

The Protection of Property Rights under the European Convention on Human Rights and the Promotion of Low-Carbon Investments

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Investors in alternative modes of electricity production that build their business cases on support schemes face the risk that states modify the financial incentives provided by these schemes once investments are made and costs are sunk. Similarly, operators of high efficiency production installations could, in the context of liberalized electricity markets, be confronted with price caps that could prevent them from recovering the higher investment costs of their state-of-the-art equipments. Investors' perception that states could act opportunistically by renegeing on commitments that constitute the financial basis of their low-carbon investments will generate emission reductions at a higher cost than in a guaranteed stable regulatory environment. This paper analyzes the extent to which the right to property in the European Convention on Human Rights offers adequate protection against such potential opportunistic interferences of states. It argues that, although the ECHR does not provide investors with absolute guarantees against these interferences, it creates essential procedural safeguards that prevent states from imposing most costs of emission reductions on private investors. This, in turn, contributes to the increased efficiency of climate change policies.

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Introduction

World-wide a huge amount of investments is required to reorient the energy sector towards more climate friendly patterns. In the electricity sector, alternative modes of electricity production, such as renewable energy sources and high efficiency combined heat and power, must be developed to meet the challenge of climate change mitigation. Moreover, considerable capital is needed to modernize traditional power plants and so improve the energy efficiency of the electricity production sector.

Given the insufficient internalization of the CO₂ externalities in the electricity prices, states have created incentives to stimulate private investors to develop these low-carbon investments.¹ In this respect, support schemes for alternative modes of electricity production aim to enable the financial viability of technologies that are, in the current market conditions, not yet profitable. Comparably, the flexible mechanisms of the Kyoto Protocol² offer to investors additional incomes to cover the higher costs of emission reduction projects that would not have been realized without this support. In addition to this support under the national or international climate (and renewable energy) regulations, states have implemented liberalization and privatization policies to attract private capital in the modernization of the electricity sector.

Market players that commit investments in renewable energy or improved energy efficiency build their business cases on the basis of these policies and promises of support. They, therefore, rely on the faithful implementation of these commitments by the states. Investors in alternative modes of electricity production expect to receive public support in accordance with the schemes existing at the moment of investing. Participants to the flexible mechanisms of the Kyoto Protocol count on an amount of emission credits

¹ The notion of “low-carbon” investments within the meaning of this paper refers to investments in the modernization (or improved energy efficiency) of electricity production, investments in electricity production on the basis of renewable energy sources and high efficiency combined heat and power. It also refers to greenhouse gas emission reduction projects implemented under the flexible mechanisms of the Kyoto Protocol.

² Signed on 11 December 1997 and entered into force on 16 February 2005.

corresponding to the verified emission reductions that are generated by their approved projects. Investors in liberalized electricity markets rely on the fact that they will be able to recoup the higher (investment) costs of their state-of-the-art power plants by charging higher electricity prices.

However, given the financial consequences of these policies for the state budget and for consumers, states may be tempted to renege on these promises once the needed investments have been made and costs are “sunk”.³ They may modify or even withdraw the promised public support. States may also be reluctant to issue emission credits or refuse to transfer them to private foreign investors. Moreover, public authorities may introduce limits (caps) to the market price of electricity (and capacity) to shield residential and industrial consumers from price increases.

Investments in electricity production are highly capital-intensive and require long pay-back times. Investors in this sector are, therefore, highly averse to changes of the “rules of the game” that may affect the profitability of their investments.⁴ They generally internalize their perceptions of risks of fundamental regulatory changes by adding a risk premium, which increases the required return on investment⁵ and reduces the flow of investments.⁶

³ See D Helm, C Hepburn and R Mash, ‘Credible Carbon Policy’ (2003) 19 *Oxford Review of Economic Policy* 438 at 440. E Aisbett, ‘Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation’ (2007) 2255 *Munich Personal RePEc Archive Paper* 1 at 5, available online at <http://mpira.ub.uni-muenchen.de/2255>. See also M Bergara, W Henisz and P Spiller, ‘Political Institutions and Electric Utility Investment: A Cross-Nation Analysis’ (1997) *POWER* 1, at 3.

⁴ See Joint Paper by the Energy Charter Secretariat and the International Energy Agency presented to the 1998 G8 Energy Ministerial in Moscow. See also EURELECTRIC, *Ensuring Investments in a Liberalized Electricity Sector* (Brussels: EURELECTRIC, 2004), p. 55.

⁵ Or by further discounting the value of future returns. See J Guasch and P Spiller, *Managing the Regulatory Process: Design, Concepts, Issues, and the Latin American and Caribbean Story* (Washington DC: The World Bank, 1999); S Banerjee, J Oetzel and R Ranganathan, ‘Private Provision of Infrastructure in Emerging Markets: Do Institutions Matter?’ (2006) 24 *Developments Policy Review* 175.

⁶ See K Neuhoff and L De Vries, ‘Insufficient Incentives for Investment in Electricity Generations’ (2004) 12 *Utilities Policy* 253 at 264.

For this reason, it can be argued that the perception of risks of *ex post* interferences of the states with low-carbon investments, and in particular with their financial basis, negatively affects the development of these projects.⁷ By contrast economic and financial theory might suggest that a guarantee of protection against these risks might reduce the required returns and thus stimulate the penetration of these investments.⁸

The Kyoto Protocol, as well as most national climate and electricity laws, does not contain an investment regime explicitly protecting low-carbon investments from harmful *ex post* interventions of the states. In the absence of such climate related investment regime, this contribution examines whether the European Convention on Human Rights could offer adequate protection against state interferences with the financial basis of low-carbon investments. In particular, it looks at the protection of property under Article 1 of the First Additional Protocol (Part 2) and at the protection against discrimination under Article 14 of the Convention (Part 3). Before that, it examines into more detail what type of interferences of the state could affect low-carbon investments (Part 1).

1. Potential *ex post* interferences of the state with low-carbon investments⁹

Considerable risks of *ex post* interferences by the state are inherent in the mechanisms developed nationally and internationally to promote low-carbon investments. Indeed, they characterize the liberalization processes of the energy sector that aim to improve the efficiency of energy production. They constitute a major concern for investors

⁷ See S Frankhauser and L Lavric, 'The Investment Climate for Climate Investments: Joint Implementation in Transition Countries', *Working Paper no 77 European Bank for Reconstruction and Development* (2003), available online at <http://www.ebrd.com/pubs/econo/wp0077.pdf>. See also A Cosbey *et al*, *Clean Energy Investment – Project Synthesis Report* (Winnipeg: IISD, 2008), p. 14; B. Brandzaeg and S Hansen, *Barriers to Investment in the Power Sector in Developing Countries – Power Sector Task Force Annex B* (Econ Analysis Nordic Consulting Group, 2005).

⁸ Anex considers that 'to provide a reasonable rate of return, the governments (...) must take steps to reduce the risk of investment (...) to the point where investment risk is justified by potential return.' R Anex, R Anex, 'Restructuring and Privatizing Electricity Industries in the Commonwealth of Independent States' (2002) 30 *Energy Policy* 397, at 407.

⁹ This part is largely based on A Boute, "The Potential Contribution of International Investment Protection Law to Combat Climate Change" X (2009) *Journal of Energy and Natural Resources Law* xx, at xx-xx.

implementing renewable energy projects on the basis of national support schemes. And they can be identified in the flexible mechanisms of the Kyoto Protocol.

1.1. Risks for investors that participate to the modernization of the electricity sector in a liberalized market

Reforms of their energy sector have often been initiated in order to attract private investors and to improve the (energy) efficiency of their energy industry.¹⁰ Most experience has been accumulated in the privatization and liberalization of the electricity market.¹¹

These reforms have created new regulatory structures to replace the central and monopolistic organization with market driven decision-making.¹² The liberalization of the electricity sector is based on the unbundling of the natural monopoly infrastructure (transmission, distribution) from the competitive activities (generation, supply).¹³ The underlying reasoning is that introducing market forces would increase the investment attractiveness of this industry and stimulate market players to improve energy efficiency.¹⁴ This reasoning, for instance, underlies the reform of the Russian electricity market. In accordance with the Resolution of the Government of the Russian Federation

¹⁰ C. von Hirschhausen and T Wälde, 'The End of Transition: An Institutional Interpretation of Energy Sector Reform in Eastern Europe and the CIS' (2001) 11 *MOCT-MOST* 91; C von Hirschhausen and P Opitz, 'Power Utility Re-Regulation in Eastern European and CIS Transformation Countries (1990-1999): An Institutional Interpretation' (2001), <http://ideas.repec.org/p/diw/diwwpp/dp246.html>. Anex considers that '[t]he principal reasons for privatizing electric power are to attract needed investment, to increase efficiency, and to rationalize resource allocation.' R Anex, *op cit*, at 407.

¹¹ R Bacon and J Besant Jones, 'Global Electric Power Reform, Privatization and Liberalization of the Electric Power Industry in Developing Countries' (2001) 26 *Annual Review of Energy and Environment* 331.

¹² X Yi-chong, 'The Myth of the Single Solution: Electricity Reforms and the World Bank' (2006) 31 *Energy* 802, at 804-805. See also J H Williams and R Ghanadan, 'Electricity Reform in Developing and Transition Countries: A Reappraisal' (2006) 31 *Energy* 815.

¹³ *Ibid.*

¹⁴ Alternative reform models include the promotion of independent power projects (IPP) within centrally controlled electricity systems. H Inadomi, *Independent Power Projects in Developing Countries - Legal Investment Protection and Consequences for Development*, PhD in Law, University of Oslo, 2007; E Woodhouse, 'The Obsolescing Bargain Redux? Foreign Investment in the Electric Power Sector in Developing Countries' (2006) 38 *International Law and Politics* 121.

No. 526 of 11 July 2001 on Restructuring the Electric Power Industry of the Russian Federation ‘[t]he qualitative increase of the energy efficiency and the improvement of the investment climate in the electricity sector are not possible without (...) implementing a structural reform of the electricity sector. (...) The strategic task of the reform is the reorganization of [this] sector (...) on the basis of market principles’.¹⁵

The confidence of investors participating in electricity reform initiatives has often been frustrated by fundamental changes of the regulatory structure and unexpected governmental interference affecting the returns of their investments. One risk faced by an investor in the electricity sector is the risk of interference with electricity (and capacity) pricing. Investments in energy efficient (or state-of-the-art) installations generate higher investment costs. Their financial viability thus often requires higher electricity (and capacity) prices. Moreover, in liberalized electricity markets, the returns on investments usually depend on increased electricity prices during scarcity periods. However, governments may seek to prevent such price increases for (short-term) social, economic and political reasons.¹⁶ Politicians tend to protect the competitiveness of the domestic (strategic) industry and the immediate social concerns of the population. The attempt of policymakers to ‘smooth out volatility’¹⁷ is therefore almost irresistible.¹⁸ Standard and Poor’s, for instance, considers that power generation companies in the Russian electricity sector are ‘highly exposed to the risks of political interference, including implicit price controls.’¹⁹ Fitch considers that ‘[i]n Russia as elsewhere, affordable power supply tends to be viewed as a fundamental (quasi-political) right. Even in the most liberalized markets, sustained spikes in wholesale power prices raise the specter of government intervention as the public and business react.’²⁰ The perception that the government will

¹⁵ Author’s translation from Russian.

¹⁶ R Anex, op cit, at 407.

¹⁷ Ibid, at 45.

¹⁸ G Brunekreeft and T McDaniel, ‘Policy Uncertainty and Supply Adequacy in Electric Power Markets’ (2005) 21 *Oxford Review of Economic Policy* 111, at 125.

¹⁹ Standard and Poor’s, *Why Russia’s Power Sector Restructuring Presents Governance and Minority Shareholder Risks* (2008), www.standardandpoors.com/ratingsdirect, p. 7.

²⁰ FitchRatings, *The Russian Power Generation Landscape 2008* (2008), www.fitchratings.com, p. 2.

meet these short-term political considerations by capping electricity prices is likely to discourage investors.²¹ Therefore, this potential political interference jeopardizes the efficient attainment of the reform objectives, *i.e.* attracting private capital to aid in the modernization (and improved energy efficiency) of the sector.

In general, investors will negatively evaluate the risk of unjustified and unexpected changes in the host state tariff policy. Indeed, in electricity markets that are yet to be liberalized, the return on investment depends on regulated electricity prices. Before committing their investments, private investors will usually seek assurances from public authorities as to future tariff policy. Host countries will however be tempted to renege on their commitments.²² Changes to pricing policy can be expected to negatively affect the profitability of the concerned investments and discourage (foreign) private investors.²³

1.2. Risks of changes or withdrawal of national support schemes for alternative modes of electricity production

The failure to internalize carbon externalities in the current electricity prices means that the financial viability of investments in alternative modes of electricity production often depends on public support.²⁴

This support can be granted by creating a system of ‘green certificates’, ‘feed-in tariffs’ or by granting investment aid or fiscal advantages to electricity producers using

²¹ See EURELECTRIC, *Ensuring Investments in a Liberalised Electricity Sector*, op cit, at 54. See also K Neuhoﬀ and L De Vries, op cit, at 264; F Roques, ‘Market Designed for Generation Adequacy: Healing Causes Rather Than Symptoms’, (2008) 16 *Utilities Policy* 171, at 175.

²² T Wälde, ‘Treaties and Regulatory Risk in Infrastructure Investment’, *Journal of World Trade* (2000) 34 1, at 5.

²³ A Sharma and E Vohra, ‘Foreign Direct Investment in the Electricity Sector: The Indian Perspective’ (2008) 21 *The Electricity Journal* 63, at 73-74.

²⁴ The World Bank, *Clean Energy and Development: Towards an Investment Framework*, 2006, p. 21, [http://siteresources.worldbank.org/DEVCOMMINT/Documentation/20890696/DC2006-0002\(E\)-CleanEnergy.pdf](http://siteresources.worldbank.org/DEVCOMMINT/Documentation/20890696/DC2006-0002(E)-CleanEnergy.pdf).

renewable energy sources.²⁵ Under feed-in tariff schemes, the electricity generated from renewable or high-efficiency cogeneration installations is paid a fixed minimum price. This minimum purchase price is generally set higher than the market price and guaranteed over a specified duration of time. Under certificate schemes, regulatory authorities deliver tradable certificates for each MW of electricity generated from renewable energy sources or high-efficiency cogeneration units. The value of such certificates is created by obliging electricity suppliers to submit a certain amount of certificates to the regulatory authorities. This amount is generally determined in proportion to their supplies of electricity to final consumers. Suppliers that fail to meet this quota-obligation are fined. A secondary market for certificates is created where eligible producers and suppliers with too many certificates can sell their certificates to others market players.

Investments based on such support schemes will have to rely on the faithful and sustainable implementation of the promised aid. However, the implementation of such support schemes in the European Union suggests that these policies also entail important risks of regulatory change and that the perception of such changes will have a negative impact on investment decisions.²⁶ Indeed, recent analyses of the effectiveness of support schemes for renewable energies implemented in the enlarged European Union show that the Member States have introduced fundamental changes in their policy framework.²⁷ These changes have generated high investment uncertainty and negatively affected the investment decisions in this sector.²⁸ For instance, Latvia's policy in the field of

²⁵ Communication of the European Commission COM(2005) 627 final of 7 December 2005 on The Support of Electricity from Renewable Energy Sources, pp. 4-5.

