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The EVFTA's Investment Protections and Emerging Legal Risks from Vietnam's Feed-In Tariff (FIT) Policy Transition

Abstract

In recent years, Vietnam has become a regional leader in renewable energy development, particularly in solar and wind power. This growth was largely driven by the adoption of the Feed-In Tariff (FiT), a fixed, preferential pricing scheme aimed at encouraging private investment in clean energy. However, since 2021, Vietnam has discontinued the FIT for new projects and shifted to alternative electricity trading mechanisms. This paper examines the legal consequences of this policy change, identifies limitations in the current Vietnam's framework, and assesses the potential risk of investment disputes under the protection mechanisms provided by the European Union – Vietnam Free Trade Agreement (EVFTA).

KEYWORDS: renewable energy, FIT, investment disputes, ISDS, international arbitration, energy policy

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1 Introduction

It is evident that, from ancient times to the modern era, energy has always been a core factor driving the development of nations. Energy is a fundamental driving force that enables any system of science and technology to function and advance. When science and technology thrive, a nation is bound to achieve remarkable progress. Therefore, when a country attains greater prosperity than others, it is undoubtedly due to its ability to produce energy more efficiently and abundantly.[1]

In the context of a rapidly changing world, the modern era has witnessed significant transformations, most notably the shift in many nations' perspectives on energy security. Unlike the traditional approach in which countries concentrated on the exploitation of fossil fuels such as oil, coal, and natural gas, the concept of renewable energy has become increasingly prevalent in today's global landscape, driven by its economic and environmental advantages.[2] For the first time in global history, total energy investment has surpassed 3 trillion USD, with over 771 billion USD allocated to the renewable energy sector in 2024 alone – demonstrating the strong investment appeal of renewable energy production.[3] This shift represents a significant effort by countries to reduce greenhouse gas emissions and combat global climate change.

In response to the urgent demands of the global energy transition and international commitments to reducing greenhouse gas emissions, Vietnam has identified the development of renewable energy as a key pillar in its strategy for ensuring energy security and promoting green growth. Since the Doi Moi[4] policy in 1986, along with the shift from a centrally planned economy to a socialist-oriented market economy, Vietnam's energy policy framework has been gradually improved. Notably, at the COP26 Conference in 2021, Vietnam pledged to achieve net-zero emissions by

1 Eugene A. Rosa, Gary E. Machlis, and Kenneth M. Keating, "Energy and Society" *Annual Review of Sociology*, No. 1 (1988): 150.

2 Renewable energy is commonly understood as energy derived from continuous, inexhaustible sources such as sunlight, wind, rain, tides, waves, and geothermal heat.

3 International Energy Agency, *World Energy Investment 2024* (Paris: IEA, 2024).

4 Doi Moi (meaning "renovation" in Vietnamese) refers to a comprehensive reform policy launched by the Vietnamese government in 1986. It marked the transition from a centrally planned economy to a socialist-oriented market economy, aiming to liberalize trade, attract foreign investment, and encourage private sector development.

2050 – a commitment with significant political and legal implications, laying the groundwork for far-reaching reforms in the energy sector. In order to promote the development of renewable electricity, Vietnam has been working to improve the legal framework governing this sector, while issuing policies aimed at supporting and encouraging investment in renewable power projects. One of the most notable policies is the Feed-in Tariff (FiT) mechanism, stipulated in Decision No. 39/2018/QD-TTg on the support mechanism for the development of wind power projects in Vietnam. As a result, the period from 2017 to 2020 witnessed a sharp increase in renewable electricity projects – mainly in solar and wind energy – driven by the positive impact of the FiT scheme.[5] This policy was designed to create a stable and predictable investment environment, thereby effectively attracting private capital flows, including a large number of foreign investors – such as those from the European Union (EU) – who are protected under bilateral investment treaties (BITs) and free trade agreements (FTAs) that contain investment chapters. However, since 2021, the Vietnamese government has discontinued the application of the FiT mechanism for new projects, replacing it with market-based electricity pricing methods such as competitive bidding and direct power purchase agreements (DPPA).[6]

From a legal perspective, the change in the FiT policy may be considered a violation of Vietnam's international obligations concerning investment protection – particularly the principles of Fair and Equitable Treatment (FET),[7] the protection of legitimate expectations,[8] and the prohibition against arbitrary or non-transparent withdrawal of investment incentives.[9] Under the framework of the European Union-Vietnam Free Trade Agreement (EVFTA), EU investors are strongly protected through an investment dispute settlement mechanism. Accordingly, a policy change that lacks transparency, reasonableness, and predictability may serve as

5 Nguyễn Chí Dũng, "Quy định về năng lượng tái tạo tại Việt Nam: So sánh với một số quốc gia trên thế giới", *Tạp chí Luật sư điện tử*, (2024).

6 Mayer Brown, *Vietnam's Direct PPA Pilot Scheme – Energy Market Update (February 2022)*, March 2022.

7 FET requires host states to treat foreign investors in a manner that is just, consistent, and non-arbitrary.

8 The doctrine of legitimate expectations protects the reasonable expectations of investors based on the host state's legal framework and representations at the time of investment.

9 The principle of non-arbitrary withdrawal of incentives prohibits states from unexpectedly or opaquely revoking investment advantages once granted, especially when such acts undermine investor confidence and legal certainty.

a legal basis for EU investors to initiate international arbitration proceedings against Vietnam, seeking compensation for damages.

