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FACT FINDING AND *IURA NOVIT CURIA* IN ARBITRATION: HOW FAR DO ARBITRATORS' POWERS REACH?

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"BODYGUARDS" OR "POLICE," WHO CAN ESCORT US TO A MORE SUSTAINABLE FUTURE?
A DEEP DIVE INTO "ELITE EIGHT" IN 2021 INTERNATIONAL ENERGY ARBITRATION

by Lawrence (Yichu) Yuan

I. INTRODUCTION

The investor-state dispute settlement (ISDS) in Energy Charter Treaty (ECT) (investor-state arbitration in effect)[1] have been taunted as the "bodyguards for the fossil fuel industry" by some media analysts because they have been used to challenge states' climate actions, such as closing coal mines and power plants, ceasing oil and gas operations, decommissioning new fossil fuel infrastructure, and cutting subsidies.[2] The metaphorical use is telling as "bodyguards" are hired often by well-heeled private parties to protect private interests, bearing a resemblance to private secretive tribunals hired by corporations to protect corporate interests. Corresponding to "bodyguards" is the "police," which obviously cannot be hired as it is monopolized by the state for public benefits. If investor-state arbitral tribunals act like "bodyguards," courts should be the "police" correspondingly, which may sound paradoxical at first glance since ideally courts should remain independent from executive influence. But state courts, in investor-state disputes where national and geopolitical interests are often at stake, can hardly refrain from being politicized as an extension of the executive branch, one of the principal concerns that gives birth

[1] Under Article 26 of the ECT, investors have the right to bring a suit before ICSID, before an arbitral tribunal established under the UNCITRAL arbitration rules, before the Arbitration Institute of the Stockholm Chamber of Commerce, or before the courts or administrative tribunals of the respondent state. As of December 31, 2021, 145 investor-disputes reported by the Energy Charter Secretariat chose arbitration instead of state courts as ISDS. See International Energy Charter, List of Cases, https://www.energychartertreaty.org/cases/list-of-cases/.

[2] *See*, *e.g.*, *Busting myths around the Energy Charter Treaty*, CORP. EUROPE OBSERVATORY, Dec. 15, 2020, https://corporateeurope.org/en/2020/12/busting-myths-around-energy-charter-treaty; Hannah Robinson, *What we know about the EU's mysterious Energy Charter Treaty*, OPEN DEMOCRACY, Oct. 21, 2020, https://www.opendemocracy.net/en/can-europe-make-it/what-we-know-about-eus-mysterious-energy-charter-treaty/.

to investment arbitrations.[3] Therefore, metaphorizing courts as "police" is not unfounded in this context.

However, state courts are not the only police-like presence in state-related disputes. Supranational courts such as the Court of Justice of the European Union (CJEU) and the Multilateral Investment Court (MIC) in the making and intergovernmental organization like the European Commission, all of which the article would touch on, are also apt for the "police" metaphor. Correspondingly, "bodyguards"—private-driven entities favored by business community—also has a wide scope that captures ICSID arbitral tribunals, non-ICSID arbitral tribunals and even conglomerate-endowed research institute.

Drawing on the eight major cases and events ("Elite Eight") in 2021 international energy arbitration nicknamed and selected by Dr. Laurence Shore at the 10th ITA-IEL-ICC Joint Conference on International Energy Arbitration, this article examines the "Elite Eight" under the tension between and within "bodyguards" and "police" in the transition to a more sustainable future. The tension is manifested, inter alia, in:

- their power struggle for the jurisdiction of ECT disputes;
- their divergent interpretive lenses of contract terms, corporate and state conduct;
- their principals' differing visions of the energy sector's future;
- the impact they exert on achieving sustainable development.

To better present the unifying theme and better brief researchers and practitioners, each sub-section of the article leads with at-a-glance summaries of the "Elite Eight," followed by analyses of the necessary context, reasoning, policy, and impact based on the author's research alongside Dr. Shore's comments.

II. "ELITE EIGHT": "BODYGUARDS" AND "POLICE"

A. *Normal Science*

The following three "elites" are grouped under "Normal Science" by Dr. Shore because they are "exemplars of well-developed approaches in existing energy law."

[3] United Nations Conference on Trade and Development, Investor–State Disputes: Prevention and Alternatives to Arbitration, 13-14, UNCTAD/DIAE/IA/2009/11 (2010).

1. A State Aid Dispute: *Eurus Energy v. Spain*

Eurus Energy v. Spain is an ICSID arbitration brought by a Japanese company, Eurus Energy, and its fully-owned Dutch subsidiary, which owns and operates wind farms to generate electricity in Spain under the ECT[4] (the Dutch claimant withdrew from the arbitration in 2018).[5] The dispute arose from Spain's change in its state aid regime to renewable energy in accordance with EU requirements, reducing the subsidies to the Japanese claimant and even clawing back subsidies it had already received.[6] The Japanese claimant alleged that Spain violated Article 10 (fair and equitable treatment (FET)) and Article 13 (indirect expropriation) of the ECT.[7] The tribunal dismissed the expropriation claim[8] but held the retroactive claw-back of subsidies by Spain breached the FET standard.[9] The tribunal directed the parties to seek agreement on the amount of the claw-back claim.[10]

The tribunal's holding and reasoning in merits are not surprising as it "reflects well-established features of a complex energy investment arbitration, particularly concerning legislative changes to renewables' programs," as Dr. Shore pointed out.

First, the expropriation claim fell through for two reasons: (i) the Japanese claimant's purported "public law right" with unspecified duration to receive state subsidies based on administrative certificates and provisions is not a vested right recognized under the Spanish legal system but derives from administrative measures that are subject to change;[11] therefore, it is more akin to an expectation which can be frustrated, denied, but not expropriated;[12] (ii) even if it is an acquired right susceptible of expropriation, established jurisprudence suggests that expropriation requires

[4] Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/4., Decision on Jurisdiction and Liability, ¶ 3 (Mar. 17, 2021).

[5] *Id.* ¶ 3.

[6] *Id.* ¶¶ 101, 242-45.

[7] *Id.* ¶¶ 241, 276-370.

[8] *Id.* ¶ 274.

[9] *Id.* ¶ 467.

[10] *Id.* ¶ 468.

[11] *Id.* ¶¶ 259, 261, 264, 266

[12] *Id.* ¶¶ 256, 272.

