

International Investment Law and Climate Change

RE-GLOBE Seminar

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Introduction

- Recognition of climate change as the most urgent contemporary global sustainable issue (economic, social and political issue).
- Traditional dichotomy between economic rights and non-economic values (e.g., environment, health, labour standards).
- Regulatory chill about climate change action by States (Schill) ?
- Scepticism about the potential of the international investment regime to promote climate change action (Baetens, Aerni et al.) or acknowledgment of the “invisibility” of the climate question (e.g., renewable energy arbitrations, Grosbon).

Cross-references

- Energy: transition from the exploitation of fossil fuels to “clean” energy (e.g., renewable energies).
- Environment: the references in IIAs to the environmental protection and concerns, although without expressly mentioning climate change, are nevertheless capable of being interpreted extensively as encompassing climate change action based on the application of general principles of treaty interpretation such as good faith and effectiveness (Vadi, 2015; Ben Hamida, 2021).

The Multilateral Framework

- United Nations Framework Convention on Climate Change (UNFCCC) (9 May 1992).
- 2015 Sustainable Development Goal (SDG) No. 13: «Take urgent action to combat climate change and its impacts».
- Paris Agreement (12 December 2015).
- Article 2: mitigation (temperature goal: to hold global warming «well below» 2°C - 1.5°C above pre-industrial levels), adaptation and finance.
- «Ambition cycle»: the combination of the expectation of progression (Article 3), the global stocktake (Article 14, from 2025) and the binding obligation of each Party to present an NDC every five years (Article 4).

Enforcement of the Paris Agreement Goals

- Key question: may international investment law (IIL) and investor-state dispute settlement (ISDS) be used (also) to implement States' obligations under the Paris Agreement and/or to contribute to realize its ambitions?
- Enforcement/compliance gaps in the international climate change regime (ICCR).
- Effective enforcement regimes available in the context of ISDS (ICSID Convention 1965; New York Convention 1958).
- Dispute settlement arena: third-party adjudication, public exposure by States and investors, transparency of proceedings.

Recent Treaty Practice

- Treaty practice is firmly oriented to the objective of sustainable development.
- Express references to climate change in the preambular language and operative provisions.
- Direct references to the Paris Agreement (EU-China Comprehensive Agreement on Investment – CAI, 2020).
- General exceptions with regard to State environmental measures (no carve-out).
- Carve-out of the investment in fossil fuels (ECT modernization). Specific carve-outs: e.g., indirect expropriation.
- Codification of investor's commitments relating to the environmental protection (express reference in the treaty or CSR obligations).
- The reference to environmental protection and concerns may encompass climate change action.

Green Investment

- The imperatives of climate change action are widely shared in the business community.
- Role of private institutions (chambers of commerce, arbitral bodies, lawyers associations).
- Self-regulation in the private sector (CSR).
- Clear connection with the climate finance.
- Investor «due diligence» (European Commission proposal for a Directive on Corporate Sustainability Due Diligence, 23 February 2022).
- Climate change within the «business and human rights» movement.

Green Investment (2)

- Legal applications in investor-state dispute settlement:
 - Green component in the definition of «investment» *ratione materiae* (jurisdiction).
 - Green component in the notion of «legality» of the investment (especially if investment has to be made in accordance with the laws of the host State) (admissibility).
 - Counterclaims by States against investors for violation of obligations and commitments relating to climate change (merits): *factual* connectedness with the investor's claim.

State Actions (and Omissions)

- Failure to implement NDCs can be scrutinized under IIAs.
- Breach of fair and equitable treatment.
- Legitimate expectations may be breached in case of specific «promises» by the host State at the time of the investment.
- Precedent relating to international environmental law: *Allard v. Barbados* (2016) (UN Convention on Biological Diversity, Convention on Wetlands of International Importance).
- State action in furtherance of the Paris Agreement goals should not violate non-discrimination obligations (most-favoured-nation and national treatment) and the prohibition of unlawful expropriation, including indirect, unless it is arbitrary, unreasonable and not even-handed.

EU Climate Change Action

- European Green Deal (2019). Synergy with the NextGenerationEU.
- European Climate Law (Regulation (EU) 2021/1119).
- Objective to become climate neutral by 2050 (no net emissions of greenhouse gases – GHG by 2050).
- EU binding target to reduce net GHG emissions by at least 55% by 2030, compared to 1990 levels.
- Commitment to negative emissions after 2050.
- E.g.: detailed proposal for heavy-duty vehicles – HDVs (14 February 2023) by the EC of 2030 zero-emissions target for new city buses and 90% emissions reductions for new trucks by 2040.
- Activism by the private sector in the EU: transition to climate neutrality is «irreversible».

EU Nationally Determined Contribution

- Nationally Determined Contribution (NDC) (Paris Agreement, Article 4).
- Obligation of conduct: the State is not bound to actually achieve its self-imposed targets, whereas it must pursue its best efforts to this goal within a bottom-up regime (ambition cycle).
- EU and Member States' NDC (December 2020): more specific commitments to achieve net domestic reduction of at least 55% in greenhouse gas emissions by 2030 compared to 1990:
 - the EU committed to reduce its emissions from the sectors covered by the Emissions Trading System (ETS) legislation by 43%.
 - Member States also engaged in lowering their emissions from the sectors outside the ETS from 2005 levels by 2030 (for instance, France by 37%, Germany by 38%, and Italy by 33%).

EU International Investment Policy

- European Parliament's resolution (23 June 2022) on the future of EU international investment policy:
 - 1) the immediate prohibition of fossil fuel investors from suing Contracting Parties for pursuing policies to phase out fossil fuels, in line with their international commitments;
 - 2) the significant shortening of the time frame for phasing out the protection of existing investments in fossil fuels;
 - 3) the reform of the ISDS mechanism.
- Key connection(s) with climate change action.
- (The ECT modernization AIP was disclosed on the following day).