²⁶ R Katofsky and L Frantzis, 'Financing Renewables in Competitive Electricity Markets' (2005) 109 *Power Engineering* 76, at 76.

²⁷ M Ragwitz et al., *OPTRES- Assessments and Optimization of Renewable Energies Support Schemes in the European Electricity Market-Final Report* (Intelligent Energy Europe, 2007), p. 34-37, www.optres.fhg.de/OPTRES_FINAL_REPORT.pdf; N H van der Linden, et al., *Review of International Experience with Renewable Energy Obligation Support Mechanisms*, (Petten: Energieonderzoek Centrum Nederland, 2005), p. 18, 29, 37, 48, 55 and 56.

²⁸ The OPTRES-interim report considers that "[a] financial change of the system has been performed in a number of markets in the past and has led to drastic consequences on the RES development, e.g. in Denmark". M Ragwitz et al., *Interim Report of the Project OPTRES*, 2006, p. 77-78,

renewable electricity has been characterized by ‘frequent policy changes and short duration of guaranteed feed-in tariffs [which resulted] in high investment uncertainty’.²⁹ In the case of the Slovak Republic, the analysis considers that the ‘lack of longer-term certainty in the past [has] made investors very reluctant’³⁰ to invest. By contrast, Slovenia’s ‘relatively stable tariffs combined with long-term guaranteed contracts makes the system quite attractive to investors’.³¹

Indeed, from an investor's perspective, ‘a financial change of the support system is considered the most important risk factor’ for investments in renewable energy³² since the level of support is the most important element influencing the expected profit.³³ Based on interviews with stakeholders in the renewable energy business, analysts concluded that:

“developers of renewable energy projects consider the stability of the support instrument to be the most important factor for the scheme’s success, regardless of the type of support scheme involved. Whether a feed-in tariff based support system, a quota obligation scheme or a tax incentive is concerned, creating a framework which ensures long-term stability is needed to attract investors and project developers (...).”³⁴

The European Commission acknowledged that:

“[o]ne of the main concerns with national support schemes is any stop-and-go nature of a system. Any instability in the system creates high investment risks

www.optres.fhg.de/results/OPTRES_D5_INTERIM_REPORT.pdf. See also N H van der Linden, et al., op cit., p. 55; D de Jager and M Rathmann, *Policy Instrument Design to Reduce Financing Costs in Renewable Energy Technology Projects*, (Utrecht: Ecofys, 2008), p. 8 and 119.

²⁹ M Ragwitz et al, op cit, at 19.

³⁰ Ibid.

³¹ Ibid, at 21.

³² Ibid, at 77. See also Communication of the European Commission COM(2005) 627, op cit, at 16-17.

³³ M Ragwitz et al, op cit, at 77.

³⁴ Ibid, p. 21.

(...). Thus, the system needs to be regarded as stable and reliable by the market participants in the long run in order to reduce the perceived risks.”³⁵

The success of a support scheme would thus depend on the “credibility of the public authority’s long-term commitment”.³⁶ It can however be argued that gaining this credibility by minimizing investors’ perceptions of ex post regulatory adjustments is a difficult task. The fear is that, once investments are made, public authorities will be tempted to reconsider their commitments.³⁷ Indeed, according to Finon and Perez:

“[t]he public authority is not committed in the regulatory contract as much as the developers-operators who invest money in [renewable energy sources] RES-E projects; this opens the door to discretionary changes in the contract. The possible government’s opportunism, exerted in unforeseeable amendments of the design of the instruments or by willing to change the instrument, creates a risk of expropriation of quasi-rents on existing RES-E plants or current RES-E investments, and this risk can be a strong deterrent against investing in RES-E”.³⁸

³⁵ Communication of the European Commission COM(2005) 627 final of 7 December 2005 on The Support of Electricity from Renewable Energy Sources, pp. 16-17. As regards support schemes for high-efficiency cogeneration, Recital 30 of Directive 2004/8/EC on High-Efficiency Cogeneration provides explicitly that “[w]ithin the purpose of this Directive to create a framework for promoting cogeneration it is important to emphasise the need for a stable economical and administrative environment for investments in new cogeneration installations. Member States should be encouraged to address this need [...] by avoiding frequent changes in administrative procedures etc.” As regards support schemes for renewable electricity production, Art. 4 of Directive 2001/77/EC of 27 September 2001 on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market, OJ 27.10.2001 L283/33 enjoins the European Commission to foresee transition periods of at least seven years and “maintain investors confidence” in case it would present a harmonised European support scheme. Gunst, ‘Impact of European Law on the Validity and Tenure of National Support Schemes for Power Generation from Renewable Energy Sources’, *Journal of Energy and Natural Resources Law* 23 (2005), at 116-119

³⁶ D Finon and Y Perez, “The Social Efficiency of Instruments of Promotion of Renewable Energies : A Transaction-cost Perspective” 62 (2007) *Ecological Economics* 77, at 83.

³⁷ See D Helm, C Hepburn and R Mash, ‘Credible Carbon Policy’ (2003) 19 *Oxford Review of Economic Policy* 438 at 440. See also Petterson, ‘Investing in Renewables: Can We Trust the Subsidies?’, presentation given at the Energy Forum conference on Investing and Financing Long Term Power Supply (2006).

³⁸ *Ibid*, at 83.

For instance, the host country could refuse to pay or diminish the amount of the promised feed-in tariffs. In countries with green certificates schemes, the host country could refuse to issue the certificates or issue fewer certificates than expected according to the rules existing at the moment of investing. It could also diminish the quota thereby depressing the price for the green certificates. These concerns will increase the risk premium and thus societal costs associated with renewable energy investments.³⁹ A contrario, a stable investment climate is important to “lower the societal transfer of costs of RES-E support due to the lower risk premium.”⁴⁰

1.3. Joint Implementation

Joint Implementation (JI), defined in Article 6 of the Kyoto Protocol, refers to the implementation by Annex I Parties (*i.e.* states with CO₂ emission reduction obligations) of project activities that reduce greenhouse gas emissions in other Annex I Parties.⁴¹ Projects qualify as JI and are entitled to emission credits (also known as Emission Reduction Units or ERUs) if they generate emission reductions that are “additional” to any that would otherwise occur.

³⁹ A Johnston, A Kavali and K Neuhoff, “Take-or-pay Contracts for Renewables Deployment” 36 (2008) *Energy Policy* 2481, at 2482; L Butler and K Neuhoff, “Comparison of Feed-in Tariff, Quota and Auction Mechanisms to Support Wind Power Development” 33 (2008) *Renewable Energy* 1854, at 1854 and 1864; S Jensen and P Morthorst, “Support Schemes and Risk Premiums for Renewable Energy Technologies”, IAEE International Conference, 2008, Istanbul. See also Deutsche Bank Climate Change Advisors, *Global Climate Change Policy Tracker: an Investor’s Assessment*, October 2009, www.dbadvisors.com/deam/stat/globalResearch/1113_GlobalClimateChangePolicyTrackerExecSummary.pdf, considering that “investors face legislative and regulatory risks that raise the cost of capital required to finance renewable energy deployment”, p. 12.

⁴⁰ M Ragwitz, OPTRES, *op cit.*, p. 193. According to de Jager and Rathmann, “[r]educing actual and perceived risks for market actors results in lower financing costs for renewable energy technologies. (...) Commitment, stability, reliability and predictability are all elements that increase confidence of market actors, reduce regulatory risks, and hence significantly reduce cost of capital and overall societal cost.” D de Jager and M Rathmann, *op cit.*, p. 119; O Langniss (ed.), *Financing Renewable Energy Systems* (Stuttgart, DLR, 1999), p. 112; C Mitchell, D Bauknecht and P M Connor, “Effectiveness through Risk Reduction: A Comparison of the Renewable Obligation in England and Wales and the Feed-in System in Germany”, 34 (2006) *Energy Policy* 297, at 297 and 305; D Finon and Y Perez, *op cit.*, at 91.

⁴¹ See C Streck, ‘Joint Implementation: History, Requirements and Challenges’, in D Freestone and C Streck (eds.), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms - Making Kyoto Work* (Oxford University Press, 2005) 107, at 108.

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If a host Party meets certain eligibility requirements⁴², it may, under the so-called ‘Track 1 procedure’, itself verify the additionality of emission reductions and issue a corresponding amount of ERUs.⁴³ ERUs are generated by converting Assigned Amount Units (AAUs).⁴⁴

If a host Party does not meet these requirements, the ‘Track 2 procedure’ applies: emission reductions must be verified through the verification procedure under the JI Supervisory Committee.⁴⁵ Under this procedure, Accredited Independent Entities (AIEs)⁴⁶ determine whether a project activity and the ensuing emission reductions meet the relevant requirements of Article 6 and the Guidelines for its implementation.⁴⁷ Along the same lines as the Clean Development Mechanism (CDM) project cycle, these guidelines provide that project participants shall submit a PDD to an AIE outlining the additionality of the project activity in relation to a baseline.⁴⁸ The AIE shall determine whether the project activity complies with this additionality requirement and has an appropriate baseline and monitoring plan.⁴⁹ Moreover, the AIE shall confirm that the project activity has been approved by the Parties involved (Letter of Approval). The emission reductions must be monitored by the project participants in accordance with the monitoring plan. The amount of emission reductions is finally determined by the AIE.⁵⁰

⁴² In accordance with para. 21 of the Guidelines for the implementation of Article 6 of the Kyoto Protocol (Decision 9/CMP.1, FCCC/KP/CMP/2005/8/Add.2), an Annex I Party is eligible to transfer and/or acquire ERUs if: (a) It is a Party to the Kyoto Protocol; (b) Its assigned amount has been calculated and recorded; (c) It has in place a national system for the estimation of anthropogenic greenhouse gas emissions; (d) It has in place a national registry; (e) It has submitted annually the most recent required inventory, including the national inventory report and the common reporting format; (f) It submits the supplementary information on assigned and makes any additions to, and subtractions from, assigned amount.

⁴³ See para. 23. of the Guidelines for the implementation of Article 6 of the Kyoto Protocol.

⁴⁴ The allowances allocated to the Annex I countries corresponding to their greenhouse gas emission limits.

⁴⁵ See *Ibid*, para 24.

⁴⁶ Their role is thus similar to the role of DOEs within the CDM. AIEs shall be accredited by the JI Supervisory Committee. See para. 3, b and c of the Guidelines for the implementation of Article 6 of the Kyoto Protocol.

⁴⁷ See Guidelines for the implementation of Article 6 of the Kyoto Protocol.

⁴⁸ See para. 31 of the Guidelines for the implementation of Article 6 of the Kyoto Protocol.

⁴⁹ See *ibid*, para. 33.

⁵⁰ See *ibid*, para 37.

The risks related to the issuance of ERUs for JI projects implemented under the JI ‘Track 2 procedure’ are relatively limited.⁵¹ Indeed, these credits are issued by an international body, the JI Supervisory Committee. Nevertheless, some authors have argued that host countries could still affect such projects by exercising influence on the AIE.⁵² This could for instance have an impact on the certification of the amount of emission reductions achieved by the project activity and thus the amount of ERUs issued. Host country pressure on the AIE could also affect the renewal of the project beyond the first crediting period.

The risks for JI projects implemented under the ‘Track 1 procedure’ may be more important. Under this procedure, the discretionary power of the host country is much broader given its central role in the issuance of ERUs. Risks can, among others, arise from changes in the baseline and the calculation of the emission reductions.⁵³ In addition, the host country could find it impossible to transfer the emission credits because of its failure to comply with the JI eligibility criteria.⁵⁴ Moreover, there is the risk that the host country might refuse to transfer ERUs that have been issued notwithstanding commitments included in the Letter of Approval.⁵⁵

The perception of these risks will affect the returns of the concerned projects. According to Wilder, Willis and Guli, ‘the greater the risk involved in purchasing Emission

⁵¹ See D Ratliff, ‘Arbitration in ‘Flexible-Mechanism ‘Contracts’ in D Freestone and C Streck (eds.), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms - Making Kyoto Work* (Oxford University Press, 2005) 377, at 383.

⁵² D Ratliff, *op cit*, at 383. Ratliff considers that ‘[o]nly the CDM executive Board can issue CERs, but the host country could affect the means of producing them and exert influence on the verifier and DOE, resulting in indirect or ‘creeping’ expropriation.’ See also C Brown, ‘The Settlement of Disputes Arising in Flexibility Mechanism Transactions under the Kyoto Protocol’ (2005) 21 *International Arbitration* 361, at 376-380.

⁵³ C Streck, ‘World Bank Carbon Finance Business: Contracts and Emission Reductions Purchase Transactions’, in D Freestone and C Streck (eds.), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms - Making Kyoto Work* (Oxford University Press, 2005) 355, at 369.

⁵⁴ *Ibid.* See also Morgan, ‘Carbon Trading under the Kyoto Protocol: Risks and Opportunities for Investors’ (2006) 18 *Fordham Environmental Law Review* 151, at 168.

⁵⁵ A Pogány, ‘Negotiating a JI Contract: A Project Developer’s Perspective’, in D Freestone and C Streck (eds.), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms - Making Kyoto Work* (Oxford University Press, 2005) 329, at 331.

Reductions, the lower the price that a purchaser will be willing to pay and the stricter to conditions it will endeavor to place on the seller.⁵⁶

1.4. Credibility of climate policy and the attraction of investments

Low-carbon investments face potential interferences of the state with the public support mechanisms and regulatory commitments that often enable the financial viability of these investments. These interferences can thus seriously jeopardize their business case.

In transition economies, the impact of these risks of *ex post* interventions is exacerbated due to the investors' perception of the instability of the investment climate.⁵⁷ Transition economies are often characterized by the necessity to complete the creation of the basic institutions of a market economy.⁵⁸ Respect for the rule of law, effective enforcement of contractual rights and security of property rights still need to be further developed. The weak institutional and administrative capacity of these states, accompanied by corruption, as well as history of regulatory changes, expropriations and repeated failures to honor commitments, all negatively impacts the ability to attract capital.⁵⁹

On the other hand, the same countries are characterized by a huge potential for (relatively cheap) greenhouse gas emission reductions. High energy intensity and an obsolete energy infrastructure generate much bigger cost-efficient energy savings than in developed countries. Thus there appears to be a negative correlation between the potential for

⁵⁶ M Wilder, M Willis and M Guli, op cit, at 310.

⁵⁷ M Jamison, L Holt and S Berg, 'Measuring and Mitigating Regulatory Risk in Private Infrastructure Investment' (2005) 18 *The Electricity Journal* 36, at 37. See also A Estache and M Pinglo, 'Are Returns to Private Infrastructure in Developing Countries Consistent with Risks since the Asian Crisis?' (2004) *World Bank Policy Research Working Paper Number 3373*; B Brandzaeg and S Hansen, *Barriers to Investments in the Power Sector in Developing Countries*, 2005, p. 19, www.norad.no/default.asp?FILE=items/3538/116.

⁵⁸ T Wälde, 'Treaties and Regulatory Risk in Infrastructure Investment', op cit, at 6.

