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Contents

Case Notes

Focus Section on EFILA

Book Reviews

CHAPTER 2

The European Union's Proposed Amendments to Article 10(1) of the ECT: Advancing or Undermining Its Ambitions for the Green Transition?

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Abstract

This article considers the European Union (EU)'s proposed amendments to Article 10(1) (the fair and equitable treatment (FET) standard) of the Energy Charter Treaty (ECT), put forward in the context of the on-going 'modernisation' process of that treaty. The amendments proposed by the EU (which have now been agreed upon in principle by the Contracting Parties to the ECT) seek to narrow the current open-ended definition of the FET standard, and therefore may be seen to limit investor protection. This, in turn, may undermine the confidence of investors looking to invest in the EU at a time when billions of Euros in investment is required to power the green transition and meet the EU's climate change objectives. This article considers whether the EU's proposal to amend Article 10(1) of the ECT may be considered to advance or undermine those objectives.

1 Introduction

The EU has proposed extensive amendments to the ECT in the context of the on-going 'modernisation' process. These include a proposal to delete the current open-ended wording of the FET standard in Article 10(1) of the ECT in its entirety and to replace it with a closed list of five measures that will be considered to "constitute" a breach of the FET provision (EU Proposal). The EU Proposal also seeks to narrow the protection of investor's legitimate expectations offered in Article 10(1). With a communication published on 24 June

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2022 by the Energy Charter Secretariat, it has now been announced that the Contracting Parties of the ECT have indeed reached an agreement in principle on the EU Proposal. This means that, subject to completion of an editorial and legal review, the draft text of the treaty (including the EU Proposal) will be communicated to the Contracting Parties by 22 August 2022 for adoption by the Energy Charter Conference on 22 November 2022.[1]

This article considers what, specifically, the EU Proposal with respect to Article 10(1) entails. It then compares the EU Proposal to recent ECT jurisprudence in the context of cases brought against EU Member States relating to changes in their renewable's regimes over the past decade or so. Mindful of the European Commission's (EC) ECT-modernisation-objectives to promote a "high level" of investment protection and advance the green transition (as discussed below), we consider whether these objectives are achieved in light of the EU's Proposal.

2 The European Union's Proposed Amendments to Article 10(1) of the ECT

The 'modernisation' process of the ECT began in 2017. In October 2019, the Energy Charter Conference approved suggested policy options for the modernisation of the ECT, submitted by certain of the Contracting Parties.[2] Those included options proposed by the EU through the EC.[3] The EU's general principles and objectives for a modernised ECT are (amongst others): "to facilitate investment in the energy sector in a sustainable way [...] by creating a coherent and up-to-date legally binding framework that provides for legal certainty and ensures a *high level* of investment protection while respecting the ect Contracting Parties' right to regulate".[4]

Further, the ECT "should reflect climate change and clean energy transition goals and contribute to the achievement of the objectives of the Paris

1 Energy Charter Conference Decision, *Public Communication Explaining the Main Changes Contained in the Agreement In Principle* (CCDEC 2022 10 GEN, 24 June 2022) https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf accessed on 24 June 2022.

2 Energy Charter Conference Decision, *Adoption by Correspondence – Policy Options for Modernisation of the ECT* (CCDEC 2019 08 STR, 6 October 2019) https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf accessed on 1 June 2022.

3 As mentioned above, these have now been agreed in principle by the Contracting Parties of the treaty – *see* note 1.

4 ibid, p 2. (emphasis added).

Agreement".[5] For context, the EC proposes to cut greenhouse gas emissions by at least 55% from 1990 levels by 2030 as part of its "European Green Deal"[6] and, over the long-term, the EU aims to be climate-neutral by 2050 – that is, an economy with net-zero greenhouse gas emissions.[7] This is in line with the EU's commitment to global climate action under the Paris Agreement.

With those modernisation-objectives in mind – in short, creating a framework that (i) provides for legal certainty and (ii) advances the green energy transition – the EU has proposed[8] deleting the current Article 10(1) of the ECT in its entirety and replacing it with the following text:

> (1) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities and to Investors of other Contracting Parties with respect to such Investments fair and equitable treatment and the most constant protection and security in accordance with sub-paragraphs (i) to (iv).
> (i) A Contracting Party breaches the obligation of fair and equitable treatment referenced above through measures or series or [sic] measures that constitute:
> (a) denial of justice in criminal, civil or administrative proceedings; or
> (b) fundamental breach of due process, including a fundamental breach of transparency in judicial and administrative proceedings; or
> (c) manifest arbitrariness; or
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
> (e) abusive treatment such as harassment, duress or coercion.
> (ii) When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Contracting Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, upon which the

5 ibid, p 2.