"substantial deprivation of the asset in question or its value" which is unmet, because the plants here are still intact, operating under the Japanese claimant's ultimate control, although their value is impaired; and therefore, there is no conduct by Spain tantamount to expropriation.[13]

Second, on the FET Claim, the tribunal found that the Japanese claimant did not have a legitimate expectation that certain subsidies would continue to be paid for the lifetime of its plants because Spain had not made any "specific commitments" to maintain these subsidies.[14] The five-prong "Blusun test" was applied to ascertain the existence of "specific commitments" (in parenthesis are the majority's brief answers): (i) was there a specific commitment of stabilization? (no); (ii) absent a specific commitment, did the claimant entertain a legitimate expectation that subsidies would not be reduced during the lifetime of the project (no); (iii) were the subsidies lawfully granted (yes, in accordance with EU law); (iv) were the changes in legal regime "disproportionate to the legitimate aim of the legislative amendments" (no, except the claw-back of benefits already paid); and (v) did the reform have due regard to the reasonable reliance interests of recipients who had committed substantial resources on the basis of the earlier regime (yes, except the claw-back).[15] Based on the test, the tribunal found that (i) Eurus had legitimate expectations that those subsidies would be continued in "some substantial form," but not to the extent that they would remain the same for the lifetime of Eurus's investment and (ii) only the retroactive claw-back breached FET standard.[16]

In analyzing the claw-back under the fourth question of the "Blusun test," the tribunal rejected the Spanish constitutional court's formalistic interpretation of "retrospectivity" and adopted a more functional approach. Specifically, the Japanese claimant claimed its expectation that the state subsidies would sustain for the duration of the project's operational lifetime (25 years ultimately found by the

[13] *Id.* ¶¶ 256, 274.

[14] *Id.* ¶ 319.

[15] *Id.*

[16] *Id.*

tribunal) was violated because the new incentive only covered the first 20 years.[17] The reduction in future payment was based on factoring in the past subsidies made to the plants, resulting in no payments for 11 of the plants.[18] The tribunal found it to be "a weaker form of retrospectivity" as no payment would need to actually be made to Spain, but reducing future remuneration based on past gains has the effect of clawing back remuneration to which the investor had a right at the time the payment was made.[19] In reaching this conclusion, the tribunal disregarded the Spanish court's judgment and instead recalled its fellow "bodyguards' practices"—a handful of ICSID awards—and ultimately followed a substance-over-form approach adopted by the *RREEF Infrastructure Limited v. Spain* tribunal which reasoned the same.[20]

The policy consideration underpinning the deviation from Spanish court judgments seems to be not to penalize the plants producing renewable energy for their successful operation which sustained their past subsidies over those years.[21] The foothold of the non-deference to state court is ICSID's self-contained enforcement mechanism:[22] an ICSID arbitration contains (i) no arbitral seat; (2) no interim measures from the court; (3) no review of award from courts,[23] and instead the proceeding and interpretation, revision, and annulment of award must be made within the ICSID Convention framework. The very salient feature that no state "police" at seat can either stay, compel, or otherwise influence ICSID proceedings, or set aside ICSID awards, especially on the amorphous "public policy" ground allows ICSID tribunals to be the "bodyguards" of businesses in the battle against sovereign states.[24]

[17] *Id.* ¶¶ 339-40, 344.

[18] *Id.* ¶¶ 346-47.

[19] *Id.* ¶¶ 347, 354.

[20] *Eurus Energy*, ¶¶ 347, 354; RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶¶ 328-29 (Nov. 30, 2018).

[21] *Eurus Energy*, ¶ 355.

[22] URSULA KRIEBAUM, ET AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 343-44 (3rd ed. 2022).

[23] ICSID Convention, art. 26

[24] *Id.* at art. 54; KRIEBAUM, *supra* note 22, at 448.

Lastly, this case is a good counterexample to the one-sided media portrait of ISDS: even if the ECT and ECT tribunals are acting as "bodyguards," they are not necessarily protecting polluters in fossil fuel industry, but all corporations entitled to ECT claims, which include the ones promoting renewable energy.

2. Is "Continuous Drilling" Drilling Non-stop? *Sundown Energy v. HJSA No. 3*

In *Sundown Energy v. HJSA No. 3*, the Texas Supreme Court rendered a judgment on the contractual dispute of the interpretation of a "continuous drilling program" provision in a mineral lease between Sundown (the "Lessee") and HJSA No.3 (the "Lessor").[25] The issue was whether activities other than spudding in[26] a well are sufficient to satisfy the precondition to maintain the lease under conflicting contract terms. The Texas Supreme Court held that spudding in is not required to maintain the lease and activities other than drilling can constitute "drilling operations."

The holding that "continuous drilling" is not drilling non-stop by the Texas Supreme Court is fact-sensitive. Specifically, the lease provides that at the end of the lease's 6-year primary term the Lessee was required to reassign to the Lessor operating rights and non-producing areas unless the Lessee was engaged in a "continuous drilling program."[27]

The Lessor argued that if the Lessee failed to timely "spud in" new wells, the lease would be terminated based on the contractual provision which states, "[t]he first such continuous development well shall be spudded-in on or before the sixth anniversary of the Effective Date, with no more than 120 days to elapse between completion or abandonment of operations on one well and commencement of drilling operations on the next ensuing well."[28]

The Lessee's position was that activities other than spudding-in, such as reworking, fracturing, and other well operations, were sufficient to maintain the

[25] Sundown Energy Ltd. P'ship v. HJSA No. 3, Ltd. P'ship, 622 S.W.3d 884, 885 (Tex. 2021).

[26] "Spud in" means the first boring of the hole in the drilling of an oil well.

[27] *Id.* at 887.

[28] *Id.*

lease.[29] This is supported by a definition clause contained in the lease which defines "drilling operations" as three categories of operations that include, but are not limited to, spudding in a well. Specifically, the definition clause provides that, "*[w]henever* used in this lease the term 'drilling operations' shall mean: [1] actual operations for drilling, testing, completing and equipping a well (spud in . . .); [2] reworking operations . . . ; and [3] reconditioning, deepening, plugging back, cleaning out, repairing or testing of a well."[30]

The trial court found for the Lessee, but a divided Court of Appeals reached the opposite conclusion and found that the lease required timely spudding in, which the Lessee had failed to do.[31] The Texas Supreme Court reviewing de novo found that the lease clearly defined that the term "drilling operations" in the continuous drilling program provision included reworking operations in addition to spudding in;[32] and therefore, activities other than spudding in a well are sufficient to maintain the lease.[33]

Other than the contract construction part being a cautionary tale for contract drafters, the Texas Supreme Court's holding and dicta in the judgment contain important policy considerations that could surface in future arbitrations if Texas law is applied. To illustrate, the Lessor argued that the mineral lease's objective is to encourage the full exploration and development of undeveloped acreage and from this utilitarian standpoint, the Lessee should have to spud in new wells to meet this policy objective.[34] In contrast, the Lessee argued the policy objective is met because fracturing and reworking are production maximizing activities as well that can be more cost-effective than drilling new wells; and therefore, maximizing production should not be equated with drilling new wells.[35] As Dr. Shore commented, "while the

[29] *Id.*

[30] *Id.* at 887-88.

[31] *Id.* at 887.

[32] *Id.* at 890.

[33] *Id.*

[34] *Id.* at 889.

[35] *Id.*

court did not choose one policy argument over the other, the per curiam opinion was clearly at pains to show that production maximizing, a central concern of Texas energy law, would be upheld either way the mineral lease is construed."

Granted, this case is not apt for the "police" and "bodyguards" metaphors because there is no state party involved in the dispute, and so the court is hardly under any executive influence to act as a "police." However, it does represent how state courts are, to the extent of its judicial discretion, willing to safeguard the business arrangements towards a more sustainable development in the fossil fuel industry: with the advent of new technology like rework and recondition and other hydrocarbon production, coupled with proper definition clauses, the end goal of "production maximizing" can be served other than drilling *per se*.

