New Institutional Architectures and Substantive Rules in International Economic Law

The EU and the UN Sustainable Development Goals

Edited by Elisa Baroncini, Carlo de Stefano, Luca Rubini

with the collaboration of Klarissa Martins Sckayer Abicalam

RE-GLOBE

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With the collaboration of the Interest Group of the Italian Society of International Law (SIDI) on international economic law (DIEcon).

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INTRODUCTION

Particularly since the late 1980s, International Economic Law (IEL) has been characterized by the growing pressure to be interpreted and applied, as well as redesigned and updated, as a major driver of sustainability, promoting equitable liberalization and protection of international trade and foreign investments. Within the perspective of a very ambitious UN 2030 Agenda, new international substantive and institutional rules have been discussed, and sometimes agreed on, to shape trade and investment agreements, and unilateral measures have been adopted to pursue sustainability targets when common understandings were not possible to achieve. Within this already very demanding context, first economic clashes started to arise -and explode- in particular between the United States and China; and, subsequently, the inability to find diplomatic solutions to overcome geopolitical tensions has resulted in highly thorny conflicts, putting further strain on global economic governance.

In such a difficult context, the Re-Globe Jean Monnet Module and the Interest Group on International Economic Law (DIEcon) of the Italian Society of International and EU Law (SIDI) joined forces to analyse this new complex reality and systematize the proposals seeking stability and fairness, guaranteeing core labour and environmental standards, and keeping global warming under control.

The present open-access book, therefore, gathers together -with the very important editing support of Klarissa Martins Sckayer Abicalam, to whom we express our gratitude- the essays produced in some of the 2023 - 2024 DIEcon and Re-Globe events, considering the IEL developments in practice and scholarship, with constant attention to the EU. In fact, the EU is a major actor in pursuing sustainability, and economic security, in its trade policy and the IEL reform processes -an approach at the centre of the Re-Globe activities, which has been highly enriched by the relevant comparative perspectives of the DIEcon experts.

We hope that readers may appreciate our publication, and that further research may be attracted through it.

Elisa Baroncini, Carlo de Stefano, Luca Rubini

Bologna - Roma - Milano, February 2025

The Evolution of Sustainable Development from *Brundtland* Report to the UN Agenda 2030

NICO LONGO*

The concept of Sustainable Development (S.D.) was defined for the first time in the report *Our Common Future* of the UN World Commission on Environment and Development in 1987 (so-called ***Brundtland Report***) as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*"[1]. It affirms that any economic activity aiming at satisfying the needs of the current generation should not sacrifice the needs of the future ones, in an intergenerational perspective of solidarity. The concept seeks to reconcile the economic development with the protection of the environment, now and for generations to come, according to a long-term strategy.[2]

The building blocks of this definition echoed the 1972 ***Stockholm Declaration*** on the Human Environment, which stated the responsibility to protect and improve the environment for present and future generations (principle n. 1), an integrated approach to development planning (n. 13) for reconciling conflicts between the needs of development and the need to protect the environment (n. 14).[3] In adopting the *Brundtland Report*, the UN General Assembly expresses its view that S.D. "*should become a central guiding principle of the United Nations, Governments and private institutions, organizations and enterprises*".[4]

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* The views and opinions expressed by the Author are personal and are not attributable to the Italian Ministry of Foreign Affairs and International Cooperation.

[1] *Report of the World Commission on Environment and Development*: *Our Common Future,* UN doc. A/42/427, 4 August 1987. The Report was named after the Prime Minister of Norway, Gro Harlem Brundtland, who chaired the Commission.

[2] VIÑUALES, *Sustainable Development*, in RAJAMANI L., PEEL J. (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press (OUP), 2nd ed., 2021; BEYERLIN, *Sustainable Development*, in *Max Planck Encyclopedia of Public International Law*, OUP, 2015; ATKINSON, DIETZ, NEUMAYER, AGARWALA, *Handbook of Sustainable Development*, Edward Elgar Publishing Ltd., 2nd ed., Cheltenham, 2014; FRENCH, *Sustainable Development*, in FITZMAURICE M., ONG D.M., MERKOURIS P. (eds.), *Research Handbook on International Environmental Law*, Edward Elgar Publishing Ltd., 2010, pp. 551-568; SCHRIJVER, WEISS, *International law and sustainable development: principles and practice*. Martinus Nijhoff, Leiden-Boston, 2004.

[3] *Report of the United Nations Conference on the Human Environment* (Stockholm, 5-16 June 1972), A/CONF.48/14/Rev.1, UN publication, Sales No. E.73.II.A.14.

[4] *Report of the World Commission on Environment and Development.* Resolution adopted by the UN General Assembly (UNGA), n. A/RES/42/187, 11 December 1987.

In the subsequent years, UN Member States filled this conceptual definition with more specific and elaborated contents. In 1992, the UN Conference on Environment and Development (***UNCED***, so-called *Rio Earth Summit*) provided a more detailed understanding of the concept, giving it structuring reference[5] through the two outcome documents of the Summit: the '*Rio Declaration on Environment and Development*', a set of 27 principles on S.D., and the '*Agenda 21*', a voluntary action plan for their implementation [6].

Moreover, principle n. 1, both in the 1972 Stockholm and 1992 Rio Declarations laid down the foundations for recognizing the human right to a healthy environment (respectively: "*[m]an has the fundamental right to [...] adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations*"; "*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature*"). In the subsequent *treaty-law*, such right has been recognized by several regional treaties, like the UNECE (UN Economic Commission for Europe) ***Aarhus Convention*** in 1998 (46 State Parties), as an individual right and duty (preamble: "*[…] every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations*"); [7] the ***Arab Charter on Human Rights*** in 2004 (art. 38: "*Every person has the right […] to a healthy environment*"); [8] the ECLAC (Economic Commission for Latin America and the Caribbean) ***Escazu Agreement*** in 2018 (15 State Parties, see artt. 1,4).[9] These normative advances have significantly consolidated the human-

[5] BARRAL, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, in *European Journal of International Law* (EJIL), Vol. 23(2), OUP, 2012, p. 383; MARCHISIO, *Gli atti di Rio nel diritto internazionale*, in *Rivista di Diritto Internazionale*, ed. Giuffré, 1992, fasc. 3, pp. 581-621; PINESCHI, *La Conferenza di Rio de Janeiro su ambiente e sviluppo*, in *Rivista Giuridica dell'Ambiente*, Ed. Scientifica, 1992, fasc. 3, pp. 705-712; TREVES, *Il diritto dell'ambiente a Rio e dopo Rio*, in *Rivista Giuridica dell'Ambiente*, 1993, fasc. 3-4, pp. 577-583.

[6] *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 June 1992), *Resolutions adopted by the Conference*, A/CONF.151/26/Rev.1 (Vol. I). UN publication, Sales No. E93.I.8 and corrigendum.

[7] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, done at Aarhus, Denmark, 25 June 1998, in force since 30 October 2001, UNTS (United Nations Treaty Series), Vol. 2161, p. 447, No. 37770.

[8] LEAGUE OF ARAB STATES, *Arab Charter on Human Rights*, 22 May 2004, entered into force on March 15, 2008, available at *UN Digital Library*, https://digitallibrary.un.org/record/551368.

[9] *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, done at Escazù (Costa Rica), 4 March 2018. UNTS C.N.195.2018. Treaties-XXVII.18, No. 56654, in force since 22 April 2021. See art. 1: *"[…] the right of every person of present and future generations to live in a healthy*

rights approach to environment, with over 120 States parties to "*at least one binding regional treaty proclaiming the right to a healthy environment*", [10] and more than 155 States having recognised "*some form of a right to a healthy environment in, inter alia, international agreements or their national constitutions, legislation or policies*". [11]

In this context, a decisive step was taken in 2021 by UN Human Rights Council with its Resolution 48/13 expressly recognizing the **right to a healthy and sustainable environment**, as a human right.[12] Nine months later, the same right was proclaimed by the UN General Assembly with a Resolution of similar content (art. 1: "*Recognizes the right to a clean, healthy and sustainable environment as a human right*").[13] The Resolution, although a non-binding instrument, rooted such human right to the existing international law (art. 2) and promoted it by "*full implementation of the multilateral environmental agreements under the principles of international environmental law*" (art. 3).[14]

Together with this environmental pillar, the Rio Declaration requires that "*environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it*". Such ***integration principle*** (n. 4) denotes the essence of S.D. as an indivisible link between the two processes (economic development and environmental protection) and must

environment and to sustainable development"; art. 4: "*Each Party shall guarantee the right of every person to live in a healthy environment […]*".

[10] ZAMFIR, I., *A Universal Right to a Healthy Environment*, in *At a glance*, online publication by the European Parliamentary Research Service (EPRS), 2021. See also KALTENBORN M., KRAJEWSKI M., KUHN H., *Sustainable Development Goals and Human Rights*, Springer-Cham, 2019; KNOX J.H., PEJAN R., *The Human Right to a Healthy Environment*, Cambridge University Press, 2018; BOYD, D, *The Environmental Rights Revolution: a global study of Constitutions, Human Rights, and the Environment*. University of British Columbia Press, 2011; HAJJAR LEIB, L., *Human Rights and the Environment. Philosophical, Theoretical and Legal Perspectives*, Leiden, Brill, 2010.

[11] HUMAN RIGHTS COUNCIL, *The human right to a clean, healthy and sustainable environment*, Resolution A/HRC/RES/48/13, adopted on 8 October 2021, see the preamble.

[12] The HRC Resolution 48/13 was adopted by 43 votes and 4 abstentions. See art. 1: "*Recognizes the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights*". Similar wording can be found in art. 1 of UNGA Resolution A/RES/64/292 of 28 July 2010, which recognized "*the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights*".

[13] UNGA, *The human right to a clean, healthy and sustainable environment*, A/RES/76/300, 1 August 2022. The Resolution was adopted on 28 July 2022 with 161 votes in favour, 8 abstentions and no votes against.

[14] GRADO, V., *Il diritto umano universale a un ambiente sano: recenti (e futuri) sviluppi*, in *Ordine Internazionale e Diritti Umani*, n. 2/2023, Ed. Scientifica, 2023, pp. 225-252; NANDA, V. P., *The Environment, Climate Change, and Human Rights: the significance of the Human Right to Environment*, in *Denver Journal of International Law and Policy*, Vol. 50(2), 2022, p. 89; EBBESSON, J., *Getting it right: Advances of Human Rights and the Environment from Stockholm 1972 to Stockholm 2022*, in *Environmental Policy and Law*, Vol. 52(2), 2022, pp. 79-92.

be read together with the inter-temporal perspective of principle n. 3 ("*The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations*"). To promote quality of life for all, State conduct should integrate environmental considerations into the decision-making processes of economic development, in order to balance the needs of today's generation with the longer-term ones of future mankind. In summary, the Rio Declaration adopted in 1992 by 178 UN Member States established sustainable development in international law,[15] detailed its content and promoted the evolution of its legal status, requesting States to cooperate "*in the further development of international law in the field of sustainable development*" (principle n. 27). Since then, many other UN conferences reaffirmed the role of S.D. and contributed to further it.

In 1994, the ***Barbados Declaration*** and its programme of action reaffirmed the principles and commitments to sustainable development embodied in the *Rio Declaration* and in the *Agenda 21*, viewing S.D. as a people-centred 'process', seeking to enhance the quality of life of peoples, including their health, well-being and safety.[16] One year later, the social dimension emerged as a third pillar of S.D. at the UN World Summit for Social Development. Its ***Copenhagen Declaration*** specifies the three dimensions with the following wording: "*economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development*" (at para. 6).[17] This formula was adopted and reiterated by the ***Beijing Declaration*** (at para. 36) [18], by the ***Earth Summit+5*** in 1997 (par. 23) [19], by the ***Johannesburg Declaration*** in 2002 (para. 5) [20] and by the ***World Summit Outcome*** in 2005, in order to promote "*the integration of the three components of sustainable development - economic development, social development and*

[15] UNDESA (United Nations Department of Economic and Social Affairs), *Review of Implementation of the Rio Principles.* Study prepared by the Stakeholder Forum for a Sustainable Future, 2011, p. 1, available at: https://sustainabledevelopment.un.org/content/documents/1127rioprinciples.pdf.

[16] *Report of the Global Conference on the Sustainable Development of Small Island Developing States* (Bridgetown, Barbados, 25 April - 6 May 1994), A/CONF.167/9. UN publication, Sales No. E.94.I.18 and corrigenda. See Annex I, Declaration of Barbados, Part one, art. 1.

[17] *Report of the World Summit for Social Development* (Copenhagen, 6-12 March 1995), A/CONF.166/9. UN publication, Sales No. 96.IV.8.

[18] *Report of the Fourth World Conference on Women* (Beijing, 4-15 September 1995), A/CONF.177/20/Rev.1. UN publication, Sales No. E.96.IV.13.

[19] *Special Session of the General Assembly to Review and Appraise the Implementation of Agenda 21*, (New York, 23-27 June 1997), UNGA Res. A/RES/S-19/2.

[20] *Report of the World Summit on Sustainable Development* (Johannesburg, 26 August - 4 September 2002), A/CONF.199/20, UN publication, Sales No. E.03.II.A.1 and corrigendum.

environmental protection - as interdependent and mutually reinforcing pillars" (para. 48).[21]

Twenty years after the 1992 Rio Earth Summit, the UN Conference on Sustainable Development (UNCSD, Rio de Janeiro, 20-22 June 2012, known as *Rio+20*), in its final document, ***The future we want***, renewed the Rio commitments to "*further mainstream sustainable development at all levels, integrating economic, social and environmental aspects and recognizing their interlinkages, so as to achieve sustainable development in all its dimensions*" (at para. 3).[22] At the same time, the document raises the level of ambition, making S.D. evolve towards a set of *Sustainable Development Goals*, enunciated at paras. 246-247 as action-oriented, global in nature, universally applicable and incorporating "*in a balanced way all three dimensions of sustainable development and their interlinkages*".

In 2015, the UN General Assembly fulfilled these instructions by adopting the resolution '*Transforming our world: the 2030 Agenda for Sustainable Development*', known as ***UN 2030 Agenda***. The document reaches global institutionalization of S.D., articulated in 17 Sustainable Development Goals (**SDGs**) and 169 targets. [23] The SDGs are global in nature, universally applicable, integrated and indivisible, and balance the three dimensions of sustainable development (paras. 2, 5).[24] The Agenda aims at universal implementation, since it is "*accepted by all countries and is applicable to all [...]. These are universal goals and targets which involve the entire world, developed and developing countries alike*" (at para. 5).

The Resolution A/RES/70/1, being a *soft-law* instrument, does not contain legal obligations for UN Member States, yet it is transformative by its very nature and necessitates implementation through specific objectives and targets to be reached within a fixed deadline (year 2030). The UN 2030 Agenda is a mechanism of governance through goals, which was preceded in 2010 by a likewise action-oriented UNGA Resolution A/RES/55/2, setting out eight *Millennium Development Goals* (***MDGs***) to be achieved by 2015, where S.D.

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[21] *2005 World Summit Outcome*, UNGA Res. A/RES/60/1, 16 September 2005.
[22] *The Future we want,* UNGA Res. A/RES/66/288, 27 July 2012.
[23] *Transforming our world: the 2030 Agenda for Sustainable Development*, UNGA Res. A/RES/70/1, 25 September 2015. For a focus on the 17 SDGs and their normative implications, see FRENCH, D., KOTZÉ, L.J., *Sustainable Development Goals: Law, Theory and Implementation*. E. Elgar Publishing Ltd., 2018; TECHERA, *The Sustainable Development Goals in International Law and Policy*, Routledge, 2025; GUIRY, *International Law & The Sustainable Development Goals*, The Boolean, University College Cork-UCC, 2024, Vol. 7.
[24] See par. 2: *"We are committed to achieving sustainable development in its three dimensions - economic, social and environmental - in a balanced and integrated manner*"; par. 5: "*They are integrated and indivisible and balance the three dimensions of sustainable development*".

appeared at MDG4, related to the protection of the environment ("*We reaffirm our support for the principles of sustainable development*", at para. 22).

To help achieve the SDGs, the UN 2030 Agenda provides a review mechanism, headed by the *High Level Political Forum* (HLPF), convened annually under the auspices of the Economic and Social Council (ECOSOC). Such compliance mechanism is voluntary and country-led, undertaken by both developed and developing countries, and carried out by means of Voluntary National Reviews (VNRs, at para. 84) to track progress on the implementation of the SDGs. The whole VNRs exercise scores quasi-universal compliance: 187 Countries (95% of UN membership) have presented at least one VNR since 2016.[25] It is an important example of voluntary implementation of a *soft-law* instrument by UN Member States, coupled with widespread endorsement from international organizations that incorporate the SDGs into their activities. [26]

From the *Brundtland* Report, through the major UN conferences and summits, sustainable development experienced *pari passu* a phenomenon of ***treatification***, starting from environment-related treaties with nearly-universal ratifications, in which S.D. is mentioned *expressis verbis*.

In 1992, the Rio Earth Summit established the Convention on Biodiversity (UNCBD, 196 State parties), on Climate Change (UNFCCC, 198 Parties) and to combat Desertification (UNCCD, 197 Parties).[27] The ***three Rio Conventions*** are intrinsically linked, because the conservation of biological diversity and sustainable use of its components, as well as the measures to combat desertification and climate change, aim at achieving sustainable development for the benefit of present and future generations. Accordingly, UNFCCC recognizes that State Parties "*have a right to, and should, promote sustainable development*"

[25] HLPF, *2022 Voluntary National Reviews Synthesis Report*, available at: https://hlpf.un.org/sites/default/files/2022-10/VNR%202022%20Synthesis%20Report.pdf.

[26] Most of the SDGs-related methods of computation and data collection processes have been elaborated by UN specialized Agencies. Related high-qualified databases - such as the ones of UNCTAD (*United Nations Conference on Trade and Development*) for international trade, ILO (*International Labour Organization*), UNEP (*UN Environment Programme*), WHO (*World Health Organization*), FAO (*Food and Agriculture Organization*) - are part of the valuable *know-how* of these Agencies: they have been devoted to aspects of sustainability well before 2015, and continue to do so for the implementation of SDGs. Many specialized Agencies are *custodians* for one or more SDG indicators, in collaboration with national governments and other relevant stakeholders. For data collection contributions by custodian Agencies, see the UN Statistical Commission's link: https://unstats.un.org/sdgs/dataContacts/.

[27] *United Nations Convention on Biological Diversity*, done at Rio de Janeiro on 5 June 1992, in force since 29 December 1993, UNTS Vol. 1760 p. 79, n. 30619; *United Nations Framework Convention on Climate Change*, done at New York, 9 May 1992, in force since 21 March 1994, UNTS Vol. 1771 p. 107, n. 30822; *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa*, signed in Paris on 14 October 1994, in force since 26 December 1996, UNTS Vol. 1954 p. 3, n. 33480.

(art. 3.4), laying down both the right and the obligation to promote S.D., in line with Rio principle n. 3.[28]

In 1994, the ***Marrakesh agreement*** establishing the World Trade Organization (WTO, 164 States Parties) recognizes S.D. as an 'objective' in its preamble: trade is not an end in itself, but should be conducted with a view to raising standards of living, full employment and "*allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment […]*".[29] The WTO agreement is in line with Rio principle n. 12 ("*States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries […]*"), and contributes to the global affirmation of a sustainable economic development model.[30]

The EU recognizes S.D. as a 'principle' in 1997 (*Treaty of Amsterdam*), [31] and later on, in 2009, with the entry into force of the ***Lisbon Treaty*** (TEU: preamble; artt. 3, 21; TFEU art. 11; *EU Charter on Fundamental Rights*: preamble, art. 37).[32]

In the following years, the reference to S.D. appeared on the rise, in a wide range of legally binding international treaties, as for example in the ***Aarhus Convention*** in 1998, the ***Cotonou*** Agreement in 2000,[33] ***UNCAC*** in 2003,[34] ***UNESCO Convention*** on the intangible heritage in 2003, [35] as well as in the ***Paris Climate Agreement*** in 2015,[36] the ***Escazù Agreement*** in 2018, and in the

[28] *United Nations Framework Convention on Climate Change: Handbook*. Climate Change Secretariat (UNFCCC), Bonn, 2006, p. 26.
[29] *Marrakesh Agreement Establishing the World Trade Organization*, signed on 15 April 1994, in force from 1st January 1995, 1867 UNTS 154, 33 I.L.M. 1144.
[30] BARONCINI, *Il funzionamento dell'Organo d'Appello dell'OMC: bilancio e prospettive*, Bologna, Bonomo ed., 2018, p. 47.
[31] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, signed in Amsterdam on 2nd October 1997. See art. 1: "*determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development*".
[32] *Treaty of Lisbon*, 13 December 2007, Official Journal of the European Union (O.J.) C 306, 17.12.2007. *Treaty on the Functioning of the European Union*, consolidated version (O.J. C 202/47, 7.6.2016); *Treaty on European Union,* consolidated version (O.J. C 326/13, 26.10.2012); *Charter of Fundamental Rights of the European Union*, O.J. C 326/391, 26.10.2012.
[33] *Partnership agreement 2000/483/EC between ACP countries and the EU*, signed in Cotonou on 23 June 2000, O.J. L 317, 15/12/2000.
[34] *United Nations Convention against Corruption*, New York, 31 October 2003, in force since 14 December 2005. UNTS Vol. 2349, p. 41, n. 42146.
[35] *Convention for the Safeguarding of the Intangible Cultural Heritage*, done at Paris, 17 October 2003, in force since 20 April 2006, UNTS Vol. 2368 p. 3, n. 42671.
[36] *Paris Agreement on Climate Change*, done at Paris, 12 December 2015, in force since 4 November 2016, UNTS Vol. 3156, C.N.63.2016. Treaties-XXVII.7.d, n. 54113.

RCEP preamble in 2020, the latter expressly recognizing the three pillars of S.D. according to the Copenhagen definition.[37]

Moreover, there is also a trend for States to increasingly include environmental and social considerations into trade and investment treaties, with references *per tabulas* to sustainable development in the treaty text.[38] For instance, eleven of the fifteen International Investment Agreements (**IIAs**) concluded in 2019 and reviewed by UNCTAD (and eight out of nine in 2020) make reference to the protection of health, labour rights, environment or to sustainable development.[39]

The EU is one of the major players in this field, since its external action is guided by the principle of S.D. (artt. 3.5, 21.2 TEU) [40] and its treatification translates into a network of modern *Free Trade Agreements* (**FTAs**) promoting an innovative trade policy based on sustainability patterns.[41] This approach is fully in line with the UN 2030 Agenda, which recognizes at para. 68 that international trade is "*an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development*". To this aim, the EU Commission included in FTAs an innovative sustainable development Chapter (***TSD Chapter***), with provisions addressing several aspects of S.D., such as the respect for core human and labour rights (as reflected in the fundamental ILO conventions), environmental protection, public health.[42]

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[37] *Regional Comprehensive Economic Partnership Agreement*, done at Jakarta, 15 November 2020, in force since 1st January 2022.

[38] PETERSMANN, *Transforming World Trade and Investment Law for Sustainable Development*. OUP, 2022; CORDONIER SEGGER, *Crafting Trade and Investment Accords for Sustainable Development. Athena's Treaties,* OUP, 2021; BEVERELLI, C., KURTZ, J., & RAESS, D., *International Trade, Investment, and the Sustainable Development Goals: World Trade Forum*. Cambridge University Press, 2020; MANJIAO, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications*. Routledge, London-New York, 2017; SACERDOTI, *Investment Protection and Sustainable Development: Key Issues*, in HINDELANG S. & KRAJEWSKI M. (eds.), *Shifting Paradigms in International Investment Law*, OUP, 2016, pp. 19-40; CORDONIER SEGGER, M.C., GEHRING, M., NEWCOMBE, A., *Sustainable Development in World Investment Law*. Kluwer Law International, 2010; ZARSKY, *International Investment for Sustainable Development. Balancing Rights and Rewards*. Routledge, London, 2004.

[39] UNCTAD, *World Investment Report 2020*, p. 112; *World Investment Report 2021*, pp. 131-132.

[40] *A sustainable European future: the EU response to the 2030 Agenda for Sustainable Development*, Council Conclusions, 20 June 2017, 10370/17, see point 1: "*[…] sustainable development lies at the core of European values and constitutes an overarching objective of the European Union as set out in the Treaties*".

[41] *Trade for All. Towards a more responsible trade and investment policy*. Communication from the Commission, 14 October 2015, COM(2015) 497 final; *Trade Policy Review - an Open, Sustainable and Assertive Trade Policy*. Communication from the Commission, 18 February 2021, COM(2021) 66 final.

[42] DOUMA, *The Promotion of Sustainable Development through EU Trade Instruments*, in *European Business Law Review*, Vol. 28(2), 2017, pp. 197-216; HUSH, *Where No Man Has Gone before: the Future of Sustainable Development in the Comprehensive Economic and Trade*

These ***non-trade*** **values** [43] entail a balancing process, while fostering and facilitating trade and investments between the contracting Parties, in a manner conducive to sustainable development in its economic, social and environmental dimensions.

The new EU FTAs [44] are in force with **South Korea** (2011) [45], **Canada** (*CETA*, provisionally applied since 2017) [46], **Japan** (*Economic Partnership Agreement-JEFTA*, signed on 17th July 2018, entered into force on 1st February 2019), **Singapore** (FTA and an *Investment Protection Agreement-IPA,* both signed on 19 October 2018, only the FTA in force since 21 November 2019), **Vietnam** (both FTA and IPA signed on 30 June 2019, only the FTA in force since 1st August 2020), **UK** (*EU-UK TCA Trade and Cooperation Agreement*, signed on 30 December 2020 and entered into force on 1st May 2021), **New Zealand** (FTA entered into force on 1 May 2024), while with **Chile** an Interim Trade Agreement (ITA) entered into force on 1 February 2025.

In the EU FTAs in force, S.D. appears in the treaty preamble and in the TSD Chapter. In some cases, it is introduced by recalling the main *soft-law* instruments (as seen, for example, in the text of art. 22.1 CETA; art. 12.1 FTA Singapore; art. 13.1 FTA South Korea), and in four FTAs mentioning explicitly the UN 2030 Agenda (art. 13.1.2 FTA Vietnam; art. 16.1. JEFTA; art. 19.1 FTA New Zealand; art. 26.1 ITA Chile). All the EU FTAs in force make use of the Copenhagen definition of S.D. (notably, in art. 22.1.1 CETA; art. 12.1.2 FTA Singapore; art. 13.1.3 FTA Vietnam; art. 13.1.2 FTA South Korea; art. 16.1.2 JEFTA; art. 355 EU-UK TCA). The role of trade for S.D. is recognised under **SDG 17** (*Partnerships for the goals*) and the EU FTAs constitute an example of

Agreement and New Generation Free Trade Agreements, in *Columbia Journal of Environmental Law*, Vol. 43:1, L. 93, 2018; KALFF, RENDA, *Hidden Treasures: mapping Europe's sources of competitive advantage in doing business*, ed. CEPS (Centre for European Policy Studies), Brussels, 2019; ZAMFIR, *Human rights in EU trade agreements: the human rights clause and its application.* European Parliament Research Service, 2019; BARONCINI E., ESPA I., MARCEDDU M.L., MULAS L., SALUZZO S., *Enforcement & Law-Making of the EU Trade Policy*, AMS ACTA Institutional Research Repository -ALMA DL University of Bologna Digital Library, Bologna, 2022.

[43] BARONCINI, *Organo d'appello dell'OMC e non-trade values*, in LUPOI M.A., *Frontiere di tutela dei diritti fondamentali (a settanta anni dalla Costituzione italiana)*. Revelino ed., Bologna, 2019.

[44] For an analysis of such '*mega-regional*' agreements that are central to EU external economic relations, see BARONCINI, E. CUNSOLO, F., *L'Accordo CETA tra UE e Canada: sostenibilità e partecipazione.* Bologna: Dipartimento di Scienze Giuridiche, 2021; GRILLER, S., OBWEXER, W., VRANES, E., *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA. New Orientations for EU External Economic Relations*, OUP, 2017.

[45] *Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, O.J. L 127, 14 May 2011.

[46] *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, O.J. L 11, 14.1.2017.

the EU contribution to this Goal, using bilateral and multilateral trade agreements to shape global standards.[47]

EU is fully committed to be a frontrunner in implementing the UN 2030 Agenda,[48] together with its Member States. The achievement of **SDG 13** (*Climate action*) is another example of EU best practice, developing its interlinkages with the protection of environment, health (**SDG 3**), sustainable energy production (**SDG 7**) and consumption patterns (**SDG 12**). The EU has taken a leading role in pursuing the *Paris Agreement* to limit global warming to well below 2°C, by adopting the *European Green Deal* for a climate-neutral economy by 2050,[49] the *Circular Economy Action Plan*,[50] the *Fit for 55 Package* to increase ambition on climate mitigation [51], and other relevant measures for the energy-climate nexus.[52] As for its international action, at the intersection between energy and climate policies, it is worth noting that EU is one of the founding members and participates in the different activities of **IRENA** (*International Renewable Energy Agency*), an intergovernmental organisation created in 2009 (168 Member States as of 2022) with the aim to promote, according to its Statute's preamble, "*the widespread and increased adoption and use of renewable energy with a view to sustainable development*".[53]

Since its appearance in the UN *soft-law* instruments, sustainable development has been increasingly included in numerous legally binding treaties, FTAs and IIAs.[54] The treatification of S.D. - as a principle, legal concept or treaty explicit objective - has promoted a new approach to trade and investments, which is part and parcel of the overall achievement of SDGs, calling for transformation of the global economy according to sustainability patterns. In reaching the SDGs by 2030 lie the evolution of sustainable

[47] For an overview of EU ongoing negotiations for FTAs see link: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en.

[48] *Next steps for a sustainable European future. European action for sustainability*. Communication from the Commission, 22 November 2016, COM(2016) 739 final, see point 1.2.

[49] *The European Green Deal*. Communication from the Commission, 11 December 2019, COM(2019) 640 final.

[50] *A new Circular Economy Action Plan for a cleaner and more competitive Europe*. Communication from the Commission, 11 March 2020, COM(2020) 98 final.

[51] *'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality*, Communication from the Commission, 14 July 2021, COM(2021) 550 final.

[52] For an overview of these EU relevant initiatives, see the Commission's website on climate action: https://commission.europa.eu/energy-climate-change-environment/topics/climate-change_en.

[53] *Statute of the International Renewable Energy Agency*, IRENA/FC/Statute, done at Bonn, 26 January 2009, entered into force on 8 July 2010, see website: https://www.irena.org/.

[54] VERSCHUUREN, *The principle of sustainable development as a legal norm*, in D. FISHER (ed.), *Research Handbook on Fundamental Concepts of Environmental Law*, Edward Elgar Publishing Ltd., 2022, pp. 228-251.

development, as State conduct is even more confronted with an obligation of means (or of 'best efforts') to achieve sustainable development, integrating economic, social and environmental objectives into the national decision-making processes.[55]

[55] BARRAL, *ibidem*, pp. 377-400. VOIGT, *Sustainable Development as a Principle of International Law. Resolving Conflicts between Climate Measures and WTO Law.* Martinus Nijhoff, 2008.

Do We Really Need an Appellate Review in International Economic Law? What Sustainability Disputes are Telling Us

LUCA RUBINI

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1. A limited goal

The goal of this brief contribution is to try and think "out of the box" when we talk of dispute settlement in international economic law. It is a broad topic, but it nicely intersects with the issue of sustainability since the latter has recently offered good food for thought about the nature and limits of dispute settlement in international law, and also about the limits of the substantive law.

My impression is that when we talk of international economic law, and of the specific topic of appellate review in dispute settlement, there is a risk to accept the status quo, or (whenever there has been a change, even a dramatic one) a tendency to try and go back to the status quo ante, almost as if this by necessity represents the natural and only benchmark available. I will use international trade and international investment law to show this point. More specifically, in these discussions, the status quo (ante) and benchmark are represented by the World Trade Organization (WTO) Appellate Body.

One key point I want to convey is that technical details are important, but they can only follow the answer to the first questions, those that are directly related to the objective of key legal principles and institutions. When we talk of international dispute settlement the key questions are as follows. Why do we have dispute settlement in international law, and particularly in trade and investment law? Why do we need it? Do we need an appellate review in order to pursue the goals of dispute settlement internationally?

My brief comments will follow two directions. First, I will argue for the professionalisation of the current systems of dispute settlements. Secondly, I will highlight that, quite often, the root of the difficulty does not lie in institutional or procedural devices but rather in lacune in the substantive law (and it is here that sustainability helps us).

2. Setting the scene: dispute settlement in international trade law

Let's now start with international trade law. As known, initially the GATT did not have an appellate review – and not even a fully developed dispute settlement system (GATT Articles XXII and XXIII simply sketch the basic conditions for raising a complaint for "nullification and impairment" of the benefits Contracting Parties may expect from the GATT). Dispute settlement was provided for in the Havana Charter and the International Trade Organization (ITO) which, as known, never came into being.[1] What happened is that, with time and a great sense of pragmatism, the system developed a unique and pretty effective system of dispute settlement. The best indication thereof is that, despite the need for a positive consensus to any report coming out from the system, only 20% of cases ended up in an "unadopted report".[2] What is this telling us? The veto power of the losing party was not consistently used because the system managed to produce solutions to disputes which were acceptable – also to the losing party. It is also known that the GATT dispute settlement system progressively acquired legal characteristics which were not present at the beginning. In other words, we progressively witnessed to a shift from diplomacy to law, from negotiated outcomes to judicial dispute settlement. The core of this shift is represented by the entrenchment of a "rule-based" system.[3]

An appellate review makes its entry in the world trading system only with the advent of the WTO. There are also several indications that this major development was not even much "thought of" or even subject to detailed discussions during the Uruguay Round negotiations.[4] With time the Appellate Body, which started its operations in 1995, developed a very rich and sophisticated jurisprudence, arguably becoming the most developed system of dispute settlement in international law. This jurisprudence has generated an increased and sustained interest and, inevitably, criticism. And decisions in the area of sustainability are a good example of this.

With the passing of time, the relationship between Members and the Appellate Body has also got worse. The climax was reached when one key Member, the United States, effectively exercised a veto power, by refusing to appoint new members of the Appellate Body. They pulled the plug and in

[1] See Petros Mavroidis, *The Regulation of International Trade: Volume 1 the GATT*, Cambridge Mass, MIT Press, 2016, Chapter 1.

[2] See Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, New Haven, Butterworths: 1993).

[3] For a critical analysis of this point see Joseph Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement", 2001, Journal of World Trade, 191-207.

[4] See Peter Van den Bossche, "From Afterthought to Centerpiece: the WTO Appellate Body and its Rise in the World Trade Organization", *Maastricht Working Papers Faculty of Law*, 2005-1.

December 2019, when the minimum number of members to operate (3) evaporated, the Appellate Body effectively died. Why did the US veto? Many complaints have been levied which all essentially boil down to the indictment of "judicial activism". Rather than interpreting the law, the Appellate Body would have created it.[5] They would have "added to the rights and obligations of the parties" thus explicitly and fundamentally breaching the key duty of their mandate as enshrined in Article 3 of the Dispute Settlement Understanding (DSU). Importantly, empirical research carried out by scholars of the European University Institute has shown that many WTO Members shared the same sentiments of the US.[6] It therefore looks like that the death of the Appellate Body was the consequence of the end of the necessary trust of the Membership towards its "judges" (which, by contrast, was significantly there during the GATT era: the basic data outlined above on report adoption support this point).[7] Few WTO Members have reacted to the "gap" created by the demise of the Appellate Body by creating a temporary appeal system, the so-called "Multi-Party Interim Appeal Arbitration" (MPIA).[8] At the time of writing, though, this temporary solution is here to stay since there is no tangible prospect for a reinstalment of an appellate review.

3. The goals of dispute settlement in the WTO

The key question is whether we really need an Appellate Body. To answer this fundamental question, it is necessary to think about the goals of dispute settlement in the WTO. Article 3 of the DSU is the key reference provision. It refers to "security and predictability" but it also mentions "management" and "settlement of disputes", "positive solution to a dispute". It is difficult to challenge the observation that these must be the key goals of the system. But are there any other objectives? Should the dispute settlement also have other functions? Those that adopt a constitutional view of international law, and international trade law specifically, would suggest that dispute settlement is also

[5] The paradigmatic example of this complaint is the consistent Appellate Body jurisprudence that prohibited zeroing in all phases of anti-dumping investigations, which, in view of the US, would have patently breached the special standard provided for in Article 17.6 of the Agreement on Anti-Dumping (ADA).

[6] Fiorini, Hoekman, Mavroidis, Saluste, and Wolfe, *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences* (November 2019). Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2019/95.

[7] EUI reference

[8] This is nothing else that an arbitration system based on Article 25 of the Dispute Settlement Understanding. It entered into force on 30th April 2020.

needed to create law, to ensure the uniformity of the legal system. This view was strongly debated in the late 1990s and early 2000s.[9]

Two remarks are in point here.

First, it is obvious that any tribunal or court somewhat "creates" law. That being said, it is a matter of degree. We can think of dispute settlement, and judicial activity, as a spectrum. Which degree of creativity judicial bodies should embrace substantially depends on the key tenets of the legal system within which they operate. The WTO DSU, which includes the key guidelines for dispute settlement activity, talks of "preservation of the rights and obligations of the parties", and repeats that "recommendations cannot add to or diminish the rights and obligations provided in the covered agreements" twice (Article 3 e art 19).

As Claus-Dieter Ehlermann, one of the first members of the Appellate Body, wrote in 2002 when he summarised his 6 years on the World Trade Court bench, the Appellate Body was particularly cautions in its interpretation activity in its early days. The first members of the Appellate Body strived to adopt "circumvention" when approaching the law. This is why in the very two first disputes they highlighted that they would have been guided by Articles 31 and 32 of the Vienna Convention of the Law of Treaties. That may appear obvious but what is probably less obvious is the emphasis put on textual interpretation which, as Ehlermann noted, was expressly motivated by the willingness to be "circumspect" and ensure that their interpretations be more easily accepted by the litigants and by the WTO constituency at large. In other words, circumspection to garner legitimacy.

Secondly, we need to highlight one key difference between international law is domestic law. We don't have supreme courts or constitutional courts at the international level. The example of the Court of Justice of the European Union is truly unique and is the result of a unique history of integration. From another perspective, I would suggest that international law, and especially international economic law, still retain a strong "contractual" nature. This means that circumspection in interpreting the law should be of the essence.[10]

[9] For a critical analysis of the issue see Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading Order*, Oxford, Oxford University Press: 2005. See also the thought-provoking book review written by Joost Pauwelyn and published in the American Journal of International Law, 2001, 986-991. I still remember attending in May 2001 the first WTO law conference organized in London by the Institute of International Economic Law (Georgetown) and the British Institute of International and Comparative Law. The title of the first session, opened by Professor John Jackson, was: "The World Trade Organization and its Dispute Settlement System: Is there a Constitutional Crisis Emerging?".

[10] Age of innocence.

4. The Secretariat's expanding role: An issue of "institutional design"

The role of the Secretariat in dispute settlement, at both Panel and Appellate Body levels, has raised important issues.

It is known that panellists are appointed *ad hoc*. Working part-time, modestly remunerated, they do not have sufficient incentives to perform at the highest possible level. There is an official roster but those appointed are often not included in this roster. There is no clear and transparent logic in appointments. Most importantly, there are often serious doubts about the quality and capacity of the appointees. This may generate a phenomenon whereby the support activity of the Secretariat becomes too much preponderant. A common allegation has been that the secretariat played a significant and ubiquitous role also in the context of the activity of the Appellate Body. Simple observation of the Appellate Body members appointed since the beginning up to the end of its activity makes it evident that, against initial appointments which were highly qualified, the professional quality of the members subsequently chosen progressively decreased. Close to the end of the life of the Appellate Body, it is not difficult to note that, out of the seven members, only a handful had a strong legal background. Participation at lectures or conferences could have been enough to realize that some members did not even have a proficiency in English – the working language of the World Trade Court. The author of this piece was attending a conference on occasion of the twentieth anniversary of the Appellate Body when one (at the time) current member of the Appellate Body was quick to issue the disclaimer that he could not positively participate in the debate on the case-law of the Appellate Body since he was not a lawyer!

Irrespective of professional and language qualifications, the fact is that, if you have an international adjudicating body, this has to take legal decisions. If the members of that body are not fully qualified in doing so, who does take the actual decisions? Who gives a meaningful contribution to the meetings? Who leads in discussing the legal issues, the various alternative interpretations and the possible solutions? Who eventually writes the reports and the key language of the key paragraphs? Anecdotal evidence and, more recently, even scholarly work have been suggesting that the Appellate Body secretariat has increasingly been playing a key role in many, if not all, of these steps. To be sure, the issue is not that judicial decision making should not be supported by the work of law clerks or assistants. The key issue is that judges or adjudicating body members should always have the intellectual leadership in deliberating and externalizing their reasoning. More recently, highly authoritative voices have planted the seed of doubt. The most clamorous *j'accuse* has come from a former member of the Appellate Body, the American Thomas Grant, when he delivered his farewell

speech on 5th March 2020 at Georgetown University (when the Appellate Body's doors had already closed).[11] More recently, an article published in the American Journal of International Law, co-authored by Professors Joost Pauwelyn and Krzysztof Pelc, has constituted the strongest and more reasoned academic piece analysing the topic.[12] This article sparked a very lively debate with a symposium published in the same journal in late 2022 and, most dramatically, another former member of the Appellate Body, Professor Giorgio Sacerdoti, responding to the claims in a blog post.[13]

My view is that, whatever may be the merits of the claim, if there is a problem, this is not one which only focuses on the people and their (lack of) qualifications or leadership but, more radically, also with the institutional design of the Panels and the Appellate Body.

If this is correct, the solution is not to create an appeal system based on arbitration – in which key WTO Members (think of the US) do not participate – on the dubious premise that this is just a temporary solution to the permanent comeback of the Appellate Body. This is just fudging the issue. The solution is to take dispute settlement seriously which, above all, means to professionalise it. What does professionalisation mean? Full time members (perhaps even divided up by area specialisation), high qualifications relevant to the job, financial and human resources (for example, to set up a proper system with legal clerks under the direction of each member). If this were done, perhaps there would be no need for an appellate review. In other words, if Members already had one instance of adjudication which is impartial, qualified, efficient and permanent, for what other reason you would *also* need an appellate review? This is not a new idea.[14] It was put forward by many, for example the EU, and rehearsed also in academic and policy circles alike. The final question is political. Why, despite a good solution has been there for a while, nothing has happened? Perhaps, because WTO Members do not have an interest in having a robust system of dispute settlement.[15]

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[11] Fareweel speech of Appellate Body Member Thomas R. Graham, 5th March 2020, available here.

[12] Joost Pauwelyn and Krzysztof Pelc, "Who guards the 'Guardians of the system'? The role of the secretariat in WTO dispute settlement", American Journal of International Law, Volume 116, Issue 3, 534-566.

[13] Giorgio Sacerdoti, "A critical reaction to Joost Pauwelyn and Krzysztof Pelc's 'The WTO Secretariat's Open Secret': Unpacking the Controversy", EJIL Talk, 2nd September 2022, available here.

[14] See, for example, Bernard. Hoekman and Petros Mavroidis, *To AB or Not to AB?: Dispute Settlement in WTO Reform*, Journal of International Economic Law, Vol. 23, p. 703, 2020; European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme Working Paper No. RSCAS 2020/34 (2020).

[15] There are various factors showing this, the best example being the lack of retroactivity of remedies in GATT/WTO law, which is a unicum in public international law.

5. Investment Law

Much of what has been said with respect to international trade law is also relevant to investment law.

On the one hand, it is known how investor-state arbitration, which is the central system of dispute settlement in international investment law, is fraught with opacities, conflicts of interests, biases, fragmentation.[16] On the other hand, it has been suggested that one solution to at least some of these illnesses could be represented by the creation of a centralised appellate review. In its proposal, the EU has even suggested that the Appellate Body of the WTO could have represented a model.[17] That happened before the Appellate Body's death.

6. Lacune in substantive law: the example of sustainability

But, at this point, there is another important observation – which eventually is leading me to talk of the central topic of this symposium: sustainability. Many of the problems of dispute settlement in international economic law do not stem out from dispute settlement itself but, more fundamentally, from the inefficiencies of the substantive laws which the various adjudicating bodies – WTO Panels, Appellate Body, ISDS arbitrators – have to interpret and apply.

International environmental law and the law of sustainability offer great example in this respect.

The WTO Panel and Appellate Body in *Canada – Renewable Energy/FIT* (DS 412; DS 426) made significant efforts to conclude that the measure at issue (a policy to incentivise green energy production) was not a subsidy under WTO law. In so doing, they have been subject to significant criticism for having distorted basic rules of legal interpretations and creating a "carve out" not present in the rules.[18] Why did this happen? Because, fundamentally, the legal system does not provide an explicit exception for subsidies pursuing good public policy objectives (in the case at issue, green energy generation).

It is known that traditionally investment law has not been very responsive to the public interest objectives pursued by host governments and to their right

[16] See Federico Ortino, *The Origin and Evolution of Investment Treaty Standards*, Oxford, Oxford University Press, 2020; Rodrigo Polanco, *The Return of the Home State in Investor-State Disputes: Bringing Back Diplomatic Protection?*, Cambridge: Cambridge University Press, 2019.

[17] Céline Lévesque, *The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?*, Centre for International Governance Innovation, Investor-State Arbitration Series, Paper No 10, September 26, 2016.

[18] See, e.g., Luca Rubini, 'The Good, the Bad and the Ugly. Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies' (2014) *Journal of World Trade*, 895-938.

to regulate.[19] As a result, the introduction of new, more demanding, environmental rules have often been considered as forms of indirect expropriation breaching investment laws.[20] To be sure, we may criticise individual arbitration awards but, in many cases, the root of the problem does not lie in the interpretation of investment treaties but in the substance itself of investment treaties. The key question, in other words, is whether the fair and equitable standard is apt to sustain the complex balancing of investor interests and public interests, or rather whether basic needs of legal certainty would require the introduction of express provisions safeguarding the right to regulate for the pursuit of certain objectives. Like in the international trade scenario, it is therefore clear that the key question is a matter of substantive law and not of dispute settlement.

The said lacunae in the law have created difficulties and pressure on adjudicating bodies forcing them to adopt sub-optimal, even incorrect, decisions.[21] If this is true, the solution is not to create an appellate review to remedy mistakes of first instance adjudication but rather to be bold enough to address the problem at its roots: reform the law.[22]

7. Conclusions

In conclusion, as I was suggesting in a blog post few years ago,[23] the most important thing is to start from the key, first questions. What do we need? What do we want the dispute settlement of this particular regime of international economic law do for us?

Only clear answers to these questions enable the analysis of the issue of the need for an appellate review. Otherwise, it may become a dangerous diversion because we are wasting precious resources for the wrong investment. And, these days, the political capital to invest in international negotiations is terribly scarce

[19] See Ortino, *op. cit.*; Polanco, *op. cit.*, *passim.*

[20] For an overview of recent disputes see the chapter written by Maria Laura Marceddu in this e-book.

[21] That was the essence of my call in Luca Rubini, 'Ain't Wastin' Time No More. Subsidies for Renewable Energy, the SCM Agreement, Policy Space and Law Reform', *Journal of International Economic Law*, 525-579.

[22] See Luca Rubini, 'ASCM disciplines and recent WTO case law developments: what space for "green" subsidies?' in Thomas Cottier and Ilaria Espa (eds) *International Trade in Electricity and the Decarbonisation of the Economy. The World Trade Forum 2014* (Cambridge: Cambridge University Press), 311-355

[23] Luca Rubini, "'The Crown and the Jewel.' The Rise and Fall of the WTO Appellate Body: a Critical Analysis", in International Economic Law and Policy Blog, 5th October 2021, available here.

Women Empowerment in International Trade

KLARISSA MARTINS SCKAYER ABICALAM*

TABLE OF CONTENTS: 1. Women, globalization and the WTO. – 2. Women-related provisions in free trade agreements. – 3. Concluding remarks.

1. Women, globalization and the WTO

Globalization has been driven by the liberalization of international trade and investments and has lifted important barriers towards women's economic empowerment from the GATT 1947[1], and more intensively after the signature of the Marrakesh Agreement[2] which founded the WTO in 1995[3], opening the free trade system to former socialist countries under URSS *dominium* and to China. It was also in 1995, during the 4th United Nations (UN) World Conference on Women in Beijing that was adopted the *The Beijing Declaration and Platform for Action* (BDPA)[4], described as "an agenda for women's empowerment", setting strategic objectives aiming overall "at removing all the obstacles to women's active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making".[5] After 20 years, the women empowerment agenda became formally part of a broader one, the UN 2030 "Transforming our world: 2030 Agenda for

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[1] General Agreement on Tariffs and Trade, Oct 30, 1947, 61 Stat. A-11, 55, U.N.T.S 194 [hereinafter GATT 1947]

[2] WTO, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867, UNTS 154. [hereinafter Marrakesh Agreement].

[3] See World Bank. *World Development Report 2012: Gender Equality and Development*. 1st ed.., 2011, chapter 6.

[4] Report of the Fourth World Conference on Women, Beijin, 4-15, September 1995, Sales No. E.96.IV.13. Annex I and II [hereinafter *BDPA*] Available at: https://documents.un.org/doc/undoc/gen/n96/273/01/pdf/n9627301.pdf

[5] On that occasion, several UN Members presented reservations and interpretative statements mostly to restrict the scope of the BDPA.The majority of the interpretative statements were to avoid pro-abortion interpretations, and the reservations to guarantee the application of Islamic Sharia against any provision against it. On that occasion, the State of Israel and the United States of America argued that the BDPA should also cover non-discrimination on the basis of sexual orientation. See pages 154 to 175 of the Report.

Sustainable Development" (UN 2030 Agenda)[6].The Resolution adopted by consensus established as goal n.5 "to achieve gender equality and empower all women and girls*"*, setting specific targets to guarantee women's economic independence and equal rights to economic resources.

In fact, trade liberalization and the promotion of women's rights need to go hand in hand, because where basic human and labor rights are respected, trade creates better and more jobs for women[7], contributing to a more efficient, sustainable and competitive global economy. However, the pursuit of competitive prices in the global value chains by reducing production costs has also increased the exploitation of women workers in export sectors (especially in developing and least developed countries) and undermined women's entrepreneurial opportunities, given the impossibility of competing with large corporations (mostly run by men). In addition, women still face technical, financial and cultural barriers that prevent them from fully benefiting from trade and from holding decision-making positions in business.

Since its inception, the WTO has not paid particular attention to the position and participation of women in international trade, which has been criticised by feminist legal scholars[8], according to which the WTO agreements are "gender-blind"[9] or "gender-neutral"[10], as they do not provide for explicit provisions related to women or gender. However, it cannot be neglected that the WTO's preamble explicitly included the objective of sustainable development[11], which must be interpreted in an evolutionary way, as did the WTO Appellate Body in

[6] United Nations General Assembly Resolution of 25 September 2015, *Transforming Our World: the 2030 Agenda for Sustainable Development*, A/RES/70/1. [hereinafter UN 2030 Agenda].

[7] Women and Trade: The Role of Trade in Promoting Gender Equality, 2020.

[8] See, Fabian, Judit. "Global Economic Governance and Women: Why Is the WTO a Difficult Case for Women's Representation?" *Trade Policy and Gender Equality*. Ed. Amrita Bahri, Dorotea López, and Jan Remy. Cambridge: Cambridge University Press, 2023. 65–94.

[9] "To date, the WTO rulebook remains gender-blind, in the sense that it does not contain a single explicit provision that relates to women." Bahri, Amrita. *Trade Agreements and Women: Transcending Barriers.* Oxford Scholarship Online, 1st ed., 2025, p. 64.

[10] "In particular, the WTO seems singularly to lag behind other international institutions and states in its failure to adopt any commitment to pursue gender mainstreaming or even to promote the participation of women in its institutions and processes". Beveridge Fiona, "Feminist Perspectives in International Economic Law" in Buss, Doris, and Ambreena Manji. *International Law: Modern Feminist Approaches*. Hart, 2005, p. 173-201.

[11] "Six hundred-odd pages of the WTO rulebook that governs international trade is gender neutral. Some would say that it is gender blind. The WTO agreements make no explicit mention of terms such as 'gender', 'gender equality', or 'men and women'. Despite this silence, one cannot assume that the WTO is entirely gender blind. In fact, it has an implicit legal base and an explicit mandate to work on gender equality in trade" in Der Boghossian, Anoush. "Gender-Responsive WTO: Making Trade Rules and Policies Work for Women." in *Trade Policy and Gender Equality*, 2023, pp. 21–43.

the *US – Shrimp case*[12], and so contains in its social aspect the promotion of women empowerment[13].

Moreover, technically the WTO agreements do not require a new general exception to enable WTO members to adopt policies that in principle deviate from WTO obligations to promote women's empowerment if proved they are necessary to protect "public morals" (line "a" first part of GATT Article XX, and GATS Article XIV) or women health as "human health" (line "b" first part of GATT Article XX, and GATS Article XIV) provided that the application of measure fulfills the requirements of the *chapeau,* i.e., "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade"[14]. However, at the same time the application of the general exceptions is possible, it is risky, especially in the case of public morals, given the "absence of universally accepted definitions for 'public morality' or 'women's empowerment'"[15] and given the potential to create a "cultural imperialism" through trade[16]. Indeed, the application of the general exceptions in the name of women's interests could enhance protectionism, bringing about contradictory results for women across the world considering how "women empowerment" policies can be understood and

[12] Appellate Body Report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998) (adopted 6 November 1998), para. 130.

[13] There is no conventional definition of "women empowerment" in international law, although the term is mentioned in many soft law instruments as the Beijing Declaration and Platform of Action and the UN 2030 Agenda. In 2001, the Office of the Special Adviser on Gender Issues and the Advancement of Women of the United Nations in a document entitled "Important Concepts Underlying Gender Mainstreaming" defined "Empowerment of Women" as: "The empowerment of women concerns women gaining power and control over their own lives. It involves awareness-raising, building self-confidence, expansion of choices, increased access to and control over resources and actions to transform the structures and institutions which reinforce and perpetuate gender discrimination and inequality. The process of empowerment is as important as the goal. Empowerment comes from within; women empower themselves. Inputs to promote the empowerment of women should facilitate women's articulation of their needs and priorities and a more active role in promoting these interests and needs. Empowerment of women cannot be achieved in a vacuum; men must be brought along in the process of change. Empowerment should not be seen as a zero-sum game where gains for women automatically imply losses for men. Increasing women's power in empowerment strategies does not refer to power over, or controlling forms of power, but rather to alternative forms of power: power to; power with and power from within which focus on utilizing individual and collective strengths to work towards common goals without coercion or domination." Available at: https://www.un.org/womenwatch/osagi/pdf/factsheet2.pdf

[14] Introductory Clause of Art. XX, GATT. On the interpretation of this clause see for example the Appellate Body Report *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R.(3 December 2007)(Adopted 11 December 2007), para. 220-230.