6 *See* European Commission, *2030 Climate Target Plan* https://ec.europa.eu/clima/eu-action/european-green-deal/2030-climate-target-plan_en#:~:text=With%20the%202030%20Climate%20Target,below%201990%20levels%20by%202030. accessed on 1 June 2022.

7 *See* European Commission, *2050 long-term strategy* https://ec.europa.eu/clima/eu-action/climate-strategies-targets/2050-long-term-strategy_en accessed on 1 June 2022.

8 *See* EU text proposal for the modernisation of the Energy Charter Treaty (ECT) (19 May 2020) https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf accessed on 1 June 2022.

> investor relied in deciding to make or maintain the covered investment, but that the Contracting Party subsequently frustrated.[9] (EU Proposal).

The EU Proposal represents a significant narrowing of the existing Article 10(1) FET standard. The current Article 10(1) does not define what the standard entails and is open-ended; whereas the EU Proposal introduces a closed list of five measures that will be considered to "constitute" a breach of the FET provision.

Furthermore, the EU Proposal removes the possibility of an investor invoking frustration of its legitimate expectations as a stand-alone element of FET (as has generally been interpreted). Instead, it provides that such expectations "may be taken into account" by a tribunal in considering the closed list of measures listed in (a) to (e) in sub-paragraph (i), and only if: (i) there was a "specific representation", (ii) to an investor; (iii) to induce a covered investment, upon which the investor relied in deciding to make or maintain the covered investment.

The EU Proposal for the ECT largely follows the standard of treatment wording of free trade agreements concluded by the EU in recent years, including the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the EU-Singapore Investment Protection Agreement.[10]

3 A Closed List of FET Breaches

Similar to other 'old generation' investment treaties, the FET standard in the ECT, as it currently stands, is open-ended and undefined. That being the case, it is by far the most invoked provision in investor-State disputes (ISD), with claimants alleging a violation of FET in over 80% of known ISD cases according to a recent UNCTAD report.[11] Over the years, with an aim to clarify the contours of the protection offered, numerous investment tribunals have attempted to

9 ibid.

10 *See* Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 14 January 2017, OJEU L 11/23, Article 8.10, paras (1), (2) and (4); Investment Protection Agreement Between The European Union And Its Member States, Of The One Part, And The Republic Of Singapore, Of The Other Part, Brussels, 18 April 2018, COM(2018) 194, Article 2.4.

11 UNCTAD, *International Investment Agreements Reform Accelerator* (UNCTAD/DIAE/PCB/INF/2020/8, 12 November 2020) https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf accessed on 1 June 2022.

identify concrete principles encompassed by the standard. Broadly speaking, tribunals have found that it includes a host State's obligation to act transparently and in good faith, in a manner that is not arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process.[12]

An investor's 'legitimate expectations' have also been recognised as a core element of the FET standard[13]; with regulatory stability considered to be another (linked but often separate) element.[14]

12 *See Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008, para 609 https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf accessed on 1 June 2022; *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para 154 https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf accessed on 1 June 2022 (*Tecmed*); *Saluka Investments B.V. v Czech Republic*, UNCITRAL, Partial Award, 17 March 2016, paras 307–309 https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf accessed on 1 June 2022.

13 Its meaning is often traced back to *Tecmed* para 154: "The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations".

14 *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para 340 https://www.italaw.com/sites/default/files/case-documents/ita0256.pdf accessed on 1 June 2022: "[t]he stability of the legal and business environment is directly linked to the investor's justified expectations"; see also *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras 274–76, 284 https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf accessed on 1 June 2022: "[t]here can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment" and "the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law"); *OAO Tatneft v Ukraine*, UNCITRAL, PCA Case No. 2008-8, Award on the Merits, 29 July 2014, para 407 https://www.italaw.com/sites/default/files/case-documents/italaw8622.pdf accessed on 1 June 2022: "[a] predictable, consistent and stable legal framework is a FET requirement which ought to be safeguarded in its integrity irrespective of which organ of the State might compromise its availability as is well recognized under international law in the context of attribution of wrongful acts"; *Occidental Exploration and Production Company v Republic of Ecuador*, UNCITRAL, LCIA Case No. UN 3467, Final Award, 1 July 2004, paras 183, 191 https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf accessed on 1 June 2022, noting that the question at issue with respect to the alleged breach of FET was "whether the legal and business framework meets the requirements of stability and predictability under international law" and further concluding that "there is certainly an obligation not

