



SCHOOL OF  
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# **Fair and Equitable Treatment under the Energy Charter Treaty**

Reassessing Investor Protection and  
Environmental Regulation after Modernization

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# Abstract

This thesis examines the Energy Charter Treaty's (ECT) Fair and Equitable Treatment (FET) standard, how it was modernized in 2024, and how this modernization affects the legal position of developing and energy-exporting nations, especially those in the Caspian Sea region. The goal is to determine whether modernization broadens states' regulatory latitude to pursue the energy transition and climate goals while also lowering legal uncertainty. How the updated FET standard impacts developing, fossil fuel-dependent states' legal standing under the ECT is the research question.

The pre-modernization ECT, which revealed both the vagueness of the FET clause and arbitral tribunals' expansive interpretations of it, is analysed first. It then assesses the modernization, which included new provisions on climate change (Article 19 bis), sustainable development (Article 19), and a comprehensive list of FET violations. Although these changes reflect current treaty practice, they are still constrained, as the Investor-State Dispute Settlement (ISDS) system is unaltered, sustainability provisions are mainly non-binding, and reasonable expectations are still protected, giving tribunals considerable discretion.

The implications of ECT modernization for developing and energy-exporting states are further examined in the thesis. Due to their heavy reliance on the export of fossil fuels, Caspian states like Kazakhstan and Azerbaijan joined the ECT in an attempt to draw in investment.

The conclusion is that the FET standard is only partially clarified by modernization, which does not address the fundamental conflicts between climate imperatives and investment protection. With little leeway for their energy transitions, developing and energy-exporting states continue to be legally vulnerable.

**Keywords:** Energy Charter Treaty; ECT; Modernization; Fair and Equitable Treatment; investor-state dispute settlement; legitimate expectations; regulatory chill; sustainable development; environmental regulation; sunset clause; Caspian region; developing countries

# Abbreviations

ACG	The Azeri–Chirag–Gunashli
BIT	Bilateral Investment Agreement
CETA	Comprehensive Economic and Trade Agreement (EU-Canada)
CJEU	Court of Justice of the European Union
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
ECT	Energy Charter Treaty
EU	European Union
FTA	Free Trade Agreement
ICS	Investment Court System
IIA	International Investment Agreement
IPCC	UN's Intergovernmental Panel on Climate Change
ISDS	Investor-State Dispute Settlement
MIC	Multilateral Investment Court
PSA	Product Sharing Agreement
SOCAR	The State Oil Company of The Republic of Azerbaijan
USMCA	The United States-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties



# 1 Introduction

## 1.1 Background

The Energy Charter Treaty (ECT) emerged as a result of the efforts to integrate Eastern Europe and the former Soviet Union energy sector and Western capital, technology and expertise in the post-Cold War period. It was signed in 1994 and has been in force since 1998. It is a unique, multilateral, sectoral investment agreement with the most extensive geographical coverage,<sup>1</sup> “establishes a legal framework in order to promote long-term cooperation in the energy field”<sup>2</sup>. The ECT covers cooperation over trade, transit, investment protection, dispute settlement mechanisms and energy efficiency in the energy sector. Its investment protection provisions, especially Fair and Equitable Treatment (FET), aim to provide a stable, predictable legal environment for investors across contracting parties.

Despite these goals, the ECT has become controversial, especially as its extensive and vague investor protections increasingly come into conflict with global environmental policies. Its broad scope encompasses investments both in traditional fossil fuels and renewable energy sectors; however, “the ECT has fossil resources in its DNA”.<sup>3</sup> Its ISDS mechanism has been criticized as a mechanism that is rooted in colonial and extractive principles, as outdated for prioritizing foreign investors over state sovereignty, human rights, and environmental protection, prompting recommendations to terminate the ECT.<sup>4</sup> In particular, inconsistent application of the FET standard by arbitral tribunals has raised alarm about the ECT’s alignment with states’ right to regulate in the interests of environmental and climate policy.<sup>5</sup> The ambiguous and open-textured nature of the FET clause, coupled with the substantial compensatory awards in arbitration, leads to the concern over “regulatory chill”.<sup>6</sup> Therefore, the ECT is portrayed as the most dangerous investment treaty to the energy transition, with its fossil fuel-centric design contributing to over 300 megatonnes of CO<sub>2</sub>e emissions annually.<sup>7</sup>

These concerns resulted in a process of Modernization, which was initiated in 2018 and completed in December 2024 with the adoption of a modernized treaty text. The

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<sup>1</sup> Leal-Arcas, R. (eds) (2023). *Commentary on the Energy Charter Treaty*, Cheltenham, UK: Edward Elgar Publishing, 156-157

<sup>2</sup> Energy Charter Treaty (ECT) (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95, Art 2  
<sup>3</sup> Cocciolo, E. and Reins, L. (2025) ‘A Critical Review of the Energy Charter Treaty from an Earth System Law Perspective’, *Transnational Environmental Law*, 14(1), pp. 94–120. doi:10.1017/S2047102524000244. 95

<sup>4</sup> Special Rapporteur David R. Boyd, UN Human Rights Council, *Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlements*, UN Doc A/78/168 (2023) <https://www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluterscatastrophic-consequences-investor-state-dispute> accessed 8 May 2025

<sup>5</sup> Zannoni, D. (2020) ‘The legitimate expectation of regulatory stability under the Energy Charter Treaty’, *Leiden Journal of International Law*, 33(2), pp. 451–466. doi:10.1017/S0922156520000047.

<sup>6</sup> K Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 606, cited in Mala Sharma, ‘Integrating, Reconciling, and Prioritising Climate Aspirations in Investor-State Arbitration for a Sustainable Future: The Role of Different Players’ (2022) 23 *JWIT* 746, 758.

<sup>7</sup> E3G, ‘The Energy Charter Treaty Remains the Most Dangerous Investment Treaty to the Energy Transition, 4 December 2024, <https://www.e3g.org/news/the-energy-charter-treaty-remains-the-most-dangerous-to-the-energytransition/>.

modernized ECT includes clarifications of the FET standard<sup>8</sup> and new text recognizing states' right to regulate to attain legitimate policy objectives, particularly for the protection of the environment, including climate change.<sup>9</sup> It also includes an optional fossil fuel carve-out<sup>10</sup>, as well as amended Article 19 and newly introduced Article 19 bis. Article 19 expands its coverage from environmental matters to sustainable development, while Article 19 bis reaffirms Contracting Parties' commitment to the UNFCCC and Paris Agreement, and promotes trade and investment, which contributes to climate change mitigation and adaptation.<sup>11</sup>

However, it is generally argued that reforms are insufficient. While environmental amendments indicate greater attention to sovereign regulatory space, it is noted that the provision remains declaratory in nature and does not grant regulatory measures primacy over investor rights.<sup>12</sup> As such, its practical effect may be limited without additional reforms to investment protection standards or dispute settlement procedures.<sup>13</sup> Consequently, doubts remain as to whether the revised treaty structure changes the balance significantly between investor rights and regulatory autonomy of the Contracting Parties.

## 1.2 Purpose and research questions

The purpose of this thesis is to assess whether the modernization of the ECT meaningfully addresses the imbalance between investment protection through the FET lens and states' regulatory autonomy in the context of environmental and climate-related measures. In doing so, the thesis also explores whether this new legal framework expands the regulatory space available to developing countries for the implementation of environmental measures without fear of investor claims, thereby reducing the risk of regulatory chill.

The primary research questions are:

Question 1:

To what extent does the modernization of the Energy Charter Treaty clarify the Fair and Equitable Treatment standard in a way that safeguards states' regulatory autonomy for environmental and climate-related measures?

Question 2:

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<sup>8</sup> Energy Charter Conference, 'Decision of the Energy Charter Conference on the Adoption of the Modernised ECT' (Modernized ECT) (22 November 2024) CCDEC/2024/12, Art. 4 (1) (2) [https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2024/CCDEC202412\\_EN.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2024/CCDEC202412_EN.pdf) accessed 11 May 2025

<sup>9</sup> Modernized ECT (n 8) Art. 16

<sup>10</sup> Ibid, Art. 26

<sup>11</sup> Ibid, Art. 19 and 19 bis

<sup>12</sup> MR Mauro, 'Energy Security, Energy Transition, and Foreign Investments: An Evolving Complex Relationship' (2024) 13(4) *Laws* <https://www.mdpi.com/2075-471X/13/4/48> accessed 11 May 2025.

<sup>13</sup> MD Brauch, 'The Agreement in Principle on ECT "Modernization": A Botched Reform Attempt that Undermines Climate Action' (Columbia Center on Sustainable Investment 2022) <https://ccsi.columbia.edu/sites/default/files/content/docs/blog/ccsi-agreement-principle-ect-reform-climate-martindietrich-brauch.pdf> accessed 11 May 2025.

How might the revised Fair and Equitable Treatment standard affect the legal position of developing, energy-exporting countries under the ECT, such as Caspian Sea countries?

### **1.3 Delimitations**

This thesis focuses exclusively on the FET standard as an investment protection under the ECT, examining its interaction with environmental and climate regulations. The choice to analyse FET, rather than other investment protections such as expropriation, national treatment or most-favoured nation treatment, is driven by the fact that it has been frequently invoked in arbitral cases and its importance in balancing investor rights with states' regulatory autonomy in environmental matters, unlike other protections.

In order to assess the need for reform, the analysis includes the pre-modernization legal framework alongside the modernized version. By doing so, several arbitral cases have been chosen where FET was at the core. The original ECT serves as a reference point to evaluate how modernization addresses the disparities in the application of the FET standard.

The scope is limited to the FET within the ECT investment protection regime, excluding trade, transit, and institutional provisions. The reason behind that is investment protections, specifically FET's central role in ECT's overall purpose and objectives.<sup>14</sup> Moreover, investor protections directly engage with the environmental regulations.

The analysis centres on the environmental and climate regulations due to several reasons: first, because of their growing significance, pressing urgency and possible universal impact, affecting all living beings; second, their direct relevance to energy disputes, where they are often referred to. While health, social policies, and other aspects of sustainable development are crucial and urgent, they are less directly used in energy investment disputes.

The ECT is chosen as the direct object of this analysis, rather than other investment treaties, as it is the only multilateral investment agreement dedicated to the energy sector. Offering expansive geographical coverage, as mentioned in the background section. Moreover, it has undergone a modernization process recently, which makes this analysis more relevant in the context of international investments.

The analysis focuses on Caspian Sea countries – Azerbaijan, Kazakhstan and Turkmenistan – due to their ECT membership and economies reliant on fossil fuel exports.