3. Resolving Billion-Dollar Dispute in One Year: *West Africa Gas v. Ghana*

West Africa Gas v. Ghana is an arbitration case of London Court of International Arbitration (LCIA) on a dispute arising out of the termination by the West Africa Gas Limited (BVI) (the "Seller") of a gas sales agreement dated in 2015 (the "Gas Sales Agreement") made between the Seller and the Republic of Ghana (the "Buyer").[36] Two principal issues before the tribunal were: (i) whether the Seller could terminate the agreement if the Seller itself was in breach of contract;[37] and (ii) whether a 18-month delay in exercising the termination right prevented the Seller from so doing when the agreement prescribed that the seller "may thereafter terminate this Agreement with immediate effect" which permits two conflicting interpretations.[38] The Seller initially sought $1 billion for recovery fees.[39] The tribunal applying Ghanaian law found for the Seller in both issues and eventually awarded Seller $69 million. (Ghanaian law is not materially different from English law).[40]

In the midst of Ghana's decade-long energy crisis, the Buyer and the Seller

[36] West Africa Gas Limited (BVI) v. The Government of the Republic of Ghana, LCIA Case No. 194422, Award, ¶ 1 (Jan. 15, 2021).

[37] *Id.* ¶ 127.

[38] *Id.* ¶¶ 143-45.

[39] *Id.* ¶ 38.

[40] *Id.* ¶¶ 163, 326.

entered into the Gas Sales Agreement for the supply of liquefied natural gas ("LNG").[41] The agreement provided for conditions precedent to the party's obligations to sell and purchase the LNG,[42] but both sides failed to fulfill all the conditions precedent.[43] For example, the Buyer failed to obtain a letter of credit[44] and the Seller did not complete the infrastructure works at Tamer.[45] The Seller eventually terminated the agreement.[46] According to the agreement, the Seller's right to terminate arose on an agreed-upon date if "any conditions" were not fulfilled on that date or a different date if the original date is waived or modified in writing (the "Seller's right to terminate").[47] Given that the Buyer failed to fulfill certain conditions on the agreed-upon date and the Buyer no longer wanted to purchase gas because the Buyer was able to receive gas at significantly lower prices from Gazprom, saving around $400 million, the Seller exercised its right to terminate.[48]

The Buyer maintained, *inter alia*, that the Buyer and Seller's conditions were "independent" of each other and had to be performed "concurrently;" alternatively, there was an order of precedence and that the letter of credit did not have to be provided before other conditions were fulfilled.[49] Therefore, Buyer argued, the Seller could not use the Buyer's failure to perform conditions as a ground for termination. Specifically, the Buyer submitted that until the Seller had satisfied all of its conditions (in particular, completed the infrastructure works), and was in a position to supply gas to the Buyer, the Buyer's payment obligations—like opening a letter of credit—did not arise.[50]

[41] *Id.* ¶ 121.
[42] *Id.* ¶ 36.
[43] *Id.* ¶ 37.
[44] *Id.* ¶ 94.
[45] *Id.* ¶ 37.
[46] *Id.* ¶ 38.
[47] *Id.* ¶¶ 132-34.
[48] *Id.* ¶¶ 101, 106.
[49] *Id.* ¶¶ 110-11.
[50] *Id.* ¶ 116.

For the first issue, the tribunal conducted a multi-layered analysis regarding contract construction to reach the conclusion that there was nothing in the Gas Sales Agreement, making the Sellers' right to terminate conditional on having itself complied with all its conditions. The principal reasons include, *inter alia*, (i) the term "any condition" without any specificity as to which condition are wide and self-explanatory;[51] (ii) the Seller's right to terminate is subject to the Seller's unilateral right to extend the agreed upon date to accommodate the Seller's delay in fulfilling conditions caused by acts of the Buyer (the "Seller's unilateral right of extension"), which is not exercised;[52] (iii) the agreed-upon date can only be changed or be postponed if the Seller exercised its unilateral right of extension or if the parties waived the date in writing, but neither happened here;[53] (iv) given the Seller's right to terminate is expressly made subject to the Seller's unilateral right of extension—which presupposes that the Seller may not comply with the conditions—the right of extension does not undermine the alternative right to terminate;[54] (v) if the Seller's right to terminate is conditional upon its fulfillment of its conditions, it would be very uncommercial to compel the Seller to perform and undertake further expenditure to complete the infrastructure works after the Buyer announced that it was not going to further perform, as it would mean an increased "recovery fee" which the Buyer would ultimately have to pay;[55] and (vi) there is nothing in the agreement which makes the Seller's right to terminate conditional on it having itself complied with all the conditions, and nor does the Buyer have an equivalent right of extension.[56]

For the second issue, the tribunal acknowledged that the words "with immediate effect" can either govern the termination date (suggesting a limited time scale of immediacy) or govern the effectiveness of the termination notice (imposing no

[51] *Id.* ¶ 134.

[52] *Id.* ¶ 135.

[53] *Id.* ¶ 137.

[54] *Id.* ¶ 138.

[55] *Id.* ¶ 104.

[56] *Id.* ¶ 140.

restrictions on the exercise period).[57] The latter interpretation was eventually adopted. The reasons include (i) the former interpretation would render "thereafter" redundant;[58] (ii) "with immediate effect" denotes a consequence of a notice, not the time within which to serve it; had the words been intended to govern the time within which to terminate, there would have been qualifying languages as present in other provisions of the agreement (*e.g.*, Article 3.1.2 uses the phrase "may forthwith terminate;" Article 23.5 which entitles the Seller "to terminate" if no acceptable replacement LC is provided "immediately," etc.);[59] (iii) to argue that the termination should have been carried out immediately is inconsistent with the Buyer's argument that the termination was premature because the Seller had not fulfilled its conditions.[60]

The tribunal then spent 147 paragraphs on an extremely detailed determination of the recovery fee totaling $69 million.[61]

The elaborate award came only around one year after the tribunal was constituted, which prompts Dr. Shore to praise that it is exactly the "rapid painstaking analysis applied to an exceedingly complex high-valued gas sales agreement with [high] level of contract construction and quantum assessment that helps sustain arbitration as the preferred method of dispute resolution in the energy sector."

But a normative inquiry into the backdrop of this well-reasoned and efficiently-rendered decision and its impact on state and sustainable development may draw a rather bleak picture: amidst Ghana's decade-long energy crisis and the halt in economic development during COVID-19, Ghana's public debt increased to 81.1 percent of GDP in 2020.[62] Ghana has lost in a number of investor-state arbitrations and is obligated to pay $12.05 million in *Balkan Energy v. Ghana* (a 2014 PCA arbitral

[57] *Id.* ¶ 147.

[58] *Id.* ¶ 150.

[59] *Id.* ¶¶ 150-51.

[60] *Id.* ¶ 153.

[61] *Id.* ¶¶ 164-310.

