

# LESSONS TO BE LEARNT FROM REGULATORY SUPPORT FOR RENEWABLES

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# 1. *Energy Transition and Need for Legal Certainty*

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- The International Renewable Energy Agency estimates that USD 131 trillion worth of investments needed between now and 2050 to achieve energy transition
- At the same time existing investments especially carbon intensive energy face uncertainty as countries pass laws and regulations to facilitate energy transition including phasing out fossil fuels
- Energy transition and respecting rights of companies whose assets are impacted by transition **WRONGLY THOUGHT AS COMPETING GOALS**
- As energy transition accelerates i disputes are bound to multiply
- Disputes will arise under national law, international investment treaties, and investor-state contracts
- Today I will concentrate on investment treaty disputes

## 2. *Role of Governments in Promoting Renewables*

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- Renewables key element of energy mix for most countries in the world
- Role of governments seen as key to promoting renewables
- Justification: correction of negative externalities + stimulate technological change
- Types of mechanisms: Feed-in tariffs, competitive auctions, green certificates and trading carbon emissions allowances
- Feed-in tariffs entitle renewable energy generators to sell all their production in the electricity network at a fixed price or, alternatively, at a market price of electricity plus an incentive
- Competitive auction system, the regulator reserves a proportion of market for the production of renewable energy and develops a competitive system within generators that use these resources. Distributors have the obligation of acquiring the produced quantity in that reserved market

## 2. Role of Governments in Promoting Renewables

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- Under a competitive auction system the government reserves a proportion of market for the production of renewable energy. Generators are then invited to participate in this market by bidding at reverse auctions.
- In a system based on quotas of negotiable green certificates, the government imposes an obligation on suppliers of electricity to acquire a certain percentage of their supply from renewable energy. The renewable electricity generators are issued green certificates based on the amount of electricity they generate
- Carbon emission trading is a type of emission trading scheme designed for carbon dioxide (CO<sub>2</sub>) and other greenhouse gases (GHG). It is a form of carbon pricing. Emissions trading sets a quantitative total limit on the emissions produced by all participating emitters

### 3. *Investment Treaty Arbitrations*



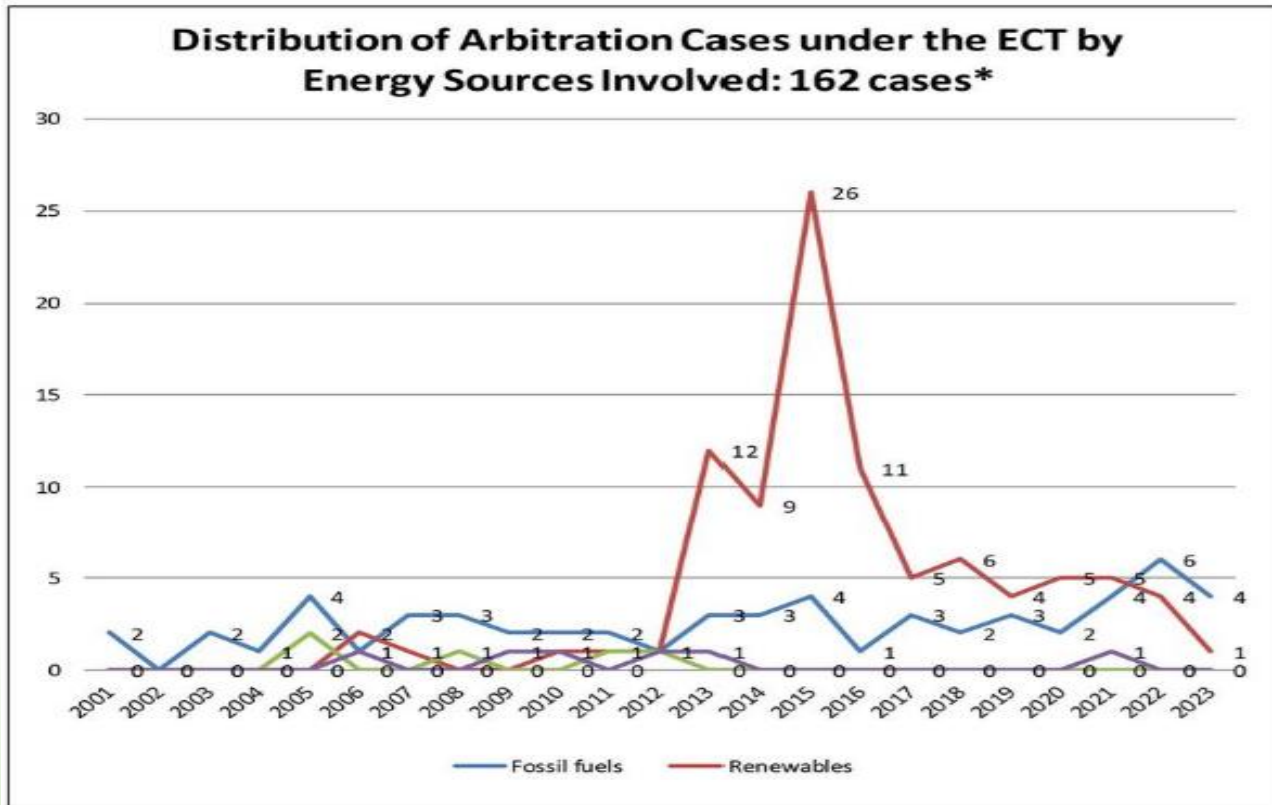
<b>COUNTRY</b>	<b>Bilateral Investment Treaty BIT</b>	<b>Energy Charter Treaty ECT</b>
Albania	40	YES
Algeria	29	NO
Armenia	40	YES
Austria	47	YES
Azerbaijan	44	YES
Bosnia and Herzegovina	37	YES
Bulgaria	38	YES
Cameroon	11	NO
Croatia	27	YES
Czech Republic	60	YES
Egypt	72	NO
Estonia	24	YES
France	84	NO