⁵⁹ A Seck, 'Investing in the Former Soviet Union's Oil Industry: The Energy Charter Treaty and its Implications for Mitigating Political Risk', in T Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment and Trade*, (London/The Hague/Boston: Kluwer International Law, 1996) 110, at 110-111.

emission reductions and the quality of the general investment climate.⁶⁰ This could prevent the realization of the emission reduction potential in these countries or generate them at a much higher societal cost.

The attractiveness of states for low-carbon investments depends not only on their potential for relatively cost-efficient emission reductions but also on their ability to convince investors of the credibility of their regulatory and policy framework governing these investments.⁶¹ In Stern's words, 'credibility' refers to the 'belief that the policy will endure, and be enforced'.⁶² Regulatory changes must be avoided as much as possible. Investors must be confident that, once irreversible investments are made, the government will not act opportunistically by adapting the rules or reneging on commitments.⁶³ The failure to offer credible guarantees may generate much higher societal costs for international efforts to combat climate change.

Can the European Convention on Human Rights offer necessary credible guarantees? Part 2 analyzes the protection of the right to property offered under Article 1 of the First Additional Protocol. Part 3 examines the protection provided under Article 14 of the Convention against discrimination in connection to the right to property.

2. The protection of property rights under Article 1 of the First Additional Protocol

⁶⁰ S Fankhauser and L Lavric, op cit, at 1. See also K Kulovesi, 'The Private Sector and the Implementation of the Kyoto Protocol: Experiences, Challenges and Prospects' (2007) 16 *Review of European Community and International Environmental Law* 145, at 150. In the same sense, see T Wälde, 'Treaties and Regulatory Risk in Infrastructure Investment', op cit, at 7.

⁶¹ Fankhauser and Lavric argue that '[u]nder the Kyoto Protocol, transition countries are expected to become important players in the emerging market for greenhouse gas emission reductions, as they can reduce emissions at a relatively low cost. However, the attractiveness of the region as a supplier of emission reductions will not only depend on its cost advantage. It will also rely heavily on the business climate offered to carbon investors. Factors like a well-functioning legal and regulatory system, economic and political stability and the capacity to process emission reduction projects efficiently will be key.' S Fankhauser and L Lavric, op cit, at 1.

⁶² N Stern, op cit, at 325.

⁶³ C Hepburn, 'Regulation by Prices, Quantities, or Both: A Review of Instrument Choice' (2006) 22 *Oxford Review of Economic Policy* 226 at 233-234. See also D Helm, C Hepburn and R Mash, op cit, at 440. C Kirkpatrick, D Parker and Y-F Zhang, 'Foreign Direct Investment in Infrastructure in Developing Countries: Does Regulation Make a Difference?' (2006) 15 *Transnational Corporations* 143 at 153.

Art. 1 of the First Additional Protocol to the European Convention on Human Rights provides that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”⁶⁴

Art. 1 of the First Additional Protocol contains three rules. First, it protects “possessions” against expropriatory measures. Second, it subjects the right of states to implement measures that do not amount to expropriations, but control the use of property, to certain conditions. More generally, it establishes a general “right to property” that offers protection against any illegitimate interference with the substance of property.

Before examining if the potential interventions of the state with low-carbon investments that have been highlighted above can be qualified as such interferences, it must be analyzed if these interventions affect “property” or “possessions” within the meaning of Article 1 of the First Additional Protocol. This part starts by analyzing this question (2.1) and turns thereafter to the qualification of these interventions as expropriations, control of the use of property or interferences with the substance of property (2.2). It finally

⁶⁴ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 20 March 1952 (hereafter the ‘First additional Protocol to the ECHR’); Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November 1950 (hereafter the ‘European Convention on Human Rights’) available at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm> (hereafter the ‘ECHR’).

examines if such interferences could be legitimated under the conditions set by Article 1 of the First Additional Protocol (2.3).

2.1. Possessions

What does constitute "property" or "possessions" within the meaning of Article 1 of the First additional Protocol to the ECHR? And do electricity prices, support schemes for green electricity and support under joint implementation schemes fall within the scope of this provision?

In accordance with the case-law of the European Court for Human Rights, the notion of "possessions" has a broad meaning.⁶⁵ It is not limited to the ownership of movable and immovable material goods.⁶⁶ But also encompasses other corporeal and incorporeal rights and interests⁶⁷, such as company shares⁶⁸, intellectual property⁶⁹, patrimonial rights⁷⁰ and contractual rights⁷¹. Moreover, it does not only cover private ownership rights, but extends to public benefits and entitlements.⁷² So, the right to social security benefits⁷³,

⁶⁵ A Grgić, et al., "The Right to Property under the European Convention on Human Rights – A Guide to the Implementation of the European Convention on Human Rights and its Protocols", (Strasbourg: Council of Europe, 2007), p. 7; P T Orebech, "From Diplomatic - to Human Rights Protection: The Possessions under the 1950 European Human Rights Convention, First Additional Protocol Article 1", 43 (2009) *Journal of World Trade* 59, at 64; A R Çoban, "Protection of Property Rights within the European Convention on Human Rights", (Aldershot: Ashgate, 2004), p. 145; Y Haeck, "Artikel 1 Eerste Protocol – Recht op Bescherming van de Eigendom", in J vande Lanotte and Y Haeck (eds.), *Handboek EVRM - Deel 2 - Artikelsgewijze Commentaar* (Antwerp, Oxford: Intersentia, 2004), 295, at 318; Heringa, 'Artikel 1 Eerste Protocol EVRM: het eigendomsrecht', in Heringa (ed.), *Eigendom in het milieurecht*, Centrum voor omgevingsrecht en Beleid/NILOS, Utrecht, p. 19.

⁶⁶ *Wiggins v. the United Kingdom*, App. No. 7456/76, Decision of the Commission on the Admissibility, 8 February 1978.

⁶⁷ *Beyeler v Italy*, Application No. 33202/96, Judgment of 5 January 2000, para. 100.

⁶⁸ *Bramelid and Malmström v. Sweden*, App. No. 8588/79 and 8589/79, Decision of the Commission on the Admissibility, 12 October 1982.

⁶⁹ *Anheuser-Busch Inc v Portugal*, App. No. 73049/01, Judgment of 11 January 2007, para. 66.

⁷⁰ *Marckx v Belgium*, App. No. 6833/74, Judgment of 13 June 1979, para 52.

⁷¹ *A, B and Company AS v Germany*, No. 7742/76, Decision of the Commission on the Admissibility of 4 July 1978.

⁷² P T Orebech, op cit., at 65.

⁷³ *Stec and others v the United Kingdom*, App No. 6573/01 and 65900/01, Admissibility Decision of 6 July 2005, para. 54; *Gaygusuz v Austria*, App No. 17371/90, Judgment of 16 September 1996, para. 41.

pecuniary claims against public authorities⁷⁴, licenses⁷⁵, permits⁷⁶ and other public rights (such as fishing⁷⁷ or hunting⁷⁸ rights) were considered as possessions. In sum, the notion of “possessions” encompasses every right or interest having a patrimonial or economic value.⁷⁹

These interests or rights must be “sufficiently established” to attract the guarantees of Article 1 of the First Additional Protocol.⁸⁰ Thus, this provision does not ensure the right to acquire possessions⁸¹ and does not protect the mere speculation⁸² or “hope of recognition of a property right”.⁸³ It only applies to “existing possessions”. Or to “assets, including claims, in respect of which the applicant can argue that he or she has at the least a “legitimate expectation” of obtaining effective enjoyment of a property right.”⁸⁴ The concept of “legitimate expectations” can only come into play if there is a sufficient basis

⁷⁴ *Pressos Compania Naviera v. Belgium*, App. No. 17849/91, Judgment of 20 November 1995, para. 31.

⁷⁵ *Tre Traktörer Aktiebolag v Sweden*, App. No. 10873/84, Judgment of 7 July 1989, para. 55.

⁷⁶ *Fredin v Sweden*, Judgment of 18 February 1991, App. No. 12033/86, para. 40.

⁷⁷ *Posti and Rahko v Finland*, Judgment of 24 September 2002, App. No. 27824/95, para. 76.

⁷⁸ *Chassagnou and Others v France*, Judgment of 29 April 1999, App. No. 25088/94, 28331/95, 28443/95, para. 74.

⁷⁹ *Van Marle e.a v. The Netherlands*, Judgment of 26 June 1986, App. No. 8543/79, 8674/79, 8675/79, 8685/79, para. 41; *Pressos Compania Naviera v. Belgium*, op cit., para. 31; *Anheuser-Busch Inc v Portugal*, op cit., para. 78. See D J Harris et al., *Law of the European Convention on Human Rights* (Oxford University Press, 2005), p. 657; A R Çoban, op cit., p. 150; Y Haeck, op cit., p. 319; L Condorelli, “Article 1 Premier Protocole Additionnel”, in L E Pettiti, E Decaux and P H Imbert (eds.), *La Convention européenne des droits de l’homme – Commentaire article par article* (Paris : Economica, 1995), 975 and 979; C Bîrsan, “La protection du droit de propriété : développements récents de la jurisprudence de la Cour européenne des droits de l’homme”, in L Caflisch et al. (eds.), *Droits de l’homme – Regards de Strasbourg – Liber Amicorum Luzius Wildhaber* (N.P. Engel, 2007) 5 at 14.

⁸⁰ In accordance with *Orebech*, the interest in the asset must be “either secured or have arisen”. P T *Orebech*, op cit., at 70.

⁸¹ *Marckx v Belgium*, op cit., para. 50; *Van der Musselle v Belgium*, App. No. 8919/80, Judgment of 23 November 1983, para. 48.

⁸² L Wildhaber and I Wildhaber, “Recent Case Law on the Protection of Property in the European Convention on Human Rights”, in C Binder et al. (eds.), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), 657, at 662.

⁸³ *Sokolowski v Poland*, Decision on Admissibility of 7 July 2009, Application no. 39590/04; *Gratzinger and Gratzingerova v. the Czech Republic*, App. No. 39794/98, Decision of the Grand Chamber as to the Admissibility of 10 July 2002, para. 73; *Kopeccky v Slovakia*, App. No. 44912/98, Judgment of 28 September 2004, para. 35.

⁸⁴ *Pressos Compania Naviera v. Belgium*, op cit., p. 31-32; *Kopeccky v Slovakia*, op cit., para. 35. See P Popelier, “Legitimate Expectations and the Law Maker in the Case Law of the European Court of Human Rights”, (2006) *European Human Rights Law Review* 10; L Wildhaber, “The Protection of Legitimate Expectations in European Human Rights Law”, in M Monti et al. (eds.), *Economic Law and Justice in Times of Globalisation: Festschrift Carl Baudenbacher* (Baden Baden: Nomos: 2007) 253.

in national law.⁸⁵ These expectations can, in themselves, be constitutive of a possession (e.g. the reliance on the fact that a legal act on the basis of which they have incurred financial obligations would not be retrospectively invalidated).⁸⁶ They can also relate to claims (e.g. the way these claims are treated in the domestic legal system), provided these claims are sufficiently established under national law to be enforceable.⁸⁷

However, the fact that the national law does not recognize a particular (legal) interest as a property right does not exclude it from the qualification of "possession" within the meaning of Article 1 of the First Additional Protocol.⁸⁸ Indeed, in accordance with the case-law of the Court, the concept of possession has an autonomous meaning.⁸⁹ The Court will not to limit its assessment of an interest to its formal classification in the domestic legal system.⁹⁰ It will examine whether the "circumstances of the case, considered as a whole," generated a substantive proprietary interest.⁹¹

Following the broad and autonomous meaning of the concept of "possessions", the rights to dispose of property (i.e. use rights) may *as such*⁹² fall within the scope of Article 1 of the First Additional Protocol. However, where the holder of these rights is also the owner

⁸⁵ *Pine Valley Developments Ltd and Others v Ireland*, App. No. 12742/87, Judgment of 29 November 1991, para. 51; *Kopecky v Slovakia*, op cit., para. 52; *Maurice v France*, Judgment of 6 October 2005, App No. 11810/03, para. 63-66.

⁸⁶ See *Pine Valley Developments Ltd and Others v Ireland*, op cit.

⁸⁷ *Stran Greek Refineries and Stratis Andreadis v Greece*, Judgment of 9 December 1994, App. No. 13427/87, para. 59; *Ambruosi v Italy*, Judgment of 19 October 2000, App No. 31227/97, para. 20; *Maurice v France*, Judgment of 6 October 2005, App No. 11810/03, para. 66. The Court considered for instance in the *Sved* case that "[a] conditional claim which lapses as a result of the non-fulfilment of the condition is not "a possession" within the meaning of Article 1 of the Protocol No. 1 to the Convention." *Sved and Others v Finland*, Decision on the Admissibility of 21 May 2002, App No. 47131/99.

⁸⁸ D J Harris et al., op cit., p. 658.

⁸⁹ Y Haeck, op cit., p. 318; C Birsan, op cit., at 7 and 10.

⁹⁰ Öneriyildiz v Turkey, Judgment of 30 November 2004, *Application no. 48939/99*, para. 124. See C L Rozakis and P Voyatzis, "Le droit au respect de ses biens' : Une clause déclaratoire ou une 'omnibus' norme ?", in H Vandenberghe (ed.), *Propriété et droits de l'homme*, (Brussels : La Charte, 2006) 1, at 13-14 ; F Sudre, « Le droit au respect de ses biens au sens de la Convention européenne des droits de l'homme », in *La protection du droit de propriété par la Cour européenne des droits de l'homme* (Brussels : Bruylant, 2005) 1 at 3.

⁹¹ *Broniowski v. Poland*, Judgment of 22 June 2004, App no. 31443/96, para. 129; *Beyeler v. Italy*, Judgment of 5 January 2000, App. No. 33202/96, para. 100; *Anheuser-Busch Inc v Portugal*, op cit., para. 75.

⁹² Given their economic value.

of the real property concerned⁹³, the case-law does not consider each use right as a separate possession.⁹⁴ The contractual rights of the owner of a house to perceive rent are, for instance, “not a separate property and cannot be considered in isolation”.⁹⁵ They are rather “an aspect of the possession of the real property at issue”.⁹⁶ The consequences of this interpretation are considerable since alleged interferences with use rights are examined as to their general effect on the real property as a whole. They are not assessed individually as specific violations of these rights.

How would these general principles apply to (1) the revenues electricity producers receive from the sale of the electricity commodity, (2) support schemes for green electricity and (3) CO2 emission credits?

First, in the context of liberalized electricity markets, electricity producers generally have the right to conclude contracts for the sale of electricity and to freely determine the price of the electricity commodity. Indeed, a fundamental aspect of the liberalization process is the replacement of the centralized and monopolistic organization of the electricity sector with free-market forces. Regulated prices (tariffs) are abandoned in favor of free unregulated prices and contracts. In accordance with the paradigm of liberalized electricity markets, producers must be able to recover the investment and exploitation costs of their production installations through these prices. Government interferences with this free price formation mechanism are often only allowed in case of abuse of dominant market position or serious malfunctioning of the market.

⁹³ *Mellacher and Others v Austria*, App No. 10522/83, 11011/84 and 11070/84, Report of the Commission of 11 July 1988, para. 184. See also *Fredin v Sweden*, op cit., para. 45; *Tre Traktörer Aktiebolag v Sweden* Application no. 10873/84, Judgment of 7 July 1989, para. 55.