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<sup>14</sup> ECT (n 2) Title I

## 1.4 Method and materials

Doctrinal legal method is applied in this thesis to examine the development of the FET standard under the ECT, with a focus on its reform in 2024. This method is particularly suitable for the present research, as the thesis is concerned with the interpretation of treaty provisions and arbitral jurisprudence, and requires analyses of primary legal sources to determine the scope, meaning and evolution of the FET obligation. By doing so, treaty provisions, arbitral awards and related legal sources are interpreted to assess whether this revision enhances legal clarity and safeguards regulatory autonomy for environmental policies. The doctrinal method is followed through the interpretation of certain provisions under the ECT, namely Article 10(1), the modernized Article 10(2), Article 19 and 19 bis, as well as provisions on the right to regulate and the ISDS mechanism.

A comparative analysis is conducted between the original Article 10(1) ECT and its modernized formulation to assess whether the new provision addresses earlier ambiguities or lacks substantive legal outcomes. Key elements of the FET, such as legitimate expectation and transparency<sup>15</sup>, are examined through arbitral case law. The selected cases, such as *Charanne*, *Eiser*, *Masdar*, *PV Investors* share a similar factual background but reached different outcomes. Moreover, the right to regulate, previously implicit in arbitral cases,<sup>16</sup> is also evaluated in light of its explicit incorporation into the modernized text.

To explore real-world implications, the thesis further applies doctrinal analysis to assess whether the revised ECT offers greater legal space for environmental regulation in developing countries like the Caspian Sea states (Azerbaijan, Kazakhstan, Turkmenistan), as they are fossil-fuel exporting and investment-dependent ECT parties, or investment protection continues to constrain the imposition of new environmental measures.

The analysis is based on the above-mentioned treaty provisions, arbitral awards, and relevant legal commentary from scholarly and institutional sources.

## 1.5 Outline

The thesis starts by analysing how the FET standard has been established and interpreted under the ECT, in the light of the arbitral case law, which forms the core of Chapter 2. The first section of this chapter focuses on how tribunals have approached some of the key elements of the FET, such as legitimate expectations, transparency, and due process, mostly reaching different conclusions. Such disparity leads to legal uncertainty, making it unpredictable for the states that seek to regulate in the public interest or to meet environmental obligations.

The chapter then proceeds to examine the 2024 modernization of the ECT, focusing on the revised Article 10(1) and its attempt to clarify the FET and the inclusion of

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<sup>15</sup> Kaj Hobér, *The Energy Charter Treaty: A Commentary* (Oxford University Press 2020) 191.

<sup>16</sup> *Charanne and Construction Investments v Spain* [21 January 2016] SCC Case No 062/2012, Award, 503–504.; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) para 177; *Electrabel SA v Republic of Hungary* [25 November 2015] ICSID Case No ARB/07/19, Award, 7.77.

the states' right to regulate. The negotiation context of the modernization is briefly discussed. Additionally, the chapter also addresses other new provisions, such as Article 19 and 19 bis, which stipulate sustainable development and climate commitments. The chapter concluded by discussing the unresolved issues, particularly the drawbacks of the current ISDS and concerns over regulatory chill.

Chapter 3 turns to the real-life implications of these reforms for developing and energy-exporting countries. First, it outlines structural disadvantages of the ECT, which are reflected in the form of limited bargaining power, asymmetric legal protection, lack of ISDS capacity, and risk of deterring necessary environmental obligations. Further analysis has been conducted on whether the modernized ECT offers broader legal space for developing countries, namely ECT member Caspian Sea states (Azerbaijan, Kazakhstan, Turkmenistan). The chapter closes by assessing whether the revised FET standard meaningfully addresses the imbalance between investment protection and regulatory autonomy.

## 2 The FET Standard in the ECT – From Legal Uncertainty to Modernization

The FET standard has long served as one of the most frequently invoked protections in disputes under the ECT. As of 2025, the FET standard has been invoked in 728 investment treaty cases, including 101 out of 172 known ECT cases, pointing to its central role in shaping the ECT’s jurisprudence.<sup>17</sup> Despite the significant number of arbitral decisions, the complex, often overlapping language of Article 10(1) has not been clearly clarified, leading to inconsistencies in how the FET standard is applied. It is argued that the FET standard is an intentionally vague term, designed to give adjudicators a quasi-legislative authority.<sup>18</sup> Such interpretive flexibility becomes evident in environmental disputes, where arbitral interpretations of the FET often clash with host states’ evolving policies<sup>19</sup>, thereby “effectively serving to restrict the policy space available to regulate for climate change”.<sup>20</sup>

These issues became one of the major motivations for the ECT’s modernization process. In addition to the inconsistent arbitral practice and legal uncertainties, global pressure, especially from the EU, to align investment commitments to the Paris Agreement, contributed to the initiation of the reform, too.<sup>21</sup>

In light of these developments, this chapter examines the development of the FET standard under the ECT, with a specific focus on the inconsistencies in arbitral decisions. The analysis begins with pre-modernization jurisprudence, identifying how tribunals applied key elements of the FET, such as legitimate expectations, transparency and due process. It then turns to the 2024 modernization of Article 10(1), assessing whether the revised text offers clearer guidance. This chapter also outlines Article 19 and 19 bis, which encompass sustainability goals and environmental measures. Finally, the chapter concludes with a discussion of remaining uncertainties.

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<sup>17</sup> UNCTAD Investment Dispute Settlement Navigator, ‘Breaches of IIA Provisions Alleged and Found’ <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 15 May 2025.

<sup>18</sup> Cees Verburg, ‘Modernizing the Energy Charter Treaty: Facilitating Foreign Investment in the Renewable Energy Sector’ (University of Groningen 2020) 158 <<http://hdl.handle.net/11370/e6f10494-9859-4b79-9394-feaf095ff927>> accessed 24 May 2025.

<sup>19</sup> Camille Martini, ‘Balancing Investors’ Rights with Environmental Protection in International Investment Arbitration’ (2017) 50 *The International Lawyer* 529, 538.

<sup>20</sup> Alessandro Monti and Matteo Fermeglia, ‘The FET Standard between Treaty Reform and ISDS Practice: An Analysis of the Modernized ECT’ (2023) 24(5–6) *Journal of World Investment & Trade* 155, 158 (The authors observe that “it leads to regulatory chill, whereby states refrain from adopting climate change legislation due to the risk of legal action from investors.”).

<sup>21</sup> Verburg (n 18) 219–222.; Johannes Tropper and Kilian Wagner, ‘The EU Proposal for the Modernization of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?’ (2022) 23(5–6) *Journal of World Investment & Trade* 813, 814.

## 2.1 Pre-Reform Interpretation of FET

The FET standard is outlined in the second sentence of Article 10(1) of the ECT as below:

“Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.”

Unlike many modern investment treaties that provide a pre-defined list of actions constituting a breach of FET<sup>22</sup>, the ECT does not enumerate a specific list of elements or a definition of what constitutes a breach of the FET. Therefore, it mostly depends on the arbitral tribunals’ interpretation. This situation is characterized as a “double-edged sword”<sup>23</sup>, as the flexibility of Article 10(1) is beneficial for the tribunals, allowing them to adapt this provision to the complex circumstances.<sup>24</sup> Moreover, vagueness could be “essential for their effectiveness” because such provisions aim to “cover situations that are not predictable at the time of conclusion of a treaty”.<sup>25</sup> However, on the other hand, such vagueness leads to significant inconsistencies and unpredictability, which are notoriously criticized by scholars.<sup>26</sup>

It is both problematic and appealing for states and investors: problematic because it lacks a specific list of actions that would breach the standard, leading to expansive interpretation, which potentially infringes states’ sovereign right to regulate; appealing because the same vagueness makes it easier for investors to raise claims.<sup>27</sup> Conversely, at the same time, such legal uncertainty makes investors “unsure what is protected under the treaty while States may become hesitant in regulating their domestic affairs, fearing that investors may invoke the ECT.”<sup>28</sup>

Even though the FET is not a new standard and it appears widely across all kinds of IIAs, it has been stipulated differently in each agreement. Therefore, “it is probably impossible to provide a definition in the abstract which would be relevant for all types of alleged violations of the standard”.<sup>29</sup> However, it is not impossible rather difficult to interpret the FET standard. In the end, in all cases, it comes down to the

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<sup>22</sup> Comprehensive Economic and Trade Agreement (CETA) (EU–Canada) (signed 30 October 2016) art 8.10; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 8 March 2018) art 9.6; Netherlands Model BIT (2019) art 9; Patrick Dumbery, ‘The Cost of Inaction: Arbitral Practice in Respect of Earlier Generation FET Clauses and Current Approaches to FET Clauses’ (2024) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4872672](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4872672) accessed 21 May 2025.

<sup>23</sup> Filip Balcerzak, *Renewable Energy Arbitration – Quo Vadis? Implications of the Spanish Saga for International Investment Law* (Brill Nijhoff 2023) 384.

<sup>24</sup> Cees Verburg, ‘Modernising the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement’ (2019) 20 *J World Investment & Trade* 425, 427

<sup>25</sup> Jerzy Menkes and Magdalena Słok-Wódkowska, ‘Challenges of Investor-State Dispute Settlement Mechanism in TTIP’ in Dário Moura Vicente (ed), *Towards a Universal Justice: Putting International Courts and Jurisdictions into Perspective* (Brill Nijhoff 2016) 375.

<sup>26</sup> Panagiotis D Michalopoulos, ‘Legitimate Expectation of Regulatory Stability under the Energy Charter Treaty’ (2019) 32(3) *Leiden Journal of International Law* 445, 462; Dário Moura Vicente, ‘Investor-State Dispute Settlement in the European Perspective: Recent Developments’ in Dário Moura Vicente (ed), *Towards a Universal Justice: Putting International Courts and Jurisdictions into Perspective* (Brill Nijhoff 2016) 253; UN Human Rights Council (n 4)

<sup>27</sup> Verburg (n 18) 158.

<sup>28</sup> *Ibid*, 385; UN Human Rights Council (n 4) p.33 and 34, noting that “States are unable to discern precisely what types of actions, policies or other measures may result in an ISDS claim being filed against them. Arbitrators tend to treat IIAs as an autonomous regime that prevails over other regulatory regimes, prioritize objectives such as encouraging investment, protecting investments and increasing economic competitiveness and disregard important contextual factors, such as States’ rationales for adopting measures related to climate action, human rights and environmental protection.”