[62] *The World Bank in Ghana*, THE WORLD BANK, https://www.worldbank.org/en/country ghana/overview#1.

award),[63] $87.2 million in *Bankswitch v. Ghana* (a 2014 PCA arbitral award),[64] $134 million *GPGC v. Ghana* (a 2021 PCA arbitral award),[65] and now, $69 million in *West Africa Gas v. Ghana* (a 2021 LCIA arbitral award). Ghana is not alone however. From 2013 to 2019, African states have received more foreign investor claims than the previous 20 years combined.[66] Although foreign investors should not foot the bill for contract default, it begs the question: how does continuously crippling a state's liquidity by uncoordinated debt claims benefit any actor? Neither can a state ridden with immediate debt claims emerge from energy crisis and then succeed in energy transition thereafter, nor can foreign investors sustainably enforce their debt claims when the vicious circle (debt-ridden states continuously borrowing new debt and defaulting in repayments) culminates in state bankruptcy.

But are "bodyguards" really the culprits here? Absent any "police" coming to rescue, a "bodyguard" like an international arbitral tribunal can at least force African states to cough up some money and theoretically safeguard the sustainability of foreign direct investment. Arguably, it is the coordination of their principals' (foreign investors') debt claims and the construction of a regime for a special protection of sovereign states under such circumstances as Ghana is experiencing that merit our attention and efforts.

B. *Energy Arbitration and Climate Crisis*

Next are three prominent examples offering European perspectives on energy arbitration amidst the climate crisis.

1. The End of ECT Intra-EU Arbitration? *Moldova v. Komstroy*

Moldova v. Komstroy is a ruling made by the CJEU on the dispute between the Republic of Moldova and Komstroy LLC, a Ukrainian company concerning the ECT.[67]

[63] Balkan Energy v. Ghana Final Award, Permanent Court of Arbitration, Final Award, ¶ 642 (Apr. 1, 2014).

[64] Bankswitch v. Ghana, Permanent Court of Arbitration, Award Save as to Costs, ¶ 11.231 (Apr. 11, 2014).

[65] GPGC Limited v. The Government of the Republic of Ghana, Permanent Court of Arbitration, Final Award, (Jan. 26, 2021), ¶ 532.

[66] *Impacts of investment arbitration against African states*, TRANSNATIONAL INSTITUTE, Oct. 8, 2019, https://www.tni.org/en/isdsafrica.

[67] Case C-741/19, Republic of Moldova v. Komstroy LLC, 2021 E.C.J., ¶¶ 1-2.

One of the issues raised by the European Commission and several member states before the CJEU is whether intra-EU arbitration (arbitration between EU investors and EU Member States) under the ECT is compatible with EU law.[68] The ruling is the CJEU's latest position on the compatibility of intra-EU arbitration with the EU law after its *Achmea* decision in 2018 ("*Achmea*"). In *Achmea*, the CJEU held that arbitration provisions found in bilateral investment treaties (BIT) concluded between EU Member States are incompatible with EU law.[69] What's new in *Komstroy*, however, is that CJEU had to decide whether the *Achmea*'s decision in BITs would apply in the new context of the ECT, a multilateral investment treaty to which EU itself is a party. Following *Achmea*, the CJEU held that the investor-state arbitration under Article 26 of the ECT does not apply to intra-EU disputes.[70]

The CJEU's reasoning is summarized as follows.

First, recalling its reasoning in *Achmea*, the CJEU stressed the importance of the autonomy of the EU legal order, and the consistency and uniformity in the interpretation of EU law under the Treaties of the EU.[71] For instance, the preliminary ruling procedure where the EU national courts may make a preliminary reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union was designed to secure uniform interpretation of EU law, thereby serving to ensure its consistency, full effect, and autonomy.[72]

Second, the CJEU followed settled case law and found that the ECT concluded by an EU institution—the Council of the European Union in this case—is an "act of EU law" and forms part of the EU legal order.[73] It follows that an ECT arbitral tribunal is required to interpret, and even apply EU law when deciding a dispute under Article 26 of the ECT.[74]

[68] *Id.* ¶ 25.

[69] Case C-284/16, Slowakische Republik (Slovak Republic) v. Achmea BV, 2021 E.C.J.

[70] *Moldova*, ¶ 66.

[71] *Id.* ¶ 45.

[72] *Id.*

[73] *Id.* ¶ 23.

[74] *Id.* ¶ 50.

Third, CJEU maintained its position in *Achmea* and held that ECT tribunals are outside the judicial system of an EU Member state and cannot make a reference to the CJEU for a preliminary ruling.[75] Additionally, the judicial review that arises in an EU-seated investor-state arbitration is limited since the referring court can only perform a review insofar as the domestic law permits.[76] In other words, the ECT does not contain mechanisms to safeguard divergences in the interpretation of its provisions by different tribunals, which would threaten the consistency and uniformity in the interpretation of EU law.

Finally, to exempt commercial arbitration from the ruling, the CJEU attempts to distinguish investor-state arbitration from commercial arbitration. The distinction drawn by the CJEU is that commercial arbitration "originate[s] in the freely expressed wishes of the parties concerned," whereas investor-state arbitration "derives from a treaty" based on states' action to remove disputes from judicial remedies provided in national courts,[77] which by inference would limit party's autonomy to a certain extent. Unfortunately, the CJEU did not elaborate on this point.

The ruling also answered one issue referred by Paris Court of Appeal regarding the definition of "investment" and held that an acquisition of a claim arising from an electricity supply contract and without any economic contribution to the host State does not constitute an "investment" under Article 1(6) ECT.[78]

The *Komstroy*'s decision to end intra-EU ECT arbitration needs to be contextualized in EU's political environment. The first are the environmental concerns. As stated in the introduction, the ECT and ECT tribunals have been criticized for protecting the fossil fuel industry because corporations are enabled to bypass national courts and sue states for billions in secretive private tribunals for their stranded assets whereby delaying the transition to clean energy. As a response, the European Commission, along with other actors, started to reform the ECT but

[75] *Id.* ¶¶ 52-53.

[76] *Id.* ¶ 57.

[77] *Id.* ¶ 59.

[78] *Id.* ¶ 85.

very little progress has been made, especially in regard to ISDS.[79] This may give rise to the rather "result-oriented" approach taken by the CJEU, a court at the center of judicial activism debate.[80] The second political factor is the European Commission's Multilateral Investment Court project, vividly described as "A World Court For Corporations."[81] The global corporate court features an appellate body, full-time judges, transparency and intervention by interested third party.[82] This mechanism has surfaced in a number of treaties concluded by EU.[83] As Dr. Shore observed, "EU's social vision is treaty disputes belong to an investment court." By displacing EU investors holding claims against EU Member states from ECT tribunals, the judgment cleared out the legal hurdle to substitute the "police" for "bodyguards."

But whether a mere paradigm shift from arbitral tribunals to an international court can realize a uniform interpretation of the EU law that CJEU apparently desires is uncertain. Because there is inherent difficulty to construe a myriad of variations of as many as seven prototypes (the ambiguous standard of fair and equitable treatment, differentially defined rights to compensation for expropriation, umbrella clauses of different ambit, etc.) without contradicting the texts and objects and purposes of the investment treaties as required by Vienna Convention on the Law of

[79] *Energy Charter Treaty reform: Why it has failed to deliver on the EU's own objectives - Briefing*, CLIMATE ACTION NETWORK (EUROPE), Mar. 4, 2022, https://caneurope.org/ect-reform-why-it-has-failed-eus-objectives/.

