".[104] The tribunal furthermore stated that an investor has the legitimate expectation that a state will not act "unreasonably, disproportionately or contrary to the public interest"[105] when modifying an existing regulation on which the investor relied. However, the tribunal found, by a majority, that the general regulation on which the investor relied could not be regarded as a specific commitment that would give rise to legitimate expectations of the investor that the legal framework would never change:

> The Claimants consider however that RD661/2007 and RD 1578/2008 were specific commitments by Spain as they are directed at a specific limited group of investors who meet the requirements within the established time periods. The Tribunal will further consider whether such regulatory framework was such as to generate legitimate expectations that it would not be modified as it was in 2010. The Tribunal, however, does not accept the argument that such rules may constitute or be equivalent to a specific commitment. Although RD 661/2007 and RD 1578/2008 were directed to a limited group of investors, it does not make them to be commitments specifically directed at each investor. The rules at issue do not lose the general nature that characterizes any law or regulation by their specific scope. To convert a regulatory standard into a specific commitment of the state, by the limited character of the persons who may be affected, would constitute an excessive limitation on power of states to regulate the economy in accordance with the public interest. Based on the foregoing, the Tribunal concludes that there was no specific commitment by Spain vis-à-vis the Claimants. Thus, the question is whether the legal order in force at the time of the investment could in itself generate legitimate expectations, and if so, which ones. A finding that there has been a violation of investor's expectations must be based on an objective standard or analysis, as the mere subjective belief that could have had the investor at the moment of making of the investment is not sufficient. Moreover, the application of the principle accordingly depends on whether the expectation has been reasonable in the particular case with relevance to representations possibly made by the host State to induce the investment.[106]

104 *Charanne* v. *Kingdom of Spain* (n 101) para. 486.
105 *Ibid.*, para. 514.
106 *Ibid.*, paras. 491–495.

Significantly, and reflecting the difficulties that such claims raise, in a dissenting opinion, Professor Guido Santiago Tawil stated that:

> the creation of legitimate expectations in an investor is not limited solely to the existence of a 'specific commitment' – either contractual in nature or founded in statements or specific conditions declared by the receiving State – but it can also derive from, or be based on, the legal system in force at the time of the investment.[107]

However, the tribunal explicitly noted that since the investor's claims were based solely on the 2010 amendment by Spain, it could not assess the subsequent amendments to the legal framework in 2013 and 2014 (which were addressed in subsequent cases).

The claimant in *Eiser* v. *Spain* acquired 85 per cent of ASTE's shares in October 2007, as a result of Spain's regulatory incentives. ASTE was a player in the Concentrated Solar Power (CSP) sector, and pre-registered three CSP systems with a valued investment of approximately EUR 148.3 million. As a result of the new regulatory framework introduced in 2013 and 2014, which abrogated the regime on which Eiser had relied, Eiser endured a 66 per cent fall in ASTE CSP's earnings.

The tribunal decided that the new regulatory amendments in 2013 and 2014, on which the claims were based, amounted to a violation of FET. In doing so, the tribunal opined that the obligation under the ECT to accord FET means that a state must "provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments".[108] The tribunal considered that while this should not prevent States from making *reasonable* changes to their regulatory regimes, the FET standard requires that no radical changes be made to a regime on which an investor relied when deciding to invest:

> the respondent's obligation under the ECT to afford investors fair and equitable treatment does protect investors from a fundamental change to the regulatory regime in a manner that does not take account of the circumstances of existing investments made in reliance on the prior regime.[109]

107 *Ibid.*, Prof. Guido Santiago Tawil's Partial Dissent (Unofficial English Translation) para. 5.
108 *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l.* v. *Spain* (n 20) para. 382.
109 *Ibid.*, para. 363.

In doing so, this tribunal distinguished itself from the *Charanne* case because the modifications after 2010 introduced a new system with completely different rules which was applicable to existing solar power plants as well, which had the effect of destroying virtually all the value of the claimant's investment. The claimants were awarded damages of EUR 128 million. The Federal Court of Australia recently enforced the award against Spain.[110]

### 3.3 *National Treatment*

National treatment is a standard commonly included in IIAs. According to Dolzer and Schreuer, national treatment aims to "provide a level playing field between the foreign investor and the local competitor" and ensures that host state measures and regulations do not differentiate negatively between local and foreign investors.[111]

To find a violation of the national treatment standard, a tribunal must consider whether the less favourably treated foreign investor and the national investor are in 'comparable' or 'like' circumstances and if there would be a possible justification for the differentiation. Tribunals tend to apply a relatively simple test of comparison in order to establish whether a foreign investor and a domestic investor are in like circumstances, which is generally based on commercial considerations only. Tribunals focus more on the effects of the measure, as opposed to on the potential state intent to discriminate.

