

# BEYOND CONTROL, BEYOND REFORM

## The EU's Energy Charter Treaty Dilemma

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# Glossary

<b>BIT</b>	Bilateral Investment Treaty
<b>CETA</b>	Comprehensive Economic and Trade Agreement between Canada & the EU
<b>CJEU</b>	Court of Justice of the European Union
<b>ECT</b>	Energy Charter Treaty
<b>EU</b>	European Union
<b>FET</b>	Fair and equitable treatment standard
<b>FIT</b>	Feed-in-tariff
<b>ICS</b>	Investment Court System
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ISDS</b>	Investor State Dispute Settlement
<b>MIC</b>	Multilateral Investment Court
<b>REIO</b>	Regional Economic Integration Organisation
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCTAD</b>	United Nations Conference on Trade & Development

# Foreword

Dear readers,

Welcome to a very timely and interesting study on the Energy Charter Treaty (ECT). This treaty has become the most important reference document for globally operating law firms, specialised in suing governments in so-called investor-to-state dispute settlement mechanisms (ISDS).

This is about a multi-billion Euro business. Greedy lawyers saw the naive drafting of the Energy Charter Treaty as an opportunity for verdicts of arbitration panels favourable to investors.

What is at stake is the ability of governments to regulate in the public interest, for instance by creating nature reserves, or by improving the protection of citizens from hazardous substances, or by altering the choice of energy supply from carbon-based to renewables. Do democratically elected Parliaments maintain the right to legislate? Will there be a regulatory chill, because governments must fear that implementing the will of the people turns out to be too costly, when arbitration panels rule on high compensation payments for disappointing investor profits ?

Since governments of EU Member States have also fallen victim of ISDS within the ECT, and after the Court of Justice of the European Union issued landmark verdicts on the incompatibility of the ECT's arbitration architecture, the European Union's Commission reluctantly increased efforts to review and amend the Energy Charter Treaty. The Commission presented a proposal for ECT reform in May 2020.

The GUE/NGL group in the European Parliament has commissioned this study into the limits of this proposal, and the value, conduct, goals and results of these negotiations. We wanted to know, whether it is enough to consider just changes of the wording, in an attempt to close certain legal loopholes. We also wanted to know whether more is needed, whether our governments must turn their back to the very logic of investor to state dispute settlement.

Ciaran Cross has delivered an excellent study and a very valuable and timely contribution to the debate accompanying the negotiations.

we have asked the previous Trade Commissioner Phil Hogan whether leaving the Energy Charter Treaty would be an option, should the negotiations for a review fail. He confirmed this option in front of the Committee on International Trade (INTA) of the European Parliament.

After reading this study, you may judge by yourself, what advice you would give to his successor Valdis Dombrovskis.

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# Introduction

In May 2020, on the brink of negotiations towards the 'modernisation' of the Energy Charter Treaty (ECT), the Energy Charter Secretariat's Secretary-General, Urban Rusnák, offered a surprising account of the ECT's contribution to climate change mitigation: "*The Paris Agreement does not protect investment. The Energy Charter Treaty does. It's a complement to the Paris Agreement...*"<sup>1</sup>

Rusnák's view is hard to reconcile with that of the ECT's many critics. In December 2019, 278 civil society organisations and trade unions condemned the ECT as wholly 'incompatible with the implementation of the Paris Climate Agreement'. In an open letter, they demanded that the European Union (EU) commit to reform the ECT by excluding fossil fuel investments from its protection and eliminating its investor-state dispute settlement (ISDS) clause; failing this, the EU and its Member States should withdraw from the ECT en masse, or terminate the agreement.<sup>2</sup>

**The backlash against the ECT in particular has been a long time coming.** Dubbed the 'brainchild of the European Union',<sup>3</sup> the ECT's ostensible objective is to 'promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources'.<sup>4</sup> It was proposed – and in large part designed by – the European Commission in the 1990s to help Western European investors capitalise on the collapse of the Soviet Union. It has been described as the 'most ambitious example' of attempts by 'Western powers to formally institutionalise neo-liberal (pro-market) rules in energy trade'.<sup>5</sup>

To date, the ECT's ISDS mechanism has been used in more arbitrations than any other investment agreement worldwide. Over the past decade, ECT-based cases have been prominent in critiques of ISDS – a widespread treaty-based arbitration mechanism allowing protected international investors to sue 'host' States for ostensible losses incurred due to regulatory measures. Myriad complaints have catalysed public opposition to ISDS in the EU in general: colossal compensation claims,

conflicts of interest and judicial bias, lack of transparency, dubious expansive interpretations of investment protection standards, as well as the powerful role of the arbitration industry and third party funders in fuelling an ISDS 'gold-rush'.<sup>6</sup>

**To date, the ECT's ISDS mechanism has been used in more arbitrations than any other investment agreement worldwide.**

**A recent boom in ECT-based claims against EU Member States** has fundamentally changed the landscape of ISDS arbitration,<sup>7</sup> including Swedish company Vattenfall's two claims against Germany: one challenging environmental policies that delayed the authorisation of a coal-fired power station (settled privately in 2010); and an ongoing €4.7 billion compensation claim resulting from Germany's nuclear phase-out.<sup>8</sup> Meanwhile Spain has rocketed to the position of third most frequent Respondent State in all known ISDS cases worldwide, defending forty-seven known ECT claims representing an aggregate liability of over €4 billion, possibly much higher. In the history of ISDS, Spain's predicament echoes the plight of Argentina after the catastrophic economic crisis in 2001, which resulted in ISDS awards representing an aggregate compensation bill of over USD\$2 billion.<sup>9</sup> Compensation awarded against Spain to date is already close to €1 billion.<sup>10</sup> Exploiting fears that States' phase-out of fossil fuels will land up in ECT arbitration with spiralling costs, energy investors are successfully using the threat of litigation as leverage. Czech lignite mining firm Leag has reportedly coaxed a multi-billion euro settlement out of Germany on condition of waiving its rights to any future ECT claim over the planned coal phase-out.<sup>11</sup> Since 2019, German company Uniper has been threatening to sue the Netherlands over its commitment to end coal power by 2030.<sup>12</sup>

**Fears that ISDS litigation under the ECT poses a threat to urgently needed climate action, to the global energy transition, and the European Green Deal, are therefore well justified.** Many more ECT claims are anticipated in the coming years and, directly or indirectly, these will have a powerful disciplining effect on the energy markets of ECT Contracting States. At precisely the moment when the existential threat of climate change requires fundamental and radical shifts in the regulation, financing and oversight of the energy sector, the ECT permits protected investors to radically increase the costs of such measures (costs borne ultimately by taxpayers). Fossil fuel subsidies and use need to be urgently phased-out, and clean renewable energy sources rapidly extended, including through market incentives. But as the energy transition shifts into gear, ECT litigation threatens to siphon off public funds and make urgently needed energy reforms less palatable.

**Simply put, overcompensating speculators in energy markets, both new and old, does not ‘complement’ but hinders the objectives of the Paris Agreement.**

## PROSPECTS OF REFORM?

Launched in 2009, the ECT’s ‘modernisation’ could present an opportunity to address these challenges. Reform remains a critical strategy since – like many other bilateral investment treaties (BITs) – the ECT’s ‘sunset clause’<sup>13</sup> binds any State that unilaterally withdraws to continue protecting existing investments for a further twenty years (so far, only Italy has withdrawn, effective from Jan. 2016).<sup>14</sup> But any meaningful modification of the ECT will require unanimous agreement of the treaty’s nearly fifty Contracting Parties – a highly unlikely prospect. Moreover, it is obvious that the ECT Contracting Parties are targeting ‘low hanging fruit’. Not one has proposed excluding ISDS, or requiring investors to first exhaust domestic remedies.

The European Commission’s own approach to the ECT is dominated by concerns about the legal architecture

of the EU. These concerns are twofold. Firstly, the European Commission is committed to eliminating the application of the ECT’s ISDS clause in ‘intra-EU’ disputes (between EU investors and EU Member States), in order to shore up the exclusive jurisdiction of the Court of Justice of the European Union (CJEU). This objective is a long way from comprehensive ECT reform. Certainly, the elimination of the ECT’s intra-EU application could have positive impacts: it would firstly reduce how much investment is actually protected by the agreement, as EU investors currently account for around 67% of ECT-covered investments in the EU.<sup>15</sup> The remaining ECT cases brought by non-EU investors may even be tolerable for EU Member States. But, as explained further in this paper, there do not appear to be any compelling legal or policy grounds to treat non-EU investors’ ECT claims fundamentally differently to those involving EU investors. Arguably, the Commission’s ‘intra-EU’ contrivance is not even supported by EU law and may encourage ‘nationality shopping’. Moreover, the Commission’s goal of precluding the ECT’s intra-EU application cannot be divorced from its designs to expand and legitimise the application of the ECT *in all other scenarios*.

Secondly, the CJEU’s endorsement in 2019 of the **Investment Court System** (ICS) included in the Comprehensive Economic and Trade Agreement between Canada and the EU (“CETA”) gave the European Commission the green light for including arbitration mechanisms in EU investment treaties with non-EU States, provided that sufficient safeguards are included. Whether the ‘safeguards’ identified in CETA are indeed effective is highly questionable. But the Commission’s ‘modernised’ ECT would omit many of those guarantees; its existing ISDS mechanism remains fundamentally unchanged and thus probably incompatible with EU law. Moreover, by seeking to escape the ECT by virtue of the requirements of EU law, the Commission has neglected a host of other concerns, not least of all: the climate crisis. Even a cursory assessment of the Commission’s ECT proposals confirms that they would contribute very little to the energy transition, energy subsidy reform, or any other objectives of the Paris Agreement. The Commission’s plans do not contain a single explicit reference to fossil fuels.

## STRUCTURE OF REPORT

**Part One** places the EU's ECT modernisation plans in the context of the Commission's prolonged attempts to rein in the intra-EU application of the ECT. It also assesses the EU law requirements suggested in the CJEU's ruling on CETA, which the Commission has attempted to transpose into draft provisions for a modernised ECT.

**Part Two** discusses how the Commission's reliance on EU competition law to challenge ECT-based ISDS claims may produce a raft of unintended consequences: nationality shopping, definitional workarounds and even the collection of compensation in non-EU States. For its part, the arbitration industry shows no signs of heeding the EU's objections.

**Part Three** highlights considerations that have been entirely neglected in the modernisation process, but which would be essential for any progressive attempt to link multilateral energy governance to the objectives of climate protections. These are by no means exhaustive, but concern issues on which multilateral agreement is sorely lacking: ensuring the supremacy of State's obligations on environmental protection, building strategies towards subsidies reforms, and creating legal obligations concerning investors' conduct.

This paper does not provide an exhaustive analysis of the European Commission's draft proposal<sup>16</sup>, but aims to highlight a number of critical issues that the Commission has emphasised, or neglected. The ECT-based awards against Spain provide a useful reference point for assessing these issues (the "**Spanish Cases**"). Ostensibly 'incompatible with EU law', these awards are moving rapidly towards enforcement, as investors seek out 'arbitration-friendly' jurisdictions. The cases therefore highlight several key, possibly intractable, problems of ISDS under the ECT, and give a taste of what is to come, as the energy transition necessitates fundamental shifts in the design and allocation of energy sector market incentives.



# 1. Making the ECT ‘CJEU-Safe’?

In the wake of two landmark CJEU rulings concerning ISDS (Achmea; Opinion 1/17),<sup>17</sup> there is little doubt that the ECT’s investment arbitration mechanism (Art. 26 ECT) is incompatible with EU law. Crucial safeguards that the CJEU identified in Opinion 1/17, which ostensibly serve to prevent tribunals from ruling on the level of protection of public interests determined by the EU, are wholly absent from the ECT. On the basis of that judgement, it would therefore appear to be ‘abundantly clear’ that the ECT’s current ISDS mechanism ‘violates the principle of autonomy of EU law’.<sup>18</sup>

Whether the CJEU confirms this assessment will depend on if, *when and how* it is asked. A referral to the Court on this question has been often mooted and long anticipated.<sup>19</sup> If requested by a Member State to rule on the ECT’s compatibility, the Court might well determine that the EU institutions had entered into an international agreement that derogates from primary EU law, exceeding their allocated competences.<sup>20</sup> Considerations ‘of the reciprocal nature of international agreements’, which featured prominently in the Court’s positive assessment of CETA,<sup>21</sup> are unlikely to suffice. International agreements to which the EU is party form a part of EU law,<sup>22</sup> but in the case of any conflict between such international agreements and the EU Treaties, the latter prevail. Such a finding by the CJEU could ultimately require the EU and Member States to abrogate the ECT.

In May 2020, the European Commission published its proposals for ECT reform.<sup>23</sup> Clearly, much of the substance of the Commission’s ECT proposals is lifted from CETA. However, from the outset it must be remarked that in endorsing the ICS, the CJEU set an *alarmingly* low standard for compatibility with EU law. The Commission’s ECT modernisation proposals invariably fall short of even this ‘CETA-benchmark’. Most problematically, they would leave the architecture of ISDS under Article 26 ECT fundamentally untouched. The draft text merely points towards wider ambitions of ‘systemic reform’ of ISDS and invites other ECT Contracting Parties to ‘consider’ the Investment Court System (ICS) as an alternative.<sup>24</sup> It also plots a course

towards hearing ECT cases at a permanent Multilateral Investment Court (MIC), the establishment of which the EU is pushing in other multilateral fora. Should it ever be realised, the MIC would consist of a first instance tribunal and an appeal tribunal, members of which would be appointed by Contracting States for a fixed duration and allocated to cases on a rotational basis. However, as has long been noted, fundamental criticisms of ISDS – the impact of ‘regulatory chill’, substantive standards of protection and the absence of any investor obligations – are not addressed at all by the MIC.<sup>25</sup> In fact, by advertising the ‘advantages’ of these alternatives (such as ‘fully independent and impartial adjudicators’, ‘efficient and transparent proceedings’), the European Commission tacitly acknowledges that ISDS under the ECT is currently neither efficient nor transparent, and that its adjudicators are not fully independent and impartial.<sup>26</sup> In these optimistic placeholders for fora that do not yet (and may not ever) exist, the Commission seems to have finally, perhaps inadvertently, accepted criticisms of ISDS that have been mainstream for nearly a decade.

The European Commission’s proposals are also notably absent any proposal that would support *ending the ECT’s intra-EU application*. The Commission intends – or so it appears – to continue to battle the ECT’s *intra-EU* application on a case-by-case basis. The possible limits of this strategy are discussed in Part 2. Suffice to note here that, potential conflicts with EU law arising from ECT-based investment arbitration are not inherently linked to their intra-EU character at all, a fact at least tacitly acknowledged by both the Commission and the CJEU.<sup>27</sup> Plenty of potential substantive incompatibilities between the ECT and EU law – for instance in respect of State aid, public policy measures<sup>28</sup> or capital transfers<sup>29</sup> – may equally arise in the context of ECT claims brought by non-EU investors against EU Member States.<sup>30</sup>

The following section provides a brief overview of the Commission’s intra-EU jurisdictional objections to ECT-based tribunals, as well as the relevance of the CJEU’s Achmea and CETA rulings for the Commission’s modernisation proposals.

## THE ECT & ISDS: FIT FOR THE FUTURE?

### *Low expectations, high stakes*

The ECT modernisation process was first launched in 2009. Following consultations, ECT Contracting Parties agreed some twenty-five modernisation topics in 2018. Negotiations will soon be in full swing: proposed amendments to the Treaty should be submitted by Contracting Parties by 17 September 2020, in time for voting at the December 2020 Energy Charter Conference.

The European Commission's negotiating mandate, approved by the European Council in July 2019, is to ensure inter alia that a modernised ECT reflects 'climate change and clean energy transition goals and contributes to the achievement of the objectives of the Paris Agreement', and reaffirms States' 'right to regulate'.<sup>31</sup>

In order to be adopted, any amendments to the ECT need unanimous support of Contracting Parties. Prospects for the Commission to successfully persuade all ECT Contracting Parties to support its proposals appear fairly bleak. Japan has already raised objections on all twenty-five modernisation topics, noting that it is 'not necessary to amend the current ECT provisions'.<sup>32</sup> In the words of Yamina Saheb, transforming the ECT into 'a climate friendly instrument' is hardly imaginable 'given the contribution of fossil fuels revenues to the economies of some of the ECT Contracting Parties...'<sup>33</sup>

### *Concurrent Reforms*

ISDS reforms are apparently like buses: you wait ages for one, and then three arrive all at once. The ECT's modernisation is taking place concurrently with discussions under the auspices of the United Nations Commission on International Trade Law (UNCITRAL, Working Group III) as well as the International Centre for Settlement of Investment Disputes (ICSID). In UNCITRAL discussions, the EU is pushing for governments to support its MIC project. More promising alternatives under discussion include a multilateral instrument that could provide various options on ISDS reform and schedules for individual states commitments; these could override existing investment treaties once ratified and include requirements for investors' to exhaust national remedies or provide for counterclaims by states against investors.<sup>34</sup> Meanwhile, ICSID reforms due for discussion in 2020 include issues of third party funding, transparency, timing, and disqualification of arbitrators, among others. Given the large proportion of ECT-based cases submitted to ICSID, such reforms would also be critical to the future operation of the ECT.