⁹⁴ The doctrine considers on the basis of the case-law of the Court that “property is a single right which gives owners different use rights, rather than a bundle of rights.” A R Çoban, op cit., p. 146, 162 and 175-176. As will be discussed into more detail below, the recognition of property as a “bundle of rights” would mean that the infringement of any one of the rights would amount to a taking of property.

⁹⁵ *Mellacher and Others v Austria*, Report of the Commission, op cit., para. 186. In a similar sense, see *Mellacher and Others v Austria*, App No. 10522/83, 11011/84 and 11070/84, Judgment of the Court of 19 December 1989, para. 21; *Pine Valley Developments Ltd and Others*, op cit., para. 56-57; *Chassagnou*, op cit., para. 74; *Aschan and Others v Finland*, App. No. 37858/97, Decision on Admissibility of 15 February 2001.

⁹⁶ *Mellacher and Others v Austria*, Report of the Commission, op cit., para. 185.

Charging electricity prices can thus be considered as a contractual (use) right that results from the ownership (or exploitation) of power plants. Moreover, it can be argued that, in most cases, electricity producers have "legitimate expectations" to freely conclude contracts for the sale of electricity and to determine prices. Indeed, the liberalization and privatization of electricity markets are policy instruments that governments adopt to induce private market players to commit investments in this sector. These investors are thus "entitled to rely on the fact that the legal action on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment."⁹⁷ Given the economic value of this pricing right, it can be sustained that it may be assimilated to a possession within the meaning of Article 1 of the First Additional Protocol. However, given the fact that the owner or operator of the power plant will often be the holder of this pricing right, this right is unlikely to be considered as a distinct property.

Second, it appears incontestable that green certificates or feed-in tariffs represent an economic interest for the eligible producers of electricity from renewable energy or combined heat and power. As introduced above, the Court admits that public benefits⁹⁸ (and rights that are based on legislation⁹⁹) may constitute an economic interest protected under Article 1 of the First Additional Protocol. It can be argued that this economic interest is "sufficiently established" for the green certificates that have already been issued. As regards feed-in tariffs, the economic interest of producers can be considered to be "sufficiently established" in proportion to the electricity that has already been produced and that this eligible to the payment of these feed-in tariffs in accordance with the existing regulation. Indeed, producers can, on the basis of the domestic rules for the support of green electricity, legitimately expect that the green electricity they have

⁹⁷ See *Kopecky*, para. 47 and *Pine Valley*, 51 and *Stretch v the United Kingdom*, App. No. 44277/98, Judgment of 24 June 2003, para 35.

⁹⁸ The Court ruled that "[p]ecuniary interests are certainly at stake in subsidy regulations and the application thereof (...)". *Woonbron Volkshuisvestingsgroep & Others v the Netherlands*, App. No. 47122/99, Decision on Admissibility of 18 June 2002.

⁹⁹ P T Orebech, op cit., at 72.

produced will benefit from the support it is entitled to in accordance with these rules. Independently from the discussions on the legal nature of these support mechanisms in the respective domestic legal systems¹⁰⁰, it can thus be sustained that these green certificates and feed-in tariffs qualify as “possessions” within the meaning of Article 1 of the First Additional Protocol.¹⁰¹ However, in line with the established case-law¹⁰², the rights to these supports mechanisms are unlikely to be considered as a separate property and will therefore not be considered in isolation from the property of the production installation itself.

The issue is more complex with regard to the support of green electricity that still has to be produced. The issuance of green certificates, as well as the payment of feed-in tariffs, is often conditional to the prove of the actual production of electricity from renewable energy sources (or combined heat and power) in certified installations. Do producers have the established right to receive support for green electricity if the support schemes are amended or cancelled before the production of this electricity?¹⁰³ Their claims to the perception of the support are not yet enforceable. However, support schemes aim to attract private capital in sustainable energy production. It can therefore be argued that, here also, investors may legitimately expect that the legal basis they took into account to commit financial obligations would not be retrospectively invalidated to their detriment. For how long may investors legitimately expect to benefit from this support? The regulations for the promotion of green electricity often limit the support in time. It can be considered that, within this period of time, eligible producers are guaranteed to receive

¹⁰⁰ On the legal qualification of green certificates in Belgium, see o. a. W Geldhof and D Hommez, “Handel in schone en vuile lucht: groenestroomcertificaten en verhandelbare emissierechten vanuit kikkorsperspectief”, (2004) *Tijdschrift voor Belgisch Handelsrecht* 823, at 830.

¹⁰¹ In the same sense, see A Johnston, A Kavali and K Neuhoff, “Take-or-pay Contracts for Renewables Deployment”, 36 (2008) *Energy Policy* 2481, at 2486 and 2497.

¹⁰² *Mellacher and Others v Austria*, Report of the Commission, op cit., para. 186.

¹⁰³ The Court considered in a case concerning the right to a subsidy that “[a] conditional claim which lapses as a result of the non-fulfillment of the condition is not “a possession” within the meaning of Article 1 of the Protocol No. 1 to the Convention.” *Sved and Others v Finland*, Decision on the Admissibility of 21 May 2002, App No. 47131/99.

this aid. If the duration of the remuneration is not fixed¹⁰⁴, it can be argued that investors may still legitimately expect to benefit from support during a reasonable period of time, taking into account the higher investment (and operating) costs of these projects.¹⁰⁵ The owners of production installations that are not constructed before the amendment of a support scheme are unlikely to be considered as holders of the right to benefit from this support scheme.¹⁰⁶

Third, it is also incontestable that CO₂ credits (ERUs) that result from emission reductions by Joint Implementation projects have a patrimonial value. Indeed, these credits are often considered as (public) licences¹⁰⁷ that confer the right to fulfil CO₂ emission reduction obligations.¹⁰⁸ This right is not absolute. It is subjected to the limitations¹⁰⁹ (e.g. validity period, transferability) imposed by the regulations governing its creation. Nonetheless, ERUs that have been issued and registered in the accounts of the JI project participant can be traded on the international carbon market. It can therefore be considered that, independently from the qualification of these credits in national

¹⁰⁴ It must be noted that, in accordance with European competition rules, the support for renewable energy (and cogeneration) projects implemented with the European Union must be limited in time. See Notice of the European Commission, Community Guidelines on the State Aid for Environmental Protection (2008/C 82/01), OJ 2008 C 82/1, para. 3.1.6.

¹⁰⁵ In Germany, the 1991 Electricity Feed-in Law (“Stromeinspeisungsgesetz”) did not fix the duration of the remuneration for individual plants. However, “the constitutional protection of legitimate expectations provided some certainty to renewable energy generators.” See International Energy Agency, Global Renewable Energy Policies and Measures – Electricity Feed-in Law of 1991, www.iea.org/textbase/pm/?mode=re&id=31&action=detail.

¹⁰⁶ In this sense, see the Judgment of the *Gerechthof te S-Gravenhage* of 11 October 2007 in the case *X and Stichting Natuur & Milieu v the Netherlands*, No. 06/1560 KG, para. 10, where the Court considered that the cancellation of the Dutch support scheme for renewable energy (feed-in) did not violate Article 1 of the First Additional Protocol in so far as the applicant had not yet constructed the renewable energy installation at the moment when the change of the support scheme was implemented and was thus not entitled to the payment of the support.

¹⁰⁷ Or “allowances”.

¹⁰⁸ See E Vranes, “Climate Change and the WTO: EU Emission Trading and the WTO Disciplines on the Trade in Goods, Services and Investment Protection” 43 (2009) *Journal of World Trade* 707, at 716-717; G Wisner, “Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services”, 2 (2002) *International Journal of Global Environmental Issues* 292.

¹⁰⁹ Van Asselt and Gupta consider that “emissions trading schemes tend to be limited authorizations rather than actual property rights”. H van Asselt and J Gupta, “Stretching To Far Russian market Developing Countries and the Rule of Flexibility Mechanisms Beyond Kyoto”, 28 (2009) *Stanford Environmental Law Journal* 311, at 337.

law¹¹⁰, these credits must be qualified as “possessions” within the meaning of Article 1 of the First Additional Protocol.¹¹¹ Here also, these possessions are unlikely to be considered as a separate property from the installation (JI project activity) that generates these credits/CO2 emission reductions.

The qualification of ERUs that have not yet been registered in the accounts of project participants, but are expected to be generated by normal operation of the project activity, is more delicate. Indeed, the registration being a decisive criterion for the transfer of emission credits,¹¹² project participants will not hold any formal (property) title on expected emission credits. It can however be argued that the project participants may legitimately expect that the host country will transfer them an amount of ERUs that corresponds to the amount of verified CO2 emission reductions generated by the JI project in accordance with the approved Project Design Document. Indeed, “[w]ith its

¹¹⁰ National regulations could explicitly provide that emission credits cannot be considered as property rights. Para. 403(f) of the United States Clean Air Act, for instance, defines a sulfur dioxide allowance as “a limited authorization to emit sulfur dioxide in accordance with the provisions of this subchapter” and explicitly specifies that this allowance “does not constitute a property right.” Werksman argues that “[w]hen establishing emissions allowance and offset schemes at domestic level, government authorities have been careful to avoid any legal characterization that these instruments can provide the basis for legal entitlements or property rights.” J D Werksman, “Defending the “Legitimate Expectations” of Privates Investors under to Climate Change Regime: In Search of Legal Theory for Redress” 39 (2008) *Georgetown Journal of International Law* 679, at 689-690. It can however be argued that, despite such “waiver clauses”, emission credits are characterized with the fundamental elements of “possessions”. These credits “*de facto* amount to a temporary property right.” H van Asselt and J Gupta, op cit., at 337. Indeed, “one must question whether a simple unilateral declaration that a property right is not established is sufficient to prevent the right from being recognized *de facto*.” K W Junker, “Ethical Emissions Trading and the Law” 13 (2006) *University of Baltimore Journal of Environmental Law* 149, at 153, quoted in H van Asselt and J Gupta, op cit., at 337. On the same issue, see also M J Mace, “The Legal Nature of Emission Reductions and EU Allowances: Issues Addressed in an International Workshop” 2 (2005) *Journal of European Environmental and Planning Law* 123, at 125; M Wemaere and C Streck, “Legal Ownership and Nature of Kyoto Units and EU Allowances”, in D Freestone and C Streck (eds.), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (Oxford University Press, 2005) 3, at 51.

¹¹¹ M Pâques, “L’emission trading à la Cour d’arbitrage”, (2006) *Aménagement-Environnement*, 2006/4 181 at 189.

¹¹² See Art. 3 of the Emission Allowances Single Trade Agreement for the EU Scheme, Version of 2 July 2004 drafted by the International Emissions Trading Association, Emission Allowances Single Trade Agreement for the EU Scheme, Version of 26 August 2006. Similarly, in the context of the transfer of Certified Emission Reductions (CERs), see Section 10.4 of the CDM Emission Reductions Purchase Agreement, Version of 20 August 2004 drafted by the International Emissions Trading Association, www.ieta.org/ieta/www/pages/getfile.php?docID=1020. On this issue, see Y S Brouhns, ‘Aspects Juridiques du Commerce des Quota’s d’Emissions de CO2’, (2006) *Aménagement-Environnement*, at 13.

approval of the project the host country has agreed to undertake the conversion and transfer of ERUs on the basis of the verification document."¹¹³ Moreover, the expectations of the project participants are reinforced by the Memoranda of Understanding signed between the host and the home country and establishing “the commitment of the host country (...) to approve individual projects and to transfer ERUs to the accounts of the partnering countries”.¹¹⁴

However, the protection of these expectations under Article 1 of the First Additional Protocol will ultimately depend on the domestic regulation for the implementation of JI projects. According to the literature, a state is inclined to "retain overall control over the allowances it has created."¹¹⁵ Consequently, domestic regulations often aim to ensure that government agencies retain a degree of discretion to issue and to discontinue emission credits.¹¹⁶ Clauses on the conditional issuance and validity of ERUs will affect investors’ “legitimate expectations” to benefit from these credits. The question is whether, under Article 1 of the First Additional Protocol, such clauses will affect the qualification of these credits as “possessions” or if these clauses must be considered as the legal basis for potential *ex post* interferences? This issue is of utmost importance given the fact that it will determine the admissibility of potential claims.

¹¹³ C Streck, “Joint Implementation: History, Requirements, and Challenges”, in D Freestone and C Streck (eds.), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (Oxford University Press, 2005) 107, at 118. See Guidelines for the implementation of Article 6 of the Kyoto Protocol, Decision 9/CMP.1, 30 March 2006, FCCC/KP/CMP/2005/8/Add.2, para. 23.

¹¹⁴ C Streck, “Joint Implementation”, at 120.

¹¹⁵ Ibid.

¹¹⁶ J Werksman, op cit., at 690. In Russia, for instance, Article 24, e) of Resolution No. 332 Government of the Russian Federation of 28 May 2007 on the Approval and Verification of the Project Implementation Process under Article 6 of the Kyoto Protocol grants the Russian Government an almost unlimited discretion to withdraw support for projects even after being approved as eligible for such support. See A Korppoo and A Moe, ‘Russian JI Procedures: More Problems than Solutions?’, (2007) *Climate Strategies Briefing Paper* 1 at 6, www.climatestrategies.org/reportfiles/russian_ji_procedures.pdf. Moreover, Para. 403(f) of the US Clean Air Act provides that “[n]othing in this section or any other provision of law should be construed to limit the authority of the United States to terminate or limit such authorization.”

The Belgian Constitutional Court¹¹⁷ analyzed this question within the context of the European Emissions Trading Scheme.¹¹⁸ In particular, it examined whether the non-delivery by the administration of emission credits that had been previously assigned to an installation in the National Allocation Plan (NAP)¹¹⁹ constituted a violation of Article 1 of the First Additional Protocol. Indeed, the regional legislation provided that, in case of closure of a CO₂-emitting installation, CO₂ credits (assigned in the NAPs) would not be effectively delivered for the following years. The Belgian Constitutional Court ruled that the operators of the closed installations could, at the moment of the closure, not be considered as “owners” of the emission rights that were assigned, but not yet delivered to them (*i.e.* registered in their account).¹²⁰ Moreover, the Belgian Arbitration Court argued that the operator “knows, at the moment that the emissions rights are initially allocated [in the NAPs] that these can be withdrawn” in case of closure of its installations.¹²¹ The Court furthermore justified this non-delivery on the basis of the environmental¹²² and economic¹²³ objectives pursued by this measure. It referred to the right that Article 1 of the First Additional Protocol confers to states to control property. And concluded that this non-delivery therefore did not amount to a violation of the right to property. The Belgian Constitutional Court thus did not limit its analysis to the qualification of emission credits (that must still be issued) as “possessions”. It also paid attention to the justification of the control measure under objectives of general interest.

¹¹⁷ Belgian Arbitration Court, Arrest n° 92/2006 of 7 June 2006, App. No. 3715, www.arbitrage.be.

¹¹⁸ Directive 2003/87/EC of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community.

¹¹⁹ Under Directive 2003/87/EC of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community, member states decide the amount of emission rights that they grant for free to each installation for each trading period. Each year, member states effectively transfer those emission rights to the account of the operators of these installations in the national registries.

