

**INVESTMENT LAW AND CLIMATE DISPUTES:
THE ROLE OF THE UNCITRAL IN POWERING SUSTAINABLE DEVELOPMENT**

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I. INVESTMENT LAW AND THE QUEST FOR GREENER SOURCES OF ENERGY

The use of renewable sources of energy, along with the implementation of eco-friendly technologies, plays a pivotal role in addressing the quandaries caused by climate change. The global demand for greener alternatives led to the emergence of an international market for renewable energy technologies and equipment.¹ Over the last decade this market attracted colossal flows of capital.² Foreign direct investment is particularly welcome as it can provide fresh funds and induce the transfer of technology.³ From a broader perspective, foreign investment is a key component of any agenda for sustainable development.⁴

The financial viability of investments in renewable energies is frequently dependent upon public support.⁵ All over the world governments have designed and implemented renewable

¹ See, generally, RENEWABLE ENERGY: A GLOBAL REVIEW OF TECHNOLOGIES, POLICIES AND MARKETS (Dirk Assmann et al. eds, 2006).

² See, e.g., Omar Ellabban et al, Renewable Energy Resources: Current Status, Future Prospects and their Enabling Technology, 39 RENEWABLE AND SUSTAINABLE ENERGY REVIEWS 748, 758 (2014).

³ Anatole Boute, The Potential Contribution of International Investment Protection Law to Combat Climate Change, 27(3) JOURNAL OF ENERGY AND NATURAL RESOURCES LAW 333, 334 (2009).

⁴ Andrew Newcombe, Sustainable Development and Investment Treaty Law, 8(3) JOURNAL OF WORLD INVESTMENT & TRADE 357 (2007).

⁵ World Bank, INCLUSIVE GREEN GROWTH: THE PATHWAY TO SUSTAINABLE DEVELOPMENT 22 (2012).

energy support mechanisms so as to encourage private investment, often in the form of subsidies and incentive tariffs.⁶ Investments in the energy field are also highly capital intensive and require a lengthy payback period.⁷ Regulatory risks loom large – the possibility that the rules in force at the moment the investment was made are altered, threatening the ability of investors to recover and earn a profit on their investments.⁸ Governments may decide to change the regulatory framework once investments take place and costs are “sunk.”⁹ Changes to economic mechanisms are a critical risk factor surrounding such investments, since the level of public support is the most important element influencing expected profits.¹⁰ Therefore, investors seek to ensure the stability of the regulatory framework that underpins their investments and secure protection from unwarranted policy changes.

International investment agreements have become especially important over the past few decades. These legal instruments aim to create a “level playing field” for investments in the energy sector, and minimize non-commercial risks associated with such investments.¹¹ These

⁶ See, e.g., Richard Ottinger & Rebecca Williams, *Renewable Energy Sources for Development*, 32 ENVIRONMENTAL LAW, 331, 359 ff (2002); Bradford Gentry & Jennifer Ronk, *International Investment Agreements and Investments in Renewable Energy*, in FROM BARRIERS TO OPPORTUNITIES: RENEWABLE ENERGY ISSUES IN LAW IN POLICY 25, 59 ff (pre-publication draft), available at http://environment.yale.edu/publication-series/documents/downloads/0-9/11-03-Gentry_Ronk.pdf (last visited October 26, 2016); Richard Ottinger et al., *Renewable Energy in National Legislation: Challenges and Opportunities*, in BEYOND THE CARBON ECONOMY: ENERGY LAW IN TRANSITION 183, 186 ff (Donald Zillman et al. eds., 2008).

⁷ Yulia Selivanova, *The Energy Charter and the International Energy Governance*, in EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 307, 315 (Christoph Herrmann & Jorg Terhechte eds., 2012).

⁸ Boute, *The Potential Contribution of International Investment Protection Law* 337; Nigel Bankes, *Decarbonising the Economy and International Investment Law*, 30(4) JOURNAL OF ENERGY AND NATURAL RESOURCES LAW 497, 502 (2012).

⁹ Mario Bergara et al., *Political Institutions and Electric Utility Investment: A Cross-Nation Analysis*, 40(2) CALIFORNIA MANAGEMENT REVIEW 18, 19 (1998); Ralf Dickel, *Impact of Liberalisation on Investment Performance in the Power Sector*, in ELECTRICITY TRADE IN EUROPE: REVIEW OF THE ECONOMIC AND REGULATORY CHALLENGES 69, 76 (Janusz Bielecki & Melaku Desta eds., 2004).

¹⁰ Boute, *The Potential Contribution of International Investment Protection Law* 342; Economist Intelligence Unit, *Managing the Risk in Renewable Energy* 10-11, available at <http://digitalresearch.eiu.com/risksandrenewables/report> (last visited October 26, 2016).