Within the scope of this paper, we will analyze the legal implications of Vietnam's shift from the FiT mechanism for renewable electricity projects, in light of the investment protection provisions under the EVFTA. The analysis focuses on assessing the compatibility of the new policy with Vietnam's international obligations, as well as identifying the potential risk of international investment disputes under the investor-state dispute settlement (ISDS) mechanism. Based on this analysis, the paper offers several recommendations to improve the legal framework governing renewable electricity in a manner that ensures stability, transparency, and alignment with international legal standards.

2 Vietnam's Feed-in Tariff Policy: Evolution and Termination

2.1. Overview of the Feed-in Tariff (FiT) Mechanism

Before the term "feed-in tariff" (FiT) became widely used, the United States had already implemented forms of price support for renewable electricity as early as the late 1970s. A notable example is the Public Utility Regulatory Policies Act (PURPA) of 1978, which is considered a precursor to the FiT mechanism. PURPA required electric utilities to purchase power from qualifying independent power producers at a price not exceeding the utility's avoided cost.[10] Although not formally referred to as a FiT, PURPA laid the foundation for the principle of mandatory power purchase from renewable sources outside traditional utility monopolies. It reflected an early policy mindset of supporting renewable electricity generation from the private sector.

10 David Jacobs, "Policy Invention as Evolutionary Tinkering and Codification: The Emergence of Feed-in Tariffs for Renewable Electricity" *Environmental Politics*, No. 5 (2014): 755–773.

The term FiT first emerged in Germany in 1991 with the introduction of the Stromeinspeisungsgesetz (StrEG), or Electricity Feed-in Law.[11] The German word "Stromeinspeisungsgesetz", which refers the legislation for feeding electricity into the grid and was passed in Germany in 1991, is the etymological origin of FiT. Eventually, it became known as "feed-in tariffs" and was anglicised to "electricity feed law." Therefore, FiT determines the amount of power sold or fed into the grid from renewable sources. Alternative names for FiT include "Renewable Energy Incentive Payments" and "Advanced Renewable Tariffs (ARTs)." Regardless of its name, FiT is universally recognised as the most efficient policy instrument for expediting the implementation of renewable energy sources.[12] In a feed-in tariff scheme, providers of energy from renewable sources, such as solar, wind, or water, receive a price for what they produce based on the generation costs. This purchase guarantee is offered generally on a long-term basis, ranging from 5 to 20 years, but most commonly spanning 15-20 years.[13] The cost of the tariff payments is typically shared with the electricity consumers.

With its flexible design, the FiT mechanism allows countries to tailor key components, such as eligibility criteria, contract duration, power purchase obligations, and capacity thresholds, to align with their institutional context, infrastructure capabilities, and specific development goals. The tariff rates set under a FiT scheme can be structured in tiers, differentiated by technology type, geographic location, or level of innovation. This enables a targeted and rational allocation of support within the renewable energy sector.

One of the core strengths of the FiT mechanism lies in its ability to create a stable and predictable investment environment – an essential condition for attracting private capital, especially in high-risk sectors with long investment cycles such as renewable energy. By guaranteeing profits through fixed electricity purchase prices over extended periods, FiT schemes enhance investor confidence, thereby enabling larger-scale

11 Claudia Hitaj, Andreas Löschel, "The Impact of a Feed-in Tariff on Wind Power Development in Germany" *Resource and Energy Economics*, 57 (2019): 18-35.

12 Chuan Yu, "Disentangling Legal Stability from Legitimate Expectations: Towards Greater Deference to Regulatory Changes in Renewable Energy Transition Policies in Investment Arbitration" *World Trade Review*, No. 1 (2025): 101-119.

13 Toby D. Couture, Yves Gagnon, "An Analysis of Feed-in Tariff Remuneration Models: Implications for Renewable Energy Investment" *Energy Policy*, 38 (2010): 955.

investments, expanding domestic supply chains, and fostering the development of local technological manufacturing capacities. Furthermore, the assurance of minimum returns acts as a catalyst for investment in research and development (R&D), promoting technological innovation and reducing production costs in the medium to long term.[14]

From an economic – institutional perspective, the FiT mechanism offers a distinct advantage in terms of cost-effectiveness in both management and implementation, owing to its simplicity, transparency, and high degree of standardization. This model significantly reduces administrative and transaction costs for both public authorities and private actors, particularly when compared to other support schemes such as production-based subsidies, competitive bidding, or renewable energy quotas. Moreover, when properly designed, FiT can enhance market competitiveness by broadening participation to include new entrants – particularly small and medium-sized enterprises – thereby fostering the growth of a supporting industrial ecosystem.

Finally, it is important to emphasize that the strategic comparative advantage of the FiT mechanism lies in the fact that it is not merely a pricing tool, but also an institutional instrument that embodies the state's long-term commitment to partnering with the private sector in the energy transition process. As such, FiT has played a pivotal role in enabling countries to attract investment in the renewable energy sector with a view toward sustainable development.

2.2. Implementation of the FiT Mechanism in Vietnam

In Vietnam, the term "preferential electricity purchase price" (commonly referred to as Feed-in Tariff or FiT) first appeared in 2011 under Decision No. 37/2011/QD-TTg,[15] and was later replaced by Decision No. 39/2018/QD-TTg on the support mechanism for the development of wind power projects in

14 UNESCAP, *Low Carbon Green Growth Roadmap for Asia and the Pacific: Fact Sheet – Feed-in Tariff*, 2012, https://www.unescap.org/sites/default/files/26.%20FS-Feed-In-Tariff.pdf.

