

# European Green Deal, Climate Policies and the Energy Dilemma: Investment Protection versus Sustainable Investment?

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## 10.1 Introduction

As two-thirds of the world's greenhouse gas emissions are generated in the energy sector,<sup>1</sup> energy-related investment is essential to sustainability. Fossil fuel still provides the basis for powering the world's industry and transport, and for producing its electricity, heating and cooling.<sup>2</sup> According to the Intergovernmental Panel on Climate Change (IPCC), it is essential that both 'governments and the private sector' make sure that 'investment in clean and sustainable energy innovation increases' to tackle the climate crisis.<sup>3</sup>

From a regulatory standpoint, in line with the Sustainable Development Goals,<sup>4</sup> the United Nations Framework Convention on Climate Change (UNFCCC) regime establishes fundamental norms for mitigating greenhouse gas emissions,<sup>5</sup> while the Energy Charter Treaty (ECT),<sup>6</sup> which is largely an initiative of the European Union (EU), is a critical instrument for the governance of investment in the energy sector.<sup>7</sup> Both instruments were adopted in the 1990s; however, whereas the UNFCCC relies heavily on the implementation of new technologies and a transition to clean energy (preamble), these are not the priorities of the ECT, which is still anchored to a model of investment that affords broad protection to cross-border investors.

It is therefore necessary to explore the relationship between the UNFCCC and related regulatory instruments on the one hand, and the ECT on the other, to assess their reciprocal consistency. The research proceeds along the lines of the 'systemic integration' principle codified in article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)<sup>8</sup> and the Vienna Convention on the Law of Treaties between States and International Organisations or

<sup>1</sup> L. Cozzi, T. Gould, What would it take to limit the global temperature rise to 1.5°C? 2019. [www.iea.org/commentaries/what-would-it-take-to-limit-the-global-temperature-rise-to-15c](http://www.iea.org/commentaries/what-would-it-take-to-limit-the-global-temperature-rise-to-15c).

<sup>2</sup> R. Lyster, A. Bradbrook, *Energy Law and the Environment* (Cambridge University Press, 2006), p. 11 ff.; S. Tagliapietra, G. Zachmann, Towards a zero-carbon and digital energy system: what policy challenges for Europe? *European Energy Journal* 2018, 7: 16–32, at pp. 17 ff.; V. Bruggeman, B. Delvaux, EU energy policy and legislation under pressure since the UNFCCC and the Kyoto Protocol, in M. Peeters, K. Deketelaere (eds.), *EU Climate Change Policy: The Challenge of New Regulatory Initiatives* (Edward Elgar, 2006), p. 233.

<sup>3</sup> IPCC. Energy Is at the heart of the solution to the climate challenge. 2020. [www.ipcc.ch/2020/07/31/energy-climatechallenge](http://www.ipcc.ch/2020/07/31/energy-climatechallenge).

<sup>4</sup> UN General Assembly, Sustainable Development Goals. 2015. <https://sdgs.un.org/goals>.

<sup>5</sup> Opened for signature 4 June 1992, 1771 UNTS 107, entered into force 21 March 1994.

<sup>6</sup> Opened for signature 17 December 1994, entered into force 16 April 1998.

<sup>7</sup> A. Boute, Combating climate change through investment arbitration. *Fordham International Law Journal* 2012, 25(3): 613–664, at pp. 626–627.

<sup>8</sup> Opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980.

between International Organisations (VCLTIO).<sup>9</sup> As treaties must not be considered in isolation, but should rather be construed in their international legal context,<sup>10</sup> this contribution assesses the possibility of a regulatory conflict between the UNFCCC and the ECT in the area of energy-related investment. It argues that, if the ECT supports investment in renewables and fossil fuel equally, it might clash with the objective of stabilizing anthropogenic greenhouse gas emissions within sustainable limits under the UNFCCC, thus largely hindering the implementation of the European Green Deal.

This chapter proceeds in two parts. The first outlines obligations under the UNFCCC and the ECT, aiming to identify a possible conflict and its scope by evaluating both UNFCCC and ECT obligations, and their implications for climate change, in turn. The second aims to chart some possible ways forward, particularly in the context of the modernization of the ECT, with respect to both substantive and procedural norms. This part elaborates on the flexible approach to investment protection developed by the EU.<sup>11</sup> It applies some proposals that have been put forward *de lege ferenda* to green investment, such as the Model Treaty for Climate Change Mitigation and Adaptation (TSICCM) and the Green Investment Protocol (GIP),<sup>12</sup> to the ECT within the framework of the modernization process.

## 10.2 United Nations Framework Convention on Climate Change and Energy Charter Treaty: Clashing Commitments?

### 10.2.1 The United Nations Framework Convention on Climate Change and Climate Change Obligations

The UNFCCC established the governing regulatory regime for climate change: it outlined the foundations for the parties to achieve sustainable greenhouse gas emissions. Currently, 197 sovereign entities have joined the Convention, including the EU, which is classified as an industrialized party under annex I.<sup>13</sup> While the degree to which the UNFCCC is binding is contested, there is little doubt that duties under the UNFCCC are compulsory, at least to a certain extent, with respect to both substantive action and attendant procedural obligations.

Substantively, UNFCCC article 2 establishes the main ‘objective’ of stabilizing greenhouse gas concentrations in the atmosphere to prevent dangerous anthropogenic interference with climate, allowing sufficient time for sustainable development. It is considered that this rule establishes a duty to prevent climate change.<sup>14</sup> According to UNFCCC article 3, the parties ‘should’ protect the climate system ‘for the present and future generations of humankind’, in line with the precautionary principle and common but differentiated

<sup>9</sup> Opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980.

<sup>10</sup> ILC, Fragmentation of international law: difficulties arising from the diversification and expansion of international law. UN Doc. A/CN.4/L.682. (2006), at p. 243, paragraphs 479–481.

<sup>11</sup> EU, Text proposal for the modernisation of the Energy Charter Treaty, 2020, at pp. 4 and 11. [https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc\\_158754.pdf](https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf).

<sup>12</sup> Available at <https://stockholmtreatylab.org/the-outcome>.

<sup>13</sup> Status of Ratification of the UNFCCC. <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/status-of-ratification-of-the-convention>. On this basis, it could be argued that the UNFCCC has universal application (O. Quirico, Towards a peremptory duty to curb greenhouse gas emissions?’ *Fordham International Law Journal* 2021, 44: 923–965, at pp. 932–933).