<sup>29</sup> Kaj Hobér (n 15), 189

facts of each case and the arbitrator. However, there are commonly accepted factors that need to be noted when interpreting Article 10(1). It is widely accepted by both scholars and arbitrators that the FET clause of the ECT is a stand-alone standard, having an autonomous character, meaning it is not linked to the international minimum standard.<sup>30</sup> Moreover, Article 31 of the Vienna Convention on the Law of Treaties should be applied, taking into account the clause's wording, context, object, and purpose of the treaty. In that sense, the first sentence of Article 10(1) is particularly important, which gives the tribunals context on "what kind of conditions for foreign investment that the FET standard is intended to encourage."<sup>31</sup>

Despite the above-mentioned difficulties, arbitral practice has developed several key elements of the FET. These included the protection of legitimate expectations, the requirement for transparency, protection against denial of justice and breach of due process, freedom from harassment and discrimination. The following subsections will examine how some of these elements were interpreted differently in key ECT cases.

### 2.1.1 Legitimate Expectations

While Article 10(1) of the ECT itself does not explicitly contain "legitimate expectations", arbitral tribunals interpreting the ECT frequently deem the safeguarding of an investor's legitimate expectations as a fundamental element of the FET standard.<sup>32</sup> "The concept of legitimate expectations is related to the investor's confidence that the Host State will not change the conditions of the investment or, at least, that the changes in the legal framework will not be unreasonable and/or disproportionate."<sup>33</sup>

Generally, in order to be protected, investors' expectations must be reasonable and objectively justifiable.<sup>34</sup> It means that subjective expectations are not enough to create protected expectations.<sup>35</sup>

There are different views on how legitimate expectations are created. One view is that legitimate expectations originate from specific representations and assurances

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<sup>30</sup> Patrick Dumberry, (n 22), 9

<sup>31</sup> Ibid, 190; the ECT (n 2), first sentence of the Article 10 (1) provides: "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area." It is commonly argued that, because of the fact that it refers to "making investments", this protection applies to the pre-investment period, rather than to the FET standard itself. However, it still gives us some features (stable, equitable, favourable and transparent conditions), that can be considered when interpreting the FET standard. Moreover, in terms of the object and purpose criterion of the Vienna Convention, the preamble and Article 2 of the ECT should be considered also.

<sup>32</sup> Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (1st edn, Cambridge University Press 2014), 161-162 <<https://www.cambridge.org/core/product/identifier/9781107326361/type/book>> accessed 24 May 2025.

<sup>33</sup> Tomas Restrepo, 'Modification of Renewable Energy Support Schemes under the Energy Charter Treaty: Eiser and Charanne in the Context of Climate Change' 8 *Goettingen J Int'l L* 101, 115.; Balcerzak (n 23), There are other definitions too: "total and unreasonable change", "radical and unexpected" measures, "fundamental changes", which "suddenly and unexpectedly eliminate the essential features of the regulatory framework in place", alter the "essential features" of the regulatory framework, are "a radical or fundamental change", do not "merely modify" but introduce a "number of fundamental changes" to the regulatory framework, or "undermine the security and viability" of the investments."

<sup>34</sup> Martini (n 19) 542.; Verburg (n 18) 169.

<sup>35</sup> Balcerzak (n 23) 189.; *SolEs, SPRL v Spain* [31 July 2019] ICSID Case No ARB/15/38, Award, 312.; *Electrabel S.A. v. Republic of Hungary* (n 16) 165.

that can be explicit or implicit.<sup>36</sup> Another view is that it can be based on the regulatory framework in force at the time of the investment.<sup>37</sup> Finally, legitimate expectations can derive from contracts or licenses.<sup>38</sup> The investor's reliance on such representations or the legal framework constitutes a further element of legitimate expectations, which must be demonstrated, and is directly linked to the investor's due diligence obligations – an issue that has been subject to investment disputes.<sup>39</sup>

These dynamics are illustrated by Spain's reversal of certain renewable energy incentives (fixed feed-in tariffs and other benefits that initially attracted investors) in the 2010s, which led to dozens of claims by renewable energy investors under the ECT.<sup>40</sup> Although nearly all cases share an identical factual background, the only consistent feature of the awards is the tribunals' inconsistent approaches.<sup>41</sup> Two main contrasting approaches can be observed. On one side, several tribunals hold the view that Spain did not violate FET because no firm promise of stability had been given. For example, in *Charanne v. Spain* the tribunal found that there are no specific commitments directed to the claimants that the legislation would not be changed.<sup>42</sup> The tribunal also touched upon the regulatory framework issue and said that converting a regulatory standard into a specific commitment of the state, by the limited character of the persons who may be affected, would constitute an excessive limitation on the power of states to regulate.<sup>43</sup> In *Isolux v. Spain*, although the tribunal acknowledged that the legal framework could give rise to legitimate expectations, but in the end held that since the time investment was made, all investors knew or ought to know the incentives would be altered or cancelled (as long as a reasonable return guarantee was respected).<sup>44</sup> The same approach was adopted by the tribunal in *Wirtgen v Czech Republic*, too, as the investors still obtained a reasonable return under the new regime.<sup>45</sup>

Starting from *Eiser v. Spain*<sup>46</sup>, the approach shifted to the other side. There, the tribunal acknowledged that Spain has full regulatory powers yet underscored that its powers cannot invalidate its FET obligations to foreign investors.<sup>47</sup> The tribunal concluded that the incentive regime, in reliance on which the investment was made, “was replaced with an unprecedented and wholly different regulatory approach”.<sup>48</sup>

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<sup>36</sup> Restrepo (n 33) 117.; Balcerzak (n 23) 193; Total S.A. v Argentina (ICSID Case No ARB/04/01, Decision on Liability, 27 December 2010) 119

<sup>37</sup> Bonnitca (n 32) 194. Giovanna Adinolfi, Freya Baetens, José Caiado, Angela Lupone and Anna G Micara (eds), *International Economic Law: Contemporary Issues* (Springer, Cham 2017) 219

<sup>38</sup> *Ibid* Bonnitca.

<sup>39</sup> Mohammad Ammar Al-Bahloul v Republic of Tajikistan (SCC Case No V.064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009) 210

<sup>40</sup> Kaj Hobér (n 15) 195-202

<sup>41</sup> Chen Yu, ‘Disentangling Legal Stability from Legitimate Expectations: Towards Greater Deference to Regulatory Changes in Renewable Energy Transition Policies in Investment Arbitration’ (2025) 24(1) *World Trade Review* 101, 103. Author observes that these cases offer a “straightforward example of how investment tribunals interpret the same obligation inconsistently regardless of mostly identical facts”

<sup>42</sup> *Charanne and Construction Investments v Spain* (n 16) 490.

<sup>43</sup> *Ibid*, 493

<sup>44</sup> *Isolux Infrastructure Netherlands B.V. v Kingdom of Spain* (SCC Arbitration V 2013/153, Award, 12 July 2016) 784-794, 803-804

<sup>45</sup> Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co KG v Czech Republic (PCA Case No 2014-03, Award, 11 October 2017) 436-437

<sup>46</sup> *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain* (ICSID Case No ARB/13/36, Award, 4 May 2017)

<sup>47</sup> *Ibid* 362

<sup>48</sup> *Ibid* 365

Such regulatory amendments were considered unfair and in breach of FET, since it “stripped Claimants of virtually all of the value of their investments”.<sup>49</sup> This reasoning was followed by the tribunal in *Novenergia v. Spain*, and it was concurred that at first Spain created a very favorable investment climate. The following measures were “radical and unexpected” and “transforming and altering the legal and business environment under which the investment was decided and made”<sup>50</sup>, thereby violating the FET standard.

The Spanish saga awards expose a clear fragmentation: tribunals applying the same facts have diverged because the ECT’s FET standard offers no precise test. It is up to panels to weigh several factors like the timing of investment, scope and type of representation, degree of change in regulation, whether there is any return (the comparison of the return), in conflicting ways.

### 2.1.2 Transparency

The first sentence of Article 10(1) requires that investors should be provided with “transparent conditions”. Kaj Hober explains that transparency “means that the legal and regulatory framework for investments must be easily accessible and understandable and that decisions concerning investments are based thereon and made available and known to the investors.”<sup>51</sup> Transparency has been consistently treated as a component of the FET standard.<sup>52</sup> In *Plama v. Bulgaria* the tribunal emphasized the role of transparency in protecting legitimate expectations<sup>53</sup> and ensuring legal stability, while the tribunal in *Al-Bahloul v. Tajikistan* affirmed it as an element of the FET standard.<sup>54</sup>

Although transparency has not been as frequently litigated and reasoned as legitimate expectations in ECT practice, the Spanish saga cases still provide us with some examples of inconsistent tribunal reasoning, highlighting why modernization was needed.

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<sup>49</sup> Ibid

<sup>50</sup> *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v Kingdom of Spain* (SCC Case No 2015/063, Award, 15 February 2018) 695

<sup>51</sup> Kaj Hobér (n 15) 224; Thomas W. Walde, 'Energy Charter Treaty-Based Investment Arbitration: Controversial Issues' (2004) 5 *J World Investment & Trade* 373, 387 (According to the author transparency means that “government administration has to make clear what it wants from the investor and cannot hide behind ambiguity if it has created such ambiguity and contradiction itself.”); *InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain* (ICSID Case No ARB/14/12, Award, 2 August 2019) 469 (The tribunal held that the FET also obliging the state with a duty of transparency and due process. States are required to be “forthcoming with information about intended changes in policy and regulations that may significantly affect investments.”); *Monti and Fermiglia* (n 20) 172 (“Although contested, the transparency concept can be broadly understood as the obligation upon host States that the legal framework for the investor’s operation is readily apparent and that any decisions affecting the investor can be traced to that legal framework.”), (“the FET transparency element entails an obligation upon host States to render both the laws and underpinning policies to be applied to a specific investment known in advance.”); *Técnicas Medioambientales Tecmed S.A. v United Mexican States* (ICSID Additional Facility Arbitration No ARB(AF)/00/2, Award, 29 May 2003) 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.”)

<sup>52</sup> *Martini* (n 19) 541; *CETA* (n 22) 8.10 – transparency is explicitly listed as one of the acts deemed to be in breach of FET; Kaj Hobér (n 15) 191

<sup>53</sup> *Plama Consortium Ltd v Republic of Bulgaria* (ICSID Case No ARB/03/24, Award, 27 August 2008) 178.