¹¹ Kaj Hobér, *Investment Arbitration and the Energy Charter Treaty*, 1(1) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 153, 155 (2010).

international legal instruments can help lower regulatory and political risks, thus boosting investor confidence and increasing international investments into renewable sources of energy.¹²

Investment agreements are a form of international law that creates a series of obligations owed by the host state towards foreign investors.¹³ The numbers of Bilateral Investment Treaties (BITs) and multilateral agreements entering into force have increased throughout the past few decades. The Energy Charter Treaty (“ECT”), a multilateral treaty entered into force in 1998, is the only energy-specific multilateral investment protection mechanism currently in force.¹⁴ While there are differences between the scope and content of the different investment treaties, there is a shared core content: they normally include the obligation to treat foreign investors fairly and equitably; provide foreign investors full protection and security; and not to expropriate foreign investment except under certain conditions, including the payment of compensation.¹⁵ Furthermore, international investment agreements normally contain procedural protections, typically including dispute resolution clauses that enable foreign investors to initiate arbitration proceedings against the host state, know as ‘investor-state arbitrations’.¹⁶

¹² Bradly Condon & Tapen Sinha, *THE ROLE OF CLIMATE CHANGE IN GLOBAL ECONOMIC GOVERNANCE* 93 (2013).

¹³ See, e.g., Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008); Andrew Newcombe & Lluís Paradell, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (2009); M. Sornarajah, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (2010); Jeswald Salacuse, *THE LAW OF INVESTMENT TREATIES* (2015).

¹⁴ See International Energy Agency, *THE ENERGY CHARTER TREATY: A DESCRIPTION OF ITS PROVISIONS* (1994); Thomas Wälde, *SUSTAINABLE DEVELOPMENT AND THE 1994 ENERGY CHARTER TREATY* (1997); Energy Charter Secretariat, *The Energy Charter Treaty: A Reader’s Guide*, available at http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECT_Guide_en.pdf (last visited October 26, 2016).

¹⁵ See Newcombe & Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 147 ff.

¹⁶ See, generally, Campbell McLachlan et al., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007); Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009).

II. THE WAVE OF DISPUTES OVER CHANGES TO RENEWABLE ENERGY INCENTIVES

With a view to increasing the production of clean energy, many countries introduced incentives to encourage investment in the renewable energy sector. As originally intended, the introduction of these mechanisms led a substantial number of companies and individuals making investments in this field.¹⁷ While economic incentives attracted significant amounts of investment, several countries – namely, Spain, the Czech Republic, Italy, Romania, and Bulgaria – have decided to reduce or eliminate them.¹⁸ These legislative measures have triggered a wave of arbitral proceedings where investors claim that such measures breach the protection afforded by international investment agreements, namely the ECT. As of 15 June 2016, 43 cases had been initiated relating to changes in economic support programs in the renewable energy market.¹⁹

¹⁷ See Onno Kuik & Sabine Fuss, *Renewables in the Energy Market: A Financial-Technological Analysis Considering Risk and Policy Options*, in *FINANCIAL ASPECTS IN ENERGY: A EUROPEAN PERSPECTIVE* 33 (André Dorsman et al. eds., 2011).

¹⁸ See Fernando Dias Simões, *When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking*, *DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY* (forthcoming).

¹⁹ Cases administered by the ICSID: *EVN AG v. Bulgaria* (case No. ARB/13/17); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Spain* (case No. ARB/13/30); *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain* (case No. ARB/13/31); *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Spain* (case No. ARB/13/36); *Masdar Solar & Wind Cooperatief U.A. v. Spain* (case No. ARB/14/1); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italy* (case No. ARB/14/3); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain* (case No. ARB/14/11); *InfraRed Environmental Infrastructure GP Limited and others v. Spain* (case No. ARB/14/12); *RENERGY S.à.r.l. v. Spain* (case No. ARB/14/18); *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain* (case No. ARB/14/34); *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Spain* (case No. ARB/15/1); *STEAG GmbH v. Spain* (case No. ARB/15/4); *9REN Holding S.a.r.l v. Spain* (case No. ARB/15/15); *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain* (case No. ARB/15/16); *ENERGO-PRO a.s. v. Bulgaria* (case No. ARB/15/19); *Cube Infrastructure Fund SICAV and others v. Spain* (case No. ARB/15/20); *Mathias Kruck and others v. Kingdom of Spain* (case No. ARB/15/23); *KS Invest GmbH and TLS Invest GmbH v. Spain* (case No. ARB/15/25); *JGC Corporation v. Spain* (case No. ARB/15/27); *Cavalum SGPS, S.A. v. Spain* (case No. ARB/15/34); *E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v. Spain* (case No. ARB/15/35); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Spain* (case No. ARB/15/36); *Silver Ridge Power BV v. Italy* (case No. ARB/15/37); *SolEs Badajoz GmbH v. Spain* (case No. ARB/15/38); *Belenergia S.A. v. Italy* (case No. ARB/15/40); *Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Spain* (case No. ARB/15/42); *Holdings S.à.r.l. and others v. Spain* (case No. ARB/15/44); *Landesbank Baden-Württemberg and others v. Spain* (case No. ARB/15/45); *Eskosol S.p.A. in liquidazione v. Italy* (case No. ARB/15/50); *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Spain* (case No. ARB/16/4); *ESPF Beteiligungs GmbH, ESPF Nr. 2*