<sup>14</sup> C. Voigt, State responsibility for climate change damages. *Nordic Journal of International Law* (2008) 77(1–2): 1–22, at p. 5.

responsibility (CBDR). In the light of its non-imperative nature, this rule is generally considered soft law.<sup>15</sup> UNFCCC article 4(1)(a)-(b) further posits that the parties ‘shall’ establish national inventories of greenhouse gas emissions by sources and removals by sinks, in the context of mitigation programs. In this framework, developed country parties are to take the lead under UNFCCC article 4(2)(a). Procedurally, under article 4(2)(b) the parties commit to providing detailed information on mitigation policies and under article 4(2)(e) they agree to co-ordinating their economic and administrative instruments and to periodically reviewing their policies. Overall, it is considered that these rules impose on the parties an obligation to implement measures to stabilize greenhouse gas emissions.<sup>16</sup>

In the context of the UNFCCC, the Kyoto Protocol first and the Paris Agreement subsequently have outlined specific emissions reduction targets.<sup>17</sup> Under article 3(1) of the Kyoto Protocol, developed annex I countries committed to ensuring that their aggregate anthropogenic carbon dioxide equivalent emissions included in annex A diminish by at least 5%, as compared to 1990 levels, between 2008 and 2012. The Geneva Ministerial Declaration clarified the strictly binding nature of this obligation.<sup>18</sup> Under article 2 of the Paris Agreement, in line with the objectives of the UNFCCC, the parties aim to ‘strengthen the global response’ to climate change, including by ‘holding’ global average temperature ‘well below 2°C above pre-industrial levels’ and ‘pursue efforts to limit’ increase to 1.5°C, which would ‘significantly reduce’ the impact of global warming. Article 4 further specifies that the parties try to reach the peaking of greenhouse gas emissions ‘as soon as possible’ and ‘shall’ adopt appropriate national mitigation measures. On the one hand, article 3 compels the parties to determining national contributions on a voluntary basis, on the other hand, article 4(2) and (9) establishes an obligation to report on measures adopted to progress towards the stabilization of greenhouse gas emissions. These are mostly regarded as duties of conduct.<sup>19</sup>

Under this framework, over 100 countries and sovereign organizations have committed to net-zero carbon policies, whereby anthropogenic emissions of greenhouse gas into the atmosphere are matched by carbon sequestration. Thus, for instance, the People’s Republic of China (PRC) has committed to net-zero carbon emissions by 2060, and each of the EU, the United States, the United Kingdom, Japan, and New Zealand by 2050.<sup>20</sup> Key elements of the European Green Deal involve, for example, promoting renewable energy, energy system integration and hydrogen, phasing out coal, and decarbonizing gas.<sup>21</sup> The Deal requires

<sup>15</sup> M. Fitzmaurice, Responsibility and climate change. *German Yearbook of International Law* (2010) 53: 90, at p. 106.

<sup>16</sup> B. Mayer, Obligations of conduct in the international law on climate change: a defence. *Review of European, Comparative and International Environmental Law* 2018, 27: 130–140, at p. 135.

<sup>17</sup> Kyoto Protocol, opened for signature 11 December 1997, entered into force 16 February 2005; Paris Agreement, opened for signature 22 April 2016, entered into force 4 November 2016.

<sup>18</sup> UNFCCC, Geneva Ministerial Declaration, UN Doc. FCCC/CP/1996/15/Add.1 (1996) at para. 8; Mayer, Obligations of conduct, p. 135; M. Fitzmaurice, The Kyoto Protocol compliance regime and treaty law. *Singapore Yearbook of International Law* 2004, 8: 23, at p. 28.

<sup>19</sup> D. Bodansky, The legal character of the Paris Agreement. *Review of European, Comparative and International Environmental Law* 2016, 25(2): 142–150, at p. 150.

<sup>20</sup> U.S., International Climate Finance Plan, 2021; European Commission, European Green Deal: delivering on our targets. 2021. [https://ec.europa.eu/commission/presscorner/detail/en/fs\\_21\\_3688](https://ec.europa.eu/commission/presscorner/detail/en/fs_21_3688); J. Murray, Which countries have committed to legally binding net zero carbon emissions? NS Energy, 2021. [www.nsenrgybusiness.com/news/countries-net-zero-emissions](https://www.nsenrgybusiness.com/news/countries-net-zero-emissions).

<sup>21</sup> European Commission, The European Green Deal, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2019) 640 final. 2019.

‘massive public investment’<sup>22</sup> and the Sustainable Europe Investment Plan seeks to mobilize investment in renewable energy for €1 trillion in the period 2020–2030 to achieve carbon neutrality by 2050.<sup>23</sup> The European Investment Bank has committed to phasing out ‘support to energy projects reliant on unabated fossil fuels’ by the end of 2021.<sup>24</sup> The Proposal for a Regulation of the European Parliament and of the Council Establishing the Framework for Achieving Climate Neutrality envisages a ‘far-reaching reform’ of ‘energy and infrastructure investment policies’.<sup>25</sup>

## 10.2.2 The Energy Charter Treaty, Investment and Sustainability

### 10.2.2.1 Essential Energy Charter Treaty Investment Mechanisms

The ECT was adopted in 1994, along the lines of the European Energy Charter,<sup>26</sup> which was adopted in The Hague on 17 December 1991, in the context of the so-called Energy Charter Process.<sup>27</sup> The ECT is a binding multilateral treaty, adopted upon the initiative of the EU and specifically governing the energy sector, with a focus on long-term co-operation (article 2). In line with the European Energy Charter, it governs investment protection, trade, energy transit and efficiency, environmental protection, and dispute settlement.<sup>28</sup> The ECT currently includes 57 signatories, encompassing all EU Member States (save for Italy), the EU itself, the European Atomic Energy Community (Euratom), and Group of 20 (G20) economies such as Japan, Turkey, Australia, and the UK, with Belarus applying it provisionally, and neither Russia nor Norway having ratified it.<sup>29</sup> Other major economies, such as Canada and the United States, are not parties, but the ECT aims to expand, particularly to African and Asian States, according to the so-called ‘CONEXO’ policy (of consolidation, expansion, and outreach).<sup>30</sup>

As regards cross-border investment, ECT part III aims to establish a ‘level playing field’, creating a stable framework for investors and limiting non-commercial risk.<sup>31</sup> To this end, the ECT regulates the access of investment to foreign markets and investment protection. The parties make their best efforts to ensure freedom of investment transfer.<sup>32</sup> Once investment enters a foreign market, the ECT establishes an obligation for the parties to ensure fair and equitable treatment (FET: article 10(1)), which cannot be less favourable

<sup>22</sup> Ibid at p. 2.

<sup>23</sup> European Commission, Financing the Green Transition: The European Green deal investment plan and just transition mechanism. 2020. [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_17](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_17).

<sup>24</sup> European Investment Bank, Energy lending policy supporting the energy transformation (2019), at p. 4.

<sup>25</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing the Framework for Achieving Climate Neutrality and Amending Regulation (EU) 2018/1999 (European Climate Law), Explanatory Memorandum, Doc. 4.3.2020 COM(2020) 80 final 2020/0036(COD) (2020), paragraph 1.

<sup>26</sup> Adopted 17 November 1991.

<sup>27</sup> The Energy Charter Process, [energycharter.org](http://energycharter.org). 2024. [www.energycharter.org/fileadmin/DocumentsMedia/Infographics/2015\\_Energy\\_Charter\\_Process\\_General.pdf](http://www.energycharter.org/fileadmin/DocumentsMedia/Infographics/2015_Energy_Charter_Process_General.pdf).

<sup>28</sup> K. Hobér, Investment arbitration and the Energy Charter Treaty. *Journal of International Dispute Settlement* 2010, 1(1): 153–190 at p. 154; M. S. Peters, Critical commentary on the Energy Charter Treaty. *European Energy Journal* 2018, 7(4): 47–54; C. Benson, C. Yim, V. Orlowski, The Energy Charter Treaty, in D. Bishop, G. Kaiser (eds.), *The Guide to Energy Arbitrations* (Law Business Research Ltd, 2nd ed., 2017), p. 33.

<sup>29</sup> Energy Charter Treaty, Signatories/contracting parties. [www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties](http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties).