In recent years, there have been calls (within and outside the ECT framework) for reforms to address the tension in the 'old generation' treaties between providing sufficient security to investors and ensuring host States' right to regulate in the public interest (for instance, to meet environmental or public health policy objectives) is not unduly limited. Some States have voiced concerns that unqualified, broad obligations, such as the FET protection in the ECT, have meant that tribunals were inclined to adopt expansive interpretations leading to frequent findings of State responsibility. This, it has been argued, has the potential to hamper the ability of States to regulate responsively to meet escalating global challenges (including regulating to address climate change), a tendency often referred to as "regulatory chill".

However, the EU Proposal appears to be mostly aimed at narrowing the scope of the FET standard to avoid over-expansive interpretations, rather than to make the ECT 'greener'. On the whole, the two most striking features of the EU Proposal are that: (i) it allows for only a very circumscribed set of specific measures to "constitute" an FET breach, which can only be found if certain high thresholds for breach are met; and (ii) it removes respect for legitimate expectations as a stand-alone obligation under the FET standard. Given that the notion of 'legitimate expectations' has been successfully invoked by renewable energy investors challenging the elimination of incentives for renewable energy investments against a few EU Member States in recent years (such as Spain, Italy and the Czech Republic), it seems the EU Proposal wishes to curb the proliferation of such cases as part of the wider ECT 'modernisation' project. It does so, even if it means that investors looking to invest in green technologies within the EU going forward are ultimately left with weaker investment protection under the ECT. This is against the backdrop of the EU's "Green Deal", which contemplates billions of Euros in investment over the next decade[15] in

to alter the legal and business environment in which the investment has been made"; *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para 284 https://www.italaw.com/sites/default/files/case-documents/ita0453.pdf accessed on 1 June 2022, identifying one of the factors of determining a breach of FET as "whether the State has failed to offer a stable and predictable legal framework"); *BG Group Plc. v The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, para 307 https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf accessed on 1 June 2022, finding that Argentina's alteration of the legal and business environment "violated the principles of stability and predictability inherent to the standard of fair and equitable treatment".

15 *See* European Commission, *A European Green Deal* https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en accessed on 1 June 2022.

order to reach its long-term goal of no net emissions of greenhouse gases by 2050, referred to above.

Leaving aside the proposed approach for legitimate expectations (addressed further in Section 4 below) and starting with the closed list of five measures that the EU considers should be captured by the FET protection, the strict qualifiers introduced for these are notable. In the EU's view, only "fundamental", "manifest", "targeted" and "abusive" violations should lead to a finding of breach of the FET standard going forward, even under the few limited circumstances that are accepted to "constitute" a FET breach. With these proposals, the EU appears to advocate for a FET protection that is even more limited than the more stringent and demanding minimum standard of treatment granted for aliens under customary international law, which goes against the approach taken in the vast majority of ECT tribunal decisions to date.

For example, with respect to measures in the proposed paragraph 1(i)(a) and (b), whilst denial of justice is preserved as an element of the FET standard, it is proposed that the customary international law standard of denial of justice is adopted.[16] Hence, both procedural and substantive denials of justice are technically captured within the scope of the protection, as recognised under customary international law.[17] That said, with respect to procedural denials of justice addressed specifically in sub-paragraph (b) of the EU Proposal, it is only a "fundamental breach of due process in judicial and administrative proceedings" that should incur liability in the EU's view.

Presumably, and guided by interpretations of ICSID annulment committees of Article 52 of the ICSID Convention referencing "fundamental rules of procedure" in a similar fashion, only rules "of natural justice – rules concerned with the essential fairness of the proceeding" – must be meant by "fundamental breaches" here. That is, violations infringing on an investor's right to be heard before an independent and impartial judicial/administrative body; or to state its claim or its defence and to produce all arguments and evidence in support

16 This is evident from the formulation suggested, being "denial of justice in criminal, civil or administrative proceedings"; *see* FV García-Amador et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Oceana publications, 1974) 180.

