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VII Tarragona International Environmental Law Colloquium (TIEC)

	INSTITUTE
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Centre for Climate Law
and Sustainability Studies
(CLASS)

'Sustainable Energy' under Reformed International Investment Agreements

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Outline

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- ① Importance of renewable energy sources (RES) for achieving Paris Agreement goals
- ② Inconsistent 'solar energy' awards arising from changes to feed-in-tariffs
- ③ Enhancement of protection of renewables in new IIAs:
 - ➔ CETA
 - ➔ UK-EU Trade and Cooperation Agreement



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Climate change: RES and IIAs

AR6 Climate Change 2022: Mitigation of Climate Change – IPCC (TS-120) →

29 may be hindering mitigation efforts, namely evidence that trade and investment agreements, as well as
30 agreements within the energy sector, impede national mitigation efforts (*medium confidence*).

Nationally determined contributions under the Paris Agreement – Revised
Synthesis Report UNFCCC Secretariat (2021) →

28. Domestic mitigation measures for renewable energy generation were most frequently mentioned by Parties, followed by measures for improvement in the energy efficiency of buildings. Some Parties communicated quantitative targets for the share (ranging from 15 to 100 per cent) of renewable energy in electricity generation by 2030; and many of those target

Thesis



how can IIAs promote investor confidence and more sustainable investments ?

what protection do IIAs offer to investors in renewables?

RES in current IIAs

Complex relationship between IIAs and climate change:

IIAs **support** energy transition:

protection of RES investments and holding states accountable for regulatory changes






IIAs **hinder** energy transition:

protection of fossil fuel investments and creating regulatory chill

RES investment disputes

- Fair and equitable treatment standard
- Stability commitment
- Legitimate expectations of investors
- Investor's due diligence

	Cases	Investor	State
	7	1 (?)	6 ✓
	50	20 ✓	4 ✓
			+1
	12	3 ✓	5 ✓

New Generation of International Investment Agreements – selected reformed provisions

	CETA 2016	USMCA 2018	UK-EU TCA 2020
FET	Qualified by a list Art. 8.10(2)	Qualified by reference to customary international law and a list Art. 14.6	X
Legitimate Expectations	Limited Art. 8.10(4) A change in legislation (x expectation of profit) Art. 8.9(2)	No breach of FET Art. 14.6.4	X
ISDS	Investment court system	X US -Canada Modified for US- Mexico	X

New Generation of International Investment Agreements – selected innovative provisions (1)

CETA

Preamble:

REAFFIRMING their commitment to promote sustainable development ...
 RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility **to achieve legitimate policy objectives**, such as public health, safety, environment...

Art 24.4 Each Party reaffirms its **commitment to effectively implement in its law** and practices ... **the multilateral environmental agreements** to which it is party.

Art 24.9 Trade favouring environmental protection

...The Parties shall, consistent with their international obligations, pay special attention to **facilitating the removal of obstacles to trade or investment in goods and services of particular relevance for climate change mitigation** and in particular trade or investment **in renewable energy** goods and related services.

Art 24.12 Cooperation on environment issues

...investment in .. green technologies .. **renewable energy**; energy efficiency..

Joint Interpretative Instrument (2017)

CETA Joint Committee: Recommendation on Trade, Climate Action and the Paris Agreement (2018)

New Generation of International Investment Agreements – selected innovative provisions (2)

EU-UK
TCA

Preamble:

1. REAFFIRMING their commitment to democratic principles, to the rule of law, to human rights, to countering proliferation of weapons of mass destruction and **to the fight against climate change**, which constitute **essential elements of this and supplementing agreements**,
7. RECOGNISING the Parties' **rights to regulate** ..in order to achieve legitimate public policy objectives such as.. the environment **including climate change**,
9. RECOGNISING the need for an ambitious .. economic partnership to be underpinned by **sustainable development**, and a **commitment to uphold .. high levels** of protection in the areas of labour ..the fight against climate change
14. RECOGNISING the **benefits of ..investment** in energy and raw materials and the importance of supporting the **delivery of cost efficient, clean and secure energy supplies**
17. RECOGNISING **the benefits of sustainable energy, renewable energy**, in particular offshore generation in the North Sea, and energy efficiency

TITLE XI Level Playing Field for Open and Fair Competition and Sustainable Development

**Chapter 7
Environment and Climate**

**Art 401
Trade and climate change**

New Generation of International Investment Agreements – selected innovative provisions (3)

Art 764 Fight against climate change

1. The Parties consider that **climate change represents an existential threat to humanity** and reiterate **their commitment to strengthening the global response to this threat**. ...each Party shall respect the **Paris Agreement** and the process set up by the UNFCCC and **refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement**.
2. The Parties shall **advocate the fight** against climate change in **international forums**..

Art 771 Essential Elements

..Article 764(1) ... constitute essential elements of the partnership established by this Agreement and any supplementing agreement.

Art. 772 Fulfilment of obligations described as essential elements

If either Party considers that there has been a **serious and substantial failure by the other Party to fulfil any of the obligations** that are described as **essential elements**..., it may decide to **terminate or suspend the operation of this Agreement** or any supplementing agreement in whole or in part...

..For greater certainty, **an act or omission which materially defeats the object and purpose of the Paris Agreement shall always be considered as a serious and substantial failure** for the purposes of this Article.