<sup>30</sup> International Energy Charter, CONEXO, 30 November 2015. [www.energycharter.org/what-wedo/conexo/overview](http://www.energycharter.org/what-wedo/conexo/overview).

<sup>31</sup> Hobér, Investment arbitration and the Energy Charter Treaty, pp. 156–162.

<sup>32</sup> Energy Charter Secretariat, Sub-Group on Modernisation, Room Document 1 (2019) at p. 5.

than that required by international law. For instance, in *Nykomb Synergetics Technology Holding AB v. the Republic of Latvia* it was considered that the ECT parties have an obligation not to treat a foreign investor differently without appropriate justification, ‘comparing like with like’.<sup>33</sup> The last sentence of ECT article 10(1) embeds an ‘umbrella clause’, which compels a contracting party to ‘observe any obligations it has entered into with an Investor or an Investment of an Investor of any other contracting party’.<sup>34</sup> The ECT also compels an endeavour to implement the most-favoured-nation (MFN) treatment (article 10(2)–(3)) and the national treatment principle (NT: article 10(7)). ECT article 10(12) further provides that a contracting party establishes effective domestic enforcement measures for investment rights. Expropriation of foreign investment is only allowed exceptionally in the public interest under ECT article 13(1) and entails full compensation, according to fair market value.<sup>35</sup>

Under part V of the ECT, inter-State disputes are to be resolved amicably via diplomatic channels, that is, negotiation, mediation, and conciliation (article 27(1)). Otherwise, a party may resort unilaterally to ad-hoc arbitration (ECT article 27(2)), except for trade-related investment disputes under article 5 and trade-related interim provisions under article 29, whereby consent is requested to commence arbitration under article 28. Under ECT article 26, when disputes between an investor of a State party to the ECT and another State party cannot be resolved amicably (ECT article 26(1)), the investor can choose between domestic adjudication (ECT article 26(2)) and international arbitration or conciliation, as each contracting party gives unconditional consent to such a means for settling disputes (ECT article 26(3)(a)).<sup>36</sup>

In the case of a contracting party included in annex IA that has not given unconditional consent with respect to investment disputes, ECT article 26(2)(4)(a)(i) establishes that, when an investor chooses to submit an investment dispute to arbitration, it further accepts the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID), under the 1965 ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),<sup>37</sup> provided that both the contracting party of the investor and the contracting party to the dispute are parties to the ICSID Convention. ECT article 26(4)(a)(ii) further establishes that the ICSID is seized under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules), in the case that only one party among the contracting party of the investor and the contracting party to the dispute is a party to the ICSID Convention. Additionally, the investor consents to submitting an investment dispute to a sole arbitrator or an ad-hoc arbitration tribunal established under the Arbitration Rules of the United Nations

<sup>33</sup> *Nykomb Synergetics Technology Holding AB v Republic of Latvia*, SCC Arbitration Institute, Arbitral Award of 16 December 2003, at p. 34.

<sup>34</sup> T. Wälde, Contract claims under the Energy Charter Treaty’s umbrella clause: original intentions versus emerging jurisprudence, in C. Ribeiro (ed.), *Investment Arbitration and the Energy Charter Treaty* (Jurisnet, 2006), p. 205.

<sup>35</sup> A. Sheppard, The distinction between lawful and unlawful expropriation, in Ribeiro, *Investment Arbitration*, pp. 169–199.

<sup>36</sup> Save if a State party under annex ID has excluded arbitration or conciliation in the case that the investor has taken action in domestic courts (ECT article 26(3)(b)). Additionally, State consent is optional if a State party included in annex IA has not given unconditional consent with respect to disputes concerning any obligations it has entered into with an investor or an investment of an investor of any other contracting party, under ECT article 10(1) (ECT article 26(3)(c)).

<sup>37</sup> Opened for signature 18 March 1965, 575 UNTS 159, entered into force 14 October 1966.

Commission on International Trade Law (UNCITRAL) (ECT article 26(4)(b)) or to proceedings via the Arbitration Institute of the Stockholm Chamber of Commerce (SCC; ECT article 26(4)(b)). Dispute resolution means under ECT article 26 are not subject to exhaustion of local remedies or contractual dispute resolution mechanisms.

Under ECT article 26(6), tribunals decide issues presented before them in accordance with the ECT and other ‘applicable rules and principles of international law’. Thus, a tribunal deciding energy-related investment disputes will apply, first and foremost, the ECT and, additionally, international law, including conflict of laws rules that may lead to the application of domestic law, particularly that of the host State or of another State. The forum choice under ECT article 26(2)–(3) has implications as concerns applicable law. For instance, ICSID Convention article 42 prioritizes the law agreed by the parties over that of the contracting State party to the dispute and international law. Under article 27(1) of the SCC Arbitration Rules and article 35(1) of the UNCITRAL Arbitration Rules, arbitral tribunals apply the law determined by the parties and, alternatively, the law that they consider most appropriate.

ECT article 36(8) establishes that arbitral awards are final and binding upon the litigating parties: each contracting party implements the awards without delay and makes provision for effective enforcement. As of 2024, the ECT Secretariat reports 135 arbitration cases established under the ECT and more have been initiated confidentially, as reporting is a right, not a duty, under ECT article 26.<sup>38</sup>

#### 10.2.2.2 Sustainability under the Energy Charter Treaty

Concerning environmental protection, the preamble to the ECT mentions the UNFCCC and the importance of sustainable development and energy efficiency. Along these lines, article 19, concerning environmental protection, establishes that the parties pursue sustainable development and take into account environmental obligations under international agreements, striving to minimize environmental impacts arising from activities in the energy cycle, in an economically efficient way. This framework entails that the parties ‘shall’ take into account environmental considerations in formulating and implementing energy policies (article 19(1)(a)), reflect environmental costs and benefits throughout the energy cycle (article 19(1)(b)), improve energy efficiency, develop renewable energy sources, cleaner fuels, and technologies (article 19(1)(d)), and co-operate in the research, development, and implementation of energy-efficient and environmentally sound technologies, practices, and processes (article 19(1)(g)). This framework is complemented by a duty to co-operate (article 19(1)(c) and (g)), collect, and share information (article 19(1)(e)), to promote public awareness on environmental impacts (article 19(1)(f)), and to encourage conditions favourable to the transfer and dissemination of technologies (article 19(1)(h)), as well as to conduct environmental impact assessments and monitor investment projects (article 19(1)(i)). While article 19 is *prima facie* construed in imperative terms (the parties ‘shall’), its compulsory effect may be limited by soft terminology such as ‘encouraging’ and ‘promoting’.

<sup>38</sup> Energy Charter Treaty, List of cases (2024). [www.energychartertreaty.org/cases/list-of-cases](https://www.energychartertreaty.org/cases/list-of-cases).



The ECT Protocol on Energy Efficiency and Related Environmental Aspects (ECT PEEREA) outlines policy principles for energy efficiency and reducing the negative environmental externalities of the energy systems (article 1(a)). The Protocol was adopted on 17 December 1994 and entered into force on 16 April 1998, at the same time as the ECT. Key objectives under article 1(b) include the development of energy-efficiency policies consistent with sustainable development and the establishment of framework conditions for using energy economically, efficiently, and in an environmentally sound way, notably via efficient energy markets better reflecting environmental costs and benefits. For this purpose, the parties formulate transparent strategies to improve energy efficiency and reduce the environmental impacts of the energy cycle (article 5). The Protocol also envisages the adoption of environmental impact assessments and initiatives, such as the use of the most energy-efficient technologies (article 8).