17 See AV Freeman, 'The International Responsibility of States for Denial of Justice' 309 (Kraus Reprint Co. 1970) (1938): "Steady international practice … as well as the overwhelming preponderance of legal authority, recognises that not only flagrant procedural irregularities and deficiencies may justify diplomatic complaint, but also gross defects in the substance of the judgement itself".

of it; or its right to have a meaningful deliberation/consideration of its claim/application in judicial and administrative proceedings.[18]

In that respect, the *Waste Management II* tribunal's formulation of denial of justice as "a lack of due process leading to an outcome which offends judicial propriety – as might be the case with *a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in administrative process*"[19] could be the inspiration for the current EU Proposal.

As it will be recalled, it was the *Waste Management II* tribunal, amongst others,[20] which attempted to consolidate the 1926 *Neer v Mexico* formulation of minimum standard of treatment of aliens under customary international law with the FET standard referenced in NAFTA Article 1105(1) expressed as "minimum standard of treatment".[21] The current Article 10(1) ECT, of course, does not reference customary international law standards, which has led ECT tribunals considering the provision to adopt a broader interpretation of the FET standard for the ECT than that exists under customary international law.

Likewise, with respect to the "manifest arbitrariness" breach addressed in sub-paragraph(c), the EU Proposal again seems inspired by the customary international law minimum standard of treatment, which has been subject of many debates within the scope of NAFTA cases. Whilst some tribunals such as *Waste Management II* and *Tecmed* have taken a more flexible approach when interpreting NAFTA's Article 1105 FET provision referencing "minimum standard of treatment", the *Glamis Gold* tribunal took a more cautious view – edging

18 *CDC Group plc v Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para 49 https://www.italaw.com/sites/default/files/case-documents/italaw6344.pdf accessed on 1 June 2022; *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, 1 February 2016, paras 308–309 https://www.italaw.com/sites/default/files/case-documents/italaw7084.pdf accessed on 1 June 2022; *Venoklim Holding B.V. v Venezuela*, ICSID Case No. ARB/12/22, Decision on Annulment, 2 February 2018, para 213 https://www.italaw.com/sites/default/files/case-documents/italaw9488.pdf accessed on 1 June 2022. (*Waste Management II*).

19 *See Waste Management, Inc. v. United Mexican States* (*"Number 2"*), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para 98 https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf accessed on 1 June 2022 (emphasis added).

20 ibid.

21 NAFTA, the North American Free Trade Agreement: A Guide to Customs Procedures (Washington, 1994), Article 1105 (1): "Article 1105: *Minimum Standard of Treatment* 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".; see also *L. F. H. Neer and Pauline Neer* (*U.S.A.*) *v United Mexican States*, Decision, 15 October 1926 https://jusmundi.com/en/document/decision/en-neer-and-neer-u-s-a-v-united-mexican-states-award-friday-15th-october-1926#decision_2583 accessed on 1 June 2022. (*Neer v Mexico*).

towards a higher threshold for liability (as described below), which the EU Proposal now wishes to incorporate into the ECT:

> It therefore appears that, although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, *manifest arbitrariness*, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105(1). … The standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer*; it is entirely possible, however that, as an international community, we may be shocked by State actions now that did not offend us previously.[22]

As to the suggestion that the host ECT State's "arbitrariness" should also be "manifest" for a finding of breach under sub-paragraph (c), the term "manifest" has been interpreted in numerous investor-State cases so far[23] and there is a consistent understanding that "manifest" means "self-evident", "clear", "plain on its face", "without need for an extensive analysis", and "not susceptible of argument 'one way or another'".[24] In other words, under the EU Proposal, it will no longer be possible to establish State liability solely on the basis of "capricious conduct" (founded on prejudice or preference rather than on a rational foundation) within the ordinary meaning of the word "arbitrary" as interpreted in FET cases so far.[25] Instead, under the EU Proposal, such conduct will need

22 *Glamis Gold, Ltd. v The United States of America*, UNCITRAL, Award, 8 June 2009, paras 616, 627 https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf accessed on 1 June 2022. (*Glamis Gold*) (emphasis added).

23 Especially by ICSID annulment committees in their consideration of the "manifest" standard under Article 52 of the ICSID Convention for a finding of an excess of powers as a ground of annulment.

24 *CDC Group plc v Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para 41 https://www.italaw.com/sites/default/files/case-documents/italaw6344.pdf accessed on 1 June 2022.