Outcomes in these processes are uncertain, but one thing is fairly sure: In the highly fragmented world of international investment law, the existence of *three concurrent, multilateral* reform processes concerning *overlapping treaties* is not likely to be expedient for any effective or comprehensive reform of the ECT, or of ISDS generally.

## 1.1 INTRA-EU OBJECTIONS

Since at least 2009, the European Commission has insisted that the intra-EU application of the ECT's ISDS clause is contrary to EU law. One of the Commission's core concerns is to ensure that EU law prevails in internal EU disputes between EU investors and EU Member States. To this end, the Commission has engaged with ISDS tribunals to challenge jurisdiction, threatened to block enforcement of intra-EU ECT-based awards within the EU, and appealed to foreign courts to stay enforcement attempts in non-EU states. Since EU law does not bind ECT tribunals, they have consistently rejected all of the Commission's objections.

### 1.1.1 Before *Achmea*

Prior to the *Achmea* judgement, the Commission and the EU Member States had already advanced a variety of arguments in ISDS proceedings as to why the ECT cannot apply in intra-EU disputes. In submissions to ECT-based tribunals as *amicus curiae* and Respondents respectively, the Commission and Member States argued that:

- An 'implicit disconnection clause' must be read into the ECT, since the ECT's conclusion was for the EU a matter of external economic relations, and no intra-EU ISDS was ever anticipated.
- Member states made an 'inter se modification' of the ECT on the accession of new States to the EU. This purportedly extends to the non-application of the ECT's conflict rule (Article 16) and confirms the general supremacy rule of EU law.
- 'EU investors' cannot claim to be investors from 'another Contracting Party', since the EU is itself a Contracting Party to the ECT (as the only Regional Economic Integration Organisation, or REIO).
- Member States have never given valid consent to ISDS arbitration in intra-EU disputes, since to do so would be incompatible with EU law.

EU law may well support some (if not all) of these arguments. However, a plain reading of the ECT does not serve any of these approaches. Although the EU currently represents the ECT's only REIO member, and therefore the only Contracting Party for whom the agree-

ment's REIO provisions apply, these contain nothing that expressly precludes the agreement's intra-EU application. In the EU's own unilateral declaration on the ECT in 1998, there is no reference to any intra-EU limitation. Also the ECT's travaux préparatoires show that the EU in fact attempted to insert an express disconnection clause precluding intra-EU application during the ECT's negotiations, but abandoned this after resistance from other States.<sup>35</sup>

It is little surprise then that no ECT-based tribunal has ceded jurisdiction on the basis of these challenges.<sup>36</sup> As discussed below (see 1.2.2), tribunals have repeatedly relied on the ECT's 'conflict of laws' clause (Art. 16), which provides that, in the event of any inconsistency between the ECT's provisions and Contracting Parties' obligations under any prior or subsequent international agreement, the provisions that are 'more favourable to the Investor or Investment' must apply.

### 1.1.2 Consequences of *Achmea* & Opinion 1/17

The CJEU's rulings in *Achmea* and *Opinion 1/17* concern primarily the compatibility of ISDS with the *architecture* of the EU legal order. The EU Treaties accord the CJEU an exclusive monopoly over its authoritative interpretation and lawful application,<sup>37</sup> from which the CJEU has developed the principle of 'autonomy' of EU law.<sup>38</sup> Member States' courts may – and in the highest instance are obliged to – refer to the CJEU for a preliminary ruling or the validity and interpretation of acts of the EU institutions.<sup>39</sup>

In *Achmea*, the CJEU established that ISDS tribunals stand outside EU law and are not entitled to make referrals to the CJEU for preliminary rulings. Following a request for a preliminary ruling from the Germany's Federal Court of Justice (*Bundesgerichtshof*), the CJEU ruled that an ISDS mechanism in the Netherlands-Slovakia BIT 'could prevent [intra-EU] disputes from being resolved in a manner that ensures the full effectiveness of EU law', as well as 'call into question... the principle of mutual trust' and undermine the 'principle of sincere cooperation'.<sup>40</sup> Since tribunals hearing intra-EU disputes may 'be called on to interpret or indeed to apply EU law,

particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital', investment agreements between Member States that provide for ISDS undermine the autonomy of the EU legal order.<sup>41</sup>

In *Opinion 1/17*, the CJEU ruled that the Investment Court System (ICS) in CETA is compatible with EU law. The CJEU noted that while an international agreement between the EU, the Member States and a third country may 'affect the powers of the EU institutions', certain 'indispensable conditions for *safeguarding* the essential character of those powers' must be satisfied in order to prevent any 'adverse effect on the autonomy of the EU legal order'.<sup>42</sup> The Court therefore framed the principle of autonomy of EU law as not merely 'formalistic', 'but one of effect'.<sup>43</sup> Many commentators expressed surprise – and dismay – at the reasoning behind the judgement, which downplays the potential impacts of ICS on the functioning of EU law. The CJEU even signed off the future Appellate Tribunal as compatible with EU law in the absence of clarity on its constitution and specific functions.<sup>44</sup>

Insofar as *Achmea* and *Opinion 1/17* relate respectively to *intra-EU agreements* and *agreements with third states*, they should both entail consequences for the multilateral ECT. Precisely what consequences is a matter of some debate. While the risks to the autonomy of EU law identified in *Achmea* are clearly present in the exercise of ECT tribunals' jurisdiction over intra-EU disputes, the *Achmea* ruling is silent on the case of the ECT, and Member States remain divided on its applicability.

Following the ruling, Member States published a series of political declarations in January 2019.<sup>45</sup> These established an EU-wide consensus that all Member States' intra-EU BITs must be terminated. A majority of twenty-two Member States agreed that the *intra-EU application of the ECT* must also be 'disapplied'. Finland, Malta, Luxembourg, Slovenia, Sweden initially reserved judgement pending a decision of the Svea Court of Appeal to refer to the CJEU on the question of the ECT's compatibility with EU law (the Swedish court later declined to make the referral). Hungary alone was unequivocal that *Achmea* 'does not concern any pending or prospective

arbitration under the ECT'. Tribunals have exploited this lack of unanimity among EU Member States to support their continuing exercise of jurisdiction over intra-EU ECT cases.<sup>46</sup>

## 1.2 AUTONOMY OF EU LAW

### 1.2.1 Applicable Law

A key element of the CJEU's endorsement of the ICS system was the Court's determination that certain provisions in CETA insulated the EU legal order from extraneous interpretation or application of EU law. Tribunals must not be accorded 'power to interpret or apply provisions of EU law... or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework'.<sup>47</sup>

It is a well-established principle of EU law that in relations between EU Member States, the EU Treaties must apply.<sup>48</sup> The CJEU confirmed in *Achmea* that EU law has the character of *both domestic and international law*.<sup>49</sup> Therefore ECT tribunals hearing intra-EU ISDS cases should consider EU law as part of the international law applicable between the Parties.

Under the ECT at present, tribunals are to determine ISDS claims based on the provisions of the ECT and 'applicable rules and principles of international law'.<sup>50</sup> The European Commission's modernisation proposals suggest adding references to 'customary rules of interpretation of public international law' to the ECT's applicable law clause. These would further clarify that the '*domestic law of a Contracting Party shall not be part of the applicable law*'. In addressing such laws, tribunals are required to defer to 'prevailing interpretations' of domestic courts or authorities.<sup>51</sup> These caveats are based on equivalent provisions in CETA, which similarly require tribunals to treat EU law as a 'matter of fact', and which were emphasised in the CJEU's decision endorsing the ICS.<sup>52</sup>

This characterisation of EU law as either *applicable international law* (in intra-EU disputes), or 'domestic fact' (in disputes between EU Member States and non-EU

investors) has not proven entirely helpful in practice. In the words of one investment law scholar, ‘international investment tribunals routinely apply and interpret EU law, in either the jurisdictional or the merits phase, regardless of whether EU law applies to the dispute as law or fact.’<sup>53</sup> Indeed, while ECT tribunals have sought to creatively evade the conclusion that *intra-EU* disputes require the application of EU law,<sup>54</sup> even ISDS tribunals hearing *extra-EU* ISDS claims have occasionally been called upon to interpret and apply EU law.<sup>55</sup> Of the Spanish Cases, several tribunals have deemed EU law as applicable only to considerations of *jurisdiction*, but not to the merits.<sup>56</sup> Nevertheless, all these ECT-based tribunals have necessarily engaged in interpretation of EU law – if only in order to dismiss the numerous *intra-EU* objections to their jurisdiction submitted by the European Commission and Respondent States.

The requirement that tribunals follow ‘prevailing interpretations’ of domestic authorities also will not serve as an absolute guarantee of judicial deference. Notably, in any dispute concerning novel issues of EU law, a tribunal cannot defer to ‘prevailing interpretations’ that do not exist. Absent such interpretations, a tribunal may well be called upon to develop interpretations of its own.

### 1.2.2 Conflict Rules

The classification of applicable law has consequences for resolving conflicts between the ECT and EU law. As a matter of customary international law, States ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’<sup>57</sup> Therefore, in a dispute involving an EU Member State and a non-EU investor, EU law must be considered a ‘domestic fact’, and consequently, no defences based on EU law will be permitted.<sup>58</sup> The only exception would be in cases where the treaty was concluded in ‘manifest violation’ of a ‘provision of its internal law regarding competence to conclude treaties.’<sup>59</sup>

Alternatively if, EU law is part of the applicable international law, then any inconsistencies between the provisions of EU law and of the ECT must be resolved by reference to the relevant *conflict of laws* rules. Under conflict

rules of customary international law, States’ multilateral treaty obligations may be overridden if they are inconsistent with obligations in later treaties (*lex posterior* rule).<sup>60</sup> The EU has argued both that accession treaties and the Lisbon Treaty constitute the ‘later’ agreement.<sup>61</sup> The EU has also invoked the EU Treaties ‘conflict of laws’ provision (Art 351 TFEU) as an alternative; this provision aims to eliminate incompatibilities between the EU Treaties and the Member States’ prior international agreements.<sup>62</sup> Arguably, the application of either rule hinges on relative dates of accession, which produces uneven and arbitrary outcomes for different EU countries.<sup>63</sup>

Reliance on either customary rules or EU law appears all but prohibited by the ECT however, which ‘purports to opt out of *lex posterior* principles.’<sup>64</sup> Article 16 ECT expressly provides that the terms of the ECT prevail over *any prior or later* treaty that accords investors a level of protection lower than that which they are accorded under the ECT.<sup>65</sup> Contracting Parties are thus effectively prohibited from lowering the ECT’s standards of investment protection, or narrowing the scope of its dispute settlement provisions, by means of another international agreement. Tribunals in the Spanish Cases have made abundantly clear that, if called upon required to resolve any incompatibilities between EU law and the ECT, they are bound by Article 16 to give primacy to the provisions of the ECT.<sup>66</sup> They are permitted to give primacy to EU law, only if it is deemed more favourable to investment protection.

To date, no tribunal has *identified* any inconsistency between the ECT and EU law. In respect of potential inconsistencies, the European Commission’s position has shifted significantly. Nearly a decade ago, the Commission was convinced of the ‘*equivalence in substantive protection* between EU law and the ECT under different standards of treatment’,<sup>67</sup> often emphasising that EU law offers an equivalent level of protection to investors and a comprehensive system of judicial review. Since then, the Commission has tempered this assessment. By 2017, it noted that ‘rules on investment protection’ in the ECT and EU law respectively are ‘not identical in content and are applied by different adjudicators’ creating ‘a risk of conflicts between the international investment treaty

and Union law.<sup>68</sup> One more recent tribunal summarised the Commission's jurisdictional objection more alarmingly as follows: '[t]he intra-EU application of the ECT would create the risk of a substantive conflict between EU law on energy and investment protection and the rules of the ECT'.<sup>69</sup> Indeed, the fact that foreign investors in the Spanish Cases have been awarded greater compensation relative to national investors, plainly demonstrates that the EU's and ECT's respective standards of treatment are *not equivalent*.

The European Commission's modernisation proposals do not touch upon Article 16 (nor have other Contracting Parties included it for discussion). The reason for this may be that the EU's modernisation proposals are designed only for extra-EU disputes, since the Commission regards intra-EU cases as invalid.

However, Article 16 may come into play in resolving conflicts with other bodies of law, in particular other multilateral agreements concerning the energy sector, climate or sustainable development. As discussed below (see 3.1), redefining the relationship between the ECT and the Paris Agreement might better serve all ECT Contracting Parties' in pursuing the fulfilment of their climate targets. The ECT modernisation proposals neglect these considerations entirely.

### 1.2.3 Allocation of Powers

An international agreement cannot affect the allocation of competences between the EU and its Member States, which is strictly a matter of EU law.<sup>70</sup> In *Opinion 1/17*, the Court was satisfied that, because CETA confers power on the EU to determine whether the EU or a Member State shall be the respondent in an ICS dispute, the 'exclusive jurisdiction of the Court to give rulings on the division of powers between the Union and its Member States is thereby preserved'.<sup>71</sup>

Under the ECT at present, the EU does not maintain powers to determine whether the EU or a Member State is the proper respondent. The EU is only able to determine such responsibility under the ECT upon a *non-mandatory request* by the investor for the determination

of the appropriate respondent.<sup>72</sup> This was elaborated by the EU in a 1998 unilateral declaration, which clarifies in a footnote that such a determination is in any case *non-binding*.<sup>73</sup> Although an EU Regulation (912/2014) has been introduced providing a framework for such allocation – and the Regulation applies also to the ECT – to be effective in respect of ECT disputes, it is necessary for a corresponding provision to be included in ECT text. Additionally, if the investor chooses to submit their claim to ICSID, the EU cannot be the respondent, since the EU is not (and cannot become) a contracting party to the ICSID Convention.

The EU's modernisation proposals do not address this issue at all. Given the weight accorded to CETA's equivalent provisions by the CJEU, this omission would seem significant in terms of EU legality.

## 1.3 SUBSTANTIVE ISSUES

### 1.3.1 Investment Protection Standards

The ECT's current 'fair and equitable treatment' (FET) standard is demonstrably broader than equivalent standards of protection under EU law. The ECT also currently provides very broad protection of covered investors against expropriation and 'indirect' expropriation.<sup>74</sup>

The Commission's ECT modernisation proposals would largely transpose CETA's somewhat narrower standards of investment protection into the ECT. In assessing the investment protection standards in CETA, the CJEU found that in CETA these had been sufficiently circumscribed to cover only the most severe cases.<sup>75</sup> The proposed FET standard would therefore be limited to an exhaustive list of situations constituting more serious mistreatment of investors, such as denial of justice, fundamental breach of due process, and manifest arbitrariness.<sup>76</sup> Like CETA, the proposed FET provisions also contain a clause permitting tribunals to 'take into account whether a Contracting Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation'. Unlike CETA, there

would be no mechanism for ECT Contracting Parties to regularly ‘review the content of the [FET] obligation’.<sup>77</sup> The European Commission further proposes to transpose CETA’s Annex on Expropriation to the ECT.<sup>78</sup>

As noted above, the CJEU’s positive assessment of CETA set a very low bar for compatibility with EU law. Still broadly framed, these standards accord arbitrators with significant discretion in interpretation. The approaches of tribunals in the Spanish Cases (see Box 2) clearly diverge from the CJEU’s in respect of with legitimate expectations.<sup>79</sup> For its part, the European Commission is satisfied that Spain ‘has not violated the principles of legal certainty and legitimate expectations under Union law’.<sup>80</sup> Given tribunals’ wide range of interpretations of investors’ legitimate expectations in those cases, the Commission’s proposals do not significantly limit future ECT tribunals from applying the FET standard in a

similarly expansive, or inconsistent, manner. There is no requirement that specific representations be written, or limitations to the level of authority exercised by public officials giving such representations. Nor do these provisions address the questions arising in almost all of the Spanish Cases, such as the significance of investors’ due diligence, or whether expectations may arise from legislation or the general legal framework.

