THE ENERGY CHARTER TREATY CRISIS – OLD WINE IN A NEW BOTTLE

Harshad Pathak*

I. INTRODUCTION

The last week of November 2022 was pivotal to the intersection of a coordinated response to climate change and international dispute settlement. It witnessed three key developments.

Firstly, on 24 November 2022, the European Parliament passed a resolution calling on the European Commission to immediately begin the process of a coordinated exit from the Energy Charter Treaty, or the "ECT".[1]

Secondly, on 29 November 2022, a group of States, led by Vanuatu, circulated to all member States of the United Nations a draft resolution to request from the International Court of Justice ("**ICJ**") an advisory opinion on the obligations of States in respect of climate change.[2]

Thirdly, on 30 November 2022, the Hague District Court dismissed the compensation claims filed by three separate plaintiffs - RWE Eemshaven Holding II[3], RWE Generation NL BV,[4] and Uniper Benelux Holding BV and others[5] - stating that the Dutch coal phase-out legislation did not breach the plaintiffs' right to property in Article 1 of the First Protocol to the European Convention on Human Rights and Article 17 of the EU Charter of Fundamental Rights.[6]

On the face of it, each development– canvassing the distinct jurisdictions of an investment arbitration tribunal under the ECT, the ICJ, and the Hague District Court – appears unrelated to the other. However, closer scrutiny reveals a thematic nexus. Each development is ultimately a part of an overarching conversation about which fora may be appropriate, or acceptable to the

*Harshad Pathak is a Doctoral Candidate at the University of Genea, and a Consultant with Mayer Brown for their international arbitration practice. He can be reached at harshad.pathak@mids.ch All views expressed in the article are personal, and do not reflect the views of any organisation the author may be associated with.

[1] Toby Fisher, *EU parliament calls for ECT withdrawal*, GAR (24 November 2022).

[2] Vanuatu ICJ Initiative - Draft Resolution, available at < https://www.vanuatuicj.com/resolution>.

[3] *RWE Eemshaven Holding II v. The State of Netherlands*, Case No. C/09/608584 / HA ZA 21-244, District Court of The Hague, Judgment (30 November 2022).

[4] *RWE Generation NL BV v. The State of Netherlands*, Case No. C:/09/608588/HA ZA 21-245, District Court of The Hague, Judgment (30 November 2022).

[5] *Uniper Benelux Holding BV and others v. The State of Netherlands*, Case No. C/09/611221 / HA ZA 21/419, District Court of The Hague, Judgment (30 November 2022).

[6] Lisa Bohmer, *Dutch court declines RWE's and Uniper's damages claims prompted by the Netherlands' coal phase-out, seeing no violation of human rights instruments; parallel ICSID arbitrations remain suspended*, IA REPORTER (30 November 2022).

community of States, to decide disputes expected to arise from the measures adopted by a State to combat climate change. And at the heart of this conversation lies the fate of the ECT.

The ECT is a multilateral treaty that has been the subject of incessant controversy. Signed in December 1994, and in force since April 1998, the ECT establishes a legal framework to promote long-term cooperation in the field of energy, based on certain complementarities and mutual benefits, in accordance with the objectives and principles of the European Energy Charter.[7] This framework includes provisions for Investment Promotion and Protection,[8] any alleged breaches of which may be adjudicated by an investment arbitration tribunal if opted by the investor.[9] This includes claims advanced by foreign investors seeking compensation for measures adopted by the ECT contracting Parties to transition towards clean energy sources and to combat climate change by reducing their carbon emissions in accordance with the 2015 Paris Agreement.

This conflict between the investment protection standards in the ECT and the obligations in the 2015 Paris Agreement has raised legitimate concerns about the former's computability with the latter instrument. And since combating climate change is no longer an option, the existence of the ECT has been plunged into doubt. The attempts to modernise its text no longer appear to be adequate and several European States have announced their intention to withdraw from it altogether. It is this crisis that has engendered an intense debate about the role of international investment law and investment treaty arbitration in a post-climate change world.

It is unclear how this ECT crisis may eventually end; especially given that the proponents of the treaty continue to remain.[10] The objective of this article is not to speculate on such questions. Rather, this article aims to recharacterize the debate surrounding the ECT crisis through the lens of Critical Legal Studies ("**CLS**"), and bring the adjudicatory function of investment arbitration tribunals to the forefront of the discussion. CLS first emerged in the 1970s as a movement in legal theory representing a committed leftist political stance.[11] It put forth "another conception of

[7] Energy Charter Treaty, art. 2.
[8] Energy Charter Treaty, part III.
[9] Energy Charter Treaty, art. 26(2)-(3).
[10] Nikos Lavranos, *Energy Charter Treaty: Withdrawing is worse than signing up to reformed deal*, BORDERLEX (20 October 2022); Guillermo Garcia-Perrote, Ella Wisniewski, *European exodus from the ECT: politics and unintended consequences*, GAR (15 November 2022) 1.
[11] Alan Hunt, *'The Theory of Critical Legal Studies'*, [Vol. 6(1)] OXFORD JOURNAL OF LEGAL STUDIES 1 (1986) 1.

law […] that implies a view of society and informs a practice of politics."[12] In international law, the CLS movement has emerged under the label of New Approaches to International Law ("**NAIL**"),[13] which challenges the assumption that the rules and doctrines of international law are apolitical and their application is objective.