[80] SUSANNE K. SCHMIDT, THE EUROPEAN COURT OF JUSTICE AND THE POLICY PROCESS: THE SHADOW OF CASE LAW, 23 (2018).

[81] *A World Court for Corporations. How the EU Plans to Entrench and Institutionalize Investor-State Dispute Settlement*, CENTER FOR INT'L ENVTL. L., Nov. 2017, *available at* https://www.ciel.org/wp-content/uploads/2017/12/AWorldCourtForCorporations.pdf.

[82] Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM/2017/0493 final, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505306108510&uri=COM:2017:493:FIN.

[83] European Commission–Canada Comprehensive Economic and Trade Agreement (final draft of Feb. 29, 2016) (CETA) art. 8.29; Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (opened for signature June 30, 2019, entered into force Aug. 1, 2020) art. 3.41; Investment Protection Agreement between the European Union and its Member States and the Republic of Singapore Investment Protection Agreement (opened for signature Oct. 15, 2018, not yet entered into force) art. 3.12.

Treaties.[84] Additionally, even if it is possible, leaving a group of judges, instead of arbitrators to figure out uniformity may not be a desideratum since "no one knows what is likely to emerge from a permanent court of State-selected judges whose very purpose is to [decide whether or not to] render monetary awards against the States that appointed them."[85] At present, it seems that courts creeping into a police-like presence in state-related dispute is a more probable outcome than the uniform interpretation somehow worked out by a group of judges, however competent they are.

While how *Komstroy* would impact political reform remains to be seen and the normative debate continues, its short-term legal fallout on ISDS is real and more complicated than one would imagine.

First, ICSID arbitral tribunals are reluctant to recognize the effects of the *Komstroy* decision: on the one hand, several ICSID tribunals have rejected Spain's attempt to invalidate multiple pre-*Komstroy* decision based on jurisdictional grounds in their reconsideration request;[86] on the other hand, the ECT tribunal in *Sevilla Beheer et al. v. Spain* dismissed Spain's intra-EU jurisdictional objection relying on *Komstroy* and continued to entertain ECT claims brought by EU investors against EU member states.[87]

Second, non-EU investors such as Eurus Energy in *Eurus Energy v. Spain* may still initiate ICSID or non-ICSID ECT arbitration against EU member states post-*Komstroy*, as they fall outside the scope of *Komstroy*. But query as to whether the tribunal in *Eurus Energy* would still maintain the same reasoning had it rendered the decision half a year later after *Komstroy* decision. Notably, the ECT tribunal in *Eurus*

[84] José E. Alvarez, *ISDS Reform: The Long View*, 36 ICSID REV. - FOREIGN INVESTMENT L.J. 272 (2021).

[85] *Id.* at 271.

[86] Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision Dismissing the Respondent's Request for Reconsideration of the Tribunal's Decision on Jurisdiction and Admissibility, ¶ 48 (Dec 6, 2021); Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18, Decision on Respondent's Request for Reconsideration Regarding the Intra-EU Objection and the Merits, ¶ 117 (Feb. 1 2022); Cavalum SGPS, S.A. v. Kingdom of Spain, ICSID Case No. ARB/15/34, Decision on the Kingdom of Spain's Request for Reconsideration, ¶ 99 (Jan. 10, 2022).

[87] Sevilla Beheer et al. v. Spain, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability, and the Principles of Quantum, ¶¶ 669-76 (Feb. 11, 2022).

Energy reasoned that (i) although Japan is a third party to the EU treaty, since the Japanese company established activities in the EU that are regulated by legal regimes (such as state aid) established by EU treaties, EU law is part of the applicable law;[88] (ii) *Achmea* did not undermine the tribunal's decision applying EU law because its jurisdiction was established by a multilateral treaty to which the EU itself is a party, as opposed to a treaty only concluded by EU member states;[89] (iii) the ECT does not contain any provision giving precedence to EU over international law, therefore the tribunal is called on to apply the normal rule of priority of international law under Article 26(6) of the ECT;[90] (iv) the autonomy of EU law does not entail that an ECT tribunal may not apply EU law and taking note of established rules of EU law does not convert ECT tribunals into unmonitored organs of the EU.[91] While the first reason is untouched by *Komstroy*, the second reason would probably be eliminated had Eurus Energy award rendered after *Komstroy*; and the third and fourth would be maintained as a take on compatibility different from CJEU.

Third, leading law firms have briefed intra-EU investors about how to maneuver around the decisions, including (i) restructuring their investment through non-EU jurisdictions (such as the UK, Switzerland, or US) or covered by extra-EU Bilateral Investment Treaties; (ii) choosing ICSID arbitration or non-EU seat for non-ICSID ECT arbitration to avoid EU jurisdiction; and (iii) identifying whether the EU Member States in which they are considering an investment has assets unprotected by immunity and located outside the EU, where enforcement of an arbitral award is less likely to be resisted on EU law grounds.[92]

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[88] *Eurus Energy*, ¶ 232.

[89] *Id.* ¶ 235.

[90] *Id.*

[91] *Id.* ¶ 236.

[92] *EU Court Undercuts Investment Protections in the Energy Charter Treaty for Intra-EU Investors*, SHEARMAN & STERLING LLP, Sept. 13, 2021, https://www.shearman.com/Perspectives/2021/09/EU-Court-Undercuts-Investment-Protections?sc_lang=de-DE; Mallory Stoyanov, *Intra-EU disputes cannot be arbitrated under the Energy Charter Treaty, says the Court of Justice of the European Union*, ALLEN & OVERY, Sept. 6, 2021, https://www.allenovery.com/en-gb/global/news-and-insights/publications/intra-eu-disputes-cannot-be-arbitrated-under-the-energy-charter-treaty-says-the-court-of-justice-of-the-european-union.

Fourth, although bypassing practices exist, EU investors may have compliance concerns post-*Komstroy* when bringing ECT claims as the Dutch claimant had in Eurus Energy post-*Achmea*. In Eurus Energy, the Dutch claimant expressed its intention not to proceed following the CJEUs *Achmea* ruling,[93] and the ECT tribunal exercised its discretion under Article 44 of the ICSID Convention to permit withdrawal in 2018.[94]

Suffice to say, the ICSID tribunals' resistance to *Komstroy* and leading law firms' client letters epitomizes the power struggle between "bodyguards" and the "police" that keeps unfolding.

2. 45% Reduction in CO2 Emissions: *Milieudefensie et al. v. Royal Dutch Shell plc.*

Milieudefensie et al. v. Royal Dutch Shell plc. was a class action brought by a group of seven Dutch NGOs and more than 17,000 individual claimants represented by climate activist lawyer Roger Cox. The complaint was filed before the Hague District Court in the Netherlands against Royal Dutch Shell ("RDS").[95] RSD is the policy-setting entity of the oil and gas conglomerate, the Shell group."[96] Claimants requested the Hague District Court to rule that (i) the annual CO2 emissions of the Shell group and RDS's failure to reduce the same constituted an unlawful act against the Claimants for which RDS was responsible; and (ii) that RDS must reduce the Shell group's CO2 emissions by 45% (net) by 2030 relative to 2019 levels.[97] The issue before

[93] *Eurus Energy*, ¶¶ 28-29, 36.