<sup>54</sup> *Al-Bahloul v Republic of Tajikistan* (n 39) 183

In *Hydro v. Spain*, the tribunal took a different view and argued that Article 10(1) forms a separate obligation of stability and transparency, not an illustration of the FET.<sup>55</sup> According to the tribunal, it is “plainly linked” to the stability and it aims to protect investors from arbitrary legal changes.<sup>56</sup>

The transparency obligations were also discussed in *InfraRed v. Spain*, where the Tribunal accepted transparency obligations as an element of the FET and held that the “regulatory reform was announced sufficiently in advance to allow the investors and actors to reach”.<sup>57</sup> Together with industry consultations, these measures relieved Spain of its duty of transparency.<sup>58</sup>

Transparency was later discussed in three Spanish saga cases, namely *Stadtwerke*<sup>59</sup>, *Watkins*<sup>60</sup> and *PV Investors*<sup>61</sup>, where Spain’s 11-month waiting period until adopting the new regime and related procedural steps were in the spotlight. In *Stadtwerke München v. Spain*, the tribunal accepted that “a finding of lack of transparency sufficient to constitute a violation of Article 10(1) must be manifested in a continuing pattern of non-transparent actions by a government”, which, according to the tribunal, was not the case in that dispute.<sup>62</sup> Moreover, the Tribunal pointed out that an 11-month period is a reasonable administrative practice for such complex elaborations.<sup>63</sup> Conversely, in *Watkins v. Spain*, the tribunal found that Spain’s abrupt regulatory change without any urgent need, an 11-month period of uncertainty, lack of any “analysis explaining underlying reasons behind” the new model, “lack of visibility and predictability” under the regime, and abolishment of the authority after criticising the new regime demonstrated that Spain’s measures was non-transparent.<sup>64</sup> Lastly, in *PV Investors*, the tribunal again affirmed that “Spain engaged in dialogue with investors prior to making changes”<sup>65</sup> and therefore there is no “record showing that Claimants were “left in the dark” for 11 months.”<sup>66</sup>

Such divergence highlights that the uniformity of findings in such cases is not solely dependent on an identical factual background, but is significantly influenced by differences in the parties’ arguments, the particular evidence (abolishment of the authority), and most critically, the various interpretive styles employed by different tribunals when applying the FET standard.

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<sup>55</sup> *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), 548-549

<sup>56</sup> *Ibid* 557

<sup>57</sup> *InfraRed Environmental Infrastructure GP Ltd and others v Kingdom of Spain* (ICSID Case No ARB/14/12, Award, 2 August 2019), 469, 471

<sup>58</sup> *Ibid* 472

<sup>59</sup> *Stadtwerke München GmbH and others v Kingdom of Spain* (ICSID Case No ARB/15/1, Award, 2 December 2019)

<sup>60</sup> *Watkins Holdings S.à r.l. and others v Kingdom of Spain* (ICSID Case No ARB/15/44, Award, 21 January 2020)

<sup>61</sup> *AES Solar and others (PV Investors) v Kingdom of Spain* (PCA Case No 2012-14, Award, 28 February 2020)

<sup>62</sup> *Stadtwerke München GmbH* (n 59) 311

<sup>63</sup> *Ibid* 313. Further, the tribunal concluded that “the length of time it takes to legislate is not a conclusive factor in determining whether the legislation is foreseeable” 314

<sup>64</sup> *Watkins Holdings* (n 60) 590-594

<sup>65</sup> *PV Investors v. Spain* (n 61) 631

<sup>66</sup> *Ibid* 632

### 2.1.3 Conclusion

Above-discussed interpretive ambiguity comes from vague language employed by the treaty, which empowers arbitrators to prioritize either investor protections or states' right to regulate. This situation endangers legal certainty and chills coherent environmental policy-making. While the revised ECT seeks to clarify the scope of FET and reaffirm states' capacity to regulate, it is nevertheless essential to devise clearer interpretive frameworks – whether through formal interpretive notes, or permanent investment court, or precisely drafted treaty provisions – to achieve balanced, consistent outcomes in future ECT disputes.

## 2.2 The 2024 Reform: Changes to the FET Clause

Due to growing dissatisfaction among Contracting Parties and contemporary global priorities, the ECT underwent a significant modernization process. This section analyses that reform effort, focusing on the context that led to the changes and specific textual revisions introduced, particularly concerning the FET clause and environmental measures

### 2.2.1 Negotiation Context of Reform

The modernization of the ECT was initiated in 2018 in response to escalating legal, environmental, and political challenges that endangered the treaty's continued viability. The ECT's investor-friendly provisions—particularly the broad and undefined scope of the FET standard—began to conflict sharply with evolving global climate objectives and the regulatory autonomy of states. The growing number of disputes filed under the treaty, often in response to states' environmental and energy transition measures, further intensified calls for reform.<sup>67</sup> In particular, the EU became a driving force behind modernization efforts, citing incompatibility between the ECT's protection standards and the climate goals embedded in the European Green Deal and the Paris Agreement.<sup>68</sup> The EU also advocated ISDS reform, considering its experience with new models, such as an ICS, in its recent agreements like CETA and FTAs.<sup>69</sup>

Another significant driver for the modernizations was a global trend towards reforming IIAs.<sup>70</sup> The ECT, being among the most frequently invoked IIAs, has been at the center of the discussions regarding the need for more balanced investment treaties and reform to the ISDS mechanism.

Between 2018 and 2024, the Contracting Parties engaged in several rounds of negotiations aimed at updating the treaty to meet 21st-century sustainable

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<sup>67</sup> E Hinrichsen, *The Energy Charter Treaty and Climate Change Law* (UEF 2023) 22–27.

<sup>68</sup> M Feigerlová, 'Comparative Climate Provisions in the Modernised ECT and CETA' in *Climate Law and Litigation* (Graz, 2024) 79-84

<sup>69</sup> Umair Ghori, 'The International Investment Court System: The Way Forward for Asia' (2018) 21 *Int'l Trade & Bus L Rev* 205, 209

<sup>70</sup> Marta Vicente, 'The European Union's Proposal for the Modernization of the Energy Charter Treaty: Specific Representations and Legislative Promises between Sustainable Development and Energy Transition' (2022) 31(3) *European Energy and Environmental Law Review* 124. 125

development goals.<sup>71</sup> The modernization process came to an end in December 2024 with the adoption of Amendments to the ECT on 3 December 2024.<sup>72</sup> Nonetheless, this reform effort was impacted by a significant amount of tension. While the EU pushed for strict environmental regulations and limitations on investor rights,<sup>73</sup> other Contracting Parties supported preserving the investor protections provided in the original Treaty.<sup>74</sup>

List of topics for the discussion on the modernization covered reforming investment protections, including FET, inclusion of explicit right to regulate, sustainable development, and other key points.<sup>75</sup>

The negotiation process itself reflected deeper structural tensions within the ECT regime. The Modernization was more about keeping the treaty intact by addressing disagreements, preventing more countries from leaving, and avoiding the complete termination, rather than reforming the legal rules and eliminating the gaps of the ECT.<sup>76</sup> This became especially clear when some EU members formally declared their intention to withdraw, citing risks to national climate policies.<sup>77</sup> The resulting reform text thus comprises a duality: on the one hand, it introduces textual innovations to reflect environmental matters, on the other hand, it preserves existing mechanisms that allowed claims against such regulations in the first place. It is because of the fact that, those innovative environmental carve-outs are determined as optional and state-specific, and the ISDS is maintained as it is.<sup>78</sup> It is argued that the ECT's structure—despite reform—continues to prioritize investor interests over environmental justice and public interest governance.<sup>79</sup>

While the modernization process was ultimately concluded in 2024, it did not result in unified acceptance. Several EU Member States, followed by the Union itself, chose to withdraw from the treaty<sup>80</sup>, raising further questions about the ECT's coherence. Meanwhile, the modernized ECT will provisionally apply to Contracting Parties from 3 September 2025, unless they choose to opt out.<sup>81</sup>

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<sup>71</sup> Verburg (n 18).

<sup>72</sup> Decision on the modernization (n 8)

<sup>73</sup> MR Mauro (n 12) 14

<sup>74</sup> Ottavio Quirico, *Investment Governance between the Energy Charter Treaty and the European Union: Resolving Regulatory Conflicts* (Brill Nijhoff 2023), 130

<sup>75</sup> Energy Charter Secretariat, 'Approved Topics for the Modernisation of the Energy Charter Treaty' (Energy Charter, 27 November 2018) <https://www.energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty/> accessed 10 May 2025.

<sup>76</sup> M Verburg (n 18)

<sup>77</sup> M Daszko, 'The Energy Charter Treaty: Past, Present and Future' (2025) *New Rules in Intl Economic Law*

<sup>78</sup> R Roiger-Simek, 'The Modernization of the Energy Charter Treaty: Dead in the Water?' (2023) 26 *Austrian Rev Intl & European Law* 119, 132; C Cocciolo (n 3); E Hinrichsen (n 15)

<sup>79</sup> UN Human Rights Council (n 4)

<sup>80</sup> European Commission, Proposal for a Council Decision on the Withdrawal of the Union from the Energy Charter Treaty COM(2023) 447 final, 7 July 2023; Council of the European Union, Council Gives Final Green Light to EU's Withdrawal from the ECT, Press Release, 31 May 2024 <https://www.consilium.europa.eu/en/press/press-releases/2024/05/31/council-gives-final-green-light-to-eu-s-withdrawal-from-the-ect/>.

<sup>81</sup> Energy Charter Conference, Decision on Entry into Force and Provisional Application of Amendments to the Energy Charter Treaty and Changes and Modifications to its Annexes (CCDEC 2024 15 GEN, 3 December 2024) [https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2024/CCDEC202415\\_EN.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2024/CCDEC202415_EN.pdf) accessed 10 May 2025

## 2.2.2 New Wording and Interpretive Shifts

As discussed above, the FET standard, which is outlined in Article 10(1) of the ECT, is a crucial, broadly interpreted provision in international investment law that arbitral tribunals have given varying interpretations. The modernization process focused on reforming the FET because of the challenges posed by fragmentation. The modernization process targeted the FET standard for reform. The new wording of the FET standard is incorporated in Article 10(2) of the modernized text. This revised clause represents a notable departure from the ECT's vague language. By establishing a closed (exhaustive) list of actions that would be deemed a violation of FET, the modernized ECT introduces a clearer definition instead of a broad standard.<sup>82</sup> The list includes common elements as in recent investment agreements, such as CETA<sup>83</sup>, or modernised EU FTAs<sup>84</sup>, which are “arbitrariness, such as blatant unreasonableness; targeted discrimination on wrongful grounds; fundamental breach of due process, including a fundamental breach of transparency; abusive treatment, frustration of an investor’s legitimate expectations.”<sup>85</sup>

In order to raise the threshold for a breach of FET based on legitimate expectations, the revised text added three criteria that these expectations must be (a) “central to its Investment”, and (b) arise “from a clear and specific representation or commitment by that contracting party upon which (c) the investor reasonably relied in deciding.”<sup>86</sup> However, including the frustration of legitimate expectations within the exhaustive list of FET breaches is very problematic and has been highly criticized.<sup>87</sup> It is neither in line with modern investment treaties nor consistent with the EU’s original proposal to eliminate it.<sup>88</sup> Recent treaties with closed lists generally do not contain investors' legitimate expectations. This particular phrasing in Article 10(2) might diminish the intended limiting effect and still expose states to claims based on legitimate expectations.