In a nutshell, the ECT crisis debate assumes that the disagreement between the proponents and critics of the ECT is confined to the text of the treaty. As a corollary, it is also assumed that a viable solution to this conflict requires one to examine whether the modernised text sufficiently addresses the incompatibilities between the ECT and the 2015 Paris Agreement. However, this characterization is, at best, incomplete, and at worst, a red-herring. This article argues that the ECT crisis is more appropriately viewed as an attempt by the contracting Parties to not only review the substantive standards of investor protection in the ECT, but also the jurisdiction of an investment arbitration tribunal to decide critical issues that impact the existence of the planet as we know it. It triggers a far more fundamental question – can the fate of the global response to climate change be left at the altar of investment arbitration tribunals?

Towards this end, this article endeavours to shift the emphasis from the text of the ECT to its application through arbitral decision-making. In this context, it argues that the adjudication of investor-state disputes essentially entails apolitical function in which the outcome of a case is not constrained by rules and doctrines. Instead, it is constrained by subjective value-judgments and political choices made by investment arbitrators based on their histories, experiences, and ideologies. Thus, a meaningful understanding of the ECT crisis must conform to this paradigm.

Part II of this article provides an overview of the ECT crisis, which forms the context for the subsequent analysis. Part III thereafter discusses how the rules and doctrines of law, including international investment law, denote the language through which political value-judgments are clothed with an appearance of objectivity. This analysis equally extends to the ECT crisis, which merely mirrors in a different context the increasing resistance by Global South states to investor-state arbitration. Part IV concludes.

[12] Roberto Unger, '*The Critical Legal Studies Movement',* [Vol. 96(3)] HARVARD LAW REVIEW 561 (1983) 563.
[13] Nigel Purvis, *'Critical Legal Studies in Public International Law'*, 32 HARVARD JOURNAL OF INTERNATIONAL LAW 81 (1991) 89.

II. THE ENERGY CHARTER TREATY CRISIS

The ECT is in crisis! Over the past decade, the contracting Parties to the ECT – especially Spain, Italy, and the Czech Republic – have faced several claims under the ECT made by foreign investors in relation to the State's measures for transitioning to clean energy sources. In many cases, investment arbitration tribunals have ruled in favour of the investor and awarded significant monetary compensation. This naturally encouraged other investors to also file similar claims for monetary compensation under the ECT, as opposed to the national courts of the host State. But at the same time, the increasing number of claims under the ECT, and its resultant application by investment arbitration tribunals, engendered apprehension about the objectives and impact of the treaty on the contracting Parties. One rightly questioned whether the ECT may eventually discourage the contracting Parties from adopting necessary measures relating to clean energy transition and reducing carbon emissions in accordance with the 2015 Paris Agreement.

The adoption of the 2015 Paris Agreement was a watershed moment to combat the threat of climate change. It also sparked legitimate concerns about its compatibility with the ECT. Article 2 of the Paris Agreement set a goal of limiting the increase in the global average temperature to well below 2 degrees Celsius, while simultaneously attempting to limit the increase to 1.5 degree Celsius.[14] The attainment of this goal would require all contracting Parties to adopt necessary measures that would adversely impact existing industries and investments. The recent COP27 UN Climate Change Conference in November 2022 reaffirmed this sentiment. The European Commission endeavoured to "push for the implementation of existing commitments to move from ambitious words to concrete actions"; being well-aware "that only the most drastic cuts in carbon emissions from now would help prevent an environmental disaster."[15] It is likely for this reason that the Preamble to the 2015 Paris Agreement itself recognizes that the "Parties may be affected not only by climate change, but also by the impacts of the measures taken in response to it."[16] But what could this impact be?

It did not take long for the ECT contracting Parties to foresee that this impact may arrive in the form of investment arbitration awards issued under the ECT, imposing significant monetary

[14] Paris Agreement, art. 2(1)(a).
[15] European Commission Press Release, *COP27: EU calls on all Parties to take concrete steps to limit global warming to 1.5°C and respect the Paris Agreement* (4 November 2022).
[16] Paris Agreement, Preamble.

liabilities on States that attempted to comply with their obligations under the Paris Agreement. Indeed, many of the "ECT contracting parties have implemented or will soon implement policy measures to phase out fossil fuels and alter their energy mix, as a step toward meeting their Net Zero targets and obligations under the [2015] Paris Agreement", which were "likely to affect investments associated with fossil-based energy sources, and thus may give rise to claims under the ECT's investor protections."[17]

Such fears were not misplaced. In 2021, the Netherlands received two claims under the ECT, by RWE[18] and Uniper,[19] which challenge the same 2019 Dutch law requiring a phase-out of all coal-based power plants by 2030 that was also considered by the Hague District Court. Though the ICSID arbitration proceedings have been currently stayed by a German court on account of certain jurisdictional constraints,[20] other similar claims under the ECT are expected to follow.

It is in these circumstances that in 2017, the ECT contracting Parties commenced a process to "modernise" the ECT. In June 2022, the contracting Parties "reached an agreement in principle, thus concluding the negotiations for a modernised ECT."[21] Yet, this was not the end of the road.

Independent organisations persistently questioned the adequacy of the modernisation of the treaty. For instance, in December 2020, a report published by a collective of independent policy think-tanks published a report that analysed the ECT and termed it "an antithesis to the Paris Agreement, allowing fossil fuel companies to sue countries over their climate policies rather than strengthening the global response to climate change."[22] Among other things, it was argued that (1) there was no evidence that the ECT attracted investment[23] or that its existence was an important factor for renewable energy investors;[24] (2) the national courts were a suitable forum