15 Government of Vietnam, Decision No. 37/2011/QD-TTg of the Prime Minister on the Mechanism Supporting the Development of Wind Power Projects in Vietnam, 29 June 2011.

Vietnam.[16] This latter decision stipulated fixed FiT rates for wind power and extended the duration of power purchase agreements to 20 years. Specifically, for onshore wind power projects, the electricity selling price available to investors was set at 8.5 US cents/kWh (approximately VND 1,928/kWh). For offshore wind power projects, EVN (Vietnam Electricity) committed to purchasing electricity at a preferential rate of 9.8 US cents/kWh (approximately VND 2,223/kWh). These preferential rates remained in effect until 31 October 2021.

For solar power, the Vietnamese government introduced the FiT mechanism through Decision No. 11/2017/QD-TTg[17], later replaced by Decision No. 13/2020/QD-TTg[18]. Specifically, Decision No. 11/2017/QD-TTg set the FiT rate for solar power at 9.35 US cents/kWh (approximately VND 2,086/kWh), applicable until 30 June 2019.

Subsequently, Decision No. 13/2020/QD-TTg introduced a differentiated FiT scheme based on the type of solar installation, effective until 31 December 2020. The revised rates were as follows:

- Rooftop solar: 8.38 US cents/kWh (approximately VND 1,943/kWh);
- Ground-mounted solar: 7.09 US cents/kWh (approximately VND 1,644/kWh);
- Floating solar: 7.69 US cents/kWh (approximately VND 1,783/kWh).

As a result of these incentive policies, Vietnam's renewable electricity sector has undergone significant, positive developments. The following chart and table illustrate the increase in renewable electricity generation from 2016 to 2023, based on data published by EVN (Vietnam Electricity) in its annual reports[19]:

16 Government of Vietnam, Decision No. 39/2018/QD-TTg of the Prime Minister Amending and Supplementing a Number of Articles of Decision No. 37/2011/QD-TTg on the Mechanism Supporting the Development of Wind Power Projects in Vietnam, 10 September 10, 2018.

17 Government of Vietnam, Decision No. 11/2017/QD-TTg of the Prime Minister on the Mechanism Supporting the Development of Solar Power Projects in Vietnam, 11 April 2017.

18 Government of Vietnam, Decision No. 13/2020/QD-TTg of the Prime Minister on Incentive Mechanisms for Solar Power Development in Vietnam, 6 April 2020.

19 Vietnam Electricity (EVN), *EVN Annual Report*.

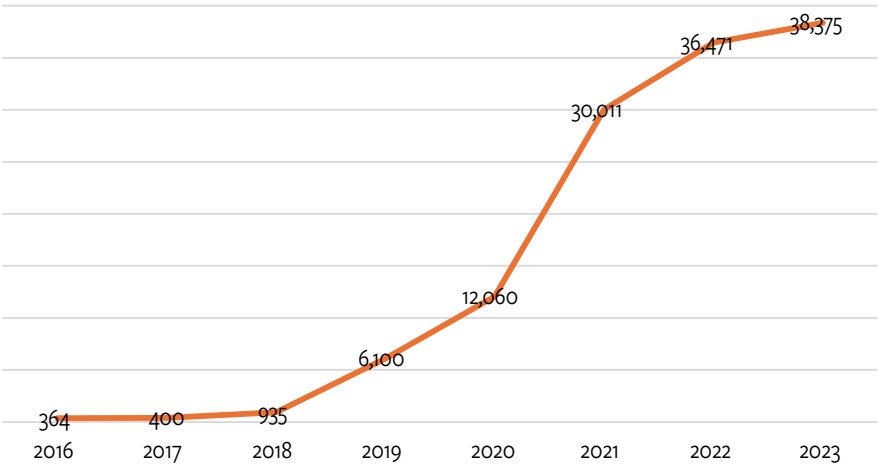

Figure 1: Production of Renewable Electricity in Vietnam (2016–2023)

Table 1: Annual Increase in Renewable Electricity Output in Vietnam (2016–2023)

Time	Increase in output (million kWh)	Increase in output (%)
2016–2017	164	45.05%
2017–2018	535	133.75 %
2018–2019	5165	552.4 %
2019–2020	5960	97.7 %
2020–2021	17951	148.84 %
2021–2022	6460	21.25 %
2022–2023	1904	5.22%

It is evident that, during the period from 2016 to 2017, the growth in renewable electricity generation was minimal, with an increase of only 36 million kWh. This slow progress can be attributed to the limited number of regulatory incentives available at the time, the novelty of the renewable energy sector in Vietnam, and the fact that the preferential FiT rates had yet to become truly attractive to foreign investors. Domestic investors, meanwhile, continued to face significant challenges, particularly in terms of access to appropriate technologies. However, from 2017 onwards, the issuance of additional legal instruments and policies to encourage investment in wind and solar power led to a substantial and consistent rise in Vietnam's annual renewable electricity generation.