[15] Bahri, Amrita, and Daria Boklan. "Not Just Sea Turtles, Let's Protect Women Too: Invoking Public Morality Exception or Negotiating a New Gender Exception in Trade Agreements?" *European Journal of International Law* 33.1 (2022): 237-69. Web.

[16] Idem, p. 243.

applied in different WTO members, which are sovereign nations entitled to define their specific domestic agendas with considerable regulatory heterogeneity[17].

Despite the cultural differences, the WTO, in particular through its Secretariat, has advocated a pragmatic and economic approach to women's empowerment. It was during the mandate of the former Director-General Roberto Azevêdo[18], which became an *International Gender Champion* (IGC)[19] that the Secretariat started to carry out studies and incentivized the discussion of policies to enhance the participation of women in international trade as a way of promoting their economic empowerment and of contributing to the global economy, since although women make up half of the world's population, they contribute less to the GDP of the nations.[20] In the *Gender Aware Trade Policy* published in 2017, Mr. Azevêdo stated that "(…) Investing in women - and empowering women to invest in themselves - is a risk free venture. What society gives them, they give back ten times over".[21]

It was also in 2017, under the auspices of the 11th WTO Ministerial Conference held in Buenos Aires, that it was presented for WTO members the *Joint Declaration on Trade and Women's Economic Empowerment*[22], framed not by WTO members, but by specialists and public officials that are part of the *IGC Trade Impact Group*[23].The fact that the declaration is legally considered a soft

[17]See Weiß, Wolfgang. *WTO and Domestic Regulation*, Bloomsbury Publishing, 2020.

[18] Mr. Roberto Azevedo was Director-General of the WTO from 1 September 2013 to 31 August 2020. Available at https://www.wto.org/english/thewto_e/dg_e/ra_e.htm

[19] The initiative created in 2015 aims to bring together decision-makers is opened to heads of organizations, permanent missions, or institutions based in one of our six hubs (Geneva, New York, Vienna, Nairobi, The Hague or Paris) "to break down gender barriers and make gender equality a working reality in their spheres of influence." Available at: https://genderchampions.com/about

[20] According to the World Bank "Women are one-half of the world's population but only contribute to 37 percent of the global GDP. An economy cannot operate at its full potential if half of its population cannot fully contribute to it." Available at: https://www.worldbank.org/en/topic/trade/brief/trade-and-gender

[21]WTO Gender Aware Trade Policy, 2017. Available at https://www.wto.org/english/tratop_e/devel_e/a4t_e/gr17_e/genderbrochuregr17_e.pdf

[22] WTO Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017. [hereinafter WTO Buenos Aires Declaration]. About the process for the conclusion of the declaration, see Der Boghossian, Anoush. "Gender-Responsive WTO: Making Trade Rules and Policies Work for Women." *Trade Policy and Gender Equality*, 2023, pp. 21–43, doi:10.1017/9781009363716.004. About the ICG initiative, see https://genderchampions.com/

[23] "Led by the Executive Director of the International Trade Centre, Arancha González, the Permanent Representative of Sierra Leone, Yvette Stevens, and the Permanent Representatives of Iceland, Högni Kristjánsson and Harald Aspelund, the group worked for a year on drafting and advocating the first ever Declaration on Trade and Women's Economic Empowerment." Available at: https://genderchampions.com/impact/trade Last Access 10.11.2024

law instrument facilitated its acceptance, as it has been endorsed by 127 WTO members.[24] Even with its very programmatic approach without any imposition of obligations, it has opened a new era in the WTO for women's economic empowerment policies, mainly led by the WTO Secretariat - the organ with higher gender equality composition in the WTO[25] - and that since 2021 is led by a woman, Mrs. Ngozi Okonjo-Iweala[26].

For instance, in 2020 with the support of the Secretariat it was created the Informal Working Group (IWG) on Trade and Gender[27], co-chaired by Cabo Verde, El Salvador and the United Kingdom, based on four pillars: experience sharing; exchanging views on how to apply a "gender lens" to the work of the WTO; reviewing gender-related reports produced by the Secretariat; and contributing to make the initiative *Aid for Trade*[28] benefit women. In 2021 the Secretariat established the WTO Gender Research Hub[29], serving as a knowledge-gathering platform to share research in women empowerment, and also in 2021 the Secretariat created a specific database to track gender provisions

[24] They are: Afghanistan, Albania, Andorra, Angola, Argentina, Australia, Bahamas, Barbados, Belarus, Benin, Botswana, Brazil, Burundi, Cambodia, Canada, Chad, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Democratic Republic of the Congo, Dominica, Dominican Republic, Ecuador, El Salvador, Eswatini, Ethiopia, European Union member states (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden), Fiji, Gabon, Gambia, Georgia, Grenada, Guatemala, Guinea, Guinea Bissau, Guyana, Haiti, Honduras, Iceland, Indonesia, Israel, Jamaica, Japan, Kazakhstan, Kenya, Korea (Republic of), Kyrgyzstan, Lao People's Mexico, Moldova, Mongolia, Montenegro, Myanmar, Namibia, New Zealand, Niger, Nigeria, North Macedonia, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Russia, Rwanda, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Samoa, Senegal, Serbia, Sierra Leone, Somalia, Sudan, Switzerland, Chinese Taipei, Tajikistan, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom, Uruguay, Vanuatu, Viet Nam and Zambia. Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/buenos_aires_declaration_e.htm

[25] "Women account for 55.6% of WTO staff overall, outnumbering men by 360 to 288. Among professional staff, women represented 48.8% in 2023 (compared to 31% in 1995). Among the support staff, women represented 67.5% in 2023 (compared to 72.2% in 1995)." Available at: https://www.wto.org/english/thewto_e/secre_e/dei_e.htm

[26] Dr. Ngozi Okonjo-Iweala was reappointed by the General Council of the WTO by consensus on 29 November 2024 for a second four-year term, set to begin on 1 September 2025. Available at: https://www.wto.org/english/news_e/news24_e/gc_29nov24_e.htm

[27] See *WTO Action Plan on Trade and Gender 2021-2026*. Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/action_plan_21-26.pdf

[28] *Aid for Trade* is the WTO's development policy to support and integrate developing and least-developed countries into world trade. See more at: https://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm

[29] Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/gender_research_hub_e.htm

in Regional Trade Agreements (RTAs)[30]. In 2022 the WTO also launched the *Trade&Gender 360° Stra*tegy, a capacity-building program on trade and gender for government officials[31], and the WTO hosted its first *Congress on Trade and Gender*[32]. In 2024, during the 14th Ministerial Conference in Abu Dhabi, the Secretariat together with the International Trade Center (ITC) launched the Women Exporters in the Digital Economy (WEDE) fund to support financially and technically women traders[33]. Overall, the policies and initiatives aim at identifying which are the barriers that limit women's participation in trade, and to promote female entrepreneurship through technical and financial assistance in an environment of cooperation and sharing of best practices.

Furthermore, at a normative level, through a successful plurilateral initiative, for the first time in a WTO regulation it was included explicit women-related provisions. According to the provisions of the *New Services Domestic Regulation*[34], when a member adopts or maintains measures relating to the authorization for the supply of a service, including financial ones, it shall ensure that "such measures do not discriminate between men and women"[35], taking into consideration that "differential treatment that is reasonable and objective, and aims to achieve a legitimate purpose, and adoption by Members of temporary special measures aimed at accelerating de facto equality between men and women, shall not be considered discrimination for the purposes of this provision."[36] This very important inclusion, which provides for an amendment to the GATS schedule for certification at the WTO for those members that have joined the initiative, is doubly important, both from a normative point of view and considering it will be applied in a sector in which a significant number of women is involved as entrepreneurs and employees[37].

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[30] "Database on gender provisions in RTAs". Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/gender_responsive_trade_agreement_db_e.htm

[31] "Capacity building on trade and gender for WTO members", available at: https://www.wto.org/english/tratop_e/womenandtrade_e/ta_trade_and_gender_e.htm#:~:text=It%20is%20part%20of%20the,women%20entrepreneurs%2C%20researchers%20and%20parliamentarians.

[32] Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/detail_wtc_gender_22_e.htm

[33] Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/weide_e.htm

[34] Joint Initiative on Services Domestic Regulation. Reference paper on Services Domestic Regulation, INF/SDR/2 26 November 2021, WTO [hereinafter *New Services Domestic Regulation*]. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/SDR/2.pdf&Open=True

[35] New Services Domestic Regulations, Section II, 22 (d) and Section II, 19 (d).

[36] Idem, footnotes 18 and 33.

[37] According to the World Bank-WTO report, "in 2021, 59% of employed women globally worked in the sector, up from 44% in 2000. In contrast, services accounted for 45% of total male employment in 2021." Available at: https://www.wto.org/english/tratop_e/serv_e/jsdomreg_e.htm

Overall, the concern with women's economic empowerment has been gradually acknowledged by WTO members in a multilateral basis, as the Declarations of the last two Ministerial Conferences demonstrate. At the 12th Ministerial Conference in Geneva, WTO members expressly recognized the importance of women's economic empowerment and the work of the WTO in this field.[38] In 2024, during the 13th MC in Abu Dhabi, WTO members devoted a more extensive paragraph to acknowledge that "women's economic empowerment and women's participation in trade contributes to economic growth and sustainable development. We take note of WTO work, including in collaboration with other relevant international organizations, through activities such as capacity-building initiatives and sharing experience to facilitate women's participation in trade."[39]

Interesting to note that all these advancements in WTO policy and law towards women economic empowerment have been done without the need of new "hard law" or consensus of all WTO members, but through an active position of the Secretariat in partnership with non-state actors, and through plurilateral initiatives of like-minded WTO members.

2. Women-related provisions in free trade agreements

In parallel to the insider women's revolution in the WTO, the most advanced legal provisions concerning women's economic empowerment have been included in free trade agreements (FTAs)[40], bringing similarities in their structure, language and cooperation activities. In general, the most advanced provisions reaffirm the parties' commitments to the main international instruments on women's rights - making reference to the 5th SDG, to the WTO Buenos Aires Declaration, to the BDPA, to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[41], and to the core ILO conventions on gender equality - and are drafted without legally binding expressions and without enforcement mechanisms. As environmental clauses, they include non-regression clauses on women's rights and the right of the parties to regulate on the issue.

At present, the trade agreements considered to be the most advanced in terms of women's empowerment provisions are those led by Chile, Canada and New Zealand, which in 2020 also launched an initiative called *The Global Trade*

[38] WTO, 12th Ministerial Conference (MC12) Outcome Document, 22 June 2022, WT/ MIN (22)/24, WT/L/1135, para. 13

[39] Abu Dhabi Ministerial Declaration, 02 March 2024, WT/MIN(24)/DEC. para. 16.

[40] For the purposes of this contribution, it was also considered non-reciprocal bilateral trade agreements between developed and developing countries.

[41] *Convention on the Elimination of all Forms of Discrimination Against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

and Gender Arrangement (GTGA)[42], a soft law instrument devoted to "promote mutually supportive trade and gender policies in order to improve women's participation in trade and investment". Although the European Union (EU) has not joined the initiative[43], it has also started to include specific chapters or sections dedicated to women in its FTAs.

The first agreement to provide for a stand-alone chapter on the matter was the Chile-Uruguay FTA[44], concluded in 2016 even before the WTO Buenos Aires Declaration. It provided for a "Gender and Trade" chapter[45] serving as a model for the next ones that followed it. It is divided in six sessions: *1. General Provisions; 2. International Conventions; 3. Cooperation Activities; 4. Gender Committee; 5. Consultations and 6. Non-application of Dispute Resolution*. The modernised FTA between Chile and Canada that entered into force in 2019[46] followed the structure of the Chile-Uruguay, with some modifications and relevant content additions, making explicit reference to the 5th SDG, to the OECD Guidelines for Multinational Enterprises[47] and to the CEDAW. The cooperation activities were enlarged to improve, i.a., the capacity and conditions for women workers, businesswomen and entrepreneurs, adding skills to reach senior levels in all sectors of society (including in corporate boards), science, technology, engineering, mathematics (STEM) and business, and open to the interaction with non-governmental stakeholders[48]. The chapter also establishes a committee on trade and gender and contact points, but excludes the chapter from the dispute settlement mechanism[49], stating that "the parties shall make all possible efforts through dialogue, consultation and cooperation to resolve any matter that may arise with regard to the interpretation and application of [the trade and gender] chapter".[50] The Chile-Canada FTA also added an article stating

[42] Text of the *Global Trade and Gender Arrangement* available at: https://international.canada.ca/en/services/business/trade/policy/inclusive/action-group/arrangement See a commentary about it on International Institute for Sustainable Development. *GTGA: The Global Trade and Gender Arrangement decoded.* Available at: https://www.iisd.org/articles/deep-dive/global-trade-and-gender-arrangement

[43] The States that joined the initiative at the moment of writing are "Mexico (October 2021), Colombia (June 2022), Peru (June 2022), Ecuador (May 2023), Costa Rica (May 2023), Argentina (October 2023), Australia (February 2024) and Brazil (February 2024)." Available at: https://international.canada.ca/en/services/business/trade/policy/inclusive/action-group/arrangement

[44] Chile-Uruguay Free Trade Agreement, signed on 4 October 2016, entered into force on 13 December 2018 [hereinafter *Chile-Uruguay FTA*].

[45] Chapter 14 of the Chile-Uruguay FTA.

[46] The modernized Canada-Chile Free Trade Agreement (CCFTA) entered into force on 5 February 2019.

[47] The guidelines were updated in 2023. See *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD Publishing, Paris, 2023.

[48] Article N *bis*-03, Chile-Canada FTA.

[49] Article N *bis*-06, Chile-Canada FTA.

[50] Article N *bis*-05 Chile-Canada FTA.

that in the event of inconsistency between the trade and gender chapter and the labour cooperation agreement existent between the parties, the latter shall prevail[51].

In 2019 also entered into force the modernised FTA concluded between Canada and Israel[52] in which it was included a stand-alone chapter on trade and gender that is very similar in structure, content, commitments and cooperation activities to the Canada-Chile FTA, but conversely, in the agreement with Israel, the parties have the possibility to submit conflicts that may arise in the implementation of the trade and gender chapter - "they may agree to submit" - to the dispute settlement provided for in the agreement if prior consultations fail.[53] Because of the possibility of enforcement, the gender-related provisions in the Canada-Israel FTA can be considered the most advanced of their kind in this respect.

It is also noteworthy to mention the FTA concluded in 2022 between the New Zealand and the United Kingdom (NZ-UK FTA)[54], that besides several provisions related to gender equality and women empowerment across the agreement, provides for a very comprehensive "Trade and Gender Equality" chapter addressed to be applied across all the provisions of the agreement, that comprehends an extensive list of cooperation activities, but that is also not subject to the dispute settlement mechanism provided for the agreement[55].

The EU, after the European Parliament (EP) Resolution *Gender Equality in EU Trade Agreements*[56] issued in 2018, updated the content of its of FTAs to include explicit provisions devoted to gender equality and women economic empowerment. The first inclusion came in the FTA with New Zealand, which had negotiations concluded on 30 June 2022 and is in force since 1 May 2024.[57] The provisions were included in a specific section named *Trade and Gender* (Article 19.4) within the Trade and Sustainable Development (TSD) chapter[58], presenting similarities with the structure of the previous agreements aforementioned. The provision also guarantees the right of the Parties to regulate,

[51] Article N *bis*-07 Chile-Canada FTA.
[52] Protocol Amending the Free Trade Agreement Between the Government of Canada and the Government of the State of Israel [hereinafter Canada-Israel FTA], signed on 28.05.2018, in force since 01 September 2019.
[53] Article 13.6 Canada-Israel FTA.
[54] Free Trade Agreement between New Zealand and the United Kingdom of Great Britain and Northen Ireland, signed on 28 February 2022, in force from 31 May 2023[hereinafter NZ-UK FTA].
[55] Art. 25.8 of the NZ-UK FTA.
[56] European Parliament Resolution: Gender Equality in EU Trade Agreements. Official Journal of the European Union, C 162/9.
[57] Free Trade Agreement between the European Union and New Zealand, OJ L, 2024/866, 25.3.2024. [hereinafter EU-New Zealand FTA]
[58] Chapter 19 of the EU-New Zealand FTA.

in accordance with their respective laws and policies regarding gender equality and equal opportunities for women and men, and it provides a broad and non-exhaustive list of cooperation activities to increase women's participation in international trade and to promote women's participation, leadership and education, particularly in areas where women are traditionally underrepresented, such as science, technology, engineering and mathematics (STEM), as well as innovation, e-commerce and other fields related to trade. It also mentions the need to promote financial inclusion, financial literacy and access to trade finance and education, as well as information regarding measures relating to licensing requirements and procedures, qualification requirements and procedures, or technical standards relating to authorisation for the supply of a service that do not discriminate based on gender[59].

A very relevant innovation in the EU-New Zealand FTA, that differentiates it from the previous EU FTAs of new generation, is that the TSD chapter is subject to the general dispute settlement mechanism (DSM) for settling disputes arising from the agreement (in previous EU FTAs, the TSD chapter had its own separate DSM)[60]. This approach was in accordance with the Commissions' Communication issued on 22.06.2022[61] (one week before the conclusion of the negotiations). However, the application of temporary measures in case of non-compliance with a panel report is only possible pursuant violation of multilateral labour standards or agreements, or for an action or omission that materially defeats the object and purpose of the Paris Agreement.[62] Hence, only women-related provisions comprised in core multilateral labour standards can be subject of trade sanctions as measures of last resort.

Conversely, in the modernised FTA with Chile, with negotiations concluded just after 6 months of the EU-New Zealand and that is in force from 1 February 2025[63], the EU adopted a different approach and included a stand-alone chapter on *Trade and Gender* (Chapter 27) - separated from the TSD chapter, following

[59] Article 19.4, para. 8, EU-New Zealand FTA.
[60] The EU-New Zealand FTA is the first of the new generation of EU FTAs to include a compliance mechanism for TSD provisions. In previous EU FTAs, starting with the one with South Korea, there was a specific dispute settlement mechanism in the TSD chapter, which has been considered a "medium" or "balanced" approach compared to other DSMs, requiring the parties to use their best efforts to implement the recommendations issued by an *ad hoc* Panel of experts (entitled to solve the issue by the Parties' request when consultations failed) without the possibility of applying sanctions in case of non-compliance.
[61] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. The power of trade partnerships: for green and just economic growth. Brussels, 22.6.2022 COM (2022) 409 final.
[62] Article 26.16 (2), EU-New Zealand FTA.
[63] Interim Agreement on trade between the European Union and the Republic of Chile ST/11668/2023/INIT, OJ L 2024/2953, 20.12.2024 [hereinafter EU-Chile Advanced Trade Agreement]. Available at: https://eur-lex.europa.eu/eli/agree_internation/2024/2953/oj/eng

Chile's approach on the agreements it concluded with Uruguay[64], Canada[65], Argentina[66], Brazil[67]and Ecuador[68]. The structure of the chapter indeed has a very similar structure to the previous FTAs concluded by Chile but can be considered more complete in terms of content and dispute settlement. The agreement expanded the already extensive list of cooperation provisions present in the EU-New Zealand FTA, bringing more activities in sharing experiences and best practices on policies and programmes to increase women's participation in international trade, addressing the situation of women as labours, entrepreneurs, traders, including the needs of mothers and caregivers.[69] However, different from the EU-New Zealand FTA, and different from the other FTAs concluded by Chile, the EU-Chile modernised FTA stipulates that issues arising from the *Trade and Gender Equality* chapter must be solved under the specific dispute settlement mechanism set up in the TSD chapter[70], which follows the EU's traditional approach on disputes arising from the TSD chapter[71], enabling for consultations, and in case it fails for an adjudication procedure by a Panel of experts, entitled to issue recommendations according to which the parties must take their *best efforts* to implement, without the possibility to suspend concessions in case of non-compliance. In this case the TSD Committee also has the role of monitoring the implementation of the panel's report[72].

After the agreement with Chile, the EU concluded on 19 June 2023 an Economic Partnership Agreement with Kenya (EU-Kenya EPA), in force from

[64] Chile-Uruguay Trade Agreement (2016), into force on 13.12.2018.
[65] Modernized Canada-Chile Free Trade Agreement (2017), entered into force on 05.02.2019.
[66] Chile-Argentina Free Trade Agreement (2016), entered into force on 01.05.2019.
[67] Chile-Brazil Free Trade Agreement (2018), entered into force on 25.01.2022.
[68] Trade Integration Agreement between Chile and Ecuador (2020), entered into force on 16.05.2022
[69] EU-Chile Article 27.4 (5).
[70] Article 27.6, EU-Chile Advanced Framework Agreement.
[71] Apart from the special model included in the EU-New Zealand FTA, dispute settlement mechanisms in FTAs has followed three different approaches of DSM: a cooperative approach, which encourages parties to resolve disputes amicably and solely through diplomatic means (the Canada-Chile FTA has followed this approach with regard to trade and gender provisions); a sanctions-based approach, which resolves the matter through binding decisions by a panel of arbitrators, backed up by trade sanctions in case of non-compliance (considered the USMCA's model); and a mixed procedure whereby an attempt is first made to resolve the dispute amicably through intergovernmental consultations, and whether consultations fail, the matter is referred to a panel of experts competent to issue recommendations according to which the Parties must make their best efforts to implement, without the possibility of imposition of sanctions in case of non-compliance with the panel's report. See also VELUT JEAN-BAPTISTE ET AL. *Comparative Analysis of TSD Provisions for Identification of Best Practices to Support the TSD Review*. London School of Economic (LSE), September 2021.
[72] Idem. Article 26.22 (16). "If the Panel of Experts finds in the final report that a Party has not conformed with its obligations under this Chapter, the Parties shall discuss appropriate measures to be implemented taking into account the report and recommendations of the Panel of Experts. (…)"

July 2024[73], that differently from the trade agreement with Chile, does not contain a *Trade and Gender* chapter, but a section inside the TSD chapter (Article 4 of Annex V), as the EU-New Zealand FTA. With Kenya, there is just a general provision on cooperation activities, and the language regarding the right to regulate is more prescriptive, stating that "Each Party shall strive to ensure that its relevant law and policies provide for, and encourage, equal rights, treatment and opportunities between men and women. Each Party shall strive to improve such law and policies, without prejudice to the right of each Party to establish its own scope and levels of protection for equal opportunities for men and women".[74] Moreover, the EU-Kenya EPA provides for what has been considered a strict TSD chapter, since it is subject to specific and enforceable dispute settlement mechanism[75], which comprise an arbitration Panel in case consultations fail.[76]However, as in the traditional model of EU-FTAs, non-compliance with a panel's report relating to a subject under the TSD chapter does not trigger the possibility to apply temporary remedies[77]. Even though, under the terms of the agreement, no later than twenty-one days after the date of the arbitration panel ruling, the Party complained against shall inform its Domestic Advisory Groups (DAGs)[78] of the compliance measures it has taken or intends to take in response to the arbitration panel ruling, and the TSD Committee is also responsible for monitoring the implementation of the compliance measures, taking into account the observations of the DAG.[79] In case "there is a disagreement between the Parties as to whether the Party complained against has brought itself into compliance with the provisions of this Agreement, either Party may request in writing the arbitration panel to rule on the matter."[80]

These new chapters have mostly adopted the language "trade and gender" or "trade and gender equality". The only agreement - not yet ratified - that

[73] Economic Partnership Agreement between the European Union, of the one part, and the Republic of Kenya, member of the East African Community, of the other part ST/13573/2023/INIT, *OJ L, 2024/1648, 1.7.2024* [hereinafter *EU-Kenya EPA*].Available at: https://eur-lex.europa.eu/eli/agree_internation/2024/1648/oj/eng

[74] Annex V, Art. 4.4 of the EU-Kenya EPA.

[75] Article 16.2, EU-Kenya FTA "In case of a disagreement between the Parties regarding the application of this Annex, the Parties shall have recourse exclusively to the dispute resolution procedures established pursuant to Articles 17 and 18 of this Annex."

[76] Annex X, Article 18 of the EU-Kenya EPA.

[77] The possibility to apply article 117 [Temporary Remedies in case of Non-Compliance] of the EU-Kenya EPA in case of non-compliance with the panel report under the TSD chapter is not mentioned in Annex V.

[78] About the role and composition of the DSA, see https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/transparency-eu-trade-negotiations/domestic-advisory-groups_en

[79] Annex V, Article 18.6 and 18.7 of the EU-Kenya EPA.

[80] Art. 116 (3) of the EU-Kenya EPA is applicable to the TSD chapter according to Annex V, Art. 18 (1).

employed the term "Trade and Women's Economic Empowerment" is the new political agreement reached by the EU and Mercosur countries on 06 December 2024[81], after the re-opening of negotiations' that followed the opposition of the European Parliament (EP) to sign the previous "agreement in principle" reached in 2019, demanding for additional sustainability guarantees and enforcement mechanisms to the TSD chapter[82]. In addition to other renegotiated trade issues, the Commission presented an Annex to the TSD chapter in which were included women-related provisions in a very different way from the previous "trade and gender" chapters mentioned above. Besides including the goal of empowering women in the general preamble of the Annex, the instrument provides for a section on "Trade and Women's Economic Empowerment" focused on women's economic growth and capacity building. Indeed, the language, format and scope of the provisions are written in totally different structure, and the term "gender" is not mentioned neither once. The section also does not make specific reference to the UN 2030 Agenda, but states in a more general way that "Each Party shall strive to ensure that its relevant law and policies provide for, and promote, equal rights, treatment and opportunities for women and men", respecting their rights "to establish its own scope and levels of protection for equal opportunities for women and men" in a way that "shall be consistent with each Party's commitments to relevant international agreements, including the Convention on the Elimination of all Forms of Discrimination Against Women". Surprisingly, EU-Mexico Trade Agreement, with negotiations concluded on 17 January 2025[83], did not provide for women-related or gender-related provisions[84],

[81] "EU and Mercosur reach political agreement on groundbreaking partnership". Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6244

[82] Although recognizing all the benefits provided for the agreement, the EP concluded that it could not be ratified: "36. Stresses the importance of the recently concluded modernisation of the EU-Mexico association agreement and the conclusion of the Mercosur association agreement, which both have the potential to deepen our strategic partnership with Latin America, to create additional opportunities in our trade relations with those countries, and to help diversify supply chains for the European economy; considers that the association agreement between the EU and Mercosur represents the largest 'bloc to bloc' deal of its kind and has the potential to create a mutually beneficial open market area encompassing approximately 800 million citizens; points out that this agreement, like all EU trade agreements, must ensure fair competition and guarantee that European production standards and methods are upheld; points out that the agreement contains a binding chapter on sustainable development that must be applied, implemented and fully assessed, as well as specific commitments on labour rights and environmental protection, including the implementation of the Paris climate agreement and the relevant implementing rules; emphasises that the EU-Mercosur agreement cannot be ratified as it stands; (…) European Parliament resolution of 7 October 2020 on the implementation of the common commercial policy – annual report 2018 (2019/2197(INI))

[83] Text of the "agreement in principle" available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement_en

[84] The TSD chapter just addresses women and gender in a generic way regarding the ILO decent work agenda in the TSD chapter - Art. 3 and art. 13 (e)- as did the previous EU FTAs of new generation from the EU-South Korea FTA signed on 6 October 2010.

demonstrating a considerable lack of coherence in addressing women empowerment provisions through the new EU FTAs under negotiation.

3. Concluding remarks

The advancement of women empowerment policies and programs within the WTO has been done in a 'female'[85] way, through diplomacy, cooperation and dialogue, gaining space gradually mainly due to the protagonist role of the WTO Secretariat (whose staff's majority is female) and the participation of non-State actors. At the same time, WTO members committed to women's empowerment have included women-related provisions in their new free trade agreements, starting with the Chile-Uruguay FTA in 2016. Indeed, Chile, Canada, New Zealand, and more recently the EU have contributed to the expansion of these provisions in FTAs, although not always in a consistent manner with all their trading partners.

Overall, the increase in the participation of women in international trade and the evolution of the women-related provisions in trade agreements are notable, even though it has been carried out without a common standard and predominantly using a cooperative approach, without enforcement mechanisms to deal with possible controversies or disputes. It seems that also in trade, women can conquest more space and strive without the need of the use of force. However, its effectiveness requires a coherent trade policy that despite cultural diversities and ideologies does not neglect fundamental women's rights and that embraces the common goal of women's economic empowerment, promoting greater cooperation between trading partners to achieve this objective.

[85] The term is not used to reinforce a stereotype, but to make reference to the gendered binary dichotomy framed by feminist international legal scholars, according to which international law, the use of force, and the idea of State is constructed as 'male', and one of the feminist strategies is "to undermine the centrality of the state in international law." Charlesworth, Hilary, and Christine Chinkin. *The Boundaries of International Law: a Feminist Analysis with a New Introduction*. Manchester university press, 2022, p. 125-169.

Navigating Global Shifts: Analysing the EU Open Strategic Autonomy and its Nexus with Sustainable Development

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1. Introduction

As stated by the European Parliament, Strategic Autonomy «*refers to the capacity of the EU to act autonomously – that is, without being dependent on other countries – in strategically important policy areas. These can range from defence policy to the economy and the capacity to uphold democratic values*»[1]. The rise and development of this concept has been induced by shifts in global dynamics caused by the fading of the rule-based, liberal and multilateral international order premised on US hegemony. The advent of a multipolar world, in which power politics is on the rise, along with a transformation of the global economic structure, prompted the European Union (EU) to reconsider its own security and defence capabilities, as well as its approach to globalisation. The notion of strategic autonomy, first developed in defence policy, has then evolved into 'Open Strategic Autonomy', spreading to other policy sectors and encompassing the internal and external dimensions of EU policies. Open strategic autonomy refers to an approach that aims to combine the objective of strengthening the EU's strategic autonomy with a commitment to multilateralism, international cooperation and openness to global partners and

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[1] Briefing of the European Parliament, *EU strategic autonomy 2013-2023. From concept to capacity*, 2022.

allies, so as to promote European institutions and values. In this regard, the nexus between open strategic autonomy and the advancement of sustainable development has emerged prominently. These two objectives, though complementary, require careful navigation and precise strategic planning. Hence, this paper will first analyse the rise and expansion of open strategic autonomy in the European policy discourse, examining how the international context has influenced this process. After having devised the principle of sustainability in the framework of EU policies, this paper will then focus on the intersections between the advocacy of sustainable development interests and the quest for open strategic autonomy. It will explore how the EU is addressing this challenge, trying to reconcile its ambition to become an environmentally responsible global player while preserving its strategic independence. The Strategic Foresight Report 2023[2] has highlighted the connections between the two concepts, identifying a number of key issues that need to be addressed. Amidst these questions, this paper will steer its attention towards two sensitive themes. In the first place, it will discuss how, in an era where the international order is evolving towards a multipolar system, the EU can advance sustainability. In its external action, the EU can use a broad spectrum of measures aligned to sustainability goals, namely a new trade policy strategy carried out through trade agreements embedding sustainability clauses, a fostered support for sustainable development initiatives in developing countries and meaningful action in international fora that may bolster international cooperation. Secondly, it will analyse the endeavour to attain a net-zero economy while pursuing open strategic autonomy. This mandates an enhancement of the single market, achieved by revitalizing industrial policies and strengthening value chains and critical infrastructures. Additionally, the success of a net-zero economy hinges on promoting equitable market conditions that ensure a uniform application of environmental regulations and reinforcing sustainability within corporate governance.

2. Why the EU needs a strategic autonomy? The origin of the concept and the transformation of the international system

The notion of strategic autonomy, as intended in its core meaning of operational capacity to ensure autonomously its security, was always present, albeit with different intensities, throughout the integration process. The first attempts to attain such a goal date back to the 1950s, when the proposed

[2] Communication from the Commission to the European Parliament and the Council, 2023 Strategic Foresight Report: Sustainability and people's wellbeing at the heart of Europe's Open Strategic Autonomy, Doc. COM/2023/376 final.

institution of a European Community of Defence (CED) failed because of the French opposition, resulting thereafter in the significantly less ambitious Western European Union, incorporated in NATO. In the following decades, the European Community thrived under the American security umbrella, becoming the most integrated area of the world and emerging as a longstanding advocate of a rule-based order based on multilateralism. In the initial post-Cold War era, the EU began to reevaluate its role in the world. The dissolution of the Soviet Union and the changing global landscape prompted the EU to consider its own security and defence capabilities. The notion of strategic autonomy was pulled out again in France as a foreign policy tool to express the desire to prevent dependency on the United States[3]. Nonetheless, European nations, despite occasional disagreements with the US (as exemplified by the US-led war in Iraq), did not earnestly consider developing the capabilities, decision-making structures, or strategic culture for autonomous protection[4]. In the post-Cold War period, which coincided with the peak of US hegemony leading a unipolar world, European security continued to be safeguarded by the United States within NATO's collective defence. During this period the EU was committed to playing an active role in expanding the liberal international order, leveraging soft power to support regional cooperation, deepening its expansion towards Eastern Europe, advocating for international norms, and addressing diverse issues like trade, climate, energy, and human rights[5]. On the economic side, the EU has set up its Economic and Monetary Union upon the tenets of the Washington Consensus[6], whose key assumptions included macroeconomic stability, market-oriented reforms, fiscal discipline, privatisation and financial liberalisation. As such, EMU needed to ensure that the social aims enshrined in the EU Treaties did not conflict with the objectives of stable money and international competitiveness. Upon this neoliberal dogma, The EU's commitment to extensive market liberalisation became evident, with any indication of EU-level economic governance mechanisms being viewed as a potential interference with the single market.

During the 2000s, the international system as described started to fade, along with a transformation of the global economic landscape. As the decade unfolded, the ascent of emerging powers, notably China, initiated a shift towards a more

[3] J. HOWORTH, *The CSDP in Transition: Towards 'Strategic Autonomy'? Governance and Politics in the Post-Crisis European Unio*n, pp. 312-329, 2020.
[4] N. TOCCI, *European Strategic Autonomy: what it is, why we need it, how to achieve it, in Istituto Affari Internazionali*, 2021.
[5] IDEM.
[6] The term 'Washington Consensus' was coined by economist John Williamson in 1989, and was advocated by international financial institutions such as the International Monetary Fund (IMF) and the World Bank.

multipolar system. The BRICS nations – Brazil, Russia, India, China, and South Africa – rose in prominence, challenging the traditional Western hegemony. Simultaneously, the global economic structure started to shift. The rapid economic growth of Asian nations, particularly China, played a pivotal role in reshaping the global economic landscape and solidifying China's status as a major economic player. Albeit the US still retains the capability to exert influence globally, including militarily, it no longer holds undisputed hegemony in the international system, as it finds itself on equal footing with, and potentially surpassed by, China on various fronts. In this context, starting from the Obama administration, the US has been recalibrating their foreign policy priorities, moving towards a more selective approach. In other terms, the US are willing to engage only when its interests are at stake. This new attitude entailed an increased focus on the Indo-Pacific region, where it intends to contain Chinese expansionism. Thereafter, the Trump administration showed a reawakening of isolationist tendencies, going so far as to consider the EU a dangerous trade rival. In addition to this event, there was the Brexit, which implied the withdrawal of the country that, more than any other, had hitherto opposed initiatives related to the common defence. In the same period, we have also observed a growing competition between democracies and autocracies, as proven by Russia's escalating aggression in Eastern Europe, notably exemplified by invasions into Ukraine in 2014 and 2022, and the assertiveness of China under Xi Jinping, reflected in initiatives like the 'Road and Belt Initiative'. The combination of all these factors has led to a disruption of internal balances and objectives within the Euro-Atlantic community and NATO, demonstrating how the European Union's integration process in the security dimension is closely interdependent with the evolutionary trajectory of NATO, itself linked to the strategic orientation of the United States[7]. Under such circumstances, Europeans started acknowledging the vulnerability of the EU as it risks becoming a geopolitical arena for global powers in an increasingly geopolitics-driven world[8]. In 2019, Dutch Prime Minister M. Rutte stated that "*the shift away from a US-led international order towards a multipolar world was set in motion long before President Trump took office. In reality, for some years now, the rise of China and the return of Russia to the world stage have had an enormous impact on world politics. It's not just the "America first" policy that Europe must find ways to deal with. We are also witnessing a chain of action and reaction, with Russia, China, India, Turkey, Brazil and many other countries putting their country first.*

[7] The Russian full-scale attack on Ukraine has once again prompted NATO to concentrate on the tasks of defence and deterrence, particularly on the Alliance's eastern flank.
[8] J. MIRÓ, *Responding to the global disorder: the EU's quest for open*, in *Global Society*, pp. 315-335, 2023.

So, my key message today is this: the EU needs a reality check; power is not a dirty word"[9]. The new outlook of the international system thus forced the EU to consider its strategic autonomy as a necessity, notably in the EU's neighbouring areas, such as Africa and the Middle East, where the US is withdrawing its engagement, as well as in the most significant transnational challenge of our era, such as climate and migration.

Likewise, recent international crises have accelerated the awareness of the need for a rapid twin transition of the European economy, green and digital, which at the same time can ensure the full competitiveness of its industry vis-à-vis international competitors and promote the creation of quality, long-term jobs. The targets pursued through the new European industrial policy, which seems to be moving away from classic market liberalisation towards more explicit steering of the economy, are indeed based on the evolving international and geopolitical context[10]. The current situation, defined as 'polycrisis'[11], has shown the vulnerability of European industry and the lack of autonomy in strategic sectors, as well as the fragility of global supply chains that have been undermined by the trade blockage caused by the pandemic. In 2021, the European Council's President Michel affirmed: "*We will reduce dependencies and achieve resilience in areas such as energy, digital, cyber security, semi-conductors, industrial policy, trade and reinforcing the Single Market"*[12]. Through the implementation of the new industrial policy, the Union wishes to act independently from the global superpowers and desires to become such a power itself, capable of exerting influence on global affairs commensurate with its economic weight[13]. The focus of the update is on reducing the Union's technological and industrial gap and dependencies, which prevent it from playing a leading role in technological innovation and from being self-sufficient, particularly in critical situations and emergencies. As will be discussed in the next section, the abovementioned concerns have prompted the expansion of Strategic Autonomy to other policy sectors than just defence policy. To sum up, at least five significant changes, whether realized or potential, directly affect the outlook for European strategic autonomy. These include the decline of the liberal international order, the regionalization of security dynamics, the anticipated

[9] M. RUTTE, *The EU: From the Power of Principles Towards Principles and Power*, in *Churchill Lecture by PM Mark Rutte*, 2019
[10] I. BEGG, *One Instrument, Many Goals: Some Delicate Challenges Facing the EU's Recovery Fund*, in *Cesifo Forum*, 2021.
[11] World Economic Forum, *This is why 'polycrisis' is a useful way of looking at the world right now*, 2023.
[12] Oral Conclusions drawn by the president of the European Council Charles Michel following the informal meeting of the Members of the European Council in Brdo pri Kranju (Slovenia), 2021.
[13] I. BEGG, "*op. cit.*"

development of political and potentially military competitions within regional areas, the expected shift of the global political and economic centre towards the Indo-Pacific with the competition between the United States and China, and the uncertain impact of this competition on the dynamics and alignments of other regions[14].

3. The development of European strategic autonomy in the broader spectrum of EU policies.

According to Charles Michel, President of the European Council, "*European strategic autonomy is goal number 1 of our generation […] the strategic independence of Europe is our new common project for this century*"[15]. The concept of strategic autonomy started to gain momentum in the 2010s, becoming an ever-greater key consideration for the EU[16]. The term was first devised by the December 2013 Foreign Affairs Council of the European Union in reference to security and defence. On that occasion, the Council welcomed the member states' request to stimulate a debate on critical areas for European defence (military, technological, industrial) and to reinvigorate internal cohesion. Strategic autonomy became central to the European debate in 2016, in the aftermath of Brexit, when the former High Representative for Foreign Policy Mogherini made it the cornerstone of the Union's Global Strategy[17]. At the time, reference was made to strategic autonomy, especially in the field of defence. Later on, the EU Implementation Plan on Security and Defence defined it as the EU's ability to act in security and defence together with partners when it can, alone when it must[18]. In the subsequent years, the pronouncements made by Brussels in its Global Strategy were not left unfulfilled. Instead, the Union notably expedited the process of military integration, and member states demonstrated their capability to effectively implement various initiatives. In 2017, the EU launched the Permanent Structured Cooperation (PESCO)[19] to foster integration and cooperation among member states in the Common

[14] A. COLOMBO, *I limiti dell'autonomia strategica europea*, in M. MAZZIOTTI, *Ambizioni e vincoli dell'autonomia strategica europea. Aspetti politici, operativi e industriali, Osservatorio di Politica Internazionale*, 2023.

[15] Speech by the President of the European Council Charles Michel at the Bruxelles Economic Forum, Recovery Plan: Powering Europe's Strategic Autonomy, 2020.

[16] *Will 'Strategic autonomy 3.0' deliver?*, edited by D. SCHMID, S. LAVERY, in *Social Europe*, 2023.

[17] Council of the European Union, *A Global Strategy for the European Union's Foreign and Security Policy*, 2016. According to the document, autonomy was necessary "to promote the common interests of our citizens, as well as our principles and values".

[18] Council of the European Union, *Implementation Plan on Security and Defence,* Doc. 14392/16.

[19] Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, 2017.

Security and Defence Policy (CSDP). Subsequently, in 2018, the European Defence Fund (EDF)[20] was created to drive competitiveness and innovation in the sector. The Strategic Compass (SC), published in 2022[21], outlines mid-term objectives (2030) and specifies the capabilities that the Union should develop to achieve them, updating priorities from the European Union Global Strategy (EUGS). In this context, divergent perspectives have shaped the debate on strategic autonomy. France leans towards greater EU autonomy from NATO, perceiving autonomy as a tool to extend its influence and emphasizing the preservation of national sovereignty, while Italy and Germany favour a collaborative approach within NATO, with Italy advocating for a more active European role globally[22]. Italy rejects the idea of a common European army but supports deeper integration within NATO. Additionally, there's a disagreement on the territorial and sectorial scope of autonomy, with France and Germany favouring a limited European neighbourhood, and Italy proposing an extension to the broader Mediterranean and sub-Saharan Africa, areas seen as strategically vital[23].

Afterwards, the concept of strategic autonomy gained widespread prominence in EU policy discussions, extending beyond the realm of security to encompass areas such as trade, economic policies, advanced technologies, energy security, climate change, financial governance, digital sovereignty, telecommunications, external action, and diplomacy. How could such an expansion have occurred? Behind such a phenomenon lies an increased geopoliticization of international economic interdependences and global politics[24]. The need for an expanded European strategic autonomy arises from the unprecedented connectivity of our age, where the challenges posed by the new multipolar order have called for a reassessment of the EU's attitude towards globalisation and world economic governance. The latter was questioned by the 'geopoliticization of trade'[25] following the Great Recession and the pandemic. This departure from the envisioned borderless world governed by multilateral rules challenges the EU's traditional approach to global governance. Instead of the hyper-globalization discourse prevalent in the 1990s, the second decade of

[20] Regulation (EU) 2021/697 of the European Parliament and the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092, in OJEU L 170 of 12.05.2021.
[21] European External Action Service, *A strategic Compass for Security and Defence,* 2022.
[22] *Tre modi di guardare all'autonomia strategica europea: un confronto tra Italia, Francia e Germania*., edited by E. BELARDINELLI, D. NATALE, in M. MAZZIOTTI, *Ambizioni e vincoli dell'autonomia strategica europea*, *Osservatorio di Politica Internazionale,* 2023
[23] E. BELARDINELLI, D. NATALE, "*op. cit.*"
[24] J. MIRÓ, "*op. cit.*"
[25] *The Geopolitization of European Trade and Investment Policy*, edited by S. MEUNIER, K. NICOLAIDIS, in *Journal of Common Market Studies*, pp. 103-113, 2019

the twentieth century saw major powers weaponizing trade for national advantages, leading to the emergence of rival regional blocs[26]. While international economic integration persists, state interactions are increasingly influenced by geopolitical considerations, resulting in a 'conflictive integration'[27]. This new landscape involves a deviation from the neoliberal principles guiding the EU since the set-up of the Single Market, prompting a strengthened public intervention at the EU level at the expense of the free market. To this extent, criticism towards the notion of strategic autonomy concerns its capacity to fuel protectionism. Such a risk is highly perceived by the neoliberal faction inside EU institutions, for which the efficiency of the free market, as well as internal and external liberalisation, still represent a top priority. This doctrine has been contested by the neo-mercantilist and social factions[28] inside EU institutions. The former aims to boost European companies' competitiveness, even if it means distorting markets with protectionist measures. They support strategic protections while maintaining engagement in the global economy. Conversely, the socially oriented faction prioritizes building market-correcting institutions at the European level, emphasizing social, environmental, and human rights protections, even if these measures constrain markets or impact European companies. In this regard, a renegotiation of the European 'embedded neoliberal compromise'[29] was reached, resulting in a new doctrine of 'qualified openness'[30].

Hence, the concept has slightly changed into 'Open Strategic Autonomy'[31], an expression used by the Commission to position itself somewhere in between its natural predilection for free trade and more protectionist positions[32]. During the first year in office, President Ursula von der Leyen's Commission embodied the new geopolitical dimensions, embracing such an expanded understanding of autonomy. This vision was echoed by High Representative Josep Borrell's call to master 'the language of power'[33], along with the Commission's Executive Vice President Margrethe Vestager, which underlined the importance of the new

[26] J. MIRÓ, "*op. cit.*"
[27] B. MAÇÃES, *The dawn of Eurasia,* London, 2018
[28] *As Open as Possible, as Autonomous as Necessary: Understanding the Rise of Open Strategic Autonomy in EU Trade Policy*, edited by L. SCHMITZ, T. SEIDL, in *Journal of Common Market Studies, 61*(3), pp. 834–852, 2023
[29] B. VAN APELDOORN, *Transnational Capitalism and the Struggle over European Integration,* 2002
[30] L. SCHMITZ, T. SEIDL, "op. cit."
[31] P. HOGAN, *Opening Statement at CETA Hearing, by Commissioner Phil Hogan in the Dutch Senate,* 2020. The prefix 'open' was first used in this speech by trade Commissioner Hogan.
[32] T. GEHRKE, *EU Open Strategic Autonomy and the Trappings of Geoeconomics*, in *European Foreign Affairs Review*, 27, pp. 61-78 , 2022
[33] European Parliament, *Hearing with High Representative/Vice President-designate Josep Borrell,* 2019

concept notably in the digital and industrial sector. This new interpretative platform was clearly expressed in 2021: «*Open strategic autonomy emphasises the EU's ability to make its own choices and shape the world around it through leadership and engagement, reflecting its strategic interests and values. It reflects the EU's fundamental belief that addressing today's challenges requires more rather than less global cooperation. It further signifies that the EU continues to reap the benefits of international opportunities, while assertively defending its interests»*[34]. European policy-makers realized that for an export-oriented economy like Europe's, aspiring for autonomy in a highly globalized economy is not exactly desirable. In other terms, Open Strategic Autonomy reflects the EU's approach to balancing its quest for strategic autonomy with its openness to international cooperation and multilateralism. At the same time, as it will be more thoroughly discussed thereafter, the term open also involves a commitment to sustainability-related values including environmental protection, human rights, core labour standards and biodiversity loss. This stance certainly entails a few contradictions, as expressed by the High Representative of the EU for Foreign Affairs and Security Policy J. Borrell: "*We don't want to be protectionists, but we have to protect ourselves*"[35]. It also raised a few criticisms, like the fear expressed by small and trade-oriented EU countries that this new doctrine could foster a concentration of power within the single market, particularly with regard to Franco-Germany industries. The integration of Open Strategic Autonomy into EU policies also raises concerns about the potential escalation of protectionist measures. This trajectory has broader implications, extending even to climate policy, where the EU recently introduced the Carbon Border Adjustment Mechanism, the primary objective of which is to establish a fair competition environment by addressing disparities in environmental standards[36]. However, the adoption of Open Strategic Autonomy also signifies a growing interconnection with the promotion of sustainable development. This nexus will be examined more comprehensively in the subsequent sections.

4. Sustainable development in the EU policy framework and its connections with open strategic autonomy

The European Union has always been at the forefront of the global fight against climate change and environmental degradation and has always regarded issues related to social and economic aspects of sustainability as a cornerstone

[34] Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, Doc. COM(2021) 66 final.
[35] European External Action Service, Why European Strategic Autonomy Matters, 2020
[36] See section 7.

of its policies. The promotion of sustainable development in the European Union is a key objective involving interconnected policies in many areas. The legal basis for sustainable development strategies is enshrined in Article 3 of the Treaty on European Union (TEU), which affirms the EU's internal and external responsibility to safeguard this principle. In this context, the EU has adopted the United Nations Sustainable Development Goals (SDGs) as a guiding framework for its policies and actions. The 2030 Agenda of the United Nations (UN)[37], inseparably linked to the Paris Agreement on climate change[38] and the Addis Ababa Action Agenda on Financing for Development[39], offers a set of ambitious goals that embrace economic, social and environmental dimensions of sustainable development, including combating climate change, reducing inequalities, promoting gender equality and protecting ecosystems. Under President von der Leyen's guidance, the Commission has unveiled an ambitious policy agenda dedicated to advancing sustainability within the European Union and beyond. The SDGs form an integral part of the President's political agenda[40] and serve as the cornerstone of policymaking, both domestically and in foreign affairs, across all sectors. During the von der Leyen Commission's tenure, the SDGs have taken centre stage in major initiatives such as the European Green Deal and Recovery and Resilience Plans. Launched in December 2019, the European Green Deal[41] is an ambitious plan to transform the EU into a climate-neutral continent by 2050.

Other goals include reducing greenhouse gases, promoting renewable energy, energy efficiency, circular economy, sustainable mobility and social justice. In broader terms, the goal is to make Europe an example of leadership in combating climate change and promoting environmental sustainability globally. Subsequently, the pandemic crisis led to the creation of the Next Generations EU (NGEU)[42], the epochal fiscal stimulus programme devised by European institutions, along with the implementation of related national recovery and

[37] Resolution adopted by the General Assembly of the United Nations on 25 September 2015, *Transforming our world: the 2030 Agenda for Sustainable Development*, Doc. A/RES/70/1, 2015. Established by heads of state and governments worldwide at the 2015 UN Summit, the Agenda aims is to create a comprehensive approach to combat poverty and achieve sustainable development, ensuring that no one is left behind in the process.

[38] United Nations Climate Change Conference (COP21), *Paris Agreement*, 2015

[39] United Nations, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development*, 2015

[40] U. VON DER LEYEN, *Political Guidelines for the Next European Commission: A Union that strives for more*, 2019.

[41] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, Doc. COM(2019) 640 final.

[42] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, in OJEU L433I of 22.12.2020

resilience programmes, which put digitisation, competitiveness, the green revolution and energy transition at the centre of the Union's agenda. Thereafter, in 2021, the European climate law has been put in place[43]. Even so, external adverse turmoil has exerted pressure on the post-pandemic economic upturn and global efforts toward sustainable development, causing a deceleration in progress, at times even resulting in setbacks[44].

Over the last years, the pursuit of sustainable development policies has become increasingly intertwined with the quest for open strategic autonomy, emerging as two pivotal and interconnected aspects of European Union policies. These objectives are not mutually exclusive; rather, they complement each other in various ways. Targets pursued by open strategic autonomy policies, such as energy safety, economic resilience, technological independence and innovation and a strengthened stance on the global stage may be better attained using efficient initiatives in terms of sustainable development. These often include a focus on reducing carbon emissions, transitioning to renewable energy sources, and promoting energy efficiency. By achieving these goals, the EU can reduce its reliance on fossil fuels and, thus, enhance its energy independence and security. This aligns with the quest for open strategic autonomy by reducing vulnerability to energy supply disruptions and external energy dependencies. Sustainable development policies can also make the EU's economy more resilient to global shocks, such as resource scarcity or extreme weather events caused by climate change. By adopting sustainable practices, the EU can strengthen its economic self-sufficiency and adaptability; diversify supply and promote circular economies. This can reduce the EU's vulnerability to disruptions in global supply chains and enhance its ability to maintain essential goods and services independently. In key technological sectors, enhancing sustainability often involves investing in innovative technologies, such as renewable energy, electric vehicles, and advanced materials. These innovations not only address environmental challenges but also position the EU as a leader in key sectors. Technological leadership enhances the EU's strategic autonomy by reducing reliance on foreign technologies and fostering economic competitiveness. As for external action aims, demonstrating a commitment to sustainability may foster the EU's soft power and global influence. By setting ambitious environmental targets and leading on climate action, the EU can influence global norms and standards as well as encourage collaboration with

[43] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), in OJEU L 243 of 9.7.2021
[44] European Commission, *EU Voluntary Review on the Implementation of the 2030 Agenda for Sustainable Development*, 2023

other nations and regions to address global challenges collectively. This diplomatic influence aligns with the quest for open strategic autonomy by strengthening the EU's position in international negotiations and partnerships based on shared values and objectives. Finally, sustainability and open strategic autonomy can contribute to peace and security. Environmental degradation and resource scarcity can be drivers of conflicts. By addressing these issues through sustainable development, the EU can contribute to regional stability and reduce the need for military interventions, promoting its own security.