In the light of these rules, some scholars assume that the ECT establishes a framework that is sufficient for achieving sustainable investment, in line with the UNFCCC,<sup>39</sup> promoting and protecting investment in clean energy, including via the ISDS.<sup>40</sup> Concerning incentive schemes for renewables, it is noted that, in cases such as *Charanne and Construction Investments v. Spain*,<sup>41</sup> *Isolux Netherlands, BV v. Kingdom of Spain*,<sup>42</sup> and *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*,<sup>43</sup> arbitral tribunals have ruled against investors in fossil fuel, with an equal number of disputes won by investors and States, whereby the outcome depends particularly on the way in which the schemes are framed.<sup>44</sup> More fundamentally, it is noted that the cost of carbon-neutral energy, such as solar photovoltaic energy, is becoming progressively lower as compared to fossil fuel generation.<sup>45</sup> This trend will remove the necessity of incentive schemes for carbon-neutral energy, and thus the root cause of arbitral disputes for fossil fuel producers under the ECT.

The prevailing opinion is nonetheless that the ECT is not aligned with the UNFCCC regime, as it affords a high level of protection to cross-border investors in fossil fuel without outlining a preferential track for investment in renewable energy.<sup>46</sup> Critiques go as far as labelling the ECT ‘an anti-climate agreement’ and ‘the antithesis of the UNFCCC’.<sup>47</sup> The ECT thus creates a regulatory clash, and establishes an insurmountable obstacle to the implementation of climate-friendly policies required under the UNFCCC. A string of cases,

<sup>39</sup> A. Boute, Combating climate change through investment arbitration, p. 617; Q. Zhang, Analysis of the impact on sustainable development by investment regulations in the Energy Charter Treaty. *Journal of World Energy Law and Business* 2015, 8(6): 542–548, at pp. 550–551.

<sup>40</sup> K. Tienhaara, C. Downie, Risky business? The Energy Charter Treaty, renewable energy, and investor–State disputes. *Global Governance* 2018, 24(3), 451–471, at p. 452; T. Restrepo, Modification of renewable energy support schemes under the Energy Charter Treaty: *Eiser* and *Charanne* in the context of climate change. *Goettingen Journal of International Law* 2018, 8(1): 101–137.

<sup>41</sup> Case 062/2012, 17 December 1994. [www.italaw.com/cases/2082](http://www.italaw.com/cases/2082).

<sup>42</sup> SCC Case V2013/153, Final Award of 17 July 2016. [www.italaw.com/cases/5893](http://www.italaw.com/cases/5893).

<sup>43</sup> ICSID Case ARB/14/3, Final Award of 27 December 2016. [www.italaw.com/cases/5739](http://www.italaw.com/cases/5739).

<sup>44</sup> Tienhaara and Downie, Risky business?, pp. 459 and 463–465. <sup>45</sup> *Ibid.*, p. 457.

<sup>46</sup> Boute, Combating climate change, p. 656.

<sup>47</sup> Public Services International, The Energy Charter Treaty is the antithesis of the Paris Agreement (2021). <https://publicservicesinternational/resources/news/the-energy-charter-treaty-is-the-antithesis-of-the-paris-agreement?id=11642&lang=en>; TNI, The Energy Charter Treaty is an anti-climate agreement (2021). [www.tni.org/en/ECTpetition](http://www.tni.org/en/ECTpetition).

either already decided or currently being pursued, illustrates the economic implications of the clash.

*Aura Energy Limited v. Sweden* and *Uniper v. The Netherlands* are particularly meaningful emerging cases concerning the establishment of a preferential treatment in favour of investors in carbon-neutral energy.<sup>48</sup> On 4 November 2019, the Australian company Aura Energy, owner of the Swedish limited liability company Vanadis Battery Metals AB for its mining activities in Sweden, filed a notice of dispute against Sweden under ECT article 26. Aura Energy requested compensation, estimated at US\$1.8 billion, for the 2018 decision to outlaw uranium mining in the country on environmental grounds, in breach of the FET, precipitating ‘an effective collapse of the Swedish uranium mining market’. On 30 April 2021, Uniper, a company mining coal and lignite for electricity, gas, steam, and air conditioning supply based in Germany and operating in the Netherlands, entered a request for arbitration under ECT article 26 against the Dutch government, based on the outlawing of coal-based power generation by 2030. The ban is part of the advanced policy adopted by the Dutch State to become carbon neutral,<sup>49</sup> in the light of the Supreme Court of the Netherlands’ decision in the *Urgenda* case, holding the Dutch State responsible for excessive greenhouse-gas emissions.<sup>50</sup>

Among cases that have already been decided, *Eiser Infrastructure Ltd and Energia Solar Luxembourg Sàrl v. Kingdom of Spain* illustrates the risk involved in rolling back incentive schemes for carbon-neutral investment.<sup>51</sup> In this case, two companies incorporated under the law of Luxembourg requested the institution of an arbitral tribunal under ICSID rules against Spain for modifying an incentive scheme for electricity produced from renewable energy sources adopted via Law 54/1997, in compliance with EC Directive 2001/77.<sup>52</sup> The scheme established preferential dispatch, premiums, and feed-in tariffs, particularly based on the quantity of electricity generated. The success of the scheme resulted in a tariff deficit, which prompted a reform via Law 24/2013, guaranteeing a yearly rate of return based on installed capacity and introducing a new tax on investors in renewable energy electricity generation. While the scheme did not absolutely exclude the possibility of a regulatory change, the Arbitral Tribunal held that the sudden and drastic reform program initiated by Spain in 2013 constituted a form of indirect investment expropriation, in breach of investors’ legitimate expectation, according to the FET standard under ECT article 10(1), duly awarding compensation for €128 million.

<sup>48</sup> Claim for Damages under the Energy Charter, Union Law and European Law, 4 November 2019, [www.italaw.com/cases/7847](http://www.italaw.com/cases/7847); *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case ARB/21/22.

<sup>49</sup> Government of the Netherlands, Climate policy (2019). [www.government.nl/topics/climate-change/climate-policy](http://www.government.nl/topics/climate-change/climate-policy); Minister of Economic Affairs and Climate Policy of The Netherlands, Letter to the House of Representatives about the Proposal for a National Climate Agreement (2019). [www.government.nl/topics/climate-change/documents/parliamentary-documents/2019/06/28/letter-to-the-house-of-representatives-about-the-proposal-for-a-national-climate-agreement](http://www.government.nl/topics/climate-change/documents/parliamentary-documents/2019/06/28/letter-to-the-house-of-representatives-about-the-proposal-for-a-national-climate-agreement).

<sup>50</sup> *Stichting Urgenda v. The State of The Netherlands* (Ministry of Economic Affairs and Climate Policy), Hague District Court, Case C/09/456689/HA ZA 13–1396, Judgment, 24 June 2015; *The State of The Netherlands* (Ministry of Economic Affairs and Climate Policy) v. *Stichting Urgenda*, Hague Court of Appeal, Case C/09/456689/HA ZA 13–139, Judgment of 9 October 2018; *Id.*, Supreme Court of The Netherlands, Case 19/00135, Cassation Judgment of 20 December 2019.