25 See, amongst others, *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para 175 https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf accessed on 1 June 2022 (*Electrabel*); and *AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary*, ICSID Case No. ARB/

to have been "clear", "plain on its face" and "not susceptible of argument one way or another".

Moving on to the "targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief" covered in paragraph (d), the EU Proposal significantly departs from the unqualified FET protection in ECT Article 10, referring only to "discriminatory treatment", and which has been interpreted by ECT tribunals as requiring a showing of differential treatment in like circumstances without an objective justification.[26] The EU Proposal, however, goes further than that and only aims to protect investors from discrimination which is "targeted" (*i.e.* deliberate as opposed to being only discriminatory in effect) and only if such discrimination is premised on "manifestly wrongful grounds". In that respect, it is a far narrower standard than the standard applied by ECT tribunals taking a strict approach to "discriminatory treatment".[27]

With respect to the final breach on the EU Proposal's exhaustive list, *i.e.,* "abusive treatment of investors including coercion, duress and harassment" listed in paragraph 1(i)(e), and which usually manifests itself as unwarranted pressure, persecution, threats, intimidation and use of force against an investor for improper reasons such as political revenge or national prejudice,[28] the EU Proposal is not inimitable. A few ECT tribunals have already found a breach of the ECT Article 10 protection due to unreasonable and discriminatory measures that impaired on the management, use, enjoyment and disposal of investments on the basis of political intimidation, coercion and harassment.[29] As

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07/22, Award, 23 September 2010, paras 10.3.7 to 10.3.9 https://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf accessed on 1 June 2022 (*AES Summit*).

26 See, amongst others, *Electrabel* (n 25), para 175; *Cavalum SGPS, S.A. v Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, para 416 https://jusmundi.com/en/document/decision/en-cavalum-sgps-s-a-v-kingdom-of-spain-decision-on-jurisdiction-liability-and-directions-on-quantum-monday-31st-august-2020 June 2022 (*Cavalum*).

27 See, amongst others, *Electrabel* (n 25); *AES Summit* (n 25), para 10.3.53.

28 Abusive conduct can potentially take many forms, such as arresting or jailing of executives or personnel; threats of or initiation of criminal proceedings; deliberate imposition of unfounded tax assessments, criminal or other fines; arresting or seizing of physical assets, bank accounts and equity; interfering with, obstructing or preventing daily business operations; and deportation from the host State or refusal to extend documents that allow a foreigner to live and work in the host State.

29 See, amongst others, *Hulley Enterprises Limited* (*Cyprus*) *v Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, para 765 https://www.italaw.com/sites/default/files/case-documents/italaw3278.pdf accessed on 1 June 2022; *Yukos Capital Limited* (*formerly Yukos Capital SARL*) *v Russian Federation*, UNCITRAL (Geneva Tribunal), PCA Case No. 2013-31, Final Award, 23 July 2021, paras 384–385 https://www.italaw.com/sites/default/files/case-documents/italaw170073.pdf accessed on 1 June 2022.

such, unlike the other four breaches, this last breach on the EU list does not appear to limit the extent of the FET protection on its face, nor does it impose a higher bar than what currently exists in ECT jurisprudence.

Yet, what is clear from the brief analysis above is that the EU Proposal aims to incorporate a very high threshold for liability into the FET standard of the ECT, which outlaws only the most serious of breaches in an investor's treatment by an ECT host State. That may be considered at odds with the EC's stated objective to promote renewable energy and provide those investors with a *high level* of protection. At a time when the EC is pushing its Green Deal and seeking billions of Euros in investment in renewable technology, investors may not be instilled with much confidence by the EU's proposal – especially given the examples of EU Member States reneging on promises made specifically to induce investment in renewable energy over the past decade. What the EC seems to be saying (along with other ECT Contracting Parties now) is that, going forward, the ECT can only offer protection against the most egregious State conduct, which is immutable on its face, but nothing that falls any shorter of that.