The national treatment standard might be successfully argued by a foreign investor who is affected by a prohibition on certain polluting activities, is excluded from participation in support schemes or when the government awards the contract to a local sustainable investor. This might give rise to treaty claims by foreign investors operating in sectors targeted by climate change mitigation measures, in case the investor can demonstrate that s/he is treated less favourable than local competitors in 'like circumstances'.

In *Nykomb* v. *Latvia*, a subsidiary of the Swedish company Nykomb entered into a contract with a state-owned electricity producer of Latvia. Under the contract, Nykomb planned to build a natural-gas power plant in Latvia after which the state-owned entity would acquire the energy produced against a double tariff for the first eight years. However, after an ongoing dispute about the non-payment of the double tariff, Nykomb claimed a breach of the national treatment provision in the ECT. The tribunal found that the non-payment by Latvia was a discriminatory measure which was prohibited by Article 10 ECT,

110 *Eiser Infrastructure Ltd* v. *Kingdom of Spain* [2020] FCA 157.
111 Dolzer and Schreuer (n 18) 198.

because two other local companies in comparable circumstances were paid the double tariff, while payments under this tariff to Nykomb were refused.[112]

## 4 How Investment Treaty Arbitration Can and Does Help Support Investment in Low-Carbon Energies and Green Technologies

Investment treaty arbitration remains a popular dispute settlement mechanism, and recent cases show that this popularity applies also to foreign investors having invested in greener energy, in response to the climate change crisis. An existing network of over 3,000 IIAs provide for ISDS and, although some States, led by the European Union are rejecting the virtues of ISDS, many States remain committed to it. This is evidenced by the recent BITs between Turkey, UAE, China and certain African States, all of which provide for ISDS as a means of resolving dispute.[113]

Similarly, emerging market investors also welcome investment treaty arbitration and continue to use it, as evidenced by the foreign investors in *AngloGold Ashanti (Ghana) Ltd* v. *Republic of Ghana*, *DP World* v. *Djibouti*[114] and *LTME Mauritius Limited and Madamobil Holdings Mauritius Ltd* v. *Republic of Madagascar*.[115]

Things are changing in the world of investment treaty arbitration, and this is not necessarily a bad thing. Considerable work has been carried out to reform the system, as evidenced by the UNCITRAL Working Group III which is operating under the mandate to identify concerns in relation to investment treaty dispute settlement, to consider whether reform is desirable and if so, to develop recommendations for such reform. There has also been substantial work undertaken in relation to the proposed revisions to the ICSID Arbitration Rules. This has been, and continues to be, a very consultative process allowing players from all spheres to contribute to the debate.

Whilst the need for some reform is acknowledged, it is important that this reform does not come at the expense of the strengths of investment treaty

112 *Nykomb* v. *Latvia*, SCC, Award, 16 December 2003 <https://www.italaw.com/sites/default/files/case-documents/ita0570.pdf> accessed on 12 June 2020.

113 U Ewelukwa Ofodile, 'Emerging Market Economies and International Investment Law: Turkey-Africa Bilateral Investment Treaties' [2019] 52 4 Vanderbilt Journal of Transnational Law 949.

114 *AngloGold Ashanti (Ghana) Limited* v. *Republic of Ghana*, ICSID Case No. ARB/16/15.

115 *LTME Mauritius Limited and Madamobil Holdings Mauritius Ltd* v. *Republic of Madagascar*, ICSID Case No. ARB/17/28.

arbitration as a dispute settlement mechanism. This is a mechanism which is built around the concept of balance – balance between the foreign investor and the host state. This balance is all the more important in the context of providing a balanced regulatory regime designed to attract foreign private investment in the context of sustainable investments, in particular greener energy investment projects.

Firstly, the availability of a neutral forum in which to have disputes resolved is significant to many foreign private investors. It provides a security and a confidence which a foreign investor is unlikely to have in the host state's domestic court or in an international investment court system within which the adjudicators are appointed by the member States.