<sup>51</sup> ICSID Case ARB/13/36; Tienhaara and Downie, *Risky business?*, p. 456.

<sup>52</sup> EC, Directive 2001/77/EC of the European Parliament and of the Council on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market.



### 10.2.2.3 The Sunset Clause and the Modernization of the Energy Charter Treaty

The EU Energy Factsheet states that 75% of greenhouse gas emissions come from the energy sector and establishes that a reduction of at least 55% by 2030 demands ‘higher shares of renewable energy’, ‘greater energy efficiency’, and an ‘integrated energy system’.<sup>53</sup> Non-renewable energy is indeed responsible for 65% of greenhouse gas emissions.<sup>54</sup> For this purpose, according to the Factsheet, it is essential to foster investment in renewable energy.<sup>55</sup> The aim is therefore improving the target in renewables from 19% to 40% by 2030 under the Renewable Energy Directive.<sup>56</sup> Additional measures target an increase in energy efficiency from 17% to between 32% and 39% by 2030, reinforcing the ETS and creating separate ETS obligations for buildings and transport fuels.<sup>57</sup> It is nonetheless considered that continuing to protect foreign investment in fossil fuel under the ECT up to 2050 would lead to some €2.15 trillion in stranded fossil fuel assets, that is, more than twice the sum required to finance the European Green Deal across the next 10 years. This would increase cumulative carbon emissions under the ECT regime from a minimum 87 gigatons by the end of 2019 to a minimum 216 gigatons by the end of 2050, that is, more than one-third of the global carbon budget remaining to limit global warming to 1.5°C by the end of the century.<sup>58</sup>

In practice, in 2015, claims for compensation triggered by cutbacks on subsidies to investment in renewable energy caused by the 2008 financial crisis prompted Italy to withdraw from the ECT.<sup>59</sup> The EU, which fathered the adoption of the ECT, considers that the ECT in its current form is such a serious impediment to the implementation of the Green Deal that it is resigning from the treaty, given that the clash has not yet been resolved in the context of the negotiations for the modernization of the Treaty.<sup>60</sup> However, if a party withdraws from the ECT, article 47 (the ‘sunset’ clause) provides that it remains bound to honour its investment obligations for a period of 20 years following the effective date of withdrawal.

One possibility for resolving the implications of the sunset clause would be for the parties to invoke ‘a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty’ under the clause *rebus sic stantibus*, allowing an unencumbered withdrawal from or termination of the ECT, according to article 62 of the VCLT and the VCLTIO. It could thus be assumed that climate imperatives were not adequately taken into account in the ECT at the time when it was adopted, as the Treaty was inspired by the model of bilateral investment treaties (BITs) and multilateral investment treaties (MITs) that prioritize investment protection and do not foster sustainable investment, while climate change currently requires an ‘unprecedented shift’ to carbon-neutral investment.<sup>61</sup> It could also be

<sup>53</sup> EU, Energy system factsheet (2021).

<sup>54</sup> U.S. Environmental Protection Agency, Global greenhouse gas emissions data (2021). [www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data](http://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data).

<sup>55</sup> EU, Energy system factsheet, p. 2. <sup>56</sup> Ibid. <sup>57</sup> Ibid. at pp. 3–4.

<sup>58</sup> ISDS Platform, Modernisation of the Energy Charter Treaty (2020), at p. 4. [www.isds.bilaterals.org/?modernisation-of-the-energy](http://www.isds.bilaterals.org/?modernisation-of-the-energy).

<sup>59</sup> A. De Luca, Renewable energy in the EU, the Energy Charter Treaty, and Italy’s withdrawal therefrom. *Transnational Dispute Management* 2015, 1. [www.transnational-dispute-management.com/article.asp?key=2232](http://www.transnational-dispute-management.com/article.asp?key=2232).

<sup>60</sup> D. Keating, EU governments under pressure to quit Energy Charter Treaty (2019). [www.forbes.com/sites/davekeating/2019/12/10/eu-governments-under-pressure-to-quit-energy-charter-treaty/#38bb572163ed](http://www.forbes.com/sites/davekeating/2019/12/10/eu-governments-under-pressure-to-quit-energy-charter-treaty/#38bb572163ed); European Commission, Proposal for a Council decision on the withdrawal of the Union from the Energy Charter Treaty, COM(2023) 447 final, 7 July 2023.

<sup>61</sup> N. Bernasconi-Osterwalder, M. D. Brauch, A. Cosbey, et al., Treaty on sustainable investment for climate change mitigation and adaptation: aligning international investment law with the urgent need for climate change action. *Journal of International Arbitration* 2019, 36(1): 7–35, at p. 8.

considered that the impact of climate change ‘radically transforms’ the ‘extent of obligations still to be performed under the ECT’, as required by VCLT and VCLTIO article 62(1) (b). However, the availability of the *rebus sic stantibus* provision is not obvious, as VCLT and VCLTIO article 62 demands a demonstration that climate change was not foreseen by the parties when the ECT was adopted in 1994, which essentially requires a ‘drastic’ change compared to the time when the ECT was adopted.<sup>62</sup> In the 1990s, the international community had a clear awareness of the problem of climate change, which is proven by the fact that the ECT was adopted at about the same time as the UNFCCC in 1994. It would therefore be difficult to argue that the absence of climate change ‘constituted an essential basis of the consent of the parties to be bound’ by the ECT, as required under VCLT and VCLTIO article 62(1)(a).

Reportedly, achieving sustainability entails a reduction of between 73% and 97% in the use of coal by 2050, 81% and 87% of oil, and 21% and 74% of gas, coupled with an increase in the share of renewables in global electricity supply of at least 63–77%.<sup>63</sup> The International Energy Agency (IEA) considers that low-carbon investment is currently inadequate to meet targets established under the UNFCCC and Paris Agreement,<sup>64</sup> and estimates that around US\$44 trillion in investment is required to achieve them.<sup>65</sup> This only leaves as a solution for implementing the European Green Deal the avenue of bringing the ECT into conformity with the UNFCCC, which is the way forward envisaged in the 2010 Road Map of the Energy Charter Secretariat for the modernization of the ECT.<sup>66</sup> The EU has indeed proposed a ‘[m]odernised ECT’ that aims to ‘facilitate investment in the energy sector in a sustainable way between the ECT Contracting Parties’ via ‘a coherent and up-to-date legally binding framework’ fostering ‘legal certainty’ and ‘a high level of investment protection’.<sup>67</sup> According to the EU, the ECT should ‘reflect climate change and clean energy transition goals and contribute to the achievement of the objectives of the Paris Agreement’,<sup>68</sup> allowing the extension of EU environmental requirements to market participants from third-party countries.<sup>69</sup> NGOs have also requested a modernization of the ECT to facilitate a quicker transition to carbon-neutral energy, including a differential treatment for developing countries.<sup>70</sup>

## 10.3 Turning the Energy Charter Treaty into a Climate Friendly Agreement?

### 10.3.1 Modernizing the Energy Charter Treaty

In 2015, a High-Level Ministerial Conference adopted the International Energy Charter (IEC) in The Hague.<sup>71</sup> The IEC aims to update the principles of the European Energy

<sup>62</sup> D. F. Vagts, *Rebus revisited: changed circumstances in treaty law*, *Columbia Journal of Transnational Law* 2005, 43(2): 459–475.