The growth in renewable electricity generation in Vietnam during the period 2018-2021 highlights the pivotal role of the FiT mechanism in promoting investment and the development of renewable energy projects. The two most notable surges in capacity (in 2019 and 2021) coincided with the issuance and implementation of Decision No. 39/2018/QD-TTg (for wind power) and Decision No. 13/2020/QD-TTg (for solar power), respectively. In both cases, the FiT mechanism served as a tool to guarantee investor returns and mitigate investment risks. As a result, by 2022, Vietnam had become the leading country in the ASEAN region in terms of renewable electricity generation, accounting for as much as 69% of the region's total solar and wind power output.[20] These outcomes reaffirm the role of feed-in tariffs as a strategically effective tool in shaping Vietnam's renewable energy market during its formative growth period.

Although the FiT mechanism has played a critical role in attracting investment into Vietnam's renewable electricity sector, its implementation has also revealed several notable shortcomings. The application of relatively high preferential tariffs – particularly during the 2017-2019 period (9.35 US cents/kWh under Decision No. 11/2017/QD-TTg) triggered an overwhelming wave of investment that exceeded the government's planning and regulatory capacity. As a result, there was a sudden surge in installed solar capacity, which led to transmission grid congestion and an imbalance in the power generation mix. Many completed projects were unable to connect to the grid, causing financial losses and exposing parties to potential contractual disputes.[21]

In response to this situation, the government discontinued the FiT mechanism and transitioned to market-based pricing models such as competitive bidding and price negotiation, in accordance with the orientation set out in Power Development Plan VIII (Decision No. 500/QD-TTg dated May 15, 2023).[22] However, this shift has also triggered significant reactions from investors, indicating that the post-FiT period presents considerable

20 Ember, *ASEAN's Solar and Wind Growth Slowed Last Year, Despite Huge Potential*.

21 Nguyen Thi Thu Minh, Nguyen Le Hoa, and Le Thi Thanh Truc, "Cơ chế mua bán điện mặt trời và điện gió trong thị trường điện cạnh tranh tại Việt Nam [Trading Mechanism for Solar and Wind Power in the Competitive Electricity Market in Vietnam]" *Tạp chí Khoa học Đại học Mở Thành phố Hồ Chí Minh – Khoa học Xã hội*, No. 1 (2024): 46–59.

22 Government of Vietnam, Decision No. 500/QD-TTg of the Prime Minister Approving the National Power Development Plan for the Period 2021–2030, with a Vision to 2050 (PDP VIII), 15 May 2023.

challenges in terms of policy stability and market confidence within the renewable electricity sector.

2.3. Post-FiT Policy Landscape

Following the expiration of the main FiT mechanisms at the end of 2020 for solar power (pursuant to Decision No. 13/2020/QD-TTg) and in October 2021 for wind power (under Decision No. 39/2018/QD-TTg)-Vietnam entered a prolonged period of regulatory transition. Many renewable energy projects completed after these deadlines were unable to sign PPA with EVN. Additionally, a large number of projects, though completed before the FiT expiration dates, were rushed in order to qualify for the preferential tariffs. In doing so, many investors violated legal requirements related to planning, land use, and construction investment procedures. As a result, these projects failed to meet the necessary legal conditions. Despite being asked to provide supplemental documentation, many investors have been unable to comply, preventing them from entering into price negotiations with EVN.[23]

For example, the Ca Mau Wind Power Projects 1A, 1B, 1C, and 1D were delayed by more than 22 months due to administrative and procedural bottlenecks. As a result, the projects missed the deadline for eligibility under the preferential FiT scheme.[24] At the same time, the absence of a stable electricity pricing mechanism following the expiration of the FiT scheme has prevented investors from finalizing power selling prices with EVN. A notable example is the Trung Nam – Thuan Nam solar power project (located in Ninh Thuan province), which was suspended by EVN in September 2022. The project was deemed ineligible for the FiT due to violations during its implementation, including the lack of legal land-use rights, failure to conduct an environmental impact assessment, and the absence of fire safety inspection and approval.[25]

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23 Nhat Minh, "Renewable Energy Investment Challenges in Vietnam: Risks and Delays" *Vietnam Investment Review*, https://vir.com.vn/renewable-energy-investment-challenges-in-vietnam-risks-and-delays-102339.html.

24 Le Nguyen, *Dự án điện gió ở Cà Mau chậm triển khai, nhiều đơn vị tham mưu bị nhắc nhở*. https://baoxaydung.vn/du-an-dien-gio-o-ca-mau-cham-trien-khai-nhieu-don-vi-tham-muu-bi-nhac-nho-192494676.html.

25 Phuong Dung, *Trung Nam kêu cứu về dự án điện mặt trời tại Ninh Thuận*. https://vnexpress.net/trung-nam-keu-cuu-ve-du-an-dien-mat-troi-tai-ninh-thuan-4740092.html.

In response to these challenges, the Ministry of Industry and Trade of Vietnam issued Decision No. 21/QD-BCT on Electricity Price Framework for Transitional Solar and Wind Power Projects in January 2023,[26] introducing a new pricing framework for solar and wind power projects in the transitional phase. This important regulation affirms the authority of EVN to negotiate power purchase agreements with renewable energy developers. Under this new mechanism, transitional solar and wind projects are subject to maximum tariff ceilings, ranging from VND 1,185 to 1,508 per kWh for solar power, and from VND 1,587 to 1,816 per kWh for wind power, depending on project classification. Investors must negotiate PPAs with EVN based on these ceiling prices. However, because the final prices are determined primarily through bilateral negotiations between EVN and each investor, the process has been criticized for its lack of transparency and predictability, raising serious concerns among investors. Notably, this shift from a fixed FiT scheme to a pricing model based on capped tariffs has led to a reduction of approximately 21–29% compared to the previous preferential FiT levels.