Indeed, it is arguable that none of the approximately 70 ECT cases brought against several EU states in recent years (*i.e.,* Spain, Italy, and the Czech Republic) by renewable energy investors for breach of the FET provision would have succeeded on the basis of the EU Proposal's exhaustive list and the high thresholds proposed. As at the date of publication, ECT tribunals comprised of highly respected arbitrators found an FET breach under Article 10(1) in 30 of these cases[30] (bearing in mind that this total only includes *decided* cases for which this information is publicly available). When coupled with the confirmed stance of the EC and the Court of Justice of the European Union (CJEU)

Outside the ECT framework, other examples of tribunals that have found an FET breach due to abusive treatment include: *Saluka Investments B.V. v Czech Republic*, UNCITRAL, Partial Award, 17 March 2016, para 308 https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf accessed on 1 June 2022; *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, paras 179, 185–187, 190 and 193 https://www.italaw.com/sites/default/files/case-documents/ita0248_0.pdf accessed on 1 June 2022. See also *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, paras 284–5 https://www.italaw.com/sites/default/files/case-documents/ita0453.pdf accessed on 1 June 2022; *Rupert Joseph Binder v Czech Republic*, UNCITRAL, Final Award (redacted), 15 July 2011, para 447 https://www.italaw.com/sites/default/files/case-documents/italaw4179.pdf accessed on 1 June 2022; *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para 171 https://www.italaw.com/sites/default/files/case-documents/italaw8208_0.pdf accessed on 1 June 2022.

30 The figure only includes findings against EU Member States.

in recent years against the arbitrability of intra-EU disputes even within the ECT framework,[31] there is a concern that the EU Proposal will further undermine one of the EU's objectives for the ECT modernisation project: to address climate change and promote green energy.

These concerns are further amplified when the second limb of the EU Proposal, which we now turn to, is scrutinised in closer detail.

4 The EU's Proposal for Narrowing Legitimate Expectations

As mentioned above, the EU Proposal is removing the frustration of an investor's legitimate expectations as a stand-alone element of the FET standard, and only provides that such expectations "may be taken into account" by a tribunal in considering the closed list of measures listed in (a) to (e) in sub-paragraph (i), and only if: (i) there was a "specific representation", (ii) to an investor; (iii) to induce a covered investment, upon which the investor relied in deciding to make or maintain the covered investment.

Stated differently, it proposes the possibility to protect the legitimate expectations of investors (but does not guarantee they will be protected) only when they relate to the five specific measures captured in paragraph 1(i), i.e., those legitimate expectations that relate to the administration of justice in judicial and administrative proceedings, due process and transparency, lack of manifest

31 As the readers will recall, the CJEU has now confirmed in CJEU Case C-741/19 *Republic of Moldova v Komstroy* ECLI:EU:C:2021:655 (*Komstroy*) and CJEU Case C-109/20 *Republic of Poland v PL Holdings S.à.r.l.*, ECLI:EU:C:2021:875 (*PL Holdings*), that arbitration of intra-EU disputes between an EU Member State and an EU-based investor is against EU law. In *Komstroy*, the CJEU ruled that Article 26 of the ECT is not applicable to "intra-EU" disputes (being those between an EU-based investor and a Member State) as a matter of EU law. In *PL Holdings*, the CJEU ruled that Member States are also precluded from entering into *ad hoc* arbitration agreements with EU-based investors, where such agreements would replicate the content of an arbitration agreement in a BIT between Member States. Likewise, the EC has confirmed this view in, *inter alia*, *amicus curie* submissions before ECT tribunals. *See*, for example, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V.* (*formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.*) *v Kingdom of Spain*, ICSID Case No. ARB/13/31, Brief for the European Commission on Behalf of the European Union as Amicus Curiae in Support of the Kingdom of Spain, 17 September 2021 https://jusmundi.com/en/document/other/en-infrastructure-services-luxembourg-s-a-r-l-and-energia-termosolar-b-v-formerly-antin-infrastructure-services-luxembourg-s-a-r-l-and-antin-energia-termosolar-b-v-v-kingdom-of-spain-brief-for-the-european-commission-on-behalf-of-the-european-union-as-amicus-curiae-in-support-of-the-kingdom-of-spain-friday-17th-september-2021#other_document_21266 accessed on 1 June 2022.

arbitrariness, targeted discrimination, and abusive treatment. Otherwise, no protection is offered for investors' legitimate expectations that do not relate to any of these five specific measures, such as those which may arise with respect to the investment environment in a host State, such as a regulatory framework specifically designed to induce investment. This is a significant departure from the current protection under the ECT, and one which would have fundamentally impacted the ECT jurisprudence on FET to date if it was in effect.