[94] *Id.* ¶ 36. Article 44 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") states, "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question." Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, art. 44, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159.

[95] Vereniging Milieudefensie et al. v. Royal Dutch Shell PLC, Hague District Court, Judgment, ¶¶ 2.1.-2.2. (May 26, 2021).

[96] *Id.* ¶¶ 4.3.6, 4.4.2.

[97] *Id.* ¶¶ 3.1., 4.4.39., 4.4.55., 5.3. ("45% (net)" refers to the sum of the reduction of CO2 emissions of the Shell group's entire energy portfolio, including emissions associated with the end-use of its fossil fuel products, *i.e.*, Scope 1, Scope 2, and Scope 3 emissions as classified by the World Resources Institute Greenhouse Gas Protocol.).

the Hague District Court was whether a private company violated a duty of care and human rights obligations by failing to take adequate action to curb contributions to climate change in its corporate policy. The Hague District Court found for Claimants.[98]

This case stems from the landmark *Urgenda Foundation v. the Netherlands* decision where the Dutch Supreme Court upheld Hague District Court's decision that the Dutch government must reduce its greenhouse gas emissions by at least 25% by 2020 relative to 1990 levels.[99] Building on the *Urgenda* decision, *Milieudefensie et al.* was effectively asking the Hague District Court to extend the principle from public entities to private entities.

The Hague District Court eventually held that RDS has an obligation to reduce 45% (net) CO2 emissions of the Shell group's entire energy portfolio by 2030 compared to 2019 levels.[100] The reduction obligation regarding the activities of the Shell group was held to be "an obligation of result"—obliging RDS to reduce the Shell group's own emissions by 2030,[101] whereas the obligation regarding the business relations of the Shell group, including the end-users was held as "a significant best-efforts obligation."[102]

Said obligations derive from the "unwritten standard of care" in Article 6:162 Dutch Civil Code informed by the Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR"), which obliges RDS to exercise due care for Dutch residents and the inhabitants of the Wadden region when creating corporate group policy for the Shell group.[103] The Hague District Court held that the full scope of the due care is considered by taking into account all relevant facts and

[98] *Milieudefensie et al.*, ¶ 5.3.

[99] Urgenda Foundation v. the Netherlands, Supreme Court of the Netherlands, Judgment, ¶ 8.3.5 (Dec. 20, 2019).

[100] *Milieudefensie et al.*, ¶ 5.3.

[101] *Id.* ¶ 4.4.39.

[102] *Id.*

[103] *Id.* ¶¶ 4.4.1.-.3., 4.4.9.-.10.

circumstances of the case, the best available climate science, and broad international consensus on the protective effect of human rights against dangerous climate change.[104] In the present case, the court found that the Shell group's global CO2 emissions—which the court noted exceeded the CO2 emissions of many states, including the Netherlands—contributed to the "serious and irreversible consequences," including climate change-induced hot spells, floods, deterioration of air quality, increase of UV exposure, etc. for Dutch residents and the inhabitants of the Wadden region.[105] Shell's corporate strategy was held to be "intangible, undefined and non-binding plans for the long-term (2050)" and, as such, incompatible with RDS' reduction obligation.[106]

The court acknowledged that Shell cannot solve this global problem on its own; however, "this does not absolve RDS of its individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence."[107]

RDS appealed, but the court made its decision provisionally enforceable,[108] meaning RDS will be required to meet its reduction obligations even as the case is appealed.

Although like in *Sundown Energy LP v. HJSA No. 3 Limited Partnership* there is no state party involved, the decision builds on the *Urgenda* decision which involves the Dutch state; therefore, there is still room for the "police" metaphor to come in. Moreover, the groundbreaking order of "45% reduction" as an obligation of result placed on private company corroborates the "police" role national court undertakes—an agent to deliver political commitments to sustainable development, complementing the existing Pigouvian taxes, quota trading, and other policy instruments targeted at targeting corporate actors addressing climate change. This

[104] *Id.* ¶ 4.1.3.

[105] *Id.* ¶ 4.4.6.

[106] *Id.* ¶ 4.5.2.

[107] *Id.* ¶ 4.4.49.

[108] *Id.* ¶ 4.5.7.

is evidenced in a number of "soft laws"[109] the court "hardened" in its interpretation of the "unwritten standard of care," including, inter alia, the UN Guiding Principles on Business and Human Rights (UNGP)[110] and the Paris Agreement[111] (The Paris Agreement does not include legally binding emission reduction targets for state parties and merely "welcomes" the action from private sector).[112]

The impact of the case is significant. For litigators, Dr. Shore noted that Claimants' attorney, Roger Cox, forecast "an avalanche of cases against the fossil fuel industry and related industries, like the car industry"[113] and identified banks and financial regulators as targets for having financed large CO2 emissions.[114] For adjudicators, some researchers noted that the case seems to join the global trend of judicial decisions that disregard the *fictio iuris* of the corporate veil and hold parent companies accountable for their subsidiaries' conduct impacting the environment.[115] In particular, the UK Supreme Court also found that a parent company's duty of care might arise from setting harm-inducing group-wide policy, actively ensuring follow-through of the policy by subsidiaries through training and supervision, or failing to deliver its public commitment of supervision and control of its subsidiaries.[116] It is foreseeable that the courts' interpretation may spill over to "bodyguards'" interpretation in investment treaty and commercial arbitration if the relevant state law is applied.

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[109] Soft laws are instruments agreed by actors of international law that are either non-binding political commitments or nominally binding contract but with no or weak enforcement mechanism. *See* Kal Raustiala, *Form and Substance in International Agreements*, 99(3) AM. J. INT'L L., 587 (2005).

[110] *Id.* ¶ 4.4.14.

[111] *Id.* ¶ 4.4.27.

[112] United Nations Framework Convention on Climate Change, *Decision 1/CP.21, Adoption of the Paris Agreement*, ¶¶ 117, 133, 134, UN Doc CCC/CP/2015/10/Add.1 (Jan. 29, 2016).

[113] Tom Wilson, *Lawyer who defeated Shell predicts 'avalanche' of climate cases*, FINANCIAL TIMES, Dec. 17, 2021, *available at* https://www.ft.com/content/53dbf079-9d84-4088-926d-1325d7a2d0ef.

[114] *Id.*

[115] Macchi, C, van Zeben, J, *Business and Human Rights Implications of Climate Change Litigation: Milieudefensie et al. v Royal Dutch Shell*, 30(3) REV. EUR. COMPAR. & INT'L ENV'T L., 409-15 (2021).

[116] Vedanta Resources PLC and another v. Lungowe and others [2019] UKSC 20, ¶51-53 (Apr. 10, 2019).