Although the article lays out conditions for legitimate expectations (centrality, specific representations, reasonable reliance), these criteria are qualitative, preserving the traditional scope of legitimate expectations. Investors can still base their arguments on the host state’s legal framework, as well as the state’s representations, as the reference to “specific representation or commitment” allows.

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<sup>82</sup> R Roiger-Simek (n 77) 130, Johannes Tropper, ‘The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?’ (2022) 23 *Journal of World Investment & Trade* 813–848, 836

<sup>83</sup> CETA (n 22), Article 8.10 (2);

<sup>84</sup> EU–Mexico Agreement in Principle, 21 April 2018 (European Commission Directorate-General for Trade) [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en) accessed 25 May 2025, Article 15(2)

<sup>85</sup> Decision on Modernized ECT (n 8) Article 10 (1)

<sup>86</sup> Mustafa T Karayigit, ‘The Compatibility of the ISDS Mechanism under the Energy Charter Treaty with the Autonomy of the EU Legal Order’ (2024) 29 *European Foreign Affairs Review* 85–114, 111

<sup>87</sup> L Schaugg and S Brewin, ‘Uncertain Climate Impact and Several Open Questions: An Analysis of the Proposed Reform of the Energy Charter Treaty’ (International Institute for Sustainable Development Report, October 2022) <https://www.iisd.org/system/files/2022-07/energy-charter-treaty-agreement-analysis.pdf>, 23

<sup>88</sup> C Knoebel and S Collins, ‘The European Union’s Proposed Amendments to Article 10(1) of the ECT: Advancing or Undermining Its Ambitions for the Green Transition?’ (2022) 7(1) *European Investment Law and Arbitration Review* 36, 39 (EU proposal: “it provides that legitimate 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”).

In all cases, the criterion that expectation must meet is “central role” and “reasonable reliance”, which are subjective and depend on the assessments by tribunals.<sup>89</sup>

The reform introduced additional wording in the preamble and a new stand-alone article clearly restates the right of states to regulate in the interest of legitimate public policy objectives, including environmental protection and climate change mitigation and adaptation.<sup>90</sup> Despite its noble intentions, the inclusion of a stand-alone provision on the right to regulate does not lessen the necessity of more carefully limited investor protections accompanied by strong carve-outs and exceptions. The right to regulate is a sovereign right that exists regardless of its express inclusion in a treaty text, but a general reassertion of that right will not safeguard against overly broad substantive protections<sup>91</sup>

In summary, the aim of revising the FET by adopting a narrow list of breaches was to make the application of the FET standard more predictable and less vulnerable to vague interpretations that might endanger a state's right to regulate. However, it should be noted that despite the reformed FET standard, its effectiveness in practice still depends on how future arbitral tribunals interpret and apply it, potentially allowing for divergence from the intended limitations.

### **2.3 Articles 19 and 19 bis: Role of Climate Commitments**

The original ECT contains Article 19 dedicated to environmental aspects. This provision comes from the traditional BIT model, which primarily prioritized investment protection.<sup>92</sup> Article 19 called upon contracting parties to "minimise in an economically efficient manner harmful Environmental Impacts" and to "take precautionary measures to prevent or minimise environmental degradation" related to economic activity in the energy sector.<sup>93</sup> It also incorporates the polluter pays principle and the precautionary principle.<sup>94</sup> However, the ECT's drafters did not choose to make this article obligatory. It does not contain "any substantive obligations binding the Contracting Parties to specific and enforceable environmental commitments"<sup>95</sup>. Crucially, Article 19, being in Part IV of the ECT, is not subject to the ISDS mechanism as per Article 26.

Modernization introduced two significant updates to address the above setbacks: expansion of Article 19 (“Sustainable Development”) and new Article 19 bis (“Climate Change and Clean Energy Transition”). Article 19 has been renamed and expanded to cover all three aspects of sustainable development, shifting beyond “Environmental Aspects”.<sup>96</sup> Contracting Parties explicitly reaffirm their

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<sup>89</sup> Monti and Fermeglia (n 20) 171-178. The authors of the article examine how the modernized ECT addresses the FET standard in relation to legitimate expectations, procedural and substantive reviews of host States' conduct. They explore the prospects for arbitral tribunals to issue rulings that better accommodate host States' regulatory powers compared to the original treaty.

<sup>90</sup> Decision on Modernized ECT (n 8) Article 4(19)

<sup>91</sup> L Schaugg and S Brewin (n 87), 29

<sup>92</sup> Ottavio Quirico (n 74) 74

<sup>93</sup> ECT (n 2) Article 19 (1)

<sup>94</sup> Ibid

<sup>95</sup> Johannes Tropper and Kilian Wagner (n 21), 821

<sup>96</sup> Decision Modernized ECT (n 8), Article 5 (1)

commitment to rights and obligations under multilateral environmental agreements, including UNFCCC and the Paris Agreement, as well as ILO conventions.<sup>97</sup> Moreover, it is required to have an impact assessment before an energy investment project may be authorized.<sup>98</sup>

New Article 19 bis again reaffirms Contracting Parties' commitments under the UNFCCC and the Paris Agreement. It aims to promote trade and investment for climate change mitigation and adaptation. These goals were also designated as “legitimate policy objectives” under the treaty, reinforcing that states have the right to regulate in pursuit of those aims.<sup>99</sup>

In short, the ECT’s climate provisions after modernization remained almost the same. It is still the object of the inter-state discussions, rather than ISDS and hard enforcement on the investors. “These reaffirmations have no concrete legal implications”<sup>100</sup> for the investment regime, and it is still up to arbitrators to interpret. States may invoke Article 19 bis to strengthen the legitimacy of their climate regulations and to demonstrate legitimate policy objectives; however, the core investment protections of the ECT continue to apply to such regulations, and arbitral panels still preserve broad discretion to find violations (or not).

## **2.4 Remaining Uncertainties: ISDS, Survival Clause, and Tribunal Discretion**

Despite the conclusion of the ECT modernization process in 2024, there are still persistent fundamental criticisms of the treaty. Several underlying components of the ECT remained unresolved and it generates uncertainties. These issues can be grouped as the ISDS system, the risk of regulatory chill, the survival clause and the broad discretion of arbitral tribunals in interpreting and applying the treaty. Given that these identified issues have been addressed several times throughout this research, this section aims to present a synthesized overview by summarizing the findings.

The ISDS mechanism, as one of the biggest uncertainties, is unchanged after the modernization. The ISDS system was not even included in the list of topics for modernization.<sup>101</sup> The omission of this has been highlighted by authors as “one of the key weaknesses of the modernization”.<sup>102</sup> While some minimal improvements were made on procedural aspects were introduced such as provisions on frivolous

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<sup>97</sup> Ibid

<sup>98</sup> Ibid

<sup>99</sup> Ibid, Article 4 (19)

<sup>100</sup> C Cocciolo (n 3) 107

<sup>101</sup> Energy Charter Secretariat (n 75)

<sup>102</sup> L Schaugg and S Brewin (n 87)

claims<sup>103</sup>, third-party funding<sup>104</sup>, and transparency through the UNCITRAL Rules<sup>105</sup>, the fundamental system of investor-state arbitration has not been reformed.<sup>106</sup> This unreformed system raises ongoing concerns about the lack of consistency, coherence and predictability of arbitral awards, since different tribunals tend to interpret the same rules differently.<sup>107</sup> Furthermore, because the system does not require the exhaustion of local remedies, investors can bypass domestic legal systems.<sup>108</sup> This structural feature has also been discussed by the CJEU. In the *Achmea* case, it is ruled that the ISDS system in intra-EU disputes violates EU law since it circumvents the jurisdiction of the CJEU and compromises EU legal autonomy.<sup>109</sup> Although the modernized ECT introduces a disconnection clause<sup>110</sup>, which specifies that certain articles (7, 26, 27, 29) “shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organization (REIO) in their mutual relations”<sup>111</sup>, it is still questionable whether this clause will fully resolve the incompatibility problem with the EU’s legal autonomy.<sup>112</sup> The persistence of ISDS without fundamental reform risks poses a serious risk of “regulatory chill”<sup>113</sup>, in which states are discouraged from implementing essential environmental policies due to costly investor claims.<sup>114</sup>

The controversial “survival clause”<sup>115</sup>, which has been kept in the modernized ECT, is another important element that was kept out of the list of topics. This clause freezes investment protections for current investments for 20 years after the withdrawal of a Contracting Party. It restricts states’ ability to withdraw from the ECT and regularly modify their energy policies in response to swift shifts in the energy market. A state will still be subject to the outdated protections of the ECT for 20 years, which significantly undermines climate action and the goal to be carbon neutral by 2050.

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<sup>103</sup> R Roiger-Simek (n 78) 137: “*The modernised ECT introduces a new provision for frivolous claims, allowing for expedited dismissal if a claim is “manifestly without legal merit.”*”

<sup>104</sup> L Schaugg and S Brewin (n 87) 35: “*The modernized ECT introduces a provision for the disclosure of third-party funding, requiring information such as the name, address, beneficial owner, and corporate structure of the funder. This is intended to increase accountability, though its effectiveness is debated due to limitations on the scope of disclosure and the absence of sanctions for non-compliance. The new provision on TPF is explicitly called a ‘missed opportunity to efficiently tighten the regulation of TPF’ ... Crucially, the absence of sanctions for non-compliance renders the provision moot.*”

<sup>105</sup> R Roiger-Simek (n 78) 136: “*The modernized ECT stipulates that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) shall apply to arbitral proceedings. These rules ensure the publication of information related to the commencement of proceedings, statements, claims, and other submissions.*”

<sup>106</sup> MR Mauro (n 12) 15

<sup>107</sup> N Jaspers, *Redesigning the Energy Charter Treaty to Advance the Low Carbon Transition* (International Institute for Sustainable Development 2019) 14

<sup>108</sup> B-J Verbeek, ‘The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?’ (2023) 8 *Bus and Hum Rts J* 97. 101

<sup>109</sup> Case C-284/16 *Slovak Republic v Achmea BV* [2018] CJEU (ECLI:EU:C:2018:158) paras 56-60

<sup>110</sup> Modernized ECT (n 8) Article 24 (3)

<sup>111</sup> *Ibid*

<sup>112</sup> Mustafa T Karayigit (n 86) 110, Paschalis Paschalidis, ‘Intra-EU Application of the Energy Charter Treaty: A Critical Analysis of the CJEU’s Ruling in Republic of Moldova’ (2022) 7 *Eur Inv Law Arb Rev* 3. 24

<sup>113</sup> “This chilling effect can manifest as an internalised chill (where policymakers prioritise avoidance of disputes over adoption of climate friendly policies) or a threat chill (where adoption of specific climate related measure is stalled because of a threat of an ISA) or a cross-border chill (when fossil fuel companies launch an ISA claim in one jurisdiction to delay/stall adoption of similar measure in another jurisdiction)” Tienhaara; Van Harten and Scott, both cited in ‘Integrating, Reconciling, and Prioritising Climate Aspirations...’ (n 6) 758.