Broad qualifiers such as ‘fundamental’ and ‘manifest’ give arbitrators significant discretion when determining the contours of the FET standard. A number of undefined qualifiers for determinations of ‘indirect’ expropriation would also be left ultimately to tribunals to interpret. For example, a measure will not amount to indirect expropriation only if its ‘impact’ is not ‘so severe in light of its purpose that it appears manifestly excessive’.<sup>81</sup>



## INCOHERENCE AND OVERCOMPENSATION: THE SPANISH CASES

### *The Special Regime*

Spain's so-called 'Special Regime'<sup>82</sup> was established under the 1997 Electricity Law (Ley del Sector Eléctrico, 54/1997), and Royal Decree 661/2007. The latter regulation – adopted before the 2007 financial crisis – established generous incentives intended to foster Spain's renewable energy capacity in line with targets established under the 1997 Kyoto Protocol, as well as EU directives. The 2007 Decree provided fixed prices to be paid for electricity generated from renewable sources, known as feed-in-tariffs (FITs). But costs of renewable technology soon began to fall dramatically, investments surged and the FIT scheme generated an unsustainable 'tariff deficit' (the gap between costs and revenues). With the additional pressure of the global financial crisis, a reduction of the FIT became inevitable.

In 2013 and 2014, Spain introduced a series of measures that repealed the Special Regime, eliminated its benefits and reduced the rate of remuneration for existing renewable energy facilities. This set in motion a flood of ECT-based claims. Investors seeking compensation for changes to the regulations have initiated 47 cases, 28 of which are still pending (see Annex 1). To date, fourteen of the claims have been decided in favour of investors, three in favour of the State; one case was discontinued and one Award subsequently annulled.<sup>83</sup>

Spain has been ordered to pay an aggregate of nearly €1 billion in compensation. Investors protected under the ECT have profited from levels of compensation unavailable to domestic small-scale investors and citizens impacted by the same regulatory changes.<sup>84</sup> The majority of claimants in these cases are private equity funds and other financial investors.<sup>85</sup> The only domestic firms that have been able to use the ECT are large multinationals that claimed ECT protection by virtue of corporate structures that include subsidiaries outside of Spain. Indeed, the fact that some claimants continued investing in Spain even after initiating their ECT claims indicates that some of these investors regard ISDS less 'as an insurance policy', than as 'an additional source of profit'.<sup>86</sup>

In response to its mounting award liabilities, Spain introduced a further amendment in 2019 (RDL 17/2019) promising a higher guaranteed rate of return for renewable installations until 2031, available to investors only on condition that they abandon their ECT claims against Spain by 30 September 2020. Whether that strategy will prove effective, only time will tell.<sup>87</sup>

### *Legitimate Expectations*

The seventeen awards to date have largely hinged on respective tribunals' different interpretations of ECT Art 10(1), which obliges Contracting Parties *inter alia* to 'create *stable, equitable, favourable* and transparent conditions for Investors', as well as to accord their investments 'fair and equitable treatment' (FET). The ECT does not refer to 'legitimate expectations'. This is however an established (and controversial) principle of investment arbitration, which has long served to expand the FET standard. The Spanish Cases provide a useful illustration of how arbitrators' divergent approaches to the issue of legitimate expectations can produce

highly inconsistent outcomes from the same material facts. Even commentators from the arbitration industry point out that these tribunals' contradictory interpretations of the ECT's FET standard in relation to largely the same material facts expose an absence of 'coherent structure' in these decisions.<sup>88</sup>

The first Award – Charanne, in favour of Spain – found no basis for the investor's legitimate expectations.<sup>89</sup> The tribunal emphatically rejected the argument that RD 661/2007 could be converted into 'a specific commitment of the state' as this would 'constitute an *excessive limitation on power of states to regulate the economy in accordance with the public interest*'.<sup>90</sup>

In the vast majority of subsequent awards, tribunals have however accepted that the investors had such legitimate expectations of profit, arising either from the *general regulatory framework*,<sup>91</sup> or from a *specific stabilisation commitment*: namely, Article 44.3 of RD 661/2017, which stated that future 'revisions' to the scheme would not affect existing facilities. This has been held to guarantee investors a fixed rate of return for the entire lifetime of their investment.<sup>92</sup> Other tribunals have been divided over whether a *registration* requirement in RD 661/2017 qualified the investors' legitimate expectations.<sup>93</sup>

Alternatively, *Eiser* and other tribunals rejected the argument that RD 661/2017 could be the basis of '*immutable economic rights*',<sup>94</sup> but accepted that investors' expectations were frustrated by Spain's 'fundamental', 'unexpected' and 'unreasonable' overhaul of the existing regulations, even in the absence of any specific commitment by Spain.<sup>95</sup> In contrast, one recent outlier decision in Spain's favour acknowledged that the government acted upon in 'good faith' to address 'the imbalances that the compensation scheme had produced in the Spanish electricity system, in a delicate time of international economic crisis.'<sup>96</sup> The majority Award concluded that Spain's corrective actions may have had 'unpleasant consequences' for the investors, but were reasonable and in the public interest.<sup>97</sup>

### Due Diligence?

Prior to RD 661/2007 a number of renewable energy Decrees had been adopted and subsequently amended. The Spanish Supreme Court had ruled in 2005 that there was nothing to prevent the government from modifying the renewable energy incentives. Later Supreme Court judgements confirmed this.<sup>98</sup> *Charanne* emphasised that investors should have been aware of these developments, and tempered their expectations of profit.<sup>99</sup> Similarly, the *Isolux* tribunal emphasised that claimants could not reasonably have had such legitimate expectations in 2012, as the regulatory environment was by this time obviously changing.<sup>100</sup> On this basis, the *PV Investors* tribunal denied the claimants' 2008 investment any benefit from ostensible commitments contained in RD 661/2007; investors should have undertaken due diligence and been aware that domestic jurisprudence recognised only a guarantee of 'reasonable profitability' under the 1997 law.<sup>101</sup>

However, the *Watkins* tribunal recently recognised investors' legitimate expectations – again on the basis of the ostensible 'stabilisation commitment' contained in RD 661/2007 – even though claimants had first acquired a portfolio of wind farms in 2011, and sold them in 2016 for €42 million profit. The *Watkins* claimants were awarded a further €77 million in compensation.<sup>102</sup>

### 1.3.2 The Right to Regulate

In Opinion 1/17, the Court suggested that the mere possibility that ‘the Union – or a Member State in the course of implementing EU law – has to amend or withdraw legislation’ as a consequence of ICS, would mean ‘that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework’.<sup>103</sup> But ultimately the CJEU found that references in CETA to States’ ‘right to regulate’ provided an effective safeguard to protect against ICS tribunals interference in domestic policy space.<sup>104</sup>

A raft of references to States’ right to regulate is proposed by the European Commission for the ECT’s modernisation. These transpose many provisions from CETA into the ECT.<sup>105</sup> For example, the proposed Articles on ‘Regulatory Measures’ reaffirm States’ ‘right to regulate within their territories to achieve legitimate policy objectives, such as the protection of the environment, including combatting climate change...’ It is extremely doubtful that such references suffice to ring-fence States’ exercise of regulatory from future challenges under the ECT. As has been widely observed, CETA’s ‘safeguards’ do not on the whole preclude but *merely limit* potential incursions by ICS tribunals into the ostensible regulatory autonomy of the EU and its Member States.<sup>106</sup>

While the CJEU was satisfied that an ICS tribunal would not enjoy jurisdiction to ‘call into question’ a Party’s level of protection of any number of legitimate public interests, tribunals hearing the Spanish Cases – or indeed

any other ISDS dispute – have never really called this right into question. Indeed, the fact that States have a ‘right to regulate’ is unlikely to ever be disputed. Rather, ECT-based tribunals have frequently observed that the ‘right to regulate’ does *not fundamentally alter* the State’s obligation to fulfil its commitments under the ECT. In particular, this right *does not release* ECT Contracting Parties from the obligation to ensure that costs resulting from such regulatory measures are not borne by protected investors.<sup>107</sup>

The CJEU’s conclusion in Opinion 1/17 fatally misrepresents and underestimates the impacts of such costs. The Court emphasised that ICS tribunals have no authority to ‘annul [a] contested measure, or require that the domestic law of the Party concerned should be rendered compatible with the CETA’, but can merely award compensation for breaches of the investment provisions.<sup>108</sup> Indeed, ISDS tribunals are almost always limited to awarding investors compensation; discussions of alternative remedies (such as restitution) in investment arbitration are exceedingly rare.<sup>109</sup>

But States may still be inclined to regulate in the interest of investors rather than in the public interest – or to *not regulate* at all (so-called ‘regulatory chill’) – in order to ‘avoid being repeatedly compelled... to pay damages to the claimant investor’.<sup>110</sup> In ‘choosing’ whether or not to appease protected investors to avoid ISDS litigation, any ‘right to regulate’ is inevitably exposed to a cost-benefit analysis, to the detriment of non-investment, public interest objectives.



## 2. The Horizons of EU Law

The European Commission's jurisdictional challenges to ECT tribunals described in Part 1 are to a degree the result of particular juridical concerns specific to EU law. The Commission has been in dialogue with various ECT-based ISDS tribunals for over a decade. To date, no tribunals to date have considered these concerns relevant to their exercise of jurisdiction. Quite simply, the European Commission's attempts to imbue internal EU law with a particular character in order to use it as a defence against the ISDS regime could be fast approaching its limits.

Firstly, the Commission's attempts to bisect the ECT into its 'intra-EU / extra-EU' application is prompting law firms to assist investors in evading 'EU' identity. Proposals in the Commission's modernisation plan may go some way to addressing this, but with few guarantees. Moreover, the Commission's strategy of deploying EU competition law to thwart enforcement of ECT-based intra-EU arbitral awards may assist in ensuring the cooperation of Member States, but is limited even as a matter of EU law. It also leaves open the question of how the Commission intends to 'legally disentangle' the intra-EU application of the ECT for 'projects involving both EU and non-EU investors', without arbitrary or discriminatory outcomes.<sup>111</sup> Whether or not these intra-EU awards are 'unenforceable' – as the Commission claims – might ultimately be determined outside EU borders. With the liability for awards in the Spanish Cases nearing €1 billion, one can only speculate how long the EU and its Member States would hold out, before capitulating to pressure from creditors pursuing for execution of these awards in the courts of non-EU states.

### 2.1 NATIONALITY SHOPPING

It is well known that investors use shell companies to adopt a 'nationality of convenience' in order claim protection under an international investment agreement. Forum shopping and treaty shopping are familiar strat-

egies in ISDS disputes: Dutch mailbox companies were behind a significant number of the Spanish Cases; two claimants were wealthy Spanish nationals who attempted secure protection as 'Dutch' investors through such companies.<sup>112</sup>

International law firms are already encouraging EU investors to strategically seek a non-EU 'home state' status for their EU investments. How popular this strategy becomes depends on a variety of factors, but the UK and Switzerland are already mooted as favourable jurisdictions, due to their proximity and ease of doing business.<sup>113</sup> One lawyer advises: 'Once the UK has left the EU, an ECT arbitration brought by a UK company against an EU Member State or by a Member State company against the UK will no longer be an intra-EU arbitration and hence *Achmea* should not apply at all... The fact that a UK investor company is owned and/or controlled by an EU company should be irrelevant: investment treaty tribunals generally decline to look beyond the place of incorporation of the investor company in determining nationality'.<sup>114</sup>

This opens up the possibility that any intra-EU distinction will ultimately be played out in proxy legal disputes over investors' nationality shopping strategies. Determining the contours of the ECT's application – and of EU law – could then depend to a certain degree on the business environment of non-EU Contracting Parties to the ECT, investors' resources to structure their investments accordingly, and the discretion of ISDS tribunals to assess whether this qualifies them for protection under the ECT. None of which sounds conducive to a predictable and stable legal environment.

The European Commission's modernisation proposal would limit the definition of covered investors to those 'engaged in substantive business activities' in the 'home state', which is to be understood as equivalent to having an 'effective and continuous link' under EU law.<sup>115</sup> A new article on 'Fivolous claims' would also require tribunals to decline jurisdiction, 'if the dispute had arisen, or

was foreseeable on the basis of a high degree of probability, *at the time when the claimant acquired ownership or control of the investment* and the tribunal determines such acquisition was ‘for the *main purpose* of submitting a claim’.<sup>116</sup>

Whether these definitional refinements proposed by the Commission will prove sufficient to ensure that ‘mailbox companies cannot bring disputes under the ECT’<sup>117</sup> depends in large part on how future tribunals interpret them. Certainly by limiting which investors or investments are covered by the ECT, or providing for mechanisms by which claims can be precluded under certain criteria, Contracting Parties to the ECT could reduce risks of nationality shopping. But case law illustrates that poorly defined terms (including ‘foreseeability’) have contributed to ‘inconsistent and unpredictable’ approaches by tribunals.<sup>118</sup>

The Commission has further proposed to reform Article 17 ECT’s ‘denial of benefits clause’. This Article currently provides that Contracting Parties reserve the right ‘to deny the *advantages*’ of the ECT’s provisions on investment protection, limited to particular circumstances – for instance where ‘citizens or nationals of a *third state* own or control’ the investment and there are ‘no substantial business activities’ in the investor’s putative ‘home state’. The Commission intends to add to Article 17 a clarification that Contracting Parties *may deny the application* of the investment protection provisions ‘without any prior publicity or additional formality’.<sup>119</sup> This is presumably intended to preclude dispute settlement, since in arbitral practice to date, the right has been interpreted very narrowly: it cannot serve to preclude jurisdiction<sup>120</sup> and must be pro-actively exercised in a timely manner, meaning prior to the commencement of any arbitration.<sup>121</sup>

The Commission’s proposal would however nullify any utility of Article 17 for guarding against ‘nationality shopping’. Firstly, it has not proposed any amendment defining ‘third states’ under Article 17; to date, this has been interpreted to apply *only to non-Contracting*

*Parties* to the ECT.<sup>122</sup> This would therefore not assist with preventing nationality shopping by investors of ECT Contracting Parties. Moreover the Commission proposes *deleting* the relevant passage on ‘ownership’, ‘control’ or ‘substantial business activities’ from Article 17 entirely.

Finally, the Commission proposes to limit the definition of ‘investment’ to ‘investments made in accordance with the applicable law and the domestic law of the host Contracting Party’<sup>123</sup> – a fairly standard caveat in BITs. Elsewhere, a footnote addition to the ECT’s arbitration clause further aims to make claims ‘inadmissible if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process’.<sup>124</sup> Limitations to jurisdiction or admissibility on the basis of these provisions could have gone considerably further, not only in addressing nationality shopping, but also by expressly linking investors’ protection under the ECT with investors’ compliance with standards of corporate conduct, due diligence obligations, human rights or environmental regulations (see below 3.3).

## 2.2 COMPETITION LAW

The relation of EU State Aid rules to investment arbitration has become rather critical to the issue of the ECT. The European Commission’s classification of the compensation Award in the *Micula* case as constituting new State Aid has emerged as a central bone of contention in the Commission’s attempts to thwart the Award’s enforcement. The EU Treaties generally prohibit subsidies granted by Member States, unless these are qualified under particular exceptions. EU competition rules – governed by Arts. 107 and 108 TFEU – endows the Commission with powers to review and approve any ‘State Aid’ measures adopted by Member States. The Commission has consequently brought its competition law competences to bear on the Spanish Cases, but the outcomes of this strategy are still very uncertain.

## COMPENSATION AS 'NEW STATE AID': MICULA

In 2005, investors sued Romania under the 2002 Sweden-Romania BIT for damages arising from the discontinuation of tax incentives that were meant to encourage investment in under-developed regions. These incentives were expected to last until 2009, but were repealed in 2004 as part of Romania's accession negotiations with the EU, having been identified as incompatible with EU State Aid rules. The Commission intervened in the ICSID proceedings as *amicus curiae* to object that the revocation of the incentives had been required by EU law and that '[a]ny ruling reinstating the privileges abolished by Romania, or compensating the claimants for the loss of these privileges, would lead to the granting of new aid which would not be compatible with the EC Treaty'.<sup>125</sup> In 2013, the ICSID tribunal nevertheless found that the measures violated the Claimants' legitimate expectations, breaching the FET standard, and awarded the investors €178 million.