The fact that these temporary tariff ceilings are significantly lower than the previous fixed rates under the FiT scheme has led to a substantial reduction in investors' expected returns. This outcome not only poses challenges to the financial viability of renewable energy projects but also raises serious legal concerns when assessed under the framework of international investment protection principles – particularly the principle of legitimate expectations. This principle is widely recognized in BITs and free trade agreements with investment chapters, to which Vietnam is a party, most notably the EVFTA.

26 Ministry of Industry and Trade (Vietnam), Decision No. 21/QD-BCT on Electricity Price Framework for Transitional Solar and Wind Power Projects, 7 January 2023.

3 ISDS Disputes over FiT Schemes: From Spain under the ECT to Vietnam under the EVFTA

In fact, numerous countries adopted FiT schemes. However, after a period of implementation, some of them decided to terminate these preferential mechanisms for renewable electricity, resulting in a decline in investor revenues, and subsequently triggering a wave of investor–state dispute settlement (ISDS) claims. For instance, Spain alone has faced approximately 50 ISDS cases arising from its modifications to incentive schemes for electricity producers using renewable energy sources-including the repeal of the FiT mechanism. Similarly, countries such as the Czech Republic, Romania, Italy, Germany, Ukraine, Bulgaria, Japan, and Argentina have also faced ISDS claims on comparable grounds.[27]

In the same vein, the shift from a FiT mechanism to a more market-based electricity pricing framework in Vietnam has also resulted in significant losses for foreign investors in the renewable electricity sector, thereby raising concerns over potential violations of Vietnam's investment protection obligations under the EVFTA and other international investment agreements (IIAs), to which Vietnam is a party.

3.1. Disputes against the Kingdom of Spain under the ECT

In FiT scheme-related cases against Spain, the alleged breaches often involve the host state's obligations to "encourage and create stable, equitable, favourable and transparent conditions" and to "accord at all times to investments of investors of other Contracting Parties fair and equitable treatment." Specifically, investors may allege that the host State's changes to the FiT regime violate the Fair and Equitable Treatment (FET) obligation, particularly when such changes undermine the investors' legitimate expectations.

For example, in Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, the investors argued that Spain's regulatory changes violated

27 Marcella Giacomarra, Filippa Bono, "European Union Commitment towards RES Market Penetration: From the First Legislative Acts to the Publication of the Recent Guidelines on State Aid 2014/2020" *Renewable and Sustainable Energy Reviews*, Vol. XLVII (2015): 218.

their legitimate expectations regarding photovoltaic (PV) and hydroelectric investments. Particularly, between 2008 and 2012, Cube Infrastructure Fund SICAV, Cube Energy SCA, and Cube Infrastructure Managers SA (collectively referred to as Cube), along with Demeter 2 FPCI and Demeter Partners SA (collectively, Demeter), invested in Spain's PV and hydroelectric sectors on the basis of guarantees established in Royal Decree 661/2007 (RD661/2007), which formed part of Spain's incentive framework for energy sector investments.

However, in 2010 and again between 2013 and 2014, Spain enacted modifications to this framework, introducing changes such as tariff reductions and new limitations on eligibility for incentives. In respone, Cube and Demeter initiated arbitration proceedings against Spain, alleging violations of Article 10 (concerning the promotion and protection of investments) of the Energy Charter Treaty (ECT).

In this case, the tribunal found that Spain had breached the FET obligation by undermining legitimate expectations created through the enactment of a special regulatory regime. It concluded that RD661/2007 established a clearly defined framework of benefits and incentives, deliberately designed to attract investment in the renewable energy sector. According to the tribunal, in the context of a highly regulated industry, it is not necessary for the State to extend individualized commitments to each investor in order to create legitimate expectations. Rather, such expectations may arise from a regulatory regime that, by its structure and stated objectives, holds out a clear and advantageous policy intended to be relied upon by investors. As the tribunal noted: "to the extent that those expectations are objectively reasonable, they give rise to legitimate expectations when investments are, in fact, made in reliance upon them."[28]

The tribunal further held that, under RD661/2007, Spain made a binding policy commitment to apply a preferential regime to qualifying power plants. While the 2010 policy changes were viewed as adjustments that did not fundamentally alter the regime, the 2013-2014 measures were found to have dismantled the regime's essential components, including

28 Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, para. 388.

key economic advantages, thereby frustrating the core expectations of the investor.[29]