Applicable Law(s)

- Applicability of the Paris Agreement to state measures.
- Legal avenues:
 - Article 31(3)(c) VCLT: systemic integration.
 - Through the medium of domestic laws(s) implementing the Paris Agreement (Article 42 ICSID Convention, Article 35 UNCITRAL Rules).
 - Through the medium of contractual commitments (especially if the treaty contains an umbrella clause).
 - «Transnational public policy».

Climate Change in the ECT

- The Preamble of the treaty recalls the UNFCCC.
- Article 19(3)(b) specifically refers to “climate” in its definition of “environmental impact”.
- Renewable energy investment arbitrations: «invisibility» of the climate question (Grosbon, 2019).
- However, in the context of the arbitrations against Spain, Italy, Czech Republic, etc., the invisibility of the climate question may be explained by the circumstances that “green” claimants directly relied on the protection of their economic rights pursuant to IIAs, without requiring the application of climate change law(s), while respondent States invoked national budgetary constraints as basis for the withdrawal or modification of incentivizing support schemes, such as feed-in-tariffs (FITs).

Climate Change in other EU Agreements

- Agreement in Principle (2020) of the EU-China Comprehensive Agreement on Investment (CAI).
 - Section IV, Sub-Section 2, Article 6 (“Investment and Climate Change”): each Contracting Party shall «effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions».
- EU–Canada Comprehensive Economic and Trade Agreement (CETA) (2016), Article 8.9(1): right to regulate (reference to «environment», not specifically to climate change action, but see caveat above).

ECT Agreement in Principle

- ECT Secretariat Public Communication (24 June 2022)
- Large reflection of the EU proposals.
- Alignment with the international commitments under the Paris Agreement: new standalone provision («each Contracting Party reaffirms its commitments to... effectively implement its commitments and obligations under the UNFCCC and the Paris Agreement»).
- Voluntary option (EU, UK) to phase-out the protection of *new* fossil fuel (“brown”) investments. For *existing* investments: after 10 years from entry into force of the new ECT.
- Sovereign right to regulate in the interest of legitimate public policy objectives (with a tendency to enhance wider leeway for regulatory space by State Parties). Express reference to «climate change mitigation and adaptation».

ECT Agreement in Principle (2)

- Fair and equitable treatment (FET): exhaustive (closed) list of measures that may give rise to the violation of the standard.
- Indirect expropriation: as a general rule, non-discriminatory measures that are adopted to protect legitimate policy objectives, such as public health, safety and the environment (including with respect to climate change mitigation and adaptation), do not constitute indirect expropriation.
- Sustainable development (new formulation of Article 19) and corporate social responsibility.
- State-to-State dispute settlement mechanism on sustainable development provisions (new Article 28-*bis*).
- No ISDS for claims that are internal within Regional Economic Integration Organisations (REIOs), such as the EU.

Fossil Fuels: In or Out?

- The carve-out relating to “brown” investors and investments is optional.
- Where the carve-out would apply, the outstanding protections for climate-friendly (“green”) investments may paradoxically result to be diminished under the modernised version of the ECT, especially with regard to FET.
- The Agreement in Principle «limits FET protection for clean energy investors in the same manner as for fossil fuel-based investors and thus diminishes the level of investment protection for renewable investments» (Tropper & Wagner, 2022).

A Tide of Exits...

- In 2022, declaration of the intention of withdrawal by France, Poland, Spain, the Netherlands, Slovenia, Germany and Luxembourg (Italy exited already in 2016).
- European Commission's statement (7 February 2023) and European Parliament Resolution (22 November 2022): call for a coordinated withdrawal by the EU, Euratom and Member States from the ECT, (also) because there is no qualified majority in the Council to adopt the modernised Treaty.
- ECT Secretariat's letter to the European Parliament (13 February 2022) urging not to block the ECT modernization process.
- Critical issue: 20 years sunset clause (ECT Article 47(3)).

ECT Modernization & Climate Change

- ECT and Paris Agreement: alignment of objectives, but not of (operative) agendas.
- At present, the ECT modernized text falls shorter than the EU expectations of substantial change required to shift the ECT towards a “climate-friendly” investment treaty.
- Therefore, the prospects of EU-driven climate change action through the ECT seem to be downsized in comparison to the EU original political support.
- Possible reluctance of EU Member States to be subject to the jurisdiction of ECT tribunals for the enactment of “green” measures. Possible failure of EU and Member States to comply with their NDC may sanctioned under the ECT.
- The exclusion of ISDS is limited to «intra-EU» disputes: «side-effect» (or not?) of countering EU «brown» investors’ claims against Member States (e.g., *Uniper v. The Netherlands*). What about «extra-EU» arbitrations?

Concluding Remarks

- Critical issues:
 - Requirements of adjudicators (expertise in international climate change law needed): discussion on the reform of ISDS / proposals of investment court systems.
 - Basic rethinking of the function of international investment law (from the “right to development” to the overarching goal of “sustainable development”)
 - Self-restraint by (some) tribunals to apply international rules outside the applicable economic treaty (the problem of “external norms”, Kurtz).
- *Lex mercatoria / lex climatica.*
- Convincing case for the climatization of international investment law.
- Transformative scenario will broaden and deepen IIL (internalization of non-economic values).
- Contribution of IIL to cure the compliance/enforcement gaps in the ICCR: IIL and ISDS as “teeth” of the Paris Agreement with regard to its goals and ambitions.