3. The End of Nuclear Energy in Germany: *Vattenfall AB et al. v. Germany*

Vattenfall AB et al. v. Germany is an ICSID arbitration commenced by Vattenfall AB and its German subsidiaries against the German government under the ECT in 2012.[117] Vattenfall AB is a Swedish state-owned power energy company that holds shares in three nuclear power plants located in Germany.[118] Vattenfall AB et al. claimed EUR 4.7 billion due to the shutdown and phase-out of nuclear power plants by the 13th Amendment to the Atomic Energy Act in Germany, which entered into force in 2011 in the wake of the Fukushima nuclear disaster in Japan.[119] On March 5, 2021, it was announced that the German government agreed to settle the legal dispute for EUR 2.4 billion.[120] Subsequently, the ICSID proceedings were suspended on March 11, 2021 and the tribunal issued a discontinuance order on November 9, 2021.[121]

The settlement was in part driven by a parallel litigation in Germany. Apart from the ICSID arbitration, Vattenfall AB also mounted a constitutional challenge in the German Federal Constitutional Court. In 2016, the court held that the nuclear phase-out was legal, but the operators were entitled to adequate compensation for approved electricity volumes that could no longer be produced by the phased-out nuclear power plants as well as for stranded investments.[122] This was confirmed in its second ruling in 2020.[123]

The background of the phase-out of nuclear power plants was due to the Fukushima nuclear disaster in 2011. Dr. Shore highlighted that, "the German government subsequently closed eight nuclear reactors and announced that all the

[117] Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Orders of the Tribunal Taking Note of the Discontinuance of the Proceeding (Nov. 9, 2021).

[118] *Id.* ¶ 6.

[119] *Id.* ¶ 5; Gernot Heller & Lefteris Karagiannopoulos, *Germany says Vattenfall has no grounds to seek arbitration over nuclear phase-out*, REUTERS, May 8, 2018, *available at* https://www.reuters.com/article/uk-vattenfall-nuclear-case/germany-says-vattenfall-has-no-grounds-to-seek-arbitration-over-nuclear-phase-out-idUKKBN1I91L3?edition-redirect=uk.

[120] *Press Release*: *Understanding to terminate disputes on German nuclear phase out*, Vattenfall, Mar. 5, 2021, *available at* https://group.vattenfall.com/press-and-media/pressreleases/2021/understanding-to-terminate-disputes-on-german-nuclear-phase-out.

[121] *See generally Vattenfall*, *supra* note 117.

[122] 1 BvR 2821/11, Judgment of the First Senate, German Federal Constitutional Court (Dec. 6, 2016).

[123] 1 BvR 1550/19, Order of the First Senate, German Federal Constitutional Court (Sept. 29, 2020).

nation's nuclear plants would close by 2022, earlier than had been planned but arguably consistent with the previous government schedule. UK, Poland, France, Finland, are generally amenable to considering building new reactors, but the German public has for decades been opposed." The decision reflects Germans' social vision: a de-nuclearized energy sector.

Germany's vision is on the opposite end of Sweden's. Nuclear generation represented around 30% of Sweden's electricity production in 2020. It also clashes with the International Energy Agency (IEA)'s recommendations that governments should ensure the operation of existing nuclear power plants as long as they are safe, support new nuclear construction and encourage new nuclear technologies to be developed to achieve CO2 emissions reductions in line with the Paris Agreement.[124] IEA also forecasts that stopping nuclear energy globally could result in billions of tons of additional carbon emissions.[125]

Although *Vattenfall AB* utilized both "bodyguards" and the "police" to protect its efforts to shape a fossil-free future, including its billion-dollar investment in nuclear facility,[126] neither stopped Germany from de-nuclearizing its energy sector but both strive to guarantee compensation for the corporate sacrifice for German's social vision. The consensus between "bodyguards" and the "police" echoes the counter to the pejorative narrative of "ISDS as bodyguards for fossil fuel industry" in *Eurus Energy*: companies in the non-fossil fuel and non-renewable sector[127] may warrant the necessary protection from "bodyguards" for their stranded investments as nuclear energy, a sustainable power source, faces an uncertain future in different states during the clean energy transition.

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[124] *Nuclear Power in a Clean Energy System*, INT'L ENERGY AGENCY, May 2019, *available at* https://www.iea.org/reports/nuclear-power-in-a-clean-energy-system.

[125] *Id.*

[126] *Sustainable production: Development of fossil-free solutions is happening*, VATTENFALL, https://group.vattenfall.com/what-we-do/roadmap-to-fossil-freedom/sustainable-production.

[127] At present, nuclear energy's renewability is questionable because of the finitude of uranium deposit and the harmful nuclear waste generated from nuclear power reactors. *See* Nicole Jawerth, *What is the Clean Energy Transition and How Does Nuclear Power Fit In?*, INT'L ATOM. ENERGY AGENCY, https://www.iaea.org/bulletin/what-is-the-clean-energy-transition-and-how-does-nuclear-power-fit-in.

C. *Emerging US and European Initiatives*

The last two "Elites" are two initiatives emerging in the US and Europe.

1. US Initiative: The Hamm Institute for American Energy

On December 15, 2021, the Harold Hamm Foundation and Continental Resources announced a combined $50 million gift creating the Hamm Institute for American Energy at Oklahoma State University, for the purpose of educating energy leaders and bringing researchers scientists, academics, and advocates for innovation in clean and reliable energy to Oklahoma State.[128] The institute plans to host symposia, authors, speakers, energy summits, and global energy leadership conversations.[129] Harold Hamm, Chairman of Continental Resources, is world-famous for his tremendous business success in horizontal drilling, hydraulic fracturing, and extracting shale oil and gas resources.[130]

Dr. Shore noted that Mr. Hamm refers to it as a focus on energy research, "free of emotions," by which he means that natural gas, for example, should not be tarred by the climate crisis and climate activists.

The Hamm Institute for American Energy is obviously a "bodyguard" hired by fossil fuel industry, but it aims at forming a "more sustainable modern world of energy" as Mr. Hamm put it.[131] In any case, it seems that what the Hamm Institute represented is a more pragmatic pathway towards sustainable development: since fossil fuels cannot be eliminated in the short-term, let's make it better.

2. European Initiative: EU Taxonomy Guidance on Certain Gas and Nuclear Activities

On January 1, 2022, two weeks after the Hamm Institute for American Energy was

[128] *Historic donation establishes Hamm Institute for American Energy at Oklahoma State University*, Oklahoma State University News & Media, Dec. 15, 2021, https://news.okstate.edu/articles/communications/2021/historic_donation_establishes_hamm_institute_for_american_energy_at_oklahoma_state_university.html.

[129] *Id.*

[130] Harold Hamm, *Fracking Pioneer, Faces a Career Reckoning*, THE WALL STREET JOURNAL, May 21, 2020, *available at* https://www.wsj.com/articles/harold-hamm-fracking-pioneer-faces-a-career-reckoning-coronavirus-shutdown-11590074165.

[131] Hamm Institute for American Energy at Oklahoma State University, Dec. 15, 2021, https://www.youtube.com/watch?v=T7crWnptpys.

founded, the European Commission began consultations with EU member states on a draft text of a Taxonomy Complementary Delegated Act covering certain gas and nuclear activities that might be undertaken on the path to achieving climate neutrality by 2050.[132] The Delegated Act is part of the EU Taxonomy which is a classification system of economic activities that aims to create a common language for investments with a substantial positive environmental impact and introduce disclosure obligations on companies and financial market participants.[133]

Acknowledging that some parts of Europe are still heavily based on high carbon-emitting coal, and the existing energy mix in Europe varies from one state to another, the Commission stated on New Year's Eve that:

> there is a role for natural gas and nuclear as a means to facilitate the transition towards a predominantly renewable-based future. Within the Taxonomy framework, this would mean classifying these energy sources under clear and tight conditions (for example, gas must come from renewable sources or have low emissions by 2035), in particular as they contribute to the transition to climate neutrality.