5. A general overview of the 2023 strategic foresight report

Against this backdrop, the 2023 Strategic Foresight Report envisages the pursuit of sustainability in the context of the realization of Open Strategic Autonomy[45]. As intended in the title of the report, «*Sustainability and people's wellbeing at the heart of Europe's Open Strategic Autonomy*», the two goals are strictly intertwined in EU policy. According to the report, «*The European Union is forging ahead with unprecedented action to achieve climate neutrality and sustainability. A successful transformation will limit the existential risks of climate change and the environmental crisis while strengthening the EU's open strategic autonomy and economic security. To succeed in this transformation, it is essential to recognize the links between the environmental, social, and economic dimensions of sustainability. This will enable Europe to pursue a forward-looking geopolitical strategy that successfully leverages its most valuable assets – namely, its unique social market economy and its position as the largest trading block in the world*»[46]. The report sheds light on how sustainable development enhances the EU's resilience, innovation, and global influence, all of which are vital for achieving strategic autonomy in an interdependent world. Balancing these objectives requires careful policy coordination and integration, acknowledging that sustainable development is not only an environmental imperative but also a strategic asset for the EU's long-term security and prosperity. Succeeding this task is crucial for Europe's long-term competitiveness, social model, and global leadership in a net-zero economy, with benefits for current and future generations. However, the green transition, alongside the digital one, presents challenges and trade-offs that impact economies and societies on an unprecedented scale and speed. Acknowledging the interconnections between environmental, social, and economic aspects of sustainability is crucial for shaping a forward-thinking geopolitical approach. The 2023 Strategic Foresight Report delves into the intersections among

[45] European Commision, *2023 Strategic Foresight Report,* cit.
[46] European Commision, *2023 Strategic Foresight Report,* cit.

structural trends that impact sustainability. It underscores the significant challenges involved in moving towards a model that respects planetary limits while upholding competitiveness, societal fundamentals, and resilience. The report places strong emphasis on the significance of advancing inclusive well-being, sustainability, and democracy to enhance Europe's global influence. Given the convergence of these challenges and their intricate interplay, thoughtful consideration is required when mapping out sustainable trajectories for Europe's future. To this extent, the report outlines six challenges affecting the social and economic aspects of sustainability[47] and ten areas for action across all policy domains[48] to achieve a socially and economically sustainable Europe with increased global influence, capable of acting in condition of open strategic autonomy. Based on the Strategic Report's findings, this paper will focus on two specific subject matters. The first topic concerns the challenges to sustainability policies posed by the new emerging global order and reshaping of globalization, which will require an empowerment of the EU's global stance. This will imply the use of a wide set of instruments, namely a trade strategy that upholds sustainability interests through careful use of free trade agreements and the generalized scheme of preferences, an actual and comprehensive strategy to sustain developing countries in the green transition and a successful climate diplomacy aimed at developing meaningful international cooperation in sustainability issues. The second topic analyzed concerns the pursuit of a net-zero economy, which will necessitate a deepening of the Single Market through a renewed use of industrial policy as well as a reinforcement of value chains and critical infrastructures. Furthermore, an effective net-zero economy will require both a strengthening of sustainable-related conducts in corporate governance and an increased market fairness that favours a level playing field with respect to the application of environment-related legislation.

[47] The six challenges are: The rise of geopolitics and reconfiguration of globalisation; the quest for a sustainable economy and well-being; Increasing pressure to ensure sufficient funding; Growing demand for skills and competencies for a sustainable future; Increasing cracks in social cohesion; Threats to democracy and existing social contract

[48] (European Commission, 2023a). The ten key areas for actions identified are: Ensuring a new European social contract fit for a sustainable future; Leveraging the Single Market to champion a resilient net-zero economy; Strengthening the interlinkages between the EU's internal and external policies, also to boost the EU's offer and narrative on the global stage; Supporting shifts in production and consumption towards sustainability; Moving towards a 'Europe of investments' by increasing private financial flows in support of strategic investments for the transitions; Making public budgets fit for sustainability; Further shifting policy and economic indicators towards sustainable and inclusive wellbeing; Ensuring that everyone can successfully contribute to the sustainability transition; Strengthening democracy, including by increasing citizens' agency.

6. The new outlook of the European trade policy and the quest for sustainability in an increasingly multipolar world

Over the last decade, several international crises have contributed to shaping a new international order, accelerating a new rise of geopolitics. First, the illegal annexation of Crimea by Russia and then the invasion of the whole of Ukraine triggered the return of war and conflict to Europe for the first time since the wars in the former Yugoslavia. At the same time, the UK's exit from the EU, the migration and energy crisis, the danger of terrorism, the reconfiguration of international trade into blocs of countries, the vulnerability of critical infrastructure, the pandemic crisis and the threat of autocracies outline an increasingly multipolar international order. In this scenario, the EU is compelled to reorganize its internal and external policies, as the EU's ambition to become a global player in the geopolitical arena has become a necessity, given the international community's expectation of the EU as a promoter of peace and security[49]. Lately, the invasion of Ukraine put an end to the West's plan to create a rule-based international order. Not just Russia, but a growing number of countries, with different governance models and values, are challenging the Western-led global order. The so-called 'Global South' (i.e. developing countries) increasingly demand more representation in international fora. China proposes itself as the head of this group that sees the Ukrainian conflict simply as another European war that has nothing to do with them[50]. Global South countries, especially African ones, have then become a strategic competition field, both in terms of a 'battle of models' and a 'battle of offers'[51] between Western countries and authoritarian regimes. In the current situation, then, there are several decision-making centres, forming a multipolar system, in which tackling transnational issues such as climate change, climate justice and energy transition is more and more difficult. According to the European Commission, «*the question Europe faces is a simple one: whether Europeans will decide on their common destiny, or whether that destiny will be decided by others. Whether the European Union wants to be a pillar of the emerging multipolar global order or whether it will resign itself to being a pawn. The challenges that Europe faces today will not go away. Global competition will harden. The pace of technological change will increase. Geopolitical instability will grow. The effects of climate change will be felt. Demographic trends mean that migration to the*

[49] Camera dei Deputati, *L'azione esterna e la politica estera e di sicurezza comune dell'UE*, 2022
[50] In fact, many of these countries have not imposed sanctions on Russia. On the contrary, they continue to trade with it in pursuit of their own interests.
[51] European Commision, *2023 Strategic Foresight Report,* cit.

EU will continue»[52]. Moreover, international trade has been strongly affected by rising geopolitical tensions, and has, in turn, contributed to fuelling them. Among the most prominent geopolitical issues are the trade war between China and the United States, with the European Union as the needle in the balance of contention, as well as the paralysis of the World Trade Organisation (WTO). Besides, the COVID-19 pandemic, together with infrastructural deficiencies, bottlenecks for strategic goods, climate change and natural disasters have shown the lack in global supply chains of an essential feature: resilience. These tensions have led to the rise of protectionism and economic nationalism, which is reflected above all in the quest for autonomy in sectors deemed strategic (like semiconductors and strategic minerals). The events that have occurred have led analysts to point to a substantial acceleration in the so-called 'deglobalisation' trend. On closer scrutiny, however, we can observe that tensions in international relations are provoking the development of new phenomena, such as the diversification of supply chains, the decoupling of economies[53] and the regionalisation of trade, i.e. the creation of an increasing number of preferential trade agreements. This is referred to as 'selective globalisation', indicating the so-called 'nearshoring' and 'friendshoring' phenomena[54]. Regionalism, although envisaged by the WTO, undermines its foundations, as it contributes to complicating and rendering less transparent the framework of global trade relations.

Compelled to adapt to a changing world characterized by the crisis of multilateralism, trade wars between great powers, and the growing influence of sanctions, and as open strategic autonomy emerged as the new ideological foundation, EU economic policies have been marked by shifting paradigms toward a new mindset. In particular, the European Union's trade policy has undergone a transformative journey. Since the 1990s, EU trade policy has been anchored in a persistent neoliberal belief in the benefits of openness, albeit with some concessions to socially oriented concerns around fairness and non-economic goals. However, the recent adoption of open strategic autonomy involves a significant departure from traditional neoliberal ideas: while not completely discarding the principles of open markets, it presents the most significant challenge to these ideas to date[55]. Open strategic autonomy introduces

[52] Communication from the Commission to the European Council, the European Parliament and the Council, *A stronger global actor: a more efficient decision-making for EU Common Foreign and king for EU Common Foreign and Security Policy*, Doc. COM(2018) 647 final.
[53]In particular American and Chinese economies.
[54] *Nearshoring* refers to the relocation of production to countries close to those of origin, or to countries other than China, but still with low labour costs. By *friendshoring*, on the other hand, we mean relocation to countries that are geopolitically allied.
[55] L. SCHMITZ, T. SEIDL, "op. cit."

a nuanced approach, containing fewer references to 'free trade' and a notable emphasis on 'trade as foreign policy' and 'fair trade'[56]. This departure appears as a reaction to the 'geopoliticization of trade'[57] in the new global disorder[58]. This shift has allowed neo-mercantilist and socially oriented actors to align their policy goals with broader security and foreign policy concerns, finding a new compromise with the neoliberal faction[59]. Following such a new interpretative platform, the EU has transitioned from a bastion of openness and liberalization to a more assertive stance that acknowledges the challenges of the contemporary global landscape. This transformative discourse and practice highlight a shift in EU trade policy, which is now less certain about the inevitability and desirability of openness, more assertive about reciprocity, and more willing to safeguard European firms and values in an increasingly turbulent world[60]. The new trade policy based on qualified openness aims to remain as open as possible while becoming as autonomous as necessary[61]. This involves a more defensive trade posture through the acquisition and utilization of new 'autonomous tools' to assertively protect and promote European interests and values in a dynamically changing world[62]. One innovative change proposed is the 'anti-coercion' trade defence instrument[63], designed as a response to threats from the Trump administration. This instrument would enable the Commission to impose economic counter-sanctions without Council approval, allowing it to circumvent the unanimity rule in foreign policy decisions. Concerns have been raised about its compliance with international law and foreign policy impacts, emphasizing the need for full engagement from member states[64]. While this unilateral trade defence tool marks a significant departure, trade agreements remain crucial for building strategic autonomy. As the former head of the EU's trade directorate affirmed, "*The single biggest change in EU trade policy is the shift from the*

[56] *New is Old? Managed Globalization and the Open, Sustainable, and Assertive EU Trade Policy*, edited BY J. ELIASSON, P. GARCIA-DURAN, in *Global Policy*, 2022
[57] S. MEUNIER, K. NICOLAIDIS, "op. cit."
[58] D. SCHMID, S. LAVERY, "op. cit."
[59] See section 2.
[60] . SCHMID, S. LAVERY, "op. cit."
[61] [61] L. SCHMITZ, T. SEIDL, "op. cit."
[62] S. WEYAND, *The Double Integration Doctrine, a Conversation with Sabine Weyand*, in *Groupe d'études géopolitiques*, 2022
[63] Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and its Member States from Economic Coercion by Third Countries, Doc. COM (2021)775 final.
[64] J. MIRÓ, "*op. cit.*" Additionally, the Commission is working on three additional trade defence tools, including an International Procurement Instrument, a Directive on Corporate Sustainability Due Diligence, and a Single Market Emergency Instrument. These tools aim to limit non-EU companies' access to the EU public procurement market, ensure corporate sustainability across global supply chains, and allow export restrictions in emergency situations.

multilateral to the bilateral or regional approach"[65]. Despite the EU's commitment to multilateralism, the shift towards bilateral or regional approaches has been necessitated by the failure to secure a new multilateral deal in the WTO. The EU now stands at the centre of an extensive network of free trade agreements, reflecting a fundamental change in its trade policy approach.

The rise of geo-economic confrontation has affected EU sustainable policies, hampering the stream of green goods and technologies and exposing the EU's strategic dependencies on critical raw materials crucial for its twin transition. It also forced the EU to partly relocate its productions in order to guarantee more resilient supply chains. Given this context, the advancement of sustainable development objectives compels the EU to adopt a multi-faceted and integrated approach to policymaking. It needs to leverage its diplomatic, economic, and political influence on the global stage, so as to contribute to a more sustainable and equitable world. In concrete terms, it means it will have to adopt a wide array of economic instruments, especially trade-related tools. Sustainable purposes lie at the heart of the new trade strategy presented by the Commission in February 2021[66], which frames the EU's trade initiatives in the new context of open strategic autonomy. Within the framework of its trade policy, the EU can foster sustainability aims through a wide range of tools, with an approach defined as 'governing through trade'[67]. First, it can incorporate sustainability clauses into Free Trade Agreements (FTAs), encouraging trade partners to adopt more sustainable practices involving environmental protection, labour standards and sustainable development. While these concerns have gradually found their way into EU trade agreements in recent times, the Commission has now committed to independently prioritize and advance them further[68]. An instance of this commitment is the all-new EU-Kenya Economic Partnership Agreement (EPA), deemed as the most ambitious economic partnership agreement the EU will have with a developing country when it comes to sustainability provisions, as it includes binding provisions on trade and sustainable development, such as climate and environmental protection and labour rights, and a transparent dispute resolution mechanism[69]. Tailored to

[65] D. O'SULLIVAN, *The EU's Digital Footprints Go Round in Circles*, in *Financial Times*, 2020
[66] Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, Doc. COM(2021) 66 final.
[67] A. MARX, *Integrating Voluntary Sustainability Standards in Trade Policy: The Case of the European Union's GSP Scheme*, in *Sustainability*, 2018
[68] T. GEHRKE, "op. cit."
[69] Proposal for a Council Decision on the signing, on behalf of the European Union, of the Economic Partnership Agreement between the Republic of Kenya, Member of the East African Community of the one part, and the European Union of the other Part, Doc. COM(2023) 559 final.

address Kenya's development needs, the Economic Partnership Agreement (EPA) outlines a phased opening of Kenya's market in agriculture and the protection of its developing industries. The EU aims to enhance Kenya's competitiveness, support local farmers, and build capacity to boost economic growth and development[70]. Another vivid example of this strategy was the EU-Korea free trade agreement[71]. It was the first of a new generation of European FTAs that included Trade and Sustainable Development (TSD) chapters dedicated to environmental and labour standards. To fully enforce the TSD chapter, the EU has launched dispute proceedings against South Korea due to Korea's delay in the ratification of fundamental conventions of the International Labour Organisation (ILO). This case showed how the EU is willing to enforce sustainability interests through its trade policy[72]. At the same time, it reveals how this strategy can be contentious. Recently, the FTA with MERCOSUR has raised similar concerns. Negotiations between the EU and four of South America's largest economies have encountered a new obstacle as Brasilia criticized Brussels' efforts to introduce environmental obligations concerning deforestation into the export agreement[73]. The agreement, which underwent twenty years of negotiations and was ultimately finalized in 2019, has faced ratification delays. EU nations, led by France, have demanded a concrete commitment from Brasilia to safeguard the amazon forest before they will endorse it. To this extent, the European Commission has recently created the Chief Trade Enforcement Officer, a newly established role responsible for ensuring that trade partners fulfil their FTA obligations, which also encompass sustainability commitments, and taking enforcement actions when required[74]. Under the trade policy framework, the Generalised Scheme of Preferences (GSP) can also be used for sustainable commitments. The GSP is a unilateral and non-reciprocal scheme offering developing nations improved access to the majority of its goods, in the form of the partial or entire suspension of import tariffs. This program aims to enable beneficiary countries to boost their export revenues and encourage their industrialization, without requiring reciprocal trade concessions. The GSP usually includes conditionality provisions aimed at

[70] A. MARTINELLI, *Sustainability': Key-Word of the Economic Partnership Agreement Eu-Kenya*, in *Istituto Analisi Relazioni Internazionali*, 2023

[71] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, 2011

[72] M. GARCÌA , *Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case*, in *Politics and Governance*, 10(1), pp. 58-67, 2022

[73] *EU trade deal with South America delayed by row over environmental rules*, edited by A. BOUNDS, B. HARRIS, in *Financial Times*, 2023

[74] European Commission, *Chief Trade Enforcement Officer*, 2021

promoting human rights and labour standards[75]. In its recent application, the Commission has been granting preferences to countries that meet conditions related to good governance and sustainable development[76], using the facilitated access to the Single Market as a 'carrot' to foster the achievement of its sustainable goals[77]. Although improvements in sustainability commitments have been achieved, a compliance gap has emerged[78], which needs to be properly addressed in the future.

As an instrument placed at the crossroads of different fields of EU external action[79], The GSP is strictly linked with EU development cooperation policy, a significant sector of the EU's external action to enhance global sustainability. In the forthcoming years, it will be fundamental for the EU to allocate a significant portion of EU development aid to projects and programs that promote sustainable development. It will have to provide technical assistance and capacity-building support to developing countries to help them implement sustainable policies and practices. This can include training, technology transfer, and knowledge sharing. In this regard, the new Global Gateway Strategy plays a pivotal contribution. Launched in December 2021, this is the EU strategy to harness public and private investment in infrastructure connections between the EU and its partners[80]. Sustainability is a core pillar of the Global Gateway strategy. It aims to narrow the international gap in infrastructure investments related to the global green and digital transition. It is also designed to make international trade more resilient to future shocks, improving supply chains around the world and helping partner countries fight climate change[81]. As it was argued[82], the Global Gateway might give the EU a stronger geopolitical relevance. It represents the answer to China's Belt and Road Initiative and to

[75] [75] C. PORTELA, *Are EU GSP Withdrawals and CFSP Sanctions Becoming More Alike*, in *European Foreign Affairs Review*, 28, pp. 35-52, 2023

[76] *The Unilateral Turn in EU Trade and Investment Policy*, edited by T. VERELLEN, A. HOFER, in *European Foreign Affairs Review*, 28, pp. 1-14 2023

[77] Report from the Commission to the European Parliament and the Council on the Generalised Scheme of Preferences covering the period 2014–2015, Doc. COM/2016/029 final.

[78] Joint Staff Working Document 'The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') Covering the Period 2014–2015 Accompanying the document Report from the Commission to the European Parliament and the Council Report on the Generalised Scheme of Preferences during the period 2014 – 2015. Doc. SWD/2016/08 final.

[79] G. SILES-BRÜGGE, *EU Trade and Development Policy Beyond the ACP: Subordinating Developmental to Commercial Imperatives in the Reform of GSP*, in *Contemporary Politics*, 20(1), pp. 49-62 ,2014

[80] Joint Communication to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *The Global Gateway*, Doc. JOIN(2021) 30 final.

[81] C. SHIRLEY, *A gateway to partnership*, in *European Investment Bank*, 2023

[82] *The Global Gateway: A recipe for EU geopolitical relevance*?, edited by C. TEEVAN, S. BILAL, E. DOMINGO, A. MEDINILLA, in *The Centre for Africa-Europe relations*, 2022

other global rivals to restore the EU's position in the world, especially in Africa. If the EU manages to combine a new approach to development policies, more focused on concrete development issues of partners, with a long-term vision centred on sustainable objectives and values, it will overcome reputational issues in developed countries and therefore will be able to boost its global standing. This will allow the EU to increase its geopolitical influence and assertiveness, becoming a global leader in shaping global rules and standards in areas like climate change, sustainable development, human rights, and labour standards. Also, the EU can engage with other nations on climate change mitigation and adaptation, as well as advocate for the green transition of developing countries through an effective and assertive climate diplomacy in international fora. At the COP27 summit[83], the European Commission demonstrated ambition and flexibility to keep the goal of limiting global warming to 1.5°C achievable[84]. The EU supported the creation of a 'loss and damage' fund to support the most vulnerable countries affected by climate-related disasters[85]. This fund pertains to the issue of climate justice, which involves the responsibility of developed countries to provide financial support to developing nations, which are more vulnerable to the effects of global warming, considering their limited contribution to climate change[86]. A central issue concerns the financing conditions for climate action in developing countries, ensuring that they can receive substantial financial support without incurring further debt. In this context, it is important to mention the Bridgetown Initiative, which foresees a suspension of debt interest related to natural disasters, financial support for climate-related issues in the form of grants rather than loans, a carbon emission tax on most polluting companies for disaster-vulnerable nations and the creation of a global climate mitigation fund[87].

7. Achieving a net-zero economy within the context of open strategic autonomy. The EU's drive for a European industrial policy, market fairness and sustainable corporate behaviour

As the EU is striving to reach open strategic autonomy and promote sustainability in the context of a changing geopolitical landscape and escalating

[83] The 27th UN Climate Change Conference (COP27) took place from 6 to 20 November 2022 in Sharm El-Sheikh, under the presidency of Egypt.
[84] European Commission, *EU at COP27 Climate Change Conference*, 2022
[85] Istituto per gli Studi di Politica Internazionale (ISPI), *Cop27: cosa c'è, cosa manca,* 2022
[86] R. BOSTICCO, *Loss and damage: c'è speranza per la finanza climatica*, In *Affari Internazionali*, 2023. To make the fund operational, a Transitional Committee has been established which is tasked with determining its functioning and governance, as well as the source, terms, and amount of available funds by the upcoming COP28.
[87] R. BOSTICCO, "*op. cit*."

climate crisis, the aim to achieve a net-zero economy based on the dual transition mandates the EU to reinvent its internal market. It needs to foster its environmental sustainability and resiliency, also keeping in mind the demands of social sustainability[88]. Taking into account the significant erosion of social support for the single market, deemed in the last decade as unfair and a source of inequalities, and considering the foreseeable effects on employment of the upcoming environmental-oriented measures under open strategic autonomy, a careful look at social sustainability is necessary to attain a large-scale political and social support. The pursuit of these ambitions necessitates a departure from the neoliberal beliefs of extensive market deregulation, moving toward the reconfiguration of the competition policy and the substantial adjustments to level-playing-field mechanisms of the single market[89]. Simultaneously, a new European industrial policy designed to address these challenges has been coming to the fore[90]. In fact, the quest for a net-zero economy in the single market implies above all a renewed competition for both industrial hegemony and dominance in strategic green technologies.

As sustainability will constitute a crucial source of its long-term competitive advantage[91], the EU will have to safeguard its leading position in the global race to net-zero industry[92], considering also that the global market for net-zero technologies will triple by 2030[93]. In doing so, it must strengthen its industrial capabilities in critical technologies while making its strategic supply chains more resilient. In addition, as the world's largest trading bloc, it can leverage its social market economy to drive positive change, pushing both foreign and European operators to adopt high sustainability standards. Europe is currently a net-zero technology importer[94]. To advance its green and digital ambitions, the EU needs

[88] M. AKGÜÇ, P. POCHET, *European Single Market 2.0: Striving for a more social and environmental market aligned with open strategic autonomy*, in *Cesifo Network*, 2023

[89] A few changes are underway, e.g. revised regulation on important projects of common European interest (IPCEI), the Temporary Framework on State Aid and the reform of the Stability and Growth Pact.

[90] K. MCNAMARA, *Transforming Europe? The EU's Industrial Policy and Geopolitical Turn*, in *Journal of European Public Policy*, 2023

[91] Cambridge Institute for Sustainability Leadership , *Competitive Sustainability Index: New Metrics for EU Competitiveness for an Economy in Transition*, 2022

[92] European Commision, *2023 Strategic Foresight Report,* cit.

[93] Istituto per gli Studi di Politica Internazionale (ISPI), *Net Zero Industry Act: l'Ue gonfia i muscoli (industriali)*, 2023. By 2030, a turnover of approximately EUR 600 billion is estimated. The production of electric vehicles will grow 15-fold by 2050, as will the production of heat pumps by 6-fold.

[94] A. GILI, *Clean Tech: l'UE risponde all'IRA (e a Xi)*, in *Istituto per gli Studi di Politica Internazionale* (ISPI), 2023. About a quarter of Europe's electric cars and batteries and almost all of its photovoltaic modules are imported. In the clean tech market, China is at the forefront: it produces more than 75 % of the world's photovoltaic panels, 60 % of the world's electric vehicles, 90 % of electric buses and 95 % of electric trucks, and 75 % of electric batteries. Moreover, 50% of the world's installed wind power capacity in 2022 was in China. This absolute

to enhance its industrial and technological capacity. This means, on the one hand, underpinning the creation of strategic value chains capable of strengthening the EU's supply-chain resilience[95], thus reducing and diversifying foreign dependencies in strategic sectors (i.e. semiconductors, raw materials, batteries, hydrogen). On the other hand, it entails a massive flow of investments to be directed into research, development and manufacturing to support the advancement of EU-based productions of net-zero technologies. Meanwhile, it becomes imperative to back the execution of an ambitious economic security strategy[96], capable of assessing future dependencies across strategic sectors. These actions are pivotal to fortifying the EU's open strategic autonomy as well as to sustaining its quest for a net-zero economy.

In concrete terms, the EU is carrying out these objectives through a coordinated package of measures, which encompasses the European Green Deal Industrial Plan[97], the Net Zero Industry Act[98] (NZIA) and the Critical Raw Materials Act[99]. The Green Deal Industrial Plan is aligned with previous initiatives, i.e. the European Green Deal and REpowerEU[100]. It is structured around four key elements. First, establishing a stable and streamlined regulatory framework, facilitating permits for production and assembly sites for clean tech products, thus accelerating European industrial production in these sectors. In second place, expediting financial access to allow state aid to increase production in these critical sectors. In this regard, the Commission has proposed the creation of a European Sovereignty Fund intended to avoid a fragmentation of the European Single Market that could occur due to the larger fiscal space of some countries, thereby ensuring the maintenance of European technological expertise in critical areas of energy and technology transition[101]. Thirdly,

prominence is also facilitated by China's wealth of metals and rare earths that are crucial in the energy transition industry.

[95] T. GEHRKE, "op. cit."

[96] Joint Communication to the European Parliament, the European Council and the Council on the "European Economic Security Strategy", Doc. JOIN(2023) 20 final.

[97] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Green Deal Industrial Plan for the Net-Zero Age*, COM/2023/62 final.

[98] Proposal for a Regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act), Doc. COM/2023/161 final.

[99] Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw material, Doc. COM(2023) 160 final.

[100] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, REPowerEU Plan, Doc. COM(2022) 230 final.

[101] Press Corner of the European Commission, A European Sovereignty Fund for an industry "Made in Europe" I Blog of Commissioner Thierry Breton, 2022

strengthening skills development, thus increasing labour market participation in green sectors. Finally promoting open trade with like-minded countries and resilient supply chains through their diversification for critical raw materials, an objective pursued by the Critical Raw Material Act[102]. The NZIA, on the other hand, introduces an industrial strategy aimed at advancing clean tech manufacturing through a structured approach. To achieve this, it follows a four-step plan. Initially, it identifies eight specific net-zero technologies categorized as 'strategic': solar photovoltaic and solar thermal, onshore wind and offshore renewables, batteries and storage, heat pumps and geothermal energy, electrolysers and fuel cells, sustainable biogas and biomethane, carbon capture and storage (CCS) and grid technologies. Secondly, it establishes an overarching target for EU domestic manufacturing in these technologies, aiming to fulfil at least 40% of the EU's annual deployment requirements by 2030. Thirdly, it outlines a governance framework, where member states propose Net-Zero Strategic Projects (NZSPs) with minimal oversight from the European Commission. Lastly, the NZIA delineates a suite of policy tools, primarily at the national level, to support the selected NZIA projects[103]. These initiatives represent an answer to similar acts implemented by major trade competitors (i.e. the Inflation Reduction Act - IRA - enacted by the United States[104]). The return of industrial policy, albeit motivated by the quest for strategic autonomy in key green and digital sectors, has been deemed as a dangerous return to economic protectionism[105]. These plans risk indeed violating WTO rules, hence undermining free trade and cooperation in tackling global public goods such as the environment and the twin transition. To this extent, it will be crucial to preserve collaboration and promote industrial cooperation agreements, at least with like-minded countries. An example of this kind of cooperation is the recent EU-US Trade and Technology Council (TTC), which also handles topics like green technology and supply chain security[106]. International cooperation can also be bolstered by the previously mentioned Global Gateway. It can function as the international facet of the EU's industrial policy by both aligning with its domestic

[102] A. GILI "*op. cit*.". The Critical Raw Materials Act mandates the EU to achieve specific targets by 2030. These include covering 10% of the consumption of critical minerals through domestic production, processing 40% of these minerals, and recycling at least 15% of them. Furthermore, it stipulates that no more than 65% of the EU's annual consumption of any critical raw material, at any significant processing stage, should originate from a single third country.
[103] *Green tech race? The US Inflation Reduction Act and the EU Net Zero Industry Act*, edited by D. KLEIMANN, D. POITIERS, N. SAPIR, A. TAGLIAPIETRA, S. VÉRON, N. VEUGELERS, R. ZETTELMEYER, in *The World Economy*, 2023
[104] The White House, *Inflation Reduction Act,* 2022
[105] L. TAJOLI, *Politiche industriali: paga giocare in difesa?*, in *Italian Institute for International Political Studies* (ISPI), 2023
[106]Joint Communication to the European Parliament, the European Council and the Council, *A new EU-US agenda for global change*, Doc. JOIN(2020) 22 final.

industrial objectives and fostering connections with global markets. This entails upholding the green and digital economic transitions, ensuring supply chain security, and addressing other concerns related to strategic autonomy[107]. Such actions will help conjugate autonomy and openness so as to reinforce both EU sovereignty and the achievement of a net-zero economy.

The EU has also been trying to leverage its Single Market to force trading partners to adopt similar green policies. Besides, it has been trying to bolster responsible corporate behaviour embedding human rights and environment-related concerns into companies' practices and corporate governance. That is the case with the Carbon Border Adjustment Mechanism (CBAM)[108], the Deforestation Regulation[109] and the Due Diligence Directive proposal. The main goal of CBAM, provisionally entered into force on October 2023, is to reduce the risk of carbon leakage, i.e. the relocation of carbon-intensive productions outside the EU, which would offset EU's efforts to reduce carbon emissions caused by European productions. In other terms, the new environmental tax is designed to ensure that efforts to reduce greenhouse gas emissions within the EU are not undermined by a simultaneous increase in emissions outside its borders for goods, produced in non-EU countries, which are imported into the European Union[110]. Concretely, it means to impose tariffs on several imported polluted goods that are not subjected to carbon prices in their origin country. This will also help maintain a level playing field inside the internal market, allowing European undertakings subjected to carbon pricing to compete with foreign companies that are not exposed to the same rules. The CBAM mechanism involves the application of a price for emissions embedded in products from certain types of industries, similar to that borne by EU producers under the current emission trading system (EU ETS)[111]. The introduction of CBAM has been criticised for its risk to fuel protectionism and for its possible non-compliance with WTO-rules. The new regulation will have significant impacts on both the internal market and external relations of the EU. On the one hand, the CBAM will create incentives for both EU and non-EU industries to reduce their carbon footprint as well as to invest in cleaner technologies to avoid or

[107] T. GEHRKE, "op. cit."
[108] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, in OJEU L130 of 16.5.2023.
[109] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation, in OJEU L150 of 9.6.2023.
[110] Agenzia delle Dogane e dei Monopoli, CBAM - Carbon Border Adjustment Mechanism, 2023
[111]Directive of the European Parliament and the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC. Launched in 2005, the EU ETS operates in trading phases. The system is now in its fourth trading phase (2021-2030).

minimize the CBAM costs, fostering innovation and sustainability. Domestic industries will also benefit from a more level playing field if the CBAM ensures that imported products adhere to similar environmental standards. On the other hand, the establishment of CBAM may potentially lead to tensions with third-country trading partners, entailing a risk of trade retaliation if such countries perceive the CBAM as discriminatory or unfair. This is especially true for developing and emerging economies (EMDEs). Facilitating the transition from environmentally polluting technologies to green alternatives appears indeed comparatively more arduous in EMDEs than in Europe. The potential implementation of the CBAM, without due consideration for the unique characteristics of the EU's trading partners, could result for these countries in significant socio-economic downsides, namely loss of employment, tax income, and export earnings.

As for the Deforestation Regulation, which entered into force in May 2023, it establishes new rules aimed at minimizing the risk of deforestation and forest degradation associated with products entering or exported from the EU market. According to the regulation, mandatory risk-based due diligence to assess and mitigate risks along supply chains is imposed on all operators and traders who place or make available in the Single Market a specific list of products whose production is linked to deforestation and forest degradation[112]. Finally, on February 2023 the European Commission adopted a proposal for a Directive on corporate sustainability due diligence[113]. The proposed Directive aims to promote sustainable and responsible corporate conduct by integrating human rights and environmental considerations into companies' operations and governance. It introduces a corporate due diligence duty, requiring companies to identify, address, prevent, mitigate, and account for adverse human rights and environmental impacts within their operations, subsidiaries, and value chains. Additionally, it mandates large companies to align their business strategies with climate commitments outlined in the Paris Agreement. The scope extends to both EU and non-EU companies operating in the EU internal market with turnovers surpassing specific thresholds. Non-compliance with these due diligence duties may empower the Commission to intervene, leading to sanctions such as blocking imports in response to such violations[114], as well as supervisory

[112] *Hardening corporate accountability in commodity supply chains under the European Union Deforestation Regulation*, edited by L. BERNING, M. SOTIROV, in *Regulation & Governance*, 2023

[113] Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Doc. COM/2022/71 final.

[114] I. ZAMFIR, *Towards a Mandatory EU System of Due Diligence for Supply Chains*, in *European Parliamentary Research Service*, 2020

authority requirements, financial penalties, and civil liability. While the implications for investment lawyers may not be immediately apparent, this new mechanism essentially applies EU standards extraterritorially, subjecting foreign investors to standards on human rights, environment, and labour. As the EU seeks to enhance its global influence, the directive reflects its ambition to extend standard-setting influence globally[115]. The aforementioned directive falls within the broader European regulatory framework concerning the control of foreign direct investments (FDI), as interpreted according to the tenets of sustainability and open strategic autonomy. Against this framework, other notable initiatives include stricter monitoring of FDI, prompted by concerns about foreign control of critical European assets. The 'Framework for the Screening of Direct Investments into the Union' allows scrutiny and rejection of non-EU investments in strategic areas, allowing the adoption of restrictive measures not based on economic concerns. In response to the growing securitization push, the Commission introduced the FDI Screening Regulation and proposed rules to address distortions caused by subsidized foreign companies in the single market. Recognizing a gap in the legal framework, the Commission aims to empower itself to scrutinize and potentially block acquisitions and public procurement bids fuelled by state subsidies from non-EU countries[116]. Finally, another enlightening example of the nexus between sustainability issues and open strategic autonomy in FDI is the signing of the EU-China Comprehensive Agreement on Investments (CAI). The CAI received a commendation for securing specific commitments from China regarding labour, human rights, and sustainability. Notably, China committed to making continued and sustained efforts to ratify the fundamental conventions of the International Labour Organization (ILO) and agreed to transparent scrutiny of labour-related abuses. However, the ratification of the CAI faced obstacles after the imposition of sanctions in March 2021, targeting Chinese officials implicated in human rights abuses in Xinjiang, and China's immediate retaliatory sanctions, leading to a 'justifiably frozen' status. Nevertheless, the CAI serves as an instance of the EU's pursuit of open strategic autonomy by simultaneously advocating sustainable goals[117]. This experience highlights the harsh feasibility of the EU assertively seeking increased openness and economic partnerships with countries like China while defending and promoting human rights and labour standards. To sum up, all the examined initiatives help promote responsible business practices,

[115] M. SATTOROVA, *EU investement Law at a Crossroads: Open Strategic Autonomy in times of heghtened security concerns*, in *Common Market Law Review*, pp. 701-732, 2023)
[116] L. SCHMITZ, T. SEIDL, "*op. cit*."
[117] M. SATTOROVA, "*op. cit*."

encouraging foreign and European companies to adhere to ethical and sustainable business practices when operating in the Single Market.

8. Conclusion

In recent times, European strategic autonomy has shifted from exclusively focusing on defence policies to adopting a more unified and comprehensive approach across diverse policy areas. The scope of action has broadened, encompassing economic, trade, and technological interactions, with a distinction between the conventional strategic aspect related to defence and the imperative to include various civilian sectors where the EU collaborates with third countries[118]. The extension of strategic autonomy to non-defence sectors reflects not only heightened political and economic interdependence but also an acknowledgement of the inevitable intersection between European security and the safeguarding of industrial and technological independence[119]. Essentially, increased investments in European defence are aligned with cross-border collaboration in technological and industrial spheres. Strengthening strategic autonomy, besides benefiting Europe, contributes to fortifying the entire Atlantic Alliance. A strengthened and more autonomous Europe, capable of taking care of the neighbouring areas and engaged in a rejuvenated advocacy of western liberal values, will allow the United States to dedicate its maximum efforts to the systemic challenge with China in the Indo-Pacific. Concurrently, the concept of autonomy is evolving to be more 'open,' underscoring Europe's dedication to multilateralism, a rules-based international order, and sustainability values across environmental, social, and economic dimensions. The pursuit of open strategic autonomy is not merely about diminishing external dependencies related to defence, industry, and trade; it also aims to enhance international coordination mechanisms to tackle global challenges, particularly the pressing issue of climate change. In essence, it signifies not just a Europe free from external constraints, but a Europe liberated to take action, propose initiatives, and engage in meaningful interactions[120]. Overall, this paper offers different insights into how the EU can successfully navigate the intersection of sustainable development and open strategic autonomy, ultimately contributing to global leadership and the well-being of current and future generations. It highlights the importance of an integrated approach that harmonizes these two critical dimensions to create a more sustainable and equitable future. The insights drawn

[118] D. IRRERA, *Il Potenziale dell'Autonomia Strategica Europea*, in M. MAZZIOTTI, *Ambizioni e vincoli dell'autonomia strategica europea*, *Osservatorio di Politica Internazionale,* 2023
[119] J. DARNIS, *L'Unione europea tra autonomia strategica e sovranità tecnologica: problemi e opportunità,* in *Istituto Affari Internazionali*, 2021
[120] D. IRRERA, "*op. cit*."

from the 2023 Strategic Foresight Report have provided a valuable framework for understanding the challenges and opportunities ahead. Among the key areas of action outlined by the Strategic report, both the strengthening of the EU's offer on the global stage and the reinforcement of the Single Market to Champion a net-zero economy are crucial to the EU's commitment to sustainable development. This paper emphasizes the interconnections between sustainability and strategic autonomy in the attainment of such objectives, highlighting how they can complement and reinforce each other. This duality underscores the complex yet crucial balancing act that the EU must navigate to tackle global environmental challenges while maintaining its autonomy and resilience as well as its commitment to multilateralism. If we are to achieve the sustainability transition, it will be crucial in the upcoming future to place sustainability at the heart of the EU's open strategic autonomy, so as to deliver on a triple promise: '*a healthy planet and thriving environment; economic growth that is decoupled from resource use and environmental degradation; and an assurance that no person or place will be left behind*'[121]

[121] European Commision, *2023 Strategic Foresight Report,* cit.

The EU Deforestation Regulation and Its Potential Impacts on Brazil

MARIANA DE ANDRADE

TABLE OF CONTENTS: 1. Introduction. – 2. The EU Timber Regulation: Main aspects. – 3. The forthcoming system: the EU Deforestation Regulation. – 4. The impact of the EUDR for Brazilian operators. – 5. Concluding remarks.

1. Introduction

Against the backdrop of the European Union's recent initiatives on environment and climate change, the European bloc has recently adopted 'Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation' (hereinafter, 'Deforestation Regulation' or EUDR).[1] On 30 December 2024, the new Regulation will officially repeal its predecessor, the European Union Timber Regulation (Regulation (EU) No 995/2010; hereinafter, 'Timber Regulation' or EUTR),[2] which determines obligations specifically for the trade in timber and timber products.

The EUDR preamble directly links the new Regulation to the Sustainable Development Goals (SDGs) under the 2030 Agenda for Sustainable Development, adopted by the United Nations (UN) Member States in 2015. Among other references, paragraph (11) highlights that EU Member States 'have emphasised that since current policies and action at global level on conservation, restoration and sustainable management of forests do not suffice to halt deforestation, forest degradation and biodiversity loss, enhanced Union action is needed in order to contribute more effectively to the achievement' of the UN SDGs. Moreover, paragraph (20) notes that 'halting deforestation and restoring

[1] *Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1115, accessed 12.06.2023.

[2] *Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market,* available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R0995, accessed 12.06.2023.

degraded forests is an essential part of the SDGs. This Regulation should contribute in particular to meeting the goals regarding life on land (SDG 15), climate action (SDG 13), responsible consumption and production (SDG 12), zero hunger (SDG 2) and good health and well-being (SDG 3)'.[3]

The EUTR is intrinsically connected to recent European regulatory actions tackling the UN SDGs. This contribution provides a brief overview of the EU Timber Regulation and its current operation, a summary of the main aspects of the Deforestation Regulation, and the possible impacts of the EUDR on Brazilian operators. The Deforestation Regulation is complex and technical; therefore, this contribution focuses on specific aspects that will more directly change the legal framework of import/export of commodities into the European Union.

2. The EU Timber Regulation: Main aspects

The EUTR prohibits the 'placing on the European market' of illegally harvested timber and timber products by European operators (ie. 'any natural or legal person that places timber or timber products on the market', as per EUTR Article 2). For the purposes of the EUTR, 'illegally harvested' means timber harvested in contravention of the applicable legislation in the country of harvest. The Regulation is closely intertwined with the EU initiative 'Forest Law Enforcement, Governance and Trade' (FLEGT) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

According to the Timber Regulation, operators must carry out a due diligence verification to ensure compliance with the prohibition to place illegally harvested timber on the European market, and must be able to identify the entire supply chain of the timber and timber products that it intends to trade. The fundamental core of the Regulation is thus contained in the so-called obligation for operators of carrying out a due diligence system, set forth under Article 6. Member States and national competent authorities are responsible for enforcing these obligations and communicating the progress of their implementation to the European Commission.

The due diligence system comprises three main elements: access to information, risk assessment and risk mitigation. To implement the due diligence system, operators must collect all relevant information regarding timber and timber products, such as the name of tree species, country and region where the timber was harvested, concession of harvest, quantity and names of suppliers and traders in the supply chain. Once information is collected, the operator must then perform a risk assessment to ascertain whether the timber was illegally harvested, according to 'relevant risk assessment criteria', including compliance with local legislation, the prevalence of illegal harvesting of specific tree species,

[3] *Regulation (EU) 2023/1115* (n 1).

the prevalence of illegal harvesting or practices in the country of harvest where the timber was harvested, the prevalence of armed conflict, sanctions imposed by the UN Security Council or the Council of the EU and the complexity of the supply chain.

Based on that information, the operator must consider whether the risk of illegally harvested timber is negligible or non-negligible and, in the latter case, put in place mitigation measures (such as requiring additional documents and third-party verification) to ensure that the timber in question is not illegal. The EUTR determined a system of due diligence primarily based on evaluating whether timber and timber products have been harvested in compliance with the country of origin's legislation.

The EUTR framework is supplemented by several other EU legal acts, among which *Council Regulation (EC) No 2173/2005* on the establishment of a FLEGT licensing scheme*, Commission Implementing Regulation (EU) No 607/2012* specifically detailing rules concerning the due diligence system, as well as non-binding (but highly authoritative) guidance on specific topics, such as risk mitigation, due diligence, armed conflicts and sanctions.

The EU periodically considers how due diligence systems may be implemented in relation to certain countries, indicating procedures and conclusions applicable specifically to those jurisdictions. Currently, specific overviews and the so-called "Expert Group conclusions" have been issued for Bosnia and Herzegovina, Brazil, Cameroon, China, Côte d'Ivoire, Malaysia, Myanmar, Republic of the Congo.[4] These conclusions are not binding in nature, but their content has highly authoritative value for the purposes of risk assessment by the competent authorities. For example, the 2020 '*Conclusions of the Competent Authorities for the implementation of the European Timber Regulation (EUTR) on the application of Articles 4(2) and 6 of the EUTR to timber imports from Myanmar'* determine that it is virtually impossible for operators to 'fully access all applicable legislation and other relevant documents and information … needed to carry out a full risk assessment or to effectively mitigate the non-negligible risk of acquiring illegally harvested timber'.[5] If these conclusions are implemented as such by the national competent authorities, they entail a *de facto* ban on the import of timber from Myanmar, a ban that the relevant EU Regulations have not determined.

[4] See Conclusions available at https://environment.ec.europa.eu/topics/forests/deforestation/illegal-logging/timber-regulation_en, accessed 12.06.2023.

[5] '*Conclusions of the Competent Authorities for the implementation of the European Timber Regulation (EUTR) on the application of Articles 4(2) and 6 of the EUTR to timber imports from Myanmar*', p. 8, available at https://ec.europa.eu/transparency/expert-groups-register/core/api/front/document/47575/download, accessed 12.06.2023.

3. The forthcoming system: the EU Deforestation Regulation

The newly adopted Deforestation Regulation will repeal the EUTR from 30 December 2024, when most of its substantial provisions will effectively start to apply. The Deforestation Regulation follows the structure set in place by the Timber Regulation; however, the EUDR is much more wide-ranging in scope. The EUDR seeks to regulate the 'placing and making available on the Union market', as well as the export from the Union, of products that contain, have been fed with or have been made using relevant commodities, namely cattle, cocoa, coffee, oil palm, rubber, soya and wood. The Deforestation Regulation, therefore, does not impact only the trade on timber, but any other good that 'contains, has been fed with or has been made using' the listed commodities. It aims to minimise the EU's contribution to deforestation, its contribution to greenhouse gas emissions and global biodiversity loss.

To that end, the prohibition imposed by the Regulation's Article 3 is comprehensive, imposing a ban on all relevant commodities and relevant products *unless* three cumulative conditions are fulfilled: (a) they must be *deforestation-free*; (b) they must have been produced in accordance with the relevant legislation of the country of production; and (c) they are covered by a due diligence statement. Operators must exercise a due diligence procedure to ensure that the products subject to this Regulation comply with this prohibition. Like the Timber Regulation, the EUDR determines that the due diligence system to be carried out by operators encompasses the collection of information, risk assessment measures and, depending on the outcome of the risk assessment, risk mitigation measures. Yet, despite the common grounds on the obligation to exercise due diligence, the EUDR introduces important innovations.

One significant distinction is the legal grounds on which the import of relevant products is prohibited. According to the EUTR, the concept of 'illegally harvested timber' is to be assessed based on the applicable legislation in the country of harvest (EUTR, Article 2(g)). In turn, it defines 'applicable legislation' as 'the legislation in force in the country of harvest covering the following matters: rights to harvest timber within legally gazetted boundaries, payments for harvest rights and timber including duties related to timber harvesting, timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting, third parties' legal rights concerning use and tenure that are affected by timber harvesting, and trade and customs, in so far as the forest sector is concerned' (EUTR, Article 2(g)).

Unlike the Timber Regulation, the Deforestation Regulation lists the 'relevant legislation of the country of production' as only one of the three criteria to be taken into account in the operator's assessment. Additionally, 'relevant

legislation' is now much broader in scope: it refers to 'the laws applicable in the country of production concerning the legal status of the area of production in terms of: (a) land use rights; (b) environmental protection; (c) forest-related rules, including forest management and biodiversity conservation, where directly related to wood harvesting; (d) third parties' rights; (e) labour rights; (f) human rights protected under international law; (g) the principle of free, prior and informed consent (FPIC), including as set out in the UN Declaration on the Rights of Indigenous Peoples; (h) tax, anti-corruption, trade and customs regulations' (EUDR, Article 2(40)).

Additionally, and crucially, at the centre of the Deforestation Regulation lies the definition of *deforestation.* In this sense, the Regulation also clarifies that '"deforestation" means the conversion of forest to agricultural use, whether human-induced or not' (Article 2(3)). Conversely, for the purposes of the EUDR, '"*deforestation-free"* means: (a) that the relevant products contain, have been fed with or have been made using, relevant commodities that were produced on land that has not been subject to deforestation after 31 December, 2020; and (b) in the case of relevant products that contain or have been made using wood, that the wood has been harvested from the forest without inducing forest degradation after 31 December, 2020' (Article 2(13)).

The risk assessment to be performed by the operators is detailed under EUDR Article 10, and it must consider several criteria. In particular, and notably, the Regulation establishes a system of assignment of risk to the relevant country of production or parts thereof, potentially intending to establish a "blacklist" of countries according to which the risk of import of the goods subject to the EUDR may entail stricter requirements. Indeed, Article 13 foresees the possibility of a system of "simplified due diligence" for countries "classified as low risk". Article 29, which is set to determine a "Country benchmarking system", divides third countries, as well as EU Member States, into three categories: '**high risk'** (high risk of producing in such countries relevant commodities for which the relevant products do not comply with Article 3), '**low risk'** (where there is sufficient assurance that instances of producing in such countries relevant commodities non-compliant with Article 3 are exceptional) and '**standard risk'** (countries which do not fall in either the category 'high risk' or the category 'low risk). This classification shall be based 'primarily' on three criteria: rate of deforestation and forest degradation, rate of expansion of agricultural land for relevant commodities and production trends of relevant commodities and of relevant products.

Other criteria include the presence of forests in the country of production; the presence of indigenous peoples in the country of production and the consultation and cooperation in good faith with such indigenous peoples; the prevalence of deforestation or forest degradation in the country of production;

concerns in relation to the country of production and origin, such as level of corruption, prevalence of document and data falsification, lack of law enforcement, violations of international human rights, armed conflict or presence of sanctions imposed by the UN Security Council or the European Union; and the complexity of the relevant supply chain and the stage of processing of the relevant products, in particular difficulties in connecting relevant products to the plot of land where the relevant commodities were produced. Finally, an interesting innovation of the EUDR is that it gives virtually binding force to the conclusions of the meetings of the Commission expert groups, an instrument that, under the EUTR, has an authoritative but not binding character.

The country benchmarking system has the potential to be highly controversial, as it is strictly related to the multilateral trading system principles on non-discrimination. In any case, as determined by the EUDR, on 29 June 2023 all countries shall be assigned a standard level of risk. Article 29(2) clarifies that the list of countries and parts thereof will be reviewed and updated, and the countries and parts considered low or high risk shall be published no later than 30 December 2024.

Should the risk assessment carried out according to the criteria in question lead to the conclusion that there is a non-negligible risk that the relevant products are non-compliant, the operator must adopt risk mitigation measures, similar to those set forth by the EUTR and described in the previous section. If the risk mitigation measures reveal to be insufficient to lower the risk of deforestation to negligible, or infeasible, the operator may not place the relevant good in the European market.

It is clear that the risk assessment that operators must carry out is far from simple. The wide-ranging scope of application of the Deforestation Regulation (applicable to several commodities, as well as products 'that contain, have been fed with or have been made using' said commodities) will require that operators determine not only whether a specific good has been produced in a deforestation-free zone, but also that all the items it contains or, in the case of livestock, have been fed with, are also deforestation-free. Moreover, the same conclusion on a product coming from a given country may not be applicable to another product of the same origin: it is possible that coffee beans are generally produced in a deforestation-free manner in a given territory, whereas soybeans from the same country are not.

4. The impact of the EUDR for Brazilian operators

Much has been said about the potential impact of the Deforestation Regulation on exports from Brazil to the European Union. The Latin American

country is an important exporter of all listed commodities, and its cattle is largely fed with soybeans (thereby doubling the incidence of application of the Regulation with respect to livestock, as an 'affected good' that is *also* fed with another affected good). The connection between Brazil's agribusiness and the deforestation of areas such as the Amazon and the Cerrado has been widely reported.[6]

In 2020, based on scientific material produced by academics and official sources, the EU Competent Authorities adopted conclusions on the application of the EUTR due diligence system to Brazil[7] and determined several risk factors in the harvesting of timber in several regions of Brazil. As mentioned, the current Timber Regulation does not confer binding value to these Conclusions; the situation will change with the entry into force of the Deforestation Regulation. Furthermore, and significantly, the Conclusions on Brazil apply only with respect to timber, whereas the Deforestation Regulation is much broader than that.

During the EUDR discussions and drafting phase, EU bodies studied Brazil's current deforestation state. These studies highlighted the increase in forest fires and deforestation in recent years and their connection to, *inter alia*, soybean and coffee plantations and cattle ranching.[8] The EU Impact Assessment (*Commission Working Document on the Impact Assessment (Part 2*)[9] carried out in connection with the preparation for the EUDR Proposal contained a specific case study on the impact of a deforestation regulation on beef from Brazil, noting, among other elements, the complexity of Brazil's beef supply chains, lack of a national traceability system and restricted public access to information and the links between the country's production of cattle and deforestation. These represent significant risk factors listed among the EUDR risk assessment criteria.

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[6] See, for example, https://edition.cnn.com/2020/07/16/americas/brazil-deforestation-soy-beef-eu-intl-hnk/index.html and https://www.theguardian.com/environment/2022/feb/10/loophole-allowing-for-deforestation-on-soya-farms-in-brazils-amazon, accessed 12.06.2023.

[7] '*Conclusions of the Competent Authorities for the implementation of the European Timber Regulation (EUTR) on the application of Articles 4(2) and 6 of the EUTR to timber imports from Brazil'*, available at https://circabc.europa.eu/ui/group/34861680-e799-4d7c-bbad-da83c45da458/library/d14e080c-230f-4773-a214-010d10a47f7f/details?download=true, accessed 12.06.2023.

[8] European Parliament, *Brazil and the Amazon Rainforest: Deforestation, Biodiversity and Cooperation with the EU and International Forums*, available at https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648792/IPOL_IDA(2020)648792_EN.pdf, accessed 12.06.2023.

[9] European Commission, '*Commission Staff Working Document Impact Assessment Report minimising the risk of deforestation and forest degradation associated with products placed on the EU market, Accompanying the document "Proposal for a Regulation of the European Parliament and of the Council'*, available at https://circabc.europa.eu/ui/group/34861680-e799-4d7c-bbad-da83c45da458/library/1ff4e85e-2b95-4f91-9843-3c8f073d68f2/details?download=true, accessed 12.06.2023.

It is hence not without reason that concerns have been raised concerning the impact of the new legislation on the export of commodities from Brazil to the European Union. In light of the current scenario, there seems to be a significant chance that Brazil will be classified as a high-risk country in the benchmarking system established by the EUDR.

5. Concluding remarks

The EUDR is an innovative, but at the same time controversial piece of legislation. With months to go before its effective implementation, it has already raised criticisms that claim the regulation reflects EU green discriminatory practices' a discussion that is by no means new to environmental measures and their relationship to the multilateral trading system. While the Regulation provides operators with multiple criteria in the assessment of risk for the purposes of the due diligence system, it does give particular importance to the country benchmarking system, listed as the first element for to be taken into consideration for the risk assessment under Article 10 (albeit the list does not follow a necessarily hierarchical order). 'Benchmarking' countries according to a methodology that is determined by the EU itself certainly raises questions concerning the degree of unilateralism in the new Regulation. On the other hand, as well established in the *US – Shrimp* case, unilateral trade measures are not per se inconsistent with the WTO; what matters is that the measures do not amount to 'arbitrary or unjustifiable discrimination'.[10]

Beyond concerns about WTO compatibility, in its Legislative Financial Statement,[11] the Commission's proposal noted the potential financial impact of the Regulation. It highlights that 'The political visibility and sensitiveness of the Regulation will increase in comparison with the previous situation covering only wood, as it will affect sectors that are essential for the economies of particular countries (e.g. cocoa in Ivory Coast and Ghana; palm oil in Indonesia and Malaysia; soy and cattle in Brazil and Argentina) requiring intensified bilateral engagement including at expert level'.[12] Therefore, also in line with EUDR's Article 30, which determines the obligation to engage and cooperate with third countries ('in particular those classified as high risk in accordance'), the Commission is expected to engage and promote bilateral and multilateral talks

[10] *US – Shrimp,* Appellate Body report, adopted on 6 November 1998, WT/DS58/AB/R, paras 172 ff.