To begin with, and considering only the European renewables cases in recent years, of the 29 tribunals that have found State responsibility granting over EUR 1 billion in aggregate compensation to investors, almost all did so on the basis of frustration of the investors' legitimate expectations with respect to the regulatory regime that was offered to them at the time of their investment.[32] None found a breach in respect of a legitimate expectation relating to EU's exhaustive list of breaches, i.e., those relating to the administration of justice in judicial and administrative proceedings, due process and transparency, lack of manifest arbitrariness, targeted discrimination, and abusive treatment. In other words, if the EU Proposal was in effect, none of the approximately 150 renewable energy investors would have been granted any compensation due to the fundamental changes to the regulatory regime retrospectively introduced by (for example) Spain, Italy and the Czech Republic after they had invested. This means that these EU Member States would have been able to escape liability when they reneged on the regulatory commitments they made when

32 Some tribunals, including in *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, para 583 https://www.italaw.com/sites/default/files/case-documents/italaw11282.pdf accessed on 1 June 2022 (*Hydro*) and *Cavalum* (n 26), para 217, also linked this to the related commitment of stability and predictability of the investment environment protected under the FET standard, whereas tribunals including in *Isolux Netherlands, BV v Kingdom of Spain*, SCC Case V2013/153, Final Award, 17 July 2016, para. 764 https://www.italaw.com/sites/default/files/case-documents/italaw9219.pdf accessed on 1 June 2022 (Isolux) and *Novenergia II – Energy & Environment* (*SCA*) (*Grand Duchy of Luxembourg*), *SICAR v Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018, paras 643, 646 https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf accessed on 1 June 2022 (*Novenergia*) considered that regulatory stability was nothing more than an illustration of the obligation to respect the legitimate expectations of the investor. See also *Foresight Luxembourg Solar 1 S. Á.R.l., et al. v Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018, para 356 https://jusmundi.com/en/document/decision/en-foresight-luxembourg-solar-1-s-a-r-l-et-al-v-kingdom-of-spain-final-award-wednesday-14th-november-2018 accessed on 1 June 2022 (*Greentech*).

attracting the renewable investors, commitments in reliance of which more than EUR 150 billion was invested in these States.[33]

It is true, however, that the approach of the ECT tribunals in renewables cases so far has not been entirely consistent as regards the legitimate expectations test. Generally speaking, whilst all required a representation by the State that the investor relied upon at the time of investment and which was subsequently revoked, they have not unanimously agreed what would constitute such "representation". Some (such as *9REN*,[34] *OperaFund*,[35] *Greentech*,[36] *ESPF*,[37] *Blusun*,[38] *Cube*,[39] and *JSW Solar*[40]) thought a generally applicable legislation deliberately implemented to attract investors in light of its object and purpose could represent a specific enough commitment which would give rise to legitimate expectations (but that such commitment was needed). Others

33 See, *inter alia*, 'Investments in clean energy in Spain from 2006 to 2009', Statista, 6 July 2021 https://www.statista.com/statistics/1253518/clean-energy-investments-spain/ accessed on 1 June 2022; 'New investment in clean energy in Italy from 2004 to 2017', Statista, 2 August 2021 https://www.statista.com/statistics/1253518/clean-energy-investments-spain/ accessed on 1 June 2022.

34 See *9REN Holding S.a.r.l v Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, para 257 https://www.italaw.com/sites/default/files/case-documents/italaw10565.pdf accessed on 1 June 2022 (*9REN*).

35 See *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, paras 483–485 https://jusmundi.com/en/document/decision/en-operafund-eco-invest-sicav-plc-and-schwab-holding-ag-v-kingdom-of-spain-none-currently-available-tuesday-11th-august-2015 accessed on 1 June 2022 (*OperaFund*).

36 See *Greentech* (n 30), para 530. According to the Greentech tribunal, "[e]xplicit promises or guarantees can be given in the legislative and regulatory framework of a state at the time an investor makes its investment when the purpose of that framework is to guarantee stability to investors upon which they can rely when deciding to invest".

37 See *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020, para 512 https://www.italaw.com/sites/default/files/case-documents/italaw11827.pdf accessed on 1 June 2022 (*ESPF*).

38 *See Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016, para 371 https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf accessed on 1 June 2022 (*Blusun*).

39 *See Cube Infrastructure Fund SICAV and others v Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, para 388 https://www.italaw.com/sites/default/files/case-documents/italaw10692.pdf accessed on 1 June 2022 (*Cube*).