<b>Legend:</b>
ERRA Full members
ERRA Associate memb.

Georgia	34	YES
Greece	28	YES
Hungary	40	YES
Kazakhstan	43	YES
Kosovo	7	NO
Kyrgyzstan	27	YES
Latvia	21	YES
Lithuania	33	YES
Moldova	41	YES
Mongolia	36	YES
Mozambique	19	NO
Nigeria	14	NO
North Macedonia	38	YES
Oman	29	NO
Pakistan	31	NO

Palestine	3	NO
Peru	26	NO
Poland	36	NO
Romania	54	YES
Russian Federation	64	NO
Saudi Arabia	21	NO
Serbia	46	NO
Slovakia	34	YES
Thailand	35	NO
Türkiye	83	YES
Ukraine	66	YES
United Arab Emirates	74	NO
United States of America	39	NO

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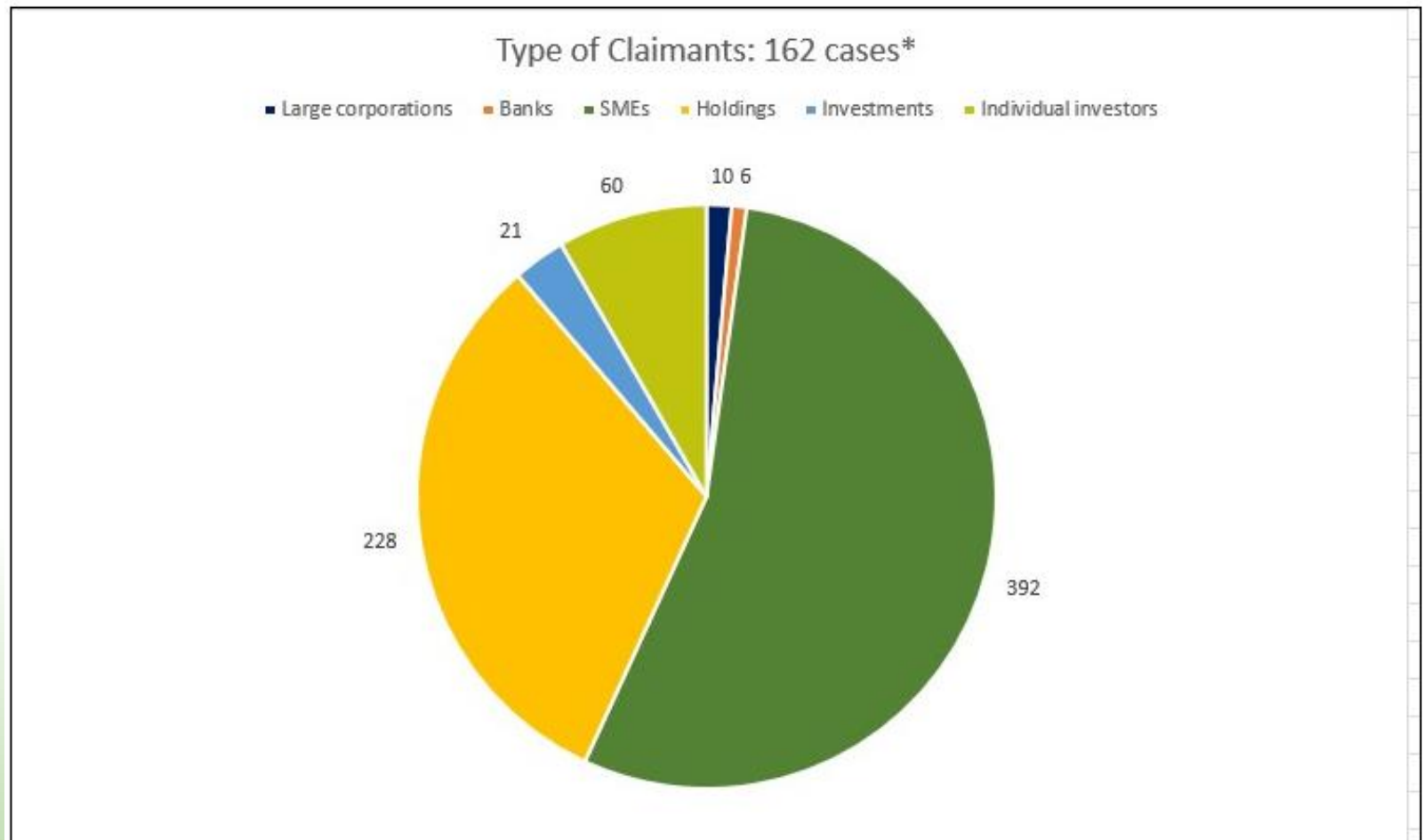


Fossil Fuels		Renewables		Nuclear		N/A	
Total Damages Claimed***	Total Damages Awarded***	Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded
approx. EUR 13 billion + the Yukos cases (EUR 87 billion)	approx. EUR 1 billion + the Yukos cases (EUR 40 billion)	approx. EUR 23 billion	approx. EUR 1.3 billion	approx. EUR 4.5 billion	approx. EUR 74 million	approx. EUR 550 million	0



### 3. *Investment Treaty Arbitrations*

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## 2. *Investment Treaty Arbitrations*

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- **Changes in feed-in tariff**
  - Some tribunals in case of Spain have held that general legislative or regulatory provisions could not give rise to legitimate expectations as to the stability of the Spanish renewables framework
  - Majority of tribunals have concluded that investors could derive legitimate expectations from certain legislative or regulatory provisions in Spain's renewables framework.