<sup>114</sup> “As affirmed in the 2022 Intergovernmental Panel on Climate Change (IPCC) report, there is now a concrete risk that ISDS mechanisms will be used to challenge climate policies” MR Mauro (n 12) 11; Adinolfi, Baetens, Caiado, Lupone and Micara (n 37) 51; N Jaspers (n 107) 15

<sup>115</sup> ECT (n 2) Article 47 (3)

Another remaining issue is the substantial discretion granted to arbitral tribunals by vague or widely drafted investment protections. Although the Article 10 (2) of the modernized ECT introduces a closed list of specific measures that would constitute a breach of FET, it is still problematic because of the requirement to exhaust legitimate expectations. Furthermore, stare decisis, or legally binding precedents, are not applicable in ECT arbitration. Tribunals are not required to follow prior awards, but they may take them into account for "persuasive" value or "jurisprudence constante".<sup>116</sup> This also leads to unpredictability and inconsistency, together with vague drafting.

Damage valuation is another matter that is left to arbitral discretion which was not addressed in the modernized ECT. The Discounted Cash Flow (DFC)<sup>117</sup> method is applied widely, notwithstanding its problematic nature, which usually results in vastly exceeding the amount invested and puts states under a significant financial burden.<sup>118</sup>

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<sup>116</sup> Filip Balcerzak (n 23) 443; Justin D'Agostino and Oliver Jones, 'The Energy Charter Treaty: A Step towards Consistency in International Investment Arbitration?' (2007) 25 *Journal of Energy and Natural Resources Law* 225. 242

<sup>117</sup> "The DCF method involves estimating the value of the investment as equal to the current value of the income the investment is expected to generate in the future. It differs from asset or cost-based methods under which the value of the investment is calculated based on the amount of investment made." Mala Sharma (n 6) 771

<sup>118</sup> L. Schaugg and S. Brewin (n 87) 34

### 3 Implications of ECT modernization for Developing and Energy-Exporting States

This chapter examines how the modernization of the ECT affects the legal and policy space of developing and fossil fuel-exporting states, with a focus on developing countries. In 2024, the ECT was modernized in an attempt to strike a balance between investor protection and states' sovereign right to regulate in order to achieve climate and sustainable development goals. However, the ramifications of the updated ECT are far from simple for developing and energy-exporting countries. On the one hand, energy-exporting developing countries, for instance, Caspian Sea countries, rely on the export of fossil fuels to maintain economic growth; on the other hand, they are under increasing pressure to decarbonize while simultaneously being limited by the strict investor protections. This chapter examines how these structural disadvantages have limited developing countries and whether the new FET language meaningfully expands the policy space of these states.

#### 3.1 Structural Disadvantages

##### 3.1.1 Dominance of Developed Nations' Interests and Capacity Gaps

**Negotiation Disparities:** Developing economies normally acceded to the ECT on unequal footing. Developing states usually have little say in shaping investment treaties and because of this imbalance in bargaining power, they are forced to follow rules they neither drafted nor fully consented to. This was the case with the ECT, too, as the majority of developing countries did not contribute to shaping the ECT. It was initially driven by European interests in protecting investments in the post-Soviet energy sector.<sup>119</sup> Although developing states joined the ECT primarily to draw in capital, the emerging terms mostly favoured the capital-exporting nations. It is because such countries experiencing weak economic growth or financial crises are usually forced to concede more expansive and asymmetrical rights to private investors, leaving them in weaker bargaining positions.<sup>120</sup>

**Legal Expertise and Resources:** Developing nations frequently lack qualified, specialized legal capacity and financial resources to navigate complex international investment disputes. It is very difficult and expensive to defend against investment claims.<sup>121</sup> The cost of defending against lawsuits depletes the funds that can be used

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<sup>119</sup> Naimeh Masumy, 'The Role of the Energy Charter Treaty in Fostering and Promoting Energy Efficiency and Sustainable Development' (2019) Economic and Social Development, International Scientific Conference on Economic and Social Development 1073, 1074

<sup>120</sup> Beth A Simmons, *Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment* (2014) 66 *World Politics* 12, 12

<sup>121</sup> Arbitration cases can cost millions in legal fees, even for a state that ultimately wins, and average defense costs have been estimated around USD 5 million per case. Monti and Fermeglia (n 20); countries in Latin America have

for vital public services. Such liabilities, often arising from public policy measures, put heavy strain on developing budgets. On the other hand, well-funded investors take advantage of the fact that weak counterparts may choose to settle or take no action at all in order to avoid a lawsuit.

### 3.1.2 Overprotection of Investor Interests

**ECT's Investor-Centric Approach:** The international investment treaties, like ECT, tend to grant a wide range of asymmetrical rights to private economic agents, which results in a regime that is fundamentally one-sided. While states do not have the same reciprocal rights against investors, investors are granted the right to bring claims against states.<sup>122</sup> Consequently, investors get significant influence over the formulation and application of investment law in the invested country.<sup>123</sup> Moreover, the lack of a requirement to exhaust local remedies further erodes local judicial authority and puts host states at a structural disadvantage, in contrast to other international law regimes.<sup>124</sup>

**The Right to Regulate vs. the FET:** Although the modernization brought an express right to regulate and the ECT explicitly acknowledges states' sovereignty over energy resources, these provisions would become ineffective in practice because of the ambiguity of the FET standard. Particularly, tribunals' reliance on "legitimate expectations" has allowed for expansive interpretations of investor rights, having a tendency to limit developing states' regulatory authority.<sup>125</sup> It is challenging to determine the exact extent of obligations and exceptions because of the inconsistent case law and unpredictability that has been created.<sup>126</sup> For developing countries with undeveloped legal systems, even reforms for sustainable development or climate change may be discouraged due to the possibility of adverse awards. Such a lack of clarity in the FET clause essentially rendered it a catch-all clause for investor claims.<sup>127</sup>

## 3.2 Caspian Sea Countries: Legal Constraints in Energy-Exporting Regions

The tension between climate policy and investment protection is not just a theoretical issue for many developing economies; rather, it has a direct impact on their ability

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been ordered to pay investors over \$33.6 billion – an amount exceeding the cost of all climate-related disasters in that region over 50 years. Bettina Müller and Luciana Ghiotto, ISDS in numbers: Impacts of investment arbitration against Latin America and the Caribbean (Transnational Institute, 21 October 2024)

<sup>122</sup> Qinglin Zhang, 'Analysis of the Impact on Sustainable Development by Investment Regulations in the Energy Charter Treaty' (2015) 8 J World Energy L & Bus 542, 555

<sup>123</sup> Beth A Simmons (n 120), 32

<sup>124</sup> Pia Eberhardt and Cecilia Olivet, Silent Expansion: Will the world's most dangerous investment treaty take the global south hostage? (Transnational Institute, 15 April 2020) 12

<sup>125</sup> Diego Zannoni, 'The Legitimate Expectation of Regulatory Stability under the Energy Charter Treaty' (2020) 33 Leiden Journal of International Law 451

<sup>126</sup> Thomas W. Walde (n 51) 379

<sup>127</sup> As commentators have observed, the open-ended wording of Article 10(1) ECT has been interpreted as a 'catch-all provision' encompassing legitimate expectations and non-discrimination, thereby overriding a sovereign right to regulate and contributing to regulatory chill. Kluwer Arbitration Blog, ECT Reform: The Final Countdown (3 August 2022) <https://legalblogs.wolterskluwer.com/arbitration-blog/ect-reform-the-final-countdown/> accessed 15 May 2025.

to plan future. Energy-exporting developing countries, namely Azerbaijan, Kazakhstan and Turkmenistan (Caspian Sea countries) are usually rely on fossil fuels. For instance, oil and gas account for more than 90% of Azerbaijan’s export earnings and about half of its GDP and national budget revenues.<sup>128</sup> Kazakhstan and Turkmenistan are also heavily carbon-dependent.<sup>129</sup> These nations are under pressure to decarbonize and diversify in accordance with international climate commitments. However, the shift away from fossil fuels may be legally problematic due to the legacy of investment treaties like the ECT and other international investment agreements.

International investment law can be employed to either facilitate a shift towards clean energy or to establish a “carbon lock-in” protecting fossil fuel production.<sup>130</sup> Unfortunately, the overall impression is that treaties like the ECT have gone in the latter direction.<sup>131</sup> In its recent assessment, the IPCC cautioned that strong investment protections have stifled efforts to mitigate climate change.<sup>132</sup> In certain cases, legal requirements protecting fossil fuel investors have impeded the rebalancing of finance toward green alternatives. States run the risk of triggering lawsuits from impacted investors under bilateral investment treaties or the ECT’s investor-state dispute mechanism when they implement ambitious climate measures, typically alleging indirect expropriation or violations of the FET.<sup>133</sup> This is by no means a hypothetical risk. While developed nations are respondents in many of the environmental disputes, the consequences for developing countries are, if anything, more dire.

In 2022, the EU signed a Memorandum of Understanding to double gas exports by 2027 with Azerbaijan as an alternative source of gas supplies after the Russian invasion of Ukraine.<sup>134</sup> In the short term, this cooperation had benefits; Azerbaijan’s natural gas export earnings increased from roughly US\$5.5 billion in 2021 to nearly \$15 billion in 2022 as a result of rising gas prices.<sup>135</sup> By 2023, gas revenues even

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<sup>128</sup> International Energy Agency, *Azerbaijan 2021* (IEA, June 2021).

<sup>129</sup> UNCTAD, *Kazakhstan: Oil and Gas Sector and Energy Transition* (UNCTAD, 2023) [https://unctad.org/system/files/information-document/unda2030d22-kazakhstan-oil-gas\\_en.pdf](https://unctad.org/system/files/information-document/unda2030d22-kazakhstan-oil-gas_en.pdf) accessed 15 May 2025; UNECE, *Energy Connectivity: Kazakhstan Policy Brief* (UNECE, January 2025) <https://unece.org/sites/default/files/2025-01/Energy%20Connectivity-Kazakhstan%20Policy%20Brief.pdf> accessed 25 August 2025; UNECE, *Turkmenistan Energy Policy Brief* (UNECE, July 2024) <https://unece.org/sites/default/files/2024-07/turkmenistan-policy-brief%20%283%29.pdf> accessed 25 August 2025.