¹²⁰ Belgian Arbitration Court, Arrest n° 92/2006 of 7 June 2006, para. B.27.1. Some authors argued on the basis of the broad interpretation of “possessions” by the European Court for Human Rights that the sole allocation of emissions rights could already create a right, protected by Art. 1 of the First Additional Protocol to the ECHR. M Pâques, ‘L’*Emission Trading* à la Cour d’Arbitrage’, *op cit.*, p. 189.

¹²¹ *Ibid.*

¹²² Attain the emission reductions obligations.

¹²³ Transfer to new entrants.

As states seek to maintain regulatory discretion over the emission credits they create, it appears indispensable to protect investors against the “arbitrary confiscation or discounting of these rights”.¹²⁴ In the context of the implementation of JI projects, project participants may legitimately expect to receive an amount of ERUs corresponding to the verified emission reductions they generated. National regulations concerning the issuance of these credits may, to a certain extent, limit these expectations. However, these regulations must, in most cases¹²⁵, be considered as interferences with these expectations that must be properly justified.

2.2. Interferences

According to the established case-law of the European Court of Human Rights, Article 1 of the First Additional Protocol contains three distinct rules.¹²⁶ The first rule, formulated in the first sentence of the first paragraph, is of general nature and enounces the principle of peaceful enjoyment of property. The second rule, set out in the second sentence of the same paragraph, covers the deprivation of possessions (or expropriation) and subjects it to certain conditions. The third rule, contained in the second paragraph, recognizes the right of states to control the use of property in accordance with the general interest.¹²⁷

Deprivation of possessions (the second rule) constitutes “the most radical kind” of interference with the right of peaceful enjoyment of property.¹²⁸ It corresponds to the extinction of all the legal rights of the owners¹²⁹ and encompasses as well *de jure*¹³⁰ as *de*

¹²⁴ C Streck, *op cit.*, at 53.

¹²⁵ Especially broad clauses, such as Article 24, e) of Resolution No. 332 of the Government of the Russian Federation on the Approval and Verification of the Project Implementation Process under Article 6 of the Kyoto and para. 403(f) of the US Clean Air Act.

¹²⁶ *Sporrong and Lönnroth v. Sweden*, App. Nos. 7151/75 and 7152/75, Judgment of 23 September 1982, Series A nr. 52, para. 61; *James and Others v UK*, App. No. 8793/79, Judgment of 21 February 1986, Series A no. 98, para. 37.

¹²⁷ It also contains the right of states to secure the payment of taxes or other contributions or penalties. This issue will not be further analyzed hereunder. See A Grgić, *et al. op cit.*, p. 182-186.

¹²⁸ *James and Others v UK*, *op cit.*, para. 71.

¹²⁹ A Grgić, *et al. op cit.*, p. 11; D J Harris *et al.*, *op cit.*, p. 677; H Vandenberghe, « La privation de propriété. La deuxième norme de l'article 1^{er} du Premier Protocole de la Convention Européenne des droits

*facto*¹³¹ expropriations.¹³² In accordance with the interpretation of the European Court of Human Rights, *de jure* expropriations require a (formal) “transfer of ownership”.¹³³ *De facto* expropriations concern cases where the owners are not deprived of their title, but are nonetheless affected by a loss of all elements of ownership in a more or less irreversible way.¹³⁴ The threshold for the qualification as expropriations is thus very high.¹³⁵ Indeed, even if interferences “substantially reduce” the value of a property, they will not amount to expropriations if this property is not “left without any meaningful alternative use” or is “not rendered worthless”.¹³⁶ Moreover, as already introduced above, the European Court for Human Rights does not separately protect different (use) rights arising from the same property.¹³⁷ The fact that one (use) right has been expropriated will therefore not be sufficient to qualify an interference as a deprivation of possessions within the meaning of the second sentence of the first paragraph of Article 1 of the First Additional Protocol¹³⁸, unless the interference took away all meaningful use of the property concerned.¹³⁹

de l’homme » , in H Vandenberghe (ed.), *Propriété et droits de l’homme*, (Brussels : La Chartre, 2006) 1, at 13-14 ; F Sudre, « Le droit au respect de ses biens au sens de la Convention européenne des droits de l’homme », in *La protection du droit de propriété par la Cour européenne des droits de l’homme* (Brussels : Bruylant, 2005) 30 at 34.

¹³⁰ *Holy Monasteries v Greece*, Judgment of 09 December 1994, App. No. 13092/87; 13984/88, para. 66; *Pressos Compania Naviera v. Belgium* op cit., para. 34; *Hentrich v France*, App. No. 13616/88, Judgment of 22 September 1994, para. 35.

¹³¹ *Papamichalopoulos and Others v Greece*, App. No. 14556/89 Judgment of 24 June 1993, para. 45. The Court considered in the *Sporrong and Lönnroth* case that “[i]n the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of (...). Since the Convention is intended to guarantee rights that are “practical and effective” (...), it has to be ascertained whether that situation amounted to a *de facto* expropriation, as was argued by the applicants.” *Sporrong and Lönnroth v. Sweden*, op cit., para. 63.

¹³² M Pellonpää, « Reflections on the Notion of ‘Deprivation of Possessions’ in Article 1 of the First Protocol to the European Convention on Human Rights”, in P Mahoney, et al. (eds.), *Protection Human Rights: The European Perspective*, (Köln/Berlin/Bonn/München: Carl Heymanns Verlag KG, 2000) 1087, at 1092; Y Haeck, op cit., p. 334.

¹³³ *Sporrong and Lönnroth v. Sweden*, op cit., para. 63. Y Haeck, op cit., p. 335. It is of no relevance whether the property is transferred to the state or to other individuals. M Pellonpää, op cit., p. 1093.

¹³⁴ M Pellonpää, op cit., p. 1101; H Vandenberghe, op cit., p. 34.

¹³⁵ D J Harris et al., op cit., p. 678.

¹³⁶ *Pine Valley Developments Ltd and Others v Ireland*, op cit., para. 56; *Fredin v Sweden*, op cit., para. 45.

¹³⁷ *Mellacher and Others v Austria*, Report of the Commission, op cit., para. 184. See also *Fredin v Sweden*, op cit., para. 45; *Tre Traktörer Aktiebolag v Sweden* Application no. 10873/84, Judgment of 7 July 1989, para. 55. See A R Çoban, op cit., p. 146, 162 and 175-176.

¹³⁸ The rationale underlying this approach is that “[i]f each of these rights were to be considered as a separate property susceptible of deprivation of possessions within the meaning of the first paragraph of

In contrast, the scope of the notion of “control of the use of property” (the third rule) is broad.¹⁴⁰ It encompasses all measures that public authorities take to regulate the use of property, but that do not amount to expropriations.¹⁴¹

Finally, the first rule constitutes the residual category.¹⁴² It is not only a general statement of principle.¹⁴³ It also constitutes an autonomous basis for assessing interferences that do not qualify as expropriatory or control measures.¹⁴⁴ It thus comprises measures that do not transfer the title or destroy the value of property and are not intended to limit or control the use of this property, but nevertheless interfere with the substance of property.¹⁴⁵

The qualification of interferences with possessions under the first, second or third rule matters because, to a certain extent, the criteria to be fulfilled to legitimate them will vary. As will be further analyzed below, expropriations, as well as substantial

Article 1 no room would remain for regulations to control the use of property under the second paragraph.” *Mellacher and Others v Austria*, Report of the Commission, op cit., para. 185.

¹³⁹ A R Çoban, op cit., p. 176; D J Harris et al., op cit., p. 677.

¹⁴⁰ A R Çoban, op cit., p. 180.

¹⁴¹ The difference between the second and the third rule is thus a matter of degree of the interference, less than a matter of the nature of the interference. *Hutten-Czapska v Poland*, Application no. 35014/97, Judgment of 22 February 2005. See F Tulkens, “La réglementation de l’usage des biens dans l’intérêt général. La troisième norme de l’article 1^{er} du Premier Protocole de la Convention Européenne des Droits de l’Homme”, in H Vandenberghe (ed.), *Propriété et droits de l’homme*, (Brussels : La Charte, 2006) 1, at 13-14 ; F Sudre, « Le droit au respect de ses biens au sens de la Convention européenne des droits de l’homme », in *La protection du droit de propriété par la Cour européenne des droits de l’homme* (Brussels : Bruylant, 2005) 61 at 65.

¹⁴² Rozakis and Voyatzis use the notion of “omnibus norm”. C L Rozakis and P Voyatzis, op cit., p. 2.

¹⁴³ D J Harris et al., op cit., p. 666.

¹⁴⁴ C L Rozakis and P Voyatzis, op cit., p. 5; D J Harris et al., op cit., p. 666.

¹⁴⁵ *Sporrong and Lönnroth v Sweden*, op cit., para. 61-74; *Loizidou v Turkey*, Application no. 15318/89, Judgment of 18 December 1996, para. 63; *Doğan and Others v Turkey*, Applications nos. 8803-8811/02, 8813/02 and 8815-8819/02, Judgment of 29 June 2004, para. 146. The Court considered in this case that “the measures in question did not involve a deprivation of property within the meaning of the second sentence of the first paragraph of Article 1 because the applicants have remained the legal owner or possessor of the lands in Boydaş. The measures did not amount to control of the use of property either since they did not pursue such an aim. The Court considers therefore that the situation of which the applicants complain falls to be dealt with under the first sentence of the first paragraph of Article 1 since the impugned measures undoubtedly restricted the applicants’ rights to use and dispose of their possessions.”

interferences under the first rule, must meet a relatively higher threshold (*i.e.* required payment of compensation) to be accepted by the Court.¹⁴⁶

The second and third rules concern particular instances of interferences.¹⁴⁷ The Court will therefore first assess their applicability before turning to the general rule. Would interferences with electricity prices, support schemes and CO2 emission credits qualify as expropriations, control of the use of property or interferences with the substance of property?

As has been analyzed before, the revenue from the sale of electricity, as well as support schemes and CO2 emission credits are unlikely to be considered as distinct properties from the production installations. A deprivation of these possessions would thus, as such, not automatically trigger a qualification as expropriation. The affected producers will have to prove that the deprivation of these rights rendered their property (as a whole) worthless. Given the restrictive interpretation of the European Court for Human Rights, this appears to be an almost insurmountable task. Indeed, even if the imposition of stringent price caps or the entire withdrawal of support schemes or emission credits would substantially reduce the value of the production site, it would not take away “all its meaningful use”. The owners could still sell or rent the site or the turbines. The conclusions of the Court in the *Hutten-Czapska* case are interesting in this respect.¹⁴⁸ This case concerned measures that drastically restricted rents for private houses to a level that made it impossible for the owners to even cover the maintenance costs. At the same time, the owners had a duty to maintain their properties in specific conditions and, accordingly,

¹⁴⁶ C L Rozakis and P Voyatzis, *op cit.*, p. 24. Other authors, however, consider that “[i]t may be formally necessary to determine whether an interference is a deprivation of property or an extensive control of the use of property because, in principle, they are governed by different provisions. But in practice the classification is not so important (and the Court does sometimes not make the distinction) because of the overriding importance and general and common application of the ‘fair balance’ test.” D J Harris et al., *op cit.*, p. 679.

¹⁴⁷ *James and Others v UK*, *op cit.*, para. 62.

¹⁴⁸ *Hutten-Czapska v Poland*, Application no. 35014/97, Judgment of 22 February 2005; *Hutten-Czapska v Poland*, Application no. 35014/97, Judgment of the Grand Chamber of 19 June 2006.

were obliged to carry out maintenance works.¹⁴⁹ Moreover, they were subjected to restrictive provisions on the termination of the leases.¹⁵⁰ These measures thus not only deprived the right of the owners to receive a rent corresponding to the market value, but also caused them financial losses. The Court nevertheless ruled that:

“the applicant never lost her right to sell her property. Nor did the authorities apply any measures resulting in the transfer of her ownership. It is true that she could not exercise her right of use in terms of physical possession as the house was occupied by the tenants and that her rights in respect of letting the flats, including her right to receive rent and to terminate leases, were subject to a number of statutory limitations. However, these issues concern the degree of the State’s interference, and not its nature. All the measures taken, whose aim was to subject the applicant’s house to continued tenancy and not to take it away from her permanently, could not be considered a formal or even *de facto* expropriation but constituted a means of State control of the use of her property. The case should therefore be examined under the second paragraph of Article 1 of Protocol No. 1.”¹⁵¹

¹⁴⁹ The measures obliged the landlords “to carry out costly maintenance works, despite the fact that in practice the rent chargeable was set below the average costs of maintenance of property, not to mention the costs of major repairs which were incumbent on the landlords” *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, op cit., para. 198.

¹⁵⁰ *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, op cit., para. 198.

¹⁵¹ *Hutten-Czapska v Poland*, Judgment of 22 February 2005, op cit., para. 145. See also *Mellacher and Others v Austria*, App. No. 10522/83, 11011/84 and 11070/84, Judgment of 19 December 1989, para. 44. This case also concerned rent-controlling measures. The applicants claimed that the contested measures involved an expropriation of their contractual rights to receive payment of the agreed rent and that these measures amounted to a *de facto* expropriation since they had turned them into mere administrators of their property. The Court ruled that these measures did not amount to formal or *de facto* expropriations since “there was no transfer of the applicants’ property nor were they deprived of their right to use, let or sell it. The contested measures which, admittedly, deprived them of part of their income from the property amounted in the circumstances merely to a control of the use of property. Accordingly, the second paragraph of Article 1 (P1-1) applies in this instance.” See also cases concerning the requisition of property and its assignment to others: *Edwards v Malta*, App. No. 17647/04, Judgment of 24 October 2006, para. 58 and 59; *Ghigo v Malta*, App. No. 31122/05, Judgment of 26 September 2006, para. 49 and 50; *Fleri Soler and Camilleri v Malta*, App. No. 35349/05, 26 September 2006, para. 58 and 59. In contrast, see the Partly Dissenting Opinion of Mr. H G Schermers to the Report of the Commission of 11 July 1988 in the case *Mellacher and Others v Austria*. Schermers argued that the restriction of rents “directly takes away

On this basis, it can be argued that interferences with the revenue from electricity production, support schemes or CO2 emission credits are unlikely to be considered as deprivations of property within the meaning of the second rule of Article 1 of the First Additional Protocol. It results from the *Hutten-Czapska* Judgment, that state measures obliging producers to continue to run their power plants without being able to recoup their exploitation and investment costs, will generally not amount to expropriations. The same conclusion applies even if, together with these price restrictions, these measures impose on producers an obligation to maintain their installations in a specific condition. Such interferences will, most probably, be assimilated to means of state control of the use of property.¹⁵² The threshold for qualifying as such is low.¹⁵³ The affected producers will nevertheless have to demonstrate that the contested interferences affect the real value of their property.¹⁵⁴ Changes to subsidy measures that only affect the balance sheet value of the property are not sufficient to be assimilated as a measure of control.¹⁵⁵

2.3. Justification

The right to the protection of property established by Article 1 of the First Additional Protocol is not absolute.¹⁵⁶ Interferences are allowed provided they are prescribed by law, pursue a legitimate aim and are proportional to this aim.

income.” According to him, “[o]nce the law has accepted freely negotiated prices, it seems contrary to Article 1 to take away the agreed income without any review of individual cases.”