  - The tribunal in Cavalum, for instance, found that investors' right to earn a "reasonable rate of return" was "the cornerstone of the [Spanish] incentive regime" for solar energy, giving rise to legitimate expectations on the part of investors
- Similar cases against Czech Republic, Italy, Slovakia, Ukraine and most recently against Japan

### **3. *Investment Treaty Arbitrations***

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- **Claims regarding green certificates**
  - LSG Building Solutions v. Romania (ECT, ICSID Case, ongoing)
  
- **Claims regarding emissions trading market**
  - Koch Industries and Koch Supply & Trading LP v. Canada (NAFTA, ICSID Case, 13 March 2024)

### 3. *Investment Treaty Arbitrations*

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- Number of renewables cases under Energy Charter Treaty as of July 2023:
  - Spain:51
  - Italy: 14
  - Romania: 8
- Spain ranks 3rd in the world in terms of the outstanding damages awards: USD 1.3 billion / EUR 1.2 billion
- Spain has incurred interest rates and legal fees totalling USD 270 million / EUR 250 million
- Spain has spent at least EUR 70 million for its own legal fees

## 4. *Lessons to be learned*

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- Regulatory framework and legal certainty are key for investment
- EU member states and EU's refusal to pay out under arbitral awards undermines legal certainty and international rule of law
- Also short sighted as reduces attractiveness as place for investment
- Key lesson is to devise a robust regulatory framework for promotion of new technology which is not subject to constant change

***Thank you for your attention !***

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