[17] Anja Ipp, Annette Magnusson and Andrina Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition* (Climate Change Counsel, 2022) p.13.
[18] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4 (introduced on 2 February 2021).
[19] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22 (introduced on 30 April 2021).
[20] Lisa Bohmer, *RWE v. Netherlands arbitration is suspended, pending appeal against German Anti-Arbitration Declaration*, IA REPORTER (15 November 2022).
[21] Energy Charter Secretariat, *Decision of the Energy Charter Conference* (24 June 2022).
[22] PowerShift, Corporate Europe Observatory, Transnational Institute, et al., *Busting the myths around the Energy Charter Treaty A guide for concerned citizens, activists, journalists and policymakers* (December 2020) 4.
[23] *Ibid* at p.10.
[24] *Ibid* at p.18.

to hold governments accountable;[25] (3) the envisaged modernisation is likely to merely result in "cosmetic changes";[26] and (4) a widespread opposition to investment treaties, in general, should not be overlooked.[27]

In 2022, the Climate Change Counsel, a Stockholm-based think tank, reviewed 64 (of the 75 known) arbitral awards rendered under the ECT prior to August 2021.[28] Among other things, it concluded that the fact that countries such as Spain and Italy have faced a significant number of investment claims under the ECT can create a regulatory chill, i.e., "a disincentive for states to pass bold energy transition policies."[29] Further, while the ECT contains provisions emphasizing sustainability, renewable energy, and coordination of energy policy, these "provisions have not played any significant role in investor-state disputes to date."[30] Likewise, it noted that "[d]espite the long-recognized connection between the energy sector and global warming, climate change and energy transition are generally absent from the ECT jurisprudence."[31]

In October 2022, the International Institute for Sustainable Development ("**IISD**") published its report analysing the proposed reform of the ECT and its modernised text.[32] It concluded that "the revised treaty has not, overall, succeeded in addressing major challenges for host states regulating in the public interest, including when taking climate action."[33] The report noted that, among other concerns, the modernised text continued to embrace broad investment protection standards with weak, limited carve-outs to shield public policy,[34] and did not even attempt a systemic reform of the investor-state dispute settlement framework[35] or the compensation and valuation standards and techniques.[36] The report termed the modernised ECT "an instrument that remains a serious obstacle to states' ambitions to limit global warming to 1.5°C."[37]

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[25] *Ibid* at pp.20-21.
[26] *Ibid* at pp.24-25.
[27] *Ibid* at pp.34-35.
[28] *Supra* note 17 at p.5.
[29] *Ibid* at p.34.
[30] *Ibid* at p.6.
[31] *Ibid* at p,6.
[32] Lukas Schaugg and Sarah Brewin, *Uncertain Climate Impact and Several Open Questions - An analysis of the proposed reform of the Energy Charter Treaty* (IISD, 2022).
[33] *Ibid* at p.3.
[34] *Ibid* at pp.3-4, pp.23-30.
[35] *Ibid* at p.4, pp.39-40.
[36] *Ibid* at p.4, pp.32-34.
[37] *Ibid* at p.41.

This independent criticism was fittingly accompanied by two awards issued under the ECT, namely *Rockhopper Exploration PLC and others v. Italian Republic*[38] and *Mathias Kruck and others v. Kingdom of Spain,*[39] which found the host State liable for breaches of the treaty. While the award on compensation in the latter case is awaited, in the former case, the tribunal directed Italy to compensate the investor to the extent of EUR 184 million along with a further sum towards the payment of costs and interests (pre- and post-award). At the very least, the timing of the awards did not assist the proponents of the ECT.

As a statement published by IISD noted:

> "*The growing number of withdrawal announcements follows widespread criticism of the reform proposals, which IISD analysis confirms leave too many open questions over the "modernized" ECT's climate impacts. Recent arbitration cases based on the existing treaty have only served to underscore the problems inherent in the ECT's design, such as the claims brought by energy giants RWE and Uniper against The Netherlands contesting the Dutch decision to phase out coal-fired power generation by 2030.*"[40]

In such circumstances, some ECT contracting Parties began to question the sufficiency of the modernisation attempts. They wondered if exiting the ECT may be a more effective solution to address climate change and clean energy transition concerns. Many of them titled towards the latter, with Poland, Spain, Belgium, France, Slovenia, the Netherlands, and Germany shortly announcing their intention to withdraw from the ECT.[41] Predictably on 22 November 2022, the contracting Parties to the ECT delayed their vote on whether to adopt a modernised version of the treaty due to a lack of consensus.[42] Mere two days later, the European Parliament passed a resolution, by 303 votes against 209, calling on the European Commission to immediately begin

[38] *Rockhopper Exploration PLC and others v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award (23 August 2022).
[39] *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum (14 September 2022).
[40] IISD Newsroom, *Energy Charter Treaty Withdrawal Announcements Reflect Reform Outcome is Insufficient for Climate Ambition* (IISD, 2022).
[41] Guillermo Garcia-Perrote and Ella Wisniewski, *European exodus from the ECT: politics and unintended consequences*, GAR (15 November 2022) 1.
[42] Jack Ballantyne, *ECT parties delay vote on treaty reform*, GAR (22 November 2022).

processing a coordinated exit from the ECT and to nullify its sunset clause providing for twenty years of post-exit application.[43]

For the time being, while the controversy surrounding the continuation of the ECT post its termination may persist, it appears that the demise of the ECT may be near. To then paraphrase a traditional proclamation - the ECT is dead, long live the ECT no more!