The anatomy of these cases is substantially different from the prototype of energy-related disputes submitted to arbitration in the past. For years, states have enacted regulations to protect the environment by limiting environmentally detrimental investments. Commentators have expressed concern that investors could initiate arbitral proceedings, claiming that climate-related regulatory measures breached relevant investment treaty provisions. Such cases posed a risk that international investment agreements could have a constraining effect (“regulatory chill”) on climate change mitigation measures and restrain the host-state’s policy space significantly.²⁰

Differently, the new wave of disputes refers to cases where states are reducing or eliminating the economic incentives which they introduced years ago in order to lure investments into the renewable energy market. Investors are complaining that such regulatory changes diminish or exhaust the commercial viability of their investments.²¹ Host states argue that support mechanisms have proven too popular (and therefore, more expensive than anticipated); that they became too generous because the production costs for the new technology have decreased significantly; or that

Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italy (case No. ARB/16/5). Cases administered by the Permanent Court of Arbitration under the UNICTRAL rules: Antaris Solar and Dr. Michael Göde v. Czech Republic (registered 8 May 2013). Cases administered by the Arbitration Institute of the Stockholm Chamber of Commerce: Charanne and Construction Investments v. Spain (case No. 62/2012, registered 2012); Isolux Infrastructure Netherlands B.V. v. Spain (registered 2013); CSP Equity Investment S.à.r.l. v. Spain (registered June 2013); Greentech Energy Systems and Novenergia v. Italy (registered 7 July 2015); Alten Renewable Energy Developments BV v. Spain (registered March 2015). Ad hoc cases under the UNCITRAL Rules: PV Investors v. Spain (registered November 2011); Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. Czech Republic (registered 8 May 2013); Voltaic Network GmbH v. Czech Republic (registered 8 May 2013); ICW Europe Investments Limited v. Czech Republic (registered 8 May 2013); Photovoltaik Knopf Betriebs-GmbH v. Czech Republic (registered 8 May 2013); WA Investments-Europa Nova Limited v. Czech Republic (registered 8 May 2013); Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, and JSW Solar (zwei) v. Czech Republic (registered June 2013).

²⁰ See, e.g., Jacob Werksman et al., Will International Investment Rules Obstruct Climate Protection Policies? An Examination of the Clean Development Mechanism, 3 INTERNATIONAL ENVIRONMENTAL AGREEMENTS: POLITICS, LAW AND ECONOMICS 59 (2003); Stephan Schill, Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change? 24(5) JOURNAL OF INTERNATIONAL ARBITRATION 469 (2007).

²¹ Anna De Luca, Withdrawing Incentives to Attract FDI: Can Host Countries put the Genie Back in the Bottle? 2, available at <http://ccsi.columbia.edu/files/2013/10/No-125-De-Luca-FINAL.pdf> (last visited October 26, 2016); Daniel Behn & Ole Fauchald, Governments under Cross-fire? Renewable Energy and International Economic Tribunals, 12(2) MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW 117, 120 (2015).

they simply cannot afford these initiatives due to the ongoing financial crisis.²² The crux of the question is whether investors can seek compensation under investment treaties when governments encourage investment via economic support schemes, but decide to reduce or eliminate them after the investment has been made. Again, we may have a clash between energy-related policies and investment law.²³

These disputes raise a classic problem in investment arbitration: how to strike a balance between foreign investors' reliance on the regulations that underpin their long-term investments and the host state's right to adapt regulations to new needs.²⁴ The introduction of changes to economic support mechanisms typically involves governmental measures adopted for public purposes, whether for financial or other reasons. The host state intervenes as the regulation of energy production, distribution and consumption is a key element of national economic law, and policy.²⁵ The novelty in this new wave of disputes is that challenged measures work against the protection of the environment, while in the past they were eco-friendly.²⁶

²² Bankes, *Decarbonising the Economy and International Investment Law* 502; Elizabeth Whitsitt & Nigel Bankes, *The Evolution of International Investment Law and its Application to the Energy Sector*, 51(2) *ALBERTA LAW REVIEW* 207, 213-214; James Prest, *The Future of Feed-In Tariffs: Capacity Caps, Scheme Closures and Looming Grid Parity*, 3(1) *RENEWABLE ENERGY LAW AND POLICY REVIEW* 25, 34-36 (2012); Del Rio & Mir-Artigues, *A Cautionary Tale* 12-14; Ioannis Glinavos, *Solar Eclipse: Investment Treaty Arbitration and Spain's Photovoltaic Troubles*, in *LESSONS FROM THE GREAT RECESSION: AT THE CROSSROADS OF SUSTAINABILITY AND RECOVERY* 251, 254 (Constantin Gurdgiev et al. eds, 2016).