<sup>130</sup> L Di Salvatore, *Investor–State Disputes in the Fossil Fuel Industry* (IISD, January 2022) <https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf> accessed 12 May 2025; L Schaugg and S Brewin (n 87)

<sup>131</sup> MD Brauch (n 13)

<sup>132</sup> IPCC, ‘Chapter 14: International Cooperation’ in AR6 WGIII (IPCC, 2022) <https://www.ipcc.ch/report/ar6/wg3/chapter/chapter-14/> accessed 15 May

<sup>133</sup> Numerous investor-state disputes have been filed (or threatened) in response to climate and environmental policies. Examples include the Dutch coal phase-out laws (which prompted RWE and Uniper to file claims under the ECT), Italy’s offshore oil drilling ban (which prompted Rockhopper to file a claim under the ECT), France’s legislation to stop the extraction of fossil fuels (which threatened Vermilion with an ECT claim), and fracking prohibitions or stricter environmental permit regulations in nations like Canada and Slovenia that resulted in threats of arbitration. Kyla Tienhaara, Lorenzo Cotula, Lise Johnson and others, “Investor–State Disputes Threaten the Global Green Energy Transition” (2022) 376(6595) *Science* 701; RWE v Netherlands (ICSID Case No ARB/21/4, pending); Uniper v Netherlands (ICSID Case No ARB/21/22); Rockhopper Exploration plc v Italy (ICSID Case No ARB/17/14, Award, 24 August 2022);

<sup>134</sup> European Commission, *EU and Azerbaijan enhance bilateral relations, including energy cooperation* (Enlargement and Eastern Neighbourhood, 18 July 2022)

<sup>135</sup> Yana Zabanova, *The EU and Azerbaijan as Energy Partners: Short-Term Benefits, Uncertain Future* (Heinrich-Böll-Stiftung, 5 November 2024); U.S. Department of State, 2023 Investment Climate Statement: Azerbaijan (Investment Climate Statements, 22 November 2023)

surpassed oil revenues for the first time in Azerbaijan's history.<sup>136</sup> However, boosting exports of fossil fuels also strengthens Azerbaijan's carbon lock-in at a time when the EU's own gas demand is predicted to decline as a result of efficiency and decarbonization targets.<sup>137</sup> Azerbaijan might be exposed to legal and financial risks if its European partners reduce their gas consumption or impose greener conditionality in the future.

Even though it does not fall within the ECT framework, The Azeri–Chirag–Gunashli (ACG) production-sharing contract, also known as the “Contract of the Century” - Azerbaijan's oldest and most significant energy agreement, is relevant for comparison. The ACG PSA, signed in 1994 by SOCAR and a consortium led by BP, became enforceable domestically and superseded conflicting laws. It contains robust stabilization arrangements, including a fiscal and legal freeze, and requires SOCAR to compensate investors for regulatory changes-related losses.<sup>138</sup> Upon approval by the parliament of Azerbaijan, the PSA has been constituted as a law of Azerbaijan and haven taken precedence over any other current or future law, decree or administrative order which is inconsistent with or conflicts with the PSA.<sup>139</sup> This drafting fully achieves regulatory stability even without the FET clause. However, from the standpoint of today, this clause is unusually inflexible: it essentially shields foreign investors from changes in legislation, which is far harsher than protection currently found in the majority of the investment agreements, including modernized ECT.

Azerbaijan's accession to the ECT creates additional challenges. The “survival clause” of the ECT implies that even if Azerbaijan leaves the ECT, investors may still be able to claim protections for 20 years. Any strategic exits or redesign of fossil fuel projects to meet new climate objectives is difficult just because of the possibility that companies claiming FET or indirect expropriation under the treaty may file a lawsuit if such projects are withdrawn or redesigned to meet the new climate objectives.<sup>140</sup> In fact, even though Azerbaijan hasn't yet been the target of a well-known ECT arbitration over a climate measure, the possibility of this influencing its policy decisions is real.

Similar legal restrictions also apply to Kazakhstan and Turkmenistan, two of the region's largest producers of hydrocarbons. Large awards have been made against Kazakhstan as a result of its involvement in several investor-state arbitrations, most notably under the ECT.<sup>141</sup> In one ECT case, for instance, a Swedish court upheld an

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<sup>136</sup> Ibid.

<sup>137</sup> European Commission, *Energy efficiency – targets, directive and rules* (European Commission)

<sup>138</sup> Agreement on the Joint Development and Production Sharing for the Azeri and Chirag Fields and the Deep Water Portion of the Gunashli Field (signed 20 September 1994, Baku, ratified 2 December 1994, extended 14 September 2017, expires 2050), Article 23.1

<sup>139</sup> Ibid.

<sup>140</sup> In a 2024 climate forum speech ahead of COP29, President Aliyev emphasized that "having oil and gas reserves is not our fault" and that Azerbaijan would "defend its right" to continue fossil fuel investments and production for years to come. He called Azerbaijan's oil and gas reserves "a gift of God." Earth.org, 'COP29 Host Azerbaijan Defends Its Right to Invest in Oil and Gas' (Earth.org, 16 January 2024) <https://earth.org/cop29-host-azerbaijan-defends-its-right-to-invest-in-oil-and-gas/> accessed 20 May 2025.

<sup>141</sup> *Ascom Group SA, Anatolie Stati, Gabriel Stati and Terra Raf Trans Trading Ltd v Republic of Kazakhstan* (SCC Case No V (116/2010)), Final Award (19 December 2013) (ECT claim). See UNCTAD, 'Stati and Others v Kazakhstan' (Case No 379) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/379/stati-and-others-v-kazakhstan> accessed 20 May 2025.

award of US\$506 million related to Kazakhstan's handling of an oil investment.<sup>142</sup> Such incidents serve as a stark reminder to lawmakers and regulators, to the point where they are hesitant to enact any laws (whether they be tax, environmental, or otherwise) that might be interpreted as infringing on the rights of investors. Multinational corporations may complain about any obvious action that violates treaty protections, such as revoking a mining or drilling license in the name of the environment or raising taxes or caps on oil production. Despite being more closed to foreign investment overall, investors have sued Turkmenistan under the ECT, frequently in cases involving energy infrastructure and construction. To illustrate how persistent such claims are, a Turkish contractor even revived an earlier unsuccessful ECT claim against Turkmenistan in 2024.<sup>143</sup>

Caspian energy-exporting nations are caught between their investment frameworks' legal rigidity and their economic reliance on fossil fuels. While the ECT's historically vague FET standard has permitted tribunals to enforce comparable expectations at the treaty level, Azerbaijan's ACG PSA safeguards investor protections through stabilization provisions with local legal force. These tools, when combined with survival clauses and the unreasonably high costs of ISDS awards, restrict the regulatory space available for climate policy, resulting in carbon lock-in and regulatory chill. Even though the new ECT acknowledges the right to regulate and restrict FET to a closed list, Azerbaijan, Kazakhstan, and Turkmenistan still have limited practical flexibility due to embedded contractual and treaty obligations.

### **3.3 The Modernized FET and Future Pathways of the ECT**

The FET standard underwent substantial textual changes as a result of the ECT's modernization, which also recognized states' power to regulate for public interest, including environmental and climate goals. However, it is still questionable how much regulatory room these reforms give developing and energy-exporting countries. By contrasting the modernized ECT with other recent treaties like USMCA and CPTPP, Section 3.3.1 assesses whether the updated FET and ISDS framework gives Caspian states more autonomy. The ECT's uncertain future in light of the EU's withdrawal is then examined in Section 3.3.2, which also analyses the consequences for states that are still bound by its provisions as well as the risk of fragmentation and possible alternatives.

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<sup>142</sup> Republic of Kazakhstan v Ascom Group SA and Others (Svea Court of Appeal, 9 December 2016) (rejecting set-aside of the ~US\$506m ECT award); see Energy Charter Secretariat, 'Judgment of the Svea Court of Appeal on Kazakhstan's Set-Aside Application (Eng)' (9 December 2016)

<sup>143</sup> Turkish investor brings new claim against Turkmenistan' Global Arbitration Review (22 May 2024) (new ICSID claim under the ECT by a bankrupt Turkish construction company, four years after the parent's claim was dismissed) <https://globalarbitrationreview.com/article/turkish-investor-brings-new-claim-against-turkmenistan> accessed 20 May 2025; Lisa Bohmer, 'Turkish company files ICSID arbitration against Turkmenistan, following expedited dismissal of its parent's claims' IAREporter (21 May 2024) <https://www.iareporter.com/articles/turkish-company-files-icsid-arbitration-against-turkmenistan-following-expedited-dismissal-of-its-parents-claims/> accessed 20 May 2025.

### 3.3.1 Does the Modernized FET Language Provide More Space?

Important amendments to the FET standard and ISDS have been made through agreed-upon modernization. The FET obligation is essentially clarified and narrowed in the new text, which raises the bar for investor claims and gives states more policy flexibility.<sup>144</sup> The FET clause in the updated ECT lists a comprehensive list of particular behaviours that constitute a breach<sup>145</sup>, rather than the vague promise of “stable, equitable, favourable, and transparent” conditions.<sup>146</sup> This approach aligns with contemporary treaty practice (for example, the USMCA clearly states that FET is the minimal requirement of customary international law and has a list of breaches<sup>147</sup>). However, despite modernization efforts, the FET standard is still ambiguous and many scholars view it as a “catch-all provision, encompassing different principles.”<sup>148</sup> A wide range of interpretations by arbitral tribunals has historically resulted from this inherent ambiguity. Moreover, the modernized ECT’s approach to FET, which includes “legitimate expectations” as a stand-alone ground for breach of FET, is extremely problematic and controversial, as it goes against current reform trends in contemporary treaties that seek to limit the scope of FET.<sup>149</sup> The broad interpretation of FET by tribunals can significantly limit regulatory space, even though states’ rights to regulate in the public interest have been reaffirmed by the modernized text.<sup>150</sup> States will probably continue to be held liable under the modernized ECT since it permits tribunals to interpret its provisions broadly.<sup>151</sup>

### 3.3.2 What Will Happen Next?

A number of EU Member States (including Italy in 2016 and France, Germany, and Poland after that) as well as the EU itself withdrew due to failure of the modernization process.<sup>152</sup> It emphasizes worries that the modernized ECT still does not adequately align with climate goals and still poses a threat through its investor-state dispute settlement (ISDS) mechanism.<sup>153</sup> A “new regime of mixed membership” or “legal fragmentation” where different rules apply to different groups of states could result from these withdrawals, undermining the internal consistency of the ECT regime.<sup>154</sup> For example, after withdrawal, friendly “facilitators” or national courts would handle intra-EU energy disputes.