¹⁵² See for instance *Holme v United Kingdom*, App. No. 78031/01, Decision on Admissibility of 14 May 2002, where the Court considered that the capping of rents “remove[d] any entitlement of the applicant to uncapped rents (...), deprive[d] the applicant of part of its income from its property and [did] thus constitute a “control of use” for the purpose of the second paragraph” of Article 1 of the First Additional Protocol.

¹⁵³ A R Çoban, op cit., p. 180; Y Haeck, op cit., p. 343.

¹⁵⁴ There are exceptions to the requirement of economic loss. See for instance, *Chassagnou and Others v France*, op cit., para. 74, where the Court considered that a law that allowed public entry for hunting on a property constituted an interference with property. See D J Harris et al., op cit., p. 662-663.

¹⁵⁵ See *Woonbron Volkshuisvestingsgroep & Others v the Netherlands*, op cit., para. 2;

¹⁵⁶ A Grgić, et al. op cit., p. 12.

The legality requirement means that interferences must have an accessible, precise and foreseeable legal basis.¹⁵⁷ In accordance with the principle of the “rule of law”,¹⁵⁸ it aims to protect owners against arbitrary measures.¹⁵⁹ The Court seldom questions the fulfillment of this criterion.¹⁶⁰

The legitimacy requirement refers to the fact that interferences with property may only be justified if they are in the “public [or general]¹⁶¹ interest”. The European Court for Human Rights interprets this notion extensively and leaves a considerable margin of appreciation to the states to appreciate it.¹⁶² The Court will thus generally respect the national judgments as to what is “in the public interest”, unless these judgments are manifestly without reasonable foundation.¹⁶³

The proportionality requirement aims to ensure a “fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”.¹⁶⁴ The requisite balance will not be found if the affected owner has to bear “an individual and excessive burden”¹⁶⁵. With other words, measures are not proportional if they impose most of the social and financial costs of a policy on

¹⁵⁷ D J Harris et al., op cit., p. 670; A R Çoban, op cit., p. 196; Y Haeck, op cit., p. 356.

¹⁵⁸ *James and Others v UK*, op cit., para. 67; *Iatridis v Greece*, App. No. 31107/96, Judgment of 25 March 1999, para. 58.

¹⁵⁹ A R Çoban, op cit., p. 195-196.

¹⁶⁰ D J Harris et al., op cit., p. 670.

¹⁶¹ The Court does not make a difference between the notions of public (second rule) and general (third rule) interest. D J Harris et al., op cit., p. 668. See also A R Çoban, op cit., p. 203.

¹⁶² Indeed, the Court bases this approach on the reasoning that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is “in the public interest”. Moreover, the decision to enact laws expropriating property will involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. *James and Others v UK*, op cit., para. 46; *The Former King of Greece and Others v Greece*, App. No. 25701/94, Judgment of 23 November 2000, para. 87. See Y Haeck, op cit., p. 359-360. According to Harris et al., “[i]t is difficult to imagine circumstances in which the Court would dispute the purpose alleged by the government or contest its assertion that the measure had a legitimate aim.” D J Harris et al., op cit., p. 668. See also Y Winisdoerffer, “Margin of Appreciation and Article 1 of Protocol No. 1” 19 (1998) *Human Rights Law Journal* 18.

¹⁶³ *The Former King of Greece and Others v Greece*, op cit., para. 87.

¹⁶⁴ *Sporrong and Lönnroth v. Sweden*, op cit., para. 69; *James and Others v UK*, op cit., para. 50, considering that “there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”

¹⁶⁵ *Sporrong and Lönnroth v. Sweden*, op cit., para. 73; *James and Others v UK*, op cit., para. 50.

certain owners. The Court therefore evaluates whether interferences are appropriate (and necessary) to the achievement of their aims.¹⁶⁶ However it leaves a wide margin of appreciation to the states.¹⁶⁷ The availability of less severe alternatives is thus, in itself, unlikely to render the contested measures unjustified.¹⁶⁸ Instead, it is the “fair balance” test that constitutes the central part of the Court’s assessment of the proportionality of state interferences.¹⁶⁹

In accordance with the case-law of the Court, the search for this balance is reflected in the structure of Article 1 of the First Additional Protocol.¹⁷⁰ It applies therefore to the three rules of this provision.¹⁷¹ However, the Court does not apply this balancing test with the same intensity. As indicated above, expropriations are assessed more severely than measures of control.¹⁷² The margin of appreciation of the states is reduced.¹⁷³ The Court, for instance, considers the payment of compensation as a necessary condition for

¹⁶⁶ *James and Others v UK*, op cit., para. 50.

¹⁶⁷ A R Çoban, op cit., p. 206.

¹⁶⁸ *Tre Traktörer Aktiebolag v Sweden*, op cit., para. 62, where the Court ruled that “[e]ven though the [public authorities] could have taken less severe measures (...), the Court, having regard to the legitimate aim of Swedish social policy concerning the consumption of alcohol, finds that the respondent State did not fail to strike a “fair balance” between the economic interests of the applicant company and the general interest of Swedish society.” See also *Mellacher and Others v Austria*, Judgment of 19 December 1989, para. 53, where the Court considered that “[t]he possible existence of alternative solutions does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.” However, in some cases the Court has opted for a broader approach. See *Hentrich v France*, op cit., para. 47, where the Court considered that “the State has other suitable methods at its disposal”. See also *Chassagnou and Others v France*, op cit., para. 85. On this issue, see T Orebech, op cit., at 85-86; F Tulkens, op cit., p. 83; Y Haeck, op cit., p. 367.

¹⁶⁹ The European Court for Human Rights thus adopts a narrow approach to proportionality. A R Çoban, op cit., p. 205.

¹⁷⁰ *Sporrong and Lönnroth v. Sweden*, op cit., para. 69.

¹⁷¹ The Court consistently rules that the “three rules [of Article 1 of the First Additional Protocol] are not “distinct” in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.” *James and Others v UK*, op cit., para. 37; *Lithgow and Others v The United Kingdom*, Application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgment of 8 July 1986, para. 106.

¹⁷² Y Haeck, op cit., p. 333.

¹⁷³ Y Haeck, op cit., p. 333.

legitimizing deprivations of property.¹⁷⁴ Only in exceptional circumstances, expropriations without compensation would respect a fair balance between the public and private interests at stake. Moreover, in accordance with the case-law of the Court, compensation must be “reasonably related” to the value of property that is expropriated.¹⁷⁵ However, Article 1 of the First Additional Protocol does not guarantee a right to full compensation in all circumstances. Objectives of “public interest”, such as economic reform or measures of social justice, may call for a reimbursement at less than the full market value.¹⁷⁶ In the application of the fair balance test to non-expropriatory interferences with property, the Court also takes into account the possibility offered to owners to obtain the payment of compensation for losses caused by these measures.¹⁷⁷ The Court pays attention to the legal ways that exist to recover mandatory costs, as well as to the possibility for owners to derive a “decent profit” from their property.¹⁷⁸ However, in contrast to expropriations, compensation is not considered as a determinative condition.¹⁷⁹ The Court insists on the “combined effect” of restrictions on property.¹⁸⁰

In addition to compensation, the Court pays attention to the consistency of the actions of public authorities (legal certainty)¹⁸¹ and to the respect by the state of the “legitimate

¹⁷⁴ *James and Others v UK*, op cit., para. 54. A R Çoban, op cit., p. 210; C L Rozakis and P Voyatzis, op cit., p. 24; H Vandenberghe, op cit., p. 51; Y Haeck, op cit., p. 370. For a study on compensation, see T Allen, “Compensation for Property under the European Convention on Human Rights” 28 *Michigan Journal of International Law* 287.

¹⁷⁵ *James and Others v UK*, op cit., para. 54; *Lithgow and Others v The United Kingdom*, op cit., para. 110.

¹⁷⁶ *James and Others v UK*, op cit., para. 54.

¹⁷⁷ *Alatulkkila and Others v Finland*, Application no. 33538/96 28 July 2005, para. 67, where the Court justified a measure of control of the use of property (restriction of fishing rights) by considering that the applicants “were provided with the possibility of applying for compensation for economic losses.” *Housing Association of War Disabled and Victims of War of Attica and Others v Greece*, Application no. 35859/02 13 July 2006, para. 39. See F Tulkens, op cit., p. 85-86.

¹⁷⁸ See below for a detailed discussion of the case-law of the European Court for Human Rights in this respect.

¹⁷⁹ Y Haeck, op cit., p. 375.

¹⁸⁰ See GC, para. 224 and 237.

¹⁸¹ See *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 168, where the Court considered that “[u]ncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue

expectations” of the applicants in its assessment of the fair balance of state interferences.¹⁸² The consideration of “legitimate expectations” within the proportionality test is however relative. Indeed, the Court will also look at the risks that are inherent to the commercial activities of the applicants to moderate their expectations.¹⁸³

Moreover, the Court evaluates whether procedural guarantees have been provided.¹⁸⁴ It will look at the legal ways available to the applicants to challenge interferences with their property or to mitigate the losses incurred.

Against this background, could interferences with electricity prices, support schemes and CO2 emission credits be considered to fulfill the (1) legality, (2) legitimacy and (3) proportionality requirements? Or could electricity producers successfully argue that these interferences are illegitimate under Article 1 of the First Additional Protocol and thus call just satisfaction under Article 41 of the European Convention on Human Rights?

First, the imposition of price restrictions to electricity producers, as well as refusals to honor support schemes and to issue CO2 emission credits, could lack a (precise and foreseeable) legal basis. On the one hand, national executive authorities, finding it difficult to resist public pressure to curb increases in electricity prices, could, for instance, impose price caps even in the absence of an express provision to that effect in the national law. Similarly, governments confronted with budget constraints could refuse to continue the implementation of support schemes as provided in the law. On the other hand, operators of low-carbon electricity production installations could be confronted with sudden changes of the rules governing the electricity market, the support for green

in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner.” See also *Broniowski v. Poland*, op cit., para. 151.

¹⁸² *The Former King of Greece and Others v Greece*, op cit., para. 98; See L Wildhaber and I Wildhaber, op cit., p. 662; A R Çoban, op cit., p. 207-208; Y Haeck, op cit., p. 369; P Popelier, op cit., at 16-18.

¹⁸³ *Pine Valley Developments Ltd and Others v Ireland*, op cit., para. 59; *Gasus Dossier-und Fördertechnik GmbH v The Netherlands*, Application no. 15375/89 23 February 1995, para. 70.

¹⁸⁴ *Hentrich v France*, op cit., para. 49 ; *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, op cit., para. 224.

electricity and the issuance of CO₂ emission credits that were not foreseeable at the moment of committing their investments. Given the flexible application of the legality requirement by the Court, it is unlikely that this would be sufficient to refuse to legitimate these interferences. However, the absence of a precise and foreseeable legal basis could frustrate the applicants' legitimate expectations and play a role in the application of the fair balance test.¹⁸⁵

Second, states will have no difficulty in arguing successfully that the interferences with electricity price formation, support schemes and CO₂ emission credits are "in the public interest". Indeed, price caps shield electricity (residential and industrial) consumers from price spikes. They can thus be considered as measures of social and economic policy. Moreover, the refusal to implement support schemes and to issue CO₂ emission credits could be justified as measures to safeguard the state budget and protect its financial interests.¹⁸⁶

Third, as indicated above, the fulfillment of the "fair balance" test will prove to be the most challenging for states. Producers affected by restrictions on their right to determine the prices for their electricity output, or by refusals of the state to honor support commitments for green electricity and CO₂ emission reductions, could argue that these interferences with their property impose on them "an individual and excessive burden". Before examining the application of the fair balance test to these interferences, it is interesting to look at the case-law developed by the European Court for Human Rights in the field of control measures of housing rents, given the fact that the housing sector in general (and in particular the underlying situation in the cases discussed hereunder) present comparable features to the electricity market.

¹⁸⁵ *Beyeler v Italy*, Application no. 33202/96 5 January 2000, para. 110, where the Court ruled that "the element of uncertainty in the statute and the considerable latitude it affords the authorities are material considerations to be taken into account in determining whether the measure complained of struck a fair balance."

¹⁸⁶ See, for instance, *Pressos Compania Naviera v. Belgium* op cit., para. 36 and 37. On these justifications, see A R Çoban, op cit., p. 202.

Indeed, both housing and electricity constitute a fundamental need in modern society.¹⁸⁷ Just as for electricity, the implementation of policies in the housing sector involves “wide-reaching consequences for numerous individuals and has significant economic and social consequences for the country as a whole”¹⁸⁸. Moreover, in the cases that are examined below, the contested measures generally originated in the shortage and obsolete condition of the housing capacity. These investment needs exposed tenants to higher prices that Governments considered as “socially unacceptable”.¹⁸⁹ Similarly, Governments’ interferences in the formation of electricity prices are likely to take place in response to price increases that result from deficit in capacity or the need to modernize production installations. Furthermore, in some of the cases examined hereunder, the bad state of the housing sector is a consequence of mismanagement during the centralized (or communist) organization of this sector. In a comparable way to the liberalization of the electricity market, the contested measures take place in the context of the transition from state-controlled rent to a fully negotiated contractual rent.¹⁹⁰ For these reasons, the assessment by the Court of the balance of the interests of landlords, on the one hand, and tenants and the state budget, on the other, is interesting for our analysis of the balance of the interests of electricity producers, on the one hand, and consumers and the state budget, on the other.¹⁹¹

The *Mellacher* case, already cited above, concerned the freezing of rents in Austria.¹⁹² In accordance with the contested rent control measure, landlords were entitled to levy extra charges in respect of some maintenance costs. They were obliged to use the income from rent for the normal maintenance costs of the building, but were not required to carry out

¹⁸⁷ On the consideration of housing as a fundamental need, see F Tulkens, op cit., at 94.

¹⁸⁸ *Hutten-Czapska v Poland*, Judgment of 22 February 2005, para. 185.

¹⁸⁹ *Hutten-Czapska v Poland*, Judgment of 22 February 2005, para. 159.

¹⁹⁰ See M Varju, “Transition as a Concept of European Human Rights Law” 2 (2009) *European Human Rights Law Journal* 170, at 173 and 177.

¹⁹¹ Of course, the housing and electricity markets differ in major aspects (a.o. as regards the ownership structure, fundamentals of price formation and investment decisions). Nevertheless, it is argued here that they share general features which allows to use the case-law that the European Court for Human Rights developed in the housing sector to draw preliminary conclusions on interferences in the electricity sector.