²³ Jorge Viñuales, *FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW* 17-23 (2012).

²⁴ See Dolzer & Schreuer, *Principles of International Investment Law* 145-149.

²⁵ Markus Krajewski, *The Impact of International Investment Agreements on Energy Regulation*, in *EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW* 343, 345 (Christoph Herrmann & Jorg Terhechte eds., 2012).

²⁶ Rachel Nathanson, *The Revocation of Clean-Energy Investment Economic-Support Systems as Indirect Expropriation Post-Nykomb: A Spanish Case Analysis*, 98 *IOWA LAW REVIEW* 863, 865 (2013).

III. RENEWABLE ENERGY POLICYMAKING AT A CROSSROADS?

Changes to regulatory frameworks might have a significant impact on what until recently seemed like an unstoppable move towards a low-carbon model of development, jeopardizing the credibility of renewable energy policies and generating high investment uncertainty.²⁷ These measures may affect the support for renewable energy in both the present and future. Governments may cut agreed subsidies for projects built or under construction but also decide not to grant any support for new projects.²⁸ If investors have the perception that governments might act opportunistically and change the ‘rules of the game’ after the investment has been made, they will most likely factor in a risk premium in future projects, increasing the costs of eco-friendly policies.²⁹

While some years ago investors were claiming that states had enacted environment-friendly regulations in a way that was detrimental to their investments, the new wave of disputes refers to cases where states are reducing or eliminating the economic incentives which they introduced years ago in order to encourage investments in the renewable energy market. This new category of disputes basically results from the move from the old to the new production matrix.³⁰

To date, only one award has been rendered in disputes relating to alterations to economic support programs in the renewable energy market. On 21 January 2016, the tribunal in *Charanne and Construction Investments v. Spain* ruled in favor of the validity of the host state’s regulatory

²⁷ European Commission, Energy 2020 – A Strategy for Competitive, Sustainable and Secure Energy, COM(2010) 639 final, of November 10, 2010, 9.

²⁸ Gerard Marata et al., Renewable Energy Incentives in the United States and Spain: Different Paths – Same Destination?, 28(4) JOURNAL OF ENERGY AND NATURAL RESOURCES LAW 481, 499 (2010).

²⁹ Anatole Boute, Combating Climate Change Through Investment Arbitration, 35 FORDHAM INTERNATIONAL LAW JOURNAL 613, 615 (2012).

³⁰ Jorge E. Viñuales, *Foreign Investment and the Environment in International Law: The Current State of Play*, in RESEARCH HANDBOOK ON ENVIRONMENTAL AND INVESTMENT LAW (Kate Miles ed., forthcoming).

changes.³¹ While this decision offers important insights into how standards of investment protection might be interpreted and applied in similar disputes, it does not establish any binding precedent. Other arbitral tribunals will have to balance the expectations of investors against the right of states to intervene in the public interest and adjust regulatory structures according to the specific circumstances that surround those cases. As divergent interpretations persist about when the investors' expectations deserve protection under the standards of investor protection, any evaluation will be deeply dependent upon the specific circumstances and facts of each particular case.³² The approach of different international investment arbitrators to similar issues can vary considerably, creating a degree of uncertainty regarding the outcome of international investment disputes.³³ This lack of certainty raises the question of the necessity to create a specific investment regime for low-carbon investments.

IV. THE POSSIBLE ROLE OF THE UNCITRAL IN DEVELOPING INTERNATIONAL ENERGY INVESTMENT LAW

The United Nations Commission on International Trade Law (UNCITRAL), established in 1966, serves as the core legal body of the United Nations system in the field of International Trade

³¹ The original award (in Spanish) and an English translation (by MENA Chambers) are available at <http://www.italaw.com/cases/2082>. For an analysis of the award see Björn Arp, Charanne B.V. v. Spain, 110(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 327 (2016) and Kim Talus, Float Like a Butterfly, Sting Like a Bee: Judicial Challenges to Renewable-Energy Support Schemes in Europe, 6 CLIMATE LAW 250 (2016).

³² Peter Cameron, Stability of Contract in the International Energy Industry, 27 JOURNAL OF ENERGY AND NATURAL RESOURCES LAW 305, 312-313 (2009).

³³ Condon & Sinha, The Role of Climate Change in Global Economic Governance 93.