[11] Proposal for a 'REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010', 17.11.2021, available at https://eur-lex.europa.eu/resource.html?uri=cellar:b42e6f40-4878-11ec-91ac-01aa75ed71a1.0001.02/DOC_1&format=PDF, accessed 16.06.2023.

[12] Ibid, p. 64.

to address the political and economic impacts of the new Regulation. In any case, it seems safe to say that the transition will not be without hurdles for the economic operators involved in the supply chain of the listed goods, and further add to the new complexities that will be introduced by the set of new EU Regulations aimed at fostering the UN SDGs.

The Potential Domino Effects of the EU's Anti-Coercion Instrument?

NIALL MORAN*

TABLE OF CONTENTS: 1. An overview of the Anti-Coercion Instrument. – 2. Coercion under International and WTO Law. – 3. Domino effects.

1. An overview of the Anti-Coercion Instrument

Since announcing its proposed Anti-Coercion Instrument (ACI)[1], the EU has been at pains to emphasise that any intervention under it shall be consistent with international law (Article 1). It is felt that current strains on the rules-based international order necessitate the adoption of an instrument that will deter attempts of economic coercion by third countries. The instrument envisages diplomatic engagement with the third country concerned (Articles 5 & 6) with a view to de-escalating the situation followed by countermeasures that would only be enacted "as a last resort".

While the ACI is designed to offer speed, flexibility and deterrence in response to acts of coercion, a proper balance is needed as speed may come at the expense of there being sufficient safeguards on its exercise and flexibility may come at the cost of certainty in its operation. To come under Article 2 of the ACI, a measure must: 1) affect trade or investment, *and* 2) interfere in the legitimate sovereign choices of the Union or a Member State. The ACI is a response to darker times and, where it provides a response to a measure affecting trade, it offers an alternative to WTO proceedings where a third country measure fits within the EU's definition of economic coercion. The ACI is less discretionary than, for example, Section 301 of the US Trade Act 1974 by confining its application to acts deemed "unjustifiable" or "unreasonable". Moreover, the Commission's Assessment Report clarifies that usage of the ACI

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[1] Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302675

would be based on quantitative criteria meaning that there must be a minimum monetary threshold at stake.

There would also be consideration of qualitative criteria, and the guidance reflects the language in Article 2.2 concerning the intensity, severity, frequency, duration, breadth and magnitude of a coercive measure. The most important filter here would likely be the severity of the measure in question. Presumably, even if the frequency of the measure were limited to a single instance and it lasted only one day, it would still be deemed to be coercive if it were severe enough. The other main filter or factor would be the extent to which a coercive measure encroaches on sovereignty under Article 2.2(c). So even if the measure is not particularly severe, if it targets the ability of a Member State to take a decision freely, this could be deemed to be coercive.

2. Coercion under International and WTO Law

This section considers questions concerning the ACI's compatibility with public international law as well as WTO law. While the European Commission seeks to defend the ACI under public international law, the instrument has serious implications for WTO law. In public international law, the use of force is prohibited under Article 2(4) of the UN Charter. Economic coercion of the type targeted by the EU's Anti-Coercion Instrument falls short of the threshold required to come under the prohibition on the use of force in Article 2(4). The question that follows is whether there is a prohibition on coercion of the ACI variety in public or customary international law.

The Commission asserts that coercive measures breach customary international law as an interference in the affairs of another subject of international law (p8). Some instruments indicate that there is a prohibition on the use of coercion, e.g. the 1970 Declaration on Principles of International Law recalled the "duty of states to refrain . . . from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state". This was further underlined in the 1974 Charter of Economic Rights and Duties of States, which stated "no state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights". The ICJ's *Nicaragua* judgment is its most relevant decision in this area. This judgment found that a trade embargo did not breach the customary law principle of non-intervention and does not lend weight to the Commission's interpretation that economic coercion breaches international law. That said, the judgment left open the question of whether economic coercion may constitute coercion. The ACI envisages the enactment of countermeasures in response to economic coercion.

The WTO's dispute settlement system (DSS) is the exclusive forum for the resolution of disputes where there is a breach of the covered agreements. Furthermore, Article 23.2 DSU prohibits WTO Members determing a violation has occurred and responding in a unilateral manner outside of the WTO's DSS, which may authorise countermeasures. The Commission asserts that the exclusivity of the WTO DSS does not apply as EU would be seeking redress for a breach of general international law. The instrument tackles coercion that would constitute a breach of the non-intervention principle under general international law.

Thus the key question is whether the types of coervice activity targeted by the EU come under this principle. If this is the case, the DSU in no way prohibits the use of countermeasures for the purpose of enforcing non-WTO international rights and such countermeasures are provided for under Article 49 ARSIWA inter alia.

3. Domino effects

If current trends continue and the ACI becomes a core part of EU trade policy, the EU should expect a response from affected countries and perhaps the adoption of similar instruments. Where the EU acts under the ACI, its actions could in turn be deemed to be coercive by third countries. This is why it is essential to use a precise and ideally narrow definition of economic coercion. Under the Commission's Impact Assessment (p7), economic coercion means "pressure… with the objective of attaining a specific outcome falling within the legitimate policymaking space…". Under Article 2 of the Commission's ACI proposal, an action that "interferes in the legitimate sovereign choices of the Union or a Member State" shall be referred to as economic coercion.

Arguably such definitions are not narrow enough. For example, neither definition is confined to areas touching on foreign policy, such as the opening of a consulate. Legitimate "policymaking space" and "sovereign choices" potentially cover just about any measure a state could take. Coercion and interference need to be distinguished from influencing or arm-twisting, both of which are fairly common in trade relations and foreign policy. As an example, the Impact Assessment (p13) refers to China's blocking of a shipment of Covid vaccines until Ukraine withdrew its support for a statement at the UN Human Rights Council calling for access for independent observers to Xinjiang. However, there are circumstances in which the EU took similar actions which may well be seen to be coercive or interfering with other countries' domestic policies. For instance, in July 2018, the European Parliament backed a non-binding resolution to "make ratification and implementation of the Paris Agreement a condition for future trade agreements". This suggests that the EU

may link certain elements of trade relations with the signature of other international agreements, thereby influencing legitimate sovereign choices of other governments.

In February 2020, the EU partially withdrew trade preferences for Cambodia due to human rights violations including restrictions on freedom of expression. This was the first time such a withdrawal had been made under the Generalised Scheme of Preferences (GSP). If such a withdrawal were to be considered solely in terms of the application of the ACI, it likely would not be deemed to be coercive. Article 2.2(d) ACI addresses this by taking into account "whether the third country is acting based on a legitimate concern that is internationally recognised". However, other countries may not emphasise the difference between conditioning trade relations on legitimate international concerns compared to open acts of coercion. The EU needs to be careful about how it construes interference because then each time it seeks to influence a foreign country it may open itself up to allegations of coercion.

Another related example is the US' potential withdrawal of benefits from South Africa under the African Growth and Opportunity Act (AGOA). Resolution 145 was tabled in the aftermath of South Africa participating in the Mosi II joint naval drill with Russia and China in 2023. Whether this comes under the EU's definition of economic coercion seems to depend on whether 1) South Africa's participation is considered to be a legitimate sovereign choice, and 2) whether the US acted "on the basis of a legitimate concern that is internationally recognised". There may be an 'eye of the beholder' element to assessments such as these, where what constitutes a legitimate concern and a legitimate choice may not be universally accepted.

One of the key legal questions concerning the ACI is whether the type of measures targeted by the Commission fall under the non-intervention principle of international law. In terms of its effects, the ACI may trigger the adoption of similar instruments in other countries and actions under the ACI will likely result in retaliation. The ACI proposal contains a broad definition of economic coercion. The thinking may be that this will enhance the instrument's deterrent effect. However, the danger is that in practice, such a broad definition does not place sufficient limits on the situations in which the ACI may be used.

Environmental and Social Impact Assessments as Preventive Tools in International Investment Law

MIRKO CAMANNA

TABLE OF CONTENTS: 1. Concept of impact assessments – 2. Types of impact assessments. – 3. The problem of the sources. – 4. The dual preventive role of ESIAs: ESIAs as preventive tools. – 5. Potential concerns. – 6. Conclusion and proposals.

1. Concept of impact assessments

Environmental and social impact assessments (ESIAs) are procedures that identify the likely environmental or social impacts of projects before their approval[1]. They help public authorities to decide whether and how to approve a proposed investment project[2]. More generally, ESIAs are instruments of *environmental governance* that integrate environmental and social concerns into development and decision-making and lead to better-informed decisions[3]. Usually, suggestions arising from ESIAs do not directly bind public authorities. Nevertheless, they can influence the final decision significantly[4]. In this respect, ESIAs are part of a political process whose primary purpose is to ensure that the impacts of projects are fully known and understood[5]. The results of impact assessment can be positive and negative. Even if authorities identify potential

[1] Convention on Environmental Impact Assessment in a Transboundary Context, 1991, art. 1; V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, in *Polish yearbook of international law*, 2010, 30, p. 171; C. WOOD, *Environmental impact assessment: a comparative review*, Routledge, Oxford, 2013[2], p. 1 ss.; L. COTULA, *Foreign investment, law and sustainable development: a handbook on agriculture and extractive industries*, International Institute for Environment and Development, London 2016[2], p. 75.

[2] INTERGOVERNMENTAL FORUM ON MINING, MINERALS, METALS AND SUSTAINABLE DEVELOPMENT (IGF), *The Importance of Consultation and Engagement in Environmental and Social Impact Assessments*, edited by J. HILL, 2023, p.2, https://www.iisd.org/system/files/2023-01/igf-case-study-environmental-social-impact-assessments.pdf.

[3] K.R. GRAY, *International Environmental Impact Assessment-Potential for a Multilateral Environmental Agreement*, in *Colo. J. Int'l Envtl. L. & Pol'y*, vol. 11, 2000, p. 88; V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit.; C. WOOD, *Environmental impact assessment*, cit., p. 1 ss.; P. SANDS, J. PEEL, A. FABRA AGUILAR, R. MACKENZIE, *Principles of international environmental law*, Cambridge/New York, 2018[4], p. 657. They refer to the environmental dimension, but this consideration can be extended also to social dimension.

[4] D. A. COLLINS, *Public Participation in Environmental Impact Assessments for Foreign Investment Projects: A Canadian Perspective*, in *Public Participation and Foreign Investment Law*, edited by E. DE BRABANDERE, T. GAZZINI, A. KENT, Brill Nijhoff, Leiden, 2021, p. 231.

[5] C. WOOD, *Environmental impact assessment*, cit., p.3.

impacts, but they are not too severe or irreversible, the outcome of ESIAs may be positive. In such cases, the authorities may identify alternatives, preventive or mitigating measures[6]. Whatever, a positive assessment is often accompanied by a social and environmental management plan covering the whole life of the project and how the potential risks identified will be addressed[7]. Reviews are possible or, sometimes, mandatory[8].

However, the functions and benefits of using ESIAs in international investment activities are manifold. First of all, ESIAs can be used to implement the Sustainable Development Goals (SDGs) and the 2030 Agenda, as highlighted by the Minsk Declaration in 2017[9], although today the SDGs are usually mentioned without any further role[10]. Moreover, SDGs could also help to define the criteria for ESIAs[11]. A further function of ESIAs has also been highlighted by arbitral tribunals[12] and international human rights case law[13]: the promotion of transparency and participation of local communities and indigenous peoples in public decision-making processes. Thus, ESIAs not only have practical and pragmatic functions related to economic activities but are also significant for the

[6] L. COTULA, *Foreign investment, law and sustainable development*, cit., p. 75.

[7] *Ibid.*, p. 75; G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements: Global Administrative Law and Transnational Cooperation*, in *The Journal of World Investment & Trade*, vol. 18, 2017, n.1, pp. 135 ss.

[8] G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements*, cit., pp. 135 ss.
For an example see United Nations Human Rights Council, A/HRC/19/59/Add.5, p.8: «*all the impacts of the entry into force of a trade or investment agreement can be anticipated. Therefore, ex ante human rights impact assessments should be complemented by human rights impact assessments performed ex post, once the impacts are measurable. A human rights impact assessment should be conceived of as an iterative process, taking place on a regular basis, for instance, every three or five years*».

[9] Meetings of the Parties (MoP) to the UNECE Convention on Environmental Impact Assessment (EIA) in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment (SEA), Minsk Declaration, 2017; M. NILSSON, Å. PERSSON, *Policy note: Lessons from environmental policy integration for the implementation of the 2030 Agenda*, in *Environmental Science & Policy*, vol. 78, 2017, pp. 36–39.

[10] E. RAVN BOESS, L. KØRNØV, I. LYHNE, M. R. PARTIDÁRIO, *Integrating SDGs in environmental assessment: Unfolding SDG functions in emerging practices*, in *Environmental Impact Assessment Review*, 2021, 90.

[11] M. NILSSON, Å. PERSSON, *Policy note*, cit.

[12] V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit., p. 202.

[13] The Social and Economic Rights Action Center and the Center for Economic, and Social Rights v Nigeria, 27 May 2002, communication n. 155/96; European Court of Human Rights, 30 March 2005, Taşkin e others v. Turkey, application n. 46117/99; Inter-American Court of Human Rights, 28 November 2007, Saramaka People y Suriname, application n. 12338/2000; European Court of Human Rights, 27 January 2009, Tatar v. Romania, application n. 67021/01;. BUTZIER, STEVENSON, *Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent*, *Journal of Energy & Natural Resources Law*, vol. 32, 2014, n. 3, pp. 318 ss. See also the International Covenant on Civil and Political Rights (art. 25 (a)).

protection and promotion of human rights. Moreover, ESIAs are also relevant from an *ex-post* perspective, using them as evidence in national court cases and investment arbitration[14], as discussed below.

2. Types of impact assessments

The category of impact assessments encompasses several types of instruments, which differ in terms of their object, methodology, and purpose. This paper focuses on impact assessment regarding investment projects[15]. The best-known tool in this context is the Environmental Impact Assessment (EIA), which integrates environmental concerns into socio-economic development and public decision-making[16]. The main purpose of EIA is to identify potential risks to the environment from economic activities, particularly in the areas closest to the project site[17]. Today, however, EIAs usually consider not only environmental but also social and human rights concerns, requiring the involvement of local communities and indigenous peoples, and introducing instruments such as the social license to operate or the free prior informed consent (FPIC)[18].

Two distinct types of impact assessment are social impact assessment and human rights impact assessment. The former focuses on identifying and assessing undesirable and desirable social outcomes and concerns[19], while the

[14] R. PAVONI, *Environmental Rights, Sustainable Development, and Investor-State Case Law*, cit., p. 546; J. PEEL, *The use of science in environment-related investor-state arbitration*, in *Research Handbook on Environment and Investment Law*, edited by K. MILES, Edward Elgar Publishing, Cheltenham/Northampton, 2019, pp. 244–263.

[15] Even impact assessments on economic agreements are possible but are not considered in present work. See for example M. G. PLUMMER, D. CHEONG, S. HAMANAKA, *Methodology for Impact Assessment of Free Trade Agreements*, Asian Development Bank, 2011.

[16] E. MORGERA, *Human Rights Dimensions of Corporate Environmental Accountability*, in *Human Rights in International Investment Law and Arbitration*, edited by P.-M. DUPUY, E.-U. PETERSMANN, F. FRANCIONI, Oxford University, Oxford, 2009[1], p. 518; P. SANDS, J. PEEL, A. FABRA AGUILAR, R. MACKENZIE, *Principles of international environmental law*, cit., p. 657;

[17] E. MORGERA, *Human Rights Dimensions of Corporate Environmental Accountability*, cit., p.519.

[18] J. A. VANDUZER, P. SIMONS, G. MAYEDA, *Integrating sustainable development into international investment agreements: a guide for developing country negotiators*, Commonwealth Secretariat, 2013; M. PAPILLON, T. RODON, *Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada*, in *Environmental Impact Assessment Review*, vol. 62, 2017, pp. 216–224; J. HILL, *The Importance of Consultation and Engagement in Environmental and Social Impact Assessments*, cit.
See for example the Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts in the IFC, *Performance Standards on Environmental and Social Sustainability*, (2012) or the above mentioned Akwè Guidelines.

[19] Secretariat of the Convention on Biological Diversity, *Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities*, 2004, cit., p.7; J. HARRISON, *Human rights measurement: reflections on the current practice and future potential of human rights impact assessment*, in *Journal of Human Rights Practice*, vol. 3, 2011, n. 2, pp. 162–167.

latter focuses on international human rights standards that may be violated by investors' activities[20]. A third typology of impact assessment for investment projects is the more recent Sustainability Impact Assessment (SIA)[21], which takes a broader approach and analyses the investment project in terms of all the different pillars of sustainable development (environmental, social, and economic)[22]. Given the intersections between the different types of impact assessment, the distinction outlined here should not be overstated, and an integrated approach that considers the social, environmental, and economic dimensions together is preferable.

In addition to the above, there are other types of impact assessment related to investment activities and International Investment Law (IIL). The first is the impact assessment of international agreements, which usually takes the form of a sustainability impact assessment or human rights impact assessment. It is conducted before the conclusion of international economic agreements to avoid and prevent potential conflicts between States' environmental and human rights obligations and those arising from trade and investment agreements[23]. The second is regulatory impact assessment, which is a systematic approach to critically evaluating the positive and negative impacts (e.g. on environment) of proposed and existing regulations and alternatives[24]. Regulatory impact assessment is also helpful for investors, as it should help clarify what kind of legislation is most appropriate to promote investment and provide guidance on specific host States' obligations and requirements[25].

A similar tool is a human rights audit, which would examine a Host State's

[20] J. HARRISON, *Human rights measurement: reflections on the current practice and future potential of human rights impact assessment*, *Journal of Human Rights Practice*, vol. 3, 2011, n. 2, pp. 162–167; S. DEVA, *International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives*, in *Handbook of International Investment Law and Policy*, edited by J. CHAISSE, L. CHOUKROUNE, S. JUSOH, Springer Singapore, Singapore, 2022, p.1751.

[21] See the proposal of European Commission, Directorate General for Trade, *Handbook for trade sustainability impact assessment*, 2016.

[22] *Ibid.*; S. SCHACHERER, R.T. HOFFMANN, *International investment law and sustainable development*, in *Research Handbook on Foreign Direct Investment*, edited by M. KRAJEWSKI, R.T. HOFFMANN, Edward Elgar Publishing, Cheltenham/Northampton, 2019, pp. 587 – 588.

[23] O. DE SCHUTTER, *Guiding principles on human rights impact assessments of trade and investment agreements*, cit.; EUROPEAN COMMISSION, DIRECTORATE GENERAL FOR TRADE, *Handbook for trade sustainability impact assessment.*, cit.; M. GEHRING, S. STEPHENSON, M.-C. C. SEGGER, *Sustainability Impact Assessments as Inputs and as Interpretative Aids in International Investment Law*, in *The Journal of World Investment & Trade*, 18/1, 2017, pp. 163–199. Several National Action Plans on Business and Human rights require conducting impact assessment during agreements' negotiations, see for example Finnish National Plan, art.1.3.

[24] OECD (ed.), *Regulatory impact assessment*, OECD Publishing, Paris 2020.

[25] EUROPEAN COMMISSION, HIGH-LEVEL EXPERT GROUP ON SUSTAINABLE FINANCE, *Financing a sustainable european economy*, 2018, https://finance.ec.europa.eu/system/files/2018-01/180131-sustainable-finance-final-report_en.pdf.

human rights obligations and allow the investor to anticipate and take into account future changes in this legislation, thereby avoiding the creation of legitimate expectations and better defining the landscape of foreign investors' legitimate expectations in a way that does not leave excessive *ex-post* discretion to arbitrators[26].

3. The problem of the sources

The evaluation of the space given to ESIAs in international sources can be positive and negative. Looking at general International Law, ESIAs have been mentioned since the 1970s. Today, the obligation to conduct EIAs seems to be an important environmental principle and a well-established tool, both in case law and in international sources (although many of these sources are soft law in this respect)[27]. Even national legislations usually provide for ESIAs, in particular environmental impact assessment, although these laws may have criticisms, as will be explained below.

Looking at IIL, the situation is quite different. In the specific context of IIL, there is a lack of references to ESIAs in International Investment Agreements (IIAs)[28]: analysing the more than 3,000 IIAs and the more than 400 TIPS that have been adopted to date, only 44 IIAs contain references to impact assessment[29]. Among these 44 IIAs, 39 of them mention environmental impact assessment, and only 3 IIAs mention social impact assessment[30].

The first reaction to this data is discouraging, and it seems that IIAs have basically no interest in dealing with ESIAs. It should be noted that, according to some authors, the ESIAs provisions - or proposals - in IIAs go far beyond what

[26] B. SIMMA, *foreign investment arbitration: a place for human rights?*, in I*nternational and Comparative Law Quarterly*, vol. 60, 2011, n.3, pp. 573–596.

[27] D. SHELTON, *International Environmental Law: 3rd Edition*, Brill | Nijhoff, Leiden, 2021, pp. 236 – 244; R. PAVONI, *Environmental Rights, Sustainable Development, and Investor-State Case Law*, cit., p. 546.
See Art. I, Kuwait Regional Convention (1978); Art. 13, West and Central African Marine Environment Convention (1981); Art. 10, South-East Pacific Marine Environment Convention (1981); 14(1) (a), Biological Diversity Convention (1982); Principle 11 of the World Charter for Nature (1982); Art. 206, UNCLOS (1982); Art. 14, ASEAN Agreement (1985); Artt. 6, 15, Tribal Peoples Convention 169 (ILO 169) (1989), Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, (1991); art. 14, Convention on Biological Diversity; See also Principle 17 of the Rio Declaration (1992); Art. 4(1) (f), Climate Change Convention (1992); Preamble, Amendments to the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources, (1996); art. 6, Aarhus Convention, (1998); UN Guiding Principles on Principles on Business and Human Rights (2011).

[28] J. A. VANDUZER, P. SIMONS, G. MAYEDA, *Integrating sustainable development into international investment agreements: a guide for developing country negotiators*, cit., p. 268.

[29] UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements, last access 24.07.2023.

[30] UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements last access 24.07.2023.

could reasonably be expected from an IIA[31]. On the other hand, it is interesting to note that a significant number of the 44 treaties that mention impact assessments are recent treaties, well known for their focus on the environment and human rights[32]. Therefore, this may be the beginning of a changing trend. Otherwise, ESIAs may also become indirectly relevant in investment arbitration, where provisions in IIAs require arbitrators to decide on the basis of national or international law[33], and these sources regulate ESIAs.

Considering the European Union as a case study, there is a difference between the internal and the external perspective. Concerning internal policies, the EU has a relevant regulation on impact assessment[34]. But looking at the external policies, specifically the economic agreements concluded by the EU, there are some references to impact assessment, but these references are mainly contained in trade agreements or trade chapters and not in investment chapters[35]. Moreover, these references are mostly to the regulatory or agreements' impact assessment[36], and not to investment activities impact assessments. Even the recent EU-Angola Sustainable Investment Facilitation Agreement contains an impact assessment, but this is a regulatory impact assessment[37].

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[31] P. MUCHLINSKI, *Negotiating New Generation International Investment Agreements*, in *Shifting Paradigms in International Investment Law*, edited by S. HINDELANG, M. KRAJEWSKI, Oxford University Press, Oxford, 2016, pp. 41–64.

[32] E.g. IISD Model International Agreement on Investment for Sustainable Development; PAIC SADC Model Bilateral Investment Treaty 2012, art. 13; Morocco Nigeria BIT, art.14; 2019 Dutch Model BIT.

[33] See the partial dissenting opinion of Professor Philippe Sands in case Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, award 30 November 2017, par. 11: «*The same considerations apply in the present case in relation to the requirements of ILO Convention 169, and in particular its Article 15 on consultation requirements. Article 837 of the Canada Peru FTA, on Governing Law, provides that this Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". ILO Convention 169 is a rule of international law applicable to the territory of Peru. This Tribunal is entitled to take the Convention into account in determining whether the Claimant carried out its obligation to give effect to the aspirations of the Aymara peoples in an appropriate manner, having regard to all relevant legal requirements, including the implementing Peruvian legislation*».

[34] See in particular Directive 2001/42/EC, Directive 2011/92/EU, and Directive 2014/52/EU.

[35] Although there are interesting provisions related to economic activities in other EU's agreements. See for example the recent EU – New Zealand FTA, art. 13.8, that introduce an assessment of environmental impact: *Each Party shall ensure that its laws and regulations require an environmental impact assessment for activities related to production of energy goods or raw materials, where such activities may have a significant impact on the environment*. See also EU - United Kingdom Trade and Cooperation Agreement affirms at Article 7.4 par. 2: *The Parties reaffirm their respective commitments to procedures for evaluating the likely impact of a proposed activity on the environment, and where specified projects, plans and programmes are likely to have significant environmental, including health, effects, this includes an environmental impact assessment or a strategic environmental assessment, as appropriate*.

[36] See for example EU – New Zealand FTA, art. 22.8; EU - United Kingdom Trade and Cooperation Agreement, artt. TBT.4, GRP.8

[37] See art. 25 of EU-Angola Sustainable Investment Facilitation Agreement.

4. The dual preventive role of ESIAs: ESIAs as preventive tools

The first section outlined the main functions and benefits of using ESIAs for international investment projects. This section focuses on the role of ESIAs as preventive tools: as will be explained, this preventive function is one of the main benefits of ESIAs. The preventive function of ESIAs is closely linked to their outcomes and timing. As explained above, ESIAs intervene before investment activities are approved and initiated. Considering the ESIAs' findings, public authorities could decide to suspend or require modifications to the investment project if they identify likely adverse impacts and concerns.

In light of these considerations, ESIAs could have a twofold preventive function: first, from and environmental and human rights perspective; second, from an International Investment Law and investor-State dispute settlement (ISDS) perspective. Concerning the first dimension, ESIAs could prevent environmental, social, and human rights abuses and concerns. From an environmental perspective, ESIAs can prevent potential damage and pollution from investment activities, because if ESIAs identify potential negative impacts, the project would not be approved or would be modified to avoid such problems. Even arbitral tribunals have recognised this preventive role of ESIAs, for example in the leading case *Maffezini v. Spain*: « *(...) the Environmental Impact Assessment procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This is true, not only under Spanish and EEC law, but also increasingly so under international law*»[38]. This preventive role of ESIAs for environmental concerns is particularly true in the case of high-impact activities, such as extractive industries[39].

This role of ESIAs as preventive tools is crucial: it would certainly be better to prevent environmental damage from occurring than to ensure that investors who cause damage are held fully responsible[40]. Even if investment project with potentially harmful effects is approved, ESIAs at least make authorities and local communities aware of the potential harmful externalities of investment activities[41].

The preventive role of ESIAs also addresses social tensions, human rights abuses, and cultural heritage concerns[42]. As explained above, ESIAs include

[38] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award 13 November 2000, par. 67.
[39] L. JOHNSON, *FDI, international investment agreements and the sustainable development goals*, in *Research Handbook on Foreign Direct Investment* edited by M. KRAJEWSKI, R.T. HOFFMANN, Edward Elgar Publishing, Cheltenham/Northampton, 2019, p. 147.
[40] A.K. BJORKLUND, *Sustainable development and international investment law*, in *Research Handbook on Environment and Investment Law*, edited by K. MILES, Edward Elgar Publishing, Cheltenham/Northampton, 2019, p. 67.
[41] C. WOOD, *Environmental impact assessment*, cit., pp. 3 – 4.
[42] F. FRANCIONI, *Diritto internazionale degli investimenti e tutela dei diritti umani: convergenza o conflitto?*, in *La tutela dei diritti umani e il diritto internazionale : XVI Convegno, Catania,*

tools such as local community engagement, transparency, FPIC, and social licence to operate: these instruments may prevent potential tensions with local communities, ensure full disclosure of investment projects and benefits, and help to find a compromise between local communities and investors. The problem arises in particular when local communities do not want investment activities in their territories, especially if they are highly impactful, but also in cases where investment activities would not be particularly harmful, but the population may still perceive them as such[43].

Conversely, denying local communities the right to participate in public decision-making, especially where environmental or social concerns are foreseeable, could provoke their reactions, which could be legal[44] but also violent and unlawful[45].

This problem is clearly illustrated in two cases. The first is the Ecuadorian saga of oil exploration projects in the Ecuadorian Amazon[46]. In this case, Ecuador approved an investment project without the mandatory involvement of local communities and indigenous. The epilogue of this saga was highly problematic: first, local communities violently protested for their exclusion from the public procedure, and Ecuador was even condemned by the Inter-American Court of Human Rights[47]. Second, there were relevant problems of pollution and oil spills, so Ecuador revoked the authorization to the foreign company, but this latter requested an arbitration[48]. In the end, the arbitration ended favourably for Ecuador and is also one of the few cases with a counterclaim upheld on

23- 24 giugno 2011 (*SIDI, Società Italiana di Diritto Internazionale*), edited by A. DI STEFANO, R. SAPIENZA, Editoriale Scientifica, Napoli, 2012, pp. 432 – 433.

[43] Compliance Advisor/Ombudsman, 7 September 2005, Assessment Report of a complaint in relation to the Marlin Mining Project in Guatemala; R. PAVONI, *Environmental Rights, Sustainable Development, and Investor-State Case Law*, cit., p. 522.

[44] Such as going to court or appealing international human rights bodies. E.g. The Social and Economic Rights Action Center and the Center for Economic, and Social Rights v Nigeria; 27 May 2002, communication n. 155/96; Inter-American Court of Human Rights, 28 November 2007, *Saramaka People y Suriname*, application n. 12338/2000; European Court of Human Rights, 27 January 2009, *Tatar v. Romania*, application n. 67021/01.

See also Bilcon v Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, where the project was denied because the Canadian appellate body affirmed that the project presented significant and adverse environmental effect on the 'community core values'.

[45] Copper Mesa Mining Corp. v Ecuador, PCA Case No. 2012-2, Award 15 March 2016, see for more details Court of Appeal for Ontario, ONCA 191, Piedra v. Copper Mesa Mining Corporation, 11 March 2011; Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, award 30 November 2017;

[46] C. BINDER, J. HOFBAUER, *Case Study: Burlington Resources Inc. v Ecuador/Kichwa Indigenous People of Sarayaku v Ecuador*, 2016.

[47] Inter-American Court of Human Rights, 27 June 2012, Kichwa indigenous people of Sarayaku v. Ecuador, application n. 12465/2003.

[48] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, award on liability 14 December 2012.

environmental grounds[49]. This is a clear example of the interactions between investment activities, environmental damage, and human rights abuses. This case is also significant because there has been a concurrence of claims before both human rights tribunals and ISDS.

The second case is *Metalclad v. Mexico*[50], where pressure from local communities on the government persuaded - or forced - the authorities to revoke the investor's permit, even though the project was well advanced. Significantly, in this case, the local communities were initially excluded from the preliminary stages of the investment project. As a result of the revocation, the investor filed an ISDS claim for unfair conduct of Mexican authorities and breach of the investor's legitimate expectations. The second dimension of the preventive role of ESIAs relates to International Investment Law and arbitrations. In this sense, ESIAs can be a tool to prevent the recourse to arbitration[51], to safeguard public decisions and even to protect investors' interests. First, this preventive role in IIL is related to the preventive function for environmental and social concerns. Environmental or human rights abuses caused by investors' activities may provoke a reaction from the host State and the local population, causing social problems or environmental damage and convincing the host State to revoke project permits. As a result, the investor may react to protect its investment, even proposing arbitration. ESIAs could therefore prevent these violations and tensions between the host State, investors, and population, and thus prevent potential ISDS.

In this context, ESIAs primarily benefit the host State. Decisions by public authorities that affect investors' interests may not appear arbitrary or unjustified if they depend on the results of ESIAs, and this could prevent potential claims by investors. Alternatively, host States could condition project approvals on the results of ESIAs, thereby preventing the emergence of legitimate investor expectations. ESIAs can therefore protect and justify public policies and decisions. However, the sole existence of ESIAs legislation in the host State is insufficient to prevent arbitration and safeguard the choices of public authorities. What is needed is clear and complete legislation that is applied fairly and

[49] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, decision on counterclaim 7 February 2017.

[50] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, award 30 August 2000; A. TAMAYO, *The New Federalism in Mexico and Foreign Economic Policy: An Alternative Two-Level Game Analysis of the Metalclad Case*, in *Latin American Politics and Society*, vol. 43, 2001, n. 4, pp. 67–90; F. EL-HOSSENY, *Civil Society in Investment Treaty Arbitration: Status and Prospects*, Brill, Leiden, 2018, pp. 77 – 80.

[51] F. FRANCIONI, *Dispute Avoidance in International Environmental Law*, in *Economic Globalization and Compliance with International Environmental Agreements,* edited by D. SHELTON, A. KISS, Wolters Kluwer, The Hague, 2003, p. 235; V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit.

correctly.

Nevertheless, if investors were to file a claim, the host State would use the ESIAs as a defence to justify its decision and discourage ISDS claims[52]. ESIAs benefit investors as well as States. They can prevent the creation of legitimate false expectations and avoid the commencement of investments in States where negative assessments have been made (with potential denial of permits or subsequent revocation), thus avoiding wasted time and resources. In this sense, even the cost of an impact assessment is lower and preferable than the costs of a failed investment and a hypothetical ISDS[53].

5. Potential concerns

Despite the benefits, ESIAs are not a *panacea*[54], and using impact assessments can also have negative effects, both from a substantial and ISDS dimension. From a substantial dimension, the first problem is the uncertainty about sources[55]. Even today, ESIAs procedures are mainly regulated at the national level [56], but this legislation may be absent, uncertain, constantly changing, or inadequate to deal with complex investment projects. The main problem, however, is whether ESIAs legislation exists but is ineffective, not applied, or misapplied. The reasons for these inefficiencies can be manifold, such as the inadequacy of the authorities responsible for carrying out ESIAs, the lack of capacity to analyse complex projects, pressure from governments and investors, or corruption[57].

Poorly or inadequately conducted ESIAs could have the opposite effect of what they are supposed to prevent because they fail to assess the likely or potential negative impacts of investment projects. This could lead to the approval of projects that are deemed safe, but which later turn out to be unsafe and produce 'foreseeable but unforeseen' negative externalities for the environment, local

[52] In Glamis Gold, Ltd. v. The United States of America, UNCITRAL for example the EIA's outcomes against the open-mine project was a strong argument in favour of USA.

[53] F. FRANCIONI, *Diritto internazionale degli investimenti e tutela dei diritti umani: convergenza o conflitto?*, cit., p. 433.

[54] In the same term but regarding *ex ante* regulatory impact assessment RENDA, *Impact assessment in the EU: the state of the art and the art of the state*, Brussel, 2006, pp. 41 - 44, 79, 88, 135.

[55] S. ROBERT-CUENDET, *Protection of the environment and international investment law*, in *Research Handbook on Foreign Direct Investment*, edited by M. KRAJEWSKI, R.T. HOFFMANN, Edward Elgar Publishing, Cheltenham/Northampton, 2019, p. 606.

[56] A.K. BJORKLUND, *Sustainable development and international investment law*, cit., pp. 52 – 53.

[57] L. COTULA, *Foreign investment, law and sustainable development*, cit. See in particular p. 79: «*Recurring problems include: inadequate company systems and expertise; lack of institutional capacity in the government agencies that scrutinise impact studies and subsequently monitor compliance with management plans; lack of institutional independence between the project proponent and the party (often a consultant) carrying out the assessment; and weak negotiating power of environmental agencies with other ministries when it comes to investment decision making*.

communities, and human rights[58]. In these cases, the authorities may be unprepared to react because the project was approved and considered safe. Moreover, even in cases where ESIAs are well done, the possibility of exceptional and unforeseen events remains[59].

Substantial problems are also reflected in the IIL and ISDS dimensions. ESIAs do not preclude the recourse to arbitration, and investors could challenge both the fact that ESIAs have been enforced and how they have been enforced[60]. Indeed, from an investor's perspective, ESIAs can be positive, but they can also hinder or slow down investment activities. Thus, ESIAs can be a «*pervasive form of interference with investment activities*» and affect the profitability of investments[61]. Nevertheless, investors are much more likely to challenge how ESIAs are carried out than the reasons to require them[62]. Looking at the case law, ESIAs have been challenged in particular for: the methodologies applied[63]; inefficiencies and misinformation[64]; the timing to conduct them, especially if requested after project approval (when the investor has already started its activities, or there is already a legitimate expectation)[65]; the use of ESIAs by Host States as a pretext to revoke investment approvals no longer desired[66].

[58] Compliance Advisor/Ombudsman, November 2003, Assessment Report on the complaint regarding the Zambia Konkola Copper Mine Project; Assessment Report of a complaint in relation to the Marlin Mining Project in Guatemala, cit.; G.W. FERNANDES ET AL, *Deep into the mud: ecological and socio-economic impacts of the dam breach in Mariana, Brazil*, in *Natureza & Conservação*, vol.14, 2016, n. 2, pp. 35–45; R.M. TÓFOLI ET AL, *Gold at what cost? Another megaproject threatens biodiversity in the Amazon*, in *Perspectives in Ecology and Conservation*, vol. 15, 2017, n. 2, pp. 129–131 for the concerns about Volta Grande project in Brasil.

[59] S. SCHACHERER, R.T. HOFFMANN, *International investment law and sustainable development*, cit., p. 488.

[60] G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements*, cit., p. 138. Ascent Resources Plc and Ascent Slovenia Ltd v. Republic of Slovenia, Notice of Intent 23 July 2020.

[61] R. PAVONI, *Environmental Rights, Sustainable Development, and Investor-State Case Law*, cit., p. 476; V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit., p. 190; G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements*, cit. pp. 132, 138. The Renco Group, Inc. v. Republic of Peru [I], ICSID Case No. UNCT/13/1.

[62] V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit., p. 190; L. COTULA, *Foreign investment, law and sustainable development*, cit., p. 80 ss.

[63] Methanex Corporation v. United States of America, UNCITRAL, Final Award 3 August 2005.

[64] COUNCIL OF EUROPE, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, *Human rights compatibility of investor–State arbitration in international investment protection agreements*, p. 14.

[65] Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award 8 June 2009; MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7**,** Award 25 May 2004**.**

[66] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award 13 November 2000; Chemtura Corporation v. Government of Canada, UNCITRAL, Award 2 August 2010, (para. 35 and 41); Bilcon v Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015

Moreover, even a positive impact assessment and project approval do not provide investors with a full guarantee. Events such as political changes or new legislation could lead to reconsider the project approval, but this change would be contrary to investors' expectations and would breach investors' rights under the IIAs[67].

Another key issue is the *chilling effect*[68] that could result from the fear of arbitration due to ESIAs. First, the chilling effect could hinder the introduction or strengthening of ESIAs legislation (*regulatory chill*). Second, the threat of ISDS could influence the administrative authorities responsible for ESIAs, which might hesitate to enforce or implement stringent EIA procedures or be induced to make more investor-friendly assessments, even for ESIAs concerning local companies[69].

Finally, in International Law the obligation to conduct impact assessments is often imposed only on States, not on investors[70]. Therefore, the investor is usually not internationally responsible for not conducting ESIAs.Concluding and summarizing, this is the paradox: ESIAs are supposed to be a preventive tool, but they risk causing the same negative impacts they are supposed to prevent.

6. Conclusion and proposals

As explained above, ESIAs for international investment activities have positive and negative aspects. On the one hand, they are a tool for preventing human rights and environmental abuses and for ISDS. On the other hand, they can contribute to and cause both human rights and environmental abuses and ISDS claims.Some proposals are therefore suggested to strengthen the preventive and positive role of ESIAs without increasing the negative externalities.

[67] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, award 30 August 2000; Copper Mesa Mining Corp. v Ecuador, PCA Case No. 2012-2, award 15 March 2016; Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, award 14 October 2016; Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5, Award 3 June 2021.
[68] K. TIENHAARA, *Regulatory chill and the threat of arbitration: A view from political science*, in *Evolution in Investment Treaty Law and Arbitration*, edited by C. BROWN, K. MILES, Cambridge University Press, Cambridge, 17/11/2011[1], pp. 606–628.
[69] G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements*, cit., pp. 144 ss. See also dissenting opinion *Bilcon v Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 by Professor Mc Rae.
[70] Pulp Mills on the River Uruguay (Argentina v. Uruguay), I.C.J. Reports, 2010, (I), Exhibit CL-127, par. 101; Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica), I.C.J. judgement, 2015, par. 101, 104; Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Final Award 27 December 2016 par. 275-6.

1. Reform IIAs. In particular, introduce ESIAs[71] and integrate them with other IIAs provisions. Integrating social and environmental concerns into IIL is a significant challenge for modern IIAs, and ESIAs could prevent the occurrence of potential human rights or environmental violations and the recourse to ISDS. The introduction and integration of ESIAs into IIAs could also provide greater certainty about the mutual obligations of host States and investors, clarify ESIAs procedures, and define the interaction between ESIAs and investors' legitimate expectations.

2. Effective implementation of ESIAs. As explained above, the main problem with ESIAs in investment arbitration seems how they are conducted. It is crucial to clarify their scope, methodology, and application. Furthermore, Host States and investors should strive to implement ESIAs as best as possible. Poor ESIAs lead to higher risks and a higher likelihood of ISDS claims.

3. Adopt an SDGs approach. As investment activities have an impact on all dimensions of sustainable development (environmental, social, and economic), ESIAs must be designed with the SDGs in mind. In this sense, ESIAs could allow States to respect and fulfil national and international sustainable development obligations. In this context, the SDGs could also define the evaluation criteria in ESIAs[72]. As the case law demonstrates, carrying out impact assessments is certainly time-consuming and costly, but failing to carry out impact assessments or carrying them out inadequately has far more negative consequences.

[71] R. PAVONI, *Environmental Rights, Sustainable Development, and Investor-State Case Law*, cit.; V. VADI, *Environmental impact assessment in investment disputes: Method, governance and jurisprudence*, cit.; ; G. MAYEDA, *Integrating Environmental Impact Assessments into International Investment Agreements*, cit.; L. JOHNSON, *FDI, international investment agreements and the sustainable development goals*, cit.; S. DEVA, *International Investment Agreements and Human Rights*, cit., p. 1751.
[72] M. NILSSON, Å. PERSSON, *Policy note*, cit.

The Energy Charter Treaty: The Past, the Present and the Future

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1. Introduction

It is difficult to convincingly speak of reforming the global economic governance in the EU context without paying due attention to one of the most well-known, if not infamous, instruments of international economic law in the region: the Energy Charter Treaty ("the ECT" or "the Treaty").[1] The ECT, with its intricate provisions and far-reaching implications, serves as a compelling case study for understanding the complexities and challenges inherent in reshaping international economic frameworks. This chapter undertakes a comprehensive examination of the ECT through a temporal lens, spanning the past, present, and future. The first part delves into the negotiating and drafting history of the Treaty (II.), shedding light on its origins and primary functions. The second part explores the real-world implications of the ECT in today's context (III.),

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[1] The content presented in this contribution shares certain similarities with a previously published work by the author: Daszko A, 'The Energy Charter Treaty at a Critical Juncture: Of Knowns, Unknowns and Lasting Significance' (2023) Journal of International Economic Law, forthcoming. The current piece reflects more accurately the content of the seminars presented by the author in Bologna in March 2023 as part of the seminar offer in the Re-Globe Jean Monnet Module. Efforts have been made to ensure distinctiveness and value in each respected publication.

focusing, to an extent, on pertinent case law in which Italy has been involved as the respondent State. Finally, the third part looks toward the future, contemplating the modernization of the Treaty and, indeed, the possibility of alternative approaches (IV.). Through this multifaceted exploration, the contribution aims to provide a thorough understanding of the ECT's evolution, current impact, and the potential avenues for its modernisation, or alternatives, to address contemporary challenges and future needs facing global economic governance.

2. Learning from the past: History, functions and objectives of the ECT

Today, the ECT is both the biggest and the most-oft invoked multilateral investment treaty in the world: it encompasses 54 parties and has given rise to at least 158 known disputes.[2] This means that over 10% of all known investor-State disputes, based on investment treaties, are rooted in the ECT.[3] Though to better understand how the ECT has risen to its prominence in the context of international investment law and arbitration,[4] we must consider two aspects: its historical origins (A.) and its structure and functions (B.).

2.a The origins of the Energy Charter Treaty: Historical and political context

The ECT emerged through complex negotiations and prolonged ratification during a period marked by unprecedented geopolitical and institutional transformations.[5] This era witnessed significant events across the globe such as the fall of the Soviet Union, the Gulf and Bosnian Wars, and a revitalised dedication to global institutions, highlighted by talks on NATO and EU expansion, the Uruguay Round negotiations, and the conclusion of the UN Framework Convention on Climate Change (UNFCC), to name a few.[6]

[2] ECT Secretariat Statistics, https://www.energychartertreaty.org/cases/statistics/, figure as of 31 May 2023. Number of parties, including the EU, have recently expressed their interest to withdraw. As will be discussed below, withdrawal is effective from one year of receipt, by the ECT Secretariat, of the official withdrawal decision (Article 40). In addition, as per the so-called sunset clause enshrined in Article 47(3), investment protection and dispute settlement continue to apply for 20 years the protection provided for by Part III with respect to existing investments

[3] UNCTAD, World Investment Report 2023 (2023) https://unctad.org/system/files/official-document/wir2023_en.pdf 78.

[4] The ECT's numerous non-investment provisions are also of note, especially those on trade and transit. The analysis of these, however, falls outside the scope of this contribution.

[5] Hober K, The Energy Charter Treaty: A Commentary (OUP 2020), 14.

[6] For a contemporary comment see: Axelrod RS, 'The European Energy Charter Treaty: Reality or Illusion?' (1996) 24 Energy Policy 497.

The journey towards the ECT commenced in June 1990, when the then Dutch Prime Minister Lubbers, first presented the idea of a European Energy Community at the European Council meeting in Dublin.[7] Lubbers suggested that industrial cooperation in the field of Energy might be a "a catalyst for economic revival in Eastern Europe and the USSR".[8] The first formal initiative to achieve this goal, was the signing of the European Energy Charter (EEC) on 17 December 1991.[9] The EEC was a political declaration not a binding international treaty, even its Title IV in the first paragraph stated that it was "not eligible for registration under Art. 102 of the UN Charter".[10] The Charter was a declaration of political intent to promote co-operation in the field of energy, throughout Europe,[11] and beyond. Indeed, despite being called "European", the scope and focus of the EEC was global – Australia, Japan, Russia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan were all founding members of both the Charter and the Treaty.[12] Although involved in the negotiations, the US refrained from signing the Treaty, citing that the level of protection under the ECT lagged behind that offered by US BITs.[13]

Overall, the EEC laid ground for the conclusion of the ECT three years later and its entry into force in April 1998. On the side of Western European States, a key strategic concern was the security of supply, as a significant proportion of the energy in the region was imported from the increasingly unstable Middle East region, thereby underscoring the need for diversification.[14] The ECT was also welcomed by Russia and the former Soviet Union States, rich in energy resources but "in a state of political flux",[15] and in need of significant investments to aid development.[16] Indeed, Charles Rutten, the Energy Charter Conference Chair, hoped that, with the conclusion of the ECT: "the industrial

[7] Papaioannou A, 'Security of Energy Supply: The Approach in the European Union and the Contribution of the Energy Charter Treaty' (1995) 2 Maastricht Journal of European and Comparative Law 34, 34-35.
[8] Axelrod (n 6), 497.
[9] Walde T, 'Introductory Note: European Energy Charter Conference' (1995) 34 International Legal Materials 360, 361.
[10] Craig Bamberger, Jan Linehan & Thomas Walde, The Energy Charter Treaty in 2000: In a New Phase, Chapter from Energy Law in Europe, edited by Martha M Roggenkamp, Oxford University Press 2000.
[11] Kaj Hober (n 5), 3.
[12] Geraets, D and Reins L, 'Article 1: Definitions' in: Commentary on the Energy Charter Treaty, (Edward Elgar Publishing, 2018), 1.05.
[13] See United States: Statement on the European Energy Charter Treaty, Dec. 1 5-16, 1994 (1995) 34 I.L.M. 556.
[14] Papaioannou (n 7), 37; Konoplyanik A and Walde T, 'Energy Charter Treaty and Its Role in International Energy' (2006) 24 Journal of Energy & Natural Resources Law 523, 524.
[15] Andrews-Speed P, 'The Politics of Petroleum and the Energy Charter Treaty as an Effective Investment Regime' (1999) 4 Journal of Energy Finance & Development 117, 132.
[16] Konoplyanik and Walde (n 14), 524.

and financial resources of the West will be harnessed to work alongside Eastern companies in developing the East's massive energy resources and systems." Thus, an instrument offering seemingly a win-win scenario was concluded by most of the participants in the negotiations.[17]

As for the official purpose of the ECT, Article 2 states that it is to create a 'legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits'. Importantly, the ECT offers the same level of protection to investments in renewable energy as it does to those pertaining to energy stemming from nuclear, coal, natural gas, and petroleum sources.[18]

Overall, the ECT, conceived amidst tumultuous global changes, can be seen as a testament to the power of multilateral diplomacy and showcases the role international institutions play in international rulemaking.[19] By crafting a legal framework aimed at long-term energy cooperation, it not only shaped international energy policy but also transformed the landscape of international disputes. Today, as the world faces renewed concerns further accentuating the energy trilemma,[20] the ECT's experience could be seen to underscore the necessity and potential of such global cooperative efforts in navigating shared challenges, even if, as will be explored below, questions arise whether the Treaty is still fit for purpose with many advocating for its abandonment.

2.b The structure and functions of the Energy Charter Treaty: Investor-State dispute settlement

It shall come as no surprise that with its 8 parts, 50 articles, 14 Annexes, 5 Conference declarations and numerous understandings and interpretations the ECT has been described as "user unfriendly".[21] The text encompasses provisions not only on investment protection but also on aspects such as trade and transit, the environment, and taxation. These, however, fall outside the scope of ISDS or indeed outside the application of the sunset clause, discussed below.

[17] There were numerous points of contention during the negotiations, particularly around non-discrimination of foreign investors, pre-investment national treatment, and the mandate for sub-national authorities to observe ECT rules. See in detail: Hober (n 5), 13-24.
[18] Article 1(5), (6) ECT; Understanding with respect to Article 1(5) ECT; Annex EM ECT. For criticism of this 'non-discriminatory' approach see: Cima E, 'Retooling the Energy Charter Treaty for Climate Change Mitigation' (2021) 14 The Journal of World Energy Law & Business 75, 80.
[19] Andrews-Speed (n15), 132; Konoplyanik and Walde (n 14), 556.
[20] The energy trilemma refers to the challenge of balancing three interconnected and often conflicting goals in energy policy: energy security, energy sustainability, and energy affordability It represents the balance between ensuring a clean and long-lasting energy supply (sustainability), making energy accessible and affordable to all (affordability), and maintaining a reliable and secure energy infrastructure (security).
[21] Hober (n 5), 14.

Nevertheless, the ECT still contains special provisions, at the contracting party level, for the resolution of trade and transit disputes and consultation procedures for competition and environmental disputes.[22]

The present contribution, however, focuses on two main aspects of the ECT: Part V (dispute settlement) and Part III (investment protection).

2.b.1 Dispute settlement under the Energy Charter Treaty

The ECT provides for two types of dispute settlement: State-to-State under Article 27 and investor-State under Article 26. Publicly, Article 27 has only been invoked once: in February 2023, by Azerbaijan against Armenia, alleging "illegal exploitation and expropriation" of its energy resources on its "internationally recognised sovereign territory".[23] Details regarding this case remain limited;[24] however, on the reading of Article 27 it can be assumed that the proceedings, if they continue, will likely be conducted under UNCITRAL Arbitration Rules (Article 27(3)(f)).

To provide a stark contrast to the one known dispute under Article 27, Article 26 has given rise to 158 publicly reported cases. Historically, the aim of the dispute clause which allows foreign investors to bring claims against States was to counter "the natural and instinctive protectionist tendencies within countries and their well-established, often monopoly-based and publicly owned, energy companies."[25]

Article 26 provides the claimants with a choice of several fora, including domestic courts and international arbitration. Those interested in arbitration may choose between ICSID arbitration, *ad hoc* arbitration under the UNCITRAL Arbitration Rules, and arbitration under the rules of the Stockholm Chamber of Commerce. The choice is informed by various interests and preferences such as transparency rules, interpretation rules, allocation of costs provisions etc.[26]

Furthermore, Article 26 ECT, as most ISDS clauses in international investment agreements (IIAs), provides that a tribunal shall decide the issues in dispute in line with the Treaty and the relevant international law standards

[22] Hober K, 'Investment Arbitration and the Energy Charter Treaty' (2010) 1 Journal of International Dispute Settlement 153, 156.
[23] Republic of Azerbaijan Ministry of Foreign Affairs, No:093/23, Press release on arbitration case filed by Azerbaijan against Armenia under the Energy Charter Treaty for illegal exploitation of Azerbaijan's energy resources, February 2023, https://mfa.gov.az/en/news/no09323.
[24] Tom Jones, 'Azerbaijan lodges ECT claim against Armenia', *GAR* (27 February 2023), https://globalarbitrationreview.com/article/azerbaijan-lodges-ect-claim-against-armenia.
[25] Konoplyanik and Walde (n 14), 556.
[26] See e.g., Veeder VV, 'The Investor's Choice Of ICSID And Non-ICSID Arbitration Under Bilateral And Multilateral Treaties', *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2009)* (Brill Nijhoff 2010).