40 *See Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar* (*zwei*) *GmbH & Co. KG v Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, para 372 https://www.italaw.com/sites/default/files/case-documents/italaw9498.pdf accessed on 1 June 2022 (*JSW Solar*).

(such as *Eiser*,[41] *Antin*,[42] *Novenergia*,[43] *NextEra*,[44] *PV Investors*,[45] and *Antaris*[46]) concluded that State liability could still ensue because a radical or fundamental change to the regulatory environment would frustrate an investor's legitimate expectations, even when one could not conclude that the State made a specific commitment to the investors in the said legislation. The latter group otherwise did not consider that an investor is shielded from regulatory changes unless the State has made a specific commitment to that effect, either in legislation or in bilateral relationships with the specific investor. Some tribunals following the latter approach (such as *Hydro* and *Antaris*) based their conclusion on the regulatory changes relied upon by the investor falling outside the "acceptable margin of change", even if they did not follow the "radical" or "fundamental change in the essential characteristics of the regulatory framework" formulation proposed by the earlier cases (such as *Eiser*, *Antin* or *Novenergia*).

Notwithstanding the nuances in the approaches of the ECT tribunals in European renewables cases, however, none of these cases could or would have been pursued in light of the EU Proposal's second limb. This is because, not only do they not arise out of the five specific breaches, but also because paragraph (1)(ii) of the EU Proposal seeks to limit representations to "specific representations" made to an investor to induce a covered investment, upon which the investor relied in deciding to make or maintain the covered investment. Thereby, the second limb of the EU Proposal excludes the possibility of reliance on a general regulatory framework in ECT Contracting States – no matter how targeted and specific such legislation may be in its object and purpose

41 See *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para 382 https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf accessed 1 June 2022 (*Eiser*).

42 See *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V.* (*formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.*) *v Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, para 532 https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf accessed on 1 June 2022 (*Antin*).

43 See *Novenergia* (n 32), para 654.

44 See *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, para 599 https://www.italaw.com/sites/default/files/case-documents/italaw10569.pdf accessed on 1 June 2022 (*NextEra*).

45 *The PV Investors v Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, para 580 https://www.italaw.com/sites/default/files/case-documents/italaw11250.pdf accessed on 1 June 2022 (*PV Investors*).

46 See *Antaris Solar GmbH and Dr. Michael Göde v Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, paras 360 https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf accessed on 1 June 2022 (*Antaris*).

– as the sole basis for a legitimate expectation claim. This is in contrast to the approach generally taken by ECT tribunals in renewables cases to date. Even those tribunals adhering to the more stringent standard of requiring a specific commitment from the State not to interfere with the regulatory environment, acknowledged that such commitment may be present in the legislation itself.[47] Ultimately, the EU Proposal effectively shields ECT Contracting States from investor claims even they radically change the regulatory regime created to attract investment in the first place. From an investor's perspective, this lack of legal protection and predictability may make investment potentially less attractive.

Given the recent agreement in principle on the EU Proposal by the ECT Contracting Parties, green investors may now not wish to invest at all or, at a minimum, require much higher returns for investing in the EU given the increased risks. This, of course, raises the cost of the green transition for EU taxpayers. These changes are also particularly significant as there is no equivalent FET protection to EU investors under EU law which permits such an investor to bring a claim against an EU Member State.

5 Conclusion

On the whole, the EU Proposal has the potential to undermine the EC's own stated objectives of promoting renewable energy investment and providing such investors with a *high level* of protection. Indeed, it appears that the EU has been pursuing two conflicting agendas with its proposal for the modernisation of the ECT: seeking to limit the protection of investors on the one hand, whilst desiring the achievement of its climate change policy goals (which inevitably requires the mobilisation of private investment) on the other. At a time when the CJEU has already sought to curtail the rights of investors to bring claims against EU Member States on the basis of the "intra-EU" objection (through its decisions in *Achmea*, *Komstroy* and *PL Holdings*), EU investors in particular – and including those looking to make investments in green technologies – may be wondering whether it is preferable to invest their capital elsewhere.

Of course, investment protection is just one factor in such a decision, but the EU's Proposal does not purport to send a signal of offering a "*high level*"

47 See notes 32 to 38 above, referencing *9REN*, *OperaFund*, *Greentech*, *ESPF*, *Blusun*, *Cube*, and *JSW Solar*.

of investor protection, when such protection may already be considered to have been undermined in the wake of changes to renewables-regulation by EU Member States, thus creating regulatory uncertainty.