III. LAW AS THE LANGUAGE OF POLITICS

As previously foreshadowed, the ECT crisis is often reduced to assessing the compatibility between a modernised ECT and the 2015 Paris Agreement. It is described as a conflict between two international instruments and the values they embrace. This paves the way to hypothesize that this conflict can be harmoniously addressed by bringing the ECT in line with the 2015 Paris Agreement. And the fate of the ECT is ultimately determinable by the success of this attempted harmonisation or modernisation process. This approach is adopted not only by the proponents of the ECT, but is also visible in the criticism of the modernisation process.[44]

While the incompatibility of the text of the ECT and the 2015 Paris Agreement is relevant to the discourse surrounding the ECT crisis, it is hardly the whole of it. Rather, this discourse is incomplete until item braces the role of investment arbitration tribunals as decision-makers. The fundamental question is not about the compatibility of the substantive standards of investment protection in the ECT, but rather the extent of trust that can be placed in those who conventionally interpret and apply it to resolve investor-state disputes implicating the contracting Parties' policies to combat climate change. This is because the outcome of a case under the ECT, or any other investment treaty, is not necessarily constrained by the substantive provisions of a treaty, but rather the political choices and value-judgments made by an arbitral tribunal.

This assertion is appropriately explored through the lens of (A) CLS and the Indeterminacy Thesis, which permits (B) a Reformulation of the Energy Charter Treaty Crisis.

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[43] Toby Fisher, *EU parliament calls for ECT withdrawal*, GAR (24 November 2022).

[44] N. Bernasconi-Osterwalder and M.D. Brauch, *Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition*, TDM Special Issue on Modernisation of the ECT (2019); Aishwarya Nair and Lukas Schaugg, *The Reform That Isn't: Why the Reformed Energy Charter Treaty Threatens Climate Commitments,* VERFBLOG (18 November 2022); Martin Dietrich Brauch, *The Agreement in Principle on ECT "Modernization": A Botched Reform Attempt that Undermines Climate Action*, COLUMBIA CENTER ON SUSTAINABLE DEVELOPMENT BLOG (17 October 2022).

A. CLS, INDETERMINACY, AND FUNDAMENTAL CONTRADICTION

The regime of international investment law rests upon a twin-assumption: *firstly*, the rules of international investment law are apolitical; and *secondly*, these rules are sufficiently determinate such that they can be objectively applied by neutral decision-makers, or arbitrators, to constrain a singular correct outcome. These assumptions are, however, inaccurate, as demonstrated through a CLS-led critique.

In mainstream scholarship, the most popular claim advanced by CLS is that law is politics;[45] closely followed by its "indeterminacy" thesis which says that "rules are not on their own capable of providing a solution, as they are indeterminate."[46] However, though accurate, these aspects warrant further explanation.

At its core, CLS challenges the assumption "that some type of analysis provides a solution to problems of legal choice, policy choice, or social analysis by limiting the range of pure choice within which the analyst - judge, policy-maker, social scientist - operates."[47] And this challenge is based on the indeterminacy thesis, namely that legal rules and doctrines are indeterminate, or at least, not sufficiently determinate.[48]

Determinacy implies that a legal rule or doctrine, if applied correctly, would distinguish right from wrong in a specific case. While resolving any legal issue, it would constrain the decision-maker to reach a singular accurate outcome by eliminating all other available choices. Inversely, to claim "that a legal doctrine is indeterminate means that [it] allows choice rather than constraining or compelling it."[49] In other words, an indeterminate rule or doctrine "does not provide determinate answers or cover all conceivable situations."[50] It simply becomes the

[45] Andrea Bianchi, *International Law Theories* (OUP 2016) 135.
[46] *Id*.
[47] Mark Tushnet, 'Perspectives on Critical Legal Studies', [Vol. 52] THE GEORGE WASHINGTON LAW REVIEW 239 (1984) 239.
[48] Ken Kress, 'Legal Indeterminacy', [Vol. 77(22)] CALIFORNIA LAW REVIEW 283 (1989) 283.
[49] Joseph Singer, 'The Player and the Cards: Nihilism and Legal Theory' [Vol. 94(1)] THE YALE LAW JOURNAL 1 (1984) 11.
[50] J. Stuart Russel, 'The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy', 18 OTTAWA LAW REVIEW 1 (1986) 8.

language through which a decision-maker can imperfectly mediate between equal competing interests, neither of which is dominant, based on their own value judgments.[51]

The indeterminacy thesis, in turn, is based on the notion of fundamental contradiction. This notion understands that legal rules and doctrines are perforated with a pervasive contradiction between the sanctity of individual freedoms and a simultaneous need to preserve relations with others.[52] As such, the maintenance of social order was predicated on "a series of contradictory dualities and values", such as autonomy and community.[53] To put it differently, legal doctrines and rules are infused with "competing, and indeed irreconcilable, principles and ideals", such that to resolve this contradiction in a dispute, "the judge must make a choice which is not dictated by the law."[54] These choices are influenced by the historical experiences, ideologies, and values of a decision-maker; thereby, contradicting the claims of neutrality or objectivity in decision-making.[55] Consequently, the prevalence of fundamental contraction makes legal rules and doctrines inherently malleable, and incapable of being applied objectively and apolitically to constrain a singular correct outcome.[56] On the contrary, they are capable of being applied to justify a plurality of plausible outcomes, no matter how opposing they may appear.[57]

From this perspective, the concept of "[m]ediation between conflicting interests at best offers only a pragmatic response to social conflict which can achieve nothing other than a set of results which reflects the unequal distribution of power and resources whilst claiming to act in the name of a set of universal social values."[58] It is neither objective nor apolitical. This reveals legal reasoning and decision-making as a value-driven process that seamlessly "blends into political and ideological discourse."[59]

This analysis extends to the regime of international investment law and arbitration as well.