(Article 26(6)).[27] Many commentators perceive Article 26(6) as crucial, anticipating that arbitrators would (or should) align the ECT with evolving international benchmarks, especially in the context of climate change and human rights. This, however, is more complicated, as the tribunal in *RENERGY v. Spain* observed: "Article 26(6) ECT, as most governing law provisions, is not a conflict rule (…). The Article embodies a hierarchy which starts, logically, with "this Treaty", i.e. the ECT. The applicable rules and principles of international law are then mentioned to allow a tribunal to supplement the Treaty where necessary, not to contradict it. Thus, where the ECT is clear, Article 26(6) ECT does not open a door to introduce a contradictory meaning through applicable rules and principles of international law."[28]

It is a form of truism, explored much better elsewhere, that ISDS does not operate in a vacuum. Therefore, what about the proposition that tribunals themselves bear the onus of reconciling concurrent international State obligations? Some (ECT) tribunals opine that they "may" "rely on, any relevant legal principles or judicial or arbitral decisions in accordance with the principle of *jura novit curia*, even if those have not been referred to by the Parties"[29] while others argued that a tribunal is "required" to do so, "provided it seeks the Parties' views if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate."[30] In practice, however, arbitral proceedings remain adversarial rather than inquisitorial in nature,[31] often valuing the parties' directives above all else. Indeed, as pointed out by *Tanzi* the principle of *jura novit curia* needs to be correlated with that of *ne ultra petita* - which restricts adjudicators from delving into matters not presented before them.[32] Through its drafting, the (unmodernised) ECT can be seen to further limit arbitrators in issues they can consider: with its clear scope of issues which can be subject to ISDS (Part III), largely consistent case law on interpretation vis-à-vis jurisdiction,[33] and its all-encompassing conflict clause under Article 16.[34]

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[27] On "international law" under the ECT see e.g., *Mathias Kruck and others v. Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum, 14 September 2022, paras 76-80.
[28] *RENERGY S.à r.l. v. Spain*, ICSID Case No. ARB/14/18, Award, 06 May 2022, para. 339.
[29] *Beheer v. Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 552.
[30] *AES Solar* (*PV Investors) v. Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, paras 519, 552.
[31] Verburg C, 'Modernising the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement' (2019) 20 JWIT 425, 440.
[32] Tanzi AM, 'On Judicial Autonomy and the Autonomy of the Parties in International Adjudication, with Special Regard to Investment Arbitration and ICSID Annulment Proceedings' (2020) 33 Leiden Journal of International Law 57, 62.
[33] Cf. *Green Power v. Spain,* SCC Case No. V2016/135, Award, 16 June 2022, para. 470.
[34] Discussed below (Part II.B.2).

However, while only Part III provisions are subject to dispute settlement under Part V, the tribunals have also recognised that they can take into account "conduct clearly in breach of other provisions of the ECT insofar as it is relevant to the admissibility of a claim".[35] Here, given the current realities of the climate crisis, one could hope for a bigger role for Article 19 (Environmental Aspects) which proposes, *inter alia*, that a Contracting Party "shall strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle" and promote the use of cleaner fuels.[36] However, and in line with the Article 19 Understanding, the provision does not impose a direct obligation on the investor,[37] operating "not at the level of individual investors but at the interstate level […]. In so far as there is any requirement for private parties to carry out an EIA for any proposed project, this can only arise under the relevant national law."[38] In other words, the ECT's obligations regarding the environment,[39] if any, are binding only as between contracting parties. Similarly, substantive investment protection provisions, to which we shall now turn, do not convey any positive obligations onto the investors. Rather, as is true for all old-generation IIAs, the ECT is asymmetric in nature: bestowing obligations onto the host States but granting rights to the qualifying investors.

2.b.2 Investment protection under the Energy Charter Treaty

The ECT is so well-known mostly for its role as an international investment agreement, granting foreign investors certain protections and direct access to arbitration. Provisions on the investment protection are found in its Part III, which in turn is modelled on Chapter XI NAFTA and on the contemporary type of BITs developed in particular by the US and the UK.[40] As was true for those early BITs, the provisions contained therein were broadly-written, sometimes leading to conflicting outcomes.[41] However, it needs to be remembered that while the decentralised system of ISDS lacks legal precedent and interpretation

[35] *Blusun v. Italy*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 275.
[36] Article 19 is not subject to the dispute settlement under Article 26. Instead, Article 19(2) points to the Charter Conference as the forum for the amicable settlement of disputes subject of which is the interpretation or application of Article 19.
[37] Vajda P, Aleksić V and Hunter T, 'Article 19. Environmental Asspects' in: Leal Arcas R, Commentary on the Energy Charter Treaty (Edward Elgar Publishing 2018), para. 19.22.
[38] *Blusun v. Italy*, para. 275.
[39] For more see Levashova Y, 'New Wine in Old Wineskins? Climate Cases and the Energy Charter Treaty' in Quirico O and Kwapisz Williams K (eds), *The European Union and the Evolving Architectures of International Economic Agreements* (Springer Nature 2023), 78-81.
[40] Konoplyanik and Walde (n 14), 532.
[41] Restrepo T, 'Modification of Renewable Energy Support Schemes under the Energy Charter Treaty' (2017) 8 GoJIL 101; Cima (n 18), 84.

is conducted on case-to-case basis, a level of consistency has nevertheless emerged over the years, especially vis-à-vis the same legal instrument.[42] This is because, as held by the tribunal in *Saipem v. Bangladesh*, and replicated elsewhere time and again: a tribunal "must pay due consideration to earlier decisions of international Tribunals […] subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases [and] subject to the specificities of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law."[43] Consequently, through years of adjudication, a degree of consistency has also emerged concerning the interpretation of the ECT's broad standards, particularly regarding expropriation (Article 13) and the Fair and Equitable Treatment (FET) (Article 10(1)), especially in the context of case law stemming from modification of incentive regimes in renewable energy production.[44] More broadly, the ECT offers the same standards of protection as most other IIAs. Article 10 encompasses protection from discriminatory treatment in line with National Treatment and Most-Favoured Nation standards (Article 10(7)), full protection and security (Article 10(1)), and the operation of the umbrella clause (also Article 10(1)). Additionally, Article 14 obliges the host State not to obstruct the free transfer of funds.

Another provision of Part III carrying significant implications for the parties is the Treaty's conflict clause (Article 16). It provides that when a conflict arises between the ECT and any other treaty addressing the same subject matter found in Part III or Part V, the treaty that is more favourable to the investor takes precedence.[45] Here *Atanasova*, recalling Viñuales, makes an insightful observation that the design of the Treaty and the relationship between Article 16, the doctrine of police powers (domestic measure based on a national policy being invoked to justify expropriatory conduct) and Article 27 VCLT (non-justification of international breaches on the basis of domestic law), creates a "hierarchy in which non-[international economic law] disciplines [e.g. international environmental law or human rights] hold a lower position in relation to

[42] This "level of consistency" in interpretation should not be mistaken for complete uniformity. Some inconsistencies in the application of remain, as discussed below III.A.

[43] *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009 para. 90.

[44] See in general Balcerzak F, *Renewable Energy Arbitration – Quo Vadis?* (Brill Nijhoff 2023); Noilhac A, 'Renewable Energy Investment Cases against Spain and the Quest for Regulatory Consistency' (*QIL QDI*, 14 June 2020); Levashova Y, 'Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law' (2020) 67 Netherlands International Law Review.

[45] On relationship between Article 16 and the precedence of EU law as invoked by numerous States in intra-EU proceedings see Huremagic H and Tropper J, 'Mission Impossible? Implementing Komstroy and Modifying the Energy Charter Treaty', Volkerrechtsblog, 17 November 2021, https://voelkerrechtsblog.org/de/mission-impossible/.

investment ones."[46] This provision further limits the proposition that the arbitrators themselves should give more weight to *other* instruments of international law as discussed above.[47]

It is important to reiterate that the ECT, apart from its exclusive subject matter, does not significantly differ from other International Investment Agreements (IIAs) in its operation. This is true not only concerning the substantive standards of protection and broad definitions of investment but also regarding non-derogation clauses akin to Article 16, which are prevalent in the majority of IIAs.[48] Consequently, the case law under the ECT is as nuanced and similarly balanced as observed in ISDS more broadly.

3. Considering the present: Overview of the Italian case law under the Energy Charter Treaty

Overall considering the 158 known cases, out of the 87 final decisions rendered under the ECT, four represented a settlement agreement, and three had undisclosed outcomes. In 46% (or 40 cases), a violation of the ECT was established, resulting in compensation. Tribunals found no breach in 26% (23 cases) and lacked jurisdiction in 14% (12 cases).[49] In addition, in one case there was a manifest lack of legal merit, and in three instances, the tribunals found a breach but awarded no damages. Thus, all in all, it could be said that States prevailed in 49% of the claims (39 cases).[50] In 54% of cases with available data, the defeated party bore a portion of the victor's legal fees. This is largely in line with the general trends in ISDS, where the outcomes are oftentimes more balanced than one would presume.[51] Concerning the type of underlying investments, in the 158 proceedings, 59% were in renewables and 34% in fossil fuels.

The Italian experience of the ECT encapsulates the broader experience under the Treaty rather well. Despite having officially withdrawn from the ECT on 31 December 2014, with the withdrawal taking effect a year later, Italy continues to be bound by the investment provisions and ISDS clause of the ECT by virtue of Article 47(3). This so-called sunset clause of the Treaty states that

[46] Atanasova D, 'Non-Economic Disciplines Still Take the Back Seat: The Tale of Conflict Clauses in Investment Treaties' (2021) 34 Leiden Journal of International Law 155, 177.
[47] See also *Kruck v. Spain,* paras 340, 588-590.
[48] Atanasova (n 46), 163.
[49] ECT Secretariat Statistics, https://www.energychartertreaty.org/cases/statistics/, figure as of 31 May 2023.
[50] In one case, having found the State liable under another international agreement, the tribunal dismissed an alternative claim under the ECT.
[51] Daszko A, 'ICSID Annual Report 2022: Same Old but Different?' (10 December 2022) Kuwer Arbitration Blog https://arbitrationblog.kluwerarbitration.com/2022/12/10/icsid-annual-report-2022-same-old-but-different/#comments.

its provisions "shall continue to apply to investments made in the Respondent's territory as of the date when the withdrawal takes effect for a period of 20 years from such date."[52] Indeed, Italy has over the years become one of the most active actors in the ECT jurisprudence. Amongst its 54 contracting parties, Italy is the second most frequent, after Spain, respondent State, with 14 claims brought against it so far. Italy is also home to the third biggest national group of initiators of claims under the ECT, with 95 claimants being of Italian nationality (note that claims can be lodged by multiple persons).

There are currently five pending cases against Italy, all brought by claimants in the renewable energy field. While the underlying issue in one of these cases, initiated by Veolia, a waste-to-energy operator, remains unknown, the other four arose following Italy's modification of its solar power incentive regime.[53] Of the nine disputes already decided, eight concerned renewable energy (A.) and one involved an investment in fossil fuels (B.). Italy prevailed in five cases[54] and lost on four occasions.[55] Confirming another trend in ECT case law, in many of these proceedings Italy attempted to rely, unsuccessfully, on the EU law, specifically on the jurisprudence of the Court of Justice of the EU in the *Achmea* and *Komstroy* cases (C.).

3.a Renewable energy arbitration under the Energy Charter Treaty: Italian "solar cases"

94 out of 158 disputes under the ECTs have been instigated by operators in renewable energy sectors, mostly (63) in various types of solar energy. Furthermore, over 50 of these cases have been brought against Spain following the country's change to its incentives regime. Italian solar cases have a similar background. In the wake of the Kyoto Protocol and EU directives mandating national renewable energy targets, Italy, like other European nations, implemented a series of measures designed to attract FDI in renewable energy, particularly within the photovoltaic (PV) sector.[56] These efforts led to the

[52] *Silver Ridge Power BV v. Italy*, ICSID Case No. ARB/15/37, Award, 26 February 2021, footnote 1.

[53] These cases are: *Encavis et al. v. Italy* (ICSID Case No. ARB/20/39), *Suntech Power v. Italy* (ICSID Case No. ARB/23/14*), Hamburg Commercial Bank v. Italy* (ICSID Case No. ARB/20/3), *VC Holding II S.a.r.l. and others v. Italy* (ICSID Case No. ARB/16/39).

[54] *Blusun v. Italy*, *Silver Ridge Power v. Italy*, *Belenergia v. Italy* (ICSID Case No. ARB/15/40), *Eskosol v. Italy* (ICSID Case No. ARB/15/50), *Sun Reserve Luxco Holdings SRL v. Italy* (SCC Case No. 132/2016).

[55] *Rockhopper v. Italy* (ICSID Case No. ARB/17/14), *ESPF v. Italy* (ICSID Case No. ARB/16/5), *CEF v. Italy* (SCC Case No. 158/2015), *Greentech v. Italy* (SCC Case No. V 2015/095).

[56] Poponi D, Basosi R and Kurdgelashvili L, 'Subsidisation Cost Analysis of Renewable Energy Deployment: A Case Study on the Italian Feed-in Tariff Programme for Photovoltaics' (2021) 154 Energy Policy 112297; See also, De Luca A, 'Renewable Energy in the EU, the Energy

introduction of Decree 387 and a set of legislative decrees known as *Conto Energia* in 2004.[57] These initiatives assured PV investors of additional tariffs for their electricity production. Initially, upon connecting to the grid, investors received a confirmation letter from the Italian Gestore dei Servizi Energetici (GSE), the overseeing entity for incentives, specifying their entitlement to a fixed tariff for a 20-year duration. Subsequently, PV operators entered into contracts with GSE, delineating precise tariff rates and payment schedules. Furthermore, Decree 387 established an off-take regime in compliance with EU directives, whereby GSE directly purchased electricity from certain plants at a minimum guaranteed price (MGP). Qualified PV producers engaged in one-year MGP contracts with GSE, subject to automatic renewal. However, over time, the sustainability of these incentives became a growing concern as costs escalated. Consequently, the Italian government began to roll back the incentives with an introduction of further decrees, such as for example, the *Romani* decree of March 2011 which limited granting of certain tariffs to PV plants established before April 2011. Subsequently, in June 2014, Italy enacted Law Decree 91/2014, commonly referred to as the *Spalma incentivi* decree.[58] This decree presented producers with three alternative options: Firstly, Italy would provide a reduced incentive tariff, extending the incentive period to 24 years. Alternatively, the 20-year duration could be preserved, but the tariff rate would undergo a reduction between 2015 and 2019, followed by an increase thereafter. Lastly, producers could opt to maintain the 20-year period while accepting a fixed percentage reduction in the tariff rate based on the capacity of their plants. Furthermore, the decree introduced a delay in the disbursement of incentives. Italy also imposed restrictions on the MGP scheme, limiting it to facilities with a capacity of less than 100 kW. To further mitigate the financial implications of the previous incentive framework, an annual administrative fee was introduced to cover the management expenses of the GSE and the costs associated with electricity projection discrepancies.

As outlined, thus far in cases stemming from these regulatory changes, tribunals have sided with the investors on three, and with the State on five occasions. There are several reasons for these differing outcomes. On the one hand, while the claims have similar roots, they are highly fact-specific thus, for example, in *Blusun v. Italy* (win for the State), claimants protested the *Romani* decree, while in *ESPF v. Italy* (loss for the State), the *Spalma incentivi* decree.

Charter Treaty, and Italy's Withdrawal Therefrom' OGEL/TDM 3 (2015), Bocconi Legal Studies Research Paper No. 2657395.

[57] Faccio S, 'The assessment of the FET standard between legitimate expectations and economic impact in the Italian solar energy investment case law' (2020) 71 QIL, Zoom-in, 7.

[58] Ibid.

On the other hand, tribunal decisions may be inconsistent, and further exploration is required to understand these inconsistencies. For example, in *Belenergia v. Italy* (win for the State), the tribunal held that the claimant should have reasonably anticipated changes in the Italian regulatory framework between 2011 and 2013, as there was a "clear trend towards incentives' reduction."[59] Moreover, the claimants' final investment wave occurred at a time when Italy had already ceased granting subsidies to new plants, rendering the subsequent *Spalma incentivi* reform unsurprising. In *Greentech v. Italy,* on the other hand, the majority opinion determined that the measures implemented by Italy violated the claimants' legitimate expectations, lacked transparency and consistency, and breached the impairment and umbrella clauses of the ECT. The tribunal held that the *Conto Energia* legislation, the GSE letters, and the GSE agreements constituted "repeated and precise assurances to specific investors"[60] regarding fixed incentive tariffs for 20 years.[61] While acknowledging Italy's economic challenges, the arbitrators concluded that these assurances represented "non-waivable guarantees"[62] and that the rationale for breaching them (to reduce the marginal cost of electricity for consumers) did not meet the threshold of force majeure. This divergence in case outcomes underscores the complex and evolving nature of legal interpretations surrounding Italy's renewable energy incentives; with some tribunals and arbitrators advocating that the timing of the investment should play a crucial role when determining claimants' legitimate expectations, while others, like the majority in *ESPF v. Italy*, finding that "the legitimate expectations analysis pursuant to the ECT and international law does not require a "timing test" or temporal aspect."[63]

Italy has sought to annul all awards issued against it on various grounds, including the contention that the tribunal in *ESPF v. Italy* failed to sufficiently address awards made in Italy's favour elsewhere (in *Belenergia* and *SunReserve*), resulting in a 'lack of reasons' for the ESPF award.[64] This, however, under the strict rules for annulment in ICSID arbitration, was not sufficient for the *ad hoc* committee. The committee held that when an annulment due to lack of reasons is sought, the committees "must consider whether there has been a failure to address each issue necessary to the conclusions the tribunal reached. The key word here is "issue": it is not (as Italy acknowledges) an

[59] *Belenergia v. Italy,* Award, 28 August 2019, para. 587.
[60] *Greentech v. Italy*, Award, 23 December 2018, para. 450.
[61] The same was confirmed in *CEF v. Italy*, Award, 16 January 2019, paras 217, 237-238, 243-245.
[62] *Greentech v. Italy*, Award, 23 December 2018, para. 450.
[63] *ESPF v. Italy,* Award, 14 September 2020, para. 543.
[64] Article 52 ICSID Convention outlines five permissible grounds for annulment of an arbitral award. One of the most relied upon is within Article 52(1)(e) namely, when "the award has failed to state the reasons on which it is based".

obligation to reference or distinguish every legal authority put forward by a party."[65] The committee further observed that:

Different tribunals may come to different conclusions on the same or similar facts; that does not render any one decision annullable. What matters for purposes of an annulment application are the issues that the tribunal had to evaluate, on the basis of the arguments and authorities presented by the parties. The issue before the Tribunal here was the alleged breach of the FET standard contained in Article 10(1) of the ECT, and more specifically (i) whether the FET analysis required a balancing exercise; (ii) the existence or not of legitimate expectations on ESPF's part; and (iii) whether Italy's Spalmaincentivi Decree breached those legitimate expectations. It is undisputed, or at least not reasonably disputable, that the Tribunal made reasoned findings on each of these key issues, which then led to a finding (by the majority) of liability on Italy's part.[66]

Although discussions of annulment or non-enforcement of arbitral awards fall outside of this chapter's scope, it needs to be highlighted that the above analysis regarding annulment applies to all ICSID awards, not just those made under the ECT.

3.b Oil & Gas arbitration under the Energy Charter Treaty: *Rockhopper v. Italy*

In the public eyes, in the most general terms, perhaps the most controversial aspect of the ECT is its continuing protection of fossil fuel investments.[67] Many believe that in the era of the climate crisis and considering drastic needs for decarbonisation, such protection should, at least to a certain degree, no longer apply. Indeed, how in today's day and age and taking account of climate change, can oil & gas investors have legitimate expectations (under Article 10 FET) as to the longevity of their investments? Frankly, this question remains untested under the ECT. Despite several cases involving fossil fuel investments, research shows that environmental arguments (and thus, considerations) play a minimal role in these proceedings.[68] In other words, States rarely invoke arguments based on the need to tackle climate change as the ground for their actions. There are some notable exceptions, especially *Ascent v. Slovenia* which is pending, *RWE*

[65] *ESPF v. Italy*, Decision on Annulment, 31 July 2023, para. 336.
[66] *ESPF v. Italy*, Decision on Annulment, 31 July 2023, para. 339 (emphasis added).
[67] Here, one would observe that a lot of criticism of the ECT (as discussed in IV.A below), is the kind of criticism bestowed upon the ISDS system more broadly.
[68] Ipp A, Magnusson A and Kjellgren A, 'The Energy Charter Treaty, climate change and clean energy transition', Climate Change Counsel (2022), https://www.climatechangecounsel.com/advocacy.

v. The Netherlands which was discontinued; *Vattenfall v. Germany* which was settled; and, at least on the surface, *Rockhopper v. Italy*.

The background to the *Rockhopper* case is as follows: In 2014, a UK oil and gas company Rockhopper acquired two companies, which at the time held exploration permits in the Italian coastal waters and had previously applied for an exploitation concession in 2008. In 2010, Italy enacted a ban on offshore drilling projects within 12 nautical miles of its coastline, but following a 2012 amendment, the ban no longer applied to companies that had submitted applications for exploitation concessions prior to 2010. On 7 August 2015, Italy's Ministry of Environment approved Rockhopper's environmental impact assessment (EIA), following which the claimants filed their application for the concession on 14 August. Pursuant to Italian Decree 484, the statutory period in which the production concession was to be granted, following the approval of an EIA, was 2 weeks. Here this meant 29 August 2015, but no such concession was granted. Yet, complicating matters, in late December 2015, Italy's Parliament passed a law that reinforced the offshore drilling ban within 12 nautical miles by eliminating the exception on which Rockhopper had relied. Subsequently, in January 2016, Italy's Ministry for Economic Development rejected Rockhopper's application for an exploitation concession, citing the December 2015 law as the basis for their decision.

The tribunal found, unanimously, that this "regulatory roller coaster"[69] which "wiped out" the Rockhopper's "undoubted right" to be granted the concession,[70] amounted to expropriation under Article 13 ECT. In the end, and what this author believes to be the most controversial finding of the tribunal, Rockhopper was awarded EUR 240 million (including interest) versus some EUR 30 million initially invested.[71]

A caveat is warranted here: the award does not tell us much about the relationship between international investment law and climate change. It appears that no climate-related arguments were forwarded by Italy's legal team, what *Mazotti* rather aptly calls a "missed moment of truth".[72] How tribunals will act when confronted with environmental arguments is yet to be seen, as observed in the publicly-available memorials submitted by the parties to *RWE v. The Netherlands*,[73] these issues will be at the forefront of future ECT arbitrations.

[69] *Rockhopper v. Italy*, paras 153-154, 197.
[70] *Rockhopper v. Italy*, para. 169.
[71] Marzal T, 'Polluter Doesn't Pay' (2023) EJIL:Talk! https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/.
[72] Mazzotti P, 'Rockhopper v. Italy and the Tension between ISDS and Climate Policy: A Missed Moment of Truth?' Völkerrechtsblog (2022), https://voelkerrechtsblog.org/de/rockhopper-v-italy-and-the-tension-between-isds-and-climate-policy/.
[73] The claim arises from the Dutch decision to phase out coal-fired plants by 2030. *RWE v. The Netherlands*, ICSID Case No. ARB/21/4.

This is, of course, not to say that climate change considerations are altogether absent from ISDS. For instance, in the non-ECT, UNICTRAL case of *Muszynianka v. Slovak Republic*, Slovakia argued that the constitutional amendment concerning water supply, which was challenged by the claimants under the FET standard, was rooted in climate change concerns. The majority of the tribunal concurred that the amendment did not infringe upon the claimant's legitimate expectations, noting: "The vital importance of this non-renewable resource cannot be overstated, especially in an era of alarming climate change. By contrast, while the Claimant may have had a commercial interest in the (cross-border) exploitation of the Legnava Sources, it held no right or even a legitimate expectation to that effect. No relevant private interest at issue therefore seems remotely capable of outweighing the public interests involved […]."[74]

3.c Intra-EU objections and the Energy Charter Treaty

Although not strictly related to investment protection, EU law has come to play a pivotal role in how EU Member States, including Italy, attempt to defend investment claims brought against them by EU investors. Although the European Commission has been critical of ISDS within the EU for a while, the key development came in March 2018, when the Court of Justice of the EU handed down its judgment in the case of *Slovak Republic v. Achmea*.[75] The CJEU held that the ISDS clause in the Dutch-Slovak BIT had an adverse effect on the autonomy of EU law, as it prescribed that bodies, other than EU courts, could decide on issues of interpretation of EU law, violating Articles 267 and 344 TFEU.[76] What has followed is extensively and competently covered in literature.[77] For the purposes of this contribution, the most relevant of the slough of developments was the CJEU's further ruling in *Moldova v. Komstroy,* whereby, following *Achmea*, the Court held that Article 26 ECT was not applicable to disputes between a Member State and an investor of another Member State.[78] These developments led to what in ISDS has come to be known as *Achmea*-objection, with EU Member States attempting to argue that tribunals

[74] *Muszynianka v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020, para. 575.
[75] *Slovak Republic v. Achmea*, CJEU, case C-284/16, ECLI:EU:C:2017:699, 6 March 2018.
[76] Article 344 TFEU reads: Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.
[77] See, with further references, Happ R, Wuschka S, 'EU Law and Investment Arbitration: Of Cooperation, Conflict, and the EU Legal Order's Autonomy' in: Kröll et al. (eds) Cambridge Compendium of International Commercial and Investment Arbitration (CUP, 2023), 2006-2056.
[78] *Republic of Moldova v Komstroy LLC,* CJEU, case C-741/19, ECLI:EU:C:2021:655, 2 September 2021, para. 66.

lacked jurisdictions to decide on intra-EU claims. In terms of ECT jurisprudence, Italy invoked such objections in all its cases so far: *Blusun, Greenetch, CEF, Eskosol, Rockhopper, Belenergia, SunReserve, ESPF* and *Silver Ridge*. In each case, the tribunals found against the State on this matter. The tribunals based their decisions on several factors, both pertaining to: treaty interpretation under VCLT, especially its Article 31 "which prioritizes the [plain reading of the text of the] treaty provision under interpretation over any other elements of treaty interpretation",[79] as well as to Article 16 ECT. Regarding the latter, the tribunal in *Belenergia v. Italy* observed that:

> Because the ECT provides for a more favourable dispute resolution mechanism this cannot be derogated by the Lisbon Treaty. Article 26 ECT confers upon investors of a Contracting Party the right to directly initiate international arbitration such as ICSID arbitration against another Contracting Party, after a short waiting period with the possibility of raising claims based on ECT's rights and obligations, directly effective before an arbitral tribunal. The EU judicial system does not offer a similar option for investors, which have to act in the courts of the State that allegedly damaged their investment, under national procedural rules, in the language admitted in these courts and with the obligation to engage local lawyers. Hence, the conflict rule under Article 16 ECT confirms, as a *lex specialis*, the investor's right to international arbitration under Article 26 ECT, as being a more favourable dispute resolution mechanism.[80]

Indeed, the only known instance of tribunal not giving priority under Article 16 ECT to the ECT vis-à-vis EU law was in *Green Power v. Spain,* the reasoning, however, has thus far not been adopted by subsequent tribunals, including another Stockholm-seated ECT case *Mercuria v. Poland (II).*[81]

4. Looking to the future: Modernisation of the ECT

Despite how it may appear, the ECT has not remained static since its conception in 1994: amendments, annexes and protocols have all been agreed upon and inserted in those last 30 years,[82] with meetings of the Energy Charter

[79] *SunReserve v. Italy*, SCC Case No. V2016/32, Final Award, 25 March 2020, para. 388.
[80] *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, 6 August 2019, para. 319.
[81] See *Mercuria v. Poland (II),* SCC Case No. V 2019/126, Award, 29 December 2022, para. 363.
[82] See Energy Charter Treaty website: https://www.energychartertreaty.org/treaty/other-documents/technical-changes-to-annexes-em-i-ni-and-eq-i/.

Conference (ECT's COP), taking place every year. Thus, for example, at a Ministerial Conference in May 2015, more than 90 States[83] (as well as the EAC, ECOWAS and the EU) signed a new political declaration: the International Energy Charter. IEC confirmed the text of the 1991's European Energy Charter also recognising "the global challenge posed by the trilemma between energy security, economic development and environmental protection, and efforts by all countries to achieve sustainable development."[84]

However, in 2017 signatories and contracting parties decided the time has come to consult on the need to update and clarify parts of the binding ECT, as opposed the non-binding political declaration.

The list of topics considered for modernisation was extensive and included: Pre-investment; Definitions of investment and investor; Right to regulate; Definitions and clarifications of: FET, MFN, 'most constant protection and security', indirect expropriation; Compensation for losses; Umbrella clause; Frivolous claims; Transparency; Valuation of damages; Third-party funding; Sustainable development and corporate social responsibility; and regional economic integration organisation (REIO).[85] The drivers of the modernisation process included the EU, Luxembourg and Azerbaijan and after 15 rounds of negotiations, which began in July 2020, an Agreement in Principle was concluded on 24 June 2022, 'ready' to be voted in on 22 November 2022.

Perhaps to better understand why not only the vote did not take place but also how is it that, at the time of writing, the future of the survival of the ECT is far from certain, we need to consider the very negative public perception of the ECT (A.) set against the actual outcomes of the modernisation negotiations (B.).

4.a The need for modernisation: Public perception[86]

Despite what some would call somehow balanced statistics or the fact that the ECT does not substantially differ from other IIAs, the Treaty nevertheless has attracted an unprecedented amount of criticism in recent years: most of it reflecting the criticism that can be directed also at the ISDS system as a whole

[83] Logically and mathematically, also including States that are neither parties nor signatories to the ECT, for example, Nigeria, UAE and the US.
[84] Preamble International Energy Charter 2015.
[85] Energy Charter Secretariat, Report by the Chair of the Subgroup on Modernisation, CCDEC2018, 27 November 2018, https://www.energychartertreaty.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201821_-_NOT_Report_by_the_Chair_of_Subgroup_on_Modernisation.pdf.
[86] This part is based on an earlier work with Kilian Wagner. See Daszko A & Wagner K, 'Modernisation of the Energy Charter Treaty: A necessary turning point for investment protection in the energy sector?' (7 August 2023) EFILA Blog https://efilablog.org/2022/08/07/modernisation-of-the-energy-charter-treaty-a-necessary-turning-point-for-investment-protection-in-the-energy-sector/

(lack of transparency, legitimacy and consistency; alleged chilling effect). As for example, described by lawyers of a leading environmental NGO: "an outdated investment treaty which contains a controversial 'investor/state dispute settlement' mechanism – a tool which allows companies to bypass national courts and sue states for billions in compensation in secretive tribunals".[87] Another respected NGO proclaimed the ECT as "the biggest climate action killer nobody has ever heard of", others called it "the world's most dangerous investment agreement."[88]

In any case, the perceived 'evils' of the ECT seem to be on everyone's lips. Calls for abandonment of the Treaty come from all directions: from blog posts, newspaper articles and even (at least) one graphic novel and one cartoon, to tweets, political manifestos and climate change litigation claims. Indeed, recently the European Court of Human Rights has suspended, pending resolution of other climate change proceedings, the case of *Soubeste and 4 other applications v. Austria and 11 other States,* whereby the applicants complain, relying on Articles 2, 3, 8 and 14 of the Convention, that the ECT inhibits the respondent States from taking immediate measures against climate change, making it impossible for them to attain the Paris Agreement temperature goals.[89]

This criticism needs to be set in a wider context of climate action, going beyond the scope of this chapter. Leading authorities on climate change advocate for a substantial upsurge in (private) investments directed towards renewable energy coupled with a steadfast commitment to phase out of fossil fuels, in order to facilitate a rapid and efficient transition to renewable energy, while also addressing the energy trilemma.[90] Beyond the scope of this contribution is also the economic assessment of whether IIAs (and specifically ISDS clauses) attract (green) investment or not.[91] However, upon examining the EU's modernisation

[87] ClientEarth, 'Abandon Energy Charter Treaty or Miss Climate Goals, Lawyers Warn Commission' https://www.clientearth.org/latest/press-office/press/abandon-energy-charter-treaty-or-miss-climate-goals-lawyers-warn-commission/; See also Rankin J, 'Secretive Court System Poses Threat to Paris Climate Deal, Says Whistleblower' *The Guardian* (3 November 2021) https://www.theguardian.com/environment/2021/nov/03/secretive-court-system-poses-threat-to-climate-deal-says-whistleblower.

[88] Friends of the Earth Europe,'Stop the Energy Charter Treaty Stop the Climate-Killer Energy Charter Treaty - ACT NOW!' https://friendsoftheearth.eu/energy-charter-treaty/

[89] ECtHR, 'Status of Climate Applications before the European Court' https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7566368-10398533%22]}.

[90] E.g., IAE, World Energy Investment 2023 report (May 2023), 57; IPCC, 'Climate Change 2022: Mitigation of Climate Change', ch 14, para. 81; IPCC, Climate Change 2021: The Physical Science Basis Report, 1; IEA, Net Zero by 2050: A Roadmap, (2021) 81.

[91] Brada JC, Drabek Z and Iwasaki I, 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis' (2021) 35 Journal of Economic Surveys 34; Cf. Ahmad S, Liebman B and Wickramarachi H, 'Disentangling the Effects of Investor-State Dispute Settlement Provisions on Foreign Direct Investment' (2022) US International Trade

proposals and then the agreed upon (but later abandoned) outcomes of the negotiations, one could argue that the ECT, in its 'modernised' form would be "a step in the right direction when it comes to facilitating a shift of private capital from fossil fuels to renewable energy investments".[92] This view, however is not widely shared in the public opinion, despite, as will be discussed the fact that the negotiations were by most measures, successful.

4.b The modernisation process of the Energy Charter Treaty: The outcomes

Comparing the agreed-upon text with the EU's proposals,[93] the influence of the block on the negotiation process becomes evident.[94] Numerous achievements of the EU negotiators can be outlined such as, for example, a new exception in Article 24(3), prescribing that certain provisions of the ECT, including the dispute settlement clause, no longer apply to contracting parties from the same REIO, with the only REIO being the EU. Or, importantly the clarification of the FET clause (inclusion of explicit wording regarding legitimate expectations and definition of "treatment") (Article 10(2) and 10(8)(i)), as well as of the expropriation provision. Here the negotiators clarified that non-discriminatory measures intended to protect legitimate policy objective "(including with respect to climate change mitigation and adaptation)" do not constitute indirect expropriation (Article 13(2)-(4)). Moreover, several new stand-alone articles have been created, including on the right to regulate and on climate change and clean energy transition, including explicit references to the Paris Agreement (Article X). Furthermore, one would also have to welcome the complete deletion of Article 16 from the modernised text and indeed, with conclusion of many forward-thinking IIAs in recent years, fear the consequences of Article 16 remaining as it is and conceivably taking precedence over those new agreements.[95]

Commission, Working Paper 2022–11–A, available at https://www.usitc.gov/staff_publications/all?f%5B0%5D=document_type%3Aworking_papers.

[92] Tropper J and Wagner K, 'The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?' (2022) 23 JWIT 813, 847.

[93] European Commission, ECT Modernisation: Revised Draft EU proposal, WK 3937/2020 INIT (20 April 2020), https://www.euractiv.com/wp-content/uploads/sites/2/2020/04/EU-Proposal-for-ECT-Modernisation-V2.pdf.

[94] For the analysis of the Modernised Agreement see Roiger-Simek K, 'The Modernization of the Energy Charter Treaty: Dead in the Water?' (2024) 26 Austrian Review of International and European Law Online 119.

[95] Atanasova D, 'The efforts to modernize the ECT and the hidden cost of non-derogation clauses' (Investment Treaty News, 30 March 2022) https://www.iisd.org/itn/en/2022/03/30/the-efforts-to-modernize-the-ect-and-the-hidden-cost-of-non-derogation-clauses/.

Perhaps EU's most ambitious proposal was to introduce a general phase-out plan for fossil fuels from investment protection by redefining "Energy Materials and Products", in effect, certain fossil fuel investments would cease to enjoy protection from December 2030. While not gaining enough support to be included in the text of the Treaty proper, the provision was replaced by a voluntary carve-out (Annex NI) to the same effect.[96] The overall negotiation procedure warrants a comment that the negotiation mandate bestowed upon the Commission by the Council of the EU,[97] was indeed fulfilled.

As outlined, the Agreement in Principle was in place, ready to be voted in on 22 November 2022. At the 11th hour, however, 4 Member States decided to withdraw their vote, meaning that the quote could not have been met. Subsequently, the vote was pushed to the next meeting in April 2023, which was also postponed. In the meantime, on 24 November 2022, the European Parliament, weary of the fact that certain Member States were already unilaterally withdrawing from the Treaty,[98] called on the Commission to withdraw from the ECT.[99] What has followed, up until July 2023, was a back-and-forth between the EU and the ECT Secretariat on the legal consequences of the withdrawal,[100] with the main issue being the sunset clause.[101] Ultimately, on 7 July 2023, the Commission proposed a "coordinated withdrawal" of EU Member States.[102] The ECT Secretariat responded, asking the Commission and the Member States not to oppose the modernisation which can still be carried out by the remaining contracting parties.[103] The Secretariat also highlighted that the withdrawal, and thus the 20-year sunset clause, would concern the un-

[96] See Levashova (n 39), 77. On a possible improvement to the ECT carve-out system see: Paine J and Sheargold E, 'A Climate Change Carve-Out for Investment Treaties' (2023) 26 JIEL 285, 297.

[97] Council of the EU, 10745/19 ADD 1 ANNEX.

[98] On Poland's decision to withdraw see: Daszko A, 'No Longer Feeling the Energy' (9 September 2022), Verfassungsblog, https://verfassungsblog.de/not-feeling-the-energy-anymore/. By August 2023 Germany, Poland, France and Luxembourg have officially informed the ECT Secretariat of their withdrawal.

[99] European Parliament resolution on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP)) 23 November 2022.

[100] European Commission, 'Next steps as regards the EU, Euratom and Member States' membership in the Energy Charter Treaty' Non-paper, https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf.

[101] ECT Secretariat (Guy Lentz), Letter of 13 February 2023, https://www.energycharter.org/fileadmin/DocumentsMedia/News/0047-SG-13022023-EP_President.pdf.

[102] European Commission, COM(2023) 447 final (7 July 2023).

[103] ECT Secretariat, Statement by the Secretary General of the Energy Charter Secretariat on the draft Council Decision proposing the withdrawal of the European Union from the Energy Charter Treaty, 11 July 2023, https://www.energycharter.org/media/news/article/statement-by-the-secretary-general-of-the-energy-charter-secretariat-on-the-draft-council-decision-p/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=44c59eb08571a57c64875f5eb94512d2.

modernised Treaty – with all of its current imperfections, including, for example, Article 16.[104]

The fast pace with which the events around the ECT have been unfolding, left many commentators pondering "what is next?"[105] Each one wonders how best to nullify Article 47(3), the sunset clause, with reference to various provisions of the VCLT: *inter se* agreement on the sunset-clause between the willing parties, under Article 41 VCLT (and in order to circumvent Article 16 ECT: conclusion of a second agreement on non-application of the conflict clause)[106] and fundamental change of circumstances under Article 62 VCLT.[107]

Whatever may happen to current investments that fall under Article 47(3) is unclear. However, if the ECT contracting parties do not act promptly and decisively, withdrawing States may find themselves in a situation akin to Italy's, which, despite its early withdrawal, continues to be an active, albeit unwilling, participant in ECT disputes.

5. Conclusion.

This chapter has set out to comprehensively navigate through the intricate landscape of the ECT, with a focus on its historical origins, contemporary implications, and potential future directions. This contribution embarked by delving into the historical context and primary functions that underpinned the creation of the Treaty. Shifting the focus to the present, this chapter explored the real-world consequences of the ECT, with specific attention to Italy's role as a respondent State in relevant case law. It dissected cases involving renewable energy and the contentious issue of fossil fuel investments, illuminating the intricate legal interpretations that are relevant in today's context.

As we peer into the future, contemplating the modernization of the ECT or the exploration of alternative approaches, a critical juncture emerges. The fate of the ECT and its ongoing disputes remains uncertain, opening doors to new legal mechanisms and avenues.

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[104] On further alternatives, including investment contracts see Daszko (n 1).

[105] Levashova (n 39); Roiger-Simek (n 94); Morgandi T and Bartels L, 'Exiting the Energy Charter Treaty under the Law of Treaty' (2023) 34 King's Law Journal (forthcoming); Klabbers J, 'A Moral Holiday: Withdrawal from the Energy Charter Treaty' (2022) 11:6 ESIL Reflections; Eckes C, 'Stepping out of the modernized Energy Charter Treaty – the best way forward?' (23 September 2022) European Law Blog.

[106] Tropper J, 'An inter se Modification of the ECT to Exclude Intra-EU Arbitration – How Can It Work?' (19 June 2023) Kluwer Arbitration Blog, https://arbitrationblog.kluwerarbitration.com/2023/06/19/an-inter-se-modification-of-the-ect-to-exclude-intra-eu-arbitration-how-can-it-work/.

[107] Morgandi and Bartels (n 105); Ali R, VCLT's Article 62: A valid basis for withdrawing from the ECT (2022) ITN, https://www.iisd.org/itn/en/2022/12/26/vclts-article-62-a-valid-basis-for-withdrawing-from-the-ect-raza-ali/; Cf. Klabbers (n 105).

As for this future…? The dissolution of the ECT will not bring an end to disputes in the energy sector. Logically, foreign investment in energy infrastructure is still a protected investment under other applicable IIAs, if these are in place. South American States and Canada, which are some of the most frequent respondents in energy disputes are bound not by the ECT but by other IIAs. Abandonment of the Treaty will also not negate its continuing impact on ISDS – as a most-oft invoked single treaty mechanism in investment arbitration, it will provide guidance to future tribunals for as long as the substantive standards remain similar across the field.

As for the regions which are moving away from the ISDS system, such as the EU, we are yet to see. The European Commission asserts that the existing EU legal order affords adequate protection to EU investors, for whom, according to Brussels, the appropriate fora for dispute resolution are national courts.[108] The waters of cross-border investment protection under EU law are largely untested.[109] It also remains to be seen whether energy investors may seek recourse in other, often under-the-radar, legal solutions including via commercial arbitration through contractual terms of, for example, concession agreements. As long as States continue to attract investment in the energy sector, whether it is in traditional or renewable sources, the need for a certain level of legal protection remains evident, especially in a world where the rule of law is supposed to play a central role in international relations. In any case, further research into these areas critical for reforming the global economic governance is both vast and promising

[108] European Commission, Protection of Intra-EU investment COM (2018) 547, 3.
[109] Daszko, A, 'Humanising European Investors: BITs Are Dead, Long Live the ECHR? A Look to RWE v. The Netherlands' (2023) European Yearbook of International Economic Law (forthcoming).

Fair and Equitable Treatment and the Renewable Energy Disputes

MARIA LAURA MARCEDDU*

TABLE OF CONTENTS:1. Introduction. – 2. Renewable energies project and investment arbitrations against Spain. – 3. Sustainable development protection presents public policy conflicts.

1. Introduction

The 2030 Agenda for Sustainable Development, adopted by the UN General Assembly in 2015, clearly positions energy as a cornerstone for achieving sustainability. Sustainable development goal (SDG) n.7 calls for ensuring 'access to affordable, reliable, sustainable and modern energy for all'. This goal is not only central to the 2030 Agenda but also reinforces the objectives of the Paris Agreement on Climate Change, addressing global challenges such as better health, more inclusive communities, and increased resilience to climate change.

In recent years, a combination of factors—including climate change, the race to net zero, and global disruptions such as the COVID-19 pandemic and the Ukraine conflict—has accelerated the push for renewable energy adoption. As a consequence, governments worldwide have faced mounting pressure to regulate energy sectors and meet international commitments. To support the transition away from fossil fuels, particularly coal, many states introduced incentive schemes requiring substantial capital investments. Most of these incentives took the form of subsidies designed to boost renewable energy production, especially from wind and solar sources, and gradually phase out certain types of fossil fuels. In Europe, the most successful programmes subsidized tariffs for energy producers. Spain's initiative, in particular, succeeded in attracting significant foreign investments.[1] As renewable energy investments grew, states began modifying their regulatory frameworks to reflect changing economic and environmental realities. However, these long-term agreements exposed investors to political risks and regulatory uncertainties, which eventually rendered some subsidy schemes economically unsustainable. In Spain, initial amendments to

* I am most grateful to Prof. Elisa Baroncini and the participants to the SIDI event of the International Economic Law Interest Group in Naples for their very helpful comments and exchanges. All opinions and errors remain mine.

[1] Spanish Promotion Plan for Renewable Energy, originally promulgated in 2000 and revised in 2005: Plan de Fomento de las Energías Renovables en España 2000– 2010 (30 December 1999); Plan de Energías Renovables en España (PER) 2005– 2010 (26 August 2005).

subsidy schemes—driven by fiscal pressures—soon escalated into more significant regulatory overhauls. Over time, the Spanish government's decision to phase out subsidies, despite the initial success in mobilizing capital, left investors facing unexpected losses.

A critical factor in this evolution has been the shifting market dynamics. Initially, subsidies helped bridge the cost gap between renewables and fossil fuels. Over time, however, the costs of renewable energy have generally decreased due to technological advancements and economies of scale. In contrast, fossil fuel prices have experienced fluctuations—often influenced by global supply conditions and geopolitical events—that do not always favour renewables in the short term.

A historical analysis of energy costs reveals that in the early 2000s, solar photovoltaic and wind energy were significantly more expensive than traditional fossil fuel-based electricity generation.[2] However, by the late 2010s and early 2020s, the global average levelized cost of electricity from solar PV and onshore wind plummeted due to rapid improvements in efficiency, large-scale production, and declining manufacturing costs for components like solar panels and wind turbines. By 2021, the levelized cost of electricity for solar PV dropped further—making it cost-competitive with, and often cheaper than, fossil fuels in many regions. This trend significantly altered the role of subsidies: while once crucial for market entry, they gradually became less necessary for renewable energy competitiveness.

Despite this declining cost trajectory, the dependency on subsidies remained high in the short term. Many investors entered the market based on the expectation of guaranteed returns under fixed subsidy schemes, particularly in jurisdictions such as Spain, Italy, and Germany. Early renewable projects relied heavily on subsidy support, and the rapid phasing-out of these incentives, combined with unforeseen market shifts, challenged the economic competitiveness of renewables during transitional phases. The rapid withdrawal or reduction of subsidies—sometimes with retroactive effects—created financial instability for projects structured around long-term expectations of government support. This shift underscores a crucial lesson: while subsidies play an essential role in the early stages of a renewable energy market, their design must account for long-term flexibility and market adaptation to prevent investor-state disputes and unintended economic consequences.

In Spain, the amendments of the regulation initially and the termination of the subsidy scheme eventually sparked dozens of claims from investors against

[2] For instance, in 2010, the global average levelized cost of electricity for solar PV was way higher than coal and natural gas. Thus, governments introduced subsidies, such as feed-in tariffs and tax credits, to attract investment and close this price gap.

Spain. The influx of cases amounts to more than 50 claims (as of August 2023) filed at the ICSID, the Stockholm Chamber of Commerce (SCC) or before UNCITRAL tribunals. A similar fate, albeit with less intensity, was suffered by other EU countries, including Italy, Romania, and the Czech Republic, which introduced measures that progressively retract the financial incentives of the original subsidies scheme, up to a complete overhaul of the scheme. As a consequence of this change, investors could no longer benefit from the subsidies scheme and decided to initiate multiple investment arbitrations challenging host states' changes to the incentive regimes.

These arbitrations highlight the tension between a state's right to adjust its regulatory policies for public interest and the protection of investors' legitimate expectations. Investors argue that their decisions were based on the stable framework promised by the original subsidy scheme. In contrast, states contend that no individual investor received a binding guarantee and that regulatory changes were a necessary and rational response to evolving economic conditions.

At the heart of these disputes is the concept of 'legitimate expectations' under the Fair and Equitable Treatment (FET) obligation. The issue, admittedly nebulous, hinges on a crucial distinction between the general regulatory framework and the specific, binding commitments made to individual investors.

Typically, governments outline broad policy goals—such as support for renewable energy through subsidies—without offering specific guarantees to individual investors. For instance, Spain's original feed-in-tariff (FIT) scheme represented a general policy direction rather than a detailed, individualized contract promising fixed returns or an unalterable regulatory framework. In cases like *Novenergia v Spain*, tribunals have observed that the absence of explicit, individualized commitments limits an investor's ability to claim a breach of their legitimate expectations. Clear, tailored representations, whether through written contracts or explicit policy guarantees, would create a more legally binding expectation. This differentiation is crucial as it balances the need for policy adaptability with investor protection. To corroborate this point, this contribution will briefly deal with the wave of investment treaty claims that have predominantly hit Spain (Section 2), before drawing some concluding remarks (Section 3).

2. Renewable energies project and investment arbitrations against Spain

In 2007, Spain introduced a subsidized feed-in tariff (FIT) to stimulate solar photovoltaic investments. However, when fiscal deficits emerged, the government reduced these subsidies. Aggrieved investors, who had based their

decisions on the promise of stable returns, initiated over 50 arbitrations under the Energy Charter Treaty (ECT), alleging a breach of the FET obligation.

More specifically, investors argued that the sudden policy shifts frustrated their legitimate expectations, given that their investments were made under the promise of regulatory stability. They argued that many of the investments were made in reliance on the subsidies scheme and that they reasonably relied on Spain's representations that the regulatory regime would be stable. In response, Spain defended its actions by emphasizing that the subsidy scheme was designed to secure only a 'reasonable' rate of return. The Spanish government further argued that, without specific, individualized commitments, expecting an unchanging regulatory environment was unrealistic as it would pose excessive limitations on the Spain government's power to regulate the economy in accordance with the public interest.

These cases primarily rely upon the FET obligation (Art.10(1)), enshrined in the ECT, which reads in the relevant part as follows: Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties *fair and equitable treatment*. […] No Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.

While the ECT encourages stable and favourable conditions it does not differentiate about the nature of the protected investment – i.e. whether a protected investment is fossil fuel or clean. This ambiguity is underscored by cases such as *Rockhopper v Italy*, where investors received substantial damages after Italy banned coastal oil exploration.[3]

The arbitral tribunals varied in the way they resolved the disputes, and used different analyses when reviewing the reasonableness of Spain's policy changes. As the remainder of this section will show their judgments have differently hinged on factors such as: the rationale behind regulatory amendments, the extent to which investors' legitimate expectations were affected, comparative analysis between the actual returns versus expected benchmarks, and the allocation of associated costs and risks.

When applying the FET provision to the specific circumstances at hand, some tribunals rejected the investors' claims based on legitimate expectations and regulatory stability principally because the claimants had not received any

[3] CLIFFORD CHANCE, Energy Arbitration Trends 2023 (February 2023), 3, available at: https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/02/energy-arbitration-trends-2023.pdf

specific promises or commitments from respondents.[4] In their view, a commitment to a group of investors did not amount to a commitment to an individual investor, and to find otherwise would amount to an excessive limitation on the power of the state to regulate the economy following the public interest. Certain tribunals corroborate this view by positing that legitimate expectations at the regulatory level originate from specific *individualized* representations made to induce investors to invest in renewables.[5] In the absence of such a specific commitment, investors cannot form a legitimate expectation that the regulatory framework would not be modified.[6] According to other tribunals, there does not have to be a specific representation for a legitimate expectation to arise: a state's acts or conduct, acts of general legislation together with the general market condition at the time the investment was made create a legitimate expectation of *relative stability*.[7] Moving from this perspective, those tribunals conclude that the FET standard carries with it an implicit expectation of protection of investors' basic and fair expectations.[8] Put differently, FET under Art. 10(1) ECT accords investors a legitimate expectation of relative stability of the regulatory regime against radical or fundamental changes,[9] although no state could reasonably be expected to freeze its laws.[10]

The tribunals that have found a breach of the FET standard considered that ECT Article 10(1) entitled investors that Spain would not drastically and totally change the regulatory regime on which the investment depends when pursuing a legitimate policy objective. For the tribunals embracing this vision, the measures adopted by Spain were not a *normal* exercise of its regulatory powers. While investors could not expect absolute regulatory stability, according to these tribunals the legislative changes introduced by Spain were so drastic and fundamental that violated the legitimate expectations of investors to obtain stable returns on their investments. In *Novenergia v Spain,* for example, the tribunal found that the FIT acted as 'bait' inducing investments under the promise of

[4] *Stadtwerke München and others v Spain* (Award, 2 December 2019), paras 198, 308.
[5] *Philip Morris v Uruguay* (Award 8 July 2016), para 426; Hortel v Poland (Award, 16 February 2017) para 238; *Isolux v Spain* (Dissenting Opinion of Prof. Dr. Guido Santiago Tawil, 12 July 2017) para 4.
[6] *RREEF v Spain* (Decision on Responsibility and on the Principles of Quantum (30 November 2018) para 245.
[7] *Novenergia II v Spain* (Final Award, 15 February 2018), para 651; *Cube Infrastructure v Spain* (Decision on Jurisdiction, Liability, and Partial Decision on Quantum, 19 February 2019) para 245; *Micula v Romania* (Award, 5 March 2020), para 362; *SunReserve v Italy* (Award 25 March 2020) para 817; *Renergy v Spain* (Award, 6 May 2022) para 639-642.
[8] According to Tecmed, the FET obligation entails a protection of investor's basic and fair expectations. *Tecmed v Mexico* (Award, 29 May 2003) para 154.
[9] *Eiser Infrastructure v Spain* (Award, 4 May 2017) para 363; *Novenergia II* (n 7) para 654; *SolEs Badajoz v Spain* (Award, 31 July 2019) para 308; *Operafund and Schwab v Spain* (Award, 6 September 2019) para 508.
[10] Renergy (n 7) para 639.

stability—a promise that was later unfulfilled. Various remuneration models in the subsidies (specifically Renewable Energy Plan 2005-2010 and RD 61/2007) strengthened investor expectations of a stable subsidy scheme. Despite Spain's arguments that some changes were foreseeable, the tribunal found that Spain had violated the investors' legitimate expectations and violated its obligations under the ECT.[11]

The tribunals that found a breach of the FET standard relied upon the existence of an expectation of stability[12] that somehow has become a binding component of the FET. From this standpoint, the line between the point up to where the expectation of stability extends and the point from where the obligation of stability begins remains blurred. Sornarajah is not wrong in arguing that it is as if a stabilization clause is read into every contract, although the parties did not make the treaty to provide for contractual protection.[13]

Conversely, other tribunals adopted a more flexible view, emphasizing that a state's inherent right to regulate allows for adjustments in the public interest, like protecting consumers[14] from a tariff increase without incurring violations of the ECT Article 10(1). In their view, the reduction of public expenditure with no excessive burdens on consumers of electricity has been balanced against the need to encourage environmental protection and renewables and, at the same time, protect the legal rights of existing investors.[15] In *Eurus Energy v Spain*, for instance, the tribunal noted that the absence of specific commitments from the state weakened the claim for a breach of the FET standard. It then confirmed that oral statements on 'promotional occasions' were insufficient to constitute a 'specific commitment'. The majority of the Tribunal also found that legitimate expectations related to 'circumstances in existence at the time the investment [was] made'. As most of Eurus' investments predated the FIT, Eurus's claim failed.[16]

To sum up, two main positions emerge. First, the legitimate expectation of stability has been interpreted as an obligation to protect investors under the broader FET umbrella. Second, the legitimate expectation of stability has been interpreted in terms of systemic proportionality. This divergence in tribunal reasoning also raises questions about the boundaries between a stable regulatory

[11] CHUNG, LOW AND HUANG, 'Public policy conflicts in investor-state energy arbitrations', 20 International arbitration report (Norton Rose Fulbright May 2023), 18, available at: https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report-issue-20.pdf?revision=1eb03007-24d5-4d37-a854-db4991a7840d&revision=5249886851577387904

[12] *Hydro Energy and Hydroxana v Spain* (Decision on Jurisdiction, 9 March 2020) para 673.