The New York Times reported on this new consultation with the headline "Europe Plans to Say Nuclear Power and Natural Gas are Green Investments."[134] Dr. Shore commented that the headline perhaps is slightly premature. This is because any final plan on what constitutes a sustainable investment can be blocked by "reverse reinforced qualified majority" (at least 20 Member States representing at least 65% of the EU population), and the European Parliament by a majority.[135] "But that's unlikely after the consultation," Dr. Shore predicted, "because of the reality of the energy mix in Europe."

Although the European Commission's pragmatic approach resembles the one

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[132] EU Taxonomy: Commission begins expert consultations on Complementary Delegated Act covering certain nuclear and gas activities (Jan. 1, 2022, (IP/22/2)), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2.

[133] EC Factsheet: How Does the EU Taxonomy Fit Within the Sustainable Finance Framework?, https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/sustainable-finance-taxonomy-factsheet_en.pdf.

[134] *Europe Plans to Say Nuclear Power and Natural Gas Are Green Investments*, THE NEW YORK TIMES, Jan. 2, 2022, *available at* https://www.nytimes.com/2022/01/02/business/europe-green-investments-nuclear-natural-gas.html.

[135] *See* EU Taxonomy, *supra* note 132.

taken by the Hamm Institute, "that short-term convergence, on natural gas" as Dr. Shore noted, does not indicate that the "long-term goals of the two initiatives" are the same. After all, EU is making a temporary compromise to its pro-renewables social vision, whereas the US "bodyguard" seated in the resource-rich Oklahoma State is hired by a profit-driven company for a win-win in both fossil fuel research and business.

III. CONCLUSION

To recapitulate briefly, the tension between and within "bodyguards" and "police" are four-layered. First, the jurisdictional tension intensified after *Achmea*, as evidenced in the CJEU's hardline stance on intra-EU ECT arbitration in *Komstroy* ("police") *vis-à-vis* ICSID's self-contained feature allow for ECT arbitration cases such as Eurus Energy ("bodyguard") to continue. Second, the tension in the outcome of the merits persists as courts and tribunals take divergent interpretative lenses to examine contract terms, corporate and states' action: a functional approach in *Eurus Energy* ("bodyguard"), a formalistic approach in *West Africa Gas* ("bodyguard"), an activist approach in *Komstroy* ("police") and *Milieudefensie et al.* ("police"). Third, the tension also lies in the multiplicity of their principals' visions of the energy sector's future: a production-maximization and fossil-fuels–based pragmatic vision in the US represented by *Sundown Energy* ("police") and the Hamm Institute ("bodyguard") in contrast to a pro-renewables vision in Europe represented by *Milieudefensie et al.* ("police") and the European Initiative ("police"), with a de-nuclearized spin offered by Germany in *Vattenfall AB et al.* ("bodyguard" and "police"). Lastly, the impact they exert on states and energy sector's future are wide-ranging: opening the floodgate on lawsuits against fossil-fuel-related industry by *Milieudefensie et al.* ("police"), safeguarding non-fossil fuels in *Vattenfall AB et al.* ("bodyguard" and "police") and *Eurus Energy* ("bodyguard") and protecting fossil fuels in *West Africa Gas* ("bodyguard").

Upon closer scrutiny via the eight influential cases and events presented at the ITA year-in-review, the characterization of private-driven entities as "bodyguards for the fossil fuel industry" as if they are "shameful enterprise that only protects the

property of wealthy oligarchs—'the one percent'"[136] are far from accurate.

Correspondingly, painting state-driven forces as "police safeguarding the non-fossil fuels" are equally misleading. In addition to the discrepancy between what their principals have envisioned for the future, the agents' own power struggles and divergent legal approaches also add more complexity to whose interests they are shielding and the energy future they are shaping. Joining the forces of "police" and "bodyguards" and incremental self-correcting reforms within the existing dispute resolution framework promise a more pragmatist pathway to a more sustainable future than movements to demonize and phase out the "bodyguards."

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[136] ALVAREZ, *supra* note 84, at 253 (describing the views of hardline critics of international investment agreements).

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ITA is a founding sponsor of **KluwerArbitration.com**, the most comprehensive, up-to-date portal for international arbitration resources online. The **ITA Arbitration Report**, a free email subscription service available at *KluwerArbitration.com* and prepared by the **ITA Board of Reporters**, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. All ITA members receive a free subscription to **ITA in Review**, an e-journal edited by its **Board of Editors.** The Institute's acclaimed **Scoreboard of Adherence to Transnational Arbitration Treaties**, a comprehensive report on the status of every country's adherence to the primary international arbitration treaties, is published on ITA's website and in its quarterly newsletter, **News and Notes**. The **Online Education Library** on the Institute's website presents a variety of educational videos, mock arbitrations, recorded webinars, oral history interviews and books, many of them produced by the **Academic Council** for the benefit of professors, students and practitioners of international arbitration. **ITAFOR** (the ITA Latin American Arbitration Forum), a listserv launched in 2014 is the leading online forum on international arbitration in Latin America. International dispute resolution instructors are welcome to explore the course curricula and other pedagogical materials shared by leading professors on the website's **Legal Educators Resources Collection** and to participate in the accompanying **ITA-LEL listserv.** Young ITA members receive the **Young ITA Newsletter**.

Please join us. For more information, visit ITA online at **www.cailaw.org/ita.**

INSTITUTE FOR TRANSNATIONAL ARBITRATION

2022 Annual Membership Dues and Benefits

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- Eight Advisory Board representatives (two under 40) with all **Advisory Board Member benefits** described below
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- Free membership in ITA as a *Young ITA Member* (does not include membership on the Advisory Board)
- Free attendance at Young ITA programs and meetings and the annual ITA Forum in Dallas
- Young ITA member discount at the annual ITA Workshop and all other ITA programs, publications and online educational products
- Opportunity to serve in the Young ITA leadership
- Opportunity to participate in Young ITA online fora
- Free subscription to the ITA e-journal *ITA in Review* and e-newsletter *News & Notes*
- Recognition as a *Young ITA Member* in publications

Advisory Board Member Benefits

- Free attendance at the ITA Annual Meeting and Workshop OR the Annual Americas Workshop
- Free attendance at the members-only ITA Forum
- Member discount at all other ITA programs
- Free subscription to all ITA video and audio online educational products
- Free subscription to ITA's e-journal *ITA in Review* and quarterly newsletter *News and Notes*, with its *Scoreboard of Adherence to Transnational Arbitration Treaties*
- Opportunity to participate in the committees, leadership and other activities of the Advisory Board
- Recognition as an Advisory Board member in publications
- If qualified, the right to appear on the IEL Energy Arbitrators List

Institute for Transnational Arbitration
ITA IN REVIEW

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A Division of The Center for American and International Law

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