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[51] *Ibid,* at p.8.
[52] Duncan Kennedy, *'The Structure of Blackstone's Commentaries'* 28 BUFFALO LAW REVIEW 205 (1979) 213.
[53] J. Stuart Russel, *'The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy'* 18 OTTAWA LAW REVIEW 1 (1986) 10.
[54] Andrew Altman, '*Legal Realism, Critical Legal Studies, and Dworkin'* 15(3) PHILOSOPHY AND PUBLIC AFFAIRS 205 (1986) 217.
[55] Joseph Singer, '*The Player and the Cards: Nihilism and Legal Theory'* 94(1) THE YALE LAW JOURNAL 1 (1984) 5-6.
[56] *Supra* note 53 at p.18.
[57] *Supra* note 54 at p.209.
[58] Alan Hunt, *'The Theory of Critical Legal Studies'* 6(1) OXFORD JOURNAL OF LEGAL STUDIES 1 (1986) 5-6.
[59] *Ibid.*

The international investment law regime embraces a fundamental contradiction between two competing, but equal, values relating to individual and community interests. On the one hand, the framework of investment treaties and arbitration is designed to protect the property rights-based interests of a foreign investor. On the other hand, it also endeavours to avoid excessive interference with the sovereign autonomy of the host State to adopt public interest measures. This equality is logical. It emanates from the emphasis of investment treaties on the protection of foreign investment, balanced against the candid acknowledgment that "if the protection of the foreign investors were exaggerated, the host State might be dissuaded from admitting all foreign investors."[60]

Accordingly, an investment treaty denotes a negotiated balance between the two competing values, reached in the context of the politics of the global order. This is accepted by investment arbitration tribunals too. For instance, they rightly recognize that the ECT is "aimed at realizing a balance between the sovereign rights of the state over energy resources and the creation of a climate favorable to the flow of investments on the basis of market principles."[61] Further, this is not confined to the ECT, but instead denotes a more general principle that "the protection of investments and the right to regulate operate in a balanced way under the ECT as in all other investment treaties."[62]

The mere existence of a balancing exercise, however, does not guarantee uniformity. Rather, the contours of the balance arrived in each treaty are perennially uncertain. It remains contingent on multiple considerations, such as the identities of the negotiating States, their social, political, and economic priorities, and any relevant circumstances prevailing at the time of the conclusion of the treaty. Notably, any fundamental change in such circumstances would necessarily require the negotiating States to revisit the tenability of the balance attained. The aforementioned desire of European States to exit the ECT in the face of climate change concerns, and the learning from the previous ECT arbitration decisions, is a contemporary example of this tendency.

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[60] *Rumeli Telekom A.S. and Telsim Mobil TelekomunikasyonHizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) ¶ 598.
[61] *The PV Investors v. The Kingdom of Spain*, PCA Case No. 2012-14, Final Award (28 February 2020) ¶ 570. See also *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum (11 February 2022) ¶ 714.
[62] *The PV Investors v. The Kingdom of Spain*, PCA Case No. 2012-14, Final Award (28 February 2020) ¶ 570.

Therefore, the structural design of investment treaties, and the equal competing values they embrace, provide the argumentative framework within which each investor-State dispute must be resolved through the agreed processes of dispute settlement. And within this framework, the purpose of international investment law rules and doctrines is to mediate the conflict between these equal competing values in the context of a specific dispute. An investment treaty, as such, merely provides a prescriptive framework for ordering relations between a host State and its foreign investors. It still requires interpretation and application, either by consensus or through peaceful coercion. The latter predominantly occurs through investment arbitration proceedings, in which arbitrators are required to decide which competing value to prioritize in the factual circumstances before them. This is the function of an investment arbitration tribunal that cannot be described as apolitical or value-neutral.

B. REFORMULATING THE ENERGY CHARTER TREATY CRISIS DEBATE

The above deconstruction of the framework of international investment law and arbitration allows us to reformulate the debate surrounding the ECT crisis. Contrary to certain oft-repeated assumptions, the locus of this crisis is not the conflict between investment protection standards in the ECT and the obligations in the 2015 Paris Agreement. Rather, this crisis largely emanates from, and is centred around, identifying the decision-makers for resolving the apparent conflict.

As noted by certain scholars, albeit in relation to the clean energy transition disputes: "[t]he interaction between international legal frameworks leads to the States' competing obligations – towards protection of the environment on the one hand and protection of the investor on the other hand. Effectively, it requires a fine balance between States' right to regulate aiming at a just energy transition and protection of (fossil fuels) investors."[63] The ECT crisis is, therefore, not only about reconciling "the States' competing obligations" that require to be balanced, but also about revisiting which forum will determine this balance.

In this regard, the evidence relating to investment arbitration claims and decisions under the ECT in relation to the clean energy transition measures hardly inspires confidence. For instance, even the proponents of the modernised ECT acknowledge that:

[63] Piotr Wilinski and Matthew Brown, *Is the Energy Charter Treaty Fit for The Energy Transition? The Analysis of The Climate Change Counsel Report*, JUS MUNDI BLOG (3 October 2022) p.5.

> "*The increase in cases brought by investors in the renewable energy sector (as a proportion of treaty claims generally) has been remarkable. Available data suggests that of all claims initiated under the ECT since its inception in 1994, approximately 60% are claims made by investors in the renewable energy sector (up to 1 June 2022). The increase is particularly noteworthy when considering claims commenced in the past decade only. Of all claims commenced under the ECT since 2012, claims relating to reforms affecting the renewable energy sector make up just under 70%.*"[64]

It is logical and foreseeable that such a remarkable increase in cases may disincentivise States from adopting the necessary policies to combat climate change due to a fear of justifiable as well as unjustifiable adverse outcomes. This was essentially the "regulatory chill" that the Climate Change Counsel had warned about.[65] And it exists not only in relation to the obligations under the 2015 Paris Agreement, but also in general international law. After all, all States have "the right and the duty to enact regulations and to take measures to protect society and the environment. The right to regulate arises out of the basic attributes of sovereignty, while the duty to protect arises out of a range of international and domestic legal instruments."[66]

Nonetheless, under the existing and modernised text of the ECT, investment arbitration tribunals "have the power to integrate these two areas of international law or to decide that one trumps the other."[67] They essentially "set the boundaries for state regulatory conduct",[68] and for this reason, "continue to play an important role in interpreting the investor protections and deciding how they apply, including in the context of climate change and energy transition."[69]

It is this insistence that may prove the biggest obstacle to the survival of the ECT. There is a diminishing confidence that an investment arbitration tribunal could be trusted to undertake an analysis similar to that of the Hague District Court for assessing the three compensation claims relating to the Dutch coal phase-out legislation.