[13] SORNARAJAH, *The International Law on Foreign Investment* (4th ed, CUP 2017) 420.

[14] *Isolux v Spain* (Award, 12 July 2016) para 823.

[15] *Renergy v Spain* (Dissenting Opinion of Prof. Philippe Sands KC, 6 May 2022).

[16] CHUNG, LOW AND HUANG (n 11) 18.

framework and a state's sovereign right to adapt policies as market conditions evolve. Where would these conflicting results ultimately point to?

3. Sustainable development protection presents public policy conflicts

The conflicting arbitral outcomes underscore a broader dilemma: achieving sustainable development may come at the expense of predictable investment conditions. Governments, while striving to comply with international agreements like the Paris Agreement, might inadvertently breach obligations under treaties like the ECT if their regulatory adjustments are seen as discriminatory against foreign investors.

While the ongoing processes of reform are steering towards more sustainable-oriented choices, aligning with modern energy and climate goals is likely to require a profound, if not radical, systemic rethinking, although compromise is inevitable. For example, the modernized ECT (Art.19) attempted to integrate sustainable development and environmental protection by requiring contracting parties to honour their human rights obligations and commitments under the UNFCCC and the Paris Agreement. Although it introduced a dispute settlement mechanism tailored for sustainable development, it still allows states a 'flexibility mechanism' that can exempt fossil fuel protections. Regrettably, this mechanism is optional, and existing investments remain shielded for up to 10 years after the new provisions take effect.

One problem that is likely to persist in the realm of renewable energies and, therefore, hinder their contribution to sustainable development, is the flexibility accorded to this type of investment. As Helmut Scholz aptly observes, governments should be free to adjust policies without the looming threat of investor lawsuits.[17] Spain's experience—with over 50 lawsuits amounting to at least €8 billion in claims—serves as a cautionary tale. If investment agreements create a chilling effect on regulatory reforms, governments may be hesitant to support renewable energy initiatives, potentially increasing the overall cost and slowing the energy transition.

Until a more balanced approach is developed—one that reconciles regulatory flexibility with investor protection—states may continue to face a surge in energy-related investor-state disputes.[18] Such conflicts not only

[17] COLUMBIA CENTER ON SUSTAINABLE DEVELOPMENT, 'Scaling Renewables: Helmut Scholz on Regulatory Frameworks and Investment Treaties' (July 2023), available at: https://ccsi.columbia.edu/news/scaling-renewables-helmut-scholz-regulatory-frameworks-and-investment-treaties

[18] MARCEDDU, 'The Pursuit of The United Nations Sustainable Development Goals Between EU's International Investment Policy and Renewables Investment Arbitrations', *Diritto del Commercio Internazionale* (2024).

complicate the path toward sustainable development but also amplify the uncertainty and cost of the energy transition.

The disputes over renewable energy subsidies and the Fair and Equitable Treatment standard under the ECT epitomize the clash between state sovereignty and investor expectations. Governments must navigate a complex landscape where evolving market dynamics, the need for regulatory flexibility, and the protection of legitimate investor expectations intersect. By learning from both Spain's experience and those of other nations, policymakers can work toward reformed investment treaties and regulatory frameworks that support a robust and sustainable energy transition. A balanced approach that preserves both policy adaptability and investor confidence is essential to advance global renewable energy initiatives and sustainable development.

The *Rockhopper* Case and the Destiny of ISDS in the EU Energy Sector: Do Inflexible Creatures Risk Extinction?

CHIARA CELLERINO

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1. Introduction

On 23 August 2022 the ICSID Tribunal established on the basis of the Energy Charter Treaty in the *Rockhopper v. Italy* case awarded EUR 182 million damages to the claimant for failure of the Italian State to grant an application for exploitation activities in the marine site of "Ombrina Mare". More precisely, the denial of the application for a production concession resulted from the passage of the *legge* no. 208/2015 (budget Law 2016), which confirmed the ban of exploitation activities for "*off shore liquid and gas hydrocarbons*" in waters within 12 miles of the coastline. Despite Italy's withdrawal from the ECT as of 1st January 2016, the dispute falls within the scope of application of the 20 years sunset clause provided for by art. 47(3) ECT, for investments made prior to withdrawal.[1] The award sparked several critical reactions, pointing to the lack of consideration of environmental a climate change issues within the balancing of interests drawn by the Tribunal. The introductory remarks of the award seem to anticipate such criticisms, by reassuring that «*the Tribunal appreciates and is acutely sensitive to the fact that there are strongly-held environmental, civic and political views about offshore production in Ombrina Mare. However, the outcome of this case passes no judgment whatsoever on the legitimacy or validity of those views».* In this regard, the attempt of the Tribunal to draw a distinction between the «*environmental debate, which is of a civic or political character»* and the *«legal issue at hand, namely, whether compensation is due to a foreign investor in respect of its investment, based on specific international criteria as*

[1] Italy notified the Depository of its withdrawal on 31 Decembre 2014. According to the one year notice period provided for by art. 47(2) ECT, withdrawal became effective on 1st January 2016 and the sunset clause will end on 1st January 2036. The sunset clause covers investment made before withdrawal, including during the notice period.

contained in a treaty to which Italy was, at the material time, a contracting party» may not be particularly persuasive.[2]

Rather, it seems that environmental issues, including action undertaken to face climate change, while certainly being subject to political and civil society debate in Italy, were directly incorporated into the legal questions raised by the dispute, considering in particular that they underpinned the enactment of the *legge* no. 208/2015. A different balance could probably have been found, through the solution of the very legal questions addressed in the award, between the economic interests of the investor and the interest of Italy to pursue fundamental non-economic public (and global) goals, such as the environment and sustainability choices. This could have occurred at several stages of the reasoning on the merits, in particular with reference, at least, to the following points: the qualification of Italian State conduct as "direct expropriation", the rejection of the police power doctrine and the amount of damages awarded to the investor.

Leaving aside the jurisdictional issues based respectively on the *intra*-EU jurisdictional objection[3] and the *fork-in-the-road* objection[4], both rejected by the Tribunal, purpose of this paper is to provide a critical analysis of the core questions on the merits, with particular reference to (i) the qualification of the conduct of Italy as a direct expropriation and (ii) the rejection of the police power doctrine. Some more general considerations are then drawn on other aspects of the case, showing the problematic relationship between international investment law - including investor/State dispute settlement (ISDS) provided for by relevant

[2] See ICSID, Award of 23 August 2022, *Rockhopper Italia S.p.A et al. v. Italy*, ICSID case no. ARB/17/14, par. 10: *«The Tribunal appreciates and is acutely sensitive to the fact that there are strongly-held environmental, civic and political views about offshore production in Ombrina Mare. However, the outcome of this case passes no judgment whatsoever on the legitimacy or validity of those views. In particular, the Tribunal is at pains to point out that this award is not a "victory" for one side or the other in that environmental debate, which is of a civic or political character, but rather addresses the legal issue at hand, namely, whether compensation is due to a foreign investor in respect of its investment, based on specific international criteria as contained in a treaty to which Italy was, at the material time, a contracting party. As is discussed and analysed later in this Award, the material factual circumstances which have led to the final result of this arbitration are both specific and discrete from the environmental considerations which have been argued before the Tribunal».*

[3] The objection is based on the lack of Tribunal jurisdiction as a matter of EU law, due to the incompatibility of Member States consent to arbitrate intra-EU disputes with the principle of autonomy of EU law and with the principle of mutual trust among them, as stated in Judgement of the Court of Justice, 6 March 2018, case C-284/16, *Achmea v. Slovak Republic* and Judgment of the Court of Justice, 2 September 2021, Case C-741/19, *République of Moldova v Komstroy LLC.*

[4] The objection was based on the fact that Rockhopper had challenged before Italian Administrative Courts the decision of the Italian Ministry of Environment to require an Environmental Impact Authorisation, as a matter of supervened regulation. This triggered, according to Italy, the fork in the road clause contained in art. 26(2) ECT.

international investment Treaties - and the role of the State in the achievement of environmental goals, as mandated by fundamental international and EU commitments.[5] It is argued that, by providing a text-book example of the above-mentioned problems in a sector which is highly implicated in climate change mitigation strategies, such as the energy one, the award may turn out as the best argument in the hands of ISDS opponents, as the recent developments relating to the destiny of the Energy Charter Treaty seem to confirm.

2. The *Rockhopper* case: Setting the factual and normative scene

The facts of the case and the main tenets of the award are widely known.[6] Suffice here to briefly recall some elements of the dispute relevant to our purposes.

Mediterranean Oil and Gas Plc ("MOG") and its wholly owned subsidiary Medoilgas Italia S.p.A. (formerly, Intergas Più s.r.l.), held the permit, issued from the competent Italian Ministry to their predecessors in 2005, to explore the marine site of "Ombrina Mare", off the Italian Coast of Abruzzo.[7] In 2008 the exploration activities confirmed the existence of the oil reservoir and the companies applied for an exploitation concession, in accordance with the two-stage authorisation process in those years provided for by the applicable Italian law.[8] This request met strong oppositions from local communities, on mixed environmental grounds concerning risks to marine environment, and impact on fishing and tourism activities of the Region. The protests raised to national debate and, following also the *Deepwater Horizon* accident in the Gulf of Mexico in 2010, Legislative decree no. 128/2010, amending art. 6 of Legislative Decree 128/2010 ("Environmental Code")[9], introduced a ban to oil drilling activities in protected marine and coastal areas, in marine areas within 12 nautical miles from the external perimeter of protected areas, as well as in marine areas within 5 nautical miles from the Italian baseline. The ban was established

[5] Reference is made mainly to commitments undertaken under the Paris Agreement of 12 December 2015 on Climate change, the EU Green Deal and implementing legislation, see Communication from the Commission, The European Green Deal, 11.12.2019, COM(2019) 640 final.

[6] *Ex pluribus*, T. MARZAL, *Polluter doesn't pay: The Rockhopper v. Italy award*, in *EJIL Talk!*, 19 January 2023, ; P. MAZZOTTI, *Rockhopper v. Italy and the tension between ISDS and Climate policy*, in *Volkerrechtsblog*, 21.12.2022, https://voelkerrechtsblog.org/de/rockhopper-v-italy-and-the-tension-between-isds-and-climate-policy/; *No trivelle, Italia condannata a pagare 190 milioni per il blocco di Ombrina*, in *Il Sole 24 ore*, 24 August 2022; J. MOULDS, *Outrage as Italy faces multimillion pound damages to UK oil firm*, in *The Guardian*, 25 July 2021.

[7] The permit was originally obtained in 2005 by an Italian company subsequently acquired by MOG.

[8] See Law no. 239/2004, art. 1, parr. 77-78.

[9] Legislative Decree no. 128/2010, art. 1, par. 3.

«*for the purposes of protecting the environment and the ecosystem"*,[10] and would apply to pending authorization, including the Ombrina Mare one, which was located around 6 and 7 nautical miles from the base-line, but within 12 nautical miles from the external perimeter of a protected area in the region.[11]

In 2012, however, the Italian Government amended again art. 6 of the Environmental Code, extending the ban to drilling activities within 12 nautical miles of the base-line or protected areas, and granting a (retroactive) exemption from the mentioned ban to applications for production concessions that were under review at the time Decree no. 128/2010 came into force.[12] It is relevant to highlight that, according to the facts agreed upon by the Parties of the dispute, «*one of the stated purposes of Decree 83/2012, which was set out in the accompanying Government report, was to avoid contingent litigation that would follow from permit holders such as* [the predecessors of] *Rockhopper Italia who would understandably seek compensation for the denial of their legal rights"*.[13] This shows that, in this case, a regulatory chill derived from the availability of ISDS to foreign investors, to the extent that the Italian legislator decided to postpone the effects of environmental standards to such investors, for the fear of ISDS.

As a consequence, the Ombrina Mare procedure was resumed, together with the local communities' protests against it. For the sake of completeness, the above-mentioned exemption came with a price for the industry, in that the royalty rates in favour of the State were increased from 7% to 10% for gas and from 4% to 7% for oil, with a view to address environmental externalities: the increase would be reallocated to specific income components of the budgets of two Ministries for «*the full performance, respectively, of activities aimed at monitoring and countering marine pollution and activities for the supervision and control of the safety, also environmental, of offshore exploration and production plants*".[14]

Furthermore, pursuant to a new regime applicable to off-shore structures,[15] the Italian Ministry of the Environment and Protection of Land and Sea required MOG Italia to apply for an Integrated Environmental Authorisation (*Autorizzazione integrata ambientale – AIA*, hereinafter also "IEA") as a precondition for the signing off of the Environmental Impact Assessment

[10] Environmental Code, art 6, as amended by Legislative Decree 128/2010, Art. 6, par. 17.
[11] See Ministero dell'Ambiente e della tutela del territorio e del mare, Parere 541 del 7.10.2010, http://va.mite.gov.it
[12] Law Decree no. 83/2012, art. 35.
[13] See Award, p. 31, par. 101 and footnote 16.
[14] Environmental Code, art. 6, as amended by Law Decree no. 83/2012.
[15] Law Decree no. 5/2012, converted in Law 4 April, 2012, no. 35, amending Annex VIII of the Environmental Code.

(*Valutazione di impatto ambientale -VIA*, hereinafter also "EIA") on the project. The request was challenged by MOG before Italian administrative courts. On 17 April 2014, the Lazio Regional Administrative Tribunal rejected the claim.[16] As a result, MOG Italia had to apply for an IEA.

In this regulatory context, in August 2014 Rockhopper Exploration took over MOG and Medoil Gas Italia, changing their names to Rockhopper Mediterranean and Rockhopper Italia, respectively. This gave birth to the investment for which protection is sought under the ECT in the case at stake.

After the positive completion of the EIA procedure on 7 August 2015, Rockhopper filed an application for the final grant of the concession on 14 August 2015 to the Ministry of Economic development. However, the Italian administration failed to act in the following days and months. Arguably, as Claimant observes, the delay was also due to the political turmoil surrounding the legal regime of marine extraction authorizations in Italy. More precisely, in the wake of the adoption of Law Decree no. 133/2014, converted in Law 11 November 2014, no. 164 (so called "*decreto Sblocca-Italia*") relating to other strategic reforms of Italian extraction industry, ten Italian Regions, supported by environmental civil society movements and associations, proposed an abrogative referendum, targeting *inter alia* the above-mentioned provision granting exemption to pending authorizations.[17] Before the referendum took place, in consideration of the stance taken by a large share of Italian Regions, and with a view to avoid the referendum, the exemption was repealed by *Legge* no. 208/2015 (budget law 2016).[18] This obviated the referendum question, which was hence dropped. Soon after, the Italian Ministry of economic development notified Rockhopper the final rejection of its application for production authorization with Letter dated 29 January 2016. Rockhopper filed a request for arbitration to ICSID against Italy on 14 April 2017. In particular, Claimant asked compensation of €281,675,391 million, including lost profits, for violation of art. 10.1 ECT (Fair and equitable treatment standard, hereinafter "FET", and prohibition of unreasonable and discriminatory measures) and art. 13 ECT (prevention from unlawful expropriation).

3. The *Rockhopper* award in the merits

[16] Regional Administrative Tribunal of Lazio, no. 4123/2014, confirmed in appeal by Council of State, n. 943/2016.

[17] For a full account of referendum questions, see *No alle trivelle dello sblocca Italia, avanti coi quesiti referendari*, https://www.carteinregola.it/index.php/40072/?utm_source=rss&utm_medium=rss&utm_campaign=40072

[18] Law no. 208/2015, art. 239.

After dismissing the jurisdictional objections raised by Italy, the Tribunal found that Respondent had directly expropriated Rockhopper investment without compensation in violation of art. 13 ECT. This rendered unnecessary to address other claims, in particular violation of FET. The latter would probably result groundless in any case, as the individual opinion by Arbitrator Pierre-Marie Dupuy, nominated by Respondent, tried to explain.[19] According to his opinion, «[*i]t would have been almost impossible to conclude, on the basis of the elements of the case, that Rockhopper could reasonably and legitimately expect a positive response from the Italian authorities to its application for an operating permit. The Respondent was able to demonstrate efficiently that no promise had ever been made by its administration to the investor to that effect, especially since, as confirmed by the Italian Council of State itself, the granting of an* exploration *permit by a company in no way entailed in domestic law the automatic granting of an* exploitation *permit»*. Quite puzzling is however how the grant of the same permit, which could not, according to Arbitrator Pierre Marie Dupuy, be reasonably expected by the Claimant under the FET test, became, in the award, the object of a full right vested on the Claimant and expropriated by the Respondent. An expropriation which, in any case, although qualified as "direct", did not bring any transfer of property in favour of the State.[20]

The award finds that the approval of the EIA in August 2015 bestowed a legal right of Rockhopper to obtain the production concession within a certain period of time. This arguably follows in particular by the application of art. 16 of Decree of the President of the Republic 18 April 1994, No. 484, according to which «*[t]he Ministry within fifteen days from the receipt of the environmental compatibility decree by the Ministry of the environment, issues the decree for the award of the production concession».*[21] The applicability of the mentioned provision was debated among the parties, in particular due to the subsequent developments in the Italian legislation, which may have repealed it implicitly.[22]

[19] Individual Opinion by professor Pierre-Marie Dupuy, *Rockhopper Italia S.p.A et al. v. Italy*, ICSID case no. ARB/17/14, par 2.

[20] See, for example, on the point, Award of 16 December 2003, *Nykomb v. Latvia,* Case No. 118/2001, where the Arbitral Tribunal concluded that the loss of the economic value of the investment did not, by itself, constitute an expropriation because the State did not take possession of the enterprise or its assets, or interfere with the shareholders' rights or management control. See also Award of 21 January 2016, *Charanne v. Spain,* Case No 062/2012, were it was held that Spain's modification of the photovoltaic incentive regime did not amount to an indirect expropriation, as indirect expropriation implies a substantial effect on the property rights of the investor.

[21] Translation reported from the award, and verified by the Author.

[22] In any case, as prof. Picozza clarified its testimony, should the provision not apply, reference should be made to L. 241/1990, which sets a general 30 days term for public administration to act.

However, the Tribunal found that the provision was still in force at the time of the procedure and «*the (temporal) Rubicon was indeed crossed once the Respondent issued its Decree on 7 August 2015 and the Claimants lodged their application on 14 August 2015. At that latter moment, as a matter of the Tribunal's appreciation and factual findings of Italian law, the Claimants held a right to be granted the production concession. This was no mere hope or aspiration; the legal right to be granted such a concession was then irrevocably in train as a matter of Italian law as it then stood».* Such presumed "legal right" was deemed expropriated by the decision of Italian Administration to reject the application in January 2016, pursuant to the supervened enactment of the above-mentioned *Legge* no. 208/2015.[23]

The award further rejects the police power doctrine invoked by the Respondent in connection with the application of the precautionary principle. As known, the doctrine, purports that *bona fide*, non-discriminatory regulation adopted in the public interest may exempt State from responsibility for unlawful expropriation of foreign investments. Although applied by some Tribunals, the status of the doctrine under international law is debated.[24] The Tribunal seems to refuse its application, to the extent that the only conditions taken into account for the possible exemption from State responsibility are those provided for under art. 13 ECT, including in particular (i) the public interest purpose of the measures and (ii) the payment of prompt compensation. While the Tribunal easily and correctly finds that compensation had not been paid, it further observes that, after the EIA was approved in August 2015, Italy could no longer rely on the precautionary principle, invoking additional environmental reasons to justify the rejection. As a consequence, «*the more likely reason for the position taken by*

[23]Award, par. 149 "*The Tribunal has taken the greatest care possible to ensure that a full, thorough and fair consideration has been given to the competing viewpoints, both in its extensive deliberations on the issue, and also reflected in the fullest opportunity afforded to both sides to cross and re-examine both witnesses. Ultimately, as with any contested matter of material and predicate importance, the Tribunal must decide by reference to that which has been persuasive. In this case, as discussed and analysed above, the Tribunal is persuaded that Decree 484 was in force at the relevant time.*
150. This finding has the factual consequence, in the Tribunal's view, that the (temporal) Rubicon was indeed crossed once the Respondent issued its Decree on 7 August 2015 and the Claimants lodged their application on 14 August 2015. At that latter moment, as a matter of the Tribunal's appreciation and factual findings of Italian law, the Claimants held a right to be granted the production concession. This was no mere hope or aspiration; the legal right to be granted such a concession was then irrevocably in train as a matter of Italian law as it then stood".

[24] For a full account of the doctrine e related arbitral practice, see, *ex multis*, C. TITI, *Police Powers Doctrine and International Investment Law*, in F. FONTANELLI, A. GATTINI, A. TANZI (eds), *General Principles of Law and International Investment Arbitration*, Brill, 2018, 323; O.E. BULUT, *Drawing boundaries of police powers doctrine: a balanced framework for investors and states*, in *Journal of International Dispute Settlement*, 2022, 13, 583.

the Respondent culminating in the letter of 29 January 2016 is the political and civic engagements as discussed earlier».[25] Whether this excludes, in the reading of the Tribunal, the public purpose nature of the measure is not clear.

4. A critical appraisal through the lenses of Italian law: Legitimate interests *vs* individual rights

For an Italian lawyer, the finding of a legal right to the grant of a concession for cultivation of hydrocarbons, in a situation like the one at stake, is perplexing for several reasons. This does not mean that Respondent's delays in the conclusion of the procedure met good administration standard, nor that it was lawful. Indeed, irrespective of whether the (in any case, non-peremptory) terms provided under Italian administrative law are reasonable for issuing such a permit, failure to act in due time amounts to a violation of legal provisions, and remedies exist to force the Administration to act within time-limits and, possibly, obtain compensation for suffered losses. Surprisingly, Rockhopper did so by commencing proceedings before Lazio Administrative Court on 30 December 2015, when it was however too late, as the mentioned *Legge* no. 208/2015 had already passed.[26]

But it seems a step too far to state that the legitimate interest of the applicant in having a lawful and timely conclusion of the procedure turns into a legal right (even an internationally protected one) to have the concession granted. This is unlikely to be so, at least, until the Public administration is required to exercise discretionary powers, as the case seems to be, according also to the very clear statements contained in the EIA Decree of 7 August 2015.[27] Indeed, additional legal obstacle could in principle still interfere with the grant of the concession, taking into account that the meeting among the public administrations involved (so-called *conferenza di servizi*) still had to be convened and could originate further prescriptions on the project.[28] Interpreting the law in a different way

[25] Award, par. 198.

[26] Due to delays of the Administration, on 30 December 2015, Rockhopper commenced legal proceedings before the Lazio Administrative Court seeking an order that the Ministry of Economic Development grant the production concession and, in the absence of such a grant, to appoint an external commissioner to take the decision in lieu of that Ministry. Such proceedings however are initiated after the enactment of Legge no 208/2015, which led to the subsequent rejection of the application. Yet, they were relied upon by the Tribunal as evidence of Rockhoppers right.

[27] D.M. 7 agosto 2015, n. 172, available at https://va.mite.gov.it/it-IT/Oggetti/Documentazione/2026/3943, p. 8, last two paragraphs, referring to the work of the decisive service conference still to be held, following further authorizations to be obtained by the applicant.

[28] On the same point, G. PARDI, *Rockhopper v. Italia: sul contrasto ancora irrisolto tra tutela dell'ambiente e interessi degli investitori*, in *Federalismi.it*, 28 giugno 2024, p. 145.

would be equal to assume that the EIA Decree is valid also as a concession title. This is clearly wrong under law applicable to the procedure.

This element is central, and lies at the very core of the distinction, under Italian law, between a legitimate interest (*interesse legittimo*) and a subjective right (*diritto soggettivo*). They are both protected under the law, but the former is an advantage subject to the exercise of authoritative power of the Administration in the public interest. With respect to such a legal position, the individual is not entitled to full protection, but is only entitled to have a judicial scrutiny on the legitimacy of the exercise of such power by the public administration: thus, it is a "mediated" protection.[29] Indeed, a legitimate interest cannot be expropriated (albeit it can be violated) by the State.

It is true that, at that point of the procedure, the discretion left to the Ministry of Economic Development was probably limited to remaining aspects relating to the technical and economic capability of the Applicant (see para. 157 ff.). Yet, it can hardly be said that the no discretion was left to the Italian Public administration, at least as regards the cost-effectiveness of the project. The reported correspondence exchanged among the parties between November and December 2015 seems to confirm this assessment. In this respect, one should also add that the exercise of public powers comes with the obvious obligation to apply relevant laws in force at the time of the decision, in accordance with the principle *tempus regit actum*. *Quid iuris* if, for example, *legge* no. 208/2015 had passed after the EIA was issued, but before the 15 or, more likely, 30 days term for public administration to act?

The slippery slope on which the Tribunal ventured in this respect seems confirmed by the unconvincing arguments used to support it. According to the Tribunal, «*the Claimants' conduct from August 2015 right up to 30 December 2015 […] demonstrates that they were a party clearly understanding themselves to be possessed of such a right …In particular, the Claimants' engagement with the Respondent insofar as matters such as complying with requests for information, demanding an extension of the exploration permit lest its validity expired before the grant of the production concession, and (perhaps this is quite illuminating) ultimately bringing proceedings seeking an order compelling such a grant, are individually and collectively indicative of a party conducting itself in a consistent manner; that manner is consistent with a party believing itself to have a right to be granted a production concession… The factual consequence of all of the foregoing is that before the formal denial by the Respondent of the*

[29] Recently, Council of State, 3.10.2022, n. 8434/2022. See also, on a similar distinction, but with a different outcome as regards the case of public administration powers curtailed within the limits of application of precise legal provisions, Cass. 29 September 2022, n. 28429; Cass., S.U., n. 23436/2022.

production concession application, the Claimants had an undoubted right to be granted such a concession in respect of the Ombrina Mare field». Unfortunately, however, the individual belief to possess a right does not bring such a right into existence, unless the law so provides. As explained above, this was not the case. Rather, the evidence mentioned by the Tribunal seems to show that some activity (and exercise of power) was still due on the side of the Italian Administration before a final decision could be taken as regards the grant of the concession.

All the above is without prejudice to the possibility of the Claimant to seek the legitimate reimbursement of some (emerging) costs, through the activation of national legal remedies against the conduct of the Italian Administration.

5. On the rejection of the police power doctrine

Coming now to the rejection of police power doctrine, we tend to agree with the idea that, at some point in time, environmental issues needed to be defined within the procedure, and this moment probably came with the approval of the EIA. However, the consequence drawn by the Tribunal from such a finding is misleading. In particular, the enactment of *legge* no. 208/2015 addressed wider environmental concerns than the EIA did and applied the precautionary principle to a different and more general issue, namely the legality *ex ante* of any drilling activity within 12 miles of the base-line. Such a choice pertains to sovereign energy and sustainability choices, and was inspired both to the precautionary principle, and to long term climate change mitigation strategies,[30] as compelled by EU and international law commitments. The same environmental concerns raised by the political and civil "engagements" referred to by the Tribunal resulted in a law passed by the Italian Parliament. The two elements are therefore closely related. The rejection of the concession was nothing else than an act of application of a *bona fide* regulatory measure adopted, on non-discriminatory basis, in the public interest, following civil society mobilization. Once again, the Tribunal's argument seems to miss the point, or elude it. Accepting and applying the police power doctrine could have probably changed the outcome of the case.

In conclusion, despite the declared effort of the Tribunal to take «*the greatest care possible to ensure that a full, thorough and fair consideration has been given to the competing viewpoints»*,[31] it seems that it was persuaded only by those submitted by the Claimant.

The award of Euro 184 million for allegedly lost – but more likely hoped for – profits, in the face of a legitimate regulatory activity of Italy aimed at the protection of the environment, is quite disappointing for Italian tax payers, and

[30] Award, par. 109.
[31] Award, par. 149.

not only.[32] The amount of awarded damages remain significantly lower than that claimed by Rockhopper (Euro 273 million), and yet significantly higher (more than five times) than the value of the initial investment made by Rockhopper to acquire MOG Italia (36 million).[33]

The Tribunal may have wished to justify the outcome of the case on philosophical grounds by affirming that «[*t*]*here is no uniquely 'right' answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as 'wrong'*».[34] However, Tribunals are required to do choices relating the application of the law in specific cases. Indeed some "choices" are perceived as more "wrong" than others. This is, in our perspective, one of them.

6. ISDS *vs* green energy policies in the EU: What destiny for the ECT?

The *Rockhopper* case clearly shows that ISDS is capable not only to influence the activity of national legislators (so called "regulatory chill" effect), pushing them to avoid or postpone the effects of environmental legislation, as occurred with regard to exceptional regime for pending applications enacted by Italy in 2012 (*supra*, § 2), but also to drive up the costs of the energy transition for States.[35] At Italian level, within the reorganization of the energy policy in compliance with EU law sustainability requirements, an attempt is made to discharge costs deriving from regulatory changes on the industry, by raising the administrative fees on hydrocarbon activities, with a view to set up a fund to edge, inter alia, against potential litigation. [36] Yet, as a matter of policy, more structural solutions may need to be found.

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[32] On the criteria used for the calculation of damages, T. MARZAL, *Polluter doesn't pay*, cit,

[33] Rockhopper acquired MOG for 36 million Euros, including 12 million cash held by MOG, while costs for exploration activities between 2005 and 2008 amounted to 18 million Euros. Respondent's position was that damages should only be based on acquisition market price, depriced of 63% due to decline of oil industry, for a total amount of 13 million.

[34] Award, par. 190(3).

[35] These two elements are acknowledged, inter alia, by the Intergovernmental Panel on Climate Change (IPCC), *Mitigation of Climate Change - Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, 2022, https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf, and correctly denounced in the literature, inter alia, by T. L. BERGE, A. BERGER, *Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity*, in *Journal of international dispute settlement*, 2021, 12, 1; K. TIENHAARA, *Regulatory chill in a warming world, The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, in *Transnational environmental law*, 2018, 229.

[36] D.R. DI BELLA, J. GALVEZ, *Oil Gas: Is Italy Doing It Wrong All Over Again?*, in *Kluwer Arbitration Blog*, March 13, 2019, https://arbitrationblog.kluwerarbitration.com/2019/03/13/oil-gas-is-italy-doing-it-wrong-all-over-again/. See Law Decree No. 135/2018 converted into Law No. 11/2019. Article 11-ter of the Law 11/2019 is going to increase the administrative fees on

In this regard, some argue that the cause of the arbitrations like the present one is rooted in years of a «*somewhat confused energy policy, incapable of a long-term predictability»*, something that is quite important in a sector where huge investments are expected to earn profits over a long period of time.[37]

Whether or not Italian approach to energy policy is to be blamed, one should recall that the public (and political) debate relating to the transition to renewable sources of energy as a matter of climate change mitigation, has been going on for, at the very least, around 15 years now.[38] On its side, the European Union has issued several public documents on the topic and Directive 2018/2001, replacing former Directive 2009/28, set a binding regime for Member States as regard renewable energies targets, based on their respective renewable energies potential.[39] Member States are now required to shape long term energy plans according to Regulation UE/2018/1999.[40]

The publicity of the above-mentioned debate is meant to provide certainty to policy makers and investors, avoiding that choices made today lock in existing emissions levels. In this regard, suffice here to mention that the regulatory risk at the time of Rockhopper investment was quite predictable, considering also that the Italian halt to drilling activities, whether it was wise or not, dates back to 2010. Availability of ISDS may have been assessed by the investor as… a

hydrocarbon activities by 25 times as of 1 June 2019, with a view to set up a fund to edge against potential investment arbitrations.

[37] D.R. DI BELLA, J. GALVEZ, *Oil Gas: Is Italy Doing It Wrong All Over Again?*, cit.

[38] A reference in point is, *inter alia*, the signature of the 2005 Kyoto Protocol, then replaced by the 2015 Paris agreement on Climate change, and the connected 2015 UN Agenda 2030. 2015 UN Agenda 2030 - goal 7 refers to the need to ensure access to affordable, reliable, sustainable and modern energy for all – including increase the share of renewable energy global consumption. The 2015 Paris Agreement on Climate change set the binding obligation to keep the global temperature increase to well below 2°C and pursue efforts to keep it to 1.5°C, leaving however the States parties free to determine how to achieve such goals in accordance with their respective national plans, based also on the different renewable energy potentials of each country. The EU legislation and policy implements these objectives and sometimes unilaterally raises the standards.

[39] See Directive (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources, which replaced former Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. See also the EU Green Deal objective to decarbonise EU's energy system and achieve carbon neutrality by 2050.

[40] Regulation (EU) 2018/1999 of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, art. 14; for Italy, see *Piano nazionale integrato per l'energia e il clima (PNIEC)*, adopted by the Ministry of Environment and Energy security in 2020 and updated in June 2023, available at https://www.mase.gov.it/comunicati/clima-energia-il-mase-ha-trasmesso-la-proposta-di-pniec-alla-commissione-ue

rewarding insurance against such a risk, also with regard to the timing of the investment.

It is true that the sector is sensitive to geopolitical turmoil, as the current war in Ukraine is showing. A certain revival of traditional energy sources (oil and gas), at least in the short term, is recorded also at Italian level, in order to protect national strategic interests.[41] However, in the long run, energy security requires further independence and diversification of energy sources and this will entail also the progressive replacing of legacy fuels (such as coal, oil, and, to a lesser extent, gas) by renewable energy sources, in compliance with EU energy policy goals, ex art. 194 TFEU, and laws. In this context, and save contingent needs, the long-term promotion of renewable energies, in compliance with international and EU law commitments to tackle climate change, is going to meet also national strategic interests. The conundrum outlined above is well reflected in Communication of the European Commission "Repower EU", adopted to reduce dependence on Russian fossil fuels and speed up the green transition.[42] In particular, the Communication promotes support (including financial support) to three, mutually beneficial, lines of action: energy savings, diversification of energy supplies, and accelerated roll-out of renewable energy to replace fossil fuels in homes, industry and power generation. No doubts, therefore, that Member States are required to be in full control of their national energy policies and to undertake a well-planned long-term "green approach" to it.

In light of the regulatory and policy context described above, the "splendid isolation" of investment law and arbitration from national, EU and (other domains of) international law, as emerging from cases like this, may not be the wisest choice to allow ISDS to survive the changing landscape. Besides reforms of relevant investment treaties currently pursued at several levels, more accommodating interpretations techniques, which characterize certain arbitration cases, may represent a better way to enable ISDS to navigate the seas of a "warming world".[43] Evolution history teaches that creatures incapable of

[41] Law 5 December 2022, no. 187, enacting urgent measures to protect national interest in strategic sectors, including financial support to fossil fuels energy producers facing hardships due to EU sanctions regime; see also Law Decree, 18 November 2022, no. 176 (so called "aiuti-*quarter"*), reopening certain frozen concessions for drilling activities, in order to ensure energy supply for national industry at certain prices.

[42] Communication from the Commission Joint European Action for more affordable, secure and sustainable energy, COM(2022)108, 8.3.2022.

[43] The term is borrowed by K. TIENHAARA, *Regulatory chill in a warming world*, cit. A good example of an interpretative approach inspired to art. 31.2 of the Vienna Convention on the Laws of Treaties is offered by Award 16 June 2022, *Green Power K/S and Obton A/S v. Spain*, SCC Case No. V 2016/135, which acknowledges the relevance of international obligations stemming from the TEU and TFEU on member States of the European Union, with regard to the Jurisdiction of investment tribunals established through international treaties among the Member States.

adaptation risk extinction. The destiny of the ECT, as emerging from the proposal of the European Commission, on 7th July 2023, for a collective withdrawal from the Treaty by EU, Euratom and its Member States, seems to confirm the rule.[44] After the failure of the modernization process,[45] the outcome of the *Rockhopper* case may have contributed to accelerate this choice. Certainly, it did not help to postpone it.

An application for annulment of the award is now pending under art. 52 of the ICSID Convention. Without prejudice to the merits of the request, on 11 July 2023, the ICSID *ad hoc* Committee decided to lift the provisional stay of enforcement, subject to the establishment by Rockhopper of escrow arrangements agreed with Italy, in order to mitigate risk of non-recoupment of assets in case of annulment of the Award.[46] Yet, from an EU law perspective, it is not a secret that the *intra*-EU jurisdictional objection may, *inter alia*, result successful, should the case be brought before national courts in the enforcement phase, at least if such courts are those of the Member States of the EU. The clash among legal orders is possibly going to display further consequences in other phases of the case.

[44] Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty, COM(2023)447, 7.7.2023.

[45] Since 2018, the Energy Charter Treaty has been subject to a revision process, calling for a modernisation of its provision, with a view to align them to EU law, notably on investment policy and energy and climate goals. After "agreement in principle" was found on modernisation among the parties to the Treaty, in 2022, the Commissions proposed an EU position on the ECT amendments, to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference, see Proposal for a Council decision on the position to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference, COM(2022) 521, 5.10.2022. Amendments proposed included, *inter alia*, a carve out of investment protection for all new investments in fossil fuels, carbon capture utilization and storage in the EU, the update of investment protection clauses in order to safeguard the right to regulate in the public interest, protection against frivolous claims and mailbox companies claims, as well as an express exclusion of ISDS for intra-EU disputes (in accordance with *Achmea* e *Komstroy*, cit.). Member States did not find the necessary majority to adopt the Commission proposal due to the abstention of a blocking minority of four Member States (France, Spain, Germany and the Netherlands) and, without a Union position, the modernization process was taken off the agenda.

[46] *Update on Arbitration, Stay of enforcement to be lifted once Rockhopper puts in place relevant escrow arrangements*, https://www.investegate.co.uk/announcement/rns/rockhopper-exploration--rkh/update-on-arbitration/7629613, 13 July 2023.

Enforcing Climate Change Related Obligations Through International Investment Law

CARLO DE STEFANO

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1. Introduction: climate change and international investment law in light of the UN Sustainable Development Goals (SDGs)

The present contribution aims to analyse the relationship and interaction between States' obligations stemming from their participation to the international climate change regime (ICCR) and those arising from international investment law, especially the international investment agreements (IIAs) they are parties thereto[1]. The compelling character of human-induced climate change, as incontrovertibly established by scientific evidence, furthers its acknowledgment as first and most urgent contemporary global sustainable issue also in the economic, social and political dimension[2] ("*Climate change is the*

[1] SCHILL, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?*, *J. Int'l Arb.*, 2007, vol. 24, p. 469; BAETENS, *Combating Climate Change through the Promotion of Green Investment: From Kyoto To Paris Without Regime-Specific Dispute Settlement*, in MILES (K.) (ed.), *Research Handbook on Environment and Investment Law*, Cheltenham, 2019, p. 107; BEN HAMIDA, *Droit climatique et du droit des investissements: de la friction à la coordination*, *Revista Brasileira de Arbitragem*, 2021, no. 71, p. 84; GEHRING, HEPBURN, *Climate, Trade and Investment Law in the Global Green Economy*, in RUPPEL, ROSCHMANN, RUPPEL-SCHLICHTING (eds.), *Climate Change: International Law and Global Governance. Volume I: Legal Responses and Global Responsibility*, Baden-Baden, 2013, p. 381; TIENHAARA, *Does the Green Economy Need Investor-State Dispute Settlement?*, in MILES (K.) (ed.), op. cit., p. 292.

[2] IPCC, *Summary for Policymakers*, in *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge/New York, 2021, pp. 3-32, at 4-11. The augmented levels of the emissions in the troposphere of greenhouse gases (GHGs) caused by anthropic activities, especially the combustion of fossil fuels, produce global warming with an effect of increase in the temperature of oceans, decimation of ice sheets and reduction of the glaciers around the planet, sea-level rise and alteration of meteorological patterns that results in more frequent and

mother of all global commons problems")[3], consistent with the achievement of Sustainable Development Goal No. 13 ("*Take urgent action to combat climate change and its impacts*")[4]. The Paris Agreement of 12 December 2015[5], adopted multilaterally under the aegis of the United Nations Framework Convention on Climate Change (UNFCCC)[6] and featuring 194 Parties, represents one of the most successful achievements of the ICCR. Given its comprehensive scope, it provides a wide-ranging regulation of the gamut of legal aspects and processes that pertain to climate change, such as mitigation, adaptation, finance, technology, development and transfer, transparency of action, support and capacity building, loss and damage, as well as compliance[7]. The attainment of the ambitious goals[8] envisaged in the Paris Agreement demands international and national strategies and planning fostering unprecedented figures of "green"

extreme whether events. In this scenario, human-induced climate change may provoke natural disasters, such as droughts, flooding and heat waves. Beyond the ecocentric consequences on the environment, species, ecosystems and biodiversity, also the anthropocentric impact of climate change is incommensurable having regard to the protection of human rights and the effects on various economic sectors worldwide.

[3] BODANSKI, *Climate Change: Reversing the Past and Advancing the Future*, *AJIL Unbound*, 2021, vol. 115, p. 80.

[4] ID., *13 - SDG 13: Take Urgent Action to Combat Climate Change and Its Impacts*, in EBBESSON, HEY (eds.), *The Cambridge Handbook of the Sustainable Development Goals and International Law*, vol. 1, 2022, Cambridge, p. 328; KOTZÉ, *The Sustainable Development Goals: An Existential Critique Alongside Three New-Millennial Analytical Paradigms*, in FRENCH, KOTZÉ (eds.), *Sustainable Developments Goals: Law, Theory and Implementation*, Cheltenham, 2018, p. 41.

[5] Paris Agreement, signed at Paris on 12 December 2015, entered into force on 4 November 2016, *UNTS*, vol. 3156. See BODANSKY, *The Paris Climate Change Agreement: A New Hope*, *Am. J. Int'l L.*, 2016, vol. 110, p. 288; RAJAMANI, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, *Int'l & Comp. L.Q.*, 2016, vol. 65, p. 493; MALJEAN-DUBOIS, RAJAMANI, *L'Accord de Paris sur les changements climatiques du 12 décembre 2015*, *AFDI*, 2015, vol. 61, p. 61; LAVALLÉE, MALJEAN-DUBOIS, *L'Accord de Paris: fin de la crise du multilatéralisme climatique ou évolution en clair-obscur ?*, *Revue juridique de l'environnement*, 2016, vol. 41, p. 19; MALJEAN-DUBOIS, WEMAËRE, *L'accord à conclure à Paris en décembre 2015: une opportunité pour « dé » fragmenter la gouvernance internationale du climat ?*, *Revue juridique de l'environnement*, 2015, vol. 40, p. 649; MAYER, *Enjeux et résultats de la COP21*, *Revue juridique de l'environnement*, 2016, vol. 41, p. 13.

[6] United Nations Framework Convention on Climate Change, signed at New York on 9 May 1992, entered into force on 21 March 1994, *UNTS*, vol. 1771, p. 107. See SANDS, *The United Nations Framework Convention on Climate Change*, *RECIEL*, 1992, vol. 1, p. 270.

[7] BODANSKY, BRUNNÉE, RAJAMANI, *International Climate Change Law*, Oxford University Press, 2017, p. 234.

[8] Paris Agreement, Art. 3: "(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".

investment[9]. Such investments deserve promotion and protection in conditions of stability and sufficient predictability from the viewpoint of foreign investors.

These prospective developments in the field of international investment law ultimately demand rethinking the traditional dichotomy between economic rights and non-economic values (e.g., environment[10], health, labour standards), especially in the applications to be developed in the arbitral tribunals' practice. Moreover, the protection of foreign investments in the economic sectors of the "green transition" may even be reinforced upon reliance to States' international climate change law obligations, as illustrated in the following paragraphs. The inescapable tension between States' measures aimed at countering human-induced climate change and their obligations under international investment treaties embodied the background for scholarly investigation about possible effects of "regulatory chill"[11] by international investment law and arbitration on

[9] Within the COP27 (Sharm el-Sheikh, November 2022), the Conference of the Parties has recalled "the commitment of developed country Parties, in the context of meaningful mitigation actions and transparency on implementation, to a goal of mobilizing jointly USD 100 billion per year by 2020 to address the needs of developing country Parties in accordance with decision 1/CP.16" ("Long-term climate finance", 19 November 2022). More specifically, with regard to the Green Climate Fund (GCF), it welcomed the "[t]he increase in the number of funding proposals approved, which brings the total amount approved by the Board to USD 11.3 billion to support implementation of 209 adaptation and mitigation projects and programmes in 128 developing countries" ("Report of the Green Climate Fund to the Conference of the Parties and guidance to the Green Climate Fund", 20 November 2022). For overall estimates of financial flows, including from the private sector, that are required to achieve carbon neutrality by 2050 see section 3 of this Chapter.

[10] It is submitted that the references in IIAs to the environmental protection and concerns, although without expressly mentioning climate change, are nevertheless susceptible 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. Cf. DÖRR, *Article 31*, in DÖRR, SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Berlin, 2018, p. 567. Commentators have remarked, for example, that "*[c]ertainly climate change is an environmental concern*" (VADI, *Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals*, *Vanderbilt Journal of Transnational Law*, vol. 48, No. 5, 2015, p. 1285, at 1344) and "*plusieurs traités d'investissement ont pris en considération la dimension environnementale. Cette prise en considération permet aux Etats d'agir avec flexibilité pour gouverner le changement climatique*" (BEN HAMIDA, op. cit., p. 92).

[11] There is mounting concern and warning by intergovernmental bodies and within the civil society about the constraints posed by ISDS to the States' right to regulate for the purposes of climate change action ("regulatory chill"). See IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Geneva, Ch. 14, p. 81 and Ch. 15 p. 66; UNCTAD, *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, IIA Issues Note, No. 4, September 2022: "The risk of investor–State dispute settlement (ISDS) being used to challenge climate policies is a major concern"; ID., *International Investment in Climate Change Mitigation and Adaptation. Trends and Policy Developments*, 2022, p. 14; IPP, MAGNUSSON, KJELLGREN, *The Energy Charter Treaty, Climate Change and Clean Energy Transition. A Study of the Jurisprudence*, Climate Change Counsel, 2022, p. 5. See also SHARMA, *Integrating, Reconciling, and Prioritising Climate Aspirations in Investor-State Arbitration for a Sustainable Future: The Role of Different Players*, *JWIT*, 2022, vol. 23, pp. 751-752.

sound domestic climate change related actions and policies[12]. At the same time, there was conventional scepticism in the literature about the potential of the international investment regime to promote climate change action[13] or acknowledgement of the "invisibility" of the climate question in the context of ISDS[14].

The present contribution proposes an inclusive approach about the interaction of international climate change law (*lex climatica*) and investment law ("*lex mercatoria*"), which should not be considered as competing norms. Notably, it will attempt to explain how the implementation of States' obligations under the Paris Agreement may be realized through resort to international investment law and ISDS. To such an extent, international investment law may provide "teeth" to the ICCR, thus contributing to the fulfilment of its ambitions. More significantly, international investment awards benefit from effective enforcement mechanisms pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 18 March 1965 (ICSID Convention or Washington Convention)[15] and also under the

[12] SCHILL, op. cit., p. 477: "Investment treaties will not prevent state imposition of higher emission standards or product bans as such, but restrict their unreasonable or unforeseeable introduction". *Contra*, TIENHAARA, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in BROWN, MILES (K.) (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge, 2011, p. 615; ID., *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, *Transnational Environmental Law*, 2018, vol. 7(2), p. 232 (outlining "three distinct varieties of regulatory chill: *internalization chill*, *threat chill*, and *cross-border chill*").

[13] BAETENS, op. cit., p. 107 (emphasizing the "little manoeuvring room for environment-based argumentation" in the ISDS context); AERNI *et al.*, *Climate Change and International Law: Exploring the Linkages between Human Rights, Environment, Trade and Investment*, *German Y.B. Int'l L.*, 2010, vol. 53, p. 183: "The current fragmented nature of investment law and its overall narrow focus on investment protection suggests that the existing legal frame is hardly prepared to accommodate the significantly changing regulatory agenda, which aims at responding to emerging climate change needs".

[14] GROSBON, *Investissements et changements climatiques: Le Chapitre 8 de l'Accord économique et commercial global (AECG/CETA) face aux impératifs de transition énergétique*, *Journal du droit international (Clunet)*, 2019, vol. 146(2), p. 389. In the context of renewable energy arbitrations against Spain, Italy, Czech Republic, etc., the invisibility of the climate question may be explained by the circumstance 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 nationwide budgetary constraints as basis for the withdrawal or modification of incentivizing support schemes, such as feed-in-tariffs (FITs). For a partial list of cases, see FERMEGLIA, *Cashing-In on the Energy Transition? Assessing Damage Evaluation Practices in Renewable Energy Investment Disputes*, *JWIT*, 2022, vol. 23, pp. 1004-1006.

[15] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965, entered into force on 14 October 1966, *UNTS*, vol. 575, p. 159. In particular, under Article 53.1 "[t]he award shall be binding on the parties" and under Article 54.1 "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention 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".

Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention)[16]. Indeed, the marked degree of ultimate enforceability of States' international commitments relating to the protection of foreign investments may be contrasted with the recognized gaps in terms of enforcement and compliance within the ICCR[17]. Most States are bound by the Paris Agreement (194) and the UNFCCC (198), on the one hand, and the ICSID Convention (166 signatories) and the New York Convention (171), on the other. To such an extent, investment awards through which climate change commitments can find implementation may be consequently recognized and enforced in almost all jurisdictions.

2. The tension between climate change action and the States' international obligations to protect foreign investments

International investment law and its dispute resolution system, in which, in particular, foreign investors have direct recourse to legal redress against States, portrays a *non-mediated* representation of both private and public interests in contentious proceedings. IIAs may in principle protect *ratione materiae* every kind of foreign direct investment ("FDI"), including high-carbon ("brown") and low-carbon ("green")[18]. Traditionally[19], investors operating in the sector of fossil fuels (coal, oil and gas) have been frequent claimants in ISDS as they presented at least 192 cases against States for every kind of sovereign conduct affecting their business allegedly in breach of the substantive protections owed under IIAs and investment contracts[20]. However, also "green" arbitrations have more recently arisen amounting to 80 known cases borne out of renewable energy claims, for instance relating to solar photovoltaic energy, wind and hydroelectric power[21]. More generally, investors lodged at least 175 cases to challenge State

[16] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on 10 June 1958, entered into force on 7 June 1959, *UNTS*, vol. 330, p. 3.

[17] UNFCC, Art. 14; Paris Agreement, Arts. 15 and 24. See ZIHUA, VOIGT, WERKSMAN, *Facilitating Implementation and Promoting Compliance with the Paris Agreement under Article 15 of the Paris Agreement: Conceptual Challenges and Pragmatic Choices*, *Climate Law*, 2019, vol. 9, p. 65; MAYER, *Construing International Climate Change Law as a Compliance Regime*, *Transnational Environmental Law*, 2018, vol. 7, p. 115; VOIGT, *The Compliance and Implementation Mechanism of the Paris Agreement*, *RECIEL*, 2016, vol. 25, p. 161.

[18] BRAUCH, *Reforming International Investment Law for Climate Change Goals*, in MEHLING, VAN ASSELT (eds.), *Research Handbook on Climate Finance and Investment Law*, Cheltenham, 2023.

[19] For an effective and concise historical reconstruction, cf. GROSBON, op. cit., p. 387.

[20] UNCTAD, *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, IIA Issues Note, No. 4, September 2022. The overwhelming majority (74 per cent) of these cases were brought against developing countries.

[21] Ibid. More than 90 per cent of these cases invoked the Energy Charter Treaty (ECT) as jurisdictional basis. Almost the totality (98 per cent) of such renewable energy ISDS cases were brought by investors from developed regions against developed countries (e.g., *Windstream*

measures adopted for the protection of the environment[22]. Interestingly, in the context of such environmental cases, 67 per cent of the claims were directed against States with advanced economies and 95 per cent were filed by investors originating from a home State of an economically developed region[23]. The following sections will explain how the application of substantive standards of protection contained in IIAs may affect climate change policies and, moreover, will also address the central question whether IIAs, instead of curtailing such policies, may contribute to their realization.

The international obligations of States to promote and protect foreign investments pursuant to IIAs and their implementation or failure to implement commitments stemming from the ICCR may interact in manifold respects. National laws and regulations banning or restricting high-carbon industries (for instance, phasing out coal[24]) are as a matter of principle justified either under the application of general exceptions codified in the applicable treaty or based on the general legitimate right to regulate of States.[25] The same would apply to measures incentivizing low-carbon businesses also pertaining to foreign investments performed in the territory of the host State. However, the fact that States operate under the umbrella of a climate change accord, for instance the Paris Agreement, or a multilateral environmental treaty does not, in and of itself, preclude the possibility of incurring international responsibility under IIAs. Notably, the measure at issue shall not be applied in discriminatory, arbitrary or unreasonable manner, which would entail the violation of the various substantive standards of treatment under IIAs, as applicable, both relative (most favoured nation and national treatment) and absolute (fair and equitable treatment and the prohibition of unlawful indirect expropriations). This legal framework is found also in Article 3.5 of the UNFCCC, pursuant to which "[m]easures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on

Energy LLC v. Government of Canada, PCA Case No. 2013-22, Award, 27 September 2016). See CHAISSE, *Renewables Re-energized? The Internationalization of Green Energy Investment Rules and Disputes*, *Journal of World Energy Law and Business*, 2016, vol. 9(4), p. 269.

[22] UNCTAD, "Treaty-Based Investor-State Dispute Settlement Cases and Climate Action", IIA Issues Note, No. 4, September 2022. Among those 175 cases, 118 were concluded with the following operative outcome: 40 per cent decided in favour of the respondent State and 38 per cent in favour of the claimant investor with an award of damages.