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<sup>144</sup> Cees Verburg, ‘The EU’s Text Proposal for a Revised Energy Charter Treaty: Legal Consequences and the Practical Implications for the Energy Transition’ in Martha M Roggenkamp and Catherine Banet (eds), *European Energy Law Report XIV* (Intersentia 2021) 42

<sup>145</sup> Decision on Modernized ECT (n 8) Article 10 (1)

<sup>146</sup> See Sub-section 2.2.2 above

<sup>147</sup> United States–Mexico–Canada Agreement (adopted 30 November 2018, entered into force 1 July 2020) art 14.6

<sup>148</sup> Rawnak Miraj Ul Azam, Syeda Afroza Zerin & Fahim Faisal Khan Alabi, ‘ISDS Reform and Environmental Governance: Addressing Climate Change Disputes through UNCITRAL’s Framework’ (2025) 5 *Int’l Inv LJ* 51, 55; Ivana Damjanovic & Ottavio Quirico, ‘Intra-EU Investment Dispute Settlement under the Energy Charter Treaty in Light of Achmea and Vattenfall: A Matter of Priority’ (2019) 26 *Colum J Eur L* 102, 143

<sup>149</sup> See Sub-section 2.2.2 above

<sup>150</sup> L Schaugg and S Brewin (n 87) 11

<sup>151</sup> Chen Yu (n 41) 117

<sup>152</sup> Tibisay Morgandi and Lorand Bartels, *Exiting the Energy Charter Treaty under the Law of Treaties* (2023) 34 *King’s Law Journal* (forthcoming)

<sup>153</sup> *Ibid.*

<sup>154</sup> Irina Kustova, ‘A Treaty à la carte? Some Reflections on the Modernization of the Energy Charter Process’ (2016) 9 *Journal of World Energy Law & Business* 357, 368

However, the departure of important parties does not mean that the ECT will automatically end. Even after the EU left, the treaty is still in effect among the remaining Contracting Parties. Nevertheless, the geographic reach and significance of the ECT are significantly altered by the departure of EU members. Many advanced economies around the world, as well as major foreign investors, are withdrawing. To support climate goals, even the UK, which is no longer a member of the EU, declared it would leave. About 37 states are still parties to the treaty as of early 2025, while about 10 states and the EU have declared their intention to withdraw.<sup>155</sup> In addition to some EU members who have not yet completed their withdrawal, the remaining Contracting Parties are now mostly non-EU nations, such as Japan, Switzerland, Turkey, and several Eurasian and Central Asian nations (Kazakhstan, Azerbaijan, Uzbekistan, etc.). What happens to energy investments that cross over between withdrawing and remaining states?

An orderly retreat is underway for the UK and other EU nations. According to ECT Article 47(2), each withdrawing state is required to provide formal notice and wait a year for the withdrawal to take effect. Crucially, ECT protections for investments made prior to withdrawal will subsequently be extended for an additional 20 years by the treaty's "sunset clause" (Article 47(3)). To avoid being bogged down by legacy fossil-fuel claims until the 2040s, the withdrawing states are exploring ways to neutralize the sunset clause.<sup>156</sup> While there are a number of strategies that deal with intra-EU situations, such as preventing a German investor from suing Poland, they do not always protect an EU member from claims made by an investor from Japan or Azerbaijan. To this end, using a fundamental change of circumstances (Article 62 of the VCLT) as justification for early termination of the ECT obligations is another legal theory that is being discussed.<sup>157</sup> Proponents contend that the ECT's very goal and purpose are undermined by the drastic changes in the global energy and climate landscape since the 1990s; in other words, they contend that the treaty's continued application to long-term fossil investments is a ridiculous outcome in light of the Paris Agreement and national net-zero laws. However, VCLT Article 62, sometimes referred to as the "nuclear option" of treaty law, is infamously difficult to apply successfully.

For the contracting parties that remain, the treaty will remain a legally binding agreement and modernization can move forward with the parties who chose not to withdraw.<sup>158</sup> We might view the ECT's refocus as a way to expand its geographic reach and provide a platform for energy investment cooperation outside of the EU. But that excitement could be tempered by the European withdrawal. Following the EU's exit, some African governments are reconsidering whether it makes sense to

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<sup>155</sup> David Turner, *The ECT Reform Finally Moves Forward: Fossil Fuels Phased Out and Intra-EU Disputes Excluded* (Baker Botts, 10 February 2025)

<sup>156</sup> Tibisay Morgandi and Lorand Bartels (n 152); Martin Dietrich Brauch, *Should the European Union Fix, Leave or Kill the Energy Charter Treaty?* (Columbia Center on Sustainable Investment, February 2021); Isabelle Wenger and Ellen Dixon, *A Reflection on the Withdrawal from the Energy Charter Treaty* (Daily Jus, 19 March 2025)

<sup>157</sup> Eoin Jackson, 'The Energy Charter Treaty: Letting the Sun Set on Sunset Clauses' (2024) 33 *Review of European, Comparative & International Environmental Law* 619.

<sup>158</sup> M Daszko (n 77) 110

join the ECT; alternatives include contemporary bilateral investment treaties (BITs).<sup>159</sup>

To sum up, the future of the ECT is questionable, however it is not yet "dead." Whether it becomes a thing of the past or finds a new home among a group of non-EU nations will be decided in the upcoming years. The ECT could become a more modest agreement that coexists with the Paris climate regime if the remaining members adopt the updated terms. However, there may eventually be a push for the treaty's complete termination if those states also lose faith (for example, if investors continue to make significant claims that impede policy reforms). There is currently no set end date for ECT; legally, it won't end for a state until its withdrawal takes effect and its sunset period expires (unless both parties agree to shorten it).

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<sup>159</sup> Isabelle Wenger and Ellen Dixon (n 156)

## 4 Conclusion

This thesis has assessed whether the 2024 modernization of the Fair and Equitable Treatment (FET) standard under the Energy Charter Treaty (ECT) appropriately strikes a balance between investor protection and state regulatory autonomy, particularly in measures related to the environment and climate. The study highlights persistent tensions between the pressing need for sustainable energy transitions and investment stability by examining the updated treaty text, pre-reform arbitral jurisprudence, and implications for developing energy-exporting countries like those in the Caspian Sea region. The findings demonstrate how modernization adds clarifications but ignores underlying imbalances, resulting in ongoing regulatory chill and legal ambiguity.

In response to the first research question, the modernization clarifies the FET standard to some extent, but it does not challenge the regulatory autonomy of states with regard to environmental and climate measures. The Spanish renewable energy scandal demonstrates how pre-reform interpretations of Article 10(1) revealed significant disparities. In crucial areas like reasonable expectations and transparency, tribunals differed. *Eiser* and *Novenergia* concluded that significant regulatory changes violated FET by compromising expectations derived from the original legal framework, while *Charanne* and *Isolux* emphasized the absence of specific commitments and supported states' regulatory authority as long as reasonable returns were maintained. *Stadtwerke*, *Watkins*, and *PV Investors* reached different conclusions about Spain's 11-month consultation period and procedural steps. Hydro, however, believed that transparency was a specific responsibility related to stability. The ECT's vague language, which restricts states' ability to regulate for climate goals without fear of legal action and grants arbitrators the power to prioritize investor rights over evolving public policies, is the cause of this confusion. The 2024 reforms seek to address these issues by reformulating FET in Article 10(2) as a closed list of violations, which includes abuse, arbitrariness, targeted discrimination, fundamental due process violations, and frustration of legitimate expectations. By requiring expectations to be fundamental to the investment, based on specific representations, and reasonably relied upon, this modification raises the bar for claims. It aligns with modern agreements like the USMCA and CETA. The expansion of Article 19 on sustainable development and the new Article 19 bis, which restates the commitments made in the UNFCCC and Paris Agreement, as well as the explicit recognition of the right to regulate for legitimate purposes, such as climate change and environmental protection, also demonstrate a greater focus on sovereignty. However, these changes are mainly just declaratory and do not override investor rights in favour of regulatory actions. The inclusion of the legitimate expectation in the list preserves interpretive flexibility, which jeopardize predictability. The lack of legally binding case law and problematic damage valuation techniques are examples of unresolved issues like the ISDS mechanism, sunset clause and arbitral discretion, which lead to disparities and potential

regulatory chill, as states may be hesitant to enact public policy legislation in the face of potentially costly awards.

Regarding the second research question, the modernized FET standard has resulted in a limited improvement in the legal position of developing energy-exporting countries, such as Azerbaijan, Kazakhstan and Turkmenistan under the ECT. These Caspian Sea states have been disadvantaged structurally by the investor-centric design of the ECT, including unequal bargaining power, capacity gaps in defending ISDS claims, and imbalanced protections granted to the capital-exporting nations. Agreements like ECT that safeguard investments in traditional energy sectors contribute to the carbon lock-in of fossil fuel-reliant countries. FET claims can put a burden on budgets and discourage reforms, as presented by arbitral cases against Kazakhstan and Turkmenistan, which frequently involve the energy sector. Such limitations are displayed even in non-ECT agreements, such as ACG PSA with a strict stabilization clause, which puts investor stability ahead of regulatory autonomy.

Modernization provides some additional leeway through the FET list and climate provision, which may allow the Contracting Parties to pursue decarbonization without facing violation risks, provided that changes are compatible with the legitimate policy goals. Yet, there are still questions that need to be addressed as like 20-year survival clause, post-withdrawal processes, unreformed ISDS that avoids local remedies, and the broad tribunal discretion. Along with a number of other member states, the EU's withdrawal breaks the harmony of the ECT, leading to a mixed regime where the remaining parties, such as Caspian states, may benefit from a refocused treaty, but confront continuing incompatibility with climate goals and decreased investment attraction.

In conclusion, the modernization of the ECT is the initial move in reaffirming regulatory rights, trying to reduce vagueness in the FET standard, and bringing investor protections and environmental goals into alignment. However, it is the reality that these amendments did not substantially change the balance by maintaining legitimate expectations, untouched ISDS, and optional carve-outs. Although the ECT's future is uncertain amid withdrawals, additional reforms, such as mandatory environmental primacy, ISDS revision, and a shortened sunset clause, would be necessary for the ECT to truly support sustainable development. Finally, these results show that it is time for investment law to pass the legacy of fossil fuels and put the health of the planet first.

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