<sup>63</sup> N. Bernasconi-Osterwalder, M. D. Brauch, *Redesigning the Energy Charter Treaty to advance the low-carbon transition*, *Transnational Dispute Management* 2019, 1, at p. 3.

<sup>64</sup> IEA, *World energy investment*. 2019. [www.iea.org/reports/world-energy-investment-2019/introduction](http://www.iea.org/reports/world-energy-investment-2019/introduction).

<sup>65</sup> IEA, *Energy technology perspectives*. 2017. [www.iea.org/reports/energy-technology-perspectives-2017](http://www.iea.org/reports/energy-technology-perspectives-2017).

<sup>66</sup> Energy Charter Secretariat, *Road Map for the Modernisation of the Energy Charter Process*. 2010.

<sup>67</sup> Energy Charter Secretariat, *Policy Options for Modernisation of the ECT*. CCDEC 2019 08 STR (2019), at p. 2.

<sup>68</sup> Emphasis added. <sup>69</sup> EU, *Text proposal* (2020) at pp. 4 and 11.

<sup>70</sup> NGOs, *Open letter on the Energy Charter Treaty*. December 2019. <https://isds.bilaterals.org/?open-letter-on-the-energy-charter>.

<sup>71</sup> Adopted 20 May 2015.

Charter within the global markets,<sup>72</sup> focusing on the energy ‘trilemma’, concerning energy security, economic development, and environmental protection. Fostering harmonized energy policies, the IEC acknowledges as ‘objectives’ under title I ‘energy efficiency’ and ‘environmental protection’, and promotes energy efficiency and the climate objectives established in the Paris Agreement and Sustainable Development Goal No. 7. With specific regard to investment, the IEC aims to remove barriers to energy-related investment and to foster stable investment conditions. The Charter notably supports the creation of conditions favourable to profitable investment in energy efficiency and environmentally friendly energy projects.

The IEC has paved the way for a reform of the ECT. In October 2017, the Energy Charter Strategy Group started discussions on the modernization of the ECT and established a Subgroup on Modernization. In November 2017, the Energy Charter Conference commenced consultations on modernization,<sup>73</sup> and in 2018 that Conference adopted the topics for the modernization of the ECT,<sup>74</sup> with a focus on investment issues. Climate change and binding obligations under the UNFCCC regime are key to the process of modernization. Furthermore, the ISDS system is under heavy criticism as a means for requesting multi-million dollar compensation from governments in private tribunals, along the lines of the work carried out by the UNCITRAL Working Group III and the ICSID.<sup>75</sup> From publicly available documents it can be seen that specific provisions on climate change,<sup>76</sup> including corporate social responsibility, have been proposed by sovereign entities, particularly the EU, and States such as Switzerland, Luxembourg, Turkey, and Georgia.<sup>77</sup> However, the path to sustainability is littered with hurdles. Substantially, modernization must take place in accordance with the just transition envisaged in the Paris Agreement (preamble), for instance, ensuring sufficient time for the fossil fuel sector to adjust,<sup>78</sup> along the lines of the EU Additional Submission to its Text Proposal for the Modernization of the ECT.<sup>79</sup> Not all States agree with the imperative of a change and, with coal-heavy economies such as Japan opposing a fundamental revision of the ECT,<sup>80</sup> negotiations stalled in June 2022.<sup>81</sup> Between 2019 and 2024, discussions on the modernization of the ECT have focused on issues spanning pre-investment, the definition of economic activity in the energy sector, and investment protection provisions.<sup>82</sup> Within this context, the EU has proposed a carve-out of fossil fuel from the ECT and the Secretariat has developed relevant options for discussion in line with the Paris Agreement.<sup>83</sup>

<sup>72</sup> P. Aalto, *The New International Energy Charter: instrumental or incremental progress in governance?* *Energy Research and Social Sciences* 2016, 11: 92–96, at p. 92.

<sup>73</sup> Energy Charter Conference, *Modernisation of the Energy Charter Treaty*, Doc CCDEC 201723STR (2017).

<sup>74</sup> Approved topics for the modernisation of the Energy Charter Treaty, 28 November 2018. [www.energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty](http://www.energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty).

<sup>75</sup> Energy Charter Secretariat, *Sub-Group on Modernisation*, Room Document 1.

<sup>76</sup> Energy Charter Treaty, *Modernisation*, [www.energychartertreaty.org/modernisation-of-the-treaty](http://www.energychartertreaty.org/modernisation-of-the-treaty).

<sup>77</sup> Energy Charter Secretariat, *Policy options*.

<sup>78</sup> Osterwalder et al., *Treaty on sustainable investment for climate change mitigation and adaptation*, p. 30.

<sup>79</sup> Available at [https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc\\_158754.pdf](https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf).

<sup>80</sup> Energy Charter Secretariat, *Policy options*, 3; J. Lo, *Japan blocks green reform of major energy investment treaty*, 2020. [www.climatechangenews.com/2020/09/08/japan-blocks-green-reform-major-energy-investment-treaty](http://www.climatechangenews.com/2020/09/08/japan-blocks-green-reform-major-energy-investment-treaty).

<sup>81</sup> Energy Charter Treaty, *Agreement in Principle*, 24 June 2022. [www.energycharter.org](http://www.energycharter.org).

<sup>82</sup> European Commission, *Public Communication on the Third Negotiation Round on the Modernisation of the ECT* (2020). <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2206>.

<sup>83</sup> European Commission, *European Green Deal: delivering*.

### 10.3.2 Establishing a Preferential Track for Sustainable Investment

The most suitable option for aligning the ECT with the UNFCCC is extending protection for carbon-neutral investment already in place under the ECT.<sup>84</sup> *De lege ferenda*, some model proposals have been put forward in the field of investment, such as the TSICCMA, GIP and the Multilateral Treaty for the Encouragement of Investment in Climate Change Mitigation and Adaptation (MTEICCMA).<sup>85</sup> These proposals essentially aim to harmonize currently existing BITs and MITs under the umbrella of the UNFCCC.

The need to protect low-carbon investment could be embedded in the ECT by mentioning the stabilization of greenhouse gas emissions under the UNFCCC and the Paris Agreement as fundamental objectives in the initial provisions, notably the preamble and article 2.<sup>86</sup> Along the lines of TSICCMA article 2(3), GIP article 1 and the statement of objectives and principles of the proposal for a Framework Convention on Investment and Sustainable Development,<sup>87</sup> the ECT could thus affirm the commitment of the parties to meeting their duties under the Paris Agreement, in line with the Sustainable Development Goals. The EU Proposal for the Modernisation of the ECT envisages recognition of the Sustainable Development Goals and other key international environmental instruments, as well as the acknowledgement that the parties commit to ‘promoting the development of international trade and investment in energy-related sectors in such a way as to contribute to the objective of sustainable development’.<sup>88</sup> In more detail, the Proposal includes a provision stressing the ‘urgent need’ to pursue the stabilization of greenhouse gas emissions under the UNFCCC and the Paris Agreement, including commitments with regard to nationally determined contributions, effectively combating climate change and enhancing the contribution of trade and investment to mitigation and adaptation.<sup>89</sup>

More specifically, in order to create an investment environment that eliminates carbon-intensive schemes and does not disincentive investment in carbon-neutral energy, in harmony with the UNFCCC regime, the ECT should prioritize low-carbon energy investment, particularly renewables, over investment in carbon-intensive energy,<sup>90</sup> along the lines of GIP article 4.<sup>91</sup> The distinction between carbon-neutral and non-carbon-neutral investment could be specified from the very inception of the ECT in the definition of ‘investment’ under Articles 1 and 19, which is currently uniform.<sup>92</sup>

On this basis, it would be possible to exclude the application of the principle of non-discrimination, and thus of the MFN and NT principles, with respect to carbon-intensive investment, along the lines of TSICCMA article 3(2)(3), which provides that carbon-neutral

<sup>84</sup> Q. Zhang, Analysis of the impact, p. 550.

