

Statement of the Investment Protection Coalition

The signatories of this declaration gather investors in the energy sector, who share the conviction that the rule of law principle underpinning investor protection is one of the European Union's key advantages in the global competition for quality investments. All too often, this principle has failed investors in recent years.

While the industry acknowledges the need to adjust regulatory frameworks over time to respond to declining technology costs and market developments, retroactive changes are a misguided answer and erode investor confidence in the EU energy infrastructure sector where costs are sunk from the moment of the investment and there is very limited ability to improve profitability thereafter. Accordingly, investors in the space have no choice but to expect long-term regulatory stability for renewable energy plants. Thus any regulatory change should be concerted, non-retroactive, non-discriminatory, and avoid any legal gaps that would undermine investor certainty.

The renewable energy sector has provided many examples of sharp policy reversals since 2011. These range from retroactive tariff cuts for existing investments in Spain, Romania, the Czech Republic, Greece, and Italy, to abrupt policy reversals and rapid withdrawal of support to projects under construction or development in Finland and Poland. The EU's lack of action in these cases has led investors to bring legal claims in national courts, and increasingly in international arbitration under the Energy Charter Treaty (ECT) which was created and spearheaded by the EU in the 1990s. 50 investor – state disputes have been recorded in the last three years under the Energy Charter Treaty (ECT), with Spain alone facing more than 25 lawsuits.

The impacts of such actions have undermined investor confidence in the recipient Member States and had material impacts on the economy. The revenues of wind assets in Spain decreased by more than 25% - amounting to €1bn per year - as a result of retroactive regulatory changes introduced in 2012 and 2013.¹ Asset owners in Romania also saw their financial position deteriorate in 2013 and 2014. The sector experienced a 30% drop in equity due to impairment losses and 39% decrease in revenue – almost €0.5bn – following the retroactive changes².

The effects of abrupt policy changes have reached markets and technologies not directly targeted. They have contributed to the overall decline of renewable energy investment in the EU since 2010 and the collapse of investment in many countries. For example, according to Bloomberg New Energy Finance, Italy fell from nearly €13 billion in investment in 2011 to €1.4 billion in 2015 following rapid tariff cuts and retroactive changes in 2015.

Conversely, between January 2011 and June 2016, Germany and the UK accounted for 67% of total EU renewable energy investment – new projects and investments in existing projects.³ It is revealing that the two countries that have expressly rejected retroactive changes to existing assets have attracted the vast majority of investments.

Therefore, the signatories call on the EU to take the following steps to promote investment in EU infrastructure and help ensure a sustainable flow of competitive, long-term capital.

1. Introduce a permanent dispute settlement mechanism independent of national courts and enshrined in the EU Treaty with protection against expropriation, discrimination and breach of legitimate expectations
2. Integrate a grandfathering principle in the post 2020 Renewable Energy Directive to prevent retroactive changes and guarantee the economic viability of existing assets

¹ AEE: Asociación Empresarial Eólica, 2014

² EY, 2015: Financial position and performance of the Romanian wind power sector

³ Bloomberg New Energy Finance

A dispute settlement mechanism enshrined in the EU Treaty

In the absence of valid means to address investors' rights and investment protection related issues at EU level, investors have been forced to resort to international arbitration and non-European Courts (in particular under the Energy Charter Treaty) to see their rights protected.

The Energy Charter Treaty is a valuable tool today and its basic principles protecting investors from discrimination, expropriation and breach of legitimate expectations embody EU law and policy regarding investment. It is however limited to cross border investors.

Therefore, we believe it is imperative that a mechanism reflecting these values and rights is implemented at EU level. This system should be effective, efficient and available to all EU energy investors, regardless of size, nationality or location. This will reinvigorate domestic and cross border capital flows that have been disrupted, and further infrastructure investments that advance EU climate, energy and economic recovery goals.

To this end, the signatories of this declaration support the spirit of the proposal of the delegation of Austria, Finland, France, Germany and Netherlands, for a system that would provide a unified legal protection to investors.⁴

In the long term, conferring jurisdiction to the European Court of Justice would offer the highest level of protection. In the meantime, it is important that the EU refrains from actions that could interfere with existing arbitrations under the Energy Charter Treaty, which was spearheaded and implemented by the EU.

A grandfathering clause in the post 2020 Renewable Energy Directive

In the short term, additional measures are required to ensure legal certainty. We call on the European Commission to address the concerns of investors in the post 2020 Renewable Energy Directive to be tabled by the European Commission in 2016.

A grandfathering principle should be integrated in the new Directive, namely in the design of the support mechanisms. This should guarantee the economic viability of already consented assets and safeguard investors' legitimate expectations in the face of unforeseen changes to national regulatory regimes.



⁴ Non-paper from Austria, Finland, France, Germany and the Netherlands on the intra – EU Investment Treaties: Council of the European Union, Trade Policy Committee April 2016