While Romania's attempt to annul the 2013 ICSID Award failed, the Commission issued an injunction preventing Romania from paying. Subsequently, the Commission declared that payment of the *Micula* Award 'constitutes State aid within the meaning of Article 107(1) [TFEU]' (EC Decision 2015 (Romania)).<sup>126</sup> As EU State Aid law is primary law, it takes precedence over Member States' international obligations', and the Commission ordered Romania not to pay any compensation, and to recover payments already made.<sup>127</sup>

### Not so fast...

Then, in 2019, the General Court of the CJEU ruled that the Commission lacked competence to assess the lawfulness of the incentives under EU law, since the investors' 'right to receive the compensation' arose when Romania repealed the incentives in 2004, but EU law only became applicable in Romania upon its accession to the EU on 1 January 2007.<sup>128</sup> By failing to draw this distinction (between 'before or after accession'), the Commission had 'exceeded its powers in the area of State aid review'.<sup>129</sup> EC Decision 2015 (Romania) was thus annulled in its entirety. The Commission has appealed the judgement to the Court of Justice.

Accordingly, if an ISDS Award entitles investors to compensation equal to the benefit of an unlawful incentive that has been revoked, payment of that compensation would indirectly restore illegal State Aid.<sup>130</sup> But for any measure to be classified as 'aid', it must still fulfil Article 107(1) TFEU, which requires inter alia that payment should be *imputable* to the Member State.<sup>131</sup> What if the payment of compensation is 'involuntary'? In EC Decision 2015 (Romania), the Commission countered this objection by highlighting that Romania voluntarily entered into the BIT.<sup>132</sup> It remains to be seen if that position on imputability is still tenable in the context of the execution of intra-EU ICSID Awards in the courts of non-EU States.

### Voluntary payments?

Initially at least, EC Decision 2015 (Romania) served to stop EU Member States' courts from enforcing the *Micula* Award. For instance, the UK courts granted Romania a stay of enforcement, citing both Member States' 'duty of sincere cooperation' and the (then still pending) judgement of the CJEU. However, in February 2020, the UK Supreme Court lifted this stay of enforcement, citing its obligations under the ICSID Convention Art. 54 (discussed further below, 2.3.1). The Court argued *inter alia* that because the *EU is not a Contracting Party to the ICSID Convention*, the CJEU should defer to UK Courts on the Convention's interpretation.<sup>133</sup> Consequently the UK is being hailed as 'fertile ground' for the enforcement of awards, having demonstrated that it is 'ready to embrace intra-EU awards that may not be to the CJEU's liking'.<sup>134</sup>

The *Micula* claimants have also succeeded in having the Award enforced in the US. In May 2020 as the Court of Appeals for the District of Columbia Circuit confirmed the conversion of their ICSID Award into a US\$ 330 million judgment.<sup>135</sup> Intervening as *amicus curiae*, the Commission submitted objections based on several international law doctrines (international comity, act of state and foreign sovereign compulsion), but to no avail.



### 2.2.1 EC Decision 2017 (Spain)

The European Commission's modernisation proposals do not touch directly on the issue of 'compensation as new aid' (see Box 3). They do however attempt to 'carve-out' from the scope of ISDS under the ECT any disputes concerning the discontinuation of State aid. These draft provisions affirm that the ECT's investment protection provisions must not 'be interpreted as a commitment from a Contracting Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits'. More specifically on subsidies, a States' 'decision not to issue, renew or maintain a subsidy' shall not constitute a breach of the ECT 'in the absence of any specific commitment under law'.<sup>136</sup> These proposals mirror equivalent safeguards included in CETA.

In considering this approach to 'carving out' the discontinuation of subsidies from the scope of ISDS under the ECT, it is worth looking at how tribunals have responded to objections based on EU State aid rules. In 2017, the European Commission published a decision assessing the compatibility with EU State Aid rules of *new renewable energy regulations* introduced by Spain in 2013-2014 (EC Decision 2017 (Spain)).<sup>137</sup> As described above (see Box 2), these measures effectively abolished the benefits of the so-called 'Special Regime' (RD 661/2007), prompting the wave of ECT-based claims against Spain.

The EC Decision 2017 (Spain) did not assess whether the *Special Regime* was legal under EU state aid law, as such a determination was deemed 'not relevant'.<sup>138</sup> Nevertheless, the Decision declared that *any award for compensation* to investors in the Spanish Cases 'would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation'. As a matter of EU law, 'a recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that *has not been notified to the Commission*'.<sup>139</sup> It is important to note however, that the Decision required only that compensation be notified to the Commission, but did not state 'that an award for compensation for loss of the [Special Regime] would automatically be irreconcilable with EU state aid law'.<sup>140</sup>

This notification requirement is not limited to intra-EU cases. The Commission further declared: 'In an intra-EU situation... *the principle of fair and equitable treatment cannot have a broader scope* than the Union law notions of legal certainty and legitimate expectations in the context of a State aid scheme'. That may be so as a matter of EU law, but, as illustrated above, the ECT's FET standard as interpreted by most tribunals in the Spanish Cases has a demonstrably 'broader scope' than any equivalent principles of EU law.

The European Commission and Spain have frequently cited the EC Decision 2017 (Spain) in submissions to tribunals, both in Spain's defence to illustrate that repeal of the Special Regime of renewable energy incentives was required by EU State Aid law, and to highlight that – as a matter of EU law – Spain and other Member States are required to stay enforcement proceedings. It is probably truer to say that the repeal of the Special Regime was encouraged by EU State Aid rules, than required by them.<sup>141</sup>

Several tribunals have noted in response that EC Decision 2017 (Spain) specifically did not assess whether the Special Regime or RD 661/2007 constituted unlawful State Aid. Rather the Decision concerned *only* the 2013-2014 measures, which replaced those measures on which the investors' expectations of remuneration relied.<sup>142</sup> More problematically, tribunals in the Spanish Cases have used a variety of methods to establish that Spain made 'commitments' giving rise to the investors' legitimate expectations. With reference to the Commission's modernisation proposal, one can see that few of these ostensible breaches of the ECT were 'absent any specific commitment under law', and none of them entailed interpreting the ECT's investment protection provisions 'as a commitment' not to 'change the legal and regulatory framework'. Rather, many tribunals simply converted a general regulation (namely, Article 44.3 of RD 661/2017) into a 'specific commitment under law', thus giving rise to legitimate expectations.<sup>143</sup>

Accordingly, the Commission's proposed ECT subsidies carve-out might not serve to prevent such awards. For example, as the *PV Investors* tribunal recently concluded,

if arbitrators simply award compensation on the basis of investors' more general expectations of 'reasonable profitability', rather than to restore any lost benefits under RD 661/2007, 'there is no suggestion either from the Commission or from Spain that [this] would constitute State aid'.<sup>144</sup> Similarly, international law-firm Allen & Overy considers that claimants in the Spanish Cases still 'stand a chance of avoiding Micula-type State aid issues': if compensation awarded can be 'classified as a "minor alteration" of the approved scheme [it] may not have to be notified at all'.<sup>145</sup> In light of such definitional workarounds, it is far from guaranteed that the Commission's proposal to carve-out subsidies from the scope of investment protection will work.

The issue of defining subsidies in fact goes far beyond these matters of EU competence and competition rules. Entirely neglected in the ECT modernisation process is the question of agreeing a methodology for the *identification* of fossil fuel subsidies, one of the foremost challenges of future energy governance, subsidisation and climate change (see 3.2).

### 2.2.2 Mixed Claims

The potential for a tribunal to award compensation restoring unlawful State aid is not limited to cases involving EU investors. EU State aid rules do not provide for any such distinction and apply to all economic operators within the EU, regardless of whether they fall under the protection of the ECT or any other investment agreement.

Six of the Spanish Cases involve either non-EU investors or are 'mixed claims' involving investors of EU member states *and* of non-EU states (see Annex 1). To date, only the *Operafund* case has resulted in an Award. The *Operafund* tribunal did not dwell on whether the 'intra-EU objection' is appropriate in proceedings concerning Maltese and Swiss investors; the European Commission and Spain's intra-EU objections were aimed only at the former.<sup>146</sup> The tribunal ultimately concluded that the claimants – Swiss *and* Maltese, without distinction – *did* have legitimate expectations, and the FET standard was breached.

It is worth recalling that the CJEU in *Opinion 1/17* deemed situations like this and in *Micula* 'highly improbable' under CETA.<sup>147</sup> In light of the Spanish Cases, this assessment understates the risk considerably. The Court specifically concluded that ICS cases could not lead to 'unequal treatment to the disadvantage of an EU investor', since it is '*unimaginable*' that an ICS tribunal would find a violation of the FET standard, or deem such measures to be indirect expropriation, 'where the competition rules have been *correctly applied* by the Commission or by a competition authority of a Member State'.<sup>148</sup> This optimism rested largely on CETA's provisions referring to 'the importance of free and undistorted competition in their trade relations'.<sup>149</sup> But like CETA, the ECT also has provisions concerning competition law; and as recently as 2012, the Commission and the ECT-based *Electrabel* tribunal were still singing from (broadly) the same hymn-sheet: the tribunal concluded that 'the ECT and the EC Treaty share the same broad objective in combating anti-competitive conduct', *expressly including in respect of EU State aid rules*.<sup>150</sup> That 'shared, broad objective' has however now emerged as a definitional crisis for the EU and the ECT.

As for the five remaining pending ECT claims against Spain involving 'non-EU' investors, how will the Commission proceed? If it does intervene with the same EU-law based objections, the Commission cannot further sustain its position that *only intra-EU* ECT disputes are incompatible with EU law. If it doesn't, how will this *de facto* discrimination in favour of non-EU investors be justified?

## 2.3 ENFORCEMENT & EXECUTION

The European Commission's warning that intra-EU ECT tribunals may render 'unenforceable awards' has not deterred tribunals from exercising jurisdiction.<sup>151</sup> Neither have these protestations discouraged claimants from aggressively attempting to enforce their awards across the EU and beyond. Lawyers at Allen & Overy, for instance, encourage successful intra-EU ISDS claimants to 'enforce their award outside the EU' (in the US or Switzerland) or even to sell the awards 'at a discount to third parties, such as investment funds'.<sup>152</sup>

For an arbitral award to be enforced in a third State it must first be recognised by national courts, and converted by entering a judgment on the award; only then can awards be executed against the property of an award debtor. Historically, there have been relatively few ‘recalcitrant’ respondents (States that refuse to pay compensation awards) in ISDS cases.<sup>153</sup> Whether (and where) these intra-EU awards are ultimately enforceable is therefore an open question, one that is still being tested and contested in various EU and non-EU jurisdictions: Australia, Belgium, France, Luxembourg, Romania, Sweden, the United Kingdom and the US.

What steps (if any) are available to Respondent States to challenge or prevent enforcement depends to a degree on the chosen forum of an ECT dispute. Claimants submitting ECT-based ISDS disputes under the ECT may choose between submitting them to ICSID, to an ad hoc tribunal under UNCITRAL Arbitration rules or to the Stockholm Chamber of Commerce (SCC).<sup>154</sup> ICSID awards can be enforced according to the “ICSID Convention” in the jurisdictions of 154 States; non-ICSID awards according to the “New York Convention”, which 164 States have ratified.<sup>155</sup>

### 2.3.1 Non-EU Enforcement

Avenues for national courts to review the validity of an arbitral award under EU law, as well as to refer matters to the CJEU using the preliminary reference procedure, are only available if the *seat of arbitration* is within the EU.<sup>156</sup> Although several non-ICSID ECT tribunals have been fixed within the EU, these tribunals *might choose* to fix their seat outside the EU, and thereby circumvent any such review by domestic courts of the EU.<sup>157</sup> Under the New York Convention, national courts may only refuse to recognise or enforce awards on limited grounds: the EU and Member States could argue that the ECT tribunal did not have jurisdiction, or that enforcing the award would violate EU public policy.<sup>158</sup> In non-EU states, national courts may take the Commission and Member States’ EU law-based objections into account before enforcing any non-ICSID awards.<sup>159</sup>

However, as with ISDS claims generally, the vast majority of the Spanish Cases (35 of 47) are proceeding under the ICSID Convention and are international arbitrations ‘with no seat or legal place within the European Union’.<sup>160</sup> There is therefore no possibility for national courts of EU Member States to review ICSID awards.<sup>161</sup> Moreover, the ICSID Convention prohibits any appeal or other remedy except provided for in the Convention, and ICSID annulment procedures are strictly limited to procedural matters.<sup>162</sup> In May 2020, an ad hoc ICSID committee took the rare move of unanimously annulling the 2017 *Eiser Award* on grounds of an arbitrator’s conflict of interest.

National courts have proven willing to stay enforcement proceedings pending annulment. But if annulment through ICSID procedures fails, the ICSID Convention provides for ‘automatic’ enforcement of ICSID awards: all Contracting Parties are to treat an ICSID award as ‘binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State’ (Art. 54.1).

This provision of the ICSID Convention may create conflicts with EU law. In *Electrabel*, the Commission warned that, should the claimants attempt to enforce an ICSID Award that is contrary to EU law *within the EU*, ‘proceedings would be stayed under Article 267 TFEU, in order for the CJEU to decide on the application of Article 54 of the ICSID Convention’.<sup>163</sup> No decision of the CJEU on this provision has yet been requested. Interestingly, in his Opinion on *Achmea*, AG Wathelet noted that such concerns about EU legality had not been sufficient to stop the Commission from including ICSID in subsequent EU trade and investment agreements.<sup>164</sup>

Such a referral may not be necessary. Claimants in the Spanish Cases are queuing up – behind *Micula* – to enforce their awards in the US District Court of the District of Columbia,<sup>165</sup> and elsewhere.

### 2.3.2 The 'Real Battleground'?

Could the future 'autonomy of EU law' hang on the tenacity of investors' lawyers to identify Spain's commercial assets in non-EU states? We might not have to wait long for an answer.

An investor's ability to execute an arbitral award will depend 'the immunity law of the state in which [the investor] is seeking execution'.<sup>166</sup> Under the ICSID Convention, the execution of ICSID awards is governed by 'the laws concerning the execution of judgments in force in the State in whose territories such execution is sought'; but laws relating to sovereign immunity will still apply.<sup>167</sup> Consent to arbitration in investment treaties constitutes a waiver of *jurisdictional* immunity, but *execution* of awards will still requires overcoming execution immunity, from which sovereign non-commercial assets will likely benefit. Therefore investors need to *identify commercial* assets of the debtor State.<sup>168</sup>

In February 2020, the Federal Court of Australia rejected Spain's objections to the enforcement of two ICSID Awards: *Antin* and *Eiser* (the latter subsequently annulled).<sup>169</sup> These objections concerned interpretations of Australian legislation on state immunity and the enforcement provisions of the ICSID Convention. With this development, pressure on Spain to pay has increased; in the words of the claimants' lawyers: 'If Spain fails to do so, the claimants will continue to pursue their collection efforts in Australia and worldwide'.<sup>170</sup> So long as Spain maintains its refusal to pay, the execution of judgements against Spain's sovereign-owned assets in third countries is tipped to become the 'real

battleground': law-firms are lining up to offer investors 'forensic analysis' to 'identify assets owned by the sovereign debtor' such as 'bank account monies, real property, aircraft, ships and/or cargo'.<sup>171</sup>

The story is not over, but it is worth considering that the stakes here are considerably higher for the EU than for the ISDS regime. Even if investors' efforts at non-EU enforcement fail, the impacts on the world of investment law may well be negligible. One reason that recalcitrant states are so rare in ISDS is because refusal to pay awards leads to stigmatisation, not only in respect of investment, but crucially also for trade preferences and development loans.<sup>172</sup> Most states comply *voluntarily* with ICSID awards, not due to fear that sovereign commercial assets might be seized, but because the reputational and political costs are too high not to.

If they do succeed, the European Commission's options are limited. As one tribunal recently observed, the Commission might eventually classify any amounts collected against overseas assets to be unlawful State aid, and require a Member State to 'seek recovery from [the investor] in an equivalent amount'.<sup>173</sup> But whether the Commission can do so under EU law hinges on whether these payments are *classifiable* as State Aid at all. And could recovery actions against investors also give rise to more ECT-based claims? The prospect of pendulous jurisdictional conflict between the EU institutions and arbitral tribunals is probably not at all advantageous to the EU. But as ISDS arbitrators and lawyers have a vested interest in the existence of lucrative ISDS disputes, interminable arbitration might serve the ISDS industry rather well.