[23] Ibid.

[24] See, for instance, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022 (claim eventually dismissed for lack of jurisdiction of the tribunal). See also the earlier case *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I)*, ICSID Case No. ARB/09/6, Award, 11 March 2011 (award embodying the parties' settlement agreement).

[25] TITI, *The Right to Regulate in International Investment Law*, Baden-Baden/London, 2014.

international trade"[26]. This anti-protectionist provision borrows its language from the chapeau of Article XX of the GATT 1947, which was conserved in the GATT 1994 and also provides the model for general exceptions clauses in IIAs[27]. Moreover, Article 3.5 of the UNFCCC posits a general parameter of legality of State measures adopted in furtherance of climate change commitments that affect foreign businesses.

3. Climate change law(s) as applicable law in international investment disputes

Before developing the analysis on the legality of domestic measures implementing climate change action and the censurability of States' omissions in the fulfilment of determined targets under the ICCR, it is appropriate to address the various legal avenues that may interconnect climate change norms, especially those arising from multilateral accords, and international commercial agreements with regard to treaty interpretation and the applicable law(s) to the merit of an investment dispute. This perusal completes the catalogue of the "entry points" already illustrated in the previous sections of this chapter. It will be shown that, consistently with the *jurisprudence* of the Appellate Body of the World Trade Organization, also ISDS should not be then considered "in clinical isolation from public international law"[28].

First, the interpreter of an international investment treaty may resort to systemic integration pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), pursuant to which "together with the context… any relevant rules of international law applicable in the relations between the parties" shall be taken into account[29]. Such rules may comprise both customary international law as well as international agreements concerning climate change, which may form the "external context" upon which the applicable IIA shall be

[26] UNFCCC, Art. 3.5.

[27] LEGUM, PETCULESCU, *GATT Art XX and International Investment Law*, in ECHANDI, SAUVÉ (eds.), *Prospects in International Investment Law and Policy*, Cambridge, 2013, p. 340.

[28] Appellate Body Report, *United States— Standards for Reformulated and Conventional Gasoline (US— Gasoline)*, WT/ DS2/ AB/ R, 29 April 1996, 17, at 19. See *also Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para.1200.

[29] Vienna Convention on the Law of Treaties (VCLT), signed at Vienna on 23 May 1969, entered into force on 27 January 1980, *UNTS*, vol. 1155, p. 331, Art. 31(3)(c): "There shall be taken into account, together with the context: … (c) any relevant rules of international law applicable in the relations between the parties". Cf. SOREL, BORÉ EVENO, Commentary *sub* Article 31, in CORTEN, KLEIN (eds.), *The Vienna Conventions on the Law of Treaties*, Oxford, 2011, p. 825; DÖRR, *Article 31*, in DÖRR, SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Berlin, 2018, p. 603; VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill, 2009, p. 432. See, in particular, MCLACHLAN, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, *International and Comparative Law Quarterly*, 2005, vol. 54(2), p. 279.

construed[30]. Given the large membership of the UNFCCC and the Paris Agreement, it is highly realistic that parties to a bilateral or multilateral investment treaty are also bound by climate change commitments under treaty law embodying concordant and common practice to all States concerned[31].

Second, such an openness of the system for the resolution of international investment disputes to general international law is confirmed by rules on the applicable law(s) contained in the principal international agreements and arbitration rules governing the procedural aspects of ISDS[32]. Indeed, in the absence of the agreement of the parties on the applicable rules of law, Article 42(1) of the ICSID Convention allows the competent arbitral tribunal to "apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable"[33], whereas Article 35(1) of the UNCITRAL Arbitration Rules liberally establishes that "the arbitral tribunal shall apply the law which it determines to be appropriate"[34]. Both formulations were not originally devised for treaty-based investment arbitration, but are clearly applicable in that context: they are susceptible of permitting the application of ICCR instruments by ISDS adjudicators. Therefore, this option stands as a further gateway through which norms that are *external* with respect to the relevant IIA may be directly included within the set of laws and rules that are applicable by arbitrators[35].

Third, climate change norms may be applied via municipal law(s) that implement at the nationwide level environmental commitments of States descending from international agreements. Municipal laws may be applied as applicable law to the merits of the investment dispute based on the agreement of the Contracting States to the investment treaty or by virtue of the relevant rules

[30] SOREL, BORÉ EVENO, op. cit., p. 825. Notably, Article 8.31(1) of the CETA expressly refers to interpretation under the VCLT: "When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties".

[31] DIMOPULOS, *Climate Change and Investor-State Dispute Settlement: Identifying the Linkages*, in DELIMATSIS (ed.), *Research Handbook on Climate Change and Trade Law*, 2016, Cheltenham, p. 428.

[32] SASSON, *The Applicable Law and the ICSID Convention*, in BALTAG (ed.), *ICSID Convention After 50 Years. Unsettled Issues*, Alphen aan den Rijn, 2017, p. 273; ATANASOVA, *Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?*, *Journal of International Dispute Settlement*, 2019, p. 396; HUMBLET, DUGGAL, *If you are not Part of the Solution, You are the Problem: Article 37 of the EU Charter as a Defence for Climate Change and Environmental Measures in Investor-State Arbitrations*, *European Investment Law and Arbitration Review*, vol. 2020, p. 289.

[33] ICSID Convention, Art. 42(1).

[34] UNCITRAL Arbitration Rules, Art. 35(1).

[35] MILES (W.), LAWRY-WHITE, *Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of all Stakeholders: The Role of ICSID*, *ICSID Review – Foreign Investment Law Journal*, vol. 34(1), 2019, p. 14.

of private international law. Moreover, the Parties may also stipulate a clause of observance of contractual obligations ("umbrella clause" or *clause de couverture*)[36]. In this respect, contractual commitments, for instance contracts regulating the issuance and trade of GHG emissions, may further climate change action through IIAs in so far as they are "elevated" to ISDS claims by virtue of an umbrella clause[37]. Furthermore, the respect by investors of local environmental and climate change regulatory frameworks (inspired by corporate social responsibility tenets) may form the object of specific treaty clauses, which create obligations incumbent upon enterprises and may be the object of counterclaims by the host State[38].

Finally, to complete this analysis on applicable laws, the protection from the adverse effects of climate change, as descending from multilateral treaties adopted in furtherance of the agenda subscribed by the entire community of nations, may be categorized as truly international or transnational public policy (*ordre public transnational ou réellement international*)[39] imposing itself to States and private actors, at least in terms of negative duty to abstain from aggravating global warming. While transnational public policy may be taken into consideration as doctrine preventing the admissibility of "brown" investors' claims,[40] it can also be directly resorted to as applicable law to the merits of an investment dispute[41]. Therefore, an ISDS adjudicator, while being vested with treaty-based jurisdiction, may took into consideration such prescriptive elements

[36] HAMAMOTO, *Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause*, *ICSID Review – Foreign Investment Law Journal*, 2015, vol. 30(2), p. 449; CAHIN, *La clause de couverture (dite umbrella clause)*, *RGDIP*, 2015, vol. 119, p. 103; NOUVEL, *La compétence matérielle: contrat, traité et clauses parapluie*, in LEBEN (ed.), *La procédure arbitrale relative aux investissements internationaux. Aspects récents*, Paris, 2010, p. 13.

[37] BOUTE, *Combating Climate Change through Investment Arbitration*, *Fordham Int'l L.J.*, 2012, vol. 35, p. 644.

[38] See DE STEFANO, *Equality and Asymmetry in Treaty-Based Investment Arbitration: Counterclaims by Host States*, in AMOROSO *et al.* (eds), *More Equal than Others? Perspectives on the Principle of Equality from International and EU Law*, Den Haag, 2022, p. 303

[39] LALIVE (P.), *Transnational (or Truly International) Public Policy and International Arbitration*, ICCA Congress Series No. 3, 1986 p. 257; ID., *L'ordre public transnational et l'arbitre international*, in VENTURINI, BARIATTI (a cura di), *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar*, Milano, 2009, p. 599.

[40] This reasoning has been upheld by consolidated arbitral case law in relation to traditional pleas of investor's illegality, for instance with regard to allegations of corruption. See MILES (C. A.), *Corruption, Jurisdiction and Admissibility in International Investment Claims*, *JIDS*, Vol. 3, 2012, p. 329.

[41] MILES (W.), LAWRY-WHITE, op. cit., p. 14; BURSTEIN, *Green Investment Disputes: The Interaction Between Investment Arbitration and the Climate Change Agenda*, *Revista Brasileira de Arbitragem*, 2020, no. 68, pp. 121-124; ELBOROUGH, *International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change*, *New Zealand Journal of Environmental Law*, 2017, vol. 21, p. 119.

of transnational public policy to deny the adjudication of foreign investors' claims that infringe them or dismiss such claims in their merits.

4. The substantive scrutiny of State acts and omissions relating to climate change actions under the lens of international investment law

State measures consisting in prohibitions, bans or, less drastically, restrictions affecting a carbon intensive economic sector are in principle lawful under IIAs[42]. In January 2021, the German company RWE AG and its Dutch subsidiary RWE Eemshaven Holding II BV lodged a request for arbitration at ICSID against the Netherlands for its ban of coal-fired power generation by 2030 implemented through the Law on the Prohibition of Using Coal in the Electricity Production (*Wet verbod op kolen bij elektriciteitsproductie*, *Staatsblad* 2019, No. 493), which entered into force on 20 December 2019[43]. The Dutch government adopted this decision to meet its commitments under the Paris Agreement. However, the claimants have invoked the responsibility of the Netherlands under the Energy Charter Treaty (ECT), including for breach of FET and the prohibition of unlawful indirect expropriation, since practically no compensation was offered by the State, and emphasized that the coal ban targeted a sector in which only foreign investors were operating. A similar claim against the same ban was filed in April 2021 by the German energy company Uniper. However, in this case the investor subsequently agreed in July 2022 to withdraw its request for arbitration as a condition of the deal reached with the German government for its bailout[44].

The legality of an environmental mining ban applied by Colombia formed the object of an arbitration brought by the Canadian corporation Eco Oro. Colombia adopted relevant regulation to protect the high mountain ecosystem of Santurbán Páramo, an environmental conservation zone which fell to cover in

[42] TITI, *Police Powers Doctrine and International Investment Law*, in GATTINI, TANZI, FONTANELLI (eds.), *General Principles of Law and International Investment Arbitration*, Leiden, 2018, p. 323.

[43] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4.

[44] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22. This act by the German government appears to be in line with the position adopted by the European Commission and Member States with regard to intra-EU investment arbitration, especially in light of various judgments of the Court of Justice of the European Union (*Achmea*, *Komstroy*, *PL Holdings*, *Micula*). See "Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union", in particular at point 4: "Member States which control undertakings that have brought investment arbitration cases against another Member State will take steps under their national laws governing such undertakings, in compliance with Union law, so that those undertakings withdraw pending investment arbitration cases".

part the concession area, a gold and silver deposit, in which the investor operated for decades. The arbitral tribunal, while acknowledging that "neither environmental protection nor investment protection is subservient to the other, they must co-exist in a mutually beneficial manner"[45], found by majority – Professor Sands dissenting – that the ban violated the minimum standard of treatment of aliens, including FET,[46] pursuant to Article 805 of the Canada-Colombia FTA (2008), notwithstanding the applicability of its general exceptions clause in Article 2201(3)[47]. This conclusion appears questionable in so far as it subverts the cardinal tenet upon which a sovereign measure justified by a general environmental exception (or by legitimate right to regulate) and applied evenly and non-discriminatorily by a State shall not give rise to a violation of the applicable IIA, including in relation to compensation[48]. The same conclusion remains applicable to climate change action undertaken by States through domestic legislation. This is confirmed by other arbitral decisions that pondered in a more appropriate manner the competing societal objectives at issue. For instance, in *Chemtura v. Canada*, the tribunal considered that the ban adopted by the Canadian Pest Management Regulatory Agency (PMRA) with regard to the use of toxic agro-chemical lindane on the basis of its health and environmental effects was subject to the provisions of Aarhus Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic

[45] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 828. See LÉTOURNEAU TREMBLAY, *In Need of a Paradigm Shift: Reimagining* Eco Oro v Colombia *in Light of New Treaty Language*, *JWIT*, 2022, vol. 23, p. 915.

[46] A controversial finding of breach of the minimum standard of treatment, including FET, under Article 1105 of the NAFTA was decided by majority in the *Clayton/Bilcon* case in relation to the environmental assessment decision by Canadian authorities to reject a project to develop and operate a quarry and a marine terminal in Nova Scotia significantly based on "community core values". See *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, paras. 588-604 and 733-741 *Contra*, Id., Dissenting Opinion of Professor Donald McRae, 10 March 2015, especially para. 44 et seq. See the report by SCHACHERER in BERNASCONI-OSTERWALDER, BRAUCH (eds.), *International Investment Law and Sustainable Development: Key Cases from the 2010s*, International Institute for Sustainable Development, 2018, pp. 54-60. See also PEEL, *The Use of Science in Environment-related Investor-State Arbitration*, in MILES (K.) (ed.), op. cit., pp. 256-257.

[47] This provision applied specifically to the investment chapter of the relevant FTA and preserved the adoption of "measures necessary: a. To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health; b. To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or c. For the conservation of living or non-living exhaustible natural resources". See Canada-Colombia FTA (2008), Art. 2201(3)(a)-(c) and Annex 811(2)(b).

[48] For the tribunal's reasoning, cf. *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, paras. 826-837. See also *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 477.

Pollutants (LRTAP Convention)[49] and therefore necessary under the international treaty obligations assumed by the State[50]. Eventually, the tribunal did not find any breach of NAFTA and consequently did not award any damages to the claimant[51].

Also State measures that provide incentives to "green" investment, for instance in the sector of renewable energies, are in principle legitimate under international investment law[52]. However, such support schemes should not engender a breach of contingent non-discrimination standards under IIAs, namely the obligations of most-favoured-nation (MFN) treatment vis-à-vis investors of third countries and, especially, the national treatment vis-à-vis domestic undertakings. In *Nykomb v. Latvia*, a Swedish investor successfully complained about the refusal by Latvia to honour a promise of incentivization, namely a double-tariff, for low-carbon electricity production on the basis of which its investment was made. The tribunal ascertained discriminatory treatment by the State under Article 10(1) of the ECT, since the administrator of the incentive schemes continued to support low-carbon installations operated by domestic investors, while refusing this benefit to foreign investors operating in comparable conditions[53]. This case law entails that national incentive schemes applying *de iure* to and benefitting both foreign as well as domestic investors would not trigger international responsibility of the State under investment treaties.

Hitherto, it has been analysed how positive measures by States imposing bans or restrictions on "brown" investments or providing incentives in favour of "green" investments may withstand the ISDS scrutiny, but for a finding of discriminatory, selective or protectionist application. The necessary achievement of the objectives that are consubstantial to the fight against climate change may provide a sound and viable justification to such measures under both general international law and international investment law. The remaining paragraphs of this section will instead investigate to what extent the inaction of States in implementing climate change measures required under the umbrella of the ICCR may be sanctioned under IIAs for breach of non-contingent standards of

[49] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, done at Aarhus on 24 June 1998, *UNTS*, vol. 2230, p. 79.
[50] *Chemtura Corporation v. Government of Canada*, UNCITRAL (formerly *Crompton Corporation v. Government of Canada*), Ad Hoc NAFTA Arbitration under UNCITRAL Rules, Award, 2 August 2010, para. 266.
[51] See also *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, especially Part IV, Chapter D, para. 7 (claim dismissed on the merits in relation to the Californian ban on the use or sale in California of the gasoline additive MTBE).
[52] BEN HAMIDA, op. cit., p. 90 et seq.
[53] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para. 4.3.2.

treatment, in particular FET[54]. Notably, the analysis focuses on the relevance of climate change mitigation and adaptation measures to which a State committed through the issuance of its nationally determined contributions (NDCs)[55]. While the previous analysis assumed a dimension of confrontation between international investment law and climate change law, this scenario posits a relation of reciprocal synergy between the two. In particular, the economic protection of a "green" business investing in the territory of the host State in reliance of the latter's unilateral NDC and in line with the objective to fully realize the climate "ambition cycle" of the Paris Agreement would be placed in alignment rather than opposition.

Pursuant to Article 3 of the Paris Agreement, "[a]s nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of" the Paris Agreement itself[56]. Moreover, it is stated that "[t]he efforts of all Parties will represent a progression over time"[57]. Pursuant to Article 4[58], each Party "shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions"[59]. Each State Party shall communicate every five years its NDCs and every successive edition thereof shall "represent a progression" and "reflect" the "highest possible ambition" of

[54] Concerning the substantive standard of the prohibition of unlawful expropriation measures, especially indirect, the adoption and evenhanded implementation by States of climate change legislations and regulations would constitute a legitimate exercise of their police powers, especially if necessitated by multilateral commitments, and would not result in a violation of IIAs. See, for example, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 272-307, especially 304 (taking into consideration the World Health Organization Framework Convention on Tobacco Control). Moreover, as observed above (see *supra* section 2 of this Chapter) the measures at issue would not be sanctioned as unlawful under the relevant IIA, if the latter contains an express carve-out clause. See CETA, Annex 8-A (*Expropriation*). Instead, it would be markedly speculative to submit that the State's failure to adopt specific climate change action on which the investor legitimately relied may embody an expropriatory act, notably for lack of the requirement of substantial deprivation of the value of the investment. See VANDUZER, *The Complex Relationship between International Investment Law and Climate Change Initiatives: Exploring The Tension*, in DELIMATSIS (ed.), op. cit., p. 440.

[55] HELLIO, L*es «contributions déterminées du niveau national», instruments au statut juridique en devenir*, *Revue juridique de l'environnement*, Special Issue 2017, p. 33.

[56] Paris Agreement, Art. 3.

[57] Ibid.

[58] MAYER, "*Article 4: Mitigation*", in VAN CALSTER, REINS (eds.), *The Paris Agreement on Climate Change*, 2021, Cheltenham, p. 109; WINKLER (H.), *Mitigation (Article 4)*, in KLEIN *et al.* (eds.), *The Paris Agreement on Climate Change: Analysis and Commentary*, 2017, Oxford, p. 141.

[59] Id., Art. 4(2). See DOELLE, *The Heart of the Paris Rulebook: Communicating NDCs and Accounting for Their Implementation*, *Climate Law*, 2019, vol. 9, p. 3.

the issuing State[60]. These obligations bind all Contracting Parties of the Paris Agreement, having regard to the "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (CBDRRC-NC)[61].

5. The relevance of the Nationally Determined Contributions (NDCs) provided under the Paris Agreement and the "leadership" of the European Union (EU)

In the NDCs synthesis report of 2022, the UNFCCC Secretariat acknowledged that "[m]any Parties (56 per cent) mentioned specific policy instruments in place to facilitate NDC implementation in addition to institutional arrangements, and some others (25 per cent) mentioned instruments being under development. Such policy instruments include energy and/or climate strategies, low-emission development strategies, NDC implementation road maps, NDC action plans, laws and regulations on climate change, sectoral national mitigation and adaptation plans, and NDC investment plans"[62]. Moreover, it is mentioned that numerous States (58 per cent) identified certain types of technology that they intend to use for implementing adaptation and mitigation actions, most frequently related to "the energy, agriculture, water and waste sectors"[63]. At present, fewer States refer to partnership with non-State stakeholders, including investors, whereas voluntary commitments may in any case be contracted between States (and SOEs) and foreign enterprises to ultimately support implementation of the Paris Agreement[64]. This means that, but for a certain degree of flexibility and modularity, such commitments that are instrumental to

[60] Id., Arts. 4(3) and 4(9). See RAJAMANI, GUÉRIN, *Central Concepts in the Paris Agreement and How They Evolved*, in KLEIN *et al.* (eds.), op. cit., p. 78: "Suffice it to say here that these expectations in relation to progression are of tremendous significance, as they are designed to ensure that, notwithstanding the national determined nature of contributions from parties, the regime as a whole is moving towards ever more ambitious and rigorous actions from parties. This ensures that there is a 'direction of travel' for the regime, as it were." See also BODANSKY, BRUNNÉE, RAJAMANI, op. cit., p. 234: "The standards of progression and highest possible ambition are arguably objective rather than self-judging".

[61] Paris Agreement, Arts. 2(2) and 4(3). See VOIGT, FERREIRA, "Differentiation in the Paris Agreement", *Climate Law*, 2016, vol. 6, p. 58; ID., *'Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement*, *Transnational Environmental Law*, 2016, vol. 5, p. 285; MAYER, *The International Law on Climate Change*, Cambridge, 2018, p. 97; MALJEAN-DUBOIS, MORAGA SARIEGO, *Le principe des responsabilités communes mais différenciées dans le regime international du climat*, *Les Cahiers de Droit*, 2014, vol. 55, p. 83. See also RAJAMANI, *Differential Treatment in International Environmental Law*, Oxford, 2006.

[62] "Nationally determined contributions under the Paris Agreement. Synthesis report by the secretariat", 26 October 2016, FCCC/PA/CMA/2022/4, para. 104.

[63] See https://unfccc.int/ndc-synthesis-report-2022#Means-of-implementation.

[64] "Nationally determined contributions under the Paris Agreement. Synthesis report by the secretariat", 26 October 2016, FCCC/PA/CMA/2022/4, para. 103.

the realization of the goals of the Paris Agreement – first and foremost its temperature goal, the net zero target and the financial pledge – must not be overturned and, moreover, must be progressively strengthened in the course of the "ambition cycle", namely the combination of the expectation of progression (Article 3), the global stocktake (Article 14) and the binding obligation of each Party to present an NDC every five years (Article 4)[65].

In the latest NDC dated December 2020, the EU committed to reduce its emissions from the sectors covered by the Emissions Trading System (ETS) legislation by 43% and Members 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%)[66]. In its updated NDC submitted in July 2021, Canada promised to reduce its GHG emissions by 40-45% below 2005 levels by 2030 and to achieve net-zero by 2050[67]. Canada also provides more concrete and specific applications of its contribution in various economic sectors, such as housing, transportation, energy, agriculture and land management, for instance to "[r]equire 100 % of new light-duty vehicle and passenger trucks sold in Canada to be zero emissions by 2035, a commitment supported by pursuing a combination of supportive investments and regulations"[68]. The contents of NDCs by developing countries may be less articulated. In the update to its first NDC, India assured to reduce the "Emissions Intensity of its GDP by 45 percent by 2030, from 2005" and "to better adapt to climate change by enhancing investments in development programmes in sectors vulnerable to climate change, particularly agriculture, water resources, Himalayan region, coastal regions, health and disaster management"[69].

Under the Paris Agreement, a Party's substantive commitment pursuant to its NDC embodies an obligation of conduct rather than result[70], which entails

[65] RAJAMANI, WERKSMAN, *Climate Change*, in RAJAMANI, PEEL (eds.), *The Oxford Handbook of International Environmental Law*, 2nd ed., Oxford, 2021, p. 503; RAJAMANI, BODANSKY, *The Paris Rulebook: Balancing International Prescriptiveness with National Discretion*, *ICLQ*, 2019, vol. 68, p. 1026; ZAHAR, *Collective Progress in the Light of Equity Under the Global Stocktake*, *Climate Law*, 2019, vol. 9, p. 101.

[66] Update of the NDC of the European Union and its Member States, 17 December 2020, p. 13.

[67] Canada's 2021 Nationally Determined Contribution under The Paris Agreement, 12 July 2021, p. 1.

[68] Id., p. 4.

[69] India's Updated First Nationally Determined Contribution Under Paris Agreement (2021-2030), 26 August 2022, p. 2.

[70] See MAYER, *International Law Obligations Arising in relation to Nationally Determined Contributions*, *Transnational Environmental Law*, 2018, vol. 7, pp. 256-262; RAJAMANI, "The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations", *Journal of Environmental Law*, 2016, vol. 28, p. 354; BODANSKI, "The Legal Character of the Paris Agreement", *RECIEL*, 2016, vol. 25, p. 146; VOIGT, "International Environmental Responsibility and Liability", in RAJAMANI, PEEL, op. cit., p. 1016 (characterizing Parties' NDC commitments under the Paris Agreement as a "treaty-based expression of due diligence");

that the State is not bound to actually achieve its self-imposed targets, whereas it must proffer its best efforts to this goal within a bottom-up regime[71]. Instead, the Parties' procedural obligation to prepare, communicate every five years and maintain successive "progressive" NDCs is strictly binding, including the duty to provide mandatory informational requirements to track progress in their implementation and achievement[72]. It is hereunder investigated whether substantive obligations under IIAs – especially non-contingent standards of treatment – may be applied so as to reinforce qualitatively the binding scope of NDC related obligations under the Paris Agreement in terms of operationalization of prescriptions and enforceability of contents. This analysis chiefly revolves around the protection of the legitimate expectations (as a component of FET) of foreign investors relying on a State's NDC for or in the making of its investment[73].

6. The State's failure to implement its NDCs as a possible breach of the Fair and Equitable Treatment (FET) standard

The *Antaris v. Czech Republic* tribunal provided effective FET analysis by isolating its cardinal principles. With regard to the investor's legitimate expectations, it found that "[a] claim based on legitimate expectation must proceed from an identification of the origin of the expectation alleged, so that its scope can be formulated with precision"[74]. It also added that "[a] specific representation may make a difference to the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectation, but is not indispensable to establish a claim based on legitimate expectation which is advanced under the FET standard"[75]. The representation may be explicit or

BODLE, OBERTHÜR, *Legal Form of the Paris Agreement and Nature of Its Obligations*, in KLEIN *et al.* (eds.), op. cit., p. 99.

[71] RAJAMANI, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, *Int'l & Comp. L.Q.*, 2016, vol. 65, pp. 500 and 511; BODANSKY, *The Paris Climate Change Agreement: A New Hope*, *Am. J. Int'l L.*, 2016, vol. 110, p. 300; KERBRAT, MALJEAN-DUBOIS, WEMAËRE, *Conférence internationale de Paris sur le climat en décembre 2015: comment construire un accord evolutif dans les temps?*, *JDI (Clunet)*, 2015, vol. 142(4), p. 1115.

[72] Cf. Paris Agreement, Art. 13(7)(b).

[73] For an effective FET analysis, see *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360.

[74] Id., para. 360(2), quoting *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 535.

[75] *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360(5), quoting *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.78.

implicit[76]. Furthermore, consistent arbitral case law and literature establish that the investor's reliance on a legitimate expectation should be crystallized at the time of the investment decision or in the post-establishment phase at the time of the determination whether to channel additional economic resources into an ongoing project or operation[77].

To borrow the language of the *Total v. Argentina* tribunal, NDCs may embody a State's "previous publicly stated position, whether that be in the form of a formal decision or in the form of representation"[78]. The substantiation of such a position may depend on the particularization of the content of the individual NDC, which, as above illustrated, may vary based on the discretion of the communicating Party[79]: the more specific and clear the declaration to the addressees, the more compelling the case that the foreign investor in question was entitled to rely on it in good faith on the basis of a legitimate expectation. NDCs are not addressed by States only to single investors, but to the generality of stakeholders, *in primis* to the other Parties of the Paris Agreement[80]. However, the general character of the source of the legitimate expectation does not fatally prevent a successful FET claim. Tribunals have found that general regulatory frameworks and legislation may also give rise to legitimate expectations especially if drafted with sufficient specificity and targeted at foreign investors in order to attract their commitments of resources in the host State[81]. To this extent, domestic laws and regulations on climate change, including those

[76] *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360(3), quoting *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, 11 September 2007, Award, para. 331.

[77] SCHREUER, KRIEBAUM, *At What Time Must Legitimate Expectations Exist?*, in WERNER, HYDER ALI (eds.), *A Liber Amicorum: Thomas Wälde. Law Beyond Conventional Thoughts*, London, 2009, p. 265. Cf. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 190; *National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 219; *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 287: "where investments are made through several steps, spread over a period of time, legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment".

[78] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, par. 129.

[79] The notion of NDCs "by privileging sovereign autonomy, respecting national circumstances, and permitting self-differentiation, significantly reduced the sovereignty costs of a legally binding instrument". See BODANSKY, BRUNNÉE, RAJAMANI, op. cit., p. 212.

[80] MAYER, *International Law Obligations Arising in relation to Nationally Determined Contributions*, *Transnational Environmental Law*, 2018, vol. 7, p. 273.

[81] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 133; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 260 (referring to specific "legislative" undertakings); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 371.

envisaged in NDCs[82], that provide a defined legal framework for future "green" investment operations – for example, including the provision of support schemes and incentives – may create legitimate expectations based on specific commitments reliable by foreign investors[83].

NDCs can be considered among the variety of host States' unilateral acts or statements (or assurances, representations or declarations) that may represent a source of obligations with regard to the protection of foreign investments[84]. However, their degree of normativity depends on the clarity and specificity of their contents, which embodies the result of a State's commitment to climate change mitigation and adaptation. This approach is supported by Guiding Principle 7 of the "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" adopted by the International Law Commission in 2006: A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligation, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated[85].

The context and the circumstances in which the NDCs have been communicated by States comprise the applicable international instruments under the aegis of the ICCR, first and foremost the Paris Agreement. In particular, although the mitigation (and adaptation) targets stated in NDCs are not binding as to their result, the "ambition cycle" established by the Paris Agreement generates a reasonable expectation of progression in climate change action, which prevents the self-committing Party to reverse or repeal abruptly its representations and bind the same to take appropriate steps for the attainment of

[82] "Nationally determined contributions under the Paris Agreement. Synthesis report by the secretariat", 26 October 2016, FCCC/PA/CMA/2022/4, para. 104.

[83] GEHRING, TOKAS, *Synergies and Approaches to Climate Change in International Investment Agreements. Comparative Analysis of Investment Liberalization and Investment Protection Provisions in European Union Agreements*, *JWIT*, 2022, vol. 23, pp. 796-797; TROPPER, WAGNER, *The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?*, *JWIT*, 2022, vol. 23, pp. 839-840.

[84] REISMAN, ARSANJANI, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, *ICSID Review – Foreign Investment Law Journal*, 2004, vol. 19(2), pp. 328–343.

[85] Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, Guiding Principle No. 7. The incorporation of the relevance of the context and the circumstances in which the unilateral declaration was formulated is consistent with the case law of the International Court of Justice. See *Case Concerning Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment of 22 December 1986, *I.C.J. Reports 1986*, 554, at 574, para. 40 and *Case Concerning Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, *I.C.J. Reports 1974*, at 256, para. 34.

such goals, decisively in view of the presentation of its successive NDC[86]. This force of logic is even more mandatory in relation to countries characterized by an industrialized developed economy having reached the peak of emissions consistent with the CBDRRC-NC caveat. As a consequence, at determined conditions a foreign investor may rely on the State's specific unilateral statements formulated in NDCs and to accrue legitimate expectations that the latter would implement its climate change policy and action in effectually incremental direction. Against this background, the investments performed in furtherance of such expectations may fall under the normative scope of IIAs and their substantive protections. To such an extent, climate change multilateral agreements would constitute "any relevant rules of international law applicable in the relations between the parties" pursuant to Article 31(3)(c) of the VCLT and, therefore, may be systemically integrated in the BIT or IIA that is applicable in an investor-State dispute. The fact that a State is party to the Paris Agreement or other ICCR instrument does not "transform" the substantive standards under the IIAs to which it is also a Party (it is self-explanatory that "IIAs… are not environmental treaties")[87]. However, the *Allard v. Barbados* tribunal pertinently acknowledged in relation to the Convention on Biological Diversity (CBD)[88] and the Ramsar Convention[89] that "consideration of a host State's international obligations may well be relevant in the application of the standard to particular circumstances"[90]. This entails that ISDS adjudicators may well interpret the applicable IIA, including its external context, and substantiate the reach of the FET obligations contained therein having regard to the relevant climate change obligations binding on the Contracting Parties and the entire variety of aggregate consequences descending therefrom, including reasonable reliance by investors on the practicability of commitments formulated by States in their NDCs. This legal construct appears to be consonant with the consideration of general principles of law recognized by the community of nations such as good faith,

[86] RAJAMANI, BODANSKY, op. cit., p. 1026.
[87] BOUTE, op. cit., p. 662, quoting CAMERON, *International Energy Investment Law: The Pursuit of Stability*, Oxford, 2010, p. 203.
[88] Convention on Biological Diversity (CBD), signed at Rio de Janeiro on 5 June 1992, entered into force on 29 December 1993, *UNTS*, vol. 1760, p. 79.
[89] Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed at Ramsar on 2 February 1971, entered into force on 21 December 1975, *UNTS*, vol. 996, p. 245.
[90] *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016, para. 244 (in the context of FPS analysis). In this case, the investor had unsuccessfully argued that the host state's approval of an environmental management plan (EMP) constituted a representation that it would act in a specific way. See FARNELLI, *Investors as Environmental Guardians? On Climate Change Policy Objectives and Compliance with Investment Agreements*, *JWIT*, 2022, vol. 23, p. 907.

estoppel and *venire contra factum proprium*,[91] especially in case host State's organs and instrumentality willingly induced and attracted foreign "green" businesses by signalling a favourable investment climate. This conclusion would be even more viable if the applicable IIA required the Contracting States to implement the commitments stated in their NDCs[92].

Finally, since NDCs, as mentioned above, may lack specificity, a foreign investor and the organs (or parastatal entities or SOEs) of the host State may always incorporate in contractual arrangements a reference to climate change commitments articulated in NDCs or other obligations stemming from the Paris Agreements or other ICCR instruments. In this scenario, the breach of such privy commitments can be scrutinized under IIAs with regard to FET[93] and, if applicable, especially umbrella clauses[94]. Accordingly, the competent tribunal would be empowered to adjudicate both treaty and contract claims (the latter being governed by the proper law of contract, which usually is the domestic law of the host State) thus rendering enhanced justice to the vindication of climate change related commitments. This stands as an effective option for States and private businesses furthering the transition to the "green" economy, taking into account that the Paris Agreement's "ambition cycle" is yielding increased target setting activity through Parties' successive NDCs, but the gap between actual implementation and optimal levels of mitigation, adaptation and finance remains considerable[95].

7. Concluding Remarks

Consistently with their progressive understanding of climate change as most urgent and pressing global challenge of the present era, States, especially if characterized by a developed economic system, and investors increasingly

[91] BOWETT, *Estoppel Before International Tribunals and its Relation to Acquiescence*, *Brit. Y.B. Int'l L.*, 1957, vol. 33, p. 176: "It is possible to construe the estoppel as resting upon a responsibility incurred by the party making the statement for having created an appearance of act, or as a necessary assumption of the risk of another party acting upon the statement".

[92] EU-China Comprehensive Agreement on Investment (CAI), Agreement in Principle (2020), Section IV, Sub-Section 2, Art. 6(a). Article 6(a) of the CAI requires each Contracting Party to "effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions".

[93] See *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, Decision on Jurisdiction, 12 February 2010, para. 148 (referring inter alia to the "baseline expectation of contractual compliance").

[94] CRAWFORD, *Treaty and Contract in Investment Arbitration*, *Arbitration International*, 2008, vol. 24, p. 351.

[95] MALJEAN-DUBOIS, RUIZ FABRI, SCHILL, *International Investment Law and Climate Change: Introduction to the Special Issue*, *JWIT*, 2022, vol. 23, p. 738: "Existing pledges, however, are far from sufficient and remain inconsistent with the temperature target set in the Paris Agreement".

consider climate change norms as elements of international public policy, on one side, and a source of business opportunities rather than a negative economic externality, on the other side. In this context, unilateral domestic measures adopted by "pioneer" States in furtherance of climate mitigation, adaptation and finance would be legitimate pursuant to international law, notably under IIAs, if not applied arbitrarily, unpredictably, discriminatorily and as a way to foster protectionism[96]. Moreover, the imperatives of climate change related action, especially as ordered under the Paris Agreement, require massive sustainable investment, including FDI. In the corresponding perspective of "green" investment, climate change action and the protection of economic rights would then stand in synergy, rather than dichotomy.

With regard to investment treaty drafting (recognition of the States' right to regulate, general exceptions, express environmental carve-outs and provisions establishing investors' commitments), procedural issues (jurisdictional requirements, admissibility filters and viability of States' counterclaims) and substantive matters (treaty interpretation and applicable laws), various "entry points"[97] may be available through which the *lex climatica* – international climate change rules and implementing municipal laws – may be successfully integrated in the *lex mercatoria* – IIAs. In the framework of ISDS, it has been shown that adjudicators may positively determine the legality of domestic measures implementing climate change action and, significantly at given conditions, sanction States' omissions in the observance of determined obligations under the ICCR, in particular specific voluntary targets communicated in their NDCs. Having regard to the prong of effectiveness, international investment law and arbitration may importantly give to the ICCR those "teeth" that are lacking under the Paris Agreement and the UNFCCC, thus tempering their admitted compliance and enforcement gaps. Indeed, the prescriptions relating to climate change that are established in investment awards may be successfully recognized and enforced under the ICSID Convention and the New York Convention in accordance with the requirements set forth therein.

From the perspective of deepened and broadened international investment law, the relevance and consideration of climate change related action and concerns, notably under the framework of the Paris Agreement, may function as paradigmatic catalyst of a more sophisticated internalization of non-economic

[96] BILDER, *The Role of Unilateral State Action in Preventing International Environmental Injury*, *Vand. J. Transnat'l Law*, 1981, vol. 14, p. 51; BODANSKI, *What's so Bad About Unilateral Action to Protect the Environment?*, *EJIL*, 2000, vol. 11, p. 339; BOISSON DE CHAZOURNES, *Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues*, *EJIL*, 2000, vol. 11, p. 315.

[97] VIÑUALES, *Access to Water in Foreign Investment Disputes*, *Geo. Int'l Envtl. L. Rev*., 2009, vol. 21(4), p. 742.

values in the legal dimension of foreign investment. For instance, this forthcoming development would be demonstrated by a conclusive defeat of the sole effects doctrine[98] with regard to the ascertainment of States' breaches of IIAs, notably as to expropriatory acts.

The evolution of international investment law in response to the test of climate change will also depend on the attitude and posture of ISDS adjudicators, in terms of their possible inclusive approach or, conversely, self-restraint, with regard to the application and taking into consideration of norms and legal standards that are "external"[99] to the applicable commercial treaty. This reflection opens a reference to the question of the requirements and competences of ISDS adjudicators, which inter alia is the object of discussions within the current possible reform of ISDS at UNCITRAL. Certainly, a "demonstrated expertise in public international law"[100] by arbitrators appears to be fundamental for the purposes of appropriate integration of international climate change law in the international protection of foreign investment

[98] E.g., *Compañia del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No. ARB 96/1, Award, 17 February 2000, para. 72.
[99] KURTZ, *The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration*, *ICSID Review – Foreign Investment Law Journal*, 2010, vol. 25(1), p. 200.
[100] E.g., CETA (2016), Art. 8.27(4).

Sustainable Development in the Reformed Energy Charter Treaty: Substantive and Procedural Issues

MATTIA COLLI VIGNARELLI

TABLE OF CONTENTS: 1. Introduction. – 2. The place of sustainability in the 'old' ECT. – 3. Art. 19 ECT before and after the reform. – 4. The new article on climate change and clean energy transition. – 5. The conciliation procedure: description and assessment. – 6. Concluding remarks.

1. Introduction

On 24 June 2022, the contracting parties to the Energy Charter Treaty (ECT) reached an agreement in principle on the so-called 'modernisation' of the treaty[1] As it is well known, the announcement of the agreement did not prevent the withdrawal of several EU Member States. Over the past two years, France, Germany, Poland, Luxembourg, Slovenia, Portugal, Spain, The Netherlands, The European Union and the EURATOM withdrew from the treaty. Also the United Kingdom sent official notification of withdrawal to the depositary under art. 47, par. 1 ECT. Italy must be added to the list, as it dropped out already in 2016. Already in 2022, the European Parliament had approved a resolution calling upon the EU and its Member States to prepare for a 'coordinated' withdrawal.[2] The first official proposal to that effect was released on 7 July

[1] The agreement was announced by the Secretariat of the Energy Charter and the European Commission on 24 June 2022. The Commission, in particular, declared to have obtained «a coherent and up-to-date framework» that would bring «legal certainty and […] a high level of investment protection while reflecting clean energy transition goals and contributing to the achievement of the objectives of the Paris Agreement». For more information see Directorate-General for Trade, Agreement in principle reached on Modernised Energy Charter Treaty, 24 June 2022, available at https://policy.trade.ec.europa.eu/news/agreement-principle-reached-modernised-energy-charter-treaty-2022-06-24_en and also, from the Energy Charter Secretariat, Decision of the Charter Conference CCDEC 2022, *Public Communication explaining the main changes contained in the agreement in principle,* 24 June 2022, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf

[2] See European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty, 2022/2934 (RSP), available at https://www.europarl.europa.eu/doceo/document/TA-9-2022-0421_EN.html;

[2] See Directorate-General for Energy, *European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty*, 7 July 2023, available at

2023.[3] The document implicitly takes as a basis for the coordinated withdrawal a Communication of 5 October 2022, where the text of an «agreement between the Member States, the European Union and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty» was proposed.

In the second part of 2023, some Member States expressed within the Council their will to remain parties to the treaty and another 'pillar' to the overall strategy was added: in addition to authorising the EU withdrawal and the parallel negotiations for an agreement for coordinated exit, the EU and its Member States would agree not to obstruct the approval of the reformed text within the Energy Charter Conference.[4]

On 3 December 2024, the Energy Charter Secretariat finally announced that the Energy Charter Conference had adopted the reformed text of the ECT, which will apply on a provisional basis from 3 September 2025, pending their ratification by the Contracting Parties.[5]

Against this background, the present work offers some observations on sustainable development in the 'new' ECT. The analysis is divided in two main parts. The first part presents some brief critical remarks on the two substantive provisions on sustainable development in the reformed treaty. The first is art. 19 ECT, which was amended from its original version, but still seems to represent a significant example of the unsustainable legal conception of energy that emerges from the treaty. The second is the newly proposed art. 19bis on 'climate change and energy transition', which seems to do little to clarify the scope and content of the indeed uncertain international law obligations with respect to climate change[6].

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https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en

[3] See Directorate-General for Energy, *European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty*, 7 July 2023, available at https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en

[4] For an analysis on the legal consequences of the current EU strategy on withdrawal see COLLI VIGNARELLI, *Reflections at the Sunset: the Strategy of the European Commission for a Coordinated Withdrawal from the Energy Charter Treaty*, *Quaderni di SIDIBlog*, 2024, p. 365 ff.

[5] *The Energy Charter Conference Adopts Decisions on the Modernisation of the Energy Charter Treaty*, 3 December 2024, available at https://www.energycharter.org/media/news/article/the-energy-charter-conference-adopts-decisions-on-the-modernisation-of-the-energy-charter-treaty/

[6] The issue has been recently object of a request for an advisory opinion to the ICJ. International Court of Justice, *Request For Advisory Opinion transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023*. For a comprehensive reconstruction on the international law of climate change see e.g. BODANSKY, BRUNNÉE, RAJAMANI, *International Climate Change Law*, Oxford, 2017. For an account of States' obligation on climate change

The second part describes the conciliation procedure envisaged by the new art. 30bis, which applies to the disputes on the application and interpretation of the two provisions mentioned above. In the unmodified treaty, no dispute settlement procedure applies to Article 19 ECT, leaving 'environmental aspects' outside of any enforcement mechanism[7].

2. The place of sustainability in the 'old' ECT

Sustainable development and the environment did not feature in the initial drafts of the agreement that later became the ECT. Indeed, according to the first version of its preamble, the task of the treaty[8] was specifically the «creation of a free open market» in the energy sector, which could properly function only by separating «the functions of regulation from the functions of extraction, production, carriage and supply».[9]

The language adopted by this first draft crafted two significant elements of the relationship between international law and neoliberalism. First, this latter is by no means the 'natural' state of the economy. On the contrary, it is a product of law.[10] This should have been intuitively clear to the Western parties of the Energy Charter process, when they started to negotiate a treaty to create a 'free open' energy market having several 'transition economies' as counterparts.[11] Second, neoliberalism needs the State to actively protect the legal entitlements on which market dynamics are structured: the 'separation' of regulation from «extraction, production, carriage and supply» does not refer to the simple abstention of the State from the newly imposed competitive relations, but to the

mitigation see MAYER, *International Law Obligations on Climate Change Mitigation*, Oxford, 2022. See also below n. 28

[7] See below at par. 5

[8] Then known as the 'basic protocol' to the European Energy Charter.

[9] See Draft Treaty - Basic Protocol to the European Energy Charter, 20 August 1991, p. 2, available at https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Travaux_different_languages/English_Travaux/Draft_Treaty_-_Basic_Protocol_to_the_European_Energy_Charter_20_August_1991

[10] This is one of the key insights of the Law and Political Economy (LPE) movement, an emerging approach to legal scholarship that builds upon different theoretical strands, including institutionalism, American realism, critical legal studies and Marxist approaches to international law. See e.g. BRITTON-PURDY et al, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, *The Yale Law Journal*, 2020, p. 1784 ff. For a European research agenda in Law and Political Economy see KAMPOURAKIS, *Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe*, *Journal of Law and Political Economy*, 2021, p. 301 ff.

[11] See e.g. LUBBERS, *Foreword*, in WÄLDE (ed.) *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, London,1996, p. xiii ff.

positive act of protecting and constantly expanding competition through the use of law.[12]

In this context, the ECT seems to represent a fundamental building block of the legal conceptualisation of energy as a 'commodity with externalities'. International law commodifies energy and only subsequently tries to manage the consequences of this commodification, which lie outside the main legal discourse, as the word 'externality' itself suggests. This definition is reflective of the analytical framework provided by prof. Viñuales, who suggests that international law conceives energy as «resources converted into products through a range of activities relying on certain technologies».[13] The theory of externalities is essential in understanding the set of rules that constitute 'energy governance': the «conceptual distinction between 'transactions' and 'externalities' […] has permeated the framing and design of international law».[14] Therefore, defining the legal concept of energy as a commodity with externalities clarifies that energy, as nature, becomes visible to international law only if articulated as a «material thing subject to appropriation, reducible to property, and capable of entering the stream of commerce».[15]

The reformed ECT, in order to be considered a success from the perspective of sustainable development, should at the very least bring about some incremental change towards a more sustainable approach to energy.

3. Art. 19 ECT before and after the reform

The conceptualisation of energy as a commodity with externalities is well reflected in art. 19 ECT. This provision is extensively integrated in the reformed treaty, but its old text remains almost intact. Therefore, the analysis starts from the content of the 'old' obligations contained therein.

Art. 19 ECT was fiercely debated during the drafting process of the ECT, in the first half of the nineties. Indeed, when the Chairman included in the sixth

[12] See TZOUVALA, *The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale*, in HASKELL, RASULOV (eds.) *New Voices and New Perspectives in International Economic Law*. *European Yearbook of International Economic Law*, Cham, 2019, p. 37 ff.

[13] See VIÑUALES, *The International Law of Energy*, Cambridge, 2022, p. 20. For a similar analytical description of energy as a legal object see also MARHOLD, *Energy in International Trade Law: Concepts, Regulation and Changing Markets*, Cambridge, 2021, pp. 7-34

[14] VIÑUALES, *op. cit.*, p. 30

[15] PORRAS, *Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations*, *Leiden Journal of International Law*, 2014, p. 642

draft a new provision on 'environmental aspects',[16] this latter was welcomed with «scrutiny reserves by all delegations». The discussion on this article was very heated all along the drafting process of the ECT, with numerous amendments, comments and even complete rewriting proposals.[17]

The final result, as can be read in the current text of the ECT, is a lengthy and vague provision. Each commitment by the parties is weakened by the wording «shall strive to», and the references to environmental principles are surrounded with almost overwhelming caution.[18] In a few words, art. 19 ECT does not seem to strengthen environmental action, but to circumscribe its acceptability according to the tenets of neoliberalism.[19] Moreover, particularly interesting is the definition of «Energy Cycle» provided by art. 19, par. 2 ECT. According to this provision, the notion refers to: *«the entire energy chain, including activities related to prospecting for, exploration, production, conversion, storage, transport, distribution and consumption of the various forms of energy, and the treatment and disposal of wastes, as well as the decommissioning, cessation or closure of these activities, minimising harmful Environmental Impacts»*

The description of energy activities as a closed 'cycle' ranging from the exploration of energy sources to waste disposal conveys a sense of immutability, in which the *status quo* of fossil-fuel-based energy is destined to endlessly reproduce itself, with at most a view to «minimising» its «harmful Environmental Impacts». Hence, art. 19 ECT represents a clear example of the idea of the relationship between humanity and nature that permeated – and still permeates – international law. The economy is seen as a closed and independent system operating in a vacuum, with its adverse consequences thrown in an ill-

[16] See art. 14, Basic Agreement 6, 21 January 1992, available at https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Travaux_different_languages/English_Travaux/4_-_BA_6__21.01.93_.pdf

[17] See the various versions of art. 19, first drafted as art. 14, available at https://www.energychartertreaty.org/treaty/travaux-preparatoires/accessible-online-documents/ (last accessed on 24 July 2023)

[18] Further on art. 19 ECT see e.g. HOBER, *The Energy Charter Treaty: A Commentary*, Oxford, 2020, p. 350 ff.

[19] For instance, according to the first paragraph, the Contracting Parties are called to fulfil their obligations under international environmental agreements «in an economically efficient» manner and, while cautiously «[agreeing] that the polluter […], should, in principle, bear the cost of pollution, including transboundary pollution», this should not 'distort' «[i]nvestment in the Energy Cycle or international trade».

defined 'environment' that includes all the aspects not pertaining to the main legal discourse.[20]

Unsurprisingly, the provision remained on paper in the three decades following its adoption.[21] The 'old' art. 19 ECT does not fit the challenges of energy transition, which requires to consider the complexity of energy as a physical force and the need to harmonise the use of that force with the biogeochemical flows of planet Earth.[22] Quite the contrary, the provision takes the process of extraction, distribution and consumption of fossil fuels as a given, focusing only on its 'negative externalities'.

The reform attempts to rebalance the strong neoliberal setting of art. 19 ECT with the more nuanced contemporary sensibility. This starts from the title, where 'environmental aspects' is replaced with 'sustainable development'. In the same vein, there are several additions to the old provision, which aim to reflect the current Trade and Sustainable Development (TSD) strategy of the EU.[23] However, the reformed ECT does not seem to promote an overall innovative

[20] Namely «human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors». See art. 19(3)(b) ECT.

[21] So far, this provision has been mentioned only once in investment arbitration case law, only to dismiss its relevance. Indeed, the provision has been deemed to operate «not at the level of individual investors but at the interstate level», not affecting the obligations of the States towards an investor. (See *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award of 27 December 2016, para. 274). Given that the obligations under art. 19 ECT only apply between the parties and do not directly affect investors, the art. could be disregarded in evaluating the responsibility of a Contracting Party for a possible violation of the standards of treatment.

[22] See e.g. SZIGETI, *A Sketch of Ecological Property: Toward a Law of Biogeochemical Cycles*, *Environmental Law*, 2021, p. 41 ff.; KOTZÉ et al, *Earth System law: Exploring new Frontiers in Legal Science*, *Earth System Governance*, 2022, available at https://www.sciencedirect.com/science/article/pii/S2589811621000306

[23] Since its 2009 FTA with South Korea, the EU has included TSD Chapters in its trade agreements, committing the Parties to ratify and implement International Labour Organisation (ILO) conventions and Multilateral Environmental Agreements (MEAs), and not to lower environmental and labour standards. Furthermore, TSD Chapters create a specialised Committee to monitor its implementation and a Domestic advisory group (DAG) o involve civil society organisations and the European Economic and Social Committee (EESC) in the process, and a government-to-government consultation process to settle disputes. In the current TSD Chapters (with Central-America, Colombia, Peru, Georgia, Moldova and Ukraine) neither enforceable dispute settlement procedures nor financial sanctions for non-compliance are provided. More recently, the EU-Japan Economic Partnership Agreement included commitments to ratify and implement the Paris Agreement, while the EU-Canada Comprehensive Economic Trade Agreement (CETA) contained three different chapters covering sustainable development, labour and environment. See Communication COM(2021) 497 final from the Commission of 18 February 2021 on Trade Policy Review – An Open, Sustainable and Assertive Trade Policy.

approach to energy. None of the abovementioned critical elements is modified, except for the fact that the obligation to act in a 'cost-effective manner' is softened (the reformed provision reads: «each Contracting Party shall *strive to act* in a Cost-Effective manner»).

One of the few potentially relevant addition to the 'old' art. 19 ECT is the non-relaxation clause contained at par. (3), which provides that «Contracting Parties shall not encourage trade or investment in energy by relaxing or lowering the levels of protection afforded in their respective environmental or labour laws». Moreover, the reformed provision establishes a duty to conduct environmental impact assessments prior to granting authorisation for energy investment projects, an obligation which is however already considered part of customary international law.[24] In essence, the reformed art. 19 ECT simply juxtaposes few innovative elements to many seriously problematic ones. The result does not appear satisfactory.