Law.³⁴ It is a ‘specialized quasi-legislative commission’³⁵, a ‘transnational quasi-legislature of the world’³⁶ with a mandate to ‘further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.’³⁷ Over the past half a decade, UNCITRAL has international legal instruments on many areas of procedural and substantive law including dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and sale of goods.³⁸

The breadth of topics that UNCITRAL addresses has grown enormously since its creation.³⁹ While the incursion of the UNCITRAL into the realm of investment law is recent, its first products in this area – the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)⁴⁰ and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014)⁴¹ are noteworthy contributions that signal an increasing engagement with the tensions and quandaries surrounding this field of international economic law.

The current wave of disputes in the field of renewable energy investments signals a failure by governments in adjusting their regulatory structures without destabilizing the market for

³⁴ José Faria, *The Relationship between Formulating Agencies in International Legal Harmonization: Competition, Cooperation, or Peaceful Coexistence? A Few Remarks on the Experience of UNCITRAL*, 51 *LOYOLA LAW REVIEW* 253, 255 (2005); UNCITRAL, *A Guide to UNCITRAL. Basic facts about the United Nations Commission on International Trade Law*, available at <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> 1 (last visited October 26, 2016); David Stewart, *What Does International Law have to do with International Development?*, 42 *DENVER JOURNAL OF INTERNATIONAL LAW & POLICY* 321, 327-328 (2014).

³⁵ Katherine Lynch, *THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION* 209 (2003).

³⁶ Terence Halliday, Josh Pacewicz & Susan Block-Lieb, *Who Governs? Delegations and Delegates in Global Trade Lawmaking*, 7 *REGULATION & GOVERNANCE* 279, 280 (2013).

³⁷ UNCITRAL, *A Guide to UNCITRAL* 1.

³⁸ *Ibid.*

³⁹ Halliday, Pacewicz & Block-Lieb, *Who Governs?* 283; Edward Cohen, *Normative Modeling for Global Economic Governance: The case of the United Nations Commission on International Trade Law (UNCITRAL)*, 36(2) *BROOKLYN JOURNAL OF INTERNATIONAL LAW* 567, 581 (2011).

⁴⁰ Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html.

⁴¹ Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html.

renewable energies. Regardless of the final outcome of these disputes, they indicate a significant level of conflict between host states and investors. Well-designed economic support schemes are in the best interest of both governments and investors, because the alternative is an explosion of disputes where everyone loses except the arbitration industry.⁴² Governments should factor in some flexibility into the regulatory structure so as to eliminate the risk of legitimate policy decisions giving rise to legal disputes, while at the same time providing adequate assurances to investors.⁴³ Policymakers need to design economic support schemes that are flexible enough to accommodate changes in the market without disrupting the stability of the regime itself.

Countries need to adopt a holistic approach to renewable energy policymaking so as to avoid possible clashes between different legal frameworks. Legal instruments, international investment law in particular, can help to mobilize the huge investments required to transform the energy sector to cleaner forms of generation. The challenge is to shape national policies in ways that do not breach the rights of foreign investors under international investment agreements. This can only be achieved if host states are truly aware of the scope of their obligations to foreign investors when they design and implement their renewable energy policies.⁴⁴ This requires a clear understanding of the disciplines of international investment law and how they may limit or impact upon national regulation.

UNCITRAL is in a privileged position to assist States in reforming and improving the legal frameworks applicable to investments in the renewable energy field. The Commission has been

⁴² Kyla Tienhaara, Does the Green Economy Need Investor–State Dispute Settlement?. Investment Treaty News, November 15, 2015, available at <https://www.iisd.org/itn/2015/11/28/does-the-green-economy-need-investor-state-dispute-settlement/> (last accessed October 26, 2016).

⁴³ Vyoma Jha, Trends in Investor Claims Over Feed-in Tariffs for Renewable Energy, Investment Treaty News, 19 July 2012, available at <https://www.iisd.org/itn/2012/07/19/trends-in-investor-claims-over-feed-in-tariffs-for-renewable-energy> (last visited October 26, 2016).

⁴⁴ Condon & Sinha, The Role of Climate Change in Global Economic Governance 93.

characterized as an ‘epistemic community’ or ‘group of knowledge-based experts’.⁴⁵ Like other specialized agencies of the United Nations, the Commission exhibits an increased ‘professionalization’ and ‘bureaucratization’ with an emphasis on technical concerns and responsibilities.⁴⁶ In designing new policies or adjusting existing ones, governments need to take into account that the legal framework that supports renewable energy investment is not confined to national regulations. The legal obligations borne by states towards investors encompass obligations in domestic law (contract and administrative law) but also in international law, namely international investment law. The challenge for governments is to strike a balance between regulation that discourages foreign investment and foreign investment protection that discourages regulation.⁴⁷ The wealth of knowledge acquired by the UNCITRAL over the years might be particularly useful in raising to this challenging task.