¹⁹² *Mellacher and Others v Austria*, Judgment of the Court of 19 December 1989, para. 27.

any improvements.¹⁹³ The national regulation further provided for a considerable number of restrictions on the landlord's right to terminate a lease.¹⁹⁴ In its preliminary assessment of (the proportionality of) this scheme, the Commission considered that:

“in view of the importance of housing as a basic social need, it was legitimate to seek to curb excesses of the free play of the market forces and aim at a general moderation of the housing rents. (...) In this context it was not unreasonable that the legislature decided to restrict the free market because it considered that the results had been unsatisfactory and socially unjustified.”¹⁹⁵

The Commission justified this conclusion by underlying that:

“[w]hile the right to the peaceful enjoyment of possessions includes the possibility to use real property for purposes of financial investment and individual security, the owner has no right to the existence of a free market for the commercial use of his property.”¹⁹⁶

Based on this rejection of the right of owners to benefit from the free market, the Commission further considered that measures of price control are classical instruments of market regulation that cannot, as such, be regarded as incompatible with the second paragraph of Article 1 of the First Additional Protocol (the third rule).¹⁹⁷ Likewise this provision does not exclude that the legislator interferes with existing contracts between

¹⁹³ Such improvements could, however, be undertaken with the agreement of the tenants concerned subject to a supplement to the rent. If the necessary maintenance costs were not covered by the rental income of the last seven years, the landlord could ask for an increase in the amount of rent to be fixed by the court. In that case the landlord was required to use the entire additional rental income during that period for the necessary maintenance measures. *Mellacher and Others v Austria*, Judgment of the Court of 19 December 1989, para. 27.

¹⁹⁴ *Mellacher and Others v Austria*, Judgment of the Court of 19 December 1989, para. 28.

¹⁹⁵ *Mellacher and Others v Austria*, Report of the Commission of 11 July 1988, para. 208 and 212. The Commission further considered that “the fact that the rent corresponded to the market conditions does not mean that the legislator could not legitimately consider this level as being generally too high and socially unjustifiable.” *Ibid*, para. 214.

¹⁹⁶ *Mellacher and Others v Austria*, Report of the Commission of 11 July 1988, *op cit.*, para. 212.

¹⁹⁷ *Mellacher and Others v Austria*, Report of the Commission of 11 July 1988, para. 212.

private parties with a view to extending the price controls.¹⁹⁸ However, according to the Commission, because of the “weight to be given to acquired contractual rights”, interferences with such freely concluded contracts requires a special (somewhat stricter¹⁹⁹) justification.²⁰⁰ *In casu*, the Commission found that the reductions of rent were not proportionate because it has not been proved that this reduced rent was sufficient to cover the applicants' necessary maintenance costs.²⁰¹

The Court followed the reasoning of the Commission regarding the prerogative of states to intervene in contracts freely entered into for reasons of social justice. It confirmed that:

“[t]he fact that the original rents were agreed upon and corresponded to the then prevailing market conditions does not mean that the legislature could not reasonably decide as a matter of policy that they were unacceptable from the point of view of social justice.”²⁰²

It did, however, not reach the same conclusion as the Commission on the justification of such interventions. In explicit contradiction to the findings of the Commission, it considered that the contested measure allowed the landlords to pass on the maintenance costs and other expenses for improvement works to the tenants by increasing the rents.²⁰³ Although it recognized that the rent reductions were “striking in their amount”,²⁰⁴ this cost reflection mechanism, according to the Court, justified the proportionality of the

¹⁹⁸ *Mellacher and Others v Austria*, Report of the Commission of 11 July 1988, para. 212.

¹⁹⁹ See the Joint Dissenting Opinions of Judges Cremona, Bindschedler-Robert, Gölcüklü, Bernhardt and Spielmann, *Mellacher and Others v Austria*, Judgment of the Court of 19 December 1989, op cit., agreeing with the approach of the Commission.

²⁰⁰ *Mellacher and Others v Austria*, Report of the Commission of 11 July 1988, para. 213.

²⁰¹ *Mellacher and Others v Austria*, Report of the Commission of 11 July 1988, para. 223.

²⁰² *Mellacher and Others v Austria*, Judgment of the Court of 19 December 1989, para. 56. The Court argued that “in remedial social legislation and in particular in the field of rent control, which is the subject of the present case, it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy adopted.” *Mellacher and Others v Austria*, Judgment of the Court of 19 December 1989, op cit., para. 51. *In casu*, the Court considered that the rent control measures aimed to reduce the rents at socially more acceptable levels.

²⁰³ *Mellacher and Others v Austria*, Judgment of the Court of 19 December 1989, op cit., para. 55.

²⁰⁴ *Mellacher and Others v Austria*, Judgment of the Court of 19 December 1989, para. 56.

measure. The possibility to “pass on” costs incurred by owners of property was thus an essential criterion both for the Court and the Commission in the application of the fair balance test to measures of price control. *In casu*, however, the Court and the Commission disagreed on the actual fulfillment of this criterion. The size of the price reductions as such was not determinative.²⁰⁵

In the *Hutten-Czapska* case, the Court confirmed the main lines of this approach. As already introduced above, this case also concerned restrictions to the amount of rents (this time in Poland). These restrictions were combined with obligations for landlords to implement maintenance works, as well as with limitations to their right to terminate their leases. They were implemented in a context of degraded housing²⁰⁶ and acute shortage of flats inherited from the communist regime.²⁰⁷ The Court²⁰⁸ repeated that, in spheres such as the housing of the population, states necessarily enjoy a wide margin of appreciation.²⁰⁹ To achieve these objectives of social policy, states may introduce significant restrictions (even beneath the market value) to the freely agreed levels of rents,²¹⁰ especially if these interferences are limited in time (*e.g.* as transitional measures)²¹¹. However, in contrast to the *Mellacher* case, the Court considered that *in*

²⁰⁵ See also the Joint Dissenting Opinions of Judges Cremona, Bindschedler-Robert, Gölcüklü, Bernhardt and Spielmann, *Mellacher and Others v Austria*, Judgment of the Court of 19 December 1989, *op cit.*, agreeing with the approach of the Commission.

²⁰⁶ *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 138.

²⁰⁷ *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 225. See F Tulkens, *op cit.*, at 93.

²⁰⁸ Both the Chamber and the Grand Chamber.

²⁰⁹ *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 166 and 223. On the margin of appreciation of states in the implementation of policies in the housing sector, see F Tulkens, *op cit.*, at 89 and 92.

²¹⁰ *In casu*, the Court referred to the “exceptionally difficult housing situation in Poland” (i.e. an acute shortage of dwellings and the high cost of acquiring flats on the market), “the inevitably serious social consequences involved in the reform of the lease”, as well as the “impact that the reform had on economic and other rights of owned flats” to justify the restrictions of rents. *Hutten-Czapska v Poland*, Judgment of 22 February 2005, para. 176 and 186. *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para 202.

²¹¹ *Hutten-Czapska v Poland*, Judgment of 22 February 2005, para. 176. On the consideration of circumstances of social, political and economic transition by the European Court for Human Rights in the application of the fair balance test, see M Varju, *op cit.*, at 178-179 and 183. To understand the reasoning of the European Court for Human Rights *in casu* it is also interesting to refer the case-law of the Polish Constitutional Court on the constitutionality of the Polish rent-control measure (to which the European

casu the levels of rent were set below the costs of maintenance.²¹² And the contested measures did not provide for any legal ways enabling landlords to offset the expenses incurred in connection with the maintenance works. They did not establish any procedure for state subsidies compensating these losses.²¹³ The Court found:

“no justification for the State's continued failure to secure to the (...) landlords (...) the sums necessary to cover maintenance costs, not to mention even a minimum profit from the lease of flats.”²¹⁴

The determinative criteria in the application of the fair balance test to price control measures is thus not the level of the restriction as such, but the possibility (*i.e.* legal ways) offered to the landowners to recover their maintenance costs. The Court justified this reasoning by referring to the fact that not enabling owners to recover their costs would not contribute to improving the housing situation in Poland. The impossibility for landlords to receive sufficient rent (or other compensation) to finance modernization works²¹⁵ would, on the contrary, cause “the inevitable deterioration of the property for lack of adequate investment and modernization.”²¹⁶

The Court did however not limit its assessment to the recovery of costs. Interestingly, it also paid attention to the possibility to receive a “minimum” or “decent” profit from the

Court for Human Rights extensively refers). In particular see Judgment of the Polish Constitutional Court of 12 January 2000, Judgment of the Polish Constitutional Court of 2 October 2002 and Judgment of the Polish Constitutional Court of 19 April 2005, quoted in *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 82, 104 and 138.

²¹² The levels of controlled rent covered merely 60 percent of the maintenance costs of residential dwellings. *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 81.

²¹³ *Hutten-Czapska v Poland*, Judgment of 22 February 2005, para. 176; *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 224.

²¹⁴ *Hutten-Czapska v Poland*, Judgment of 22 February 2005, Para. 186. *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 210.

²¹⁵ See also *Hutten-Czapska v Poland*, App. No. 35014/97, Judgment of 28 April 2008, para. 22 on the Bill of the Government of Poland Supporting Thermo-Modernization and Renovations.

²¹⁶ *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 224.

property.²¹⁷ In the *Hutten-Czapska* case (as well as in other later cases²¹⁸) it explicitly recognized the necessity to pay attention to the owners' "entitlement to derive profit from their property" in the application of the fair balance test.²¹⁹

In its Judgment, the European Court for Human Rights extensively refers to the assessment of the constitutionality of the Polish rent-control measure by the Polish Constitutional Court. It is therefore very interesting to mention the justification that the Polish Constitutional Court gave to the necessary consideration of the "entitlement" to derive a profit from property in the evaluation of the proportionality of rent restrictions. In accordance with the Polish Constitutional Court:

"a decent profit derived from the exercise of the right of property is an indispensable element of the genuine protection of property rights. Without profit, there are no investments or even modernization works, which are dictated by technological progress and which are also beneficial for the interests of tenants."²²⁰

²¹⁷ *Hutten-Czapska v Poland*, Judgment of 22 February 2005, para. 175 and 186. *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 197, 202, 209, 220 and 239.

²¹⁸ See *Edwards v Malta*, App. No. 17647/04, Judgment of 24 October 2006, para. 75, where the European Court for Human Rights considered that "[e]ven assuming that the applicant was not made to cover the costs of extraordinary maintenance and repairs of the building, as required by law, the Court cannot but note that the sum at issue (...) is extremely low and could hardly be seen as a fair compensation for the use of a tenement and an adjacent field. The Court is not convinced that the interests of the landlords, "including their entitlement to derive profits from their property" (...) have been met by restricting the owners to such extremely low returns." See also *Ghigo v Malta*, op cit., para. 66; *Fleri Soler and Camilleri v Malta*, op cit., para. 74.

²¹⁹ The Court considered that the respondent State must "above all, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords, including their entitlement to derive profit from their property, and the general interest of the community – including the availability of sufficient accommodation for the less well-off – in accordance with the principles of the protection of property rights under the Convention". *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para 239.

²²⁰ Decision (*postanowienie*) of the Polish Constitutional Court of 29 June 2005 setting out recommendations for Parliament, quoted in *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 142.

The possibility for owners to recover their costs, as well as to earn a “decent” or “minimum” profit would thus be essential pre-requisites to attract investments to modernize the housing sector.²²¹ Landlords must be allowed to receive an “economically justified” or “basic rent”²²² to secure investments in the modernization of this sector. The implementation of these investments is, given the degraded state of the sector and the shortage of flats, in the (long term) interest of the tenants. It can thus be argued that, in accordance with the jurisprudence of the Polish Constitutional Court and the European Court for Human Rights, the impossibility to recover costs and to earn a “decent” profit goes against the “social function of property”.²²³ Cost-recovery and the benefit of a “decent” profit²²⁴ therefore constitute essential elements of property²²⁵ that must be taken into account in the application of the fair balance test under Article 1 of the First Additional Protocol.²²⁶

²²¹ It is interesting to highlight that, according to the Polish Constitutional Court, the Polish state could reasonably restrict the right to derive profit from property during the transition from controlled rent to contractual rent. However, the failure to meet the deadline of the end of the transition period (i.e. the “breaking of what amount to a promise”) would be a violation of the principle of legal certainty and must be taken into account in the assessment of the constitutionality of the contested measure. (See Judgment of the Polish Constitutional Court of 12 January 2000, Judgment of the Polish Constitutional Court of 2 October 2002 and Judgment of the Polish Constitutional Court of 19 April 2005, quoted in *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 82, 104 and 137).

²²² See *Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 239.

²²³ On the potential conflict between the attraction of (international) capital and the risk of “unfettered, high-turnover” demands, see P Kenna, “Globalization and Housing Rights” op cit., at 412-425, 465-467.

²²⁴ It must be noted that the Grand Chamber of the European Court for Human Rights did not unanimously accept this interpretation in the *Hutten-Czapska* Judgment of 19 June 2006. Judge Zupančič, in his partly dissenting opinion, considered that “[t]he *travaux préparatoires* of Protocol No. 1 amply demonstrate the hesitations different prospective signatories had concerning its Article 1. These hesitations concerned the question whether the right to property is a human right at all. *A fortiori*, the right to derive profit from property by merely owning an apartment building cannot be seen as a human right. I think the language of Article 1 of Protocol 1 demonstrates this (...). In other words, the question of whether “*peaceful enjoyment of one’s possessions*” implies the “*entitlement to derive profit from one’s property*” must be answered in the negative. This is not the place to discuss the “social function of property”, although a clause to that effect is an integral part of many modern constitutions. Suffice it to say that a sheer profit for the landlord – in other words, income not derived from his services – is, for the tenant, of necessity a payment that is not reciprocated by a benefit. How can that be a landlord’s human right?”. See P Kenna, “Globalization and Housing Rights” 15 (2008) *Indiana Journal of Global Legal Studies* 397, at 412-425, 465-467.

²²⁵ See P Kenna, « Housing Rights : Positive Duties and Enforceable Rights at the European Court of Human Rights » 2 (2008) *European Human Rights Law Journal* 193, at 198-199.

²²⁶ However, it is not sufficient to demonstrate that rents are not commensurate with the costs of property maintenance for rent-control measures to fail the fair balance test. In order to rule that a contested measure imposes the social and financial costs of a policy mostly at the expense of landlords, the European Court for Human Rights consistently requires a “combination of restrictions on landlords’ rights” (or the

It can be argued that this case-law provides significant arguments to electricity producers against price caps (or other interventions in the price formation of electricity) that would prevent them from recovering their operating and investment costs. Following the reasoning of the European Court for Human Rights, in the context of the modernization of the electricity production sector, producers that secure the needed investments may not be prevented from recovering their necessary costs. Moreover, investors that participate to this modernization process must be able to derive a “decent profit” from the (state-of-the-art) production plants they constructed. It could be sustained that, once investments in such installations have been made, the introduction of price caps to shield consumers from higher prices could place the financial burden of the modernization process mainly on the producers. For physical and legal reasons, it is often difficult, if not impossible, to interrupt the production process or to terminate the supply of electricity. In the absence of legal means to recoup operating or investment costs or in the absence of other state compensation mechanisms of the losses incurred by producers, control measures of electricity prices could thus fail the balance test. Moreover, in the application of the “fair balance” test to these control measures attention must be laid on the potential breach by the state of the “legitimate expectations” of electricity producers in liberalized markets. This would for instance be the case if, in contradiction to promises to withdraw restrictions on electricity prices after a certain (transition) period, these limits are prolonged. It must be highlighted that the determination of what would amount to a “decent profit” or what would constitute “necessary” expenses and costs, is likely to be very controversial. Some might argue that the evaluation of these costs and profits by the European Court for Human Rights would make it a new regulatory authority in the liberalized electricity markets. However, following the case-law of the European Court

“combined effect of defective provisions on the determination of rent and various restrictions on landlords’ rights”). (*Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 224 and 237.) As highlighted above, besides the failure to secure a “basic rent”, the Court, in particular, looks at the absence of legal ways to offset costs or to mitigate losses with state subsidies. Moreover, it pays attention to restrictions on landlords’ rights in respect of the termination of leases and the determination of other essential elements of rent contracts (such as the choice of the tenant). (*Hutten-Czapska v Poland*, Judgment of the Grand Chamber of 19 June 2006, para. 224. *Edwards*, op cit., para. 73 and 78.)

for Human Rights, the margin of appreciation of states is very broad (certainly in areas of policies that are as socially and economically sensitive as the electricity sector). Price control measures will only be considered to violate the proportionality requirement if these measures *manifestly* prevent producers to recover their costs or earn a decent profit.