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[64] Guillermo Garcia-Perrote, Ella Wisniewski, *European exodus from the ECT: politics and unintended consequences*, GAR (15 November 2022) 2.
[65] *Supra* note 17 at p.34.
[66] SA Spears, *´The Quest for Policy Space in a New Generation of International Investment Agreements´*, 13 *Journal of International Economic Law* 4 (2010) 1038.
[67] *Supra* note 17 at p.74.
[68] *Ibid*.
[69] *Supra* note 17 at p.75.

Indeed, while dismissing the compensation claims, the Hague court adopted a "fair balance test" to assess whether the legislation under challenge struck a reasonable balance between the requirements of public interest and the protection of the fundamental rights of the plaintiff.[70] As part of this analysis, the court considered the Dutch government's concern about "the arrival of new coal-fired power stations" and the prevalence of "the condition that they had to fit in with the climate policy and the climate objectives to which the Netherlands has committed itself."[71] It equally noted that "it is not merely decisive whether financial compensation has been provided for the owners of the coal -fired power stations , let alone that this can only be met if they are offered "full compensation" or if they are given the opportunity to "recoup their investments in full", as RWE Generation seems to assume."[72]

This analysis can be contrasted with the observation made by the ECT tribunal in *Rockhopper Exploration PLC and others v. Italian Republic* that:

> "*… Italy's sovereign choice to proscribe such offshore production, based on its own inherent authority and dignity, was its to make. However, that sovereign choice or act or decision… of Italy may carry with it a concomitant consequence to pay certain compensation pursuant to internationally-binding promises it made to foreign investors arising from its being a party to the ECT at the material time*."[73]

Admittedly, both decisions applied distinct legal instruments and provisions. However, in each case, notwithstanding the legal rule or doctrine raised, the decision-maker was confronted with a fundamental contradiction between an investor's right to property and the State's public interest. Each litigant naturally prioritized his own interest, and it fell for the decision-maker to decide where the appropriate balance lay. This decision was, as is frequent in decision-making, based on the political value-judgments and prioritizations made by the decision-maker, clothed with objectivity through the language of the applicable legal rules and doctrines. This is not a criticism, but only a more accurate description of decision-making provided by CLS.

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[70] *RWE Generation NL BV v. The State of Netherlands*, Case No. C:/09/608588/HA ZA 21-245, District Court of The Hague, Judgment (30 November 2022) ¶ 5.15.
[71] *Ibid* at ¶ 5.17.30.
[72] *Ibid* at ¶ 5.20.2.
[73] *Rockhopper Exploration PLC and others v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award (23 August 2022) ¶ 6.

From this perspective, the *Rockhopper* tribunal's conscious, but self-serving clarification, 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"[74] misses the point. It is based on a flawed assumption that the determination of the "legal issue at hand" in an investor-state dispute is apolitical or somehow insulated from the politics immanent in decision making processes. It is intended to create an illusion that the seemingly apolitical adjudication of a legal dispute under the ECT and the European States' political choice to modernise or withdraw from the ECT are distinct issues. CLS-led scrutiny exposes the frivolity of such claims, and affirms that the two are fundamentally similar and thus, intrinsically interlinked. Indeed, the ECT and its related documents "provide an important legal and political basis for the creation of an open international energy market."[75] Therefore, it is logical that the interpretation and application of the ECT to resolve investor-state disputes cannot remain apolitical.

A further example of the subjectivity inherent in arbitral decision-making, and the failure of international investment law rules to constrain a singular accurate outcome, is found in *Mathias Kruck and others v. Kingdom of Spain*.[76] Therein, the majority tribunal decided that by establishing a new regulatory regime, Spain had breached its Fair and Equitable Treatment obligation under the ECT,[77] for which it was obliged to make reparation to the investors.[78] It did so by resolving the "main disagreement between the Parties as to the content of the FET standard", especially in which manner it includes "the doctrine of legitimate expectations".[79] The majority decided this issue in favour of the investors and reasoned that:

> "*The question here, however, is not whether Spain had the right and the legal power to amend its regulatory regime. The question here is whether Spain had committed itself to refrain from exercising its undoubted power in a particular manner, so that if it chose to exercise its power in a manner that breached that commitment it may incur liability for losses suffered by those who acted in reliance upon the*

[74] *Rockhopper Exploration PLC and others v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award (23 August 2022) ¶ 10.
[75] The International Energy Charter – Consolidated Energy Charter Treaty with Related Documents, foreword.
[76] *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum (14 September 2022).
[77] *Ibid* at ¶¶ 211-225, 303, 366(5).
[78] *Ibid* at ¶ 366(6).
[79] *Ibid* at ¶ 158.

> *commitment. There is nothing particularly arcane about this question: it is essentially the mirror image of the question whether a State can, consistently with the FET provision in ECT Article 10, bind itself to perform a contract, in a manner that cannot be undone by the State enacting legislation that purports to abrogate its contractual obligations. The Tribunal has no doubt that a State can make such commitments and may do so by way of a unilateral declaration or representation. Nor does it doubt that in principle a breach of such a commitment can amount to a violation of an FET provision*."[80]

The majority's reasoning was not isolated, but drew support from certain previous cases that had reached the same conclusion. Nonetheless, the arbitrator appointed by Spain, Zachary Douglas KC, dissented.