Regardless of the final outcome of the pending disputes, it is important to ensure that bridges between states and investors are not burned. The transition to a low-carbon model of development requires long-term cooperation between parties. Countries will continue to strive to design and implement energy policies that allow them to face climate change. Investors are essential partners in this process, and governments need to be able to encourage them to make their contribution in future ventures. The work model followed by the UNCITRAL is particularly apt to stimulate this inclusive type of debate. The UNCITRAL has been labelled by some scholars as an ‘inclusive body’⁴⁸ or a ‘site’ for ‘normative modeling’ through which legal norms, principles, and standards for the global political economy are articulated.⁴⁹ In addition to its sixty Member

⁴⁵ Lynch, *The Forces of Economic Globalization* 212.

⁴⁶ Katherine Lynch, *THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION* 212, fn 236 (2003).

⁴⁷ Condon & Sinha, *The Role of Climate Change in Global Economic Governance* 93.

⁴⁸ Claire Kelly, *Institutional Alliances and Derivative Legitimacy*, 29 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* 605, 615 (2008).

⁴⁹ Cohen, *Normative Modeling for Global Economic Governance* 568.

States,⁵⁰ UNCITRAL also invites as observers other Member States of the United Nations, as well as international and regional organizations (both intergovernmental and non-governmental) involved in shaping the legal frameworks of national and global commerce and investment.⁵¹ Observers may participate in discussions to the same extent as members. By tradition, decisions taken by UNCITRAL and its working groups reconcile the different positions represented by its members and other participants by consensus rather than by vote.⁵² Honnold refers to UNCITRAL as a ‘mix of academic specialists in commercial and comparative law, practicing lawyers, and members of government ministries with years of experience in international lawmaking’ with an acknowledged pragmatic approach.⁵³ The inclusion of a broad array of actors including states, corporate and industry representatives, legal experts and professionals, and other public and private international organizations allows the UNCITRAL to, despite its budgetary constraints, mobilize substantial know how and expertise. In the words of Halliday, Block-Lieb and Carruthers, ‘[t] here is little point in developing a global standard if the interest groups most affected by it will reject it on arrival, or if the experts who practice around the standard find it technically deficient.’⁵⁴ Such situations can lead to ‘actor mismatch’, a situation where national or industry actors are missing from the international text-making enterprise, and when local actors are missing from national lawmaking.⁵⁵

⁵⁰ See UNCITRAL, Origin, Mandate and Composition of UNCITRAL, available at <http://www.uncitral.org/uncitral/en/about/origin.html>.

⁵¹ Faria, The Relationship between Formulating Agencies in International Legal Harmonization 262; Cohen, Normative Modeling for Global Economic Governance 568; Spiros Bazinas, Harmonisation of International and Regional Trade Law: the UNCITRAL Experience, 8 UNIFORM LAW REVIEW 53, 55 (2003).

⁵² Faria, The Relationship between Formulating Agencies in International Legal Harmonization 263.

⁵³ John Honnold, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 7 (3rd ed, 1999).

⁵⁴ Terence Halliday, Susan Block-Lieb & Bruce Carruthers, Rhetorical Legitimation: Global Scripts as Strategic Devices of International Organizations, 8 SOCIO-ECONOMIC REVIEW 77, 81 (2010).

⁵⁵ Terence Halliday & Susan Block-Lieb, *Global Duelists: The Recursive Politics of the Text in International Trade Law*, in SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT 77, 93 (Amanda Perry-Kessaris ed., 2013).

This collaborative model also has the advantage of allowing for the coordination of the activities of organizations active in the field of international trade law. This helps to avoid duplication of efforts and to promote efficiency, consistency, and coherence in the unification and harmonization of international law.⁵⁶ The Energy Charter Secretariat has been discussing the benefits of a non-binding declaration and/or an interpretative note on the promotion of low-carbon investments. It is argued that such a statement would improve legal certainty in the application of the ECT, reducing the normative and political risks and investment related disputes.⁵⁷ Moreover, a clear political statement on low-carbon investments by the Energy Charter Conference would send an important signal to the international community and to investors on its commitment to sustainable development and climate change mitigation. The overall objective being the protection and balance the interests of ECT members and of international investors.⁵⁸ Greater policy coordination between the European Union and its member states is also needed.⁵⁹ The European Commission is currently working to devise a European policy on renewable energy promotion. In this regard, the design of support schemes is of paramount importance. While economic support mechanisms have demonstrated important successes, they have also evidenced a number of policy failures.⁶⁰

The UNCITRAL is a 'quasi governmental norm-creating forum',⁶¹ but is not alone in crafting global governance norms. It should therefore cooperate and collaborate with other leading

⁵⁶ Faria, *The Relationship between Formulating Agencies in International Legal Harmonization* 264.