## 3. Paving the Road to Paris

In its present state, the ECT is a far cry from a ‘complement’ to the Paris Agreement, and the modernisation process is not likely to result in any significant modification. The European Commission has acknowledged that the ECT’s ‘outdated provisions are no longer sustainable or adequate for the current challenges’,<sup>174</sup> and in line with its negotiation mandate, proposes for the ECT’s modernisation a host of new ‘Sustainable Development’ articles.<sup>175</sup> Almost exclusively limited to promotional, cooperative or ‘best endeavour’ language, these new articles contain little that is specific enough to be effective. The mechanism proposed to handle disputes over these provisions’ implementation – similar to those in the EU FTA’s ‘trade and sustainable development’ chapters – may only issue non-binding ‘recommendations’, which disputing Contracting Parties only need ‘take into account’ when discussing ‘appropriate actions or measures to be implemented’.<sup>176</sup>

There are therefore very good environmental reasons for advocating the ECT’s immediate termination, or individual Contracting Parties’ withdrawal. However, *the case for a multilateral energy agreement that actually complements the Paris Agreement is equally compelling.* Implementation of the Paris Agreement may involve a wide range of trade and investment related measures, including subsidy reform, technology transfer, efficiency standards and border carbon adjustments. But the Paris Agreement itself is entirely silent on the question of how these implementing measures are to be squared with Parties’ obligations under investment and trade treaties.<sup>177</sup>

Existing alternative proposals highlight how deeper reform of the ECT, or its termination by an alternative succeeding treaty could contribute significantly to the achievement of the Paris Agreement’s targets.<sup>178</sup> One prominent reform demand is that any modernised ECT must ‘differentiate *low-carbon* from carbon intensive investments’.<sup>179</sup> Notably, the European Commission’s proposals do not refer to fossil fuels even once. One staunch defender of the ECT suggested recently

that carbon differentiation ‘could become grounds for discrimination...’<sup>180</sup> However, the current ECT’s ostensible ‘mission’ mandates precisely such differentiation: renewable energy sources are crucial to ensuring States’ energy security; fossil fuel dependency, on the other hand, renders States inherently ‘vulnerable’.<sup>181</sup> Therefore, treating fossil fuels and renewable energy sources differently would seem to be absolutely central to the energy security objectives of the ECT.

This section gives a brief overview of three core elements which any agreement concerning energy governance and climate change would need to address. These are neither comprehensive nor exhaustive, but are intended to highlight the significant omissions in the ECT modernisation process. For its part, the EU’s preoccupation with the implications of ISDS for the architecture of EU law has meant that much of the ECT’s significance for climate policy has been woefully neglected.

### 3.1 MEAS AND CLIMATE RESPONSE MEASURES

The European Commission’s ECT proposal obliges Contracting Parties to ‘effectively implement’ Multilateral Environmental Agreements (MEAs) they have ratified, and reaffirms ‘the right of each Contracting Party to adopt or maintain measures to further the objectives of MEAs to which it is a party’.<sup>182</sup> Each Contracting Party would be specifically obliged to ‘effectively implement the UNFCCC and the Paris Agreement... including its commitments with regard to its Nationally Determined Contribution [NDC]’, and to ‘promote and enhance the mutual supportiveness of investment and climate policies and measures...’<sup>183</sup>

Notably these proposals do not address Article 16 ECT at all. As discussed above (1.2.2), arbitral tribunals have interpreted this as an intractable barrier to enforcing the provisions of any other international agreement that

might offer less favourable terms to investors than the investment standards of the ECT.

This putative effort to reconcile climate protection objectives with the ECT's trade and investment obligations therefore neglects the fact that many MEAs do not oblige Parties to take any specific action at all, and are often lacking any effective enforcement mechanisms. To take the Paris Agreement as an example, any new obligation to 'effectively implement' that agreement brings us little closer to what effective implementation should look like: so far, the Parties' common obligation to submit voluntary, self-determined and non-binding NDCs has resulted in some NDCs that are 'quite inconsistent with the Paris Agreement's goals'.<sup>184</sup> Therefore appeals to so-called 'mutually supportive' approaches to the interpretation of international agreements serve to downplay MEA implementation, in favour of fulfilling States' more stringent trade and investment commitments.

Any agreement on trade and investment in the energy sector should expressly stipulate the supremacy of Parties' MEA commitments in the event of inconsistency. It should also address the fact that MEAs quite often do not contain specific obligations or mandatory standards, by defining such conflicts broadly, so as to include situations 'in which a provision of one treaty poses an obstacle to the implementation of another treaty', such as where 'a provision of one treaty enables or encourages a Party to undertake activities or adopt and implement measures which are prohibited by the other treaty'. In this way, an agreement like the ECT should ensure that Parties' fulfilment of their NDCs takes priority over trade or investment commitments.

More thorough still would be to subject any disputes concerning climate response measures to a mandatory preliminary reference procedure,<sup>185</sup> which would involve a panel of climate experts to determine whether a disputed measure's impacts on investors are justified by the measure's climate objectives. This determination should prioritise a scientific evaluation of the measure's impact on GHG emissions reduction, and thus preclude retaliatory litigation from either covered investors or other Contracting Parties.<sup>186</sup>

## 3.2 FOSSIL FUEL SUBSIDIES

It is estimated that eliminating fossil fuel subsidies might raise government revenues globally by US\$ 2.9 trillion, and reducing global carbon emissions by more than 20%.<sup>187</sup> The potential for litigious action under the ECT by fossil fuel investors is significant, as demonstrated in the ECT's recent history. But it is far from clear that the European Commission's proposed 'carve-out' of all ISDS claims against subsidy discontinuation would be effective in limiting challenges to fossil fuel subsidy reform. In the absence of a common methodology of *identifying* fossil fuel subsidies, defining these subsidies may become an increasingly contentious issue. Due to transparency and allocation issues, these fall under the radar of the WTO, in part due to the fact that the WTO Agreement on Subsidies and Countervailing Measures' (ASCM) notification requirements apply only to 'specific' (within the meaning of the ASCM) subsidies, which adversely affect trade.

A comprehensive methodology for identifying and measuring fossil fuel subsidies was published in 2019 by experts from UN Environment, the OECD and the Global Subsidies Initiative, as an indicator tool for achieving the Sustainable Development Goal (specifically, SDG 12, to 'ensure sustainable consumption and production patterns').<sup>188</sup> If incorporated by reference into a multilateral agreement, this methodology could serve both to reinforce any 'carve-out' of subsidy-related investment protection, as well as provide much needed impetus to broader multilateral discussions (at the WTO and elsewhere) on fossil fuel subsidy reform. Transparency and reporting are 'prerequisites' for negotiating and planning fossil fuel subsidy phase-out, and States could agree time-bound obligations to apply this framework and to notify fossil fuel subsidies using a common template.<sup>189</sup> They could also stipulate further obligations, such as re-directing the revenue savings from all fossil fuel subsidy reforms to social protection and poverty reduction programmes.<sup>190</sup>

### 3.3 INVESTORS' OBLIGATIONS

In December 2019, the Philippines' Commission on Human Rights became the first human rights body in the world to acknowledge fossil fuel corporations' contribution to climate change and identified 47 investor-owned corporations that could be found legally liable for their human rights impacts.<sup>191</sup> The implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) – a watershed in global efforts to address corporate justice and accountability, to which the EU and member states pledged full support in 2011<sup>192</sup> – and negotiations towards a UN Binding Treaty on Business and Human Rights have also advanced significantly in recent years. The UNGPs expressly outlined that international trade and investment agreements may pose a threat to regulating business conduct, and recommended that States be careful to 'retain adequate policy and regulatory ability'.<sup>193</sup>

In this light, the European Commission's proposal for a new ECT article on 'Responsible Business Practices' is scarcely adequate. The draft article merely obliges

Contracting Parties to 'promote' the 'uptake of corporate social responsibility or responsible business conduct, in line with relevant international instruments'. The accompanying references to international soft-law instruments are unlikely to have any significant impact.

Alternative investment policy options concerning investor obligations and responsibilities have long been available, but wholly ignored by the Commission.<sup>194</sup> At a bare minimum, issues of investor conduct should be linked to any protection or benefit investors gain under an international agreement; as discussed above (see 2.1), the Commission has only sought to limit investors' recourse to ISDS under the ECT in egregious cases. But trade and investment agreements could also oblige Contracting Parties to adopt and effectively implement *mandatory human rights due diligence laws, judicial mechanisms and monitoring institutions*; these could be modelled on States' National Action Plans towards mandatory human rights due diligence for corporations.<sup>195</sup> Such regulations for energy investments are urgently needed not only in respect of the fossil fuel industry, but increasingly also in the booming renewables sector.<sup>196</sup>



## 4. Conclusion

**Beyond control and beyond reform**, the ECT provides a clear warning of what can happen when EU trade and investment policy goes wrong. To date the only investment agreement in force to which the EU is itself a Contracting Party, this 'brainchild' of the Commission has developed into a major headache for EU Member States and the Commission itself. As the European Commission marches on in negotiations towards a glut of new trade and investment agreements with partners from around the globe, EU Member States should not forget the lessons of the ECT, nor the Commission's role in its inception.

The Commission's subsequent attempts to rein in the ECT's application with reference to EU legal doctrine have proven a circuitous and convoluted affair. While the EU may still succeed in keeping a lid on 'intra-EU' ECT cases, this territorial designation does not correspond to the manifold problems that the ECT poses – *not even* in respect of EU competition law, and even less in respect of the objectives of climate protection.

In fact, at its core the Commission's 'intra-EU objection' amounts to a simple refusal to *overcompensate* protected investors, relative to domestic investors, for the impacts of regulatory change.<sup>197</sup> The question therefore remains, why such a defence should not be applicable to ISDS cases involving non-EU investors or non-EU States? As of January 2020, eighteen countries were known to be working towards ECT accession.<sup>198</sup> The *sui generis* jurisdictional defence the Commission has advanced over the last ten years is – by definition – unavailable to them. But the present challenges the EU faces in respect of the energy transition are *not unique*. Meeting these challenges will involve not only public investment but also compensatory mechanisms, to support workers and communities most vulnerable to fossil fuel phase-out. But ISDS under the ECT is propelling speculators in energy markets to the front of the queue for unjustified amounts of compensation. In light of the vast regulatory

and distributive measures that a just global energy transition requires, any expansion of the ECT's coverage could prove catastrophic, both environmentally and socially.

Although not the first time that Europe's highest Court has frustrated the legitimate expectations of EU citizens,<sup>199</sup> the CJEU's 2019 endorsement of ICS further illustrates that 'compatibility with EU law' is a rather weak barometer for assessing the impacts of the EU's investment protection agreements on public policy. Indeed, the Commission's reliance on EU law as its principle reference point has ultimately meant that the ECT's relationship to the Paris Agreement has barely been addressed. One is left wondering what would happen if the Commission advocated for States' obligations under the Paris Agreement to prevail over the ECT's investment protection provisions with anything approximating the zeal it has demonstrated in defending the CJEU's exclusive jurisdiction, or its own competition law competences.

Climate justice may require precisely that we look for solutions beyond the limits of EU law. With the ECT modernisation agenda already fixed, there is little prospect of that in the coming negotiations. The Commission's proposals are unconvincing even in respect of EU legality, and in respect of the climate related aspects of energy governance, the modernisation process is simply a wasted opportunity: if the ECT could become a 'complement' to the Paris Agreement, it will need much more than the facelift the Commission is currently proposing. In this bleak scenario, the only ray of light appears to come – unwittingly – from the Energy Charter Secretariat's Secretary-General, Urban Rusnák, who recently speculated that, if the modernisation process fails, the ECT might not survive.<sup>200</sup>

That might be the best reform option yet: if the ECT doesn't have a future, we just might.



## 5. Endnotes

- <sup>1</sup> Urban Rusnák, interviewed by K. Beckman. 'A new Energy Charter Treaty as a complement to the Paris Agreement on climate change', Borderlex, 18 June 2020. Available at: <https://borderlex.eu/2020/06/18/interview-a-new-energy-charter-treaty-as-a-complement-to-the-paris-agreement-on-climate-change/> [Accessed 20 June 2020]
- <sup>2</sup> Open letter on the Energy Charter Treaty (ECT), 9 December 2020. Available at: <https://energy-charter-dirty-secrets.org/open-letter/> [Accessed 20 June 2020]
- <sup>3</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 4.6
- <sup>4</sup> Energy Charter Secretariat, 'Energy Charter Treaty (1994)'. Available at: <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/> [Accessed 20 June 2020]
- <sup>5</sup> C. Kuzemko, M.F. Keating, and A. Goldthau, *The Global Energy Challenge: Environment, Development and Security* (New York: Palgrave, 2016), p. 85, cited in K. Tienhaara and C. Downie, 'Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes'. *Global Governance* 24 (2018), p.454
- <sup>6</sup> See generally P. Eberhardt, C. Olivet & L. Steinfort, *One Treaty To Rule Them All: The ever-expanding Energy Charter Treaty and the power it gives corporations to halt the energy transition* (CEO/TNI, June 2018)
- <sup>7</sup> For a good overview of these and other cases, see generally Eberhardt et al, *One Treaty*. Also: Energy Charter Secretariat, Updated statistics on investment arbitration cases under the Energy Charter Treaty, 5 June 2020. Available at: <https://www.energycharter.org/media/news/article/updated-statistics-on-investment-arbitration-cases-under-the-energy-charter-treaty/> [Accessed 20 June 2020]
- <sup>8</sup> *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* (ICSID Case No. ARB/09/6). Request for arbitration, 30 March 2009; *Vattenfall AB and others v. Federal Republic of Germany (II)* (ICSID Case No. ARB/12/12)
- <sup>9</sup> F. Lavopa, 'Crisis, Emergency Measures and the Failure of the ISDS System: The Case of Argentina', *South Centre Investment Policy Brief*, No. 2 (South Centre, July 2015). Available at: <https://www.southcentre.int/investment-policy-brief-2-july-2015/> [Accessed 15 June 2020]; N. Bernasconi-Osterwalder, S. Brewin, N. Maina, *Protecting Against Investor-State Claims Amidst COVID-19: A call to action for governments*. (International Institute for Sustainable Development, April 2020) p.4
- <sup>10</sup> Based on data included in Annex 1, 14 awards in favour of investors to date amount to compensation debts of €944.7million (not including the recently annulled *Eiser* Award). This figure does not include interest or costs, which additionally represent tens of millions of euros. Aggregate liability for pending claims amounts to €3.3billion. Not all cases are known and not all amounts claimed are known for reported cases. Saheb recently estimated the higher figure of €8.19billion 'for the 37 cases, for which information is publicly available' (Y. Saheb, *Modernisation of the Energy Charter Treaty: A Global Tragedy at a High Cost for Taxpayers (OpenExp, Jan. 2020)*). This would appear to include both settled and pending claims; in one of these (PV Investors) Investors were reported to have originally claimed a total €1.9billion, but were awarded significantly less: €91million. Earlier assessments of total liability put the figure closer to USD\$10billion (See L.E. Peterson, 'As another Spain award looms, four more previously-confidential renewables cases surface; potential liability for all pending claims now exceeds USD\$9.5 billion', *Investment Arbitration Reporter*, 7 Feb. 2018. Available: <https://www.iareporter.com/articles/as-another-spain-award-looms-four-more-previously-confidential-renewables-cases-surface-potential-liability-for-all-pending-claims-now-exceeds-9-5-billion/> [Accessed 15 June 2020. Subscription required])
- <sup>11</sup> P. Pinzler, 'Warum der Kohleausstieg so teuer ist'. *Die Zeit*, 3 July 2020 (German only). Available at: <https://www.zeit.de/wirtschaft/2020-07/kohleausstieg-energiewende-leag-rwe-entschaedigung-bundesregierung> [Accessed 3 July 2020]
- <sup>12</sup> Marie-Amélie Brun, 'Sued for acting on climate breakdown?'. European Environmental Bureau, 7 November 2019. Available at: <https://meta.eeb.org/2019/11/07/sued-for-acting-on-climate-breakdown/> [Accessed 20 June 2020]
- <sup>13</sup> Art. 47(3), The Energy Charter Treaty [1994] 2080 UNTS 95 ("ECT")
- <sup>14</sup> The challenge of the ECT's sunset clause is not discussed here in further detail, but perhaps merits closer attention. Recently, Y. Saheb proposed that the ECT's sunset clause may be easily overcome, if EU Member States simply agree inter se (between themselves) to terminate the ECT's sunset clause, thus effectively ending intra-EU cases immediately, absent any 20-year extension of obligations (Saheb, *Modernisation of the ECT*, p.42). This strategy adapts a recent innovation in respect of mutual termination of intra-EU BITs and their sunset clauses (e.g. Art. 3, Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union. SN/4656/2019/INIT, OJ L 169, 29.5.2020). Notably, even this termination of intra-EU BIT sunset clauses may face future ISDS challenges. For the *multilateral* ECT however, such challenges are reasonably certain, since ECT tribunals have consistently rejected any arguments based on inter se derogations. In this sense, Saheb's strategy for sunset clauses does not differ significantly from previous intra-EU jurisdictional objections raised by the Commission to date (discussed in Part 1). Even if the EU seriously adopted such a strategy, it might therefore lead to the same outcomes again: i.e. tribunals hearing intra-EU ECT cases will ignore it. In this event, the EU's only avenues for enforcement would be Member State's national courts and EU infringement proceedings. How effective these are in respect of 'blocking' intra-EU ISDS claims is currently being tested (as discussed in Part 2).
- <sup>15</sup> 80% including investors from EFTA countries. Saheb, *Modernisation of the ECT*, p. 5, 42