Douglas accepted that the contours of the doctrine of legitimate expectations in international investment law are far from settled.[81] While one school of thought attributes liability based on a notion of strict liability,[82] the rival conception of legitimate expectation is based upon fault.[83] He agreed with the latter[84] on the basis of a comparative analysis of the national and regional legal systems. Disagreeing with the majority's conclusions, he explained that "no national or regional legal system contemplates that a government should be strictly liable for modifying or revoking an undertaking in a public regulation as if it were an undertaking in a private law contract."[85] Accordingly, the majority's adoption of the notion of strict liability was incorrect.

Douglas' unflinching criticism of the majority's reasoning is particularly instructive for this discussion. He explained that the doctrine of legitimate expectation, including its incarnation as a principle of strict liability, was only acceptable if it could be identified as a "general principle of law recognised by civilised nations" in the sense of Article 38 of the ICJ Statute, which in turn required a comparative analysis.[86] Critically, "if inspiration cannot be drawn from comparative

[80] *Ibid* at ¶ 199.
[81] *Ibid* at ¶ 2.
[82] *Ibid* at ¶ 2.
[83] *Ibid* at ¶ 3.
[84] *Ibid* at ¶ 4.
[85] *Ibid* at ¶ 29.
[86] *Ibid* at ¶ 18.

law in giving content to the FET standard, then the popular alternative, which is for arbitrators just to make it up, may prove to be irresistible."[87]

In this context, Douglas criticizes that the majority's decision does not cite any authority for its central proposition extracted above.[88] He also critically questions: "Where does the majority's conception come from and how is it compatible with the basic architecture of an investment treaty and the fundamental principles of state responsibility towards foreign investors? Their decision is silent on these matters."[89]

For these reasons, and other considerations articulated in his Dissent, Douglas compares the majority's reasoning as being "no different to just making it up under the shade of a fig leaf."[90] Yet, despite the conviction of his criticism, he acknowledges that the majority's decision is not isolated and draws support from previous cases:

> "*A total of 24 decisions on liability in the Spanish solar cases have been made available to the Tribunal in this case. There is a clear division in this jurisprudence between tribunals or majorities that have adopted a strict liability approach in interpreting the concept of legitimate expectations under the FET standard and those that have found or rejected liability based on fault. The touchstone of fault that is generally adopted is proportionality, which is assessed primarily in terms of whether the investment continued to earn a reasonable rate of return after the regime of RD 661/2007 was abolished. The division between the two strands in the jurisprudence is rather neat: there are 12 decisions favouring strict liability as against 12 decisions adopting a fault-based approach.*"[91]

In other words, what Douglas describes as "an extraordinary proposition with far-reaching consequences"[92] was endorsed in at least twelve previous investment arbitration cases. The very existence of these cases provides sufficient ammunition for one to argue, correctly or not, that it is Douglas' critique that warrants correction. The ultimate choice is then left for the next arbitral tribunal to make in the context of the next investment arbitration claim under the ECT.

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[87] *Ibid* at ¶ 18.
[88] *Ibid* at ¶ 16.
[89] *Ibid* at ¶ 16.
[90] *Ibid* at ¶ 21.
[91] *Ibid* at ¶ 47.
[92] *Ibid* at ¶ 54.

This sharp divide between the majority decision and Douglas' dissent in *Mathias Kruck*, and other ECT cases involving the same issue, adequately illustrates the aforementioned CLS-driven analysis. Through the metaphor of strict versus fault-based liability in the doctrine of legitimate expectations, it affirms that the fidelity of a decision-maker towards a particular outcome is not guided by rules and doctrines of international investment law. Instead, it is largely premised on a subjective choice between the competing values involved, and how the two may be balanced. The legal reasoning follows this value-judgment, which is intrinsically political and a product of the arbitrator's history, experiences, and ideologies. And for each outcome, there exists ample rules, doctrines, and existing decisions of persuasive value that inform the eventual reasoning, and obfuscate the preceding value-judgment. This is the core critique that emerges from a CLS-driven analysis.

The objective of this analysis is not to argue either in favour of or against a specific award or school of thought. Instead, it is simply to showcase the ensuing unpredictability in the adjudication of investment disputes under the ECT. Ironically, this demonstration is not novel, and is echoed by existing reports which do not adopt a CLS-driven analysis.

For instance, after reviewing the body of cases under the ECT relating to the clean energy transition measures, the Climate Change Counsel report also reached the same conclusion:

> "*With regard to the FET standard and legitimate expectations, it is difficult to predict how these principles will apply in fossil phase-out disputes, because the reviewed awards present divergent and inconsistent assessments based on similar facts and the same ECT provisions. Some tribunals found that a foreign investor is entitled to legitimate expectations of legal stability based on the laws in place at the time of investment. Other tribunals rejected that idea, stating instead that investors cannot expect regulatory stability in the absence of a specific commitment to that effect. The Masdar tribunal characterized these as "two schools of thought" on the question of legitimate expectations. Which of these two schools of thought will gain traction in cases relating to fossil investments remains to be seen.*"[93]

[93] *Supra* note 17 at p.67.