In another one, Masdar, a company constituted in the Netherlands, initiated arbitration proceedings against Spain, on the grounds that its legitimate expectations as an investor had been fundamentally undermined. The legal basis for its investment was Royal Decree 661/2007 (RD661/2007), a policy adopted by Spain to promote renewable energy development. Under this regime, renewable energy producers were entitled to a FiT consisting of a government-set premium above the wholesale market price. Crucially, Article 44.3 of RD661/2007 included a stability clause, which Masdar interpreted as a commitment that any future regulatory changes would not affect installations registered and commissioned before 1 January 2012. Relying on this guaranteed framework, Masdar invested in three concentrated solar power plants. However, between 2012 and 2014, Spain implemented a series of disputed regulatory reforms which, according to Masdar, abolished the RD661/2007 regime and replaced it with a less favorable remuneration scheme. These new measures applied retroactively, including to projects that had qualified under the original RD661/2007 system. Claiming that these reforms violated its legitimate expectations and had a detrimental impact on the value and proFiTability of its investments, Masdar alleged that Spain had breached the FET obligation under Article 10(1) of the ECT. In addressing the alleged breach of the FET obligation under the ECT, the tribunal in the Masdar case adopted a nuanced approach that engaged with competing doctrinal views on the formation of legitimate expectations. Masdar argued that the adoption of the disputed regulatory measures led to the dismantling of the RD661/2007 incentive regime, upon which it had relied when making its investments, thereby removing the stability it had reasonably expected. In contrast, Spain invoked the tribunal's reasoning in Charanne v. Spain[30], contending that general legislations or public communications do not give rise to legally protected expectations unless accompanied by explicit and individualized commitments. The tribunal reaffirmed the general principle that States retain the sovereign right to modify their legislation, and that FET does not entail an absolute guarantee of regulatory or economic stability,

29 Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, para. 476.

30 Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012.

unless specific undertakings have been made directly to the investor.[31] Nevertheless, the tribunal emphasized that this regulatory discretion is not without limit and must be exercised consistently with the principle of legitimate expectations. To determine whether Spain breached the principle of legitimate expectations, the tribunal considered the two opposing views from Charanne: the majority required specific commitments, while the dissent accepted general laws if the investor had conducted sufficient due diligence. In Masdar, the tribunal found that the investor had met the due diligence standard and could rely on general law. Additionally, the tribunal identified specific commitments made directly to the investor, concluding that both general and specific assurances had independently created legitimate expectations.[32]

As demonstrated in the two aforementioned cases, the arbitral tribunals affirmed that, when host states modify or terminate preferential FiT schemes for renewable energy, such actions may deprive foreign investors of their legitimate expectations, thereby constituting a violation of the FET obligation. However, regarding the question of what investors can legitimately expect, tribunals have adopted divergent approaches. Under a broader interpretation, investors may reasonably expect a generally stable and predictable regulatory framework, even in the absence of explicit commitments.[33] By contrast, some tribunals apply a narrower view, holding that legitimate expectations can arise only from specific, individualized assurances made by the host state to the investor.[34]

Another important factor in assessing the legitimacy of an investor's expectations in FiT scheme-related disputes is whether the investor conducted proper due diligence. Specifically, in some cases, arbitral tribunals have held that conducting due diligence is a necessary condition for an investor's legitimate expectations to be protected under the FET standard.[35] For example, in Stadtwerke v. Spain, the Tribunal determined

31 Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Final Award, para. 485.

32 Ibidem, para. 520-521.

33 See E.g. Cube v. Spain, para. 388; Eiser v. Spain, para. 382; SolEs v. Spain, para. 313.

34 See E.g. RREEF v. Spain, para. 321; BayWa r.e. v. Spain, para. 472; Infracapital v. Spain, para. 565.

35 Yulia Levashova, "Fair and Equitable Treatment and Investor's Due Diligence under International Investment Law," *Netherlands International Law Review*, 67 (2020): 233-255.

that the evidence presented by the Claimants failed to demonstrate that the Spanish authorities had provided any binding guarantee of fixed or unreduced remuneration for the electricity generated by the Andasol 3 Plant. In evaluating the reasonableness of the investor's expectations, the Tribunal emphasized that a prudent investor, acting with appropriate due diligence, would not have reasonably assumed a legally guaranteed and stable income stream over the entire operational life of the plant. Accordingly, the Tribunal found that the Claimants' expectations lacked both reasonableness and legitimacy, and ultimately dismissed their allegation that Spain had breached the obligation to provide fair and equitable treatment under Article 10(1) of the Energy Charter Treaty.[36]

3.2. Potential Disputes against Vietnam under EVFTA?

Drawing from the experience of the aforementioned cases against Spain, the changes to Vietnam's FiT mechanism for renewable electricity appear to exhibit indicators of a potential breach of the FET standard.

Following the expiration of the FiT mechanisms under Decision No. 13/2020/QD-TTg and Decision No. 39/2018/QD-TTg, foreign investors are expected to face significant challenges in implementing renewable electricity projects in Vietnam, while also being exposed to considerable legal and financial risks. Notably, the short six-month window of the FIT scheme (effective from 22 May 2020 to 31 December 2020) created substantial pressure on developers to obtain land permits and secure critical equipment within an unreasonably tight timeframe, further complicated by supply chain disruptions caused by the Covid-19 pandemic. Investors, aware of the decreasing trend in FIT rates, perceived this program as the final opportunity to benefit from attractive tariffs. This perception, combined with the rushed implementation timeline, could be interpreted as undermining the stability and predictability that underpins legitimate expectations.