- <sup>16</sup> Omissions include proposed provisions on Third Party Funding, Transparency or Transfers, or rules permitting interventions by 'Third Parties'.
- <sup>17</sup> Case C-284/16 Slovak Republic v Achmea BV [2018] ECLI:EU:C:158 ("Achmea"); Opinion 1/17 EU-Canada CET Agreement [2019] ECLI:EU:C:2019:341 ("Opinion 1/17")
- <sup>18</sup> See S. Hindelang, 'The Price for a Seat at the ISDS Reform Table – CJEU's clearance of the EU's investment protection policy in Opinion 1/17 and its impact on the EU constitutional order', in A. Biondi and G. Sangiulio (eds), *Judicial Protection and EU Free Trade Agreements, LAWTTIP Book Series* (Edward Elgar Publishing, forthcoming 2020). Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3548204](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3548204) [Accessed 15 June 2020] p.17
- <sup>19</sup> The CJEU may address the question of the ECT under EU law in answering a request for a preliminary ruling referred by Paris Court of Appeal in September 2019 (Case C-741/19, concerning the ECT-based UNCITRAL tribunal, *Energolians SARL v. the Republic of Moldova*). Previously in 2019 the Svea Court of Appeal (Stockholm) refused to request a preliminary ruling from the CJEU 'to clarify whether Article 26 of the ECT is applicable between the member states of the European Union, and if that is the case, whether Article 26 of the ECT is compatible with the European Union's primary law'. (Case No. T 4658-18, Svea Court of Appeal, 25.4.2019)
- <sup>20</sup> C. Cross & V. Kube, *Is the arbitration clause of the Energy Charter Treaty compatible with EU law in its application between EU Member States?* (The Munich Environmental Institute, February 2018), p.11; also M. Happold & M. De Boeck, 'The European Union and The Energy Charter Treaty: What Next After Achmea?' in M. Andenas, M. Happold and L. Pantaleo (eds), *The European Union as an Actor in International Economic Law* (T.M.C. Asser Press: forthcoming). Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3261590](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3261590) [Accessed 20 June 2020] p.22; J. Kleinheisterkamp, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty'. *Journal of International Economic Law* 15(1) (2012) p.105–106.
- <sup>21</sup> Opinion 1/17, para. 117
- <sup>22</sup> Art. 216.2, Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C326/47 ("TFEU")
- <sup>23</sup> European Commission, EU text proposal for the modernisation of the Energy Charter Treaty (ECT). 27 May 2020. 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) [Accessed 10 Jun 2020] ("EU ECT-modernisation proposal")
- <sup>24</sup> Part V [ECT] Dispute Settlement, EU ECT-modernisation proposal, p.15
- <sup>25</sup> See generally, Love Rönnelid, *Research Report: An Evaluation of the Proposed Multilateral Investment Court System* (GUE/NGL, October 2018)
- <sup>26</sup> In Opinion 1/17, the CJEU emphasised the requirements of independence and impartiality for future members of ICS tribunals, included in CETA's provisions on terms of appointment (duration and expertise), remuneration, as well as arbitrator ethics, conduct and conflicts of interest. See paras. 223, 230-1, 238 and 242, referring to Arts. 8.27 through 8.31, CETA.
- <sup>27</sup> See discussion in Opinion 1/17 of the risk that CETA could undermine the efficacy of EU competition law. paras. 54-55. In the context of TTIP negotiations, the Commission also noted that *Micula*-like conflicts with EU State Aid law might be avoided by precluding claims arising from the discontinuation of subsidies. See European Commission Concept Paper 'Investment in TTIP and beyond – the path for reform' (5 May 2015). Available at: [https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) [Accessed 4 May 2020]
- <sup>28</sup> The ECT provides for a limited range of *public policy exceptions* to investment protection commitments, namely: measures 'necessary' for the protection of essential security interests, the respect of non-proliferation policies (Art. 24.3), or 'for the maintenance of public order'; or measures 'necessary' to protect human, animal or plant life or health (Art. 24.2(b)). However, neither set of exceptions may apply to the Contracting Parties' obligations to provide investors with full security and protection (Art. 12) or protection against expropriation (Art. 13). In contrast, under EU law, 'all fundamental freedoms of the internal market (i.e. also the free movement of goods, workers, and capital) are subject to such public policy exceptions': Jan Kleinheisterkamp, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty'. *Journal of International Economic Law* 15(1), 85–109 (2012), 91. See also J. Kokott & C. Sobotta, 'Investment Arbitration and EU Law', *Cambridge Yearbook of European Legal Studies*, 18 (2016)
- <sup>29</sup> The ECT's capital transfer provisions are largely equivalent to those provisions in several extra-EU BITs that were subject to infringement proceedings in 2009. The CJEU found three member states – Austria, Sweden and Finland – liable for failing to eliminate incompatibilities between the TFEU (Arts. 64(2), 66 and 75) and these BIT provisions. Cases C-205/06, Commission v Austria, ECLI:EU:C:2009:118; C-249/06, Commission v Sweden, ECLI:EU:C:2009:119; C- 118/07, Commission v Finland, ECLI:EU:C:2009:715. See discussion in T. Roe and M. Happold, 'Settlement of Investment Disputes under the Energy Charter Treaty', *Cambridge University Press*, 2011, p 89; T. Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 48 *Common Market Law Review* 383 at 411–12; G. Coop, 'Energy Charter Treaty and the European Union: Is Conflict Inevitable?', *Journal of Energy & Natural Resources Law*, 27:3, 404-419, (2009) p 418
- <sup>30</sup> N. Basener, *Investment Protection in the European Union: Considering EU law in investment arbitrations arising from intra-EU and extra-EU bilateral investment agreements* (Nomos Verlag, 2017) p.155
- <sup>31</sup> Council of the European Union, *Negotiating Directives for the Modernization of the Energy Charter Treaty*, Brussels, July 2, 2019, p.3, 4
- <sup>32</sup> Policy Options for Modernisation of the ECT, Decision of the Energy Charter Conference, Brussels, 6 October 2019. CCDEC 2019
- <sup>33</sup> Saheb, *Modernisation of the ECT*, p.42
- <sup>34</sup> International Trade Union Confederation, Summary of the proceedings and trade union advocacy to the 38th session of UNCITRAL's Working Group III on ISDS Reform, October 14-18, 2019, UN Headquarters, Vienna

- <sup>35</sup> J.R. Basedow, 'The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration'. *Journal of International Economic Law* 23 (2020) p.289
- <sup>36</sup> E.g. *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30. Decision on Jurisdiction, 6 June 2016, para. 85; *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44. Award, 21 January 2020, paras. 197-202
- <sup>37</sup> Art. 19, Consolidated Version of the Treaty on European Union [2012] OJ C 326/13; Arts. 251-281 and Art. 344 TFEU
- <sup>38</sup> Opinion 1/17, paras. 106-11
- <sup>39</sup> Art. 267, TFEU
- <sup>40</sup> *Achmea*, paras. 56-9
- <sup>41</sup> *Ibid.* paras. 40-2. Worth noting that the Achmea BIT (Art. 10(5), 10(7)) is considerably vaguer than the ECT as regards applicable law, according to the tribunal power to 'determine its own procedure' and to make a judgement 'on the basis of the [BIT] and other relevant Agreements between the two Contracting Parties, the general principles of international law, as well as such general rules of law as the tribunal deems applicable'.
- <sup>42</sup> Opinion 1/17, para. 107
- <sup>43</sup> Hindelang, 'The Price for a Seat', p.7
- <sup>44</sup> S. Gáspár-Szilágyi, 'Between fiction and reality: The external autonomy of EU law as a 'shapeshifter' after Opinion 1/17' (forthcoming, on file with author), p.5
- <sup>45</sup> Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, Available at: [https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties\\_en](https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en) [Accessed 15 June 2020]
- <sup>46</sup> *The PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14. Final Award, 28 February 2020, para. 547
- <sup>47</sup> Opinion 1/17, para. 118
- <sup>48</sup> See Hindelang, 'The Price for a Seat', fn. 34; Happold & De Boeck, 'EU and ECT', p.11-13
- <sup>49</sup> *Achmea*, para. 41
- <sup>50</sup> Art. 26.6, ECT
- <sup>51</sup> Art. 26.6, EU ECT-modernisation proposal, p.16
- <sup>52</sup> See Art. 8.31.1-2 CETA; Opinion 1/17, paras. 106, 118, 131
- <sup>53</sup> Gáspár-Szilágyi, 'Between fiction and reality', p.12; S. Gáspár-Szilágyi & M. Usynin, 'The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's Achmea Judgment', *European Investment Law and Arbitration Review* (Vol. 4, Dec. 2019); A. Van Den Berghe, 'The Commission's draft proposal for the modernisation of the Energy Charter Treaty: Legal briefing', ClientEarth, April 2020, fn. 9
- <sup>54</sup> Hindelang describes Eskosol and other tribunals as displaying 'outright hostility' to the application of EU law (see Hindelang, 'The Price for a Seat', p.10): *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50. Decision on Termination Request and Intra-EU Objection, 7 May 2019, paras. 115-130.
- <sup>55</sup> For example: *Maffezini v. Spain*, ICSID Case No. ARB/97/7; *Safa v. Greece*, ICSID Case No. ARB/16/20; *Flemingo DutyFree v. Poland*, UNCITRAL, Award of 12 August 2016; *Gazprom v. Lithuania*, PCA Case No. 2011-16 (2012). See discussion in L. Ankersmit & L. Hughes, *Implications of Achmea: How the Achmea Judgment Impacts Investment Agreements with Non-EU Countries* (ClientEarth/CIEL, April 2018), p.5
- <sup>56</sup> *RREEF v. Spain*, Decision on Jurisdiction, para. 73; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36. Award, 6 September 2019, paras. 330-331
- <sup>57</sup> Art. 27, Vienna Convention on the Law of Treaties, 1155 UNTS 331 ("VCLT")
- <sup>58</sup> *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, paras. 7.6.5 -7.6.6.
- <sup>59</sup> Art. 46, VCLT
- <sup>60</sup> Art 30, VCLT
- <sup>61</sup> *OperaFund v. Spain*, Award, para. 319
- <sup>62</sup> It is questionable if (and how) Art. 351 TFEU should apply to the ECT, or the ICSID Convention. The CJEU has ruled that Art. 351 TFEU does not preserve rights or obligations *between Member States* (Case 10/61 *Commission v Italy* ECLI:EU:C:1962:2). But the UK Supreme Court recently ruled that, while Art. 351 TFEU may only apply if there are obligations under the prior treaty owed to a non-member state, this 'does not impose an additional requirement that the *particular dispute before the court must relate to extra-EU activities or transactions*'. Moreover, 'the existence and extent of obligations under prior treaties, in the context of Art. 351 TFEU, are not reserved to the EU courts' and since the EU is not even a party to the ICSID Convention, the CJEU should defer to 'the domestic courts of the United Kingdom as a Contracting State' regarding the Convention's interpretation. See *Micula and others v Romania* [2020] UKSC 5, paras. 100, 112, 116.
- <sup>63</sup> Happold & De Boeck, 'EU and ECT', p.16; Cross & Kube, 'Arbitration clause of the ECT', p.31
- <sup>64</sup> *Electrabel v. Hungary*, Decision on Jurisdiction, para. 4.78, citing Hungary's submissions
- <sup>65</sup> In light of Art. 16 ECT, Art. 41 VCLT likely precludes any utility of the lex posterior rule in Art. 30 VCLT.
- <sup>66</sup> *Charanne B.V. and Construction Investments S.a.r.l. v. Kingdom of Spain*, SCC Case No. 062/2012. Final Award, 21 January 2016, para. 438; *RREEF v. Spain*, Decision on Jurisdiction, paras. 82-87; *RREEF v. Spain*, Award, 11 December 2019, para. 75; *OperaFund v. Spain*, Award, para. 327; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36. Award, 4 May 2017, para. 202; *Stadtwerke München GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, para. 145-6; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38. Award, 31 July 2019, paras. 164-5
- <sup>67</sup> *Electrabel v. Hungary*, Decision on Jurisdiction, para. 4.105, citing EC's submission

- <sup>68</sup> European Commission Decision of 10 November 2017 on State aid SA.40348 (2015/NN) – Spain: Support for electricity generation from renewable energy sources, cogeneration and waste. C(2017) 7384 final, para.161 (“EC Decision 2017 (Spain)”).
- <sup>69</sup> *OperaFund v. Spain*, Award, para. 317.
- <sup>70</sup> *Achmea*, para. 32 and CJEU case law cited by the Court
- <sup>71</sup> Opinion 1/17, para. 74, 132 & 140, referring to Art. 8.21, CETA. It is worth noting that the CJEU’s positive assessment overlooked a significant loophole in CETA: where the EU fails to make a determination of the proper respondent within 50 days, the investor has the right to determine the proper respondent according to whether the challenged measures are ‘exclusively’ those of a Member State, or if they also include ‘measures of the European Union’ (Art. 8.21.4-5, CETA). Given the importance accorded to the internal EU allocation of responsibilities, it is surprising that this provision was deemed acceptable. See Hindelang, ‘The Price for a Seat’, p.6
- <sup>72</sup> C. Kovács, *Attribution in International Investment Law* (Kluwer Law, 2018) § 9.03; Cross & Kube, ‘Arbitration clause of the ECT’, p.10
- <sup>73</sup> Statement submitted by the European Communities to the Secretariat of the Energy Charter, pursuant to Article 26(3)(b)(ii) ECT. 9 March 1998, OJ L 69/115: ‘In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days’. Also footnote 1: ‘This is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States.’
- <sup>74</sup> Art. 13.1, ECT
- <sup>75</sup> Opinion 1/17, paras. 157-158
- <sup>76</sup> Art. 10 (1), EU ECT-modernisation proposal, p. 5-6. These provisions are equivalent to those under Art. 8.10, CETA
- <sup>77</sup> Art. 8.10 (3), CETA
- <sup>78</sup> Annex X (Expropriation), EU ECT-modernisation proposal, p. 7; cf. Annex 8-A, CETA. The only modification of CETA’s Annex is that the ECT proposal omits any reference to interference with ‘distinct, reasonable investment-backed expectations’. In any case such expectations usually inform assessments of violations of the FET standard, rather than regulatory expropriation.
- <sup>79</sup> García Castrillon summarises the CJEU’s approach as follows: ‘The elements that should be balanced are the following: the legitimate expectations of interested parties must derive from concrete acts that objectively create such expectations and that provide specific, unconditional and coherent guarantees in accordance with the applicable law; economic operators cannot have legitimate expectations in the continuation of a situation that is subject to the discretionary exercise of power by public authorities, in particular in areas that require constant adaptation to economic circumstances or that respond to exceptional or transitory situations, as well as to the need to act in the general public interest; the unpredictability of the normative changes that led to the eventual frustration of the legitimate expectations of a prudent operator when taking into account the market or economic sector circumstances; and the normative changes must take into consideration the specific situations of those economic operators and provide adaptations that minimize, compensate or rebalance the frustrated legitimate expectations through substitute measures proportionate to the stated objectives’. C.O. García Castrillón, *Spain and Investment Arbitration: The Renewable Energy Explosion. Investor-State Arbitration Series Paper No. 17* (Centre for International Governance Innovation, November 2016) p.9
- <sup>80</sup> EC Decision 2017 (Spain), para. 164
- <sup>81</sup> C. Cross, *Investor protection in CETA: Gold standard or missed opportunity?* (International Centre for Trade Union Rights & Greenpeace, October 2016), p.7-9
- <sup>82</sup> This is also referred to by the European Commission as the ‘premium economic scheme’
- <sup>83</sup> For a concise discussion of these Awards, see N. Briercliffe and D. Ingle, ‘Dispute Resolution in the European Energy Sector’, in T. Soliman Hunter et al (eds.), *Routledge Handbook of Energy Law* (Routledge 2020).
- <sup>84</sup> García Castrillón adds that the claims have even resulted in a brain drain: a dozen Spanish state attorneys temporarily abandoned their administrative roles in order to work for the law firms representing investors. See *Spain and Investment Arbitration*, p.18
- <sup>85</sup> According to Eberhardt et al, as many as 88% of claims. *One Treaty*, p.45
- <sup>86</sup> K. Tienhaara and C. Downie, ‘Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes’. *Global Governance* 24 (2018), p.458-9
- <sup>87</sup> See Saheb, *Modernisation of the ECT*, p.14; P. Pérez-Salido, ‘Royal Decree-Law 17/2019: An Opportunity for Spain to Leave Behind the Renewable Energy Arbitrations?’ *Kluwer Arbitration Blog*, 30 December 2019. Available at: [http://arbitrationblog.kluwer-arbitration.com/2019/12/30/royal-decree-law-17-2019-an-opportunity-for-spain-to-leave-behind-the-renewable-energy-arbitrations/?doing\\_wp\\_cron=1592306511.2984879016876220703125](http://arbitrationblog.kluwer-arbitration.com/2019/12/30/royal-decree-law-17-2019-an-opportunity-for-spain-to-leave-behind-the-renewable-energy-arbitrations/?doing_wp_cron=1592306511.2984879016876220703125) [Accessed 15 June 2020]
- <sup>88</sup> P. Nacimiento, ‘The Energy Charter Treaty’, in B. Legum (ed.), *Investment Treaty Arbitration Review: Third Edition* (Law Business Research Ltd, 2018), p.331-2
- <sup>89</sup> N.B. *Charanne* claimants only challenged modifications to the Special Regime made in 2010. Subsequent cases have focused on the 2013-14 measures.
- <sup>90</sup> *Charanne v. Spain*, Final Award, para. 493
- <sup>91</sup> *OperaFund v. Spain*, Award, para. 513; *Foresight Luxembourg Solar 1 S.Á.R.L et al v. Kingdom of Spain*, SCC Case No. 2015/150. Award, 14 November 2018, para. 553; *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. 063/2015. Final Arbitral Award, 15 February 2018, paras. 553-4
- <sup>92</sup> *OperaFund v. Spain*, Award, para. 485; *9REN Holding S.a.r.l, v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, para. 257; *Watkins v. Spain*, Award, para. 527