⁵⁷ See Energy Charter Secretariat, *Energy Charter 2013 Annual Report* 25-26, available at http://www.energycharter.org/fileadmin/DocumentsMedia/AR/AR_2013_en.pdf (last accessed October 26, 2016); Energy Charter Secretariat, *Energy Charter 2014 Annual Report* 19, available at http://www.energycharter.org/fileadmin/DocumentsMedia/AR/AR_2014_en.pdf (last accessed October 26, 2016).

⁵⁸ Energy Charter Secretariat, *Energy Charter 2013 Annual Report* 26.

⁵⁹ Daniel Behn et al., *Promoting Renewable Energy in the EU: Shifting Trends in Member State Policy Space* 8-11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2704333, 6 (last visited October 26, 2016).

⁶⁰ *Ibid* 2.

⁶¹ Kelly, *Institutional Alliances and Derivative Legitimacy* 610.

organizations such as the Energy Charter Secretariat, the European Union, or the World Trade Organization in furthering a modern legal framework for foreign investments in renewable energies. These and other ‘formulating agencies’ should take part in this debate so as to prevent inconsistencies and contradictions between different rules and standards regulating global investment flows. This ‘inclusive process’,⁶² involving a variety of participants, including member States of UNCITRAL, non-member States, and invited intergovernmental and non-governmental organizations, is part of the UNCITRAL’s ADN and is vital for distilling the best international practices, promoting consensus-building, and crafting a coherent, efficient legal framework. It is the combination of the process of participation and consensus-building that leads to the wide acceptability of UNCITRAL texts.⁶³

The UNCITRAL should also coordinate its activities with other United Nations agencies, namely the United Nations Conference on Trade and Development (UNCTAD)⁶⁴ and the United Nations Environment Programme (UNEP).⁶⁵ The former performs an important role in gathering and dissemination information in the field of international investment and international investment law.⁶⁶ Each year UNCTAD publishes the ‘World Investment Reports’ outlining trends in global foreign direct investment and providing in-depth analysis into trends in investment treaty

⁶² See UNCITRAL, A Guide to UNCITRAL 1.

⁶³ Caroline Nicholas, Negotiations and the Development of International Standards in Public Procurement: Let the Best Team Win? 7(1) *TRADE LAW & DEVELOPMENT* 64, 80 (2015); Julia Salasky & Corinne Montineri, *UN Commission on International Trade Law and Multilateral Rule-making: Consensus, Sovereignty and the Role of International Organizations in the Preparation of the UNCITRAL Rules on Transparency*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM. JOURNEYS FOR THE 21ST CENTURY* 584, 587 ff (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

⁶⁴ See <http://unctad.org/en/Pages/Home.aspx>.

⁶⁵ See <http://www.unep.org/>.

⁶⁶ See Investment Policy Hub (<http://investmentpolicyhub.unctad.org/>) a comprehensive and free online database of all International Investment Agreements and many investor-state dispute settlement cases.

practice.⁶⁷ The 2015 ‘Investment Policy Framework for Sustainable Development’,⁶⁸ provides guidance for policymakers in the evolution towards a new generation of investment policies, offering operational guidelines or action menus for national investment policies, guidance for the design and use of international investment agreements, and an action menu for the promotion of investment in sectors related to the sustainable development goals. This document serves as an important reference for policymakers in formulating national and international investment policies that are more suited to the particularities of renewable energy markets. It contains important suggestions on how to design investment incentive schemes for sustainable development,⁶⁹ for example, that ‘[i]nvestment incentives should (...) not become permanent; the supported project must have the potential to become self-sustainable over time – something that may be difficult to achieve in some sectors. This underlines the importance of monitoring the actual effects of investment incentives on sustainable development, including the possibility of their withdrawal if the impact proves unsatisfactory.’⁷⁰

The UNEP, on the other hand, coordinates the environmental activities of the United Nations. It aims at serving as the ‘leading global environmental authority that sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and serves as an authoritative advocate for the global environment.’⁷¹

The numerous claims over changes in economic support mechanisms that have surfaced in the past few years provide evidence that states need to rethink and reshape their renewable energy

⁶⁷ See <http://www.worldinvestmentreport.org>

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See http://investmentpolicyhub.unctad.org/Upload/Documents/INVESTMENT%20POLICY%20FRAMEWORK%202015%20WEB_VERSION.pdf.

⁶⁹ Ibid, 124 ff.

⁷⁰ Ibid, 127.