Besides, investors reasonably expect that once a FIT policy is announced and investments are committed based on it, the terms will not be subject to sudden or arbitrary change. If the government alters or withdraws these incentives prematurely or without transparent justification, especially

36 Stadtwerke München GmbH, RWE Innogy GmbH, and Others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Final Award, para. 308.

amid ongoing restructuring of the national budget, such actions may constitute a breach of the FET standard and the frustration of legitimate expectations, opening the door to potential ISDS claims. Although Decision No. 21/QD-BCT on Electricity Price Framework for Transitional Solar and Wind Power Projects has addressed the gap in electricity pricing for transitional projects by introducing new tariff ceilings, resolving policy delays, and establishing a clearer regulatory framework-thereby reducing the risk of potential ISDS claims – the decline in investor profitability (as discussed in Part II) remains a persistent concern. This ongoing loss continues to serve as a latent trigger for future claims by foreign investors. Moreover, the pricing negotiation mechanism under PPAs with EVN, as provided for in Decision No. 21, introduces additional legal and commercial risks. This is primarily because, subject to certain exceptions, EVN currently functions as the exclusive off-taker for all renewable energy projects in Vietnam, thus preserving the country's single-buyer electricity market structure. At present, corporate renewable power purchase agreements are not feasible, thereby limiting the bargaining power of investors acting as electricity sellers. Consequently, any attempt to impose fixed tariffs unilaterally may be viewed as arbitrary or potentially unfair.

In addition, in Charanne and Construction Investments v. Spain case, a criterion proposed by the Charrane Award offers investors a framework to persuade a tribunal to reevaluate the measures implemented by the host State. This criterion centers around the principle of proportionality, which the tribunal interprets as a requirement that any alterations in policy or legal frameworks instituted by the government must not be arbitrary or unwarranted.[37] Specifically, these changes should not abruptly and unpredictably strip away the fundamental characteristics of the existing regulatory framework. For example, the expected operational lifespan of solar power plants is typically accepted to be around 30 years, while the useful life of wind farms is generally determined to be approximately 20 years. Therefore, the FiT and policy stability must be upheld over a long-term commitment, as this stability is essential for ensuring ongoing and efficient performance from investors in these sectors. Any unreasonable delays, restrictions, or outright cancellations of the FiT and any changes to the commissioning deadlines necessary to benefit from the FiT could violate the FET standard. However, it should be noted that these are merely

37 Charanne and Construction Investments v. Spain, SCC Case NoV 062/2012, Final Award, para.515.

preliminary indications of potential conflict between foreign investors and the Government of Vietnam. The risk of disputes concerning fair and equitable treatment (FET) ultimately depends on the specific provisions contained in the relevant international investment agreements (IIAs).

Accordingly, when analyzing the actions of the Vietnamese Government related to the FiT mechanism within the scope of the FET standard under the EVFTA (specifically, the EU-Vietnam Investment Protection Agreement, or EVIPA), the legal outcomes may differ from those seen in the Spanish cases. In fact, the provisions of the EVFTA/EVIPA represent a new generation of investment protection standards, and this approach constitutes a significant departure. It could be a revolution from the traditional framework found in agreements such as the Energy Charter Treaty (ECT).[38]

In the Preamble of the EVIPA, the Parties explicitly emphasize that: "This Chapter shall not be interpreted as a commitment from a Party that it will not change its legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits."[39]

This provision is fully consistent with the prevailing trend in international investment arbitration, which recognizes that investors cannot expect absolute legal stability or that the host state's legal system will remain unchanged. For example, in EDF v. Romania, the tribunal held that recognizing an investor's expectation of an "immutable" legal and business environment would unduly restrict a state's right to regulate, and would be incompatible with the normal prerogatives of a sovereign nation.[40] Other provisions in the EVIPA also affirm the host state's right to regulate, in order to ensure a proper balance between investor interests and broader public interests. However, the state's right to change its policies and legal framework is only recognized where such changes are proportionate and reasonable. Therefore, these provisions do not preclude investors from initiating FET claims if government measures modifying investment incentives are found to be unreasonable.

38 See United States-Mexico-Canada Agreement (USMCA), Annex 14-B; see also: Vy Thào Nguyen Ngô, Hy Thái Hoàng Nguyên, Hiền My Xuân Nguyen, "Remarks for European Renewable Energy Investors in Vietnam under EU–Vietnam Investment Protection Agreements" *International Business Law Journal 2020*, No. 5-6 (2020): 667.

39 European Union and the Socialist Republic of Vietnam, EU–Vietnam Investment Protection Agreement (EVIPA), signed June 30, 2019, Preamble; art. 2.2.

40 EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Final Award, para. 217.

Specifically, Article 2.5 of the EVIPA provides that: "Each Party shall accord fair and equitable treatment and full protection and security to investors of the other Party and covered investments in accordance with the Agreement". Article 2.5 further clarifies the types of conduct by a host State that may be alleged to breach the FET obligation, including: (1) a denial of justice in criminal, civil, or administrative proceedings; (2) a fundamental breach of due process in judicial or administrative proceedings; (3) manifest arbitrariness; (4) targeted discrimination on manifestly wrongful grounds, such as gender, race, or religious belief; (5) abusive treatment, including coercion, abuse of power, or similar bad-faith conduct; or (6) a breach of any further elements of the FET obligation adopted by the Parties in accordance with paragraph 3.1. Notably, paragraph 4 of Article 2.5 provides that where the host State makes specific commitments but fails to honor them in a way that frustrates an investor's legitimate expectations, such conduct will be considered a violation of the FET obligation. In other words, arbitrary or abusive measures that defeat legitimate expectations grounded in specific assurances may be alleged as an FET breach under the EVIPA. This approach differs from that of the CPTPP. Under the CPTPP, a Party's action or inaction that does not align with an investor's expectations does not, by itself, constitute a breach of the FET standard-even where the investment suffers loss or damage as a result.[41] Accordingly, foreign investors cannot rely solely on the frustration of their legitimate expectations to establish an FET violation under the CPTPP.