- <sup>93</sup> The *Novenergia and Masdar* tribunals regarded the provision (Art. 17(c) RD 661/2007, requiring registration in the Registro Administrativo de Instalaciones de Producción en Régimen Especial or “RAIPRE”) as creating such a commitment. The NextEra tribunal expressly dismissed this interpretation. See *Novenergia II v. Spain*, Final Arbitral Award, paras. 665-667; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1. Award, 16 May 2018, paras. 512-521; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Award, 31 May 2019, para. 585
- <sup>94</sup> *Eiser v. Spain*, Award, para. 363; *Foresight v. Spain*, Award, para. 336; *Stadtwerke v. Spain*, Award, para. 198
- <sup>95</sup> *Eiser v. Spain*, Award, para. 363-5; *Novenergia II v. Spain*, Final Arbitral Award, para. 695; *REEF v. Spain*, Award, para. 337; *NextEra v. Spain*, Award, para. 599
- <sup>96</sup> *Stadtwerke v. Spain*, Award, para. 258-261
- <sup>97</sup> *Ibid.* and para. 364
- <sup>98</sup> Judgment of Section Three of the Spanish Supreme Court of 15 December 2005, Appeal No. 73/2004; Judgment of Section Three of the Supreme Court of 25 October 2006, Appeal No. 12/2005. See discussion in *PV Investors*, Final Award, paras. 605-606
- <sup>99</sup> *Charanne v. Spain*, Final Award, paras. 504, 514, 804
- <sup>100</sup> *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain*, SCC Case No. 2013/153. Award, 12 July 2016, para. 787
- <sup>101</sup> *PV Investors*, Final Award, para. 612, 616, 647. Also on the issue of due diligence: *Charanne v. Spain*, Final Award, para. 504; *Stadtwerke v. Spain*, Award, paras. 277-8
- <sup>102</sup> *Watkins v. Spain*, Award, para. 654. See particularly dissenting opinion of Prof. Dr. Hélène Ruiz Fabri, *Watkins v. Spain*, Dissent on liability and Quantum, 21 January 2020, paras. 11-12
- <sup>103</sup> Opinion 1/17, para. 150
- <sup>104</sup> This includes measures concerning ‘public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights’. See Opinion 1/17, paras. 160 & 154, referring to Arts. 8.9.1-2, CETA.
- <sup>105</sup> Principally, unnumbered articles on ‘Regulatory Measures’ and ‘Sustainable development – Right to regulate and levels of protection’, EU ECT-modernisation proposal, p.4, 10
- <sup>106</sup> Hindelang, ‘The Price for a Seat’, p.9
- <sup>107</sup> E.g. *Eiser v. Spain*, Award, paras. 362, 371; *Foresight v. Spain*, Award, para. 364; *9REN v. Spain*, Award, para. 253
- <sup>108</sup> Opinion 1/17, para. 144
- <sup>109</sup> One notable exception is *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015
- <sup>110</sup> Opinion 1/17, para. 149-150
- <sup>111</sup> Basedow, ‘The Achmea Judgment’, p.290
- <sup>112</sup> Namely, *Isolux and Charanne*. Both claims were unsuccessful, but were not precluded due to nationality shopping. See Eberhardt et al, *One Treaty*, p.45
- <sup>113</sup> R. Power, Clyde & Co, ‘Brexit, the Energy Charter Treaty and Achmea: A ray of light?’, *Energy Voice*, 02/01/2019. Available at: <https://www.energyvoice.com/opinion/189343/brexit-the-energy-charter-treaty-and-achmea-a-ray-of-light/> [Accessed 15 June 2020]; W. Wyss, ‘Achmea-Earthquake – Time to Consider a Swiss Solution’, *Lexology*. Available at: <https://www.lexology.com/library/detail.aspx?g=475fa99b-9c5c-4800-bc68-c854cd806525> [Accessed 15 June 2020, subscription required]
- <sup>114</sup> Power, ‘Brexit, ECT and Achmea’
- <sup>115</sup> Art. 1(7)(a)(ii) and accompanying Footnote 2, EU ECT-modernisation proposal, p.3
- <sup>116</sup> New Article: Frivolous claims [placement to be decided], EU ECT-modernisation proposal, p.16. cf Arts 8.32 and 8.33, CETA
- <sup>117</sup> Council of the European Union, Negotiating Directives for the Modernization of the Energy Charter Treaty, Brussels, July 2, 2019, p.4
- <sup>118</sup> T. Voon, A. Mitchell & J. Munro, ‘Legal Responses to Corporate Manoeuvring in International Investment Arbitration’. *Journal of International Dispute Settlement* 2014 5, p.67
- <sup>119</sup> Art. 17, EU ECT-modernisation proposal, p.9
- <sup>120</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 147-9
- <sup>121</sup> See discussion K. Hobér, ‘Overview of Energy Charter Treaty Cases’, in M. Scherer (ed.), *International Arbitration in the Energy Sector* (Oxford University Press, 2018) p.188-192
- <sup>122</sup> *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 543-555
- <sup>123</sup> Art 1(6), EU ECT-modernisation proposal, p.2
- <sup>124</sup> 26.4 [FN1], EU ECT-modernisation proposal, p.15
- <sup>125</sup> As cited in European Commission Decision (2015/1470) of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award *Micula v Romania* of 11 December 2013. C(2015) 2112 final, para. 25 (“EC Decision 2015 (Romania)”)
- <sup>126</sup> *Ibid.*, Art. 1
- <sup>127</sup> Arts. 107 & 108, TFEU; EC Decision 2015 (Romania), para. 104
- <sup>128</sup> Cases T-624/15, T-694/15 and T-704/15 *European Food SA and Others v European Commission* [2019] EU:T:2019:423, paras. 78-79, 86
- <sup>129</sup> *Ibid.* paras. 91, 108

- <sup>130</sup> Ibid, para. 103. Also C. Tietje and C. Wackernagel, 'Outlawing Compliance? - The Enforcement of intra-EU Investment Awards and EU State Aid Law'. No. 41 Policy Papers on Transnational Economic Law (2014), p.7; T. Kende, 'Arbitral Awards Classified as State Aid under European Union Law', *ELTE Law Journal* 2015 1, p.43
- <sup>131</sup> *European Food v. Commission*, para. 101: '[F]irst, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient and, fourth, it must distort or threaten to distort competition.'
- <sup>132</sup> EC Decision 2015 (Romania), para. 118
- <sup>133</sup> *Micula and others v Romania* [2020] UKSC 5, paras. 100, 112, 116
- <sup>134</sup> G. Croisant, 'Micula Case: The UK Supreme Court Rules That The EU Duty Of Sincere Co-operation Does Not Affect The UK's International Obligations Under The ICSID Convention', *Kluwer Arbitration Blog*, 20 February 2020. Available at: [http://arbitrationblog.kluwerarbitration.com/2020/02/20/micula-case-the-uk-supreme-court-rules-that-the-eu-duty-of-sincere-co-operation-does-not-affect-the-uks-international-obligations-under-the-icsid-convention/?doing\\_wp\\_cron=1592903569.9045419692993164062500](http://arbitrationblog.kluwerarbitration.com/2020/02/20/micula-case-the-uk-supreme-court-rules-that-the-eu-duty-of-sincere-co-operation-does-not-affect-the-uks-international-obligations-under-the-icsid-convention/?doing_wp_cron=1592903569.9045419692993164062500) [Accessed 20 June 2020]; A. Stanic, 'Enforcement of Intra-EU BIT and ECT Awards in the UK Post Micula', *Kluwer Arbitration Blog*, 25 April 2020. Available at: [http://arbitrationblog.kluwerarbitration.com/2020/04/25/enforcement-of-intra-eu-bit-and-ect-awards-in-the-uk-post-micula/?doing\\_wp\\_cron=1592903574.0474169254302978515625](http://arbitrationblog.kluwerarbitration.com/2020/04/25/enforcement-of-intra-eu-bit-and-ect-awards-in-the-uk-post-micula/?doing_wp_cron=1592903574.0474169254302978515625) [Accessed 20 June 2020]
- <sup>135</sup> The amount 'reflects the sum total of the Award net payments made by Romania, in addition to pre-judgment interest as of November 2, 2018, at the rate identified in the Award' see Case No. 17-cv-02332 (APM) *Micula v. Romania* (I), Memorandum Opinion of the United States District Court for the District of Columbia, 11 September 2019. 404 F. Supp. 3d 265 (D.D.C. 2019) para. 60; also Case No. 19-7127, Judgment of the United States Court of Appeals for the District of Columbia Circuit, 19 May 2020
- <sup>136</sup> [New article] Regulatory Measures, EU ECT-modernisation proposal, p.4-5
- <sup>137</sup> European Commission Decision of 10 November 2017 on State aid SA.40348 (2015/NN) – Spain: Support for electricity generation from renewable energy sources, cogeneration and waste. C(2017) 7384 final ("EC Decision 2017 (Spain)")
- <sup>138</sup> EC Decision 2017 (Spain), para. 156
- <sup>139</sup> Ibid. para. 83
- <sup>140</sup> D. Busse and S. Lange, 'European Law and Investment Treaties', in B. Legum (ed.), *Investment Treaty Arbitration Review: Third Edition* (Law Business Research Ltd, 2018) p.346.
- <sup>141</sup> F. Montanaro, "'Ain't No Sunshine": Photovoltaic Energy Policy in Europe at the Crossroads Between EU Law and Energy Charter Treaty Obligations', in *International Economic Law: Contemporary Issues*, edited by G. Adinolfi et al. Springer 2017, p 224.
- <sup>142</sup> *OperaFund v. Spain*, Award, para. 442; *PV Investors*, Final Award, para. 635.
- <sup>143</sup> *OperaFund v. Spain*, Award, para. 485; *9REN v. Spain*, Award, para. 257; *Watkins v. Spain*, Award, para. 527; *Novenergia II v. Spain*, Final Arbitral Award, paras. 665-667; *Masdar v. Spain*, Award, paras. 512-52
- <sup>144</sup> *PV Investors*, Final Award, para. 637
- <sup>145</sup> See Allen & Overy, 'Increased enforcement risk in intra-EU investment treaty arbitration'. Available at: <https://www.allenoverly.com/en-gb/global/news-and-insights/legal-and-regulatory-risks-for-the-finance-sector/europe/increased-enforcement-risk-in-intra-eu-investment-treaty-arbitration> [Accessed 20 June 2020]
- <sup>146</sup> *OperaFund v. Spain*, Award, para. 336
- <sup>147</sup> Opinion 1/17, para. 86
- <sup>148</sup> Ibid., para. 185
- <sup>149</sup> Ibid. paras. 86, 185-6, citing in particular Arts. 8.9, and 17.2, CETA
- <sup>150</sup> *Electrabel v. Hungary*, Decision on Jurisdiction, paras. 4.137-4.141
- <sup>151</sup> *Electrabel v. Hungary*, Decision on Jurisdiction, para. 5.16; *Eskosol v. Italy*, Decision on Termination Request, paras. 232-4
- <sup>152</sup> Allen & Overy, 'Increased enforcement risk in intra-EU investment treaty arbitration'. Available at: <https://www.allenoverly.com/en-gb/global/news-and-insights/legal-and-regulatory-risks-for-the-finance-sector/europe/increased-enforcement-risk-in-intra-eu-investment-treaty-arbitration> [Accessed 20 June 2020]
- <sup>153</sup> These include Argentina, Kazakhstan, Kyrgyzstan, Russia, Thailand and Zimbabwe. A 2008 study estimated that voluntary compliance with investment awards occurred in 90% of cases: L. Mistelis & C. Baltag, 'Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices', 19 *American Review of International Arbitration* (2008) p. 319, 324. See also O. Gerlich, 'State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?' 26/1 *American Review of International Arbitration* (2015), p.48; A. K. Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes' 21 *American Review of International Arbitration* (2010), p.213-4
- <sup>154</sup> Article 26 (4), ECT
- <sup>155</sup> Convention on the settlement of investment disputes between States and nationals of other States 1965, 575 UNTS 159 ("ICSID Convention"); Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959, 330 UNTS 3 ("New York Convention")
- <sup>156</sup> In *Achmea*, the Court noted that ISDS tribunals constituted under the Netherlands-Slovakia BIT would be free to determine their 'own procedure applying the UNCITRAL arbitration rules' and choose its seat of arbitration (Art 8(5) of the BIT), thereby determining both whether the arbitral award will even be subject to review by a court of an EU Member State and the standard of judicial review applicable under the State's domestic law (paras. 52-55).