Secondly, under most IIAs, each party has the right to appoint its own chosen arbitrator. This is a key factor in arbitration and one which matters significantly to parties, as they are able to prioritise what matters to them, be it legal experience, cultural background, or industry expertise. The equal involvement in the constitution of the tribunal is a clear indication from the start of the process that balance is key. This equal involvement also encourages greater confidence in the tribunal throughout the process, with a greater likelihood of respecting the final award.

Thirdly, the confidentiality of the process also facilitates settlement. This is important as settlement is often the most desirable outcome for all parties.

Fourthly, investment treaty arbitration also seeks to strike a balance between consistency, correctness and finality. By ensuring that there is no strict rule of precedence, tribunals are afforded the flexibility to be persuaded by precedent but also to distinguish where appropriate. This helps tribunals to reach a final decision as expeditiously as possible, which is also key to States and to private investors.

Lastly, enforcement is also key, and matters enormously to foreign private investors who do not necessarily want or have the option of enforcing against the host State in the host State's territory. Thanks to the ICSID and New York Conventions, enforcement is far more straight-forward for parties and this is an attractive feature for foreign investors, which are frequently relied upon.

Thus, there are many factors mitigating in favour of investment treaty arbitration, in particular from the foreign investor's perspective. Investment arbitration is much more transparent than many other mechanisms. International arbitral awards interpreting and implementing foreign investment protections under investment treaties play an important role in maintaining that stable investment environment, potentially enhancing successful transition.

There are, however, strong objections to arbitration as an appropriate forum for the evolution of climate change investment law. Investment treaty arbitration receives some prominent – and valid – criticisms. It is not uncommon to hear that the arbitral process is shut off from the rest of the world, creating a narrow field which is removed both from commercial arbitration and from public international law. Similarly, observers complain about a perceived lack of democratic accountability and lack of sensitivity to allegations of corruption. Participants refer to a lack of diversity amongst arbitral tribunals. ISDS arbitrators are not drawn from a standing roster or vetted for experience or understanding, but are instead nominated by the disputing parties. This has resulted in a comparatively small number of individuals deciding significant issues, even though that group of arbitrators is hardly diverse in terms of gender, ethnicity or geography.

Of late, there has been greater discussion relating to the arbitral process itself. Thus, there is concern about a perceived built-in bias in favour of investors, often connected with problems regarding the impartiality of arbitrators who appear in the role of counsel in other arbitrations (so-called "double-hatting") or with other forms of conflict of interest. There is much discussion around the absence of transparency and appeal options. There is a perception that procedural standards are below national and international norms, that no investment treaty has a proper appellate mechanism, and that none of the arbitrations are obliged to follow precedent in case law. There is also increasing concern around no uniform case law.

There are also vocal and compelling critics of investment arbitration as an appropriate forum for the development of climate change law. For example, ClientEarth takes the position that investment arbitration enables big corporations to sideline domestic courts and sue governments – whose environmental or social policies may affect their investment – in massive compensation claims.[116]

ClientEarth Trade and Environment lawyer, Amandine Van den Berghe, is pushing for the reform of ISDS in relation to climate change:

> Amid this climate emergency, we call on governments to respect their international commitments, and push for a deep and systemic reform of ISDS, so that these mechanisms are not able to undermine efforts to save the planet.[117]

116 ClientEarth, 'Investment tribunals could undermine urgent climate action', <https://www.clientearth.org/press/investment-tribunals-could-undermine-urgent-climate-action/#:~:text=The%20highly%20controversial%20practice%20of,environmental%20law%20experts%20have%20warned> accessed 12 June 2020.

117 *Ibid.*

Furthermore, ClientEarth is calling for States that are not ready to withdraw consent or terminate their treaties to adopt a series of five measures, which when combined should ensure that only responsible investors who respect international climate commitments can utilise ISDS:

(1) exempt all measures taken in pursuit of international obligations under the Paris Agreement on climate change from challenge under ISDS;
(2) require exhaustion of local remedies before recourse to ISDS;
(3) allow counterclaims and ensure full participation for affected third parties;
(4) ban third party funding of cases; and
(5) include climate change considerations in the calculation method for compensation.[118]

In reaction to this, we have seen numerous treaties opt for alternatives to investment treaty arbitration to resolve any disputes.