<sup>85</sup> Available at <https://thinktank30.de/wp-content/uploads/2018/08/Think-Tank-30-Model-MIT.pdf>.

<sup>86</sup> Bernasconi-Osterwalder and Brauch, Redesigning the Energy Charter Treaty, p. 18; Zhang, Analysis of the impact, p. 553.

<sup>87</sup> M. C. Porterfeld, Reforming the international investment regime through a Framework Convention on Investment and Sustainable Development. 2020. <https://uncitral.un.org>.

<sup>88</sup> EU, Text proposal, sustainable development – Context and objectives. [https://trade.ec.europa.eu/doclib/docs/2020/may/tra doc\\_158754.pdf](https://trade.ec.europa.eu/doclib/docs/2020/may/tra doc_158754.pdf).

<sup>89</sup> Ibid., Sustainable development – Climate change and clean energy transition, para. 1.

<sup>90</sup> C. Campbell, A. Trigo, A vision for green foreign direct investment: proposals for an investor–state collaborative effort. *Journal of International Arbitration* 2019, 36(1): 135–160, at p. 145; M. D. Brauch, Tackling climate change through sustainable investment: all in a treaty? 2018. <http://sdg.iisd.org/commentary/guest-articles/tackling-climate-change-through-sustainable-investment-all-in-a-treaty>.

<sup>91</sup> Bernasconi-Osterwalder and Brauch, Redesigning the Energy Charter Treaty, p. 11. <sup>92</sup> Ibid at pp. 18 and 24.

and non-carbon neutral investments do not attract ‘like’ circumstances.<sup>93</sup> This would pave the way towards the elimination of existing incentives for carbon-intensive investment, as proposed under TSICCMA article 2(5) (on Limitation of Advantages and Rights of Unsustainable Investors and their Investments). Additionally, the application of ECT article 16, which prioritizes ECT obligations over other investment agreements less favourable to investment or investors, could be excluded in the case of carbon-intensive investment.<sup>94</sup>

It would also be important to positively affirm the right of sovereign entities to adopt potentially disruptive mitigation and adaptation measures for climate change in the public interest, as proposed in TSICCMA article 5(1)(1), MTEICCMA article 20, articles 5–6 of the Green Investment Treaty (GIT),<sup>95</sup> and GIP article 12. A correlated fundamental change for withdrawing protection for unsustainable investment schemes is proposed in article 5(1) (3) of the TSICCMA;<sup>96</sup> such a provision establishes that the Model Treaty is not to be construed to compel the payment of compensation for a party that adopts non-discriminatory measures to protect the environment. This approach adjusts the FET standard to sustainability, consistent with GIP article 10.<sup>97</sup> The system is essential to excluding the possibility that international investment tribunals consider that State policies fostering carbon-neutral investment are in breach of investment protection duties under the ECT, as illustrated in the cases of *Aura Energy* and *Uniper*.<sup>98</sup> At the same time, it shields a State from compensation in the case of regulatory reforms rolling back incentive schemes for carbon-neutral energy, as illustrated in the case of *Eiser Infrastructure*.<sup>99</sup>

A radically innovative approach aligns with the EU view that investment protection cannot be interpreted as an absolute commitment for governments not to change regulation in the future, shifting the focus from the negative impact on investors’ expectations and profits to the public interest.<sup>100</sup> The EU Text Proposal for modernization also requests that national sustainable development policies and priorities, although freely determined by the ECT parties, ensure consistency with commitments under internationally recognized agreements.<sup>101</sup> Notably, the Proposal affirms the right of the parties ‘to adopt or maintain measures’ implementing multilateral environmental agreements to which they have subscribed.<sup>102</sup> More specifically, the Proposal aims to commit the ECT parties to ‘removing obstacles to trade and investment concerning low-carbon energy technologies and services such as renewable energy production capacity’, via adequate policy frameworks.<sup>103</sup>

Some provisions directly addressing investors, and thus individuals and corporations, rather than States and international organizations, could be inserted in the ECT to compel them to ensure that investment is consistent with environmental agreements, particularly the

<sup>93</sup> Campbell and Trigo, A vision for green foreign direct investment, p. 151.

<sup>94</sup> Bernasconi-Osterwalder and Brauch, Redesigning the Energy Charter Treaty, pp. 18 and 24.

<sup>95</sup> Available at <http://stockholmtreatylab.org/wp-content/uploads/2018/10/Team-13-Model-Treaty.pdf>.

<sup>96</sup> Treaty on Sustainable Investment for Climate Change Mitigation. <http://stockholmtreatylab.org/wp-content/uploads/2018/07/Treaty-on-Sustainable-Investment-for-Climate-Change-Mitigation-and-Adaptation-1.pdf>.

<sup>97</sup> P. Henin, J. Howley, A. Keene, N. Peart, Innovating international investment agreements: a proposed green investment protocol for climate change mitigation and adaptation. *Journal of International Arbitration* 2019, 36(1): 37–70, at p. 60.

<sup>98</sup> Osterwalder et al., Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation, pp. 19–20.

<sup>99</sup> S. N. Elrifai, H. Rusinek, S. R. Sinsal, A model multilateral treaty for the encouragement of investment in climate change mitigation and adaptation. *Journal of International Arbitration* 2019, 36(1): 71–94, at p. 88.

<sup>100</sup> Energy Charter Secretariat, Policy options (2019) at p. 15; EU, Text proposal, Part III, Regulatory Measure, para. 2.

<sup>101</sup> EU, Text Proposal, Sustainable Development – Right to Regulate and Levels of Protection. <sup>102</sup> Ibid. at para. 3.

<sup>103</sup> Ibid. Sustainable Development – Context and Objectives, para. (c).

UNFCCC and the Paris Agreement, along the lines of TSICCMA article 4(1) and GIP articles 8 and 14. This aligns with the EU Proposal for the modernization of the ECT, which supports ‘responsible business practices in contributing to the goal of sustainable development’, whereby the parties commit to promoting corporate social responsibility and responsible business conduct, consistent with the Organization for Economic Co-Operation and Development’s Guidelines for Multinational Enterprises,<sup>104</sup> the UN Guiding Principles on Business and Human Rights,<sup>105</sup> and other relevant regulatory instruments.<sup>106</sup>

Such reforms entail a radical rethinking of the text of the ECT. In this respect, the 2010 Road Map elaborated by the Energy Charter Secretariat for modernizing the ECT is quite restrictive, as it envisages that ECT investment provisions ‘should remain untouched in their fundamentals’.<sup>107</sup> Reforms could be facilitated by the fact that they are in line with the ECT PEEREA, although the Protocol is subordinate to the Charter according to ECT PEEREA article 13.

### 10.3.3 Designing Procedures for Carbon-Neutral Investment

As concerns decision-making and primary rules, the modernization of the ECT should be developed from both an *ex-ante* and *ex-post* perspective, establishing effective climate impact assessment procedures and adjudication mechanisms.