- <sup>157</sup> As highlighted in Commission's submission to ECT tribunals, see: *OperaFund v. Spain*, Award, para. 377
- <sup>158</sup> Article 5(2)(a) & (b), New York Convention
- <sup>159</sup> However, '[t]he value of an EU Commission injunction or decision relating to State aid may be quite limited in those states which are third parties to the [TFEU].' T. Kende, 'Arbitral Awards', p.56
- <sup>160</sup> *Electrabel v. Hungary*, Decision on Jurisdiction, para. 4.199
- <sup>161</sup> Some scholars suggest that Member States might nevertheless review or refuse to enforce ICSID Awards. C.H. Schreuer et al, 'Article 54 – Enforcement', *The ICSID Convention* (Cambridge University Press, 2009), 1115-1150, para. 91; Hanno Wehland, 'The Enforcement of Intra-EU BIT Awards: Micula v Romania and Beyond' (2016) 17 *The Journal of World Investment & Trade* 942, 959, 961–962.
- <sup>162</sup> ICSID Art 52 and Article 53(1)
- <sup>163</sup> *Electrabel v. Hungary*, Decision on Jurisdiction, para. 5.19
- <sup>164</sup> Namely, Art. 9.16 of the EU-Singapore Free Trade Agreement. See Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, footnote 199
- <sup>165</sup> P. Pérez-Salido, 'Enforceability of Intra-EU Awards at the U.S. District Court for the District of Columbia: The Spanish Cases', *Kluwer Arbitration Blog*, 21 June 2020. Available at: [http://arbitrationblog.kluwerarbitration.com/2020/06/21/enforceability-of-intra-eu-awards-at-the-u-s-district-court-for-the-district-of-columbia-the-spanish-cases/?doing\\_wp\\_cron=1593514466.1786530017852783203125](http://arbitrationblog.kluwerarbitration.com/2020/06/21/enforceability-of-intra-eu-awards-at-the-u-s-district-court-for-the-district-of-columbia-the-spanish-cases/?doing_wp_cron=1593514466.1786530017852783203125) [Accessed 20 June 2020]
- <sup>166</sup> Bjorklund, 'Sovereign Immunity', p.213
- <sup>167</sup> Arts. 54(3) & 54, ICSID Convention
- <sup>168</sup> Bjorklund, 'Sovereign Immunity', p.211, 213, 228; C. Annacker, L. Achouk-Spivak, Z. Bouraoui, 'ICSID Awards' in E. Gaillard & G.E. Kaiser (eds.), *The Guide to Challenging and Enforcing Arbitration Awards* May (Law Business Research Ltd, 2019)
- <sup>169</sup> *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157
- <sup>170</sup> S. Perry, 'Spain solar awards enforced in Australia', *Global Arbitration Review*, 24 February 2020. Available at: <https://globalarbitrationreview.com/article/1214857/spain-solar-awards-enforced-in-australia> [Accessed 20 June 2020, subscription required]
- <sup>171</sup> F. Bannon and W. Stefanidis, 'Path cleared for ICSID Award enforcement by investors in Australia', *Clayton Utz*, 28 May 2020. Available at: <https://www.claytonutz.com/knowledge/2020/may/path-cleared-for-icsid-award-enforcement-by-investors-in-australia> [Accessed 20 June 2020]
- <sup>172</sup> Bjorklund, 'Sovereign Immunity', p.237-8; C. Annacker et al, 'ICSID Awards', p.146-7
- <sup>173</sup> The Tribunal declined to comment 'on the appropriateness of such potential developments as a matter of international law.' *Eskosol v. Italy*, Decision on Termination Request, paras. 232-3
- <sup>174</sup> European Commission, Recommendation for a Council decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty, 14 May 2019, p.1
- <sup>175</sup> I.e. on the 'Right to regulate and levels of protection', 'Multilateral environmental agreements and labour conventions', 'Climate change and clean energy transition', 'Responsible Business Practices', 'Transparency' and 'Impact Assessments'
- <sup>176</sup> New Article 28A: Settlement of disputes on trade and sustainable development provisions between Contracting Parties, EU ECT-modernisation proposal, p.20
- <sup>177</sup> See C. Cross, *Anchoring Climate & Environmental Protection in EU Trade Agreements* (Powershift, 2020), p.17-36
- <sup>178</sup> N. Bernasconi-Osterwalder & M.D. Brauch, 'Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition', TDM 1 (2019) Available at: <https://www.transnational-dispute-management.com/article.asp?key=2632> [Accessed 20 June 2020]
- <sup>179</sup> Van Den Berghe, 'Commission's draft proposal', p.4
- <sup>180</sup> A.V. Belyi, 'New Challenges to the Liberal World Order: Reassessing Controversies Surrounding the Energy Charter Treaty', International Centre for Defence & Security, 1 July 2020. Available at: <https://icds.ee/new-challenges-to-the-liberal-world-order-reassessing-controversies-surrounding-the-energy-charter-treaty/> [Accessed 2 July 2020]
- <sup>181</sup> A New World: The Geopolitics of the Energy Transformation (Global Commission on the Geopolitics of Energy Transformation/ International Renewable Energy Agency IRENA, 2019) p.6, 36. Available at: <http://www.geopoliticsofrenewables.org> [Accessed 20 June 2020]
- <sup>182</sup> New Article Sustainable development – Multilateral environmental agreements and labour conventions, 2(a), 3, EU ECT-modernisation proposal, p.10-11
- <sup>183</sup> New Article Sustainable development – Climate change and clean energy transition, subparas. (a) and (b), EU ECT-modernisation proposal, p.11
- <sup>184</sup> E.g. Japan. See NDCs assessments at Climate Action Tracker: <https://climateactiontracker.org/countries/japan/> [Accessed 1 July 2020]
- <sup>185</sup> Van Den Berghe, 'Commission's draft proposal', p.6. For similar proposals in FTA context, see J. Lawrence & L. Ankersmit, *Making EU FTAs 'Paris Safe': Three studies with concrete proposals* (The Greens/EFA, Amsterdam Centre for European Law and Governance, Central European University; 8 March 2019) p.7; Cross, *Anchoring Climate Protection*, p.19
- <sup>186</sup> In 2012, it was proposed during the ECT modernisation process to develop a mechanism for giving tribunals 'interpretative guidance' on adjudicating climate change related ISDS claims is needed, in light of their wide margin of discretion in interpreting the treaty and determining violations. After an eight-year boom in ECT-based litigation, the time for mere 'guidance' has long passed. See P. Cameron, *The Energy Charter Treaty Provisions On Low Carbon Investment, Final Report*, 12 April 2013. Available at: <https://www.energycharter.org/what-we-do/investment/investment-thematic-reports/low-carbon-investment-2013/> [Accessed 20 June 2020], p.23

- <sup>187</sup> WTO Secretariat and UN Environment, *Making Trade Work for the Environment, Prosperity and Resilience* (WTO/ UNE, 2018), p.25
- <sup>188</sup> *Measuring Fossil Fuel Subsidies in the Context of the Sustainable Development Goals*, United Nations Environment Programme (UN Environment/International Institute for Sustainable Development) (2019).
- <sup>189</sup> Cameron, *The Energy Charter Treaty*, p.17, 77
- <sup>190</sup> See discussion in Cross, *Anchoring Climate Protection*, p.29-30
- <sup>191</sup> Greenpeace International, 'Commission on Human Rights declares fossil fuel companies can be held responsible for climate-related human rights harms'. 10 December 2019. Available at: <https://www.greenpeace.org/international/press-release/27881/commission-on-human-rights-declares-fossil-fuel-companies-can-be-held-responsible-for-climate-related-human-rights-harms/> [Accessed 20 June 2020]
- <sup>192</sup> *Communication from the Commission: A renewed EU strategy 2011-14 for Corporate Social Responsibility* (COM/2011/0681 final)
- <sup>193</sup> Guiding Principle 9 states: 'States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.' The UNGP's commentary clarifies that Principle 9 also applies to free trade agreements. OHCHR, *Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, p. 11
- <sup>194</sup> For two quite comprehensive examples, see: UNCTAD, *Investment Policy Framework for Sustainable Development* (2015), Section 7, Investor Obligations and Responsibilities, p.109-111; SADC, *Model Bilateral Investment Treaty Template with Commentary* (2012), Part 3: Rights and Obligations of Investors and State Parties, p.31-41
- <sup>195</sup> E.g. France, the UK, the Netherlands, Italy, Denmark, Finland, Lithuania, Sweden. See Sandra Cossart, 'What lessons does France's Duty of Vigilance law have for other national initiatives?' *Business & Human Rights Resource Centre*, 27 June 19 Available: <https://www.business-humanrights.org/en/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives> [Accessed 20 June 2020]; also Cross, *Anchoring Climate Protection*, p.36-39
- <sup>196</sup> A. Signorelli, 'Ensuring human rights underpin the global energy transition', *International Union Rights: Climate Change issue 26/4* (International Centre for Trade Union Rights, 2019)
- <sup>197</sup> Although not directed at the ECT claims, the Commission in EC Decision 2017 (Spain) expressly refers to State aid in these terms: EC Decision 2017 (Spain), para. 120, 156
- <sup>198</sup> *Saheb, Modernisation of the ECT*, p.39
- <sup>199</sup> For example: Case C-438/05 International Transport Workers Federation v Viking Line ABP (2007) ECLI:EU:C:2007:772; Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet (2007) ECLI:EU:C:2007:809; Case T-330/18 Carvalho and Others v Parliament and Council, Order of the General Court (Second Chamber) of 8 May 2019. ECLI:EU:T:2019:324 (pending appeal before the Court of Justice). See also A. Berthier, 'The General Court of the EU rejects the people climate case as inadmissible', ClientEarth, 3 June 2019. Available at: <https://www.clientearth.org/the-general-court-rejects-the-people-climate-case-as-inadmissible/> [Accessed 20 June 2020]; 'Der einzige Weg ist, dem EuGH nicht zu folgen' (Interview with Fritz Scharpf, German only), Hans Boeckler Stiftung, 2008. Available at: <https://www.boeckler.de/de/magazin-mitbestimmung-2744-aposder-einzig-weg-ist-dem-eugh-nicht-zu-folgenapos-11173.htm> [Accessed 20 June 2020]
- <sup>200</sup> Interviewed by K. Beckman, Borderlex, 18 June 2020.

# Annex 1 – ECT cases against Spain<sup>1</sup>

	DECISION (in favour of)	CLAIMANT/CASE No.
1	State	<i>Stadtwerke München GmbH and others ICSID Case No. ARB/15/1</i>
2	State	<i>Isolux Infrastructure Netherlands B.V. SCC Case No. 2013/153</i>
3	State	<i>Charanne B.V. and Construction Investments S.a.r.l. SCC Case No. 062/2012</i>
4	Investor	<i>9REN Holding S.a.r.l. ICSID Case No. ARB/15/15</i>
5	Investor	<i>Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. ICSID Case No. ARB/13/31</i>
6	Investor	<i>Cube Infrastructure Fund SICAV and others ICSID Case No. ARB/15/20</i>
7	Investor	<i>Foresight Luxembourg Solar 1 S.Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A SCC Case No. 2015/150</i>
8	Investor	<i>InfraRed Environmental Infrastructure GP Limited and others ICSID Case No. ARB/14/12</i>
9	Investor	<i>Masdar Solar &amp; Wind Cooperatief U.A. ICSID Case No. ARB/14/1</i>
10	Investor	<i>NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. ICSID Case No. ARB/14/11</i>
11	Investor	<i>Novenergia II - Energy &amp; Environment (SCA), SICAR. SCC Case No. 063/2015</i>
12	Investor	<i>OperaFund Eco-Invest SICAV PLC and Schwab Holding AG ICSID Case No. ARB/15/36</i>
13	Investor	<i>The PV Investors PCA Case No. 2012-14</i>
14	Investor	<i>RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. ICSID Case No. ARB/13/30</i>
15	Investor	<i>SOLes Badajoz GmbH ICSID Case No. ARB/15/38</i>
16	Investor	<i>Watkins Holdings S.à r.l. and others ICSID Case No. ARB/15/44</i>
17	Annulled (May 20)	<i>Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. ICSID Case No. ARB/13/36</i>
18	Pending	<i>Alten Renewable Energy Developments BV SCC Case No. 2015/036</i>
19	Pending	<i>BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH ICSID Case No. ARB/15/16</i>
20	Pending	<i>Aharon Naftali Biram, Gilatz Spain SL, Redmill Holdings Ltd and Sun-Flower Olmeda GmbH ICSID Case No. ARB/16/17</i>

<sup>1</sup> Data based on UNCTAD's Investment Dispute Settlement Navigator: [investmentpolicy.unctad.org](http://investmentpolicy.unctad.org) [accessed 15 June 2020] and author's additional research. Since not all ISDS claims are made public, there are likely to be additional cases against Spain not yet reported.

<sup>2</sup> Figures represent only damages awarded for breaches of ECT. These do not include interest or costs.

FORUM	'HOME' STATE of claimants	DAMAGES <sup>2</sup> (million EUR)
ICSID	Germany	423 (claimed)
SCC	Netherlands	68.9 (claimed)
SCC	Luxembourg, Netherlands	17.8 (claimed)
ICSID	Luxembourg	40
ICSID	Luxembourg, Netherlands	101
ICSID	Luxembourg, France	33.7
SCC	Luxembourg, Denmark, Italy	39
ICSID	UK	28.2
ICSID	Netherlands	64.5
ICSID	Netherlands	290.6
SCC	Luxembourg	53.3
ICSID	Malta, Switzerland	29.3 mln USD
PCA	Denmark, Germany, Ireland, UK, Luxembourg, Netherlands	91.1 (520 claimed)
ICSID	Luxembourg, UK	59.6
ICSID	Germany	40.5
ICSID	Luxembourg, Netherlands	77
ICSID	Luxembourg, UK	128
SCC	Netherlands	59.4
ICSID	Germany	67.4
ICSID	Germany, UK	69

	DECISION (in favour of)	CLAIMANT/CASE No.
21	Pending	<i>Canepa Green Energy Opportunities I, S.à r.l. and Canepa Green Energy Opportunities II, S.à r.l. ICSID Case No. ARB/19/4</i>
22	Pending	<i>Cavalum SGPS, S.A. ICSID Case No. ARB/15/34</i>
23	Pending	<i>Cordoba Beheer B.V., Cross Retail S.L., Sevilla Beheer B.V., Spanish project companies ICSID Case No. ARB/16/27</i>
24	Pending	<i>CSP Equity Investment Sarl SCC Case No. 094/2013</i>
25	Pending	<i>DCM Energy GmbH &amp; Co. Solar 1 KG, DCM Energy GmbH &amp; Co. Solar 2 KG, Edisun Power Europe A.G., Hannover Leasing Sun Invest 2 Spanien Beteiligungs GmbH, and Hannover Leasing Sun Invest 2 Spanien GmbH &amp; Co. KG ICSID Case No. ARB/17/41</i>
26	Pending	<i>E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH ICSID Case No. ARB/15/35</i>
27	Pending	<i>EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L. ICSID Case No. ARB/18/42</i>
28	Pending	<i>EDF Energies Nouvelles S.A.</i>
29	Pending	<i>European Solar Farms A/S ICSID Case No. ARB/18/45</i>
30	Pending	<i>Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. ICSID Case No. ARB/16/4</i>
31	Pending	<i>FREIF Eurowind SCC Case No. 2017/060</i>
32	Pending	<i>Green Power K/S and Obton A/S SCC Case No. 2016/135</i>
33	Pending	<i>Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB ICSID Case No. ARB/15/42</i>
34	Pending	<i>Infracapital F1 S.à r.l. and Infracapital Solar B.V. ICSID Case No. ARB/16/18</i>
35	Pending	<i>Itochu Corporation ICSID Case No. ARB/18/25</i>
36	Pending	<i>JGC Corporation ICSID Case No. ARB/15/27</i>
37	Pending	<i>Frank Schumm, Joachim Kruck, Jürgen Reiss and others ICSID Case No. ARB/15/23</i>
38	Pending	<i>KS Invest GmbH and TLS Invest GmbH ICSID Case No. ARB/15/25</i>
39	Pending	<i>Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale ICSID Case No. ARB/15/45</i>
40	Pending	<i>Portigon AG ICSID Case No. ARB/17/15</i>
41	Pending	<i>REENERGY S.à r.l. ICSID Case No. ARB/14/18</i>
42	Pending	<i>RWE Innogy GmbH and RWE Innogy Aersa S.A.U. ICSID Case No. ARB/14/34</i>
43	Pending	<i>Saptec, S.A. ICSID Case No. ARB/19/23</i>
44	Pending	<i>STEAG GmbH ICSID Case No. ARB/15/4</i>
45	Pending	<i>Triodos SICAV II SCC Case No. 2017-194</i>
46	Pending	<i>M Solar GmbH &amp; Co. KG, M Solar Verwaltungs GmbH, Solarizz Holding GmbH &amp; Co. KG and others ICSID Case No. ARB/19/30</i>
47	Discont.	<i>Solarpark Management GmbH &amp; Co. Atum I KG SCC Case No. 2015/163</i>

FORUM	'HOME' STATE of claimants	DAMAGES (million EUR)
ICSID	Luxembourg	-
ICSID	Portugal	60
ICSID	Netherlands	20.5
SCC	Luxembourg	840
ICSID	Germany, Switzerland	-
ICSID	Germany	324.7
ICSID	Switzerland	-
UNCITRAL	France	52.8
ICSID	Denmark	-
ICSID	Japan, Netherlands	263
SCC	UK	53
SCC	Denmark	76.1
ICSID	Luxembourg, Sweden	133.1
ICSID	Luxembourg, Netherlands	-
ICSID	Japan	-
ICSID	Japan	93.5
ICSID	Germany	67.4
ICSID	Germany	80
ICSID	Germany	482.5
ICSID	Germany	-
ICSID	Luxembourg	206
ICSID	Germany	273
ICSID	Belgium	-
ICSID	Germany	96.6
SCC	Luxembourg	-
ICSID	Germany	-
SCC	Germany	6.1

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