In CETA, the policy of moving away from arbitration materialised in its dispute resolution provisions, which are based on a new investment court system. The European Union advertised this system as a replacement of the ISDS by a supposedly new and better system. This system enshrines the rights of governments to regulate in the public interest, but also introduces a system which is public, professional, and transparent.

From the text of CETA it is obvious that the 'permanent dispute settlement tribunal' provided by the agreement is everything but an arbitral body. It is composed of judges appointed by the two state parties (the European Union and Canada) and does not allow the typical features of arbitration such as party-driven selection of adjudicators (in particular by the investors), exclusion of appeals and autonomy in the selection of the applicable law and procedure. Moreover, it is clear that the policy of avoiding arbitration as a means of resolving investment disputes is not meant to be limited to particular trade agreements. In Article 8.29 of CETA, Europe and Canada commit to 'pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes.' This confirms that rejection of arbitration options will be an element of future policies in international investment treaties that are concluded by both the European Union and by Canada.

In the meantime, the European Union has either signed or is negotiating a number of trade agreements with countries and regions around the world.

118 *Ibid.*

These include trade agreements with Japan, Vietnam, New Zealand, Australia, Singapore and Mexico, as well as the EU-Mercosur trade agreement that includes the four South American states Argentina, Brazil, Paraguay and Uruguay. In most of these concluded or contemplated agreements, some forms of dispute resolution mechanisms are envisaged, with a tendency to have less and less reference to any form of traditional international arbitration.

There exists some serious tension between the EU dispute settlement system and investment arbitration. In *Electrabel* v. *Hungary*, the jurisdiction of the investment tribunal in intra-EU disputes was contested by the European Commission in an amicus curiae brief.[119] The Commission argued that there was a conflict between EU law and the ECT.[120]

Thus, there appears to be a polarization in relation to investment treaty arbitration. The European Union is clearly not alone in opposing investment treaty arbitration, seemingly preferring the establishment of an international investment court. The European Union is not alone in this, as this idea has garnered support from other States. Just as some States support the same approach as that endorsed by the European Union, so do many States continue to prefer investment treaty arbitration for the resolution of disputes arising out of foreign investment.

However, it is argued that this is a precarious position to adopt at this point in time. Greater foreign private investment is needed to promote and push forward a more global use of greener and more efficient energies. Whilst it is not suggested that the availability of investment arbitration is a primordial motivation for foreign investors, its increasing popularity clearly indicates that it is a mechanism which is understood and respected by foreign private investors, and thus gives comfort and confidence, which can help encourage a foreign private investor. Continued investment is imperative in the context of climate change, and investment treaty arbitration evidently contributes to some of the many attractions associated with investment in greener energies as a foreign private investor.

119 *Electrabel* v. *Republic of Hungary* (n 44) para 4.89 ff.

120 The ECT is a multilateral framework that promotes energy cooperation, trade in energy and related materials, investment protection and sustainable development. *See* also C Fouchard and M Krestin, 'The Judgment of the CJEU in *Slovak Republic v Achmea* – A Loud Clap of Thunder on the Intra-EU BIT Sky', Kluwer Arbitration Blog, 7 March 2018 <http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/?doing_wp_cron=1593022184.9923090934753417968750> accessed on 22 June 2020.

## 5 Conclusion

The European Union is taking climate change seriously, and is keen to be a front player in regulatory evolution. This contribution is pivotal, and is to be applauded especially in light of the severity of the global climate change crisis. The European Union considers itself to be a global leader in limiting emissions, decarbonising economies and other measures to limit global warming, and became even more so once the USA withdrew from the Paris Agreement. The European Union has been a pivotal player in addressing climate change. It has signed the UNFCCC and Kyoto Protocol, along with its Member States, and has taken a leading role in climate change negotiations, including by way of the Paris Agreement.[121]

Internally, European Union has adopted as a central policy the '2030 Climate and Energy Package',[122] a range of climate change measures with three key targets: achieving a 40 per cent cut in greenhouse gas emissions (from 1990 levels), 27 per cent of European Union energy from renewables and 27 per cent improvement in energy efficiency. The European Union has launched an ambitious Action Plan on Financing Sustainable Growth. The European Union also supports developing countries in improving their conditions for mobilising low-carbon finance. In 2017, the European Commission increased its climate finance to developing countries, providing EUR 2.8 billion. The Commission is on track to meet its pledge to provide at least EUR 14 billion (or an average of EUR 2 billion a year) to support climate activities in developing countries in 2014–2020. 20 per cent of the whole EU budget for 2014–2020 is spent on climate-related actions – and the Commission has proposed raising this share to at least 25 per cent for 2021–2027. In addition, the European Investment Bank provided EUR 2.6 billion in climate finance to developing countries in 2017. It finances, for example, energy efficiency and renewable energy projects in Africa and other regions, and often blends funds with Commission and European Union Member State agencies.