For what concerns the application of the “fair balance” test to interferences in support schemes, it must be recalled that investments in electricity production from renewable energy sources is rarely considered to be financially viable without this support. Support schemes are designed to cover the higher investment (but also operating) costs of such production installations. The introduction by the state of significant changes to these schemes in order to preserve the state budget could thus prevent investors to recover their costs and earn a “decent profit”. Moreover, this could breach the investors’ legitimate expectations to benefit from these schemes during a sufficient period that enables them to recover their costs and receive a reasonable return on investment. Interferences in support schemes after production installations have been constructed on this basis could be considered as placing the financial costs of the development of renewable energy mainly at the expenses of producers.

Similarly, the financial viability of Joint Implementation projects generally depends on the additional income from ERUs. This results from the requirement of (financial) additionality of JI projects. It could therefore be sustained that significant interferences in the issuance of ERUs by the host state could theoretically jeopardize the possibility of investors to recover the costs of their emission reduction projects, and to derive a reasonable profit from them. These interferences could also be in contradiction to the legitimate expectations of the owners’ of these projects that they would be able to benefit from the approved amount of ERUs for the crediting periods. Moreover, JI projects implemented in the electricity production sector will generally be obliged to continue operating their plants even if unexpected changes in the issuance of the ERUs do not enable them to recover their operating costs. Here also, it could in theory be argued that

such interferences could place most financial costs of CO₂ emission reductions on the electricity producers and thus fail the “fair balance” test.

3. The principle of non-discrimination in connection to the right to property

Article 14 of the European Convention on Human Rights provides that:

“[t]he enjoyment of the rights and freedoms set forth in this Connection shall be secured without discrimination on any grounds such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

This non-discrimination provision is often considered as being at the same time complementary²²⁷ and autonomous.²²⁸ Indeed, on the one hand, Article 14 only applies to the rights covered by the European Convention on Human Rights and its Additional Protocols.²²⁹ This means that it does not protect against every kind of discrimination, but only against discriminations in relation to the enjoyment of other rights covered by the Convention.²³⁰ On the other hand, the application of Article 14 does not require a violation of the Convention right concerned.²³¹ So, even if the European Court for Human Rights does not rule that a state has breached the right to property, it could still find a violation of Article 14 in conjunction with Article 1 of the First Additional Protocol.²³² If the Court has found a violation of Article 1 of the First Additional

²²⁷ Or “parasitic”. See D J Harris et al., op cit., at 578.

²²⁸ G Goedertier, “Verbod van discriminatie”, in J vande Lanotte and Y Haeck (eds.), *Handboek EVRM - Deel2 - Artikelsgewijze Commentaar* (Antwerp, Oxford: Intersentia, 2004) 127, at 137-143.

²²⁹ See *Van der Musselle v Belgium*, op cit., para. 43.

²³⁰ In contrast, Protocol 12 to the European Convention on Human Rights (opened for signature on 4 November 2000 and entered into force on 1 April 2005) creates a freestanding nondiscrimination provision. Given the fact that, at the moment, only a relatively limited amount of states have ratified this Protocol and that it is relatively new, its relevance for low-carbon investments will not be further analyzed below. On Protocol 12, see D J Harris et al., op cit., at 611-613.

²³¹ G Goedertier, op cit., at 142.

²³² A R Çoban, op cit., at **XX (fn 78)**. See, for instance, *Inze v Austria*, App. No. 8695/79, Judgment of 28 October 1987.

Protocol, it will probably not consider it necessary to also assess the contested measure under Article 14, unless the discriminatory character of this measure is a “fundamental aspect of the case”.²³³

Since, as has been argued above, the right to sell electricity and to benefit from support schemes and CO2 emission credits are likely to fall within the ambit of Article 1 of the First Additional Protocol, electricity producers could challenge state interferences with these rights by alleging their discriminatory character.

In order to amount to violations of Article 14, electricity producers will have to demonstrate that such interferences with their rights constitute differences in treatment. Moreover, the concerned state must fail to establish the objective and reasonable justification of these inequalities. This part starts by examining whether interferences with the rights of electricity producers could be considered as differences in treatment, before analyzing if these differences could be objectively and reasonable justified.

3.1. Difference in treatment

A measure constitutes an unequal treatment if, on the basis of some “personal characteristics”, it treats certain subjects differently and places them in a less favorable position than others,²³⁴ although they are in an “analogous” or comparable situation.²³⁵ Inequality can result from the different treatment of entities that are in a similar situation, but also from the similar treatment of entities in different situations.²³⁶

²³³ See *Chassagnou and Others v France*, op cit., para 89. On this issue, see A R Çoban, op cit., at XX (fn 82); G Goedertier, op cit., at 143; D J Harris et al., op cit., at 578.

²³⁴ See D J Harris et al., op cit., at 582; G Goedertier, op cit., at 153.

²³⁵ In accordance with the jurisprudence of the European Court for Human Rights, the comparability of these situations must be determined in the light of the contested measures. See G Goedertier, op cit., at 162-164. On the “analogous situation test”, see also D J Harris et al., op cit., at 583.

²³⁶ See *Thlimmenos v Greece*, App. No. 34369/97, para. 44. On this issue, see G Goedertier, op cit., at 159; D J Harris et al., op cit., at 584.

Could interferences with the right to sell electricity, as well as to benefit from support schemes and CO2 emission credits, constitute differences in treatment within the meaning of Article 14?

It could, first, be argued that these interferences would qualify as differences in treatment if they specifically (*de jure* or *de facto*) target foreign investors in the electricity sector (on the basis of their nationality). This could be particularly tempting for states as this would impose the financial burden of the modernization of the electricity sector or the development of renewable energy sources on foreign and not domestic players. This was for instance the case in the *Nykomb v Latvia* international arbitration,²³⁷ where a foreign investor successfully argued that Latvia withdrew the support to its combined heat and power plant although it continued to support domestic operators of similar plants. For what concerns changes to the issuance of ERUs to Joint Implementation projects, attention must be laid on the fact that all these projects per definition involve the participation of foreign investors. It will therefore be difficult to argue that interferences in the issuance of ERUs that affect a specific project are based on the foreign origin of the affected project.²³⁸

Second, differences in treatment can occur on the “ground of property”.²³⁹ In this respect, interferences of the state with the right to property of certain types of production installations, but not others, could be considered as unequal treatments. Electricity producers that are specifically targeted by withdrawals of the support (or emission credits) to which they are entitled, whereas other comparable producers are not, could thus argue that these interventions constitute differences in treatment.²⁴⁰ The same

²³⁷ Award, SCC, IIC 182 (2003) 16 December 2003.

²³⁸ Moreover, although general changes of the domestic regulation for JI projects will only affect projects with foreign participation, it will be difficult to argue that such changes specifically discriminate foreigners in relation to domestic investors. Indeed, there are generally no JI projects that only involve domestic investors and to which the affected projects could be compared with.

²³⁹ See *Chassagnou and Others v France*, op cit., para 95; *James and Others v UK*, op cit., para. 77. See A R Çoban, op cit., at **XX (fn 109)**; D J Harris et al., op cit., at 584.

²⁴⁰ It must be noted that the European Court for Human Rights applies the “analogous situation test” narrowly. Therefore, there will probably be no difference of treatment if a state manages to demonstrate

reasoning would apply to interferences with the price of electricity. Changes with the priority of dispatch in favor of certain types of installations at the expense of others (for instance on the basis of the technology used) could be considered as differences in treatment.

Moreover, if states introduce general limits to the price of electricity, operators of installations that use state-of-the-art technologies could argue that the uniform application of such price limits constitutes an inequality. Indeed, given the higher costs of their installations, they should be treated differently than the operators of obsolete plants whose investment costs, for instance, are already recovered.

3.2. Justification

Differences in treatment amount to discriminations if the states fail to demonstrate that they pursue legitimate aims (*i.e.* are in the “public interest”) and that they are reasonably proportional to these aims.²⁴¹ As under Article 1 of the First Additional Protocol, the proportionality test under Article 14 consists in assessing whether there is a “fair balance” between the protection of the public interests and the rights safeguarded by the European Convention on Human Rights. One factor the Court takes into account in its assessment of the proportionality of the contested measures is the availability of less restrictive alternative means for achieving the same objective.²⁴² However, here also, the Court leaves a certain margin of appreciation to the states.²⁴³ The mere existence of alternatives is thus not always decisive evidence that the state has acted arbitrarily.²⁴⁴ The severity of the Courts’ proportionality assessment depends on the subject matter, as well

that the support for certain installations has been withdrawn because of the different characteristics of these installations (*e.g.* operational life-time) in comparison to others.

²⁴¹ See *Belgian Linguistic case*, App. No. 1474/62, 1677/62, 1691/62, Judgment of 23 July 1968, para. 10. D J Harris et al., op cit., at 585-590; G Goedertier, op cit., at 167-184.

²⁴² D J Harris et al., op cit., at 589.

²⁴³ Çoban argues that the margin of appreciation of states under Article 14 is much narrower than under Article 1 of the First Additional Protocol. A R Çoban, op cit., at XX (fn 101).

²⁴⁴ D J Harris et al., op cit., at 589; G Goedertier, op cit., at 179. See, however, A R Çoban, op cit., at XX (fn 101).

as on the basis of discrimination. So, the Court is relatively tolerant as regards the implementation of “general measures of economic and social strategy”.²⁴⁵ In contrast, the margin of appreciation of states is very narrow (i.e. states must present “very weighty reasons”²⁴⁶) if there is a common European standard in the concerned field²⁴⁷ or if the differences in treatment relate to nationality.²⁴⁸

If electricity producers manage to demonstrate that states have (*de jure* or *de facto*) based their interferences with support schemes (or with the price of electricity) on the nationality (or foreign origin) of the operators, it will be very difficult for states to justify these interferences. Article 14 would thus provide an essential safeguard against national policies that would aim to place most of the financial burden of the development of renewable energy sources (and the modernization of the electricity sector) on foreign investors. On the other hand, however, it can be argued that states will relatively easily demonstrate the objective and reasonable justification of other interferences that equally affect foreign and domestic operators. Indeed, states would enjoy a wider margin of maneuver. Moreover, they could justify these differences in treatment (that are not based on the nationality of the operators) on the grounds of different factual characteristics of the concerned installations (*e.g.* operational life-time, type of technology, installed capacity, geographical location).²⁴⁹

Conclusion

Paradoxically, low-carbon investments face very concrete risks directly related to the elaboration and implementation of the regulations that states adopt to attract these

²⁴⁵ *Burden v the United Kingdom*, App. No. 13378/05, 29 April 2008, para. 60. See D J Harris et al., *op cit.*, at 588.

²⁴⁶ *Gaygusuz v Austria*, *op cit.*, para. 42.

²⁴⁷ D J Harris et al., *op cit.*, at 592; G Goedertier, *op cit.*, at 176.

²⁴⁸ As well race (ethnic origin), religion, illegitimacy, sex, sexual orientation.

²⁴⁹ The similarity of situations is also a criterion used in the assessment of the justification of differences in treatment. The European Court for Human Rights interprets this similarity very narrowly. See A R Çoban, *op cit.*, at XX (fn 113).

investments. Indeed, once such investments have been made, states could be tempted to interfere with the support schemes aimed at the promotion of alternative sources of energy, with the issuance and transfer of emission credits to investors implementing Joint Implementation projects under the Kyoto protocol, as well as with the general reforms of the energy sector aimed at attracting private capital to improve the energy efficiency of the existing infrastructure. The fact that investors in greenhouse gas emission reductions projects perceive that their business cases can be affected by such interferences will generate additional costs to combat climate change. It can be argued that, in transition economies, the weakness of the domestic administrative and institutional capacity exacerbates these risks and thus costs.

The European Convention on Human Rights provides different protections against illegitimate state interferences with the right to property. It could therefore, in theory, participate to the improvement of the credibility of climate and energy policies in order to stimulate the flow of private capital in the implementation of low-carbon investments. It must, therefore, provide adequate safeguards to investors against state interferences with the regulations on the basis of which they have made their low-carbon investments.

This paper has argued that the right to receive revenues from the sale of electricity, as well as to benefit from support schemes and CO₂ emission reduction credits, would fall within the ambit of Article 1 of the First Additional Protocol. Although it can be sustained that these rights constitute “possessions” within the meaning of this provision, it is most unlikely that they would be protected separately from the property of the electricity production installation as such. Interferences with these rights would thus necessarily have to be assessed in terms of their general impact on the right to property of the concerned installation. Therefore, even if such interferences totally destroy these auxiliary rights, they would have to be assessed as measures of control of property, and not as expropriations.

The European Court for Human Rights leaves a wide margin of appreciation to states in the justification of measures of social and economic policy that constitute a control of property. However these measures must always respect a fair balance between the public interests pursued and the right to property of the affected subjects. In accordance with the recent case-law of the Court, this fair balance, among others, requires states to allow owners to recover the costs related to their property, as well as to derive a “decent profit” from it. Applied to investments in the electricity sector, this would mean that, in a liberalized market, states may not introduce limits to the price of electricity that prevent producers from recovering their investment and operating costs, including a “reasonable” rate of return. Moreover, if investments in alternative modes of electricity production have been made on the basis of support schemes, states may not withdraw this support as long as it is necessary to recover the investments and operating costs of these installations.

In addition, Article 14 of the European Convention on Human Rights protects owners against discriminations in relation to their property. States enjoy a wide margin of appreciation in the justification of differences of treatment. But this margin is very limited in case differences are made on the basis of nationality. Therefore, it can be argued that this provision could protect foreign investors in low-carbon technologies against interferences that specifically aim to impose on them (and not on national investors and consumers) the costs of climate policy.

The reduction of greenhouse gas emissions, in general, and the modernization of the electricity sector as well as the development of renewable energy sources, in particular, requires huge investments that represent considerable financial costs for society. Given the current lack of internalization of CO₂ externalities in electricity prices, private investors are ready to participate to the financing of these investments if states provide additional incentives. Reneging on the implementation of these incentives once investments have been made would impose on the private investors most of the financial burden of the national emission reduction policies.

The European Convention for Human Rights does not guarantee investors in low-carbon technologies that all interferences with their rights and legitimate expectations will be sanctioned. Nevertheless, it provides them with important procedural safeguards that, to a certain extent, would prevent states from implementing climate and energy policies mainly at their expenses. By guaranteeing this fair balance between public and private interests, the right to property, as protected under the European Convention on Human Rights, contributes to the improved credibility and thus efficiency of climate and energy policy.