4. The new article on climate change and clean energy transition

The second provision subject to the conciliation procedure is one of the new articles contained in the reformed ECT, a provision expressly devoted to 'climate change and clean energy transition'. Below is the text of art. 19bis: *«New Article: Climate Change and Clean Energy Transition Recognising the urgent need of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC), the purpose and goals of the Paris Agreement in order to effectively combat climate change and its adverse impacts, and committed to enhancing the contribution of trade and investment in energy-related sectors to climate change mitigation and adaptation, each Contracting Party reaffirms its commitments to:*

a) *effectively implement its commitments and obligations under the UNFCCC and the Paris Agreement;*

b) *promote and enhance the mutual supportiveness of investment and climate policies and measures, thereby accelerating the transition towards a low emission, clean energy and resource efficient economy, as well as to climate-resilient development;*

c) *promote and facilitate trade and investment of relevance for climate change mitigation and adaptation, including, inter alia, by removing obstacles to trade and investment concerning low carbon energy technologies and services such as renewable energy production capacity, and by adopting policy frameworks conducive to this objective;*

[24] On Environmental Impact Assessment, see *infra* Camanna (this e-book)

d) *cooperate, as appropriate, with the other Contracting Parties on investment-related aspects of climate change policies and measures bilaterally and in international fora, as appropriate».*

This provision, despite its symbolic value, does not bear any significant prescriptive force: it just incorporates in the ECT the many weaknesses of the UN climate change regime. For example, it recognises in letter (a) «the urgent need of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC)» and «the purpose and goals of the Paris Agreement». However, the distinction between *commitments and obligations* reiterates the ambiguity on the role of the Paris Agreement in determining the international law obligations with respect to climate change.[25] Moreover, in order for the European Commission's claim that the new ECT would be in line with the EU «environmental objectives» to be considered accurate, the agreement should have at least mentioned the commitment to progressively phase-out fossil fuels.[26] On the contrary, the ambiguous phrasing of letters (b) and (c) may suggest a dangerous equation between climate change mitigation properly said and carbon removal technologies, one of the increasingly overemphasised non-solutions to climate crisis.[27]

[25] On the existence and content of State obligations with respect to climate change mitigation and adaptation see recently VOIGT, *The power of the Paris Agreement in international climate litigation*, *RECIEL*, 2023, p. 237 ff. The topic has been subject to extensive debate during the last decades. Hopefully, the ICJ – with its advisory opinion (see *supra*) – will bring clarity, enhancing the progressive development of an effective climate change regime. For literature see e.g. BODANSKY, *Customary (and not so customary) International Environmental Law*, *IJGLS*, 1995, p. 105 ff.; SCOVAZZI, *State Responsibility for Environmental Harm*, *YIEL*, 2001, p. 43 ff.; FITZMAURICE, *Responsibility and Climate Change*, *GYIL*, 2010, p. 89 ff.; FERNANDEZ EGEA, *State Responsibility for Environmental Harm, "Revisited" within the Climate Change Regime*, in MALJEAN-DUBOIS, RAJMANI (eds.), *La mise an oeuvre du droit international de l'environnement*, London/Boston, 2011, p. 375 ff.; DUVIC-PAOLI, GERVASI, *Harm to the global commons on trial: The role of the prevention principle in international climate adjudication*, *RECIEL*, 2022, p. 1 ff.

[26] A point that is also at the center of the EU negotiating efforts within the UNFCCC regime. The EU also holds the position that carbon removal technologies should have only a residual role. See e.g. *Opening remarks on COP28 by EVP Timmermans at the Informal Environment and Energy Council in Valladolid, Spain,* available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_3818

[27] For a review see SOVACOL ET AL., *Reviewing the sociotechnical dynamics of carbon removal*, *Joule*, 2023, p. 57 ff. some economic and scientific circles suggest that, just as technology has been used to extract, produce and distribute energy from fossil fuels, so it will have to be used to retrieve greenhouse gases. In essence, climate change should be dealt with as a problem of waste management (See e.g. LACKNER, JOSPE, *Climate Change Is a Waste Management Problem*, *Issues in Science and Technology*, 2017, available at www.issues.org). Broadly speaking, it is clear that the idea of building a parallel infrastructure to the existing fossil fuel one to 'collect' the greenhouse gas 'waste' of energy production activity (and, eventually,

Overall, the two provisions appear of little help in accelerating the transition towards a sustainable energy system and more generally towards an ecologic paradigm shift in the economy.

5. The conciliation procedure: description and assessment

The old art. 19 ECT was expressly carved-out from the State-to-State dispute settlement procedure.[28] Indeed, art. 19 ECT provided that «disputes concerning the application or interpretation of provisions of this article shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference aiming at a solution». This part is delated from the reformed art. 19 ECT, as the latter and art. 19bis are subject to the new conciliation procedure, instead of the 'main' State-to-State dispute settlement mechanism, in line with EU TSD policies.

Conciliation – and more generally 'alternative disputes resolution' instruments – have experienced a revival in recent decades, despite some scepticism from part of the scholarship on their concrete impact.[29] The EU has contributed to this momentum, choosing a form of conciliation as the mean to promote the enforcement of TSD Chapters in its free trade agreements. Generally, EU TSD Chapters provide that in case of dispute between the parties of a treaty with respect to the application and interpretation of a TSD provision, a 'panel of experts' can be established to solve the dispute. Despite the fact that this procedure is a non-sanction-based mechanism at the end of which non-binding recommendations are adopted, it resembles an arbitration proceeding for

profting from it) seems appealing to the *status quo*. However, it is obvious that such technologies – highly expensive and energy intensive themselves – cannot substitute the drastic reduction of the use of fossil fuels (See CLARKE ET AL, *Chapter 6: Energy Systems* in SHUKLA ET AL. (eds), *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge and New York, 2022, p. 672). For an the intellectual history of this idea, and in particular the variant of 'direct air capture' see MALM, CARTON, *Seize the Means of Carbon Removal: The Political Economy of Direct Air Capture*, *Historical Materialism*, 2021, p. 3 ff. Generally on 'climate engineering' HAMILTON, *Earthmasters: The dawn of the age of climate engineering*, London, 2013

[28] This is due to Art. 27(2) ECT, which provides that each party to a dispute (after an attempt to settle it through diplomatic channels) «may, except as otherwise provided in this Treaty or agreed in writing by the Contracting Parties, and except as concerns the application or interpretation of Art. 6 or Art. 19 or, for Contracting Parties listed in Annex IA, the last sentence of Art. 10(1), upon written notice to the other party to the dispute submit the matter to an ad hoc tribunal under this Article».

[29] COT, *Conciliation*, in WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, 2006 (online edn)

its degree of institutionalisation.[30] The same cannot be said of the procedure established under the reformed ECT.

Art. 30bis establishes a rather cumbersome mechanism, that involves the Secretary General, the Secretariat, a conciliator, the Charter Conference and a specific subsidiary body to be established by this latter. Each stage of the procedure seems to be specifically designed to dilute its institutional strength and to hinder the clear accountability of the ECT Contracting Parties on sustainable development obligations.

According to the provision, when a dispute arises on the application and interpretation of the two articles described above, the parties undertake to resolve it by diplomatic means or judicially for a comprehensive period of 18 months.[31] Subsequently, if this does not happen, each party to the dispute may notify the Secretariat of the Energy Charter on the issue.

The Secretariat then appoints a conciliator, whose main task is to «seek information and advice from the International Labour Organisation or relevant bodies or organisations established under the Multilateral Environmental Agreements» and, upon the agreement of the parties to the dispute, to find «additional information from any source he or she deems appropriate». After having collected information and comments by the parties, the conciliator seeks an agreement between them, and in the event of failure suggests a potential compromise. If the agreement is not found, the conciliator sends a non-binding report to the above-mentioned subsidiary body of the Conference, that makes it public. The report «shall set out the relevant facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations». This entire procedure, from the appointment of the conciliator to the sending of the report, cannot last more than 180 days.

Finally, the subsidiary body discusses the measures to be taken by the Parties, taking into account the conciliator's report and the recommendations adopted. After a first compulsory round of information by the Parties, the subsidiary body has to monitor the implementation of the measures «keeping he matter under review and report to the Charter Conference» for a period determined by the above-mentioned rules of procedure.

Although inspired by it, this procedure seems rather distant from the one envisaged for the TSD chapters of EU free trade agreements. Drawing a line of progressive institutionalisation of the dispute settlement instruments that goes from negotiation to arbitration through mediation and conciliation, the

[30] So far, however, the only case of dispute based on a TSD Chapter has been the EU v. Korea case, decided in 2021. See https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes/korea-labour-commitments_en

[31] Art. 30bis.

mechanism established by art. 30bis seems to be closer to a hybrid form of mediation than to arbitral proceeding, in contrast with the usual practice and with the model provided by TSD Chapters.[32] It should be also added that it is unclear which of the sustainable development provisions bears enough prescriptive force to raise disputes on its application or interpretation, excluding perhaps the obligation of 'no relaxation' of environmental and labour standards.[33]

Finally, and maybe even more critically, the conciliation procedure does not envisage any role for civil society, and the only element of transparency in the entire procedure is the publication of the non-binding report of the conciliator. Usually, TSD Chapters in EU FTAs establish a Domestic Advisory Group (DAG) to involve civil society organisations in the process of monitoring the implementation of the sustainable development provisions, which represents one of the main driving forces of the TSD Chapters architecture and one of the positive innovations of this instruments. The complete absence of civil society involvement in the reformed ECT shows the significant gap between the EU (barely sufficient) efforts in adopting TSD policies[34] and the outcome of the ECT reform.

6. Concluding remarks.

In conclusion, the 'soft' substantive provisions and the conciliation procedure established by the reformed ECT do not seem to promote the effective advancement of climate goals and sustainable development. If compared to the current EU practice, this procedure represents a significant step backwards. What is more, the substantive provisions on sustainable development end up reproducing the unsustainable conceptualisation of energy as a commodity with externalities. Overall, it may be argued that sustainable development in the reformed ECT represents an example of *greenwashing* through treaty-making.

[32] See *supra*.

[33] In general, as shown in EU v. Korea case, the ascertainment of the breach of obligations arising from TSD provisions is not straightforward. (See for instance https://www.iisd.org/itn/en/2021/10/07/the-trade-related-conundrum-of-the-eu-korea-fta-expert-panel-are-ftas-a-novel-forum-to-enforce-sustainable-development-goals/). Suffice it to note that the two ECT provisions subject to the conciliation mechanism are even less prescriptive than those contained in the EU-Korea FTA.

[34] See VILLANI, *Settling Disputes on TSD chapters of EU FTAs: recent trends and future challenges in the light of CJEU's Opinion 2/15*, in BIONDI, SANGIULO (eds.) *The EU and the Rule of Law in International Economic Relations. An Agenda for an Enhanced Dialogue*, Cheltenham, 2021, p. 107 ss.

Corporate Climate Litigation: The Shell Appeal Judgment

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1. Introduction: the climate litigation phenomenon and the 2021 Hague District Court ruling in the Shell case

In particular following the entry into force of the Paris Agreement[1], there has been a significant increase in initiatives aimed at clarifying the responsibilities of states and businesses in combating global warming, including lawsuits brought before national[2], regional[3] or international judges[4], or requests

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[1] UNFCCC, Decision 1/CP.21 (2016), Adoption of the Paris Agreement (FCCC/CP/2015/10/Add.1). For an analysis of this Agreement see Geert VAN CALSTER, Leonie REINS (EDS.), *The Paris Agreement on Climate Change: A Commentary*, Cheltenham – Northampton, 2021. For the relevance of the Paris Agreement in climate litigation see Christina VOIGT, *The Power of the Paris Agreement in International Climate Litigation*, *Review of European, Comparative & International Environmental Law*, 2023, pp. 237-249.

[2] See e.g. *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, court-issued translation, Urgenda III); *A Sud – Ecologia e Cooperazione ONLUS et al. v Presidenza del Consiglio dei Ministri*, [2024] Trib. Roma, sez. II civ., sent. n. 3552.

[3] Cf. EUCJ, *Armando Carvalho and Others v European Parliament and Council of the European Union*, Judgment of the Court (Sixth Chamber) of 25 March 2021, case C-565/19 P, ECLI:EU:C:2021:252.

[4] ECtHR, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, Appl. no. 53600/20, Judgment of 9 April 2024. For an analysis of climate litigation before the European Court of Human Rights see Maxim BÖNNEMANN, Maria Antonia TIGRE (EDS.), *The Transformation of European Climate Litigation*, Berlin, 2024; Annalisa SAVARESI, Verein KlimaSeniorinnen Schweiz and Others v Switzerland*: Making Climate Change Litigation History*, in *Review of*

for reports or opinions by compliance human rights committees[5], or international courts[6]. Within the large phenomenon of climate change litigation -"consisting of cases brought before judicial and quasi-judicial bodies that involve material issues of climate change science, policy or law"[7]- we may thus distinguish *corporate* climate litigation, where citizens[8], associations and non-governmental organizations[9], institutional actors[10] file complaints against companies, especially multinationals[11]. In these proceedings, the plaintiffs request the judges

European, Comparative & International Environmental Law, 2025, pp. 1-9; Grazia Eleonora VITA, *Gender-Based Climate Change Litigation: A Mere Trend or A Key Solution to Address the Problem?*, in Elisa BARONCINI, Ana Maria DAZA VARGAS, Filippo FONTANELLI, Genia KOSTKA, Raquel REGUEIRO DUBRA, Piotr SZWEDO, Reetta TOIVANEN (EDS.), *The UN 2030 Agenda in the EU Trade Policy – Improving Global Governance for a Sustainable New World*, Bologna, 2025, pp. 331-340.

[5] See *Teitiota v New Zealand*, Views Adopted by the Human Rights Committee under Article 5(4) of the Optional Protocol Concerning Communication No. 2728/2016, 24 October 2019; and the so-called case *Children v. Climate Crisis*, a set of five decisions adopted by Committee on the Rights of the Child in the complaint raised by 16 child complainants against five States: *Sacchi et al. v Argentina et a*l., Decisions adopted by the United Nations Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 105/2019, 22 September 2021. For a comment on these decision see Emanuele SOMMARIO, *When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Rights Committee's Teitiota Decision*, QIL, 2021, pp. 51-65; Aoife NOLAN, *Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in Sacchi v Argentina*, *EJIL: Talk!*, 20 October 2021.

[6] See International Tribunal on the Law of the Sea, *Advisory Opinion on the Request Submitted by the Commission of Small Island States on Climate Change and International Law*, 27 May 2024; the request for an advisory opinion on the "Climate Emergency and Human Rights" submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile on 9 January 2023, currently pending; and the request for an advisory opinion on "Obligations of States in respect of Climate Change" transmitted to the International Court of Justice on 12 April 2023 pursuant to the UN General Assembly Resolution 77/276 of 29 March 2023, currently pending.

[7] This is the definition of climate change litigation adopted by Joana Setzer, Catherine Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot*, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, London, June 2024. On climate litigation cf. *ex multis* Elena D'ALESSANDRO, Davide CASTAGNO (EDS.), *Reports and Essays on Climate Litigation*, Torino, 2024; André NOLLKAMPAER, *Causation Puzzles in International Climate Litigation*, *Italian Yearbook of International Law*, 2023, pp. 25-55.

[8] See the pending case *Luciano Lliuya v. RWE AG*, launched before the District Court Essen by a Peruvian farmer against RWE, Germany's largest electricity producer, presented in Tim SCHAUENBERG, *Why is Farmer in Peru Suing an Energy Company in Germany?*, *DW*, 17.3.2025.

[9] Cf. *Native Village of Kivalina, et al v. ExxonMobil Corp. et al.*, No. 09-17490 (9th Cir. 2012).

[10] See the pending lawsuit launched in 2023 by the State of California against five oil and gas companies (Exxon Mobil, Shell, Chevron, ConocoPhillips, and BP) and the American Petroleum Institute (API): State of California Department of Justice, *Attorney General Bonta Announces Lawsuit Against Oil and Gas Companies for Misleading Public About Climate Change*, Press Release, 16.9.2023.

[11] On corporate climate litigation cf. *ex multis*, Geetanjali GANGULY, *Breaking New Ground in Private Climate Litigation*, in Francesco SINDICO, Kate MCKENZIE, Gastón MEDICI-COLOMBO,

to a) ascertain the existence and the extent of obligations regarding climate change that the defendants have to uphold, b) evaluate whether the business activities of the private economic operators are illegitimate because they fail to fulfil those obligations, and, if this is the case, c) condemn the corporations to modify their business models accordingly, as well as compensate the actors for the damages they have suffered.

Among the groundbreaking cases in private climate litigation, there is the class action lawsuit launched in 2019 by Milieudefensie (or "Friends of the Earth Netherlands"[12], in this dispute representing 17,379 individual claimants), Greenpeace Nederland, Fossielvrij NL, Waddenvereniging, Both Ends and Jongeren Milieu Actief[13] against a major energy company, then based in the Netherlands and called Royal Dutch Shell, now Shell Plc, established in London[14]. In 2021, the Hague District Court issued a landmark decision finding that the major energy company breached its duty of care under Dutch law and ruled that Shell had to reduce its aggregate CO2 emissions (i.e. scope 1, 2 and 3) by 45% by 2030 with reference to the emissions levels of 2019[15]. The Dutch judges of first instance grounded their ruling on "the unwritten standard of care laid down in …[the] Dutch Civil Code"[16], which was interpreted in the light of a) human rights law, in particular the right to life and the right to respect for private and family life as enshrined in Articles 2 and 8 of the European Convention on Human Rights (ECHR)[17] and Articles 6 and 17 of the International Covenant on Civil and Political Rights (ICCPR)[18]; b) the major soft

Lenhart WEGENER (EDS.), *Research Handbook on Climate Change Litigation*, Cheltenham – Northampton, 2024, pp. 123-144.

[12] See the official website of the Dutch non-governmental organization (NGO) https://en.milieudefensie.nl/.

[13] Among the claimants there was also ActionAid NL. However, its collective claim against Shell was declared inadmissible by the Dutch lower court because, as it results from the articles of association, the mission of ActionAId NL is "[c]ontributing to the fight against poverty and injustice all over the world ... [with] Africa … [as] an area of special focus": it is evident that the object stated does not align with the interest served by the proposed public interest action, as ActionAid NL "does not promote the interests of Dutch residents sufficiently for its collective claim to be allowable" (see Rechtbank Den Haag 26 May 2021, *Milieudefensie et al. V. Royal Dutch Shell Plc*, ECLI:NL:RBDHA:2021:5339, paras. 2.1.7 and 4.2.5).

[14] See Ron BOUSSO, *Royal Dutch No More - Shell Officially Changes Name*, *Reuters*, 21.1.2022.

[15] Rechtbank Den Haag 26 May 2021, *Milieudefensie et al. V. Royal Dutch Shell Plc*, cit., para. 5.13.

[16] Rechtbank Den Haag 26 May 2021, *Milieudefensie et al. V. Royal Dutch Shell Plc*, cit., para. 4.4.1.

[17] Council of Europe, *European Convention on Human Rights*, as amended by Protocols Nos. 11, 14 and 15, ETS No. 005, 4 November 1950, https://www.refworld.org/legal/agreements/coe/1950/en/18688.

[18] Rechtbank Den Haag 26 May 2021, *Milieudefensie et al. V. Royal Dutch Shell Plc*, cit., para. 4.4.9. For the ICCPR see UN General Assembly, *International Covenant on Civil and Political Rights*, *United Nations, Treaty Series*, vol. 999, p. 171, 16 December 1966.

law instruments of corporate social responsibility (CSR), i.e. the UN Guiding Principles on Business and Human Rights (UNGP)[19] and the OECD Guidelines for Multinational Enterprises (the OECD Guidelines)[20], and for achieving sustainable development, i.e. the UN 2030 Agenda and its Sustainable Development Goals (SDGs)[21]; and c) climate science reports, notably those of the Intergovernmental Panel on Climate Change (IPCC) available at the time of the proceedings, in particular the 2018 IPCC Special Report[22]. Furthermore, the Hague District Court selected the year 2019 as the baseline for the progressive reduction of Shell's CO2 emissions because of the combined reading of the 2018 IPCC Special Report[23] and the 2020 Oxford Report[24], and the time "when the summons in these proceedings was issued"[25] by the complainants, that is precisely the year 2019, a questionable legal reasoning in our view, as neither the mentioned scientific reports nor any standard or legislation considered in the first instance proceedings indicated the year 2019 as baseline on which calculate CO2 emissions' reductions.

Unsurprisingly, Shell appealed the ruling, and the Court of Appeal in The Hague issued its very much anticipated judgment on 12 November 2024[26]. The first instance decision was overturned with reference to the existence of a specific obligation for the energy company to reduce GHG emissions by 45% by 2030, based on 2019 levels, but it was confirmed the corporate responsibility to address climate change pointing out, *inter alia*, the duty of coherence of companies with the tools of corporate social responsibility they endorse. In this

[19] Rechtbank Den Haag 26 May 2021, *Milieudefensie et al. V. Royal Dutch Shell Plc*, cit., para. 4.4.11. For the UNGP see United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/17/31, New York, 2011.

[20] Rechtbank Den Haag 26 May 2021, *Milieudefensie et al. V. Royal Dutch Shell Plc*, cit., para. 4.4.14. For the OECD Guidelines see Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, 2011, as revised in 2023.

[21] Rechtbank Den Haag 26 May 2021, *Milieudefensie et al. V. Royal Dutch Shell Plc*, cit., para. 4.4.41. For the UN 2030 Agenda see A/RES/70/1, *Transforming our World: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015.

[22] Rechtbank Den Haag 26 May 2021, *Milieudefensie et al. V. Royal Dutch Shell Plc*, cit., para. 4.4.6 and paras. 4.4.26 ff.

[23] Intergovernmental Panel on Climate Change (IPCC), Special Report on the Impacts of Global Warming of 1.5°C, 2018 (SR15 Report), available at the link https://www.ipcc.ch/sr15/download/#chapter .

[24] University of Oxford, *Mapping of Current Practices around Net Zero Targets*, May 2020, available at the link https://netzeroclimate.org/wp-content/uploads/2020/12/Net-Zero-Target-Map.pdf.

[25] Rechtbank Den Haag 26 May 2021, (*Milieudefensie et al. V. Royal Dutch Shell Plc*), cit., para. 4.4.38.

[26] See Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, ECLI:NL:GHDHA:2024:2100.

work, we will present the key passages of the careful and informed legal reasoning of the appellate judgment, which has already garnered significant academic interest[27]. We will then highlight the major developments brought by this decision for corporate climate litigation, and the significance it may have for the role all relevant stakeholders have to play and respect in the fight against global warming.

2. The Court of Appeal's interpretation of the Dutch duty of care

The civil society organizations Milieudefensie et al. argued in front of the Court of Appeal that Shell breached the Dutch duty of care, enshrined in Article 6:12 of the Dutch Civil Code, because the energy company did not decrease its CO2 emissions by 45% (or at least 35% or 25%) by 2030 relative to 2019 levels. To address such a claim, the unwritten social standard invoked has been interpreted by the Court on the basis of "objective factors" -i.e. the relevant international law and case law on fundamental rights and climate change (in particular the Paris Agreement), the pertinent international soft law sources of corporate social responsibility, the applicable EU climate legislation- and the specific circumstances of the case[28]. Hence, we will now illustrate how the appellate judges evaluated the several recalled sources and elements to clarify the scope of the duty of care with reference to Shell.

[27] Harro VAN ASSELT, Annalisa SAVARESI, *Corporate Climate (Un)Accountability? Landmark Shell Ruling Overturned on Appeal*, *Centre for Climate Engagement*, 13.11.2024; Harro VAN ASSELT, Annalisa SAVARESI, *Shell's Legal Victory is Disappointing – but This is not the End for Corporate Climate Litigation*, *Resilience*, 18.11.2024; Andrea CEROFOLINI, Grazia Eleonora VITA, *The Shell Case: Beyond the Ruling, the Key Principles from the Court of Appeal*, *Nova Centre on Business, Human Rights and the Environment Blog*, 10.1. 2025; Sam EASTWOOD, Airlie GOODMAN, Jan HENNING BUSCHFELD, Jonathan COHEN, Nazia SOHAIL, *Milieudefensie v Shell: Dutch Appeals Court Overturns Ruling that Shell Must Reduce its CO2 Emissions by 45%*, *Mayer-Brown*, 27.11.2024; Monika FEIGERLOVÁ, *Klimatická změna a obchodní společnosti: analýza rozhodnutí odvolacího soudu v Haagu ve věci Shell o povinnosti snižovat emise skleníkových plynů*, *ekolist.cz*, 11.1.2025; Carlo Vittorio GIABARDO, *Corporate Climate Responsibility After "Milieudefensie vs. Shell" Court of Appeal Decision*, *EJIL: Talk!*, 17.12.2024; Bengt JOHANNSEN, Louis J. KOTZÉ, Chiara MACCHI, *An Empty Victory?* Shell v. Milieudefensie *et al 2024, the Legal Obligations of Carbon Majors, and the Prospects for Future Climate Litigation Action*, *Review of European, Comparative & International Environmental Law*, 2025, pp. 1-9; Kermabon Avocat, *Strategic Climate Litigation – Insights from the* Shell v. Milieudefensie *Case*, 2024; Loyens Loeff Tax and Law, *Case analysis: Unpacking the Shell Ruling in Appeal,* 7.1.2025; André NOLLKAMPAER, *Lessons of a Landmark Lost - The Judgment of the Hague Court of Appeal in Shell v Milieudefensie*, *Verfassungsblog*, 12.12.2024.

[28] See Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., paras. 7.1 – 7.5.

2.1. The relevant international law and case law on fundamental rights and climate change

The appellate judges have dwelt on the relevance of the European Convention on Human Rights, some UN reports and resolutions, and national and international case law, to conclude that "protection against dangerous climate change is considered a fundamental right, not only in the Netherlands but also elsewhere in the world"[29], a highly relevant interpretative result for defining the content of the duty of care of the climate responsibility of Shell.

In particular, the Court of Appeal emphasized that "Article 2 ECHR protects the right to life", encompassing not only "the prohibition to kill, but also the positive obligation to take measures to protect life", and that "Article 8 ECHR protects the right to respect for private and family life"[30]. The Hague Tribunal recalled that the latter provision -as interpreted by the European Court of Human Rights (ECtHR) in the *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* case, the first international ruling "holding a State accountable for failing to adopt adequate measures to mitigate and prevent the negative impacts of climate change on the enjoyment of human rights"[31]- "must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life"[32]. Considering the ruling of the Dutch Supreme Court in the *Urgenda* case[33], the Hague Appeal Court additionally underlined that "the protection of Articles 2 and 8 ECHR not only applies to specific individuals but also to society or the population as a whole", and that "the obligation [of a State] to take appropriate measures under Articles 2 and 8 ECHR includes the obligation of States to take preventive measures against … impending danger, even if it is not certain that the danger will materialize"[34], concluding that a State "has an obligation under Articles 2 and 8 ECHR to 'do its part' to prevent dangerous climate change, even if it is a global problem"[35].

Selecting the case law outside Europe "assum[ing] human rights can be invoked to protect against the effects of climate change"[36], the Court of Appeal

[29] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.6.
[30] *Ibid.*
[31] Cf. Annalisa SAVARESI, Verein KlimaSeniorinnen Schweiz and Others v Switzerland*: Making Climate Change Litigation History*, cit., at p. 1.
[32] ECtHR, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, cit., para. 519.
[33] *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda*, cit.
[34] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.7.
[35] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.8.
[36] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.12.

indicated the 2015 *Leghari* judgment of the Lahore High Court in Pakistan[37], considering "that climate change poses a serious threat to access to water and food, among other things, and that this fact constitutes a violation of the right to life"[38]; the 2018 ruling of Colombia's Supreme Court[39] finding that "Amazon deforestation leads to CO2 emissions into the atmosphere, which causes the greenhouse gas effect and in turn results in the degradation of ecosystems and water resources … [which] is a serious attack on fundamental rights, including the right to life"[40]; the 2022 decision by the Brazilian Federal Supreme Court[41], ruling that climate change is a constitutional matter and that treaties on climate change are a species of treaties on human rights"[42]; the 2023 US judgment in the case *Held v. State of Montana*[43], concluding that "the effects of dangerous climate change fall within the scope of the fundamental right to a 'clean and healthful environment' as contained in the Montana Constitution"[44]; and the 2024 *Ranjitsinh* judgment of the Indian Supreme Court[45], where it was recognized that the provisions of the Indian Constitution on the right to life and personal liberty and on the equality of all persons before the law and in the protection of laws "are important sources of the right to a clean environment and the right against the adverse effects of climate change"[46].

Turning to the UN system, the Hague Court of Appeal pointed to several reports and resolutions supported within the UN system[47], culminating in Resolution 76/300 adopted by the General Assembly on 28 July 2022[48]. In fact, the latter "[r]ecognizes the right to a clean, healthy and sustainable environment as a human right", noting that such right "is related to other rights and existing international law", calling upon also business enterprises to establish sustainable

[37] Lahore High Court 4 September 2015, *Leghari v Federation of Pakistan*, case no. W.P. No. 25501/2015, para. 7.
[38] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.12.
[39] Supreme Court of Colombia 5 April 2018, *Future Generations v Ministry of the Environment*, no. STC4360-2018, p. 13.
[40] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.12.
[41] Federal Supreme Court of Brazil 7 April 2022, *PSB et al v Brazil*.
[42] *Ibid.*
[43] Montana First Judicial District Court 14 August 2023, *Held et al. v State of Montana,* case no. CDV-2020-307, pp. 97-98.
[44] *Ibid.*
[45] Supreme Court of India 21 March 2024, *Ranjitsinh and Others v Union of India and Others,* Civil Appeal no. 3570 of 2022, par. 20.
[46] *Ibid.*
[47] See A/HRC/RES/48/13, *The Human Right to a Clean, Healthy and Sustainable Environment*, Resolution adopted by the Human Rights Council on 8 October 2021; A/77/226, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change*, 26 July 2022.
[48] A/RES/76/300, *The Human Right to a Clean, Healthy and Sustainable Environment*, Resolution adopted by the General Assembly on 28 July 2022.

production activities "scal[ing] up efforts to ensure a clean, healthy and sustainable environment for all"[49].

Having considered the recalled international rules and case law[50], the Court of Appeal, with reference to the relation between climate change and human rights, found, first of all, that "there can be no doubt that protection from dangerous climate change is a human right"[51], and that "[i]t is recognised worldwide that States have an obligation to protect their citizens from the adverse effects of dangerous climate change"[52]. It has also been emphasized that the ECtHR stated that "climate change is one of the most pressing issues of our times"[53]. While acknowledging that "[i]t is primarily up to legislators and governments to take measures to minimise dangerous climate change"[54], the appellate judges significantly recognized that "companies, including Shell, may also have a responsibility to take measures to counter dangerous climate change"[55]. The Court thus confirmed a consolidated pattern in contemporary international law pursuant to which "the private sector, including both large and small companies, has a duty to contribute to the evolution of equitable and sustainable communities and societies"[56].

2.2. The indirect horizontal effect of human rights doctrine and the special responsibility of large emitting companies

To define the existence and content of corporate responsibility to fight climate change, so that enterprises can play their part in mitigating and adapting to global warming, the Court of Appeal also resorted to the doctrine of the indirect horizontal effect of human rights to apply the evoked internationally recognized fundamental rights when interpreting the private law concept of the duty of care. In the Dutch legal system, in fact, fundamental rights have generally a vertical effect, "i.e. they apply in the citizen-government relationship"[57]. However, as "the values expressed by fundamental rights are of such great

[49] *Ibid.*
[50] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., paras. 7.13 – 7.16.
[51] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.17.
[52] *Ibid.*
[53] ECtHR, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, cit., para. 410.
[54] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.17.
[55] *Ibid.*
[56] A/CONF.199/20, *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, 26 August-4 September 2002, para. 27. On these aspects cf. Elena CORCIONE, *La tutela dei diritti umani nelle catene globali del valore*, Torino, 2024; Niccolò LANZONI, *Il riferimento alla responsabilità sociale d'impresa negli accordi preferenziali sul commercio di cui l'Unione europea è parte: verso una crescente normatività?*, forthcoming in *Il diritto del commercio internazionale*, 2025.
[57] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.18.

importance to society as a whole", they can also be invoked "by citizens in their relationship with a private company"[58], as Milieudefensie et al. asked for in their dispute with Shell. On the basis of the recalled doctrine, "the court may [hence] include fundamental rights -or the values embodied in them- in its considerations when applying general private law concepts such as conflict with what is proper social conduct"[59] according to the social standard of care under the Dutch civil code.

When applying those rights and values to determine whether that standard has been breached, the Court underlined that a variety of factors is relevant, i.e. "[t]he severity of the threat of a particular danger, the contribution to the creation of the danger and the capacity to contribute to the combating of the danger"[60].

With reference to *the severity of the climate change question*, the appellate judges stated that it is "the greatest issue of our time"[61] as it poses a threat to human and animal existence, damaging the rights protected by Articles 2 and 8 ECHR. Regarding *the contribution to the creation of the danger*, the Court notes that "[i]t is an established fact that fossil fuel consumption is largely responsible for creating the climate problem"[62], and that companies like Shell "contribute significantly to the climate problem"[63] by selling their products. Finally, relating to *the power to contribute to combating the danger*, it was remarked that large emitting companies like Shell have the power to counter the threat of climate change through a business strategy reducing and then eliminating the harmful emissions attributable to their industrial activity.

Therefore, the responsibility "to combat the danger posed by climate change … does not lie exclusively on States"[64]. "[E]veryone has a responsibility"[65], remarked the judges, also private parties, and especially companies that are large CO2 emitters like Shell. The latter, concluded the Court of Appeal, "have an obligation to limit CO2 emissions in order to counter dangerous climate change, *even if this obligation is not explicitly laid down in (public law) regulations of the countries in which the company operates*. Companies like Shell thus have their own responsibility in achieving the targets of the Paris Agreement"[66].

[58] *Ibid.*
[59] *Ibid.*
[60] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.24.
[61] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.25.
[62] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.26.
[63] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.27.
[64] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.26.
[65] *Ibid.*
[66] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.27, emphasis added.

2.3. The duty of coherence with international soft law sources of corporate social responsibility

Such responsibility also lies with the increasingly relevant body of international soft law sources regarding corporate social responsibility. The Court of Appeal, in fact, highlighted the importance that human rights, environmental protection, and the fight against global warming have in the UN Guiding Principles on Business and Human Rights, and in the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, emphasizing that Shell has endorsed them both, and thus implicitly indicating a duty of coherence of the energy company, whose business activity has to be consistent with the principles stated in those codes, even if the latter are formally qualified as non-legally binding instruments. UNGP recalls that "[b]usiness enterprises should respect human rights … [and thus also] address adverse human rights impacts with which they are involved"[67] considering that the responsibility of economic actors to respect human rights "should be proportionate [also] to … the size of the organisation"[68]. The OECD Guidelines indicate that enterprises have to operate having in mind "the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations"[69]. In the chapter on environmental protection and climate change introduced in 2023, the OECD Guidelines *inter alia* affirm that enterprises should improve not only their environmental performance but also that of the entities "with which they have a business relationship … *promoting higher levels of awareness among customers* of the environmental implications of using the products and services of the enterprise, including by providing relevant and accurate information on their environmental impacts (for example, on greenhouse gas emissions, impacts on biodiversity, resource efficiency, reparability and recyclability or other environmental issues)"[70].

Finally, the appellate judges selected a range of other non-binding CSR tools all recognizing "as their starting point that companies have a responsibility on climate"[71]. The reconstruction of the relevant CSR legal framework is visibly aimed also at demonstrating that companies themselves adhere to and contribute

[67] UNGP, Principle 11.
[68] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.20.
[69] OECD Guidelines, Chapter IV, Human Rights, introductory sentence.
[70] OECD Guidelines, Chapter VI, Environment, para. 5, let. c).
[71] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.23.

to developing these advanced codes, as they need a clear transnational set of standards on the basis of which to conceive their strategies and compete fairly.

Through its legal reasoning, the Court of Appeal contributes to unequivocally highlighting the relevance corporate social responsibility has acquired in international law to indicate the role of economic actors. For instance, private parties are significantly empowered in the new EU trade agreements through increasing references to CSR in the preambles and specific provisions of those treaty instruments[72] -an approach, that of including in the trade agreements "effective [CSR clauses] … with concrete guidelines for investors"[73], significantly promoted by the European Parliament (EP)[74]. Arbitration investment proceedings recognize that "international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce"[75], while the Institute of International Law has recently adopted a resolution declaring that "States and international organizations shall make sure that corporations respect corporate

[72] See e.g. the Preamble of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), where the Parties encourage "enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct" (Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, *OJEU* L11/1, 14.1.2017). See also Article 13.10, para. 2, lett. e) of EU-Vietnam FTA: "… the Parties … in accordance with their domestic laws or policies agree to promote corporate social responsibility, provided that measures related thereto are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade; measures for the promotion of corporate social responsibility include, among others, exchange of information and best practices, education and training activities and technical advice; in this regard, each Party takes into account relevant internationally agreed instruments that have been endorsed or are supported by that Party, such as the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises, the United Nations Global Compact and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" (Council Decision (EU) 2019/753 of 30 March 2020 on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, *OJEU* L186/1, 12,6,2020).

[73] See P7_TA(2013)0411, *European Parliament Resolution of 9 October 2013 on the EU-China Negotiations for a Bilateral Investment Agreement* (2013/2674(RSP)), para. 33.

[74] In the ad hoc 2010 Resolution, the European Parliament expressed "the view, in the light of the key role played by corporations, their subsidiaries and their supply chains in international trade, that corporate social and environmental responsibility must become an integral part of the European Union's trade agreements" (see P7_TA(2010)0446, *European Parliament Resolution of 25 November 2010 on Corporate Social Responsibility in International Trade Agreements* (2009/2201(INI)), para. 7.

[75] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, award (8 December 2016), para. 1195.

social responsibility, including human rights, social and environmental rights and the fight against corruption"[76].

2.4. The significance of the EU climate legislation

To clarify the scope of the social duty of care, the Court of Appeal established that also the EU climate legislation is an "objective factor"[77] to take into account, as it reserves -and demands- a relevant role to economic operators to achieve a net zero economy[78].

The Hague judges highlighted first the European Green Deal strategy[79] and the Fit for 55 initiative[80], within which a new important set of disciplines has been adopted, and another group of already existing measures has been strengthened, always in order to achieve the Paris Agreement targets and thus reduce the GHG emissions. Hence the Appeal Court considered the relevant EU Climate Legislation, i.e. four EU Directives and the EU CBAM Regulation, plus a set of other EU measures part of the EU Fit for 55 package.

Describing the EU ETS Directive[81], and the EU ETS2 Directive[82], it was underlined their functioning on the basis of a mechanism issuing to the relevant companies permits for emissions whereby States have now to achieve the target of a 62% reduction in GHG emissions by 2030 relative to 2005 for the EU ETS covered industries, and of 42% for the EU ETS sectors. Complementary to these two Directives are a) the EU CBAM Regulation, aiming to limit the so-called "carbon leakage" phenomenon through the imposition of a levy on third-country goods when they have embedded CO2 emissions[83]; and b) the group of Fit for

[76] Institute of International Law, 4th Commission on Human Rights and Private International Law (Rapporteur: Mr Fausto Pocar), *Resolution of 4 September 2021*, Article 19.
[77] See *supra*, paragraph 2.
[78] See Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.54.
[79] COM(2019) 640, *Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal*, Brussels, 11.12.2019.
[80] COM(2021) 550, *Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions – "Fit for 55": Delivering the EU's 2030 Climate Target on the Way to Climate Neutrality*, Brussels, 14.7.2021.
[81] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, *OJEU* L275/32, 25.10.2003.
[82] See the EU ETS Directive as amended pursuant to the Fit for 55 initiative: Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme, *OJEU* L 130/134, 16.5.2023.
[83] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, *OJEU* L 130/52, 16.5.2023.

55 emission reduction measures for the transport sector – the EU Regulation on sustainable aviation fuels (ReFuelEU)[84], the EU Regulation on cleaner shipping fuels (FuelEU)[85], the EU Regulation on stricter CO2 performance standards for cars and vans[86], and the EU Directive promoting the use of energy from renewable resources[87]. In the appellate proceedings, it was thus evident that the respect of this group of EU measures already produces for Shell a significant reduction of CO2 emissions for scope 1, 2 and 3.

With reference to the EU Corporate Sustainability Reporting Directive (CSRD)[88], the Court underlined that it requires larger companies to prepare a sustainability report where those companies ensure that their business model and strategy are compatible "with the transition to a sustainable economy and with the limiting of global warming to 1,5 °C in line with the Paris Agreement and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119"[89], i.e. the EU Climate Law[90]. Likewise, when describing the EU Corporate Sustainability Due Diligence Directive[91], it was stressed that it demanded the same reassurance, asking the targeted enterprises to adopt and implement a climate transition plan ensuring "through best efforts" that their business model and strategy are compatible with the Paris Agreement and in line with the purpose of the EU Climate Law[92]. The appellate judges put the accent on the fact that beyond Articles 1 and 22 of the CSDDD Directive, with the expression "through best efforts", also the text of its preamble reiterates the

[84] Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport (ReFuelEU Aviation), *OJEU* L, 2023/2405, 31.10.2023.
[85] Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport and amending Directive 2009/16/EC, *OJEU* L234/48, 22.9.2023.
[86] Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999, *OJEU* L111/1, 26.4.2023.
[87] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources and repealing Council Directive (EU) 2015/652, *OJEU* L, 2023/2413, 31.10.2023.
[88] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting *OJEU* L322/15, 16.12.2022.
[89] Article 29 a, para. 2, let. a), point iii), Consolidated sustainability reporting, of the EU CSRD.
[90] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulation (EC) No 401/2009 and Regulation (EU)2018/1999, *OJEU* L 243/1, 9.7.2021.
[91] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, *OJEC* L, 2024/1760, 5.7.2024.
[92] See Article 1, para. 1, let. c), and Article 22, para. 1 of the EU CSDDD.

flexibility of the foreseen requirements, as it declares that the latter "should be understood as an obligation of means and not of results" as the climate transition is complex and evolving, and thus it may happen that it "is no longer reasonable" to stick to previous GHG reduction targets[93].

Shell, falling under the scope of the recalled EU climate legislation, argued that no further obligation could be imposed on economic operators beyond the requirements established by ad hoc legislation. "According to Shell, decisions on reducing CO2 emissions belong to *the domain of the legislator* and not *the domain of the civil court*" because "[c]limate change and energy transition require *a balancing of interests* that *only the legislator can make*"[94]. The Court of Appeal had, therefore, also to consider whether legal duties of corporate responsibility in addressing climate change had to be limited only to those codified in climate legislation. It first observed that pursuant to this approach there would be "no room left for the civil court to rule that, on the basis of the social standard of care, there is an (additional) obligation for Shell to (further) reduce its CO2 emissions"[95]. The Court of Appeal then disagreed with Shell, considering that "[t]he measures taken by the legislator to reduce CO2 emissions are not exhaustive in and of themselves", and that neither the EU nor the Dutch legislator "has stipulated that companies that comply with existing schemes to combat climate change no longer have obligations to further reduce their CO2 emissions"[96]. In fact, the *ratio* of the considered EU legislation, in the view of the appellate judges, is that "companies also have their own duty to reduce their emissions"[97]. It follows that "obligations arising from existing regulations do not preclude a duty of care based on the social standard of care on the part of individual companies to reduce their CO2 emissions"[98].

3. Shell obligations for scope 1 and 2 emissions

Having clarified that the Dutch duty of care involves a corporate responsibility going beyond the full respect by companies of the relevant legislation, the Court of Appeal entered the exam of the specific claim proposed by the civil society organizations, splitting its analysis of the alleged obligation for the company between the scope 1 and 2 emissions, and the scope 3 emissions of Shell. To clarify the technical aspects of the distinction in three different "scopes" of emissions, we may recall that, pursuant to the Greenhouse Gas

[93] See Recital 73 of the preamble of the EU CSDDD.
[94] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., cit., para. 7.52, emphasis added.
[95] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.28.
[96] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.53.
[97] *Ibid.*
[98] *Ibid.*

Protocol (GHG Protocol), the recognized global standard for measuring, managing and reporting climate-warming emissions,[99] scope 1 emissions are attributable to the production facilities of an enterprise, i.e. the direct CO2 emissions produced from sources that an economic operator owns or controls. Instead, scope 2 emissions refer to indirect emissions produced by the third-party installations giving energy, heat or steam for the functioning of an industry, also occurring in locations other than those of use, but still attributable to the responsibility of the industry in question as the end user. Finally, scope 3 emissions, representing around 95% of the company's releases[100], are those produced by the customers (both businesses and consumers) of an enterprise when using or consuming a product or service supplied by that company[101].

Regarding the claim of Milieudefensie et al. for Shell scope 1 and 2 emissions, it was highlighted that Shell had set itself the ambitious target of a 50% reduction by 2030 compared to 2016 levels, and that, by the end of 2023, the energy company had already achieved a 31% reduction, a highly concrete and important result. The Dutch NGOs admitted that "a 50% reduction of scope 1 and 2 emissions by the end of 2030 compared to 2016 corresponds to a 48% reduction of scope 1 and 2 emissions by the end of 2030 relative to 2019"[102], i.e. a result higher than the request by the civil society organizations (a 45% reduction of scope 1 and 2 emissions using as baseline the year 2019). The Court of Appeal therefore recalled that "[t]he granting of an order aimed at preventing a future violation of standards requires the existence of a threatening violation of a legal obligation"[103]. Since Shell respected its business plan pursuant to the most recent data of the year 2023 -a plan presented to the investors and the public during the Capital Markets Day in June 2023 and in its Energy Transition Progress Report 2024, and recorded in the documents filed with the US Securities and Exchange Commission (SEC)- the appellate judges concluded that there was no evidence to suggest that Shell would have deviated from its goal, stated both at public and institutional level[104]: "an impending violation of a legal obligation has … not been established", and thus, "[t]o that extent, the claim of Milieudefensie et al. cannot be granted"[105].

[99] Ghg Protocol, About us, GHG Protocol https://ghgprotocol.org/about-us.
[100] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 3.24.
[101] See GHG Protocol, *Technical Guidance for Calculating Scope 3 Emissions*, World Resources Institute & World Business Council for Sustainable Development, 2013, available at https://ghgprotocol.org/scope-3-calculation-guidance-2.
[102] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.64.
[103] *Ibid.*
[104] See Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*) cit., para. 7.65.
[105] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.66.

4. Shell obligations for scope 3 emissions

The Dutch NGOs asked the appellate judges to order Shell to reduce its scope 3 emissions, representing around 95% of the company's releases[106], cutting them by 45% by 2030 compared to 2019 levels, or alternatively by 35% or 25%. The civil society organizations drew the proposed percentages for scope 3 emissions from widely known scientific reports providing analysis on how to reduce fossil emissions to meet the Paris Agreement goals, *inter alia* the IPCC reports[107] and the IEA reports[108]. However, the Court concluded that those texts did not offer a sectoral standard for oil and gas companies, and that "no sufficiently unequivocal conclusion can be drawn from all these sources regarding the required reduction in emissions from the combustion of oil and gas on which to base an order by the civil courts against a specific company"[109]. Although the lack of scientific consensus and the available data impeded the recognition of the existence of an effective obligation for Shell to reduce its scope 3 emissions, not providing "the court with sufficient support to oblige Shell to reduce its CO2 emissions by a certain percentage in 2030", it is to be emphasized that the Court reiterated Shell's general responsibility "to do its part in combating dangerous climate change"[110].

Furthermore, the appellate judges underlined that ordering Shell to reduce its scope 3 emissions could be ineffective because other companies could replace Shell in selling fossil fuels[111], a scenario which "might prevent an overall

[106] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 3.24.
[107] The relevant parts of the IPCC reports recalled by the Dutch NGOs are reported at paras. 3.8 and 3.9 of the appellate ruling. They are IPCC, 2018, *Summary for Policymakers*, in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3-24; and IPPC, 2023, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland.
[108] The IEA reports recalled by Milieudefensie et al. are considered at para. 3.11 of the appellate judgment. They are IEA, *2019 World Energy Outlook*; IEA, *2020 World Energy Outlook*; IEA, *Net Zero by 2050 - A Roadmap for the Global Energy Sector*, October 2021; IEA, *Net Zero Roadmap - A Global Pathway to Keep the 1.5oC Goal in Reach – 2023 Update*, Revised Version of November 2024.
[109] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.91.
[110] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.96.
[111] See in particular Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.106.

emissions reduction"[112]. The Appeal Court hence decided to dismiss the claims of the Dutch NGOs also on the basis of these "effectiveness" and "market substitution" arguments: the plaintiffs, in fact, could not have standing because their claim, if admitted, would not have provided an effective remedy[113].

5. The *obiter dictum* on the lack of coherence of new oil and gas investments with the Paris Agreement

As analyzed, the Court of Appeal was asked by the Dutch NGOs to establish whether an obligation could be imposed on Shell to reduce its scope 1, 2 and 3 emissions for a specific percentage starting from a particular baseline. Milieudefensie et al. also discussed Shell's planned investments in new oil and gas fields, arguing that, by so doing, the energy company failed to contribute to the achievement of the Paris Agreement goals, particularly because of the so-called "carbon lock-in" effect. In fact, exploring, extracting, producing, transporting and distributing fossil fuels require very important initial investments, which have a long payback period, incentivizing "to keep using this infrastructure [and thus fossil energy] for as long as possible"[114], hence delaying the transition to cleaner energy systems. Although the appellate judges did not make a ruling on this issue, as it was not part of the claim addressed to them by the NGOs, they nonetheless provided a set of considerations which have been commented on by experts as paving the way to a new line of climate disputes[115]. The Court of Appeal, in fact, remarked that as "[t]o keep the climate goals of the Paris Agreement within reach, emissions will have to be drastically reduced by 2030", it is "plausible that this will require not only taking *measures to reduce demand for fossil fuels but also limiting the supply* of fossil fuels"[116]. Therefore, "[i]t is reasonable to expect oil and gas companies to take into account the negative consequences of a further expansion of the supply of fossil fuels for the energy transition also when investing in the production of fossil fuels"[117].

[112] Bengt JOHANNSEN, Louis J. KOTZÉ, Chiara MACCHI, *An Empty Victory?* Shell v. Milieudefensie *et al 2024, the Legal Obligations of Carbon Majors, and the Prospects for Future Climate Litigation Action*, cit., at. p. 7.
[113] See Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.110.
[114] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.59.
[115] See the authors quoted *supra* in footnote 27.
[116] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.61, emphasis added.
[117] *Ibid.*

6. Conclusions

In our view, the Shell appellate ruling is a significant and balanced decision. It asserts that "there can be no doubt that protection from dangerous climate change is a human right"[118], and emphasizes the need for stakeholders to do their part in the fight against global warming.

In fact, actors filing a complaint to request a company to go beyond, in its transition climate plan, what the relevant legislation establishes have to submit, in the proceedings, detailed and sounding scientific evidence and standards[119].

Enterprises have to be fully coherent with the codes of corporate social responsibility they adhere to, and concur to shape and develop, even if those codes are formally voluntary. Soft law sources of CSR, utilized by the Court of Appeal to inform its judgment, enhance their normative quality, despite being formally qualified as non-binding tools[120]. The strategic plans and business choices of enterprises have to be convincingly solid, updated and competent, and mirror the values expressed by international climate change law (in particular, the Paris Agreement), international human rights law, the CSR codes, and the regional or domestic legislation applicable to their activities[121]. Far from concluding that, in the absence of specific obligations or standards, a large emitter company like Shell cannot be held accountable for further engaging to contrast global warming, the Court determined that beyond adhering to relevant legislation, such type of company bears a responsibility to actively participate in the fight against climate change. This responsibility is proportional to their level of emissions -and thus their capacity to reduce them- as long as there is scientific consensus[122] on sufficiently case-specific standards[123]: "companies also have an obligation to contribute to the mitigation of dangerous climate change … [m]ore can be expected of Shell than of most other companies, as Shell has been a major player in the fossil fuel market for over 100 years and … it continues to occupy a prominent position in that market today"[124]. Having thus concluded that Shell-like companies have a special responsibility, the Court of Appeal has nevertheless ruled very clearly that from the general standard for a global reduction pathway supported by the scientific reports recalled by Milieudefensie

[118] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.17.
[119] See in particular the discussion concerning Shell scope 3 emission, Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., paras. 7.67 – 7.111.
[120] On these aspects cf. Robert MCCORQUODALE, *Business and Human Rights*, Oxford, 2024, pp. 42-47.
[121] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., paras. 7.6-7.54.
[122] See Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., paras. 7.67 – 7.111.
[123] See Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.75.
[124] *Ibid.*

et al. (suggesting a 45% reduction by 2030) it cannot be determined "what specific reduction obligation applies to Shell"[125].

Last but not least, the appellate judges recalled that States have the right, and the duty, to regulate at the domestic level and to discuss and engage at the international level to achieve coordination and possibly common rules to effectively contrast global warming[126]. Otherwise, ordering a company to observe strict environmental limitations in its activities, while its competitors do not, creates an uneven playing field and fails to effectively address the challenge of global warming[127]. Any judicial decision, by its very nature, is limited by and to the specific case it has to decide. However, global issues such as climate change require a broader perspective driven by political action for an appropriate and lasting resolution. Therefore, the political-normative dimension is essential for adequately governing the phenomenon of global warming.

Yet, the Shell appellate ruling is not the end of the story. In fact, on 11 February 2025, Milieudefensie made public its decision to take the case to the Dutch Supreme Court[128]. A final ruling could then arrive in 2026[129]. It will be interesting to see whether and how the November 2024 judgment will be revisited.

We are in a highly evolving and changing fluid context. In front of the ICJ is pending the request for an advisory opinion on the "Obligations of States in respect of Climate Change"[130], which might also consider how states should regulate the conduct of private actors in order to achieve global climate goals[131]. At the same time, the European Union is revising its highly demanding Green Deal legislation, considering postponing and restricting the scope of application of some of its measures[132], while the United States withdrew for the second time

[125] Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.73.
[126] "It is primarily up to legislators and governments to take measures to minimise dangerous climate change", Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.17. See *supra* paragraph 2.1.
[127] See Gerechtshof Den Haag 12 November 2024, *Shell Plc/Milieudefensie et al*, cit., para. 7.106, and *supra* paragraph 4.
[128] Milieudefensie, *Why We're Taking our Shell Climate Case to the Supreme Court*, 11 February 2024, press release available at https://en.milieudefensie.nl/news/why-we2019re-taking-our-shell-climate-case-to-the-supreme-court.
[129] Dana DRUGMAND, *Landmark Climate Case Against Shell Goes To Dutch Supreme Court*, *Climate in the Courts*, 13.2.2025.
[130] See *supra* footnote 6.
[131] On these aspects see Monika FEIGERLOVÁ, *Klimatická změna a obchodní společnosti …*, cit.
[132] See the so-called "Omnibus Package" presented by the European Commission in February 2025 (Press Release, *Commission Proposes to Cut Red Tape and Simplify Business Environment*, Brussels, 26.2.2025), composed also by COM(2025) 80, *Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements*, Brussels, 26.2.2025; and COM(2025) 81, *Proposal for a Directive of the European Parliament and of the Council amending Directives*

from the Paris Agreement[133] and retracted its support from the UN 2030 Agenda[134]. The hope is expressed that all the institutional and private actors, civil society and science based on doubt more harmoniously work together to face one of the most complex issues of our time, offering the perspective and method of constant and constructive political discussions beyond the dimension of litigation.

2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, Brussels, 26.2.2025.

[133] United Nations, Paris Agreement, Paris 12 December 2015, *United States of America: Withdrawal*, 27.1.2025, C.N.71.2025.TREATIES-XXVII.7.d.

[134] United States Mission to the United Nations, *Remarks at the UN Meeting entitled 58th Plenary Meeting of the General Assembly*, 4.3.2025.

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