121 UN Climate Change, 'UNFCCC Process – List of Parties'<https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states; UN Treaty Collection, 'Chapter XXVII: Environment: Kyoto Protocol to the UN Framework Convention on Climate Change' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en>; UN Climate Change, 'Paris Agreement Status of Ratification' <https://unfccc.int/process/the-paris-agreement/status-of-ratification> all accessed on 12 June 2020.

122 European Commission, '2030 Climate and Energy Package' <http://ec.europa.eu/clima/policies/strategies/2030_en> accessed 2 March 2020.

There can be no doubt that the European Union is championing positive responses to climate change. There can also be no doubt that an efficient regulatory approach to climate change mitigation must reflect and address investors' concerns about regulatory stability and predictability, in order to encourage greater investment in efficient and environmentally friendly energies and technologies. Providing guarantees of regulatory stability and predictability is controversial because it involves a limitation of States' regulatory space. This limitation, however, by definition, is "a necessary corollary to the objective of creating an investment-friendly climate."[123] If States want to increase the credibility of their political commitments, they must accept being bound by them in the future. The important point, especially under the Paris Agreement, is that individual States – be they European Union Member States or not – should be making those commitments, not the European Union on their collective behalf.[124] By signing and ratifying IIAs, States recognise that regulatory stability and predictability influence investment decisions. They have accepted binding external constraints to attract foreign capital and technology.

The fundamental objective of environmental law and investment law is to attract private capital, especially of foreign origin, and to stimulate the transfer of technology to developing countries and economies in transition. To achieve this objective, climate change law creates incentives to enable the financial viability of low-carbon investments. Investment law, on the other hand, aims to promote investment by protecting it against non-commercial risk. Investment arbitration is critical to that, especially from the perspective of the foreign investor. Investment arbitration plays a key role in attracting the enormous levels of FDI required to push forward the development and implementation of greener energy to face the climate change crisis.

Under climate change law, support schemes for the promotion of low-carbon investments aim to attract investors on the basis of promises of support. States thus create expectations in reliance of which low-carbon investors commit capital and transfer technology. The international investment law principle of FET, on the other hand, is directed at protecting foreign investors against eviscerations by States of the expectations they have created to attract investors. Climate change law creates expectations, while investment law protects them. The expropriation standard under international investment law protects investors against measures that destroy the economic value of

123 Dolzer and Schreuer (n 18) 9.

124 M Grubb and D Newbery, 'Pricing Carbon for Electricity Generation: National and International Dimensions', in M Grubb, T Jamasb and M G Pollitt (eds) *Delivering a Low-Carbon Electricity System: Technologies, Economics and Policy* (CUP 2008) at 278, 300.

investments, including contractual and regulatory rights. Both climate change law and investment law recognise contractual relations between the state and investors as the foundation of investment decisions. Under climate change law, contractual rights are created to facilitate the investment process. Under investment law, contractual rights are protected against state interference in order to guarantee the stability of investment conditions.

There are obvious downsides to investment treaty arbitration, and these should be addressed and remedied, to the extent possible. The law is a living thing that must not remain static, and investment treaty arbitration is supportive of that. History shows that investment treaty arbitration is well placed to respond to changes and to help form new boundaries and approaches which should result in a significant contribution to regulatory regimes enabling States to progress in meeting low-carbon energy supplies and attracting foreign private investors for this. European Union Member States should not suffer greater challenges in attracting foreign private investment simply because the European Union has a highly ambitious climate change agenda and an aversion to investment treaty arbitration. The most pressing need – and what the world needs now – is to attract investment in sustainable and greener energies, to ensure that development and widespread implementation of these sustainable energies and greener technologies. The European Union must not stand in the way of this, especially at this point in time.