Equally, it is for this reason that the IISD Report lamented that "the reform leaves the most problematic provision—the investor-state dispute settlement mechanism—intact."[94]

Consequently, unless the discourse surrounding the ECT crisis shifts from a comparison of the text of the modernised ECT and the 2015 Paris Agreement, it is unlikely to be of meaningful assistance. It must first acknowledge the politics inherent in arbitral decision-making and devise ways to address it. This could include reforming or abandoning the existing framework relating to investment arbitration, or at least, making the decision-makers conscious of the multifarious non-legal considerations that influence their reasoning and outcome.

Indeed, once the politics in arbitral decision-making is acknowledged, it paves the way for a more holistic conception of the regime of international investment law. This would disclose the doctrinal biases,[95] and permit the creation of a framework in which the political choices can be made in a nuanced, historically informed, and socially responsible manner. In other words, if international law cannot be detached from its politics, then at least a cumulative interpretative approach, premised on CLS, allows one to strive for "better politics".[96]

IV. CONCLUSION

It is easy to make sense of the ECT crisis if one views it from the lens of the former colonies, or the Global South broadly, who upon attaining sovereignty were soon "encouraged" to sign investment treaties as part of a barter for receiving access to foreign capital. Indeed, the few years immediately following the conclusion of such treaties were uncontroversial; characterized by none or a limited number of claims by foreign investors to be decided by investment tribunals. But as each State began to exercise its sovereign discretion, admittedly with some instances of indiscretion, it came with a rise in the number of investment arbitration decisions. Each arbitral decision reflected the value-judgements and political choices of the decision-making arbitrator. And each decision constituted a limitation on the host State's sovereignty, albeit the one that the State had itself agreed to.

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[94] Lukas Schaugg and Sarah Brewin, *Uncertain Climate Impact and Several Open Questions - An analysis of the proposed reform of the Energy Charter Treaty,* (IISD, 2022) 41.
[95] Deborah Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' 65 NORDIC JOURNAL OF INTERNATIONAL LAW, 341 (1996) 377.
[96] Martii Koskenniemi, 'The Politics of International Law – 20 Years Later', [Vol. 20(1)] EUROPEAN JOURNAL OF INTERNATIONAL LAW 7 (2009) 8.

Given the need and lure of foreign capital, it was anticipated that the difference between the value- judgements and political choices of the arbitrator and the host State would be tolerated. However, it was also foreseeable that at some point in the future, the limits of tolerance would be breached if the need to attract foreign investment is matched, or outweighed, by a competing public interest. For many Global South States, this point of time arrived during the past decade. It now appears that the threat of climate change was the final straw that broke the camel's back for the European continent too.

Unsurprisingly, the response of the European continent has mirrored the one provided by the Global South States that first bore the brunt of investment arbitration decisions on issues of sovereign priority. Their arguments are also familiar; highlighting the regulatory chill created by inconsistent arbitral decision-making, failure to balance an investor's property-based rights with the host State's public interest, and the ramifications of awarding crippling compensation. Soon, the contrary voices in select corridors, which critique the grievances and / or point to the possibility of reform, are crowded out.

Sooner than later, States that have burnt their hands are no longer able to place their hopes in the possibility of reform. By now, they have analysed (1) the lack of any proven link between the conclusion of investment treaties and the receipt of foreign investment, (2) the unpredictability in the interpretation of investment protections standards, and (3) the disproportionate power held by a small community of non-state actors to globally influence existing and future policies. At this stage, the decision to terminate investment treaties, and search for better alternatives, becomes a mere formality.

Until recently, it appeared that the European continent was oscillating between placing their hopes in reform, or modernisation of the ECT, and exiting it entirely. While the final decision is yet to be made, given the threat of climate change to the existence of the world as we know it, the tide may be turning towards the latter. If this were to be, it would not only reflect the lack of trust in the modernised text of the ECT, but also in those who interpret and apply it. Therefore, this decision is not merely a referendum on the modernised text of the ECT, but more broadly on the acceptability of its application through investment arbitration.

Viewed from this perspective, the ECT crisis is akin to old wine in a new bottle. It is merely yet another instance, this time in the context of climate change, of certain States revisiting their

acceptance of an investment arbitration regime that increasingly prioritizes the property rights of an investor over a competing public interest. It is simply another manifestation of the crisis of confidence that has already engulfed States in other parts of the world, ranging from Africa,[97] Asia,[98] Latin America,[99] and the European Union itself for intra-EU disputes.[100]

Until this crisis of confidence, including with respect to the ECT, is appropriately addressed, it will continue to raise its head in novel contexts. Till then, as far as the ECT crisis is concerned, one can take solace in Douglas' warning that - "The regulatory chill that inevitably accompanies this approach will be no consolation to a warming planet."[101]

[97] Naomi Tarawalli, 'Towards or Away from Investment Treaty Arbitration in Africa?', (2019) 9 EMERGING MARKETS RESTRUCTURING JOURNAL 1, 4.
[98] Alison Ross, *'India's Termination of BITs to begin'*, GAR (22 March 2017); Prabhash Ranjan, *'Making the BIT Unworkable for Investors' in India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP 2019); Zafar Bhutta, *'Pakistan to terminate 23 bilateral investment treaties'*, The Express Tribune (5 August 2021); Olivia Chung, *'The Lopsided International Investment Law Regime and its Effect on the Future of Investor-State Arbitration'*, (2007) 47(4) Virginia Journal of International Law 953, 969-975 (discussing how States such as Pakistan, Indonesia and Russia have attempted to escape the "unfair BIT regime by defying arbitration".)
[99] Katia Fach Gomez, *'Latin America and ICSID: David versus Goliath'*, (2011) 17(2) LAW AND BUSINESS REVIEW OF THE AMERICAS 195, 200.
[100] See generally, Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (29 May 2020), SN/4656/2019/INIT.
[101] *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Partial Dissenting Opinion of Zachary Douglas (13 September 2022) ¶ 57.