⁷¹ See <http://www.unep.org/about>.

policies. The determination of what is reasonable for the investor to expect is important for any reform of legal frameworks. Shifts in both policy and the development of countries make this determination different from country to country.⁷² The creation of efficient and sustainable markets for renewable sources of energy is a tremendous financial and legal challenge. This endeavour can only be achieved through a thorough knowledge of the functioning and possible implications of the economic mechanisms and legal frameworks that underpin foreign investments in the renewable energy market. While it is not the only global formulating agency, the work of the UNCITRAL gains added credibility and legitimacy from its perceived representatives and its institutional aura as a United Nations organ.⁷³ In crafting modern legal instruments to address these issues, the Commission need to adopt democratic and legitimate rule-making processes that ensure fair representation and participation of all the interests at stake in the development process.⁷⁴ The Commission should invite other international formulating agencies and international organizations to co-operate closely on these issues so as to avoid duplication of efforts and inconsistency between policies and rules.

The work of the UNCITRAL typically takes the form of conventions, model laws, legislative guides, or model provisions.⁷⁵ The use of varied strategies allows UNCITRAL the flexibility to approach particular areas of law taking into account its specificities and reflect the different degrees of consensus that can be reached among all intervening parties. Conventions are, naturally, difficult to negotiate. It seems more realistic, therefore, to adopt alternative tools such

⁷² Åsa Romson, *International Investment Law and the Environment*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 37, 40 (Marie-Claire Segger et al. eds, 2011).

⁷³ Gerard McCormack, *Secured Transactions Law Reform, UNCITRAL and the Export of Foreign Legal Models*, in AVAILABILITY OF CREDIT AND SECURED TRANSACTIONS IN A TIME OF CRISIS 33, 34 (N. Orkun Akseli ed., 2013).

⁷⁴ Jan Wouters & Nicolas Hachez, *The Institutionalization of Investment Arbitration and Sustainable Development*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 611, 626 (Marie-Claire Cordonier Segger et al. eds., 2011).

⁷⁵ UNCITRAL, A Guide to UNCITRAL 13-18.

as the elaboration of a legislative guide that could provide valuable technical information to promote and revise bilateral or multilateral investment treaties and national investment laws. Legislative guides allow for greater flexibility by accommodating dissent and national particularities and including more detailed background material for the guidance of national legislators.⁷⁶ A legislative guide on international investments in the renewable energy market should focus on reducing inconsistent or overly broad interpretations of investment disciplines by offering model provisions that incorporate more precise language and are adjusted to the technical intricacies of this type of investments. The guide should circulate among key actors so as to, hopefully, shape legal reform efforts in more indirect but effective ways than formal conventions.⁷⁷

It should also be recognized that UNCITRAL, like other elements of the United Nations, faces budget pressures, so it is important that it focuses its UNCITRAL focuses its efforts and resources in priority projects.⁷⁸ In considering what topics should be added to its work program, the Commission takes into account factors such as global significance, special interest to developing countries, developments in technology, and changing trends in commercial practice.⁷⁹ For the reasons discussed in the second and third sections of this paper, UNCITRAL could, and should, devote its attention to the creation of a modern international legal framework that supports and promotes investments in the renewable energy field, protecting the legitimate interests of investors while retaining the regulatory space of host states. The UNCITRAL has been recognized

⁷⁶ Megan Donaldson & Benedict Kingsbury, Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation, 14(1) CHICAGO JOURNAL OF INTERNATIONAL LAW 1, 12(2013).

⁷⁷ Edward Cohen, Normative Modeling for Global Economic Governance: The case of the United Nations Commission on International Trade Law (UNCITRAL), 36(2) BROOKLYN JOURNAL OF INTERNATIONAL LAW 567, 582 (2011).

⁷⁸ Keith Loken, A New Global Initiative on Contract Law in UNCITRAL: Right Project, Right Forum?, 58 VILLANOVA LAW REVIEW 509, 519 (2013).

⁷⁹ Faria, The Relationship between Formulating Agencies in International Legal Harmonization 268.

as one of the most practical and productive organs in the United Nations constellation.⁸⁰ Its legislative products are highly influential in shaping the law of global commerce.⁸¹

UNCITRAL has developed sophisticated means of integrating widely diverse interests, of obtaining broadly inclusive representation, of establishing expert authority.⁸² This paper has argued that the UNCITRAL is in a privileged position to lead an effort – along with other international organizations, public and private stakeholders – to conduct a thorough analysis of the challenges raised by the growing interaction between international investment treaties and national legal frameworks that regulate economic incentives in the renewable energy field and devise a legislative text offering effective solutions.

⁸⁰ Loken, A New Global Initiative on Contract Law in UNCITRAL 519.

⁸¹ Cohen, Normative Modeling for Global Economic Governance 567-568.

⁸² Terence Halliday, Susan Block-Lieb & Bruce Carruthers, *Attaining the Global Standard*, in BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS 122, 124 (Terence Halliday & Bruce Carruthers eds., 2009).