*Ex ante*, the ECT should include a duty to carry out environmental impact assessments for large-scale investment projects.<sup>108</sup> A model provision is embedded in GIT article 27 and TSICCMA article 6(2),<sup>109</sup> compelling the parties to ensure that their national laws require investors to conduct high-standard pre-establishment assessments on the positive and negative impacts of prospective investment regarding climate change mitigation and adaptation, including a quantification of greenhouse gas emissions. Additional procedural safeguards aiming to ensure effectiveness require that the assessment be carried out via an independent entity, include input from independent experts, be transparent and accessible, and involve affected communities. This aligns with recent corporate social responsibility regulatory measures undertaken by the EU<sup>110</sup> and the pathway traced in the *Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) v. ING* decision.<sup>111</sup> Similarly, the EU Proposal for the modernization of the ECT includes a modification of ECT article 19, requesting that the legislation of the ECT parties compel an impact assessment involving public participation prior to granting authorization for energy-related projects with significant environmental and climatic implications.<sup>112</sup>

<sup>104</sup> Adopted in 2011. <sup>105</sup> UN, Guiding Principles on Business and Human Rights (2011).

<sup>106</sup> EU, Text Proposal, Sustainable Development – Responsible Business Practices.

<sup>107</sup> Energy Charter Secretariat, Road Map, p. 6.

<sup>108</sup> Bernasconi-Osterwalder and Brauch, Redesigning the Energy Charter Treaty, p. 18; M. Gehring, A. Kent, Sustainable development and international investment agreements: from objective to practice, in A. De Mestral, C. Lévesque (eds.), *Improving International Investment Agreements* (Routledge, 2013), pp. 286–288.

<sup>109</sup> D. Magraw, L. Chennoufi, K. Cowling, et al., Model green investment treaty: international investment and climate change. *Journal of International Arbitration* 2019, 36(1): 95–134 at p. 121.

<sup>110</sup> European Commission, Study on Due Diligence Requirements through the Supply Chain, Final Report (2020).

<sup>111</sup> Netherlands National Contact Point for the OECD Guidelines, Final Statement, 19 April 2019.

<sup>112</sup> EU, Text Proposal, Sustainable Development – Impact Assessment.



*Ex post*, some scholars consider that a reform of adjudication mechanisms under the ECT is fundamental for greening energy-related investment.<sup>113</sup> In particular, the ISDS system is seen as one of the root causes of massive compensation claims, owing to a lack of transparency and independence.<sup>114</sup> It has thus been proposed that the ECT establish a centralized appellate mechanism, a specialized ECT court, or a roster of arbitrators for ECT cases.<sup>115</sup> These solutions would align the ECT with the reform of the ISDS system envisaged by the EU, and particularly with the proposal for a Multilateral Investment Court.<sup>116</sup> Further prospective solutions include limiting the scope of application of the ISDS clause under the ECT, allowing class action and introducing State-to-State dispute settlement mechanisms, in addition to investor–State dispute settlement, as in the WTO Dispute Settlement Understanding.<sup>117</sup> It is considered that such mechanisms would prevent action against climate-friendly investment policies.<sup>118</sup>

Prospective solutions go further and include ad-hoc procedures for violations of environmental provisions, as foreshadowed in the EU Text Proposal for the Modernization of the ECT.<sup>119</sup> A possibility would be including the right for natural persons and civil society organizations (that is, a right to class action) to lodge complaints with national contact points when an ECT party does not comply with its obligations to prioritize sustainable investment over carbon-intensive investment, along the lines of TSICMA article 7(3). Following the expansion of substantive green investment obligations, the ECT could depart from the investor–State dispute settlement model and extend the spectrum of dispute settlement procedures to include, for instance, claims by the host State that an investor has breached climate-related obligations, along the lines of TSICMA article 9(1) (on ‘Dispute Prevention and Settlement’).

An additional remedy to prioritize sustainable investment is the exclusion of international procedural avenues for unsustainable investors. Thus, TSICMA article 9(1) allows investors in carbon-intensive energy to only put forward their claims in domestic courts and tribunals. The necessity of such an additional safeguard, reducing procedural remedies for unsustainable investment, should nonetheless be attenuated by substantive provisions prioritizing sustainable investment over unsustainable finance.

An improvement in transparency is also invoked for decision-making and adjudication procedures, in order to facilitate public understanding of investment and sustainability.<sup>120</sup> In this respect, the EU proposal for modernization provides that the contracting parties ensure ‘awareness’ and ‘reasonable opportunities’ for the participation of interested persons and stakeholders.<sup>121</sup>

<sup>113</sup> Bernasconi-Osterwalder and Brauch, *Redesigning the Energy Charter Treaty*, p. 15.

<sup>114</sup> Elrifai et al., *A model multilateral treaty*, p. 88.

<sup>115</sup> C. Verburg, *Modernising the Energy Charter Treaty: an opportunity to enhance legal certainty in investor–state dispute settlement*, *Journal of World Investment and Trade*, 2019, 20(2–3): 425–454, at p. 437.

<sup>116</sup> Energy Charter Secretariat, *Policy Options*, 2–3; EU, Text Proposal, Part V, ECT Dispute Settlement.

<sup>117</sup> Opened for signature 15 April 1994, 1867 UNTS 3, entered into force 1 January 1995.

<sup>118</sup> Bernasconi-Osterwalder and Brauch, *Redesigning the Energy Charter Treaty*, pp. 15–17.

<sup>119</sup> EU, Text Proposal, Sustainable Development – Impact Assessment, New article 28A: Settlement of Disputes on Trade and Sustainable Development Provisions between Contracting Parties.

<sup>120</sup> Public Communication on the Second Negotiation Round on the Modernisation of the ECT, 11 September 2020. See Zhang, *Analysis of the impact*, p. 554.

<sup>121</sup> EU, Text Proposal, Sustainable Development – Transparency.

## 10.4 Conclusion

A systemic analysis of investment obligations under the UNFCCC and the ECT reveals several clashing obligations in the area of investment. While decarbonization is an absolute priority for States and international organizations under the UNFCCC, the ECT is still based on the model of BITs and MITs that protect investment in fossil fuel and clean energy alike, disregarding climate externalities. Such a clash has the potential to trigger requests for billions in compensation, seriously hampering the capacity of States and the EU to achieve their objectives under the UNFCCC.

This chapter argues that resignation from the ECT should not be the preferred option, particularly in the light of the ‘sunset clause’, which binds sovereign entities to respecting investment obligations under the ECT for an additional 20 years after the taking effect of resignation. Therefore, it is argued that the preferable solution for avoiding investment obligations under the ECT impeding the implementation of effective climate policies (*mise en oeuvre*) under the UNFCCC is rethinking the ECT in the context of the current modernization process, establishing a preferential track for investment in renewables.

Consistent with *de lege ferenda* model treaties in the area of investment and EU proposals for the modernization of the ECT, a preferential track for carbon-neutral investment should be established on grounds of environmental necessity, including additional environmental rights and obligations for sovereign and non-sovereign entities as well as reasonable adjustments to the FET standard. Substantive preferential measures should be complemented by improved *ex-ante* and *ex-post ad-hoc* enforcement procedures, including impartial environmental impact assessments, investor–State and State–State litigation, as well as the possibility of action by interested third parties.