This marks a key point of divergence between the EVFTA/EVIPA approach and that of the CPTPP. Under the CPTPP, a Party's action or inaction that may not accord with an investor's expectations does not, in and of itself, constitute a breach of the FET standard – even where such conduct results in loss or damage to a covered investment. Accordingly, foreign investors cannot rely solely on the frustration of their legitimate expectations to establish a violation by the host State.

In summary, following the termination of Vietnam's FiT scheme, the absence of a standardized pricing model or a model power purchase agreement (PPA) has compelled investors to negotiate directly with EVN on uncertain and inconsistent terms, relying on temporary tariff caps issued by the Ministry of Industry and Trade. These caps are substantially lower than the previously guaranteed FiT rates, thereby undermining

41 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), art. 9.6(4).

the economic viability of projects that were developed, financed, and approved on the assumption of a stable and predictable tariff regime. Against this backdrop, abrupt and unilateral policy reversals, particularly where unaccompanied by clear justification, transparency, or stakeholder consultation, may amount to arbitrary, unreasonable, and disproportionate conduct. Where investments were made in good faith in reliance on the then-applicable legal and regulatory framework, and where those expectations were objectively legitimate, the frustration of such expectations may, under the EVFTA's investment protection chapter, constitute a breach of the FET standard.

4 Recommendations for Policy Reform and Dispute Prevention

Although preliminary warning signs have emerged, Vietnam has not, to date, recorded any formal disputes arising from the changes to the FiT mechanism for renewable electricity. Most disputes in renewable energy projects (e.g., delays, curtailment, or the application of temporary tariffs in lieu of FiT rates stipulated in PPAs) continue to be addressed primarily through internal administrative processes, petitions to state regulators, or negotiated settlements between the parties. In many instances, despite causing actual losses to investors, these disputes have not yet reached the threshold for initiating ISDS proceedings; where they have, the parties remain in pre-arbitration negotiations or are still assessing the feasibility of litigation.

However, assuming that proceedings were brought under the EVFTA (EVIPA), investors would still be more constrained in pursuing damages claims based on alleged FET violations than in, for example, the Spanish cases. The FET clause in the Energy Charter Treaty is often understood to couple notions of "stability" and "fair and equitable treatment" more closely. By contrast, most other investment agreements do not expressly impose an obligation of regulatory stability within their FET provisions, even though some tribunals have recognized that investors may reasonably expect a stable legal environment. As discussed, the EVFTA/EVIPA narrows investors' expectations of absolute legal stability. This reflects

a broader global trend toward recalibrating the balance between investment protection and the host state's right to regulate. While this approach may be viewed as potentially discouraging foreign investment, it is necessary in the context of addressing environmental and climate-change challenges. For a developing country like Vietnam, strengthening the host state's authority to adjust policies and laws to address environmental and economic concerns-including those relating to renewable energy-is essential. Accordingly, the EVFTA/EVIPA approach should be regarded as a foundation for the design of future bilateral and multilateral investment protection agreements.

However, the EVIPA still permits investors to bring claims against the host state for breaches of the FET obligation, where changes to the legal framework are carried out in an arbitrary or unreasonable manner. One of the principal sources of potential FET violations in Vietnam's renewable electricity sector lies in the absence of a clear transitional regime when policies are changed-particularly in the shift from FiT pricing to competitive auctions or negotiated tariffs. Absent transparency, a defined roadmap, and a reasonable justification, such policy adjustments may be deemed arbitrary, disproportionate, and infringing upon investors' legitimate expectations, as recognized in cases such as Stadtwerke München v. Spain[42] and Isolux v. Spain[43]. To avoid similar risks, Vietnam should adopt legally effective transitional provisions that safeguard the rights of existing investors, coupled with a consistent framework for public consultation and policy justification. This is a crucial foundation to ensure that the State's right to regulate does not overstep the limits permitted under international investment agreements, such as the EVFTA and the EVIPA.

5 Conclusion

This paper elucidates Vietnam's transition from a FiT framework to market-based pricing in the renewable energy sector, positioning it as a necessary reform to rectify systemic inefficiencies within the power grid, while

42 Stadtwerke München GmbH, RWE Innogy GmbH, and Others v. Kingdom of Spain, ICSID Case No. ARB/15/1.

43 Isolux Netherlands, B.V. v. Kingdom of Spain, SCC Case No. V2013/153.

also presenting potential avenues for international investment disputes under the EVFTA/EVIPA framework. The analysis underscores that sudden, opaque policy alterations lacking sufficient transitional provisions may affect fundamental investment protection standards-especially FET and the protection of legitimate expectations. A critical legal and policy recommendation emerges: Vietnam must create a transparent, stable, and predictable legal environment, supplemented with robust transitional mechanisms, to balance the state's regulatory prerogatives with investors' legitimate rights. However, this study is constrained to a comparative legal framework, relying on case law from other jurisdictions and not incorporating an in-depth empirical evaluation of the financial implications for investors within Vietnam. Future research should, therefore, broaden its focus to include empirical assessments of renewable energy projects, analyze the perspectives of European investors, and examine the efficacy of alternative dispute resolution mechanisms